Industrial Law

Amicable Agreements, Equitable Awards and Industrial Disorder

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INTRODUCTION

The Wright brothers flew in 1903. The very next year, Australia's federal apparatus for conciliating and arbitrating industrial disputes took flight. It was more elaborate than the Wright brothers' machine, in that it was designed with four engines—compulsory resort to the system, conciliation and arbitration, a scheme for official recognition of the participants in the system, and "sanctions" against the use of strikes or lock-outs. It is a remarkable thing that for most of the time since then, it has flown on only three of those. The sanctions engine has operated spasmodically and unpredictably and for a lot of the time has been shut down. It still remains in place, tidily housed in Part IX of the *Industrial Relations Act* 1988 (Cth), but with the airscrew feathered and subject to periodical attempts to jettison it.

It is a commonplace that one of the incentives for establishing what has turned out to be Australia's unique institutional structure for regulating industrial relations was to eliminate recourse to strikes or lock-outs,[1] and to replace them with "amicable agreements or equitable awards".[2] It was to this end that the *Conciliation and Arbitration Act* 1904 (Cth) had as the first of its chief objects "To prevent lock-outs and strikes in relation to industrial disputes" and contained penalties directed against industrial action. In so providing, the Act did not break entirely new ground, but drew on earlier Australasian models.[3]

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[1] Whether the intention was to eradicate *all* strikes and lock-outs is another matter which has been raised recently: S. McIntyre & R. Mitchell (Eds.) *Foundations of Arbitration* (1989), Introduction, p. 18. (This work is hereafter cited as McIntyre & Mitchell).

[2] Commonwealth of Australia, *Parliamentary Debates* (1903) Vol. XV p. 2883.

[3] The legislative antecedents are gathered in McIntyre & Mitchell. See Chapter 3, R.Mitchell "State systems of conciliation and arbitration: the legal origins of the Australasian Model" and Chapter 4, R. Mitchell and E. Stern "The compulsory arbitration model of industrial dispute settlement: an outline of legal developments". Some of these earlier acts were referred to in *Stemp v. Australian Glass Manufacturers Co. Ltd* (1917) 23 C.L.R. 226 at 237-238 by Isaacs J. to illustrate "the vital change of system they introduced, and under the name of conciliation and arbitration", namely compulsory arbitration "as necessarily supercessive of strikes and lock-outs" and involving punishment for such activities where arbitration had been initiated.

Notwithstanding this objective and the continued existence of legislation designed to penalise or inhibit strikes or lock-outs, it is also a commonplace that industrial action has frequently occurred, even in award regulated industries. Predominantly it has been by employees. Lock-outs now occur rarely. Australia exhibits a pattern of relatively numerous, widespread and short stoppages. Although international comparisons of strike activity are notoriously difficult, it seems, for example, that from 1962 to 1981 Australia was one of the most strike prone OECD nations.[4] Interestingly, over this period "there is no evidence that the existence of an arbitration system as opposed to one based on collective bargaining has significantly affected stoppage incidence".[5] This strike record might suggest to some that sanctions cannot work. Certainly sanctions based on the principles which have hitherto prevailed have not been conspicuously successful; indeed they have been used only episodically. But this is not to say that something more attuned to policy might not have worked and might not still work if that were thought useful. Given the inadequate structure of the sanctions available, this relative lack of use may have been a blessing in disguise. It has, in recent times, forced the parties, albeit painfully, into different and more fruitful ways of accommodation, involving no little bargaining, but managed bargaining.

This apparent failure of one of the main policies of the "new province" has been explained in various ways, and an assortment of conclusions has been drawn from the failure. These insights provide valuable, but, it is submitted, only partial explanations. This Chapter does not pretend to a complete explanation either; there will probably turn out to be no single or simple solution. The Chapter focuses mainly on one aspect of the problem, namely the seemingly mundane question of the sheer form the sanctions took for many years and the means provided, or not provided, for their implementation. The predominantly criminal or quasi-criminal nature of the sanctions, the absence of an independent body or mechanism for administering them and the failure to identify and bring within the strictures of the system some forms of socially undesirable economic pressure which can be used by employers all seem to be telling deficiencies in the forms of control hitherto favoured. A closer examination of these matters sheds further light on the failure of that fourth engine and opens the way for a consideration of better models for the identification and discouragement of irregular industrial conduct by both unions and employers.

In examining these issues, the Chapter assumes the existence of a system of so called compulsory arbitration along Australian lines. The qualification "so called" is essential, for it is well recognised that the labels "compulsory arbitration" and even "arbitration" are misleading if used as descriptions of the way the system actually works.

[4] The incidence of strikes in Australia since then seems to have declined markedly.

[5] S.W.Creigh, "Australia's strike record: the international perspective", p.48 Chapter 2 in Blandy & Niland (Eds.) *Alternatives to Arbitration* (1986) (hereinafter cited as Blandy & Niland).

Notwithstanding the terms of s. 51(xxxv) of the Constitution, much bargaining can (and does) permissibly occur within our system of conciliation and arbitration. Most disputes are settled without the need for arbitration, and conciliation and bargaining of one kind or another have played an increasingly important role in proceedings, especially over the last 20 years or so.[6] Moreover, if other heads of constitutional power were used there could be almost complete legislative control of Australian industrial relations by any means thought fit by the Parliament. There is now an almost institutionalised debate whether we should move towards some other form of industrial regulation,[7] but at the Federal level that debate has been resolved for the moment in favour of arbitration.[8]

In any event it is often overlooked that the problem of handling impermissible activity in defiance of the established regime has to be faced in a collective bargaining system as much as in an arbitration system, as for example when strike action is taken during the currency of an agreement when it should not be,[9] or where an employer adopts some outlawed practice in the negotiation phase, such as a refusal to bargain in good faith. The norms of the regime may differ, but their transgression is still a problem.

It will be clear by now that the Chapter concentrates on sanctions which are imposed by or are available under arbitration statutes, specifically the main Commonwealth statute. The relationship of general law actions, say in tort and contract, to remedies under an arbitration statute will be accommodated in the model to be outlined. But beyond that, there is a separate question whether those actions should be available at all. This raises issues which are additional to and different from those posed by legislative sanctions within a system of compulsory arbitration. These general law remedies are touched on only to the extent necessary to fit them into a compensation based model under an arbitration statute.

Sometimes it may be that a criminal act occurs in the course of some industrial disputation e.g. assault, malicious injury to property. No one seriously suggests that the normal processes of the criminal law should not be available to deal with those incidents if required. Also even those who, in general, see no role for penalties or sanctions concede that there can come a time when the adverse effects of the industrial dispute are so severe that "the referee has to stop the fight",[10] as where public health

[6] L.Cupper, "Legalism in the Australian Conciliation and Arbitration Commission" (1976) 18 *J.I.R.* 337; B. Dabscheck, "In search of the Holy Grail: proposals for the reform of Australian industrial relations", p. 167 Chapter 9 in Blandy & Niland.

[7] See, for example, R.Blandy & J.Niland (eds.), *Alternatives to Arbitration* (1986).

[8] Report of the Review Committee, *Australian Industrial Relations Law and Systems*, A.G.P.S., 1985 ; *Industrial Relations Act* 1988 (Cth). With the return of a labour government at the election on 23 March 1990, it can be expected that there will be no radical departure from an "arbitration" model. At the time of writing a completely new regime is promised for New South Wales, owing a good deal more to bargaining models than systems we have hitherto experienced.

[9] J.Niland, *Transforming Industrial Relations in New South Wales—A green Paper* (1989), Volume 1, Chapter 7.

[10] C.P. Mills, "Penalties Against Strikes," *Australian Quarterly*, December 1965, 26 at 34.

or safety or order or the integrity of the national economy are threatened in a serious way. Most commentators therefore allow some role for "essential services" legislation and for penalties, even criminal penalties, in those extreme situations.[11] There are differences of opinion about what are "essential services" and the point at which such legislation or emergency measures should be implemented. This is to be expected, because few, if any, contests of industrial strength are entirely "inter partes" with no adverse social or economic consequences; the question is how much is too much.

But the real area of contention does not lie in the legal regulation of obviously criminal acts or of the relatively rare "essential services" extremes, however delineated. The difficulties arise with respect to strikes or adverse employer actions which, while lacking criminality and falling short of extremes, nevertheless involve the use of economic pressure by one party on the other to attain industrial objectives in a way which brings with it some measure of loss, inconvenience, hardship or dislocation, usually extending beyond the immediate parties, in circumstances where the arbitration system has either produced an award which sets out the parties' rights on the matter in contention or where the system has in place mechanisms to deal with the difficulty which the parties neglect or decline to use or wait for. This is the main concern of this Chapter.

The reason for addressing activity which transgresses the norms is because persistent tolerance of such activity threatens the integrity and ultimately the utility of the system, whatever form it takes. It is now widely recognised that voluntary compliance based on commitment by the parties is the best form of control. Any system should seek to foster that and the federal arbitration system and its regular customers have made great progress in that direction in recent years. It is also recognised that this ideal will not always be realised. Something sensible needs to be in place to cope when it is not realised.

