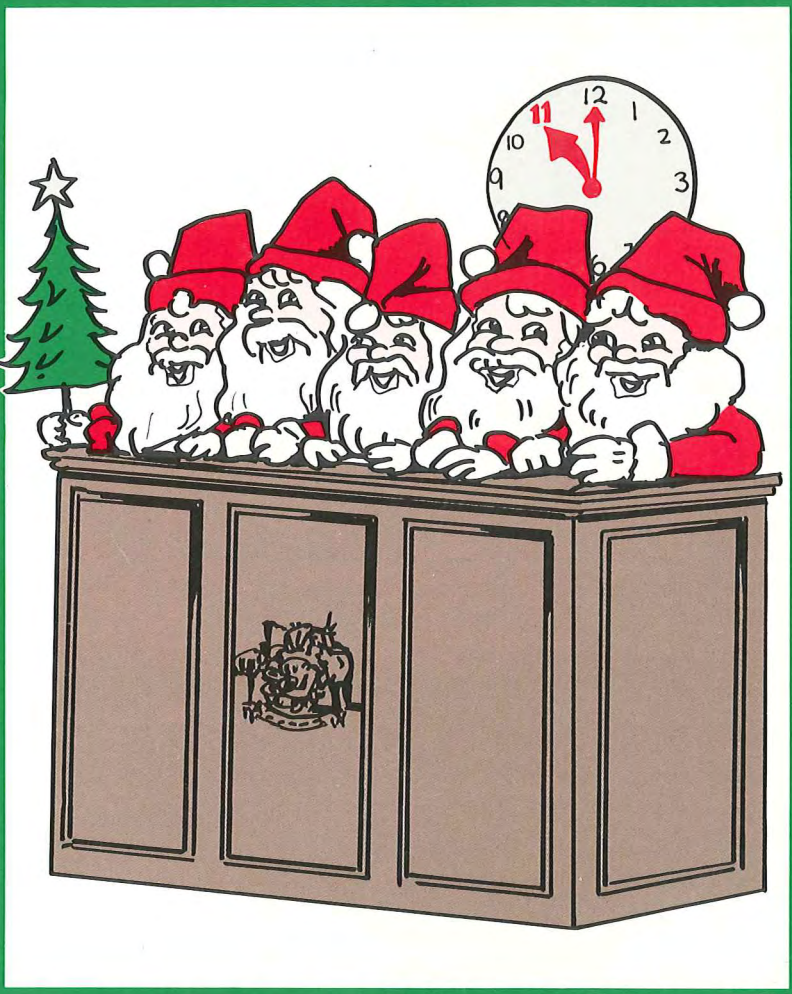
The Case Against the Arbitration Commission



P.P. McGuinness

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Foreword

As Editor-in-Chief of the *Australian Financial Review*, Paddy McGuinness is one of the country's best known commentators on public affairs. He is also one of the sharpest, in both senses of the word. He is a man of independent mind, whose views are less predictable than those of most journalists. It is therefore a matter of some intellectual consequence when such a person writes on an issue at greater length and in greater depth than is common in daily journalism. This Mr McGuinness has recently done in the *Review* in a series of long articles on the Arbitration Commission. These articles are the basis of this monograph. The Centre for Independent Studies is pleased to be able to present this material *en bloc* and in a more permanent format than its original publication.

Mr McGuinness argues that the Arbitration Commission itself should be regarded as one of the parties in the disputes with which it deals; that is, that the Commission has interests of its own which we should bear in mind when seeking to understand its decisions. Several examples are given of self-interested behaviour by the Commission. However, McGuinness's work is not an austere exercise in so-called 'public choice' analysis. His approach is eclectic enough to allow, for example, for the influence of the personalities of the Commission's Chairmen. More importantly, his writing lacks the air of clinical detachment favoured by 'public choice' writers. Rather it betrays a degree of passion fuelled by a sense of moral outrage.

His major indictment of the Commission is, I think, contained in the following passage:

> ... the Arbitration Commission has systematically encouraged the erosion of any real power over unions, preferring in exchange to join them in exercising authority over government and the labour market. In the process, its pretensions to be a quasi-judicial body have totally eroded the respect of unions and their leaderships for the law, to the extent that many unions consider themselves beyond the law in the pursuit of an industrial dispute.

His conclusion is that 'the reform of industrial relations ... require(s) that the union movement be brought back within the law and that unionism, like industry, become competitive and decentralised. The Arbitration Commission, as the main defender

of centralism and monopoly in labour markets, is the main obstacle to reform'.

While not wishing to dispute Mr McGuinness's claim that the Commission is the main obstacle to reform, I would point out that, in the absence of the political will to reform, it is but a potential obstacle. Australian governments, Labor and Liberal, have lacked the resolution to curb excessive union power. Mr McGuinness's arguments will help convince informed opinion of the need to do so. A state cannot allow its 'monopoly of violence' to be usurped by unions without ultimately losing its legitmacy. Perhaps some of our politicians will take heart from recent events in the United States and Britain, which have demonstrated that resolute governments can meet arrogant unions head on and win.

Ross Parish

The Author

Padraic Pearse McGuinness is Editor-in Chief of the *Australian Financial Review*. He is a graduate in economics of Sydney University and London School of Economics, and has taught economics in the University of New South Wales, the University of Paris and City University, London. He has been chief economist of the Moscow Narodny Bank in London, and a consultant in the economics and statistics department of the Organisation for Economic Cooperation and Development in Paris. He returned to Australia in 1971 to write for the *Financial Review*. From January 1973 until April 1974 he was senior adviser in the office of the Minister for Social Security, W.G. Hayden. He returned to the *Financial Review* as economics editor in April 1974, and was appointed Editor in 1980 and Editor-in-Chief in 1982. Until his appointment as Editor of the *AFR* he was also one of Australia's leading film critics.

The Case Against the Arbitration Commission

P.P. McGuinness

I. INTRODUCTION

The report of the Committee of Review Into Australian Industrial Relations Law and Systems (the Hancock committee) is going to be the fundamental document in the discussion about reforming industrial relations. But by its nature the Hancock report does not present any radical analysis or suggestion for reform. Nor does it face up to the shambles which the centralised wage fixation system has become.

In particular, it cannot face up squarely to the central, pernicious role in the Australian industrial relations system played by the Australian Conciliation and Arbitration Commission, the sacred cow of our politico-economic system.

As paid-up life members of the industrial relations club, the mutual admiration society of practitioners and experts in industrial relations, the three members of the committee necessarily start from the common presumption that the centralised system of wage-fixing under the Commission has worked pretty well and is in need of only minor reform. The members of the Committee are all deeply versed in the system over many years and enjoy a considerable degree of deserved public esteem. The Chairman, Professor Keith Hancock, is Vice-Chancellor of Flinders University in South Australia and has been a student of and authority on arbitration and wage-fixation in Australia for many years. Mr George Polites was for many years chief employers' representative to the Commission, and Mr Charlie Fitzgibbon is a former senior Vice-President of the Australian Council of Trade Unions, and for years secretary of the Waterside Workers Federation.

It can be argued that the system as it has grown up has become hopelessly corrupt, in the sense of being self-interested, and that the main obstacle to the reform of industrial relations in Australia is the Arbitration Commission itself.

The Arbitration Commission, by intervening in and regulating labour markets in ill-considered and ill-analysed ways, has done untold damage to the Australian economy. It has set wages to placate strong unions, it has become the major cause of poverty and unemployment, and, by establishing the pattern of strike first, arbitrate afterwards, it has become a significant cause rather than preventative of strike action.

