STATE SYNDICALISM?
SOME THOUGHTS ON THE NATURE OF THE
AUSTRALIAN INDUSTRIAL RELATIONS SYSTEM

Peter Scherer
Discussion Paper No. 53
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ABSTRACT

The Australian industrial relations system is one of the oldest in the world and has many unique features. This paper explores these features by discussing the Australian system in a comparative framework.

Section 1 of the paper examines the meaning of "arbitration" in Australia, and observes that Australia has a system of "unilateral" rather than "imposed" arbitration. Section 2 discusses the economic role played by the Australian tribunals, and makes some suggestions as to why the system has survived so long. The third section analyses the ambivalent role of trade unions in Australia, emphasising how guaranteed recognition conferred by the State has been achieved at the cost of confining that recognition to a restricted range of industrial matters. It suggests that restricted recognition is a fundamental cause of much industrial conflict in Australia. The final section discusses the role of Australian unions vis-à-vis the State, and suggests that Australia has a system of "State Syndicalism", in which the State-sponsored arbitration system can be seen as an "Executive Committee of the Labour Aristocracy".
INTRODUCTION

"The Australians have always disliked scientific economics and (still more) scientific economists. They are fond of ideals and impatient of techniques. Their sentiments quickly find phrases, and their phrases find prompt expression in policies. What the economists call "law" they call anarchy. The law which they understand is the positive law of the State - the democratic State which seeks social justice by the path of individual rights. The mechanism of international prices which signals the world's need from one country to another and invites the nations to produce more of this commodity and less of that, belongs to an entirely different order. It knows no rights, but only necessities. The Australians have never felt disposed to submit to these necessities. They have insisted that their Governments must struggle to soften them or elude them or master them. In this way they have created an interesting system of political economy. It will be necessary to examine the chief features of this system which embodies the dominating ideas and purposes of the Australian people."  

W.K. Hancock Australia

Fifty three years later these lines by Hancock are still apt. The focus of this paper is the arbitration system, a subject to which Hancock also devoted himself at length. The paper divides into four sections. Section 1 of the paper examines the meaning of "arbitration" in Australia, and observes that Australia has a system of "unilateral" rather than "imposed" arbitration. Section 2 discusses the economic role played by the Australian tribunals, and makes some suggestions as to why the system has survived so long. The third section analyses the ambivalent role of trade unions in Australia, emphasizing how guaranteed
recognition conferred by the State has been achieved at the cost of confining that recognition to a restricted range of industrial matters. It suggests that restricted recognition is a fundamental cause of much industrial conflict in Australia. The final section discusses the role of Australian unions vis-à-vis the State, and suggests that Australia has a system of "State Syndicalism", in which the State-sponsored arbitration system can be seen as an "Executive Committee of the Labour Aristocracy".

1. WHAT DOES COMPULSORY ARBITRATION MEAN?

Much of the confusion about the nature of the Australian industrial relations system, arises from confusion about the meaning of the term "compulsory arbitration". In fact, the term can have any one of a number of meanings. This section of the paper discusses three of them. To clarify matters, each of these meanings is given a separate label: "imposed" arbitration, "unilateral" arbitration and "wage stabilisation". In this

"Imposed" Arbitration

In this system the State refrains from interfering in disputes about the terms of contracts of employment unless stoppages which arise from an unsettled dispute threaten to disrupt severely the community's social or economic life. In such circumstances the State seeks to impose settlement terms on the parties, and then requires both parties to treat those terms as if they constituted a voluntary contract. This usually means that the parties are required to refrain from industrial action for the term of the award.

There are three points which may be made about such a system. First, as already mentioned, it will only be imposed when either side has the strength to cause public disruption, and will therefore not be of any use to weak unions unable to organise or to sustain a strike - or to small or weak employers unable to point to the essential nature of their business. Secondly, such a system can easily be discredited if a union successfully defies an award by continuing to strike, because the system's principal justification - that it prevents public disruption - will have been disproved. Finally, because it is generally the unions who are forced to cause public disruption in order to achieve their ends, such arbitration will usually be seen by unions as imposed on them, and as such will be resented. However, the very fact that arbitration is being imposed on a union with demonstrable bargaining strength may well make tribunals give awards which are fairly generous in order to ensure acceptance. This in turn also makes employers suspicious of this sort of "imposed" arbitration.

The crucial question in the operation of any such system is the criteria used to determine what constitutes "severe disruption". Whether this decision is in the hands of politicians or bureaucrats, the temptation will always be present to conclude
that any significant strike will cause severe disruption. As the basic purpose of this "imposed arbitration" is to set terms of employment which workers will be compelled to accept, such a blanket use of "emergency" laws can have two outcomes. Either the laws will be upheld and unions will effectively lose all rights to strike, or a union will successfully defy the laws by forcing concessions in excess of an award, and the arbitration law itself will be discredited.

"Unilateral" Arbitration

"Unilateral" arbitration is a system under which either side in a dispute has the right to request arbitration, which is now imposed by one side or the other, rather than the State imposing arbitration on both sides. Since employers can usually impose terms and conditions of employment directly on the individuals they employ, it is normally unions which take advantage of the system in order to impose "fair" minima on the terms and conditions that form the basis of individual contracts of employment. Unions will tend to use the system in those cases in which employers refuse to negotiate with them, which usually implies that they refuse to recognise them at all. Thus a system of unilateral arbitration may be an adjunct to a collective bargaining system, used only by weak unions which cannot force particular employers to bargain directly, or it may be the means by which a strategically weak union movement forces major employers to break with their previous policy of refusing to recognise them at all. The only time employers themselves are likely to take the initiative in using such a system is when a general system of awards exists. In that circumstance employers may use the system to secure a general all-round reduction in wages in a period of deflation or to nullify award conditions which they feel exacerbate inflation.