THE RIGHT TO TAKE INDUSTRIAL ACTION

There is in Australian law no such thing as a right to strike, save in a very limited number of situations.[12] Perhaps there should be a wider right, perhaps not. But in Australia the "right to strike" is a political slogan, not a statement of legal principle. And this derives from the common law as much as anything. If arbitration statutes were bereft of anything resembling sanctions or enforcement mechanisms, there would still be no legal right to strike.

Even now this state of the law is not widely appreciated. The law was less clear and probably still less well known when arbitration systems were set up and for some time thereafter. Then, no doubt, the right to

[11] See J.E.Isaac "Penal Provisions Under Commonwealth Arbitration" (1963) 5 J.I.R. 110 at 115.
[12] K.Ewing "The Right to Strike in Australia" (1989) 2 *Aust. J. of Lab. Law* 18.

strike was more readily perceived as a real right.[13] But a right of doubtful utility. The events of the 1890s, especially in the rural and maritime industries, had seen the workers soundly defeated, and had given impetus towards the achievement of the labour movement's objectives in the political rather than the industrial sphere.

In that climate, it would not be surprising if a right which had proved next to useless, if not unlawful, should be surrendered, at least in part, for the recognition and protection of a system which promised something better than attritive conflict ending in defeat. However, the extent to which the unions in fact conceived of themselves as surrendering this "right" is unclear. Reid congratulated the unions for being "willing to intrust their liberty—aye even their subsistence—to judicial decision," and for their readiness to "sacrifice the one weapon which labour has", although he noted that their "agitating" for this system "may finally result in one of the last things they would wish to accomplish".[14] The tenor of Watson's contribution to the debate does not suggest any great difficulty with the sanctions from the labour side, save for some whom Watson seemed to regard as extremists.[15] Deakin was less sanguine, referring to the "immense difficulties" likely to confront the new legislation and to the "long and painful" task which lay ahead.[16]

It is also not surprising that employers should have opposed the system through the courts and sought to restrict its area of operation in a campaign which proved relatively successful up to about 1913.[17] The employers had won in the field. What could the new system offer them but a loss of some of the captured territory? It is possible that this early legal success is one reason why employers used the statutory sanctions relatively little in those years. They were doing well enough in the courts and the regular use of remedies under the system at that time may have been perceived as tacit approval of it, something the employers would not have wished to do.

The lock out and other employer activities

Much of the legislation proceeds on the basis that the lock-out is the employer's equivalent to the strike. The lock-out is hardly ever used now. It has been a rarity for years. There is less authority on its legal status

[13] See, for example, *Barrier Branch of Amalgamated Miners' Association v. Broken Hill Proprietary Company* (1917) 11 C.A.R. 512 at 516-517 where the President, Higgins J., said that "It has to be remembered—unfortunately some people often forget it—that a strike is not *per se* illegal under British law (apart from certain Acts passed during the war). Victoria follows the British law in this respect; and probably other States which do not provide Arbitration Courts...". See also *Metropolitan Gas Company v. Federated Gas Employees' Industrial Union* (1924) 35 C.L.R. 449 at 468 per Higgins J. where his Honour in the High Court described the strike as "a remedy which is not forbidden by the common law".

[14] Commonwealth of Australia, *Parliamentary Debates* (1903) Vol. XV p. 3186.

[15] *Ibid.*, p.3211 and passim.

[16] *Ibid.*, p.2864, 2883.

[17] D.Plowman "Forced march: the employers and arbitration" Chapter 6 in McIntyre & Mitchell, *op. cit.*

than on that of strikes, but on general principle it would seem that the lock-out would, in most cases, also be a breach of contract by an employer and probably a repudiatory breach at that.

Even if it was correct at the turn of the century to regard the lock-out as an economic weapon of equal potency to the strike, legislation never seems to have adjusted to its demise and to the availability of alternative weapons which an employer could use without breaching the legislation. These will be discussed later, but the failure to appreciate and deal with them goes part of the way to explaining why the law came to have a decidedly lop-sided appearance and operation in dealing with the occurrence and effects of industrial dislocation.

THE LEGISLATIVE POLICY

Whatever the private reservations of unions and employers, it is clear from Deakin's second reading speech and from the very terms of the first *Conciliation and Arbitration Act* that one clear aim of the legislation was to prevent and punish strikes and lock-outs, some kinds of unfair labour practices by employers and many forms of industrial action by employees and unions. The Act sought to achieve this first by providing an alternative means of dispute resolution which would make such activities unnecessary and then by imposing or facilitating penalties for impermissible activity.[18]

The early legislation

It is instructive to note briefly some of the sanctions and prohibitions in the first Commonwealth Act. Not only do they show how important this policy was in the scheme of things, but they also show the form of the sanctions and the mode of their enforcement—a form and a mode which can now be seen as significant causes of the failure of this part of the legislative design. Although the content and stringency of these early provisions have been moderated since, their punitive stance remains.

Section 1 of the *Conciliation and Arbitration Act* 1904 (Cth) set out the "chief objects" of the Act, the first of which was "To prevent lock-outs and strikes in relation to industrial disputes;". Section 6 provided that no person or organization "shall, on account of any industrial dispute" do anything in the nature of a lock out or strike, unless there was "good cause independent of the industrial dispute", proof of which lay on the defendant.[19] There was a penalty of one thousand pounds for breach of this. The reference to "industrial dispute" imposed a limitation on

[18] The meaning of "industrial dispute" in this area is not what might be supposed by the non-specialist. The essence of dispute is disagreement, which may or may not be accompanied by industrial action or by a stoppage of industry. Direct action is evidence of a dispute, and usually conclusive evidence, but it is not the dispute in itself. An industrial dispute can arise from the making and refusal of industrial demands without the existence of any industrial action; hence the "paper dispute".

[19] The usual example of good cause is a threat to life or health: *Metropolitan Gas Company v. Federated Gas Employees' Industrial Union* (1924) 35 C.L.R. 449 at 457 per Isaacs and Rich JJ.

the reach of the section, for those words were defined exclusively in s.4 in a way which omitted disputes in certain rural industries and which necessarily attempted to take cognizance of the limitations imposed by s. 51(xxxv) of the Constitution. The use of the section was not in the unrestricted discretion of the parties, for proceedings for contravention of it could not be commenced without leave of the President (of the Court of Conciliation and Arbitration established by the Act). Employers or employees who, without reasonable cause, refused to offer or accept employment on the terms of an award or industrial agreement made under the Act were deemed guilty of a strike or lock-out as the case may be (s.7). There was in s.8 a similar provision deeming organizations guilty of a strike or lock-out for ordering members to refuse to offer or accept employment in like circumstances. "Strike" and "Lock-out" were defined in s.4 in inclusive definitions which gave emphasis to the "view" of the participants: in the one case combined cessation of work with a view to enforcing compliance with demands, and in the other exclusion from work with a view to compel acceptance of terms and conditions of work. Clearly, once there was an industrial dispute, limited in some ways though that concept be, the policy was firm that strikes and lock-outs were forbidden, although the Court retained some control over whether prosecutions could be instituted.

Section 9 provided that an employer was not to dismiss an employee because the employee was an officer or member of an organization or entitled to the benefit of an award. By s. 10 an employee was not to cease work because the employer was an officer or member of an organization or entitled to the benefit of an award. Proceedings for a contravention of these sections required the leave of the President or the Registrar.

By s.38(e) the Court could "enjoin any organization or person from committing or continuing any contravention of this Act." Section 48 provided that the Court could "on the application of any party to an award" make an order in the nature of a mandamus or injunction to compel compliance with an order or award under pain of a fine of up to one hundred pounds or up to three months' imprisonment. Besides that, the Court "as regards every industrial dispute of which it has cognizance" had power under s. 38(c) to fix maximum penalties for breach or non-observance of an order or award—one thousand pounds in the case of an organization or employer, ten pounds in the case of an individual. And there were provisions for the imposition and recovery of these penalties. These provisions were not in terms directed at strikes and lock-outs, although they could clearly encompass them in some circumstances. They were directed rather at maintenance of the integrity of the system and of awards and orders emanating from it.