The Arbitration Commission has acted always to preserve its own supremacy and prestige, and in doing so has effectively sabotaged the growth of collective bargaining procedures or workable decentralised labour market arrangements. Any approach to reform should have as its purpose the abolition of the arbitration system in its present form and the design of alternative arrangements that give some promise of operating to lessen strikes, boycotts, bans, limitations and other industrial conflict, and of allowing the labour market to work smoothly and flexibly.

The system has reached such a state of ineffectualness and has strayed so far from the effective establishment of orderly industrial relations in the context of respect for the law it is now the case that the most effective first step towards reform and the breaking down of the stranglehold of the industrial relations club would be the abolition of the Arbitration Commission. It has degenerated beyond cure in its present form.

The aim of such reform, of course, should be to allow unions to concentrate on the protection of their members, especially the weak, while allowing economic growth and the minimisation of unemployment.

One of the great myths of the present system is that there is no alternative possible to the Arbitration Commission federally and to the various other federal and State tribunals. In fact the constitutional head of power — Section 51(xxxv), which is the authority for the Conciliation and Arbitration Act — in no way requires anything like the present system. Nor need an alternative market-oriented system be disorderly and chaotic.

The period of disturbance and rapid wage growth that followed the abandonment in 1981 of wage indexation for increases in the Consumer Price Index is best seen as the result of an attempt by the Commission to sabotage possible alternatives to its central role. To this extent the Commission can be held largely responsible for the severity of the 1982 recession and record unemployment.

Naturally, the Arbitration Commission and the industrial

relations club will fight strongly to preserve their central role, importance, prestige and, of course, incomes. The major concern of the Commission is to preserve its own power, and it has put this above the health of the economy and industrial peace in the long term. Every major case before it has manifested this imperative.

II. THE 'INTERESTED PARTIES'

In every matter that appears before the Australian Conciliation and Arbitration Commission, there are, as if in a real court case, 'parties' who argue their cases. These will usually be the employers on one side, the unions on the other, and the Commonwealth and often State governments representing their interests or views. But of course it is immediately obvious that these parties do not exhaust the possible lines of argument on the merits of a particular wages or conditions claim. The unemployed are not present as a 'party', nor even is the social welfare lobby; still less is there present any genuine or self-styled representative of the public interest.

Number One

Perhaps the Commission itself might lay claim to this latter role. But the truth of the situation is that there is always one party before the Commission at all its hearings that is never explicitly named or referred to, and that is the Arbitration Commission itself. In every case the interests of the Commission are represented, and the form and nature of the final decision takes account of those interests. These are, of course, primarily the survival of the role and influence of the Commission, and second the expansion of the Commission's empire throughout the labour market in Australia.

The tacking back and forth before prevailing winds of government policy, trade union militancy, and economic events by the Commission would be difficult to explain were it not for the fact that the Commission's own interests are always relevant to the interpretation of its actions. There has been a degree of inconsistency in the actions and attitudes of the Commission that cannot be adequately explained otherwise, either by changing circumstances, or by changing personnel, or by changing interpretations of what is happening in the Australian and world economies.

Perhaps the most obvious example of the Commission's trimming is its series of decisions related to the existence of earnings drift. Earnings drift is a concept itself peculiar to the Australian arbitration system, and refers to the divergence of

actual earnings above (never below) the award rates set by the Commission. From time to time, as a result of pressures in the labour market and successful bargaining on the firm and industry level, wages and salaries tend to increase faster than award rates. This might seem an unobjectionable development in normal times, since it would tend to establish a dual system whereby the Commission's awards operated as a structure of minimum wages. But the Commission always tries to recapture the appearance, if not the reality, of total control of wages by granting increases that lift the award rates to something like the prevailing market rates. That is, it has consistently chased the market so as to give the impression that it is in control of the market rate.

On the other hand, in times of weakness in the labour market the Commission may accept that the rate of increase of award wages may be limited, but it is ready to accept devices such as wage indexation, which ensure that it continues to be seen by many in the community as playing an active and continual role in granting wage increases and maintaining living standards in the face of opposition from employers and sometimes from governments. In this way it actively curries favour with the union movement.

The Unions

The experience of indexation in the period 1975-81 is an excellent example of this, and of the way the Commssion ignores the interests of the unemployed. This whole indexation experiment amounted to the deliberate partial maintenance by the Court of real wages set at the level of the 1974/1975 wages explosion in the face of high unemployment. There is no doubt that in the years of recession wage levels would have fallen back even more substantially in real terms if it had not been for the Commission. The unions were not in a position to mount effective campaigns to raise money wages to keep up with price inflation, and without the help of the Commission union leaderships would have been subjected to increasing pressure and dissatisfaction from their members. Instead, however, they were given an easy run by the Commission, which allowed them to present full or partial indexation decisions as total or partial victories in the industrial relations sphere, with no effort. What effort was expended by union leaderships in these circumstances was devoted to the preparation of campaigns for catch-up when recovery came, and to claims on hours and conditions that would represent another substantial real wage push. Some of their spare time was also devoted to propaganda campaigns about evil multinational companies; little to genuine analysis of the reasons for rising unemployment.

The collapse of indexation was also represented by the Commission as having been due to the increasing restiveness of the unions and pressure by the Commonwealth Government over the period, to which it was finally succumbing. Give collective bargaining a go, the Commission said in effect, at a time when the resources investment boom was being talked up and translated into premature wage and hours claims. The period 1981-1982 is often represented by supporters of the Commission as an example of how the disorder and chaos of collective bargaining demonstrated the need for an active role by the Commission. In fact, it can as well be treated as a demonstration of how the Commission picks its timing — maintaining an active presence when it can be seen as the determinant and the Father Christmas, and strategically withdrawing when its own actions have built up irresistible pressures, only later to reenter and recapture the high ground by endorsing actual wage movements and underwriting them in times of labour market weakness.

The major role of the Commission thus emerges as being a defender and accomplice of the unions, to some extent of the employers, especially those in protected industries, and an opponent of the Government when economic policy is not to the liking of the unions. It tempers the winds of government policy.

III. THE EFFECT ON WAGES AND UNEMPLOYMENT

The net effect of this is to introduce a degree of downwards rigidity in real wages, which makes economic policy in Australia extremely difficult and ensures that external adverse developments and internal recession are not reflected in any erosion of real wages (and hence either restoration of profits or sharing of the burden of adjustment) but instead are passed directly into increasing unemployment. The Arbitration Commission therefore has a ratchet effect on both money and real wages, which ensures that gains, once made, are protected regardless of the state of the economy or its competitiveness in world markets.

It is sometimes argued that in the long run the Arbitration Commission does not affect wages, which are determined by the market; the Commission only recognises market outcomes. To some extent this is true, in that over a longish period wages (and profits) cannot grow faster than the real rate of growth of the economy. By granting short term real wage increases at inappropriate times, or by maintaining real wages when they ought to be falling, the Commission ensures a poorer performance of the Australian economy, a lower rate of growth and therefore lower

real wage growth over time. That is, while the Commission can determine wages directly in the short run, it cannot determine them directly in the long run — but it can determine them indirectly in the long run to the extent that its activities lower the rate of growth of real income.

It is important to realise the implication of this. It is that rather than raising real wages over time, in fact the Commission, by lowering the real rate of growth in the economy, ensures that wages are lower than they should be, and so is the capacity of the economy to deal with the social evil of poverty. And it causes the waste of immense human resources through the high level of unemployment its activities underwrite.