The important conceptual difference between "unilateral" arbitration and "imposed" arbitration is that "unilateral" arbitration does not require the banning of strikes. There is no necessary reason why a system which imposes "just" minima for contracts of employment should make illegal the use of labour market power to improve on those minima. The object of arbitration is not therefore the prevention of inconvenience to the public, but the securing of justice for those without the market power to protect themselves. It may be the hope of those who institute the system that it will reduce disputes through the reduction of injustice. But the system may be a "success" in reducing injustice even if at the same time, by increasing the security and strength of the union movement, it contributes to a situation in which industrial action, whether official or unofficial, becomes more widespread.
Wage Stabilisation

The third meaning which might attach to the term "compulsory arbitration" is its use in what can be labelled a policy of wage stabilisation. If leading groups in an economy - in particular, trade union and employers' cartels and the national government - are agreed that the rate of wage increase has to be modified or contained, they may agree to establish a tribunal which will have to approve any wage increase before it can be implemented. Such policies are often given the more grandiloquent title of "incomes policies", but it is quite possible for wages to be stabilised without controlling other incomes. A wage stabilisation tribunal may be part of a comprehensive incomes policy, but it need not be if a sufficient consensus exists as to the need to control wages. Wage stabilisation policies differ from the first two types of compulsory arbitration in that there is often no real conflict of interest between the parties who seek to increase wage rates. The employer is confident of his ability to finance any wage increase through price increases, and only a more or less diffuse interest in preventing inflation dissuades him. For this reason, the support of the relevant union and employers' cartel is necessary for stabilisation policy to succeed. A government which attempts to impose such a policy by fiat will experience resistance from both market and institutional forces.

As in the case of a system of unilateral arbitration, the primary concern of a wage stabilisation tribunal is not to prevent all strikes. While it may be hoped that a stabilised wage structure will result in fewer disputes, it may also be necessary at times to stand firm in the face of heartfelt grievances in order to safeguard the principles on which the wage stabilisation program is based. It is the stability of the wage structure - not the level of disputes - which is the measure of success of such a body.

Examples

Actual empirical examples of each of these three systems do not, of course, exist in pure form. Everyone hopes that the system of wage regulation they favour will prevent disputes, promote justice and stabilise wages - and this includes many systems which do not involve any form of compulsory arbitration. However, it is possible to outline the paramount concern of each particular system.

Perhaps the purest example of "imposed" arbitration was the series of "ad hoc" legislated settlements of major disputes in Norway from 1916 to 1928. The system was in fact discredited in
the latter year when a union successfully defied an imposed award. In Germany, from 1919 to 1933, the system of compulsory arbitration, initially intended for emergencies only, came to be so widespread that unions effectively lost the right and then the confidence to strike, so that, at least in the opinion of Rams, the system prepared the way for the complete wage controls of the Nazi era. More recently, several strikes in Canada have been settled by the imposition of arbitration of the terms of the new contract on the parties.

Pure examples of "unilateral" arbitration are rare. Perhaps the best example was the system which existed in Britain under the Industrial Disputes Order No 1376 of 1951 until employers requested its abrogation in 1959. Although not strictly arbitration tribunals, it is also the case that Victorian Wage Boards, while setting minimum conditions of employment, placed no restriction on the right of unions to seek improvement on those conditions through industrial action. (The same is true of British Wage Councils, which were originally modelled on Victorian Wage Boards.)

Many more examples of wage stabilisation tribunals can be found, particularly in times of national crisis. The wartime United States War Labour Board, the British National Arbitration Tribunal of 1940 to 1951, and the early postwar tribunals in countries such as the Netherlands and Norway were all essentially concerned with wage stabilisation, though in wartime a heavy emphasis was also placed on the prevention of strikes and the consequent impairment to the war effort.

Application to Australia

Obviously, none of these types clearly approximates the general systems of compulsory arbitration of industrial disputes found in most States and the federal jurisdiction in Australia, and New Zealand. However, some insights into the working of these systems can be gained by analysing them in the light of this typology.

First, there is no doubt that the settlement of strikes was the main "selling point" of the systems at the time they were proposed, as both C.C. Kingston and W. Pember-Reeves had in mind the recent experience of the 1891 strikes when they made their proposals. It is also obvious that they and other "progressive liberal" supporters of the early arbitration proposals such as H.B. Higgins, felt social injustice to be the basic cause of the strikes, and that only by offering alternative methods of dealing with injustice could society hope to avoid such upheavals. Thus they did not propose a system in which the State would do no more
than impose a settlement on the parties when a disruptive strike occurred. Rather, they sought to devise a system which would eliminate the need for strikes by offering another way for unions to achieve effective security and recognition, and to press claims for wage justice. That is, they established a system of "unilateral" arbitration, underpinned by a mechanism whereby unions could register themselves so that they could make claims on behalf of their members.

One of the main constituents of this system of social justice that was felt to be necessary was the right to form unions and organise; and it was this feature that attracted the support of the labour movement. The system combined a system of unilateral arbitration (which could by itself have been provided by a system of wages boards on the Victorian model) with a provision for the State-supported encouragement of trade unions. As the role of trade unions is to channel and express the demands and grievances of their members, the system thus offered a means of mobilising and expressing grievances as well as a means for settling them.

It is certainly true that the system was not seen by its founders as a system of "unilateral" arbitration as defined here, and many observers have criticised the system for seeming to perform only this role. Furthermore, the original Act of 1904 and many amendments since then have sought to establish "imposed" arbitration or to make wage stabilisation the main goal, and these have at times had short-term successes (particularly in the period from 1951 to 1969). But the role of the system in encouraging and sponsoring democratic trade unions has over time proved incompatible with these other goals.

This brings us to the fundamental contradiction inherent in most industrial relations systems in Western democracies, but particularly endemic in Australia. That is, a natural consequence of the recognition of the right to organise is a recognition of the right to strike. Forbidding men from withholding their labour if they are dissatisfied with the wage being offered is not possible in a free society, and once they have the right to organise unions they will inevitably use those unions to ensure that their labour can be withheld effectively. But strikes are disruptive, and it is in "the public interest" to control or even suppress them. In Northwest Europe and in the United States, this contradiction has led to the idea that workers, through their union, "voluntarily" surrender for a period the right to strike when the union signs a collective agreement or contract. That is, in return for the concession of improved wages and conditions by employers, the right collectively to withdraw labour is suspended.