Section 44 provided that penalties for breach or non-observance of an award or order could be sued for and recovered by the Registrar, an affected organization or any member of an organization affected by

the breach. This section, or rather its successor, did not impose a criminal but a civil penalty, although it took seventy five years for that to become clear.[20]

These provisions were amended and expanded before many of them were repealed in 1930. In particular, after 1930 strikes and lock-outs were no longer in terms directly punished by the Commonwealth Act. But it is important to note the generally punitive and coercive nature of the arrangements which were put in place right from the beginning, (*pace* lately clarified distinctions between civil and criminal penalties.) The language was that of "penalty," "breach or non-observance," "enjoin," "mandamus or injunction to compel." Some transgressions of the legislation were actually criminal, and the Court had a power under s. 39 to exercise any of its powers of its own motion.[21]

LATER COMMONWEALTH LEGISLATION

After the 1930 amendments the main remedies in the *Conciliation and Arbitration Act* for irregular industrial action were provided by s. 38(d) and s.38(e). The former empowered the Court as regards every industrial dispute of which it had cognizance to order compliance with any term of an order or award which had been shown to have been broken or not observed. The latter empowered the Court to enjoin any organization or person from committing or continuing any contravention of the Act.[22]

A new s.58BA was inserted making it an offence for an official of an organization during the currency of an award to encourage a member from working in accordance with an award etc. Section 83(2) gave the Court the power of a superior court of record to punish by attachment and committal any person guilty of contempt of the Court.

These amendments did not affect the award making power of the Court and so they did not operate to prevent the Court making an award which included a bans clause containing a monetary penalty for breach thereof.[23] Notwithstanding some further amendment, these provisions

[20] *Gapes v. Commercial Bank of Australia Ltd* (1979) 27 A.L.R. 87.

[21] Such a power could not now be given to a federal Court. It would almost certainly offend the separation of powers doctrine. Moreover, even if constitutional, it may be undesirable to have the same body conciliating and settling disputes on the one hand and imposing penalties or assessing compensation on the other. There is a role conflict involved for a tribunal performing both tasks, and its effectiveness in one role or the other is likely to be compromised.

[22] The powers under ss. 38(c) and (d) respectively to fix and impose penalties for the breach or non-observance of an award or order remained after 1930. So did award enforcement provisions in s.44ff, with the important omission of s.48, which had been the section giving power to make orders in the nature of mandamus or injunction to compel compliance with an award or to restrain its breach. Section 9 contained "anti-victimisation" provisions, in more expanded form than in the original Act.

[23] *Seamen's Union of Australasia v. Commonwealth Steamship Owners' Association* (1936) 54 C.L.R. 626 at 636-637 per Latham C.J. at 642-643, per Rich J. at 643, per Starke J. per Dixon J. at 645-646; Evatt & McTiernan JJ. diss. There is some doubt whether the views of the majority rested on precisely the same ground: *R v. Spicer; Ex parte Seamen's Union* (1956) 96 C.L.R. 341 at 346. The bans clause will be discussed shortly; suffice to note that it is a clause, which, in general terms, prohibits a union or its members from engaging in conduct which impedes working in accordance with or observing an award. It effectively imposes an obligation on the union and its members.

proved legally deficient as a means of enforcing penalties for strike action.[24]

By legislation in 1951 the Court was empowered to enjoin an organization or person from committing or continuing a contravention of the Act or a breach or non observance of an order or award, and was given power to punish for contempt.[25] By further amendments in 1956, the substance of these sections became part of s.109 and s.111.[26] Section 109(1)(a) empowered the Court to order compliance with an award proved to the satisfaction of the Court to have been broken or not observed; s.109(1)(b) empowered the Court to enjoin an organization or person from committing or continuing a contravention of the Act or a breach or non-observance of an award. Section 111 became the section enabling punishment for contempt. These sections were used more than any other Commonwealth provisions before or since to enforce sanctions against unions engaged in strikes. They were at the legal heart of the industrial rebellion against sanctions at the end of the 1960's.

Sections 109 and 111

These provisions were to become infamous and their operation has been described and analysed by a number of writers.[27] The usual first step to invocation of the sections by an employer was to apply to the Conciliation and Arbitration Commission for insertion into the award of what came to be called a bans clause. Such applications were not granted automatically by any means. If a bans clause were obtained and industrial action occurred thereafter, it was in breach of the bans clause. An employer might then have simply proceeded for a fairly modest monetary penalty for breach of an award clause under the sections available and customarily invoked for breach of any award clause. This was and is the mechanism used against employers who breach an award clause. However it appears that the preferred approach for breach of a bans clause in the 1950's was to seek orders under s.109(1)(a) or s.109(1)(b). If these orders were not obeyed, proceedings for contempt under s.111 were then instituted. Larger penalties were available by that route, but as Pittard points out, the procedure may have been more attractive because it was directed at

[24] *John Fairfax & Sons Pty Ltd v. Morrison* (1945) 19 A.L.J. 198; *R v. Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1950–1951) 82 C.L.R. 208.

[25] *Conciliation and Arbitration Act (No.2)* 1951 (Cth) s.6 inserting a new para.(c) in s.29 of the principal act, and s. 7 adding a new s.29A.

[26] *Conciliation and Arbitration Act* 1956, s.9, s. 10 and s. 54.

[27] For example, C.P. Mills, "The Practice of the Commonwealth Industrial Court in Strike Cases" (1968) 7 Aust. Law 137; K.D.Marks, "Use of Anti-Trust and Labour Law Remedies in the Settlement of Industrial Disputes in Australia" in C.P. Mills (Ed.) *Current Issues in Industrial Law* (1980); M.Pittard, "The Conciliation and Arbitration Act—The Prevention of Strikes and the Recovery of Wages" in *Australian Conciliation and Arbitration After 75 Years: The Federal Arbitration Process, Present Problems and Future Trends*, Seminar, Monash University, 14 July 1979.

securing a cessation of the industrial action rather than merely imposing a penalty.[28]

Bans clauses

The insertion of a bans clause was the crucial first step in this procedure. Bans clauses are still inserted in awards from time to time. A brief description of them is therefore appropriate although they are rarely enforced. They should, more accurately, be called anti-bans clauses, but the usage "bans clause" is established, and is used in legislation.

A bans clause can take various forms, but it is basically an award clause intended to impose obligations on a union, and possibly individuals as well. Bear in mind that the normal award in Australia imposes minimum obligations on the employer. It does not commonly impose obligations on the union.[29] The obligations imposed by a bans clause preclude those to whom the clause is directed being a party to any conduct which prevents or discourages observance of the award, or working in accordance with the terms of the award or offering for or accepting work in accordance with an award.[30]

The constitutional validity of such clauses has been upheld in various wide ranging circumstances. The general principle for validity is that "An award cannot give a form of relief that is not relevant to a matter in dispute, that is not reasonably incidental or appropriate to the settlement of that part of the dispute and that has no natural or rational tendency to settle the particular question in dispute. But the award need not adhere to the remedy or relief proposed or claimed in the course of the dispute or in a demand forming a source of the dispute, so long as the provision in the award is related to the dispute or its settlement in the manner stated."[31]

Later amendments

In 1970, s. 109(1)(a) was repealed, and s.109(1)(b) was amended to omit any reference to awards, so that it merely empowered the Court to enjoin contraventions of the Act, not of awards. Thereafter, breach of a bans clause could only be dealt with by the imposition of a monetary penalty

[28] M.Pittard, "The Conciliation and Arbitration Act—The Prevention of Strikes and the Recovery of Wages" in *Australian Conciliation and Arbitration After 75 Years: The Federal Arbitration Process, Present Problems and Future Trends*, Seminar, Monash University, 14 July 1979. Pittard usefully distinguishes between provisions which enforce and those which punish. As the use of ss.109 and 111 illustrates the distinction can be blurred.

[29] This is changing. "No extra claims" clauses and "Dispute settlement" clauses are becoming common and both usually bind unions.

[30] The term is defined fully in *Industrial Relations Act* 1988 (Cth), s.4.

[31] *R v. Galvin; Ex parte Amalgamated Engineering Union, Australian Section* (1952) 86 C.L.R. 34 at 40. On validity see also *R v. Gallagher; Ex parte Australian Coal and Shale Employees' Federation* (1966) 115 C.L.R. 335; *R v. Spicer: Ex parte Seamen's Union of Australia* (1957) 96 C.L.R. 341 at 349, following *R v. Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 C.L.R. 208; *R v. Commonwealth Conciliation and Arbitration Commission; Ex parte Transport Workers Union of Australia* (1959) 119 C.L.R. 529.

as with a breach of any other award clause. But there was an added requirement in that before proceedings for the penalty could be instituted an attempt at conciliation had to be made and a certificate obtained that the requirements for conciliation had been complied with. This is in substance the procedure that applies today.[32] It is rare for the procedure to be taken right through to imposition of a penalty.

The Commonwealth legislation in its various forms over these years did not contain provisions which were particularly apt for identifying and restraining or otherwise dealing with employer conduct which was inimical to the operation of the arbitration system or the maintenance of industrial peace. True, lock-outs could be punished. But they were hardly ever used. There could be no victimisation of unionists by employers. This was and is necessary and valuable but is only one of a number of unfair industrial practices an employer can adopt if so minded. The others seem to have been largely unrecognised. This is a deficiency continued in the present legislation.

THE PRESENT REGIME

The bans clause has been central in the history of redress against unions for strike action. It still remains as a possibility in the form just summarised. The present *Industrial Relations Act* 1988 (Cth) has other sanctions as well, some of which should be noted, although most of them have been rarely used.