Here again the Commission's interests in its own aggrandisement enter the argument. For many years it has vacillated between accepting that it has a role and responsibilities with respect to economic management, and denying that its fundamental responsibilities go beyond the settlement of industrial disputes. Thus whenever the Commission might be forced to make a decision in terms of economic realities that cannot be gainsaid and that the unions are clearly unwilling to accept, it tends to fall back on a reiteration of its supposed constitutional role in the settlement of industrial disputes, and argues that settlement (on virtually any terms) is more important than any other consideration.

What the Constitution Says

Its constitutional role is, however, not at all clear. It is often overlooked that the Constitution does not mention the Arbitration Commission in any of its manifestations. Section 51(xxxv) of the Constitution simply provides that the Commonwealth shall have powers to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state'. The establishment of the Commonwealth Court of Conciliation and Arbitration, as it originally was, in 1904 was only one possible way of implementing this power. It is by no means clear that the Constitution would preclude laws that would require some arbitral authority to settle disputes purely with reference to economic conditions.

Of course, the much amended Arbitration Act contains a provision that economic circumstances must be taken into account. This is section 39(2) of the Act, which in its current version provides that the Commission 'shall take into consideration the public interest and for that purpose shall have regard to the state of the national economy and the likely effects

on that economy of any award that might be made in the proceedings or to which the proceedings relate, with special reference to likely effects on the level of employment and inflation'.

But this does not require the Commission to do more than pay lip-service to economic considerations, and it certainly does not require that they should be given predominate weight. At various times the Arbitration Commission has attempted to give such weight to economic conditions, especially when 'that Irish pig farmer' (R.J.L. Hawke's description), Mr Justice Ray Kelly, was President of the Court. But with the Boilermakers Case of 1956, which greatly reduced the judicial authority of the Arbitration Commission (and in fact made its subsequent pretence to the style, titles and dignity of a Court totally absurd), the authority of the Arbitration Commission was diminished. The final blow to its authority was the Clarrie O'Shea case of the late sixties, when it became clear that the Arbitration Commission had for practical purposes no coercive or disciplinary powers whatsoever — at least with respect to the unions. The arbitration inspectorate still exercised such powers with respect to employers.

It might have been thought that this effective emasculation of the Commission would have been treated by it as a cause for retreat, accepting that since it could not in any way enforce its decisions on the unions, it would confine itself to minimum wage setting functions. Employers do not for the most part have any effective political or industrial alternative to compliance with the law. (Penal provisions with respect to unions do remain on the lawbooks, but they are universally treated with contempt.) Alternatively, the Arbitration Commission might have set out on a path of withdrawing its support for unions to the extent to which they refused to accept the authority of the Commission.

This could have been done in a number of ways. One would have been to make it easier to register new unions in industries and occupations already covered. Instead the Commission has followed a policy of granting effective monopolies to unions with respect to specific trades, occupations, types of work, and industries. Thus it laid the basis for the long-running conflict between unions such as the BLF and the Ironworkers over issues such as tower construction and who has the right to cover it.

Employers Get Little Help

Similarly, the Arbitration Commission has been remarkably unwilling to cooperate with employers in implementing stand-downs in the event of the imposition of bans and limitations, or

in standing down workers in other unions when industrial action by one union makes it impossible for the others to be employed productively. The process of deregistration of a consistently uncooperative and disruptive union, of which the BLF is only the most notorious example, is long, complicated and uncertain. Thus, rather than looking for alternative methods to the implementation of fines (which these days would be a matter for the Federal Court) for disciplining unions, the Arbitration Commission, with it must be said the implicit consent of governments of all political colours, has instead set out to seduce the unions by offering them favours. These favours have involved the strengthening of their role, their protection against competition between themselves or from new entrants into the union 'industry', and the permissive approach to compulsory unionism that has now become established. Not even the continued nuisance of pointless, bitter and costly demarcation disputes has been enough to persuade the Arbitration Commission that its long-entrenched policy of strengthening the stranglehold of the union movement over the labour market ought to be questioned.

The reason for this is simply that to question the union movement's monopolisation of labour markets would be to weaken the present and future power and prominence of the Arbitration Commission.

IV. GOVERNMENT'S AUTHORITY USURPED

The Arbitration Commission is presently engaged in a sustained campaign to usurp governmental authority. Not only does the Commission treat itself and its survival as the major 'party' before it in every case, but it is also dedicated to a sustained campaign of expansionism — over time it has persistently extended its scope and set out to dominate more and more of the labour market. To some extent this has come about as a result of the sporadic centralising tendencies of the High Court; like the bureaucrats, lawyers who become concerned with issues of administration develop a 'tidy' mentality, and see decentralised federal government as untidy and annoying because it blocks their desire to bring about reform in the most absolute and unchallengeable way possible.

So there have gradually accrued a series of High Court decisions that have widened the authority of the federal government and the Arbitration Commission in particular. This has been aided by the mindless support of 'comparative wage justice', which is so pervasive in the Australian union movement. The Arbitration

Commission has enthusiastically participated in the move to eliminate award wage differentials between States, so that uniformity of wage rates across Australia is now the rule. The fact that the cost of living is not the same, in that housing and land costs differ markedly, as do transport costs (both fares and time of transit) between big and small cities, is not considered important.

The result has been the steady elimination of the cost advantage of States like South Australia. National Institute of Labour Studies investigations at Flinders University have shown that some differential (that is, a market differential) remains between above-award payments in South Australia and the Eastern metropolitan areas. However, award wage uniformity largely overwhelms this. In effect, therefore, the Arbitration Commission has become a major influence militating against decentralisation of industry, and it has done this in the cause of extending its influence into State jurisdictions, by encouraging unions to give their federal organisations priority over their state branches and to artificially extend disputes beyond State boundaries so that they come under the Arbitration Commission rather than under State governments and industrial tribunals. The ultimate absurdity in this respect is that the Arbitration Commission has encouraged railway workers to come under federal arbitration, despite the fact that by far the greater number of railway workers work for State rail authorities and obviously cannot be involved in disputes extending beyond State boundaries. The same is largely true of electricity workers.

Comparative Wage Justice

The development of the notion of comparative wage justice, while hardly exclusive to Australia, has been encouraged from the very beginning by the Commission. A number of Australian academic supporters of the Arbitration Commission have devoted considerable effort to attempting to establish that wage relativities tend to be fairly constant between groups of workers both between countries and over time. But further studies, especially by non-committed experts like Daniel B. Mitchell (in his chapter in the Brookings volume, *The Australian Economy — A View from the North*, Allen and Unwin, 1984) have no difficulty in controverting this notion that arbitration changes little that is important. On the contrary, they see the Commission as having substantially squeezed relativities in terms of the rewards for skill and scarcity of labour. But what is even more significant than the impact of comparative wage justice on relativities is the phenomenon of the flow-on, by which wage increases in a particular industry or trade

are rapidly generalised to other industries and trades, again often with the active promotion of the Arbitration Commission.

To be fair, such are the complexities of awards, industries, unions and trades that it is not surprising that an authority attempting to extend its imperium should have encouraged the device of flow-ons, and the notion that the metal trades (the most highly protected section of organised labour) are a typical case from which decisions should flow. Some such simplifying devices are inevitable in any attempt to apply bureaucratic controls to markets.

The idea that relativities and comparative wages or margins between industries could have been left to the market is of course repugnant to the attempt of the Arbitration Commission to convince the unions that they should give their allegiance to it.