In Britain particularly, the "tradition of voluntarism" resulted in collective agreements not being legally enforceable.9 The
idea that a collective agreement is a fixed-term trade-off of the right to strike for improved terms and conditions never took hold. Rather, at least with respect to "substantive" agreements, they represent not a contract, but concessions by masters towards their workmen. There is no restriction, other than the staying power of workers or unions themselves, on seeking further concessions, whether through individual bargains, shop-level action or industry-wide bargaining.

Australian unions have always seen awards in the same light. That is, they represent the result of an appeal for fairness — not in this case directly to an employers' association, but indirectly to a state tribunal. Moderate unions may have regarded the tribunals as essentially fair and therefore have sought additional concessions by working through them, and militant unions may have regarded the tribunals as agents of a hostile bosses' state and therefore in need of goading to extort concessions, but both approached the tribunals as a supplicant — the one trusting, the other resentful. Neither, therefore, sees the resultant award as in any sense being the equivalent of a bargain. Rather, an award is seen as an acknowledgement of an entitlement, now made enforceable by law.

This view coincides with the view taken by the tribunals themselves. Because tribunals see themselves as preventing disputes by anticipating and removing the justified reasons for disputes, they are not merely finding compromises which correctly reflect the bargaining power of each of the parties; rather, they are attempting to find a consistent set of principles which the parties will be brought (or forced) to accept before they attempt to use their bargaining power. The ultimate test of the effectiveness and therefore, pragmatically, the validity of these principles is whether they do in fact ameliorate grievances felt by the workforce and thereby reduce the level of disputes. It is unlikely that a strictly consistent set of wage fixation principles will be successful in the long-term in satisfying the parties with the greatest bargaining power. The history of wage fixation in Australia is very much a history of the contradictory search for consistent wage fixation principles which also adequately deal with the aspirations of those able to fend for themselves in the marketplace.

There is certainly a paternalistic and patronising air about this process. Increases "granted" are "handed down" after the tribunals have determined how much they can "award" consistent with "the capacity of industry (or the economy) to pay" in the light of "the public interest". The terminology invites applicants to demand their "rights" and feel resentful when they believe they are not granted, while encouraging employers and governments to condemn as ingrates unionists who express dissatisfaction with increases "granted" to them. Parties who wish to escape this atmosphere have had to withdraw from the
arbitral process. The longest running of such arrangements is the system of three-year agreements between the Barrier Industrial Council and the Mine Manager's Association in Broken Hill. Similarly, since the late 1960s waterfront employment has been regulated largely outside the arbitration system and the most recent manifestation of the search for a new atmosphere was the negotiated settlement in the metal industry in December 1981.

2. ECONOMIC ROLE OF THE TRIBUNALS

The arbitration tribunals have often been criticized in Australia for stultifying the development of "true" collective bargaining. Some of this criticism has been underlined by reference to the poor understanding of industrial relations and the ignorance of collective bargaining shown in the debates on industrial power in the constitutional conventions of the 1890s. This ignorance is understandable for the times, since the term "collective bargaining" only originated with the Webbs in Industrial Democracy, first published in 1892. More to the point, it would have been futile for the architects of the system to try to regulate wages by attempting to duplicate the "bargain", reached in a collective agreement, because employers had used the economic depression to refuse any recognition of unions. Little or no bargaining, however one-sided, was occurring.

The Webbs noted that collective bargaining is only one method of union action - and a comparatively recent one at the time they wrote. Before regular bargaining relationships were developed, unions relied on unilateral regulation. The typical method of action of early craft unions - in the United States as well as Britain - was to draw up a schedule of "fair and reasonable" wage rates and unilaterally to present these to employers, withdrawing their labour from firms which did not accept. It is apparent that the Australian tribunals drew on this method of action at the time they were established. Charged with the task of determining "fair and reasonable" wages, they fell into the role of determining which union demands were fair and reasonable, and then imposing those demands on employers. This has continued to be the basic method of action of the tribunals throughout their existence.

Since the very existence of the tribunals implied a scepticism about the "free" workings of the market, it is not surprising that the decisions of the tribunals have been attacked frequently throughout their history as being economically ruinous. At the same time, the caution of the tribunals with regard to the consequences of their decisions for inflation, unemployment or the viability of employers, frequently frustrates unions and their members. The resulting denunciations echo those which
are often directed at "union bureaucrats" who compromise with employers in collective bargaining systems, and especially at those who acquiesce in wage moderation in centralised systems such as those in Scandinavia, the Netherlands, West Germany and Australia.

A leader of a union local, or even a union dominant in a particular industry, might be able to argue that his members' ambitions cannot conflict with a generalised public interest. But as soon as the union movement is recognized as representing working people in general, and its national leaders start to bargain about the general level of money wages, they will have to confront arguments as to what the public interest requires. Obviously, the public interest (and hence the workers' interest) is economic prosperity. Because wage increases in times of depression increase unemployment, in times of prosperity increase inflation, and might be presented at all times as threatening the balance of payments and business confidence, some form of wage restraint is always necessary.

Furthermore, when bargaining is sufficiently centralised, it is really the union leadership which must show restraint. An individual firm may well consider it to be in its own interest to resist wage increases, even at the cost of a strike. But this is not likely to be true for a whole industry (unless it competes on export markets and does not have the power to force currency devaluations), and it is certainly not the case for all industries collectively. Any wage increases which can be recouped by price increases will be less costly than the deadweight losses caused by an industry-wide strike, let alone a general one. "Taking wages out of competition" by securing "comparative wage justice" between all comparable workers means that competitive pressures cease to help in restraining wage rises.

However, it can also mean that union leaders do not welcome wage rises if they occur at too great a rate. Most unionists, as well as leaders, accept the notion that inflation of the price level, even if accompanied by compensating wage increases, is at best not beneficial and probably not desirable. Extra money wage increases which will themselves merely cause equivalent price increases (as against those which compensate for previous price increases) are not worth the trouble.