Industrial action

Commonwealth legislation abandoned any attempt to define what was meant by a strike in 1930. It now contains a definition of "industrial action". This is a description—a lengthy description—of various activities, rather than a definition. In terms it covers action by employers as well as employees, but the kinds of activities described are much more likely to be committed by employees or unions. The *Industrial Relations Act* 1988 (Cth) then enables various consequences to be attached to the commission of industrial action as defined. Some of these are directed against employers.

The main consequences which can flow from the commission of industrial action as defined are as follows. Under s.126(5) of the Act, the Commission may insert in an award a provision enabling the stand-down of employees who engage in industrial action. By s.126 where there is industrial action or the threat thereof in the public sector the Commission may make orders to prevent the occurrence or continuation of the action. Section 135 enables the Commission to order a secret ballot to ascertain the attitude of members of an organisation to threatened or actual industrial

[32] *Industrial Relations Act* 1988 (Cth), ss. 178, 181, 182.

action and s.140 excuses members of the organisation from obeying an organisation's call to engage in that action if they are advised of the Commission's view that the ballot shows that a majority are against it.[33] Section 294 allows cancellation of the registration of an organisation on various grounds including engaging in industrial action which is having or is likely to have a substantial adverse effect on the safety, health or welfare of the community or part thereof. More will be said of de-registration shortly.

Section 320 prohibits an employer from taking certain defined kinds of adverse action against an employee who holds a certificate of conscientious objection to union membership and also prohibits an organisation from taking or threatening to take industrial action to coerce an employer to take such adverse action. By s.334(1) an employer may not take adverse action against an employee for, among other things, the employee's failure to join in industrial action, while s.334(5) makes it an offence for an organisation to take industrial action against an employer because the employer is an officer, delegate or member of an organisation or of an association seeking registration as an organisation. By s.335 it is an offence for an organisation to take or threaten industrial action against an employer where the industrial action is taken with intent to coerce the employer to take action against a person, which, if taken, would be a breach of s.334 by the employer; or where the action is taken with intent to coerce an employer to prejudice a member of an organisation who has not complied with a direction given by the organisation. By the same section an organisation may not take or threaten action to prejudice people in their employment with intent to coerce them to join in industrial action, nor may it disadvantage its members with intent to coerce them to join in industrial action, or because they have not joined in. Finally, s.336 makes it an offence for an organisation to take or threaten industrial action against an employer to coerce the employer to take adverse action against certain defined persons (who are in the main independent contractors) or to threaten or take industrial action against an employer to coerce the employer to join an organisation.

There are four points to note about this litany. The first is to emphasise what was said above that there is not in terms a prohibition on strikes (or lock outs). However, the terms of the definition of industrial action are wide and would encompass most if not all forms of strikes and much more besides. It will later be suggested that although the drafting technique of description rather than definition is preferable, the present list is wider than appropriate for the policy behind the Act. Secondly, notwithstanding the width of the definition, there is no blanket prohibition on industrial action. It is only where it is taken in the circumstances defined in the various sections that an offence will be committed. These circumstances

[33] It is extremely doubtful whether there would be any legal obligation to obey such a call in any event.

do occur from time to time, perhaps with more frequency than is generally supposed, but they are not present in the great bulk of instances of industrial action which take place or are threatened. In any event, such offences as may be committed have rarely, if ever, been prosecuted since the abolition of the Industrial Relations Bureau in 1984. Thirdly, the form of sanction for impermissible industrial action is mostly prosecution and fine. Finally, these provisions do not deal with other forms of behaviour which constitute unfair industrial practice and which also require regulation in the public interest.

Offences, fines, enjoining orders, bans clauses, contempt—this was the dialectic of strike prevention under the federal statute, and for the most part still is.

But there are some other "enforcement" mechanisms. They include de-registration and cancellation of registration of an organisation, and cancellation or suspension of an award. They should be noted briefly.

De-registration

To participate in the system of conciliation and arbitration unions usually become registered as organisations, and so do many employer associations. Registration carries with it a number of advantages, especially for employee associations. There has always been a power to cancel the registration of organisations. It is presently in s.294 of the *Industrial Relations Act* 1988 (Cth). There are a number of grounds for cancellation of registration and as was noted in the preceding section, one of them depends on the occurrence of industrial action. The point about de-registration is that although it is undoubtedly a penalty,[34] and a severe one,[35] it has never been regarded as a punishment for other than extreme or protracted action which amounts in effect to a repudiation of the entire system of conciliation and arbitration. Apart from anything else, cancellation of registration other than occasionally and for quite extreme behaviour, would soon make an already Byzantine system almost unworkable. Given the constitutional necessity for "parties" between whom conciliation and arbitration can occur, some form of recognition and ordering of the parties is highly convenient. Registration provides that, and so facilitates operation of the system. De-registration has never been and could never be used as a routine measure.

Award alteration

The Industrial Relations Commission can set aside or vary its awards.[36] Under s.187 of the *Industrial Relations Act* 1988 (Cth), a Full Bench of the Commission can, on application and on the grounds set out in

[34] G.H.Sorrell, *Law in Labour Relations: An Australian Essay* (1979), p. 90.

[35] It takes away or at least severely impedes the right of the organisation to create disputes, obtain and enforce awards, obtain "preference", secure recognition and "coverage" and so on.

[36] *Industrial Relations Act* 1988 (Cth), s.113.

the section, cancel or suspend an award in whole or in part. The grounds are contravention of the Act or an award, refusal to accept employment at all or in accordance with an award and "any other reason" from which it appears to the Full Bench that cancellation or suspension should occur. The operation of an order of cancellation or suspension can be limited by geographical area, or to an organisation or one of its branches or a class of its members.

Clearly, s.187 is the section intended to be used as a sanction or punishment. Unless the order of cancellation or suspension is appropriately limited in its terms, its effect would be to leave the parties "award free" and outside the system unless and until another award was made. The power was most recently used in 1989 to cancel awards governing domestic air pilots, who were seeking wage increases which were said to be well outside the then current wage principles and in support of which work limitations had been in operation for a time.[37]

No doubt as matter of sheer language there may be some overlap between a power to "cancel" such as is contained in s.187 and a power to "set aside" as in s.113. But it seems unlikely that s.113 should be interpreted as widely as that, especially since the functions authorised under s.187 are to be performed by a Full Bench while those under s.113 need not be. Section 113 is more apt for dealing with administrative or formal adjustments, for correcting mistakes, for removing ambiguities, for updating an award and the like.

Nevertheless, *Australian Glass Manufacturers Co. v. Australian Glass Workers Union*[38] seems to provide an example where a single member of the *Industrial Relations Commission* acted on his own motion under the Industrial Relations Act 1988 (Cth), s.33 to vary an award so as to disqualify certain employees at a particular plant who engaged in industrial action for certain pay for public holidays. Another example, this time under the superseded *Conciliation and Arbitration Act*, is *Toyota Motor Sales Australia Limited and Federated Storemen and Packers Union of Australia*[39]. In that case the Commission varied the relevant award of its own motion to deny to employees engaging in industrial action as defined accrual of leave entitlements, to deny them any benefits on termination of employment other than one weeks' pay and to deny them certain specified national wage increases. This was done because of the "outright rejection" of a Commission recommendation. The Commission also reminded the parties that this was a paid rates award and if the employer did not abide by the decision it would cancel the award and provide only minimum rates throughout Australia.

For the reasons mentioned above it must be doubtful, to say the least, if a single Commissioner under the *Industrial Relations Act* 1988

[37] *Re Application by East-West Airlines (Operations) Ltd* Industrial Relations Commission, 19 August 1989, Print H9350.

[38] Smith C., 24 April 1989, G029 Dec 271/89 M Print H7884

[39] Smith C., 29 September 1988, Print H4882.

(Cth) has the power under that Act to make such orders, whatever may have been the situation under the *Conciliation and Arbitration Act.* Apart from the problem of statutory authorisation, such a course of action comes close to a finding of guilt and the imposition of a punishment. If it does amount to this, it would very likely involve a purported exercise of judicial power—something which the Commission, a non-judicial body, cannot do. If it were thought desirable that a single Commissioner have this capacity, the judicial power problem could probably be overcome by legislative drafting devices used in similar circumstances in other contexts.

Putting aside any constitutional difficulties, there may be merit in a tribunal having power to act in some circumstances as the Commission did in these cases. The power has been seen as useful, for example, if certain identifiable matters are traded off for a concession, say a wage increase, by the other side and then one party keeps the wage increase but then seeks to regain the matters traded off. Since one was in exchange for and conditional on the other and since both the trade off and the concession are identifiable, cancellation of that particular "deal" might be a quick simple solution to the problem. The parties are simply returned to their pre-settlement positions with respect to those specific matters. A power to suspend for a limited time might also be a useful tool for a Commissioner who wishes to "knock some sense" into the parties as part of the dispute settlement process. This may be what the Commission had in mind in *Toyota.*

IRREGULAR BEHAVIOUR BY EMPLOYERS

As Mills points out, there is no analogy between prosecutions of employers for breaches of awards and prosecution of unions for strikes, at least while the main function of awards is to fix minimum terms and conditions.[40] To say so much does not, however, justify the conclusion that strikes must be legitimate in the area of "over awards", for any dispute on terms and conditions within jurisdiction can be brought before a tribunal, say by the creation and notification of a new dispute or by an application to vary an existing award.