The old distinction made between the Basic Wage and margins for skill always suggested that the proper role of the Arbitration Commission was to set minimum wages, and indeed implied that margins were in some way related to market considerations, such as the supply of skilled labour and the costs of training it. There was always the implication that there was a role for collective bargaining. But the difficulties of combining this with the imperialistic ambitions of the Arbitration Commission led to the invention in 1967 of the concept of the 'total wage', which by implication embraced the whole of the payment of labour and was to be entirely determined by the Arbitration Commission, except for the occasional unfortunate occurrence of earnings drift. The total wage concept has proved to be an unmitigated disaster for the Australian economy, leading the Arbitration Commission, like the Fisherman's Wife Ilsebill (in the Grimm brothers' story) to demand ever more and more extension of its power. From setting the total wage, rather than a minimum wage and miminum margins for skill, the Arbitration Commission has moved on ever to bigger things.

At the beginning of the seventies it made a further major advance into social interventionism and legislation designed to overturn the results of many years of market and social forces, by deciding upon equal pay for men and women for 'equal work'. While there is absolutely no doubt about the simple justice of this principle, it ought to be obvious to even the meanest judicial intelligence that such a change in the relative wages of men and women legislated overnight must have a substantial impact on employment patterns.

These have, in the event, been disguised by concurrent social changes, in particular the major increase for non-economic reasons in the employment of women in the public service in the

seventies and the fact that substitution in the labour market is not a simple two-variable problem. The market impact of the rise in female earnings has shown up in the marked growth of part-time work in the private sector, and the (only at first sight) paradoxical effect that women have tended to replace youths of both sexes in many jobs as the cost of employing young people has also risen. The increases in wages for young people relative to adults in the early seventies were, of course, another ill-considered piece of social legislation by the Arbitration Commission.

Indexation

Perhaps the history of the treatment of indirect taxes in the context of cost-of-living indexation has been the supreme example of the overweening arrogance of the Arbitration Commission in its approach to government. By its inclusion of price increases resulting from indirect tax increases in the CPI for the purposes of indexation on most occasions, the Arbitration Commission has set itself up as a body with the power to overrule the Government's tax and revenue policy. And it assumes that in the event of a Government offering some kind of wage-tax trade-off, or a trade-off between increased indirect taxes and lowered income taxes, it will be necessary for the Government to approach the Commission cap in hand to beg for its consent and cooperation. The inclusion of indirect tax increases in the CPI for wage indexation purposes means, of course that the taxes are not paid effectively by wage-earners, but are passed on to employers and thus directly enter the cost structure of industry. The only consumers who cannot prevail upon the Father Christmasses of the Arbitration Commission to pay their taxes for them (or, rather, to make employers pay them) are those on non-indexed incomes — primarily, that is, the poor and unemployed. This indeed gives an extra dimension to complaints about the regressivity of indirect taxes.

Nor did the severe recession of 1982 give the Arbitration Commission pause. It encouraged the Hawke Government to include the Commission's role in the central instrument of economic policy, the prices and incomes accord. The business representatives at the famous National Economic Summit Conference of April 1983 were conned into including the endorsement of a continuation of centralised wage fixation (by the Commission). Thus the Commission's interpretation of the accord becomes crucial to Government economic policy, and the Commission's whims will determine the future of the accord, as in the challenge presented by the public service unions to the Government as a result of the Full Bench decision not to grant the

ridiculous claim for an 8.3 per cent wage increase over and above indexation increases. (The unusual firmness of this decision and its lack of any concession to the public service unions, even though the Government indicated that it was prepared to concede something to the unions, can perhaps be explained by the power struggle being conducted behind the scenes over the succession to the Presidency of the Commission. Sir John Moore is shortly due to step down.)

The Commission's determination to continue to act as Father Christmas to the unions and thus bribe them into continuing enthusiastic support of its central role and its immense power over economic policy making was indicated by several decisions subsequent to the Summit.

Productivity Increase

In reinstituting indexation after the shambles of the previous indexation episode (for which the Arbitration Commission blames everybody except itself), the Commission looked forward to a 'productivity' increase sometime in 1985. Nothing is surer than that little serious attention will be given to determining just what if any productivity improvements have taken place, the problems of measuring productivity, or whether any productivity increase that may have taken place might be better left to restore profitability, investment and hence job creation rather than distributed to those lucky enough to already have secure jobs. The ACTU is going to assert simply that there always is an underlying growth of per capita productivity (it will not argue that this might in recent times be the direct result of unemployment, by way of labour-shedding by business in the attempt to achieve a more economical use of labour), and that this should be linked to an extension of superannuation for blue-collar workers.

Again, there are many good arguments in principle in favour of extending superannuation to blue-collar workers. But there are fewer good arguments in favour of achieving this by another bout of ill-considered social legislation from the Arbitration Commission. However, the Arbitration Commission seems to see nothing wrong in making sweeping decisions affecting the cost of employment of labour without regard to the state of the economy or the impact of the decision on the labour market. It has already blithely entered the area of legislation on conditions affecting the long-term cost of employing labour, and hence the job prospects for future entrants into the labour force, by its decision in 1984 on redundancy payments. Typically, the Arbitration Commission in this decision made no attempt to cost the large new favour it

bestowed upon the unions, nor to assess its impact on future employment prospects. Nor did it consider that by legislating this commitment it was erecting yet another cost barrier to entry into business by new employers. Least of all did it attempt to link the decision to the prospective productivity hearing.

At the very least, any such major change in working conditions and the cost of employing labour ought to be carefully evaluated, especially at a time of large-scale and persistent unemployment. To make such a change is a matter of high policy, and the prerogative of government rather than of a wage-fixing body. It will greatly affect the flexibility of industrial structure and the Australian economy generally, as well as the labour market.

But it is of a piece with the steady extension of its power and influence, which the Arbitration Commission has been indulging in for many years. Increasingly, the Arbitration Commission is building up its claim to be both an economic policy-making agency as well as a legislative body. And it is retaining its constituency by effectively bribing it at the expense of taxpayers generally, the unemployed and the genuinely poor. Having achieved such power and status it is probable that, like the Fisherman's Wife, it will still not be satisfied and will attempt to control the rising of the sun and the moon, in economic terms — that is, total control of the labour market and the fate of the Australian economy. Whether the ambitions of the Ilsebills of the Arbitration Commission will then finally be recognised for their insatiable nature remains to be seen.

V. THE INDUSTRIAL RELATIONS CLUB

The Arbitration Commission has a powerful supportive lobby in its hungry drive for power and prestige.

A major factor in the strength of the Arbitration Commission and its success in consolidating and expanding its predominance in the Australian labour market has been the growth about it of a mutually supportive group of professionals, which has in recent times become known as the 'Industrial Relations Club' (the term was coined by the *Australian Financial Review*).

The IR Club is, of course, simply the group of more or less expert practitioners that has grown up around the institutions of the arbitration system: the Arbitration Commission itself and the various special and State industrial tribunals. The complexity and legalism of the system has meant that an intimate knowledge of its workings can be a major professional asset for a union leader or employers' advocate; as also for the retinue of academic specialists that has grown up in the universities and colleges. As with any other institutional specialists, those who have specialised in the

study of the Arbitration Commission and its workings have a vested interest in the continuance of the institution in something very like its present form; radical change would effectively devalue the intellectual capital they have built up over a professional lifetime. There are academics in Australian universities who have barely published and conducted research in any other area except the present arbitration system. To change it would render them mere historians, with no actual current expertise.