Therefore, if union leaders accept economists' arguments that an increase in factor shares going to labour through increases in the money wage level is either impossible or undesirable, they will be amenable to arguments that wages should increase no faster (at most) than some measure of labour productivity. Consequently, in the majority of Western democracies, union central have acquiesced, and often cooperated in wage restraint programs. This happened in Britain in 1949-50, 1965-68 and from
1975 to 1978\(^{13}\), in the Netherlands from 1945-1959\(^{14}\), in Sweden in 1949-50 and (in a sense) from 1955-1969\(^{15}\), in the German Federal Republic almost continuously since 1949\(^{16}\), in Austria from 1951-1953 and from 1957 onwards\(^{17}\), and even in the United States from 1961 to 1965 and in 1971-1972\(^{18}\), to mention only a sample of countries. Viewed in this light, even the policies of the Arbitration Court and Commission from 1953 to 1958 and in 1965 are not unprecedented. Certainly union movements overseas have cooperated in much more stringent restraints than those applied during the period 1975-1981 in Australia.

The most puzzling aspect of the Australian tribunals is not their origins (which can be explained by the historical circumstances of the 1900s) but their survival. If both sides find the system so unsatisfactory, why is it not replaced? Compulsory arbitration of interest disputes is not as unique to Australia as is often suggested. The compulsory arbitration of disputes over the terms of collective agreements were common in Norway from 1916 to 1928, and in Weimar Germany, while both Mussolini's Italy and the Popular Front French Government of 1936 introduced systems of compulsory arbitration based on some extent on the Australian model.\(^{19}\) Yet, except on occasion in Norway, all these nations have abandoned the idea.

The persistence of the system in Australia in the face of attacks from both sides is often attributed to historical accident. The terms of Section 52(35) of the Australian Constitution restrict Commonwealth power to this form of regulation. This (it is held) has confined Australia to the anachronism, in spite of the fact that compulsory arbitration is inappropriate to modern industrial relations.

There are some problems with this "historical accident" theory. First, it does not explain the system's persistence in New Zealand or the Australian States, all of which are free to legislate any form of industrial regulation they choose. Second, as McCallum has observed\(^{20}\), it is not clear that the Australian federal parliament could not use other bases of power to legislate for a form of collective bargaining if it so desired. (For example, the Australian Constitution repeats almost word for word the Interstate Trade and Commerce clause of the United States Constitution, on which the US Federal Labour Management Relations Act relies.) Third, as the Broken Hill experience and occasional exercises elsewhere suggest, it is possible for parties to work outside the tribunals. In fact, at times (for example, in the early 1970s) the imminent demise of the influence of the tribunals has been widely predicted.

One possible explanation for the continuing phenomenon of Australian tribunals is the structure of the Australian economy itself. Although Australia now has extensive secondary and
tertiary industrial sectors, a large part of her export trade is in primary products which are highly land or capital intensive, and which consequently employ only a small part of the labour force. Fluctuations in the volume and prices of these primary products are significant determinants of Australia's prosperity, yet they occur in industries which are not pattern-setters in wage determination.

Such an economic system can be highly unstable. The relatively sheltered or protected nature of much of Australian secondary and tertiary industry means that, over the range of wages which are socially feasible, the demand and supply schedules often do not intersect. There is no market clearing wage available, but rather a chronic shortage or a chronic surplus of labour prevails. In the circumstances, political and other non-market factors can become extremely influential in determining the distribution of income between labour and other income recipients. In the absence of rules for settling such conflicts, violent economic and political instability can result. The recent history of Chile, Argentina and Uruguay — and those of Australia and New Zealand — provides a tragic illustration of this.

The survival of the Australian system of wage settling by tribunals can be ascribed to their ability to deal with such tensions. To a large extent this has been done through the invention of socially useful myths. One such myth was the belief that the Australian wage structure was based on a "living wage". More recently, this has been replaced by the belief that the "capacity of the economy to pay" a nominal wage increase can be determined by the introspective contemplation of a series of economic indicators. A more recent example was the assertion of "consensus" about wage indexation guidelines which were never explicitly accepted by any party to the proceedings.21

The need for such devices is reduced in economically stable and prosperous times. In such circumstances, the parties can often reach accommodation between themselves, and the tribunals may do little more than rubber stamp agreements reached outside their auspices. However, externally induced disturbances in aggregate demand and the money supply make it very difficult for sheltered industries facing a low elasticity of demand for their products to reach such agreements, and it is at those times that the tribunals have found their guidance accepted and their myths welcome.
the settlement of potentially disruptive social issues which depend primarily on uncoerced acquiescence, and which have a seventy-five year history of success. The belief that an unregulated labour market would converge toward a more efficient Pareto optimal equilibrium (without social disruption which would cause offsetting loss of output) is also a myth in the terms used here. It is not obvious that a society based on this myth would be a better one.

3. THE NATURE OF AUSTRALIAN UNIONISM

Thus far, the role of "unions" in Australian industrial relations has been treated as if the unions existed outside the system, and then made demands on it. While useful as a starting point, such a view does not adequately catch the complex interaction between the Australian union movement and the arbitration system. To understand this, some reflections on the origins of the Arbitration system are necessary.

Historically, it is clear that it was frustration at having employers refuse even to meet with them which led the unions to support and advocate the introduction of compulsory arbitration in the 1890s. The defeat of the unions at the hands of the united employers in 1890 was the occasion for their turning from industrial to political action, but not for immediate support of the middle class proponents of industrial peace through compulsory arbitration. C.C. Kingston's bill, introduced in the South Australian Parliament in 1891, served as the model for the Pember-Reeves legislation in New Zealand. Shortly after its introduction, the Shearers' Union and Pastoralists in South Australia settled their dispute amicably. Subsequently the United Labour Party issued a manifesto omitting all reference to compulsory arbitration, and the Trades and Labour Council came out in opposition to compulsion, and in particular to the compulsory registration of unions. Kingston's Bill was not passed and compulsory arbitration was not introduced in that state for several years. In New South Wales, it was the union movement which pressed for the introduction of compulsory arbitration, but it did not do so in the aftermath of its defeat in the strikes of 1890 and 1891.