The better analogy with employee or union industrial action lies in the practices which an employer can adopt to exert socially disruptive or improper economic pressure on the workers—"unfair labour practices" as they are called in North America. Some of these are identified and made punishable in our industrial legislation, for example "victimisation" of unionists which has been proscribed since the first act, although not under the rubric of unfair practices.

[40] C.P.Mills, "Penalties Against Strikes," *Australian Quarterly*, December 1965, 26 at 32: see also M.Pittard, "The Conciliation and Arbitration Act—The Prevention of Strikes and the Recovery of Wages" in *Australian Conciliation and Arbitration After 75 Years: The Federal Arbitration Process, Present Problems and Future Trends*, Seminar, Monash University, 14 July 1979.

In addition to the standard enforcement sections allowing a person or entity to be fined for breach of an award, the *Industrial Relations Act* 1988 (Cth) enables employers to be punished for certain forms of adverse action against organisations or workers. They were mentioned earlier in the Chapter in outlining the present regime. It will be recalled that the forms of proscribed action include "victimisation" of a worker for a range of union or award related activities (s.334). Besides permitting a modest fine, this section allows, indeed normally requires, the Court to order re-instatement of an employee dismissed for an impermissible reason.

Two issues which require consideration are whether the employer practices made punishable are the appropriate ones for regulation and again, as with strikes, whether the forms of sanction and the modes of enforcement are apt to secure the integrity of the arbitration system. While lock-outs are a thing of the past, there are other forms of economic and social pressure which employers can bring to bear on unions and workers. These are just as inimical to the integrity and proper operation of the system and should also be subjected to whatever scheme of sanctions or consequences is adopted by the system. They include provocative or unreasonable action likely to precipitate a strike, failure to disclose relevant information and failure to consult or discuss matters raised by the union. (A union can equally be guilty of failure to respond to an employer request for discussions). These issues will be taken up later in the Chapter.

JUSTIFICATIONS OFFERED FOR THE LEGISLATIVE POLICY

A first object of the original *Conciliation and Arbitration Act* was to prevent strikes and lock-outs. The inhibition of those activities, particularly strikes, has remained a constant theme in the policies sought to be served by federal, and some State, industrial legislation. As the above analysis of the federal experience has tried to show, the legislation over the years has sought to achieve that policy mainly by criminal or quasi-criminal sanctions which have generally not been enforced with enthusiasm. Nowadays there is much greater emphasis in industrial relations on commitment and voluntary compliance, and rightly so. But even those for whom the word "sanction" is anathema and for whom the right to strike is an article of faith, concede that some apparatus has to be in place to deal with the situation where commitment and voluntarism fail. This is manifested in the present federal Act by the provisions summarised earlier in the Chapter.

The resolution of conflict, any conflict, by force has for long been rejected as undesirable, wrong, contrary to the interests of society and so on, the more so if the force impacts on non-contestants. Assaults are criminal; war is abhorred; the misuse of economic power is regulated increasingly. This is evidenced by the trade practices, securities market and consumer protection legislation of recent decades and by the growing availability of remedies to correct unfairness in the formation, operation

and termination of contracts. The essentially "private" conflicts of individuals in these areas are regulated when their resolution affects wider community or social interests. Inequality of bargaining power or a position of superior economic strength will often be a pointer to the possibility of some kind of unfairness or injustice in these areas.

It is therefore puzzling that while the use of force or the abuse of power is deprecated and regulated in virtually every other kind of conflict resolution, in industrial conflict the use of economic force is not only countenanced in practice, but advocated, at least in some defined circumstances.[41] It is an unexpected approach in an increasingly urbanised and inter-dependent society, where the adverse effects on the community and on innocent by-standers can be severe.[42] This benign acceptance of economic force is all the more puzzling in Australia where the system was designed to give an alternative to its use.

Reasons justifying the policy of prohibitions of strikes and lock-outs were often stated in decisions of the Courts, including some early High Court cases. In the first place, strikes and lock-outs were no longer necessary. As Evatt, J. summarised it in *McKernan v. Fraser*:[43]

> Australian Legislatures have usually approached questions of industrial disputes, the regulation of industrial conditions, and the combined action of workmen, from a standpoint very different from that of England, where the mere act of 'striking' has not been penalised by Act of Parliament. Here, the act of striking has frequently been made punishable. This has not been because Australian legislative bodies have been hostile to the claims of organised labour. The reason is that they have established Courts, tribunals and boards, for the very purpose of making recourse to the instrument of strike and lock-out unnecessary. Collective bargaining has always had behind it the actual or implied threat of strike or lock-out. But such bargaining has to a very large extent been replaced by compulsory fixation of industrial conditions by a specified tribunal. It is as a logical corollary, that recourse to lock-out or strike has been made unlawful.

Second, the strike or lock-out made resolution of the dispute more difficult than ever, and undermined the position of the tribunal.[44]

[41] For example, J.Niland, *Transforming Industrial Relations in New South Wales—A Green Paper* (1989), Volume 1, Chapter 7.

[42] Deakin stressed damage to the community: Commonwealth of Australia, *Parliamentary Debates* (1903) Vol. XV p. 2864.

[43] (1931) 46 C.L.R. 343 at 373. His Honour later resigned from the High Court to enter politics and in a distinguished career became, among other things, leader of the Federal Parliamentary Labour Party in opposition.

[44] *Stemp v. Australian Glass Manufacturers Co. Ltd* (1917) 23 C.L.R. 226 at 234 per Barton A.C.J.at 244 per Higgins J.;*Australian Boot Trade Employees' Federation v. Commonwealth* (1953—1954) 90 C.L.R. 24 at 40 -41 per Dixon C.J.

Third, in respect of a matter settled by an award, irregular activity put in jeopardy the settlement embodied in the award.[45] None of this was necessary any longer, the argument ran, because the award of the tribunal provided an authoritative way out of any dispute which could not be settled otherwise.

Fourth, the system not only provided an ultimate, if not always palatable, outcome in the form of the award. In addition, registration under the statute gave positive benefits to participants, especially unions. These included recognition and corporate status, "coverage", often exclusive, of part of the work force, the ability to make demands, create disputes, obtain and enforce awards, recover unpaid or underpaid benefits, seek preference for members and so on. If a party had these benefits and had access to an ultimate answer to the dispute in the form of the award, it was inconsistent and unnecessary also to have recourse to self help, and thus get the best (or perhaps worst) of both worlds:

> A dispute cannot be settled by two inconsistent methods at the same time; and if the method of reason is to be followed, the method of force—economic force—must be prohibited. The method of physical force—violence—is sufficiently prohibited by the ordinary law.[46]

THE USE OF SANCTIONS

While a clear policy can be traced through the various forms which federal legislation has taken and while there are rational justifications for such a policy in the context of a system of compulsory arbitration, the use of sanctions, at any rate against strikes, has been spasmodic and not particularly effective. Lock-outs have been a rarity for years and hence there has been little or no need to invoke sanctions against them.

From an examination of the Commonwealth Arbitration Reports, Pittard estimates that the *Conciliation and Arbitration Act* 1904, s.6—the original section proscribing strikes and lock-outs—was invoked "only six" times before it was repealed in 1930, four times against unions or unionists and twice against employers.[47] Higgins J. remarked that a case before the Court in 1917 was the first conviction for a strike under Commonwealth legislation, and possibly the first prosecution.[48] Rawson has pointed out that, at federal level, the 1950's and 1960's were the exceptional period when it was "precariously possible to impose fines

[45] *Australian Boot Trade Employees' Federation v. Commonwealth* (1953-1954) 90 C.L.R. 24 at 40-41 per Dixon C.J.

[46] *Stemp v. Australian Glass Manufacturers Co. Ltd* (1917) 23 C.L.R. 226 at 243 per Higgins J.

[47] M.Pittard, "The Conciliation and Arbitration Act—The Prevention of Strikes and the Recovery of Wages" in *Australian Conciliation and Arbitration After 75 Years: The Federal Arbitration Process, Present Problems and Future Trends*, Seminar, Monash University, 14 July 1979, p. 25.