Lawyers

The same is true of the lawyers who have concentrated on the industrial area for most of their lives. Despite the trappings of legalism in the arbitration system, there is very little actual law in the proper sense involved; the legal advocates who appear before the Commission are not really practicing law at all. Nor, of course, is the Arbitration Commission a court, nor its presidential members real judges, whether they have law degrees or not. Indeed, they are precluded by Section 71 (the crux of the Boilermakers Case of 1956) of the Constitution from the exercise of judicial power — which does not unfortunately discourage them from pretending to the full judicial dignity of a court.

Naturally, over the years the lawyers practising in the system, like the presidential members of the Commission and the rest of the club, grow further and further away from the central concerns of legal practice and become specialist servants of the system in which they too acquire a vested interest.

The lawyers who serve the unions and employers are not necessarily confined to arbitration, since there is the large field of compensation law, which is both routine and highly lucrative (it is the barrister's equivalent of conveyancing). Most compensation work is the gift of the unions or the employers' organisations, and hence they can tie lawyers to them with the work. The ramifications of this go even further in the case of unions — it has for long been the case that particular unions have in effect paid off lawyers who fight their factional, political and inter-union battles in the courts for them by throwing compensation work their way. A number of well-known 'left' lawyers have become wealthy in this fashion.

Employers

The employers' organisations are, of course, charter members of the IR Club. These organisations came into existence very largely as a response to Arbitration Commission patronage of unions, and to the demand that there be an organised party to represent

employer interests against union interests before the Commission (Court). Originally the various State employers' federations faced the unions, as did various subgroups organised on an industry basis. Federal centralism prevailed here too, and the national organisations have become increasingly important, with the chief representative of employers at National Wage Case hearings now being the Industrial Council of the Confederation of Australian Industry (formerly this was known as the Central Industrial Secretariat). Other powerful bodies play a role, of which perhaps the most notable is the Metal Trades Industry Association. The MTIA has successfully operated as a protectionist lobby as well as representing employers in the industry, which has for many years played a key role in initiating wage movements.

The classical statement of this relationship was given by Commissioner Galvin in 1952, who said: 'How it first so transpired, I am not completely aware, but the fact remains that for many years past, first the members of the Court and later conciliation Commissioners have adopted the practice of treating the rate of pay prescribed for the general engineering fitter as the focal point or yardstick upon which to measure the rates of other skilled tradesmen, and to relate thereto the services of the semi-skilled and unskilled classes of workers. It is beyond dispute that increases awarded in the Metal Trades, with very few exceptions, are reflected in other awards, and usually in a very short space of time' (*Conciliation and Arbitration Report* vol. 73, p 345).

Galvin's relatively junior status, despite his great influence, of course reflected another of the well-entrenched features of the IR Club. The structure of the Arbitration Commission is such that only lawyers can aspire to the top position, President of the Arbitration Commission. Only lawyers can, as Deputy-Presidents, enjoy the accolade of being referred to as having judicial status. The member of the Arbitration Commission bench who enjoys the most expertise in economic matters, Mr Deputy-President Isaac (former Professor of Economics at Monash University) is a second-class member and may never aspire to the Presidency, even on an acting basis. Thus is the judicial pretence maintained.

Commissioners

Below the members of the Arbitration Commission bench there are the Commissioners. In 1973 the distinction between arbitration and conciliation commissioners was abolished, much to the detriment of the cause of collective bargaining and conciliation. There are now over 20 Commissioners. To these positions and any practitioner in the field, regardless of formal qualifications, may aspire. Appointment

to the Commission has become a common career step for trade union officials wishing to withdraw from the hurly-burly of unionism; employers' representatives, industrial officers and the like can also aspire to this path. When such people become part of the Commission structure they usually accept the corporate ethos of the system and act judicially and impartially, often as a result being abused as betrayers by their erstwhile comrades.

(There is a relevant story relating to South African courts. Someone once asked a senior Government Minister why it was that South African courts often gave decisions against Apartheid. 'Surely you appoint pro-Apartheid judges?' — 'Yes, but after six months they start to think they were appointed on merit.')

Because of this commitment to the system of arbitration and conciliation, and the payoff it provides both to the organisations that participate in it and to the personnel who spend their working lives in it, there develops a good deal of camaraderie between members of the Club, whether from the employers' or employees' side. In front of the Commission, or at compulsory conferences called within the process of conciliation, or in front of the media, there will be a good deal of play-acting and confrontation, with ritual positions displayed for the sake of the troops, whether they be unionists or employers. But the real atmosphere of the system is quite different. Most matters are settled on a fairly amicable basis, over a beer or two in the corner pub or at the club. Employees' and employers' representatives see themselves as part of the system, and since their salaries and status depend largely on their expertise in the system, their ability to work it, they also have a vested interest in its continuation. They see no practical alternative to it.

Benefits of Membership

This commitment is repaid with interest by the Commission itself, the chief member and patron of the Club, by the dispensation of favours. To the unions it grants an effective network of monopoly in labour markets, and to the employers' organisations it grants a raison d'etre that would not exist without the framework that requires their existence.

Moreover, it provides them, and yet another group within the club, the public servants who deal with the Commission as instructing clients, a useful smokescreen. Although there has always been special provision within the Arbitration system for parties to represent themselves, so that the ordinary union secretary can appear without having to brief expensive counsel, there has been an increasing trend to the employment of professional legal gladiators. Unions now commonly employ lawyers to plead their cases for

changes in award conditions, as do employers, even when there are no legal issues at all involved. The most important single case, the National Wage Case, finds all parties with the exception of the Australian Council of Trade Unions represented by lawyers. The ACTU has a long tradition of having a professional advocate who is an official of the ACTU present the unions' case. To a large extent this is a matter in recent years of personalities — when R.J.L. Hawke became ACTU research officer and advocate, he happened to be a graduate in law, with some training in economics, who had studied the Australian arbitration system at Oxford, and was enrolled for a doctorate at the Australian National University researching the same topics. He was ideally naturally suited to the role of advocate before a court, having an aggressive flamboyance and articulateness that swept all before it. While none of Hawke's successors had his kind of personality, he was succeeded in the crucial post by a series of very able economists/advocates who obviated the need to hide behind the skirts of 'highly paid elocutionists'.

This latter phrase was employed by one of the succession of Queen's Counsel who represent the Commonwealth at National Wage Case hearings. The role of the Commonwealth advocate has always been farcical, since a lawyer, totally unqualified in economics, is employed to present large amounts of statistical material and economic argument to a bench for the most part nearly as ignorant. The advocate merely drones away, reading out the submission as drafted by the Treasury and other departmental officials who are the real parties before the Commission representing the Government. Whenever a question is asked by the bench, or a confusion arises, the elocutionist has to seek assistance from the experts sitting behing him, officially invisible to the august bench. Never can an official be asked to explain directly precisely what the Commonwealth's argument is about, and why it is being presented the way it is. So, in effect, a deliberate barrier to communication between the bench and the Commonwealth has been erected by mutual consent (to the great profit of the members of the Club). Still less, of course, does it ever occur to anyone in the system to point out that if the Government of the day is presenting a particular view, then the Ministers of the Government should be required to appear to defend it.

The employers' advocates are even more remote from their masters than are the Commonwealth's. The organisations that employ them are themselves only remotely connected with particular employers and have developed their own institutional self-interest and structures. These structures may be reasonably appropriate to unions but they are totally inappropriate to firms in a supposedly competitive environment.

The Club developed to its present form in the period of the fifties. Facing Bob Hawke from the employers' side was George Polites, another very able figure who dominated his side of the arbitration system in the context of wage cases for many years. Polites, a highly professional and expert practitioner in the system, was because of his competence probably responsible for a good deal of the commitment felt by employers' organisations to it. Hawke and he were excellent foils for each other, and it is no accident that on a number of occasions in his early career Hawke was offered large salary packages to swap sides.