Union recognition, and the conditions to be attached to it, were the issues in the great strikes of 1890 and 1891. The maritime strike of 1890, which exposed the strategic weakness of the combined unions, was precipitated by a dispute over the right of maritime officers to affiliate their union with the Melbourne Trades Hall Council. The main issue was the refusal of the employers to meet with the unions unless they first accepted "freedom of contract" (that is, the open shop) in (particularly) the pastoral industry. The unions refused to concede this point
prior to a conference, and consequently no meetings were held. Employers were not yet openly refusing to discuss terms and conditions of employment with the unions; they were merely seeking to ensure that any bargaining advantage gained from the surplus of labour was guaranteed to them in the discussions. Thus, in 1891, after the unions agreed that their members would work with non-unionists, the pastoralists of New South Wales did meet the unions in a conference which resulted in a settlement on conditions of employment for shearsers. But in 1894, the pastoralists refused even this concession, deliberately setting out to ensure that the union was broken, and refusing any face-saving gesture of a joint meeting.

As on the other occasions, notably the Broken Hill miners' strike of 1892, the employers even refused union requests for a government-convened meeting under the auspices of the NSW Trades Disputes Conciliation and Arbitration Act of 1892. That Act required the acquiescence of both parties for a meeting to be convened.

It was in the aftermath of these refusals by employers to negotiate that unions in New South Wales began to press for the introduction of compulsion in government-sponsored arbitration. Union-sponsored policies expressed through the new Labour parties led to compulsory arbitration spreading through most of the States and to federal jurisdiction. It was middle class radicals who proposed and wrote the Bills, but it was Labour support which secured their enactment into law.

Thus it was the refusal of employers to deal with unions which precipitated political action, and even at the height of anti-union feeling during the strikes of the 1890s unions received considerable sympathy from liberal circles on this issue. This is why extensive provision for securing union recognition was incorporated into the arbitration acts. The issue which still disturbs industrial relations in many countries - that is, in what circumstances employers must recognise unions - was more or less settled in Australia at the turn of the century as were the limits on such recognition, as will be seen from what follows.

Naturally once they were instituted, the Arbitration Acts did more than just guarantee the recognition of existing unions. They encouraged the expansion of unions, the foundation of new unions, and the revival of redundant ones. This was particularly true of the Commonwealth Act, passed in 1904. Hawke notes that most of those who participated in the debates in the Commonwealth Parliament did not appreciate what the effect of this encouragement of unionism would be. Similarly, they did not anticipate the extent to which the growth of federal unions would bring about an extension of "interstate disputes" far beyond those few industries - shearing, shipping and perhaps coal
perceived as "interstate industries" by those who wrote the Constitution. At any rate, the combined effect of the state and federal legislation encouraged unionism to such an extent that the number of union members tripled between 1906 and 191430, and for many years Australia had the highest ratio of unionists to employees of any nation in the world.31

Nor were unions recognised only for the purpose of serving claims for wage increases to be heard by the tribunals. They were also responsible - in their role as organisations registered under the Act - for the enforcement of awards. In fact, until 1928 they were solely responsible for the enforcement of federal awards.32 Relations Bureau, they retain the right to enter an employer's premises under most awards33 - and since 1973, under Section 42A means the rule in industrial relations systems which rely on only had the right to organise in the workplace since 1968, and entry into the plant as they are supposed to rely on works implement the collective agreement within the plant.35 One of the reasons for the development of the "twin systems" of industrial relations in Great Britain, discussed by the Donovan Commission, was the reluctance of employers to allow full time union officials direct involvement in the settlement of grievances or disputes within plants.36

There are of course limits to the extent of recognition conferred on the unions, particularly in firms and industries covered by federal awards. Firstly, although union officials have the right to enter plants, once they get there they can do no more than see union notices. In particular, they have no automatic right to overaward payments, even if the employer has voluntarily instituted such a scheme and the union suspects inequalities in its administration. Willingness by the employer to deal with the union on such issues depends on the employer's goodwill or the union's industrial strength - there is no obligation to bargain on matters not covered by the arbitration system itself.

The same problem arises for industries as a whole. As Glasbeek sees it:

"The High Court, without ever openly admitting it, has seen the federal arbitral power as being limited by the right of the employer to make managerial choices."37
In fact, Glasbeek feels the High Court has shown a bias in favour of employers' rights similar to the bias shown by English courts at the turn of the century, in which merchants' combinations were held to be lawful but those of trade unionists were not. A classic example of such dicta is the statement by Barwick C.J., Taylor and Owen J.J., that

"The Act (that is, the Conciliation and Arbitration Act) does not commit to the Commission authority to regulate the manner in which industry shall be carried on; its authority is limited to regulating the relationship of master and servant in the industry and matters which are truly incidental to that relationship."

Complementary to this imposed legal constraint is the attitude of the tribunals themselves as their policy is to uphold managerial prerogatives:

"Awards do not, in general, impose any restrictions on the right of an employer to select, transfer, promote, regress suspend or dismiss staff. It is for the employer to decide who is the best man for a particular job...."

This means, of course, that questions such as seniority rights with respect to promotions, transfers or dismissals, are outside the competence of the formal system, and on this point the situation is similar to that on the continent, where, unlike the United States, unions are conferred with very few rights to job control by collective agreement. Policy on this point is changing overseas, mainly as a result of legislation such as the British Employment Protection Act of 1975, and the Swedish law of 1975 providing for seniority rights. Presumably changes in prejudice on the part of the High Court and in policy on the part of the Commission could result in similar developments and the most likely way for this to happen would be for some State Australian Labour Party governments to legislate such changes within the State jurisdiction.

This question of the extent and depth of union recognition could be said to be the crucial issue in any industrial relations system. Because it is a matter which has to be settled before "regular" industrial relations practices can commence, its importance tends to be overlooked. As some of the foregoing remarks on other systems indicate, it is perhaps the crucial determinant of the dimensions of any system. The most contentious issues - and the bitterest strikes - are usually over neither "rights" nor "interests", but over the issue of who has the obligation to negotiate with whom.
In the United States, recognition has to be won in each bargaining unit separately—which usually means plant by plant.\textsuperscript{41} Once a union has won the government-supervised election with the plant, the requirement that the employer "bargain in good faith" over "rates of pay, wages, hours of employment or other conditions of employment"\textsuperscript{42} means that the union is entitled to raise many matters which, in most other countries, would be considered matters of purely managerial discretion.