[48] *Stemp v. Australian Glass Manufacturers Co. Ltd* (1917) 23 C.L.R. 226 at 242 per Higgins J.

on recalcitrant unions".[49] The New South Wales Arbitration Reports disclose four reported cases of the use of statutory sanctions in volumes 1 to 10 (from 1902 to 1911), and about 19 reported cases throughout the 1950's. No doubt at both federal and State levels there have also been cases which have not found their way into the industrial reports. Still, even if unreported cases are five or six times as numerous as reported ones, the numbers are not high.[50]

The lists and estimations just cited certainly support the proposition that sanctions have been used relatively infrequently, save perhaps in the 1950's and 1960's. That is so because the parties, mostly the employers, have not seen fit to invoke them at other times. More research is needed to clarify why this was so, especially in the early days when one would have thought there would have been some prospect of establishing a pattern of use had the employers wished to do so. One may speculate that it was because the employers were unenthusiastic about the system and sought to restrict it through the courts and legislatures, with some success up until about 1913.[51] As was suggested earlier in the Chapter, regular use of remedies under the system at that time may have been perceived as tacit approval of it, something the employers would not have wished to do. By the time the litigation and legislation strategy had run its course, it may have been too late for the employers to change a practice of non-use which had become more or less habitual. At any rate, for one reason or another employers have not generally seen it as in their interest to invoke the available sanctions. (This is one reason why an independent agency for the administration of whatever system is in place is called for.[52]) Too much has been drawn from this pattern of irregular use. Some have suggested it justifies a conclusion that sanctions cannot work. This will be taken up in the next section, which discusses reasons advanced for the failure of the sanctions which have been available.

[49] D.W.Rawson, "Industrial relations and the art of the possible" p. 277, Chapter 16 in Blandy & Niland. The use made of sanctions between 1956 and 1968 under the *Conciliation and Arbitration Act*, ss. 109 and 111 is detailed in Commonwealth of Australia, *Parliamentary Debates* (1969), House of Representatives, Vol. 65, p. 1294-p.1934. See also J.E.Isaac "Penal Provisions Under Commonwealth Arbitration" (1963) 5 *J.I.R. 110 at 118 where further data on use is given in tables.*

[50] It should also be remembered that there were and are legal remedies outside those in the arbitration systems. Thus Clark, writing of New South Wales in 1910, notes that on "December 18, 1909, the parliament of New South Wales, in a single sitting, passed through both houses a coercion act which gave the police power to break up any meeting called for strike purposes, made procedure more effective, and greatly increased the severity of the penalties for striking. The government obtained the most important conviction ever secured under a colonial labour statute, late in January, 1910, when the president of the Colliery Employees' Federation was sentenced to one year at hard labour in prison for instigating this strke, three other leaders were each condemned to eight months at hard labour, and a number of miners received shorter terms in prison.": V.S.Clark, "Recent Changes in Australasian Laws Against Strikes," (1910) 24 *Quarterly Journal of Economics* 561 at 563. Clark presumably was referring to the *Industrial Disputes Amendment Act* 1909.

[51] D.Plowman "Forced march: the employers and arbitration", Chapter 6 in McIntyre & Mitchell, *op. cit.*

[52] See the comments in B. Creighton & A. Stewart *Labour Law An Introduction* (1990), p.221 - 222.

EXPLANATIONS FOR THE FAILURE

A number of theoretical and practical explanations for the failure of sanctions have been offered. So have reasons for the inappropriateness of sanctions. There is one obvious explanation, namely that the available sanctions simply were not used, or at least not used in a regular way. Something not used or used episodically and unevenly is unlikely to produce a result or to be perceived as "effective". When some concerted attempt to use them was made in the 1950s and 1960s, not only was there no existing climate of use but the economic conditions of the time did not provide a propitious atmosphere from the employers' viewpoint. Of course the infrequent use of the sanctions in the form they have taken may well have been a blessing, given that they were not appropriate in that form; it may have forced the parties into other fruitful modes of accommodation. Still, the mere fact of non-use from the early days cannot be disregarded as one of the reasons why sanctions did not prove very effective when they were occasionally used.

It is said that those who support sanctions have a "narrow view" about how industrial relations should operate, to the effect that industrial tribunals should perform a strictly judicial function in handing down decisions which the parties meekly accept. "Industrial tribunals are unable to impose decisions on the parties. Strikes and lock-outs are part of the armoury of tactics employed by the parties as they seek to achieve their organisation goals."[53] Two comments can be made about this approach. First, a belief in the need for sanctions does not necessarily imply a "narrow" "judicial" view. Few commentators deny that commitment and self regulation are preferable. Most also recognise that this ideal will not always be attained. There needs to be some apparatus for processing situations where the reality falls short of the ideal. Even in a system where awards or agreements are reached by some process of bargaining, there must be a procedure for dealing with situations where parties do not adhere to the bargain or where they engage in proscribed activity, however it is defined. The procedure need not be, indeed should not be, a criminal penalty, but may be, say, a damages action, as in Sweden,[54] or compensation or an injunction or something else altogether. But there must ultimately be some consequence in any system where the norms are not adhered to.

Next, it is true that strikes and lock outs, or at any rate strikes, are part of the industrial armoury. But it is arguable that this is so in Australia only because they have been allowed to become and remain so. The policy of the *Conciliation and Arbitration Act* 1904 (Cth) was clear enough. The problems arose from the inadequate form of the early

[53] B. Dabscheck, "In search of the Holy Grail: proposals for the reform of Australian industrial relations", p. 168 Chapter 9 in Blandy & Niland.

[54] Noted in J.E.Isaac "Penal Provisions Under Commonwealth Arbitration" (1963) 5 *J.I.R.* 110 at 113.

sanctions, a failure to recognise that a lock-out soon ceased to be the employer's main economic equivalent to the strike and an inapt enforcement procedure. Those weaknesses still remain.

Theoretical explanations for the failure of sanctions

Rawson has argued that unions were attracted by the concept of the state intervening in industrial relations to secure justice in industrial relations. However, from their view point this involved not the kind of impartiality which was in the minds of the founders of the system, but a form of what we would nowadays call affirmative action. A pro-union bias was regarded as equitable by the unions in that it reduced the partiality of the entire economic system against them. Rawson says that this union assumption about the role of the arbitration system still exists.[55]

If this assumption still does exist, the basis for it and the need for some bias is questionable. Any early need for partiality in favour of the unions has declined since 1904. In spite of a recent fall in membership, the Australian workforce is one of the most unionised in the world—a situation fostered by the arbitration system. As might be expected, since the federal labour government came to power in 1983 the union movement has been influential in the formation of policy. Indeed, such has been this influence that our system of government has at times been compared to a form of corporatism. The Industrial Relations Commission and before it the Conciliation and Arbitration Commission have regularly been persuaded to adopt at least the main elements of wage fixing policy agreed between the government and the union movement. It is not here contended that any of this is either good or bad, merely that it is, and that it greatly weakens any need which may have existed for some "built in" partiality for unions. Indeed there are probably some who would argue that nowadays affirmative action is necessary in favour of some employers or industries and in favour of the community.[56] It has also been argued that the main Commonwealth arbitral tribunal itself has been "emasculated by trade union power".[57] If Rawson is right in saying that there was a need for some partiality towards the fledgling union movement, such a need is now greatly reduced. This in turn reduces the force of any argument that unions should be, to some extent, protected from full accountability for irregular activities because of their weak position.

[55] D.W.Rawson, "Law and Politics in Australian Industrial Relations" G.W.Ford et al *Australian Labour Relations Readings* (4th edn) p. 54. "Affirmative action" is not Rawson's usage, but mine by way of summary.

[56] Cf. the remark of Mason J. in *General Motors-Holdens Pty Ltd v. Bowling* (1977) 51 A.L.J.R. 235 at 240 to the effect that the trade union at the turn of the century was a more fragile institution than it is today. Allen has written of the "excessive power of the trade union movement and the consequent absence of an effective power balance in industrial relationships": G.Allen, "The Long-Term Implications of the Hancock Report", (1985) 27 *J.I.R.* 434 at 446. On the other hand, it seems that union membership is Australia, although still high by world standards, is in decline. The union movement in America appears to have withered almost to the point of being no longer effective.

[57] R.Blandy, "The Hancock Report: The Last Hurrah of the Past" (1985) 27 J.I.R. 452 at 458.

Creighton and Stewart argue that:

> No matter how much the existence of the tribunals may serve as a constraint upon the capacity of employers to use their economic power to act unilaterally in setting employment conditions, that factor cannot redress the power imbalance between capital and individual units of labour.

With that one may agree. They continue:

> The entire rationale for trade unions lies in the collective *strength* that they are able to bring to bear in order to counter the latent power of capital. Without the employer's freedom to withdraw capital with a comparable capacity to withdraw labour, they are enfeebled.

The authors go on to claim that while arbitration systems should undoubtedly lessen the need for strikes, they cannot realistically be expected to remove it entirely.[58] With respect, an arbitration system, appropriately designed, can be expected to remove irregular action, by employers as well as unions, in those matters which are before the tribunal or which are the subject of an award of the tribunal.