Experts in anything other than industrial relations law and practice were outsiders, not members of the Club, unless they were willing to earn membership in it by earnest support for its virtues and uniqueness. Thus although it used to be acceptable to put outside experts, mainly economists, into the witness box to be cross-examined on their contribution to the case of one or other of the parties, this has fallen into disuse. There was a kind of conspiracy to force such witnesses out of court by subjecting them to humiliating attacks on their credibility. Some also had the unfortunate habit of being unreliable, in that they could not be trusted to be totally one-eyed about the merits of the claims of the party with which they were connected. There was also an element of cowardice on the part of academic economists, who are, in Australia more than elsewhere in the world, subject to a professional code of non-participation in public discussion except under the guise of oracles.

One of the most fascinating insider's representations of the style and atmosphere of the IR Club is to be found in the novel *Anatomy of a Strike* (1979) by 'Lake O'Charley', widely believed to be the nom de plume of Arbitration Commission deputy-president Justice Jim Robinson. [The book is published by Jack de Lissa (Australia) Pty Ltd and distributed by Hodder and Stoughton (Australia) Pty Ltd.]

VI. MANAGEMENT AND INDUSTRIAL RELATIONS

One of the most serious effects of the whole arbitration system as it has grown up is that it has over time virtually destroyed good management in the field of industrial relations and labour force relations.

Partly as a result of the industrial relations Club, and partly just because busy managers inevitably tend to concede areas where they are least expert and where it seems someone else can do their jobs better, the Arbitration Commission has taken over what should be one of the central roles of management.

It is a commonplace by now that 'management is about people', so it seems odd that so little attention is given by most firms to the relations between managements and the workforce. Yet the normal situation in industry is for unions to have to deal with specialist industrial relations managers, who are paid-up members of the IR Club, and who have relatively limited managerial authority. Often this means that they are unable to negotiate without making reference back to the top management. The unions not surprisingly feel frustrated at this kind of arms-length negotiation.

The result has tended to be the reversal of the supposed order of events in the theoretical arbitration model. Instead of a process that begins with claims, proceeds to bargaining, then to conciliation and finally to arbitration, the common course of events now follows a sequence of initial claim (often a more or less unreasonable ambit claim), rejection with little discussion by the employers, strike, then arbitration and finally some effort at conciliation. The strike weapon is seen as something with which to soften up both employers and the Arbitration Commission in order to gain more favourable treatment of unions' claims.

Delays by the arbitration system in considering claims are often one of the major elements in bringing about strike action. There is considerable evidence that far from preventing strikes these days, the arbitration system is a substantial cause of them.

The same applies even more strongly to the prevalence of bans and limitations, which are a kind of partial strike, or deliberate lowering of productivity, which involves the threat of all-out strike action if the employer responds with disciplinary measures. The most absurd example of this is in the public sector, where the Fraser Government, after much agonising, introduced the Commonwealth Employees (Employment Provisions) Act (CEEP Act) to give it power to stand-down Commonwealth employees for refusing to work as directed. This Act was repealed by the Hawke Government in 1983 for no reciprocal acceptance of obligations by the public sector unions.

Arbitration as a Scapegoat

The increasing use of bans has meant that management has increasing difficulty controlling practices in the workplace, and the sanction of dismissal for non-compliance with managerial instruction becomes a very costly one. There is no doubt an argument that managerial prerogatives that do not involve consultation with the workforce represent bad management practice, but the use of bans has little to do with consultation. It is merely a form of partial strike weapon.

But the most general effect of the arbitration system on

management is the use of arbitration as a scapegoat for decisions management should be taking but is not willing to face up to. The habit of leaving the important decisions about wages and conditions to the Arbitration Commission, encouraged by the expansionism of the Commission, has led to a paralysis of initiative by management, and a resentment of an apparently uncontrollable authority that has fed business antagonism towards the union movement, and worse still ignorance. Thus when at the National Economic Summit Conference in April 1983 top executives were faced virtually for the first time with the top officials of the union movement, they were confused and easily conned into accepting an effective commitment to the prices and incomes accord through endorsement of a continuance of the centralised wage fixation system with the Arbitration Commission at its hub.

What should be one of the central functions of management, handling relations with the labour force, has been ceded to middle-level functionaries who have an interest in the persistence of a large, uniform centralised system. This interest springs from the very fact that industrial officers see their prospects of career advancement not within the firm but in moving from firm to firm as specialists in industrial relations. Thus the greater the degree of uniformity in the IR system, the greater the transferability of their skills. Moreover, since career advancement can take them from industry into participation in the system itself as Commissioners of the Arbitration Commission, their commitment to the system is further reinforced.

Lack of Management Skills

The result of this specialisation of the industrial relations function is that the development of collective bargaining skills in top management is atrophied, if it is ever really begun. Moreover, the bureaucratic management of industrial relations discourages any actual collective bargaining in a real sense within firms and industries. Since an issue will almost certainly end up in the toils of arbitration whatever happens, to devote any great effort to bargaining and discussion, as distinct from fencing and ritual confrontation, seems a waste of time. The industry-wide or craft-wide approach to arbitration also leads to a division of function within a firm, such that unions speak for workers on matters of wages and other award conditions, while 'house' committees with little authority debate issues like the cleanliness of lavatories and what to do about the air-conditioning. In these circumstances sensible relations between employees and management tend to be vitiated by continual presentation of trivial complaints.

Since every issue can become at some stage one for arbitration, managements have to take defensive attitudes about complaints that have the potential to become industrial issues. And since unions will turn virtually any problem to advantage in the framework of arbitration, even matters of occupational health and safety become bargaining counters while the welfare of employees is relegated to secondary status. Health problems are nearly always seen as tradable against wage increases, or shorter hours or lower output targets. The current worries about that indefinable and ill-understood syndrome of Repetition Strain Injury are a case in point. If RSI is a real medical-industrial problem, then it ought not to be dealt with in the context of arbitration relating to wages and conditions. If it can be so used, the suspicion must arise that the problem is not as serious as union representatives say it is for purposes of supporting claims before the arbitration tribunals.

The result of the steady erosion of the role of top management in workforce management and determination of the elements of the labour contract has been, of course, the virtual absence of skills appropriate for the effective functioning of collective bargaining. Thus when the false alternatives of continuing the arbitration system in its present form or switching to decentralised collective bargaining with no legal framework are presented, the former wins hands down. This is simply because the skills to run a centralised system are highly developed and cossetted by the Arbitration Commission and other tribunals, while the skills necessary to run any form of collective bargaining have been systematically undermined and destroyed over many years. The participants in the arbitration system are like Jules Verne's Selenites. They have been bred to particular functions, and their organs atrophied and hypertrophied accordingly, so that they cannot function otherwise.

VII. THE PUBLIC SECTOR

The worst impact of the arbitration system on management has been in the public sector. This is partly because management and employees are not for the most part distinct, so quite senior bureaucrats and supervisors will be members of the unions whom they must deal with. It is also because of the cowardice of governments, and the doctrinal confusion of Labor Governments in particular, who have allowed the Arbitration Commission to invade the functions of management very much further even than in the private sector. The fact that, save for the brief life of the CEEP Act, governments do not have the automatic power to direct employees to work as directed, and to stand them down or dismiss them on refusal, and to automatically stand-down employees who cannot be

usefully employed because of strike action by other employees, has rendered public sector bodies virtually impotent in the face of their employees.