Because of this, and because if the union can be kept out of the plant the employer is left completely unfettered, to this day the issue of recognition is a contentious one and deaths still occur from violence on the picket lines in industries such as coal mining and agriculture, due to the resistance to recognition by some employers.\textsuperscript{43} By contrast, in countries with stable industry-wide bargaining systems such as the Netherlands, West Germany and the Scandinavian kingdoms, recognition is conferred in an "articulated" fashion, with some matters settled in nation-wide or industry-wide bargains, and the rest being subject to consultation or negotiation at the plant level either by a union local or a works council. The actual arrangements vary from country to country, but the overall position is that there is some consensus—often originating in conditions imposed by employers or the law—on the issues which can be raised at each level.\textsuperscript{44}

Turbulent industrial relations practices, as in Italy, France and (more recently) Great Britain, are accompanied by the absence of such consensus, and most proposals for reform amount to measures for establishing institutions around which a new consensus might form.

Several people have observed that the Arbitration system "solved the question of employer recognition of the labour union and thus avoided almost totally what was an ugly phase in American labour relations history."\textsuperscript{46} But it is less often noted that the solution was essentially a European one—unions, by registration, achieve recognition by employers in their industry as a class rather than individually. Because the system compels recognition it leaves ambiguous the extent to which that recognition extends to those areas which, for legal or other policy reasons, the tribunals themselves do not determine. This indeterminancy is an important reason for Australia's high level of open industrial conflict, as measured by strike statistics. Many conflicts are essentially about recognition of the plant-level unions' right to be heard.\textsuperscript{47}

4. STATE SYNDICALISM?

It is now time to bring the strands of the analysis together. It
was argued in section 1 that Australia has a system of “unilateral” arbitration, which mainly operates to impose minimum conditions for “fair” contracts of employment. It is “compulsory” only in the sense that employers are compelled to pay the minimum rates determined. Section 2 suggested that the survival of the system can be attributed to features of the economic structure, section 3 argued that, in Australia, unions and the arbitration system – and hence the State – are very closely related. In this Section, an interpretation is suggested as to the way these three aspects interact.

Some observers – most notably Howard – argue that Australian unions have little independent existence, and that far from being effective strong collective representatives of workers’ interests, they are strategically weak, being totally dependent on the State for recognition and effectiveness. Technically there are no independent Australian trade union organisations as federally registered trade unions are in fact government agencies. Trade unions are organisations established under the Conciliation and Arbitration Act to carry out the purpose of that Act and their existence as democratically governed organisations is a by-product of the Act’s assertion that such organisations are necessary for the Act’s purposes.

Such unions are more akin to local governments than they are to voluntary organisations, the main difference being that they are organised on an industrial, rather than a territorial basis. Their rules are by-laws, and the courts can be used to ensure that those by-laws are enforced – including those requiring members to pay their dues, fines and levies. Like a citizen who chooses not to own rateable property, a worker can often choose to avoid many of the obligations of membership by choosing not to join the union; but he will not be able to avoid being subject to the rules of industrial government which the union has been instrumental in establishing.

This analogy helps clarify the vexed question of the relationship between unions and the State in Australia. Australian unions are a part of the State, but in the sense of local governments with entrenched traditions of autonomy. They are creatures of the State, yet not subservient to it – unruly principalities rather than vassals.

The analogy of Australian unions with local governments can only be taken so far. In particular, unions have a more ambiguous role in industrial society than local governments. The latter supply essential municipal services, and while the allocation of those services in the community involves political judgment and can be subject to economic analysis, their basic social function is rarely challenged.
Unions, however, rarely receive such general acceptance. Although found in some form in all market economies, their role in interfering with the "free" market for labour is challenged as unnecessary and harmful. Their social role almost always involves the dampening and attenuating of the impact of market forces on their members. How can Australian unions do this if they are merely agencies of the State?

Answering this question requires a departure from the "reified" concept of the State, existing above and apart from society. Such a concept may be useful for some analytic purposes, but is hardly realistic. In any society, State institutions are a part of and a product of the social fabric, not distinct from it. If unions exist in all market economies, their existence in Australia as nominally State organisations does not in itself make their role any different. The question then remains, what is that role?

It has already been explained in sections 1 and 2 how the Australian tribunals have adopted mediation of union demands as their role. Yet another parallel between the arbitration system and European collective bargaining systems is the concept of the extension of the collective agreement negotiated by a "truly representative" union to be a part of the contract of employment of all employees in the industry, whether or not the employer is a member of the employers' association which signed the agreement, and whether or not the employer refused to sign the agreement. Such laws first appeared in Europe as decrees of the revolutionary Social Democratic governments of Germany and Austria in 1919, and were then passed in Latin American and other European countries in the 1930s. In France this was part of the legislative program of the popular front government of 1936.

Provision for extension is currently made under the laws covering collective bargaining in France, West Germany, the Netherlands and (at least until 1971) Great Britain. Standardised industry-wide minimum wages were part of the National Recovery Administration Codes in the United States from 1933 to 1935, but the National Recovery Act on which they were based was held unconstitutional in 1935. Such legislation would be completely inconsistent with United States labour legislation and practices as they have developed since then, with their insistence on unit-by-unit representative elections. Only if the same union wins elections in all the bargaining units in an industry, and also manages to ensure that all contracts expire simultaneously, is it able to engage in European-style industry-wide bargaining.

An article written in 1939 which summarised the spread of such "extension" laws to date, correctly noted that the first such laws were the "common rule" provisions of the early Arbitration
Acts in Australia and New Zealand. For Constitutional reasons, the Federal tribunals cannot declare a common rule, but it has been held that an employer can be bound by an award even if he does not employ any members of the applicant union, and so "the rule in Whybrow's Case that no common rule can be made under Section 51 (XXXV) of the Constitution has, for practical purposes, been abrogated". Up to 1939 the Australasian laws themselves seem to have spread only to South Africa and Hamburger finds no evidence that the adoption of extension laws in Europe was inspired by the antipodes. Nevertheless, the Arbitration System brought about a result which in Europe required political action inspired by the left to occur.