The weakness in Creighton and Stewart's argument lies in the analogy they draw with the ability of the employer to withdraw capital. An employer can withdraw capital, or rather the use of capital, in the short term by a lockout. Lockouts are very likely to be held unlawful because they are in breach of contract and in New South Wales, for example, they are still punishable by fine. But, more to the point, the reality is that they are never used nowadays. Creighton and Stewart are unlikely to be suggesting that they should be resurrected and legitimated. The only other way an employer can withdraw capital is by selling the business or simply shutting it down—options that are simply not available in an industrial dispute because they are permanent. These ways of withdrawing capital are not at all analogous to the power of labour to withdraw from work partly or wholly for long or short periods of time and then with equal speed and facility to return to work.

Another point made by Creighton and Stewart is that it is unreasonable to expect workers not to respond to unilateral changes in working arrangements or arbitrary dismissals by taking spontaneous industrial action in some instances.[59] This is quite true, but only if the system does not provide an adequate mode of redress in such situations. It can be argued with some force that the Australian system has not adequately addressed the problem of the defensive or reactive strike. A point already touched on in this Chapter is that one of the deficiencies in the Australian scheme of things has been that employers have not been subjected to appropriate statutory constraints. Employer actions which provoke or could

[58] B. Creighton & A. Stewart *Labour Law An Introduction* (1990), p.219.
[59] *Ibid.*

be reasonably expected to provoke a strike should arguably be subjected to adverse consequences for the employer.

Inappropriateness as an explanation for the failure

One of the main criticisms of penal sanctions, or perhaps of arbitration systems in general, is that they do not engender and indeed inhibit a responsible attitude by employers and employees and unions to the ongoing management and operation of the employment relationship. That is, an award "forced" on unwilling parties by an arbitrator commands no respect and is apt to be a source of discontent leading to industrial dislocation and lack of harmony and commitment in the workplace in the future. Two comments can be made about this.

First, the manner in which arbitration operates in Australia nowadays affords ample opportunity for the parties to negotiate and agree, and, moreover, to do so within a structure which provides a bulwark, even if an imperfect one, against oppressive economic behaviour. This actually increases the possibility of an "acceptable" outcome to which commitment is likely. Conversely, the mere fact that an agreement is reached by a process of bargaining, even at enterprise or industry level, is no guarantee that it commands respect or commitment. Dabscheck has pointed out that bargained agreements can sometimes more closely resemble terms of surrender. He rightly queries the extent to which the parties, or one of them, can have any commitment to such an "agreement".[60] Second, absence of commitment or enthusiasm does not have to mean unworkability. It has always been the case that, notwithstanding strenuous efforts, institutions and individuals in other areas of human activity cannot always get what they want when they want it or perhaps at all. Nevertheless it is perfectly possible to make the best of an existing situation, while not abandoning the possibility of change later. People have to perform contracts which have become less profitable than they calculated. Employers have to meet workers' compensation journey and recess claims which they often resent because they have no control over the situations giving rise to the claims. Workers have managed to live with "unjust" awards until the time is more propitious to seek a change. Situations "forced" upon people can, often must, be made to function.

Ineffectiveness of sanctions as an explanation for failure

Dabscheck, and others, have pointed out that the sanctions which have been on the statute book have proved to be ineffective, and a virtual

[60] B. Dabscheck, "In search of the Holy Grail: proposals for the reform of Australian industrial relations", p. 165 Chapter 9 in Blandy & Niland. In *Printing & Kindred Industries Union v. Printing & Allied Trades Employers' Federation of Australia* (1982) 2 I.R. 320 the Conciliation and Arbitration Commission refused to certify an agreement on a number of grounds. Among other things, the Commission was influenced by the fact that the agreement had been "extorted by the use of blatant industrial action, and without genuine negotiation and consent". In *Bullock v. Federated Furnishing Trades Society of Australia* (1985) 10 I.R. 18 it was conceded on behalf of the union that certain agreements about the use of contract labour were unenforceable because not entered into voluntarily.

dead letter since the Clarrie O'Shea affair in 1969.[61] The use made of federal sanctions was set out earlier in the Chapter. Rawson, noting that the enforcement of federal sanctions in the 1950's and 1960's was exceptional, comments that laws are unenforceable if large sections of the community believe they are bad laws, or concern matters where it is believed that the law should have no place. He says that sweeping laws against strikes became impossible to enforce and "in that sense the principle of arbitration systems based on courts and on analogies with the criminal law was vitiated long ago".[62]

It is true that the use of the available sanctions never became an institutionalised and regular part of the system in its early more fluid days or indeed at all. It is also true that when they were used, they were not usually successful in inhibiting industrial action. Rather, they tended to inflame it. These phenomena—sparse use and doubtful efficacy—are probably attributable mainly to the form of the sanctions. The available remedies under the arbitration statutes have been predominantly punitive, often criminal, in nature. Some of them could lead to gaol. This characteristic has been observed by Rawson and others.[63]

It is reasonable to conclude from the use experience outlined that enforcement mechanisms of that particular kind do not work. It is not legitimate to extract much more than that from a limited pattern of use of criminal sanctions which had to be initiated by one of the parties. This pattern, of non-use rather than use and of blunt processes at that, does not justify without more a general proposition that no sanctions can work, or even, more precisely, a conclusion that sanctions and the law generally are effective control mechanisms only to the extent that the unions are prepared to allow that to happen.[64] With hindsight, an unsatisfactory outcome from the use of quasi-criminal sanctions was to have been expected, for in other areas of human activity, as well as in the industrial arena, criminal sanctions are a blunt instrument of social control, to be used only when all else has failed.[65] In Australia it is unfortunate that in industrial relations they were used before anything else was tried.

No doubt commitment to the process and to the award—self enforcement—is the ideal. And no doubt systems should be structured so as to bring about that positive result if at all possible. But there needs to be something else in place where, for one reason or another, self

[61] *Op. cit.*

[62] D.W Rawson, "Industrial relations and the art of the possible" p. 277, Chapter 16 in Blandy & Niland.

[63] Creighton and Stewart are the latest of a number of writers who have commented on it. B. Creighton & A. Stewart *Labour Law An Introduction* (1990), p.221. Indeed, in introducing the bill for the 1930 amendments to the federal Act, The Attorney-General described it as a "cardinal error" to use the penal sanctions of a criminal code in this area.

[64] B.Creighton "Law and the Control of Industrial Conflict" Chapter 6 in K.Cole (Ed.) *Power Conflict and Control in Australian Trade Unions*(1982).

[65] B.Fisse, "The Criminal Liability of Companies for Work or Product Related Deaths and Injuries", Paper delivered to I.I.R. Seminar, Sydney, 13 March 1990, p.11.

regulation fails. While the inappropriateness of criminal or quasi-criminal remedies seems clear, insufficient consideration has been given to other approaches, specifically those based on compensation and loss of benefits for impermissible activities, rather than on punishment. Also insufficient consideration has been given to the identification and description of those activities, especially employer activities, which require regulation because they are at odds with the integrity of the system and its outcome, the award. More will be said later about the activities of employers which should be subject to regulation, for this is another defect in the arrangements we have so far had. It has been assumed that "victimisation" and the "lock out" are the main inappropriate activities in which employers can engage. They are not. Furthermore, in designing a scheme based on compensation and loss of benefits, recourse to compensatory mechanisms outside those provided by the system, such as the common law, might need to be curtailed so as to prevent double recovery. A model of this kind would also be suitable for use in a collective bargaining system, where, as noted, there needs to be some procedure for dealing with such things as unfair industrial practices or strikes during the currency of an agreement.

It has also been seen how, in general, invocation of the available sanctions has been in the hands of the parties, usually the employers in the events which have happened. It needs to be considered whether this is inimical to the effective operation of whatever system is in place, and whether the involvement of an independent agency is indicated.

ENFORCEMENT MECHANISMS

Punishing and enforcing

Pittard has pointed out that it is useful to draw a distinction between legislative provisions which are designed to punish industrial action and those which are part of the apparatus for enforcing the system.[66] It is useful, indeed necessary, because of the different policy considerations lying behind the two kinds of legislation. Though necessary, it is not always easy, say where industrial action also constitutes a departure from the system.[67] The difficulties in drawing the distinction are illustrated by two increasingly common award clauses: the clause requiring no wage claims outside current guidelines and the clause prescribing a dispute settlement procedure. This lastmentioned clause almost always requires that work continue normally while that process is implemented. A dispute over a claim outside guidelines, if supported by industrial action, could be a breach of one or both clauses and therefore expose the union concerned

[66] See M.Pittard, "The Conciliation and Arbitration Act—The Prevention of Strikes and the Recovery of Wages" in *Australian Conciliation and Arbitration After 75 Years: The Federal Arbitration Process, Present Problems and Future Trends*, Seminar, Monash University, 14 July 1979.

[67] B.Creighton W.Ford & R.Mitchell *Labour Law—Materials and Commentary* (1983) p.469 ff.

to a monetary penalty under the routine processes for award enforcement. It could also be "industrial action" within the meaning of the *Industrial Relations Act* 1988 (Cth) and so expose the union to the "sanctions" which can flow from that circumstance. In addition, such action could be the subject of an application for insertion of a bans clause in the award. Finally, the way in which bans clauses were enforced in the 1950s and 1960s, outlined above, also illustrates that the distinction between enforcement and punishment is not always clear.