But the real difficulty in public sector arbitration is that it has in recent years become closer and closer to the processes of private sector arbitration, again with the active encouragement and participation of the Arbitration Commission. It rarely seems to have occurred to the Arbitration Commission, and it is of course not in accordance with the narrow perspectives of the unions, that the private sector model is inappropriate for the public sector. There used to be a residual of the notion that it was somehow improper for public sector employees to strike or take other industrial action. The establishment of employment security in the public sector was very largely a quid pro quo for this supposed special status.

The division of the arbitration system into State and federal jurisdictions and the overlap of craft unions between private enterprises and state enterprises have tended to obscure the common special status of public sector employees. (In fact, for many years blue-collar employees in state-owned enterprises were treated very like those in the private sector, without the special status of white-collar employees. This is now rarely the case as the prevalence of gross over-manning evidences.)

Bankruptcy-Proof

The fact that public sector employees do not face the same final sanction as do private employees, the possible bankruptcy of the employer, has not been sufficiently taken into account. It applies not only to employees under the public service acts of the Commonwealth and the States, but also to the employees of statutory authorities, corporations, commercial enterprises and so on, which enjoy a cast-iron guarantee of immortality from governments.

They are confronted with virtually no market sanctions. Even though, for example, government railways may lose market share, there is no way they will be suddenly closed down; new employment may be squeezed, labour forces run down by natural wastage, but the chances of the whole labour force losing its employment as a result of the competitive failure of the railways is zero.

Thus the state enterprises, even though often formally different, are very like the departments of government in that the wages, salaries and other emoluments of employees are not profit-related, but in the final analysis are financed effectively out of taxation revenue. The payments to public sector employees in virtually all cases come at least in part out of taxation revenue.

This insulation has been partially recognised in that the Arbitration Commission and the Government often refer to considerations of comparability of public sector and private sector wages. But if that were to be followed strictly, collective bargaining and arbitration in the public sector would not exist at all, and wages would be determined solely by collective bargaining and arbitration in the private sector labour markets.

In fact, the public sector has often acted as a pace-setter for the private sector, both in wages and conditions. And the Arbitration Commission has been only too willing to accept approaches to it by public sector unions who treat the Commonwealth Government as an employer, essentially no different from a private sector employer subject to market sanctions. To the extent that the Arbitration Commission grants wage increases of any kind to the public sector unions, it is operating as a taxing authority. It is of course open to the Commonwealth to respond to a public service wage increase by retrenching staff, but again such a response implies the prior role of the Arbitration Commission in determining the pattern of government spending and activities, or at least the overall real level of employment in the public sector.

Federal-State Distinction

The federal nature of government and the arbitration system makes this situation worse. In principle, it would seem logical for the State industrial tribunals to have full control over arbitration on wages and working conditions for employees in the State public sector. But in fact the federal structure of the unions, which is encouraged by the Arbitration Commission, means that the Commonwealth Arbitration Commission is often embroiled in industrial disputes that should not properly be considered as in any way 'extending beyond the borders' of a State in terms of the Constitution. It is certainly highly unlikely that the 'founding fathers' thought the situation would ever arise of the Arbitration Commission interfering in setting the wage of State public servants, or even of railway workers (short of the implementation of the Inter-State Commission).

Arbitration with respect to public sector employees ought to be on a totally different footing to the determination of wages in the private sector. In fact, it can be argued that the public sector, or rather the part of the public sector that cannot even in principle be subject to market criteria as can a state-owned enterprise, with measurable profit performance, is virtually the only area appropriate for wage arbitration as an alternative to bargaining in some form. Certainly the Arbitration Commission, by lumping

public and private sector wage determination together, both in the National Wage Cases (including indexation hearings) and by treating disputes between public sector unions and their government employers as directly analogous to those in the private sector, has behaved with typical irresponsibility.

VIII. ALTERNATIVES

Whenever the Arbitration Commission is subjected to sustained criticism and it is suggested that it might be abolished or replaced by some other institution or set of institutions, its defenders inevitably declare that there is no real alternative to it.

The first line of defence is to point to the similarity of the experiences of Australia and other countries with predominantly collective bargaining systems (or something rather like them), such as Britain. Even if it were true that dissimilar systems produced similar results over time, it would not be an argument for arbitration on the Australian model but rather a reason to look for other, more deep-seated similarities. The influence of British trade union structure and, perhaps as significantly, shop steward attitudes on Australia should not be ignored. However, the fact that longstanding institutional structures produce similar unsatisfactory results after many years in place could as well be treated as evidence that any institutional structure needs root and branch reform from time to time; such institutions tend to become captives of those whose behaviour they are meant to modify in the public interest.

Why Simplify?

In the Australian context there is a tendency, too, to treat arbitration as having no alternative but free, unregulated, anarchistic collective bargaining. Moreover, it is said, abolition of the federal Arbitration Commission would not necessarily be followed by similar moves towards unfettered collective bargaining in the States — the result of radical reform by the Commonwealth might simply be the creation of six separate systems of industrial tribunals and labour regulation, even more confusing than at present when the Commonwealth system at least has national scope and moral authority and is generally followed. Reform to the system should, it is said, take the form of a simplification and unification by subordinating State authorities, or preferably subsuming them completely as branches of the central authority under the Arbitration Commission.

This viewpoint is favoured by the Labor Party (but not all the unions), by many practitioners in the industrial relations field, by many employers, especially those in the East Coast metropolitan

areas, and by determined centralists in the bureaucracy and the legal profession.

It is even favoured by most Australian economists, who have the same yearning as the bureaucrats for nice, straightforward lines of authority from the centre, which make Keynesian-type policies easy to implement according to textbook models.

It may well be that the removal of the centralising influence of the Arbitration Commission would allow wage differentials to develop once again, promoting genuine relocation of industry. One very good reason for New Zealand to continue the process of economic union with Australia but to resist entry into the federation is to preserve its now considerable cost advantage relative to the federation. New Zealand has enough problems without adding the Arbitration Commission to its burdens.

Hence the argument concerning the persistence of State tribunals has little validity and depends mainly on the presumption that uniformity of wages and conditions is desirable. It is attractive to employers whose operations already in Sydney or Melbourne compete with producers elsewhere, but many more would enthusiastically relocate in areas of cheaper real estate if lower labour costs compensated for the transport cost disadvantages; differences in industrial regulation and practice are easily offset by real cost differences.

However, is there no alternative as far as federal action is concerned to vacating the field to the State tribunals?

Here it is worth having a look at the wording of s.51(xxxv) of the Constitution once again. It bestows upon the Commonwealth the power to legislate for 'conciliation and arbitration for the *prevention* and settlement of industrial disputes...'

The High Court Defines Terms

As has often been the way since Federation, the High Court has taken a perverse position on the meaning of the relevant terms in this section of the Constitution. Apart from the reference to conciliation and arbitration, the operative terms here are 'prevention', 'settlement', and 'industrial dispute'. One would think that the word 'prevention' would be interpreted in its normal sense. The prevention of pregnancy relates to the use of contraceptives (or abstention from sexual activity).

Yet as long ago as 1910 (Whybrow's case) the High Court interpreted 'prevention' as applying only to the processes of conciliation and arbitration after a dispute has commenced. This is like saying that the prevention of pregnancy refers only to abortion. Yet this strange twisting of ordinary meaning has become a central feature of our industrial relations system.

Fortunately there is some sign of change in the High Court's approach to the meaning of s.51(xxxv), most notably in the Australian Social Welfare Workers Union case (1983). (The irony that such a change should occur in the course of public servants demanding improved living standards for delivering a few crumbs to the poor should not be lost on us.)