How then can one summarise the arbitration system and the unions it has sponsored? Marx and Engels described the capitalist state as "a committee of the for managing the common affairs of the whole bourgeoisie". By this they did not mean that State authorities took orders from individual property owners, but that property owners collectively used institutions such as parliament and the law courts to derive the rules defining property rights and settle disputes about those rights. In a similar manner the arbitral tribunals and the accompanying system for regulating trade unions can be described as the executive committee of the labour movement - or at least of that privileged part of the labour movement in secure jobs which Marx dubbed the "labour aristocracy."

This concept is not quite the same as the "capture" theories of regulatory bodies which have been developed in the United States, and which Daboshek has suggested could be applied to the Australian tribunals. Those theories describe how bodies established to control industries or professions came to be "captured" by them, and to represent their interests, rather than the public interest.

It is no great revelation, to observe that union principles have "captured" the arbitration tribunals. The tribunals were established not to control unions but to encourage them; not to protect the public from irresponsible unions but to protect workers from a greedy public.

It is not unusual for powerful agents of the State to assert their independent identity. For example, in many nations the military forces assert that they have a "dual function" in defending the frontiers, as well as protecting social stability, and often destroy the Constitution in order to save it. Australia has avoided militarism, but in an often perverse way which puzzles her own citizens, she has internalised syndicalism.

Unions in Australia, while accepting the most detailed regulation
of their internal affairs, simply ignore laws which restrict their right to take industrial action. The existence of the tribunals makes long strikes unusual, and makes it unnecessary for unions to acquire large reserves and a disciplined approach to strike action. Thus an attenuated form of syndicalism lives on in one of the most bureaucratically regulated trade union movements in the Western world. Australia, the land of zoological paradoxes, has evolved a sociological one — State Syndicalism.
NOTES

This paper represents the author's personal views and not necessarily those of the Department of Employment and Industrial Relations in which he is currently employed.

1. Hancock, 1930: 88

2. See Hepple, 1975

3. For experience in Germany during the Great Depression, see Aaron and Wedderburn, 1972: pp. 296-297. For the Australian experience in 1931, see Hancock, 1979b; in 1953, see d'Alpuget, 1977 and Nielenhuyzen, 1982.

4. See Carsberg, 1925; Berg, 1933; Galenson, 1949.


7. For the US, see Mills, 1975; for the UK, Panitch, 1976; for the Netherlands, Windmuller, 1969; for Norway, Galenson, 1949.

8. C.C. Kingston advocated compulsory arbitration to the N.S.W. Royal Commission in the Strikes of 1891, and introduced a Bill to that effect in South Australia. W. Pember-Reeves of New Zealand, using Kingston's Bill as a model, guided the N.Z. Arbitration Act through parliament in 1894 (Wadham, 1953). The success of the New Zealand Act led to the passing of similar Acts in the Australian states and federation. H.H. Higgins, together with C.C. Kingston, persuaded the Constitutional Convention to provide for "the Conciliation and Arbitration of industrial dispute" in the Constitution, guided the Conciliation and Arbitration Act through Federal parliament and was President of the Commonwealth Court of Conciliation and Arbitration from 1907 to 1921.

9. See Kahn-Freud, 1972. However, as Flanders, 1975, points out, this tradition has never inhibited British unions from seeking the assistance of the State in achieving their aims.


12. Webb and Webb, 1920: p. 169 and Chamberlain and Kuhn, 1965: p. 37. The Webbs refer to the "method of mutual insurance", but it is clear from their discussion that unions which used this method relied on unilateral demands to make their claims. Mutual insurance gave them the bargaining strength to make those demands effective.
13. In 1949-50 the TUC co-operated in the successful attempt to freeze wages, called for in the white paper Cmd 7321, *Statement on Personal Incomes, Costs and Prices*, from 1948 until the restraint became impractical with the Korean war boom. In 1965-68, the TUC nominally acquiesced in the first Wilson government's Prices and Incomes policy, though with little effect. In 1975, the leader of the Transport and General Workers Union, Jack Jones, a man who had opposed as biased all previous incomes policies, led the drive for the (successful) voluntary limit of $6 per week on pay increases. A similar lower limit was agreed to for 1976. However, agreement ceased to be reached in the later years of the Callaghan government.


15. LO (the Swedish analogue of the ACTU) co-operated in a wage freeze similar to Britain's in 1949-50, and was disillusioned by the inflationary outcome. But from 1959 to 1969, LO, while rejecting government guided incomes policies, negotiated increases with private employers which were approximately of the magnitude such a policy would prescribe. See Meidner, 1974.

16. In the GFR the memories of the inflation of 1923 and 1948 has kept the unions ultra-cautious (Ulman and Flanagan, 1971: p. 75). In 1968 the unions, fearing unemployment, resisted the government's attempts to push wages up faster (Ulman and Flanagan, 1971: p. 190). For a slightly different version of the same events see Jacobs, 1973: p. 142.


18. The wage-price guidelines of the Kennedy-Johnson administrations were generally adhered to until the Vietnam wartime inflation. The AFL CIO initially co-operated with Nixon's Pay Board, but withdrew in 1973. See International Labour Office, 1933; Colton, 1951; Giunigi, 1971.


25. Higginbotham, Chief Justice of Victoria, publicly subscribed to the strike fund, giving this issue as the reason. See Pember-Reeves (1902) 1969.
26. This question of the terms on which employers initially agreed to recognise unions seems to be the crucial issue in determining the "ground rules" for industrial relations systems. In Sweden, for example, the main employers' association agreed to recognise and bargain with the unions in 1906, but specified that they would reserve to themselves the right to complete discretion in allocating, hiring and firing. These "managerial prerogatives" were subsequently asserted by the Tripartite Labour Court to be an implicit clause of all labour contracts, and remained so until at least 1975 - even though by then Sweden had become the most unionised state in the Western world, and had had a social democratic government in office for 40 years, see L0, 1972: 49-65. A similar - though more interrupted history is found in West Germany. (See Ramm, 1965).