This decision must go down as one of the landmarks affecting industrial relations. First of all, it redefines the term 'industrial dispute'. Again, for a long time the High Court insisted on arguing that this had to mean a dispute in an industry, and much heartburning went on in the attempt to define an 'industry'. (Again, as was customary, the Court did not bother to consult the large body of work by economists on just this topic.) By taking a narrow and snobbish view of what an industry was (the legal business could never be considered an industry!) the Court vitiated a large area of discussion over wages and working conditions. In the ASWU case, the Court finally brought itself to accept that an industrial dispute in ordinary usage refers and always has referred, in the context of the labour market, to an argument about wages and working conditions, wherever it may be.

The word 'dispute' has also been the source of much hair-splitting, and the invention of the 'paper' dispute and the ridiculous device of the ambit claim were occasioned by this.

But the most important aspect of the ASWU case was that remarks by members of the Court indicate that it would be likely to look favourably upon a revision of the official meaning of 'prevention' so as to allow it to refer to measures taken before the existence of any particular industrial dispute, provided these were in the context of conciliation and arbitration.

Commonsense

This has the potential to become a major element in any recasting of the industrial relations system. It means some body responsible for regulating industrial relations could exist under a basic law that established a series of conditions that would have to be met before a strike was considered legal (such as cooling-off periods, observance of no-strike clauses, proper votes by members, and so on), laid down criteria for the economic factors to be taken into account, and specified non-legalistic procedures of arbitration.

Above all such a law could, in terms of the new commonsense approach to the meaning of s.51(xxxv), lay down a framework in which collective bargaining would take place freely without regulatory provisions designed to segment and prevent the movement of labour between industries and occupations, and in

which the basic control of industrial relations would remain within individual enterprises rather than being set externally.

There is a good case to be made for the establishment of minimum wage provisions and for some prevention of discrimination on irrelevant (i.e. not work-related) grounds in the workplace. But these are hardly part of the functions of an industrial relations system, except to the extent that excessively high minimum wages are used by unions as a device to disadvantage the weaker sections of the workforce.

Many possible designs could be laid out for an industrial relations system that would work better than our own and allow a much greater scope and priority for collective bargaining. Conciliation can be seen as a useful element in most stages of this procedure, but arbitration ought to be the very last stage of any such process.

Yet arbitration is often the first stage in contemporary Australian industrial disputes, being followed by strike activity, conciliation and eventually collective bargaining.

Power and Role of Unions

Part of the problem is undoubtedly the fact that the Arbitration Commission has systematically encouraged the erosion of any real power over unions, preferring in exchange to join with them in exercising authority over government and the labour market. In the process, its pretensions to be a quasi-judicial body have totally eroded the respect of unions and their leaderships for the law, to the extent that many unions consider themselves beyond the law in the pursuit of an industrial dispute.

Moreover, there is a belief that participants in an industrial dispute who remain within the law (in its real sense) should not be allowed to prolong the processes of collective bargaining to their ultimate resolution, if this is what they wish to do. But provided a union is prepared to accept the consequences of the financial collapse of a company, there is no reason why a strike should not be taken to that ultimate conclusion if no more satisfactory settlement of a union's claims can be reached. But of course the present system involves a permissive attitude to illegal actions by the unions (physical intimidation, sabotage, the refusal of the right of non-membership to other employees). The one piece of legislation in place that places legal restrictions on sanctions additional to the withdrawal of labour in the context of collective bargaining is section 45D of the Trade Practices Act, which prohibits 'secondary boycotts', that is the practice of invoking the assistance of unions not directly involved in an industrial dispute to put pressure on an employer by harming his business.

The unions are mounting a major campaign to have this legislation repealed, even to the extent of taking reprisals against companies that invoke it — a classic case of contempt for the law.

This contempt has to a very great degree been fostered by the Arbitration Commission, which has encouraged unions in the belief that legal sanctions cannot, should not and will not be taken against unions who do not follow the 'rules of the game'. The inability of the Commission to exercise any final authority, and its pathetic and desperate attempts to maintain and extend its own role in the wage fixation and industrial relations system by cajoling the unions to cooperate in its pretence of authority, has led to a widespread belief that industrial relations, far from being a new province for law and order, is a province for the exercise of arbitrary power and coercion.

Mr Justice Higgins's dream has come to a sorry end, when law and order are excluded from industrial relations by a pusillanimous Arbitration Commission and a union movement contemptuous of legal authority.

Not that the Commission, whose self-interest has been demonstrated, is entirely to blame, except in that it has assiduously fostered the illusion that at some time in the future its good offices might produce a better state of affairs.

But the situation is now that the state of mind fostered by the Commission in the union movement has led to a general contempt for the law, apparent across the whole spectrum of the union movement but seen in only its worst form in the thuggery and duplicity of the BLF.

The present situation is very largely the product of the collapse of the authority of the then Industrial Court in 1969, when after the later famous Justice John Kerr jailed the union leader Clarrie O'Shea for contempt of court, the unions forced the Industrial Court, the Arbitration Commission and the Government to back down. Kerr's approach was ill-advised (like some of his later actions) since it concentrated the matter on the issue of contempt of court, which is not considered a serious offence by most sensible people unless it involves threats of violence.

The section 45D issue is rather different, and is significant in that it takes an offence by a union (or other body) out of the context of industrial relations as such and treats it as an offence in a more general context. The real threat perceived by the union movement here is that it might have to face up to real courts, determined to uphold their and the Government's authority and not inclined to back down in front of their clients, the union movement, as is the Arbitration Commission.

The Commission Should Not Survive

The authority of the Commission in the industrial relations field is discredited to such an extent, and the harm it does to the economy is so extensive, that the retention of it in its existing form would make the reform of industrial relations and wage-fixation an impossibility.

It would be better simply to get rid of the present Commission altogether and replace it with a network of conciliation commissioners and arbitrators whose function would be to facilitate collective bargaining and act as arbitrators on request, without the pretence of power to enforce their decisions.

The real reason why simply abandoning arbitration under the present system and removing an official framework for collective bargaining would not work is that the conditions for free, collective bargaining do not exist.

The union movement in Australia considers itself, with some justification, beyond the law. It is organised so as to exercise monopoly control over labour markets, and to prevent the settlement of disputes on a freely-negotiated basis between employers and employees in a specific firm or group of firms. The union movement is determined to exercise a wider degree of control over the future of profitable investment, while making no commitment to the profitability of investment.

This is a far cry from the role of unionism as originally conceived, and it ensures that increasingly privileged sectors of union membership do well while the costs of adjustment and low growth are concentrated on the casualties of society. It is wasteful, counterproductive and eventually self-defeating.

The reform of industrial relations and the establishment of an efficient system of conciliation and arbitration require that the union movement be brought back within the law and that unionism, like industry, become competitive and decentralised. The Arbitration Commission, as the main defender of centralism and monopoly in labour markets, is the main obstacle to reform.

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The Case Against the Arbitration Commission

P.P. McGuinness

The Australian Conciliation and Arbitration Commission is the main obstacle to much-needed reform of industrial relations according to the author of this essay. A series of High Court interpretations of the Commission's original mandate and the Commission's own aggressively self-protective actions have lead to stronger, more militant unions, higher than necessary government expenditure, and a host of 'interested parties' who all depend for their existence and livelihood on the survival of the Commission.

The only hope for reform is to abolish the Commission altogether.

P.P. McGuinness is Editor-in-Chief of the *Australian Financial Review* and a frequent commentator on industrial relations.

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