27. Sutcliffe (1921) 1967: 177-180
30. Sutcliffe (1921) 1967: 178

31. The percentage of union membership to potential union membership has been estimated as follows by Bain and Elshelkh (1976):

<table>
<thead>
<tr>
<th>Year</th>
<th>UK</th>
<th>USA</th>
<th>Sweden</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>1907</td>
<td>14.7</td>
<td>10.0</td>
<td>na</td>
<td>14.9</td>
</tr>
<tr>
<td>1910</td>
<td>14.6</td>
<td>9.0</td>
<td>na</td>
<td>21.0</td>
</tr>
<tr>
<td>1920</td>
<td>45.2</td>
<td>16.7</td>
<td>26.3</td>
<td>42.2</td>
</tr>
<tr>
<td>1930</td>
<td>8.9</td>
<td>51.9</td>
<td>32.7</td>
<td>43.5</td>
</tr>
<tr>
<td>1940</td>
<td>33.0</td>
<td>28.0</td>
<td>66.3</td>
<td>40.4</td>
</tr>
<tr>
<td>1950</td>
<td>44.1</td>
<td>16.5</td>
<td>70.9</td>
<td>56.0</td>
</tr>
<tr>
<td>1960</td>
<td>43.1</td>
<td>28.0</td>
<td>81.1</td>
<td>54.5</td>
</tr>
<tr>
<td>1970</td>
<td>47.6</td>
<td>26.3</td>
<td>81.1</td>
<td>50.4</td>
</tr>
</tbody>
</table>

*1969

32. Anderson, 1929: p. 67
33. Mills and Sorell, 1975: pp. 165-167

34. In both cases the right was won after upheavals. The French law of 27 December, 1968 implemented one of the clauses of the Protocol of Grenelle at which concessions were made to end the strikes of May-June 1968. (Schmidt 1972: p. 48). The law of 1970 in Italy, which seems to be more far-reaching, followed both an outbreak of extra-union protest in 1968 (influenced by the events in France) and the union-led "hot autumn" of 1969. (Schmidt 1972: p. 56)

36. This was particularly the case in the engineering industry, which was of course the industry on which Donovan (perhaps justifiably) seems to have based many of his recommendations. See Donovan Report, 1968.


41. The National Labour Relations Board designates bargaining units, the basis of the deliniation being up to the NLRB. The plant is usually the unit, but it can be a craft group or some other group of employees (e.g., dining workers in a university). This provision is for industries engaged in interstate commerce, other than agriculture. As in Australia, there are separate (and differing) state laws for interstate cases.

42. The fact that unions can lose as well as gain recognition explains some of the restrictions on managerial authority found in the US. The strict enforcement of seniority rights, for example, is partly explained by the unions' need to prevent employers weakening the union by favouritism towards anti-union employees.

43. In 1974 a striker was shot dead by a foreman from a mine in Harlan Co., Kentucky: The mine was owned by Duke Power Co, which supplies power to much of North Carolina, United Mine Workers Journal, June 16–30, 1975: p 24 (the incident is documented in the film Harlan County). In 1975, a strikebreaker was killed by local construction workers in South West Louisiana New Times, March 19, 1976.

44. Obviously, the unprecedented postwar prosperity of North-West Europe has helped to pacify any potential disquiet about the more repressive aspects of these systems.

45. Not always successfully: the (now repealed) British Industrial Relations Act of 1971 was a disaster in these terms.


47. The one man bus dispute which led (eventually) to the O'Shea case of 1969 was a classic example of this sort of hiatus. See Glasbeek, 1972: pp. 521–526.

48a or rather, his employer will not. A non-unionist is not himself either protected or bound by an award which is the result of a dispute between union and employer. Unlike the situation in the United States (but like that in Sweden and West Germany) unions are not deemed to be responsible for the interests of non-members, but their interest in preventing non-unionists from undercutting the conditions of unionists is recognised. This means a union can have a "dispute" with an employer who employs no members of the union, requiring that employer to adhere to the conditions the union has won elsewhere.

49. The French term is "les plus représentatifs", which is a wording taken from the ILO Constitution and which is usually translated as "the most representative". However, in France more than one union is often categorised as "plus representative" (otherwise the communist-led CGT unions would often monopolise the field). I therefore prefer Schmidt's translation, "those who are truly representative". (Schmidt 1972: p. 47).

50. Hamburger, 1939.


52. Some unions have achieved this: the United Auto Workers in the auto industry and the United Steel Workers of America in the steel industry. The United Mine Workers of America insists on a common contract in all mines it organises, but has not been able to eliminate non-union mines. For an account of a typical organising campaign, complete with pictures of jailed pickets, see United Mine Workers Journal April 1–15, 1975.


55. It is true that these measures are in the interests of the "good employers" who sign the collective agreement. But while some such legislation was jointly sponsored by both sides of industry (eg the UK Cotton Manufacturing (Wages Agreement) Act of 1934), it seems to have been political pressure from the left which achieved the first enactments; this was so in Germany and France, which are the most important cases.

56. For a comprehensive discussion of this question (and the question in the preceding sentence) see Miliband, 1969 especially p. 5.

57. Dabschek, 1980

58. The Shorter Oxford English Dictionary defines syndicalism as
follows:
"A movement among industrial workers having as its object the transfer of the means of production and distribution from their present owners to unions of workers for the benefit of the workers, the method generally favoured for the accomplishment of this being the general strike."

The situation in Australia is, de facto, analogous to that in France, where a constitutional guarantee of the right to strike makes agreements banning strikes unenforceable (although French law by no means concedes the aims of syndicalism as defined above, any more than does Australian practice).

59. Some commentators on this paper have suggested that "corporatism" would be a better label than "state syndicalism" for the system as analysed. However this term invokes the predominant role of a totalitarian state as in Mussolini's Italy or Dolluss's Austria: it is a main theme of this analysis that while the system has the outward form of such state control of unions, its actual nature is almost the converse.
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