The role of the parties

While the predominantly criminal nature of the sanctions available over the years has been noted, what has not been so often observed is that the invocation of these sanctions has been almost entirely in the hands of the parties. Although leave of the Court or the Registrar was sometimes required to commence action to punish it was still for the initiating party to seek this. This arrangement of leaving virtually exclusive power to initiate penal proceedings with the parties brings with it the possibility that in the often emotive circumstances of an industrial dispute the remedies can be used unevenly or as a mere forensic tactic or for improper motives such as sheer revenge or for some extraneous purpose.[68] Indeed Fisher has referred to an "attempt by one ill-advised body of employers to use penalties as a general weapon to coerce unions."[69] One of the arguments used by the unions in support of the ultimately successful campaign against the bans clause procedure in place before 1970 was that some employers had generally abused the statutory provisions then in place.[70] As Isaac points out, penal sanctions, at any rate, are powerful social weapons with implications spreading beyond the immediate parties.[71] The mis-use of legal remedies, especially criminal sanctions, in other areas of activity is not allowed. It can constitute abuse of process.

Any potential for mis-use could be reduced first by adopting two measures already foreshadowed,[72] and then by creating a new body to administer arrangements. This body, which would need to be independent, professional and separate from existing elements in the institutional structure, should first be empowered to initiate proceedings of its own motion. Its leave should also be required if one of the parties—union or employer— desired to proceed independently for compensation. Leave to proceed might be expected routinely unless there was an indication of mis-use of process or an absence of any proper evidentary foundation for proceedings.

[68] C.P.Mills, "Penalties Against Strikes," *Australian Quarterly*, December 1965, 26 at 34.
[69] W.K.Fisher "On Niland, Rawson and McCallum", p.365 in Chapter 21 of Blandy & Niland.
[70] C.P.Mills, "Legislation and Decisions Affecting Industrial Relations" (1970) 12 J.I.R. 366 at 367.
[71] J.E.Isaac "Penal Provisions Under Commonwealth Arbitration" (1963) 5 J.I.R. 110 at 116.
[72] That is elimination of any taint of criminality from the process by replacing it with one based on compensation, and re-examination of the range of irregular activities—of both employers and unions—which would attract a claim to compensation.

HANCOCK AND ITS AFTERMATH

In July 1983, The Commonwealth Government appointed a Committee to review Australian industrial relations. This proved to be the most thorough-going review of the industrial relations system since its establishment in 1904. That Committee, known as the Hancock Committee after its Chairman the then Prof. K. Hancock, concluded that penalties could have no more than a limited role in the arbitration system and certainly could not be its mainstay; it did not see the imposition of fines and sentences of imprisonment for strikes and lockouts as a useful aspect of the conciliation and arbitration system, and recommended that the new legislation proposed by the Committee should contain no provisions for those penalties.[73] The main sanction it recommended was de-registration of a registered organisation for an insufficient willingness to operate according to the rules. It distinguished this from cancellation of registration for administrative or procedural reasons. In addition the Committee recommended retention of the "informal sanctions" and "negative penalties" of refusal by the Commission to hear a matter while direct action was in progress and refusal to pass on an award benefit while disruption was occurring. It also recommended retention of power in the Commission to cancel an award on the ground of industrial conduct, and also power to cancel award respondency of an organisation while ensuring that the award continued to operate in respect of individual employees.[74]

The Committee's recommendation on de-registration was no more than a confirmation of the existing basis on which de-registration has been available for many years. De-registration has been used relatively infrequently and then only as an instrument of last resort to rid the system of an entity which persistently and seriously acted in a manner contrary to the purposes and objects of the Act. The effective operation of the system of conciliation and arbitration in Australia depends to a large degree on the presence of registered organisations. Expulsion of organisations as a "punishment" for other than a persistent course of seriously recalcitrant behaviour would ultimately weaken the system itself. Sorrell says that the cancellation of registration is seen by unions as a penalty.[75] In one sense it is and can be seen as such, provided it is realised that it is a penalty of a different order, completely unsuitable and unusable in any but extreme cases. It is capital punishment, "an H-bomb equivalent" as Blandy has called it.[76]

Moreover, in rejecting sanctions the Hancock Committee was directing its attention in the main to the form of sanction common in

[73] Hancock et al. *Australian Industrial Relations Systems: Report of the Committee of Review* (A.G.P.S., 1985), Volume 2, p. 635, 637. This is hereafter cited as the Hancock Report.
[74] *Ibid.*, p.639-641.
[75] G.H.Sorrell, *Law in Labour Relations: An Australian Essay* (1979), p. 90.
[76] R.Blandy, "The Hancock Report: The Last Hurrah of the Past" (1985) 27 *J.I.R.* 452 at 458.

Australia, that is criminal or quasi-criminal sanctions enforced at the behest of an aggrieved party. It does not seem to have considered non-criminal sanctions based on compensation, nor does it appear to have considered closely the range of employee and more particularly employer activities which might properly attract such consequences, nor, of course, how they might be enforced.

In the end, the *Industrial Relations Act* 1988 (Cth) contained much the same kind of compliance provisions as had been present in the *Conciliation and Arbitration Act.*

ALTERNATIVE POSSIBILITIES

In an ideal world, commitment to an industrial relations system by the parties is the best way of securing adherence to its norms. Happily there has been much greater recognition of this in Australia in recent times and there is growing evidence of such commitment in a number of industries, to the apparent advantage of both employers and employees. But it is a cliche that we do not live in an ideal world. Departures from the norms of the system have and will occur. This will be true of any system, be it an "arbitration" or a "bargaining" model. In the case of departures from the norms some apparatus for protecting the integrity of the system is required.

So far, this Chapter has noted that the compliance mechanisms in place in Australia have suffered from three main defects. First, a failure to consider properly the range of activities, particularly employer activities, which should attract adverse consequences. As general principle, those activities which undermine or circumvent the system established by the Act are apt for proscription. The second defect, noted by a number of commentators, is the predominantly criminal and quasi-criminal nature of what has been on the statute book since 1904. A scheme of civil compensation seems more appropriate. Such a scheme would, of course, need to be integrated with available damages actions at common law, perhaps by limiting access to them. Thirdly, given an appropriate range of impermissible activities and a non-criminal regime, there is the question of how the regime should be administered. Should initiation of the process be left entirely to the aggrieved parties? The Chapter will expand briefly on the features of an alternative model along the above lines which could serve as a basis for consideration and development.

IMPERMISSIBLE ACTIVITIES

In identifying which activities are to be defined as transgressing the norms of an arbitration system, it is necessary to keep in mind one of the basic aims of the system established in 1904, and that was to provide an alternative form of dispute resolution which reduced or eliminated the need for the use of economic force. This is still an appropriate policy, perhaps more necessary now than in 1904 given the greater degree of urbanisation and inter-dependence in society. Force not only tends to

lead to a crude solution—might is right—but almost inevitably has adverse social and economic consequences on non-contestants, sometimes on the whole community. This policy is served if inappropriate industrial behaviour is proscribed when it pertains to a matter presently before the tribunal or where it relates to a topic or subject matter dealt with in an award of the tribunal.

Constitutional power enables regulation of conduct in a wider range of circumstances than this, but it is not necessary and may be counter-productive to legislate to the full limit of available power. On the other hand, it is necessary to go far enough to protect whatever institutional framework is established. It has been argued that if bargaining outside the system is allowed, prohibitions on strikes should logically go no wider than the "award settling-procedures".[77] That formula would leave untouched action arising during the currency of an award in respect of a claim settled by the award. The protection of the award, as well as the procedure, seems necessary if the integrity of the system is to be guarded. After all, parties can apply to re-open or vary an award or can create and notify a new dispute and so get before the tribunal without the need to apply economic pressure.

But, at the other extreme, Mills has pointed out the lack of logic and the possible adverse industrial relations consequences of attaching sanctions under an arbitration system to activities which arise from situations over which a tribunal has and can have no jurisdiction, say because of the terms of its constating statute, or in the case of the "political strike" where the protest is usually about something which the employer cannot grant and in respect of which an award could not therefore be made.[78] So, regardless of the width of legislative power, consequences arising under arbitration statutes should be confined to defined activity in respect of some dispute or matter before the tribunal or in respect of a topic or subject matter in a current award of the tribunal.

Union activities

The *Industrial Relations Act* 1988 (Cth) contains a long definition of "industrial action." The activities which it describes are mainly those likely to be carried out by employees or unions. However, in terms the definition also encompasses those activities if carried out by an employer. It also seems wide enough to include a lock-out, although the use of lock-outs by employers seems to have passed into history.

In some ways the definition is wider than necessary. First, it covers industrial action which occurs once an industrial dispute[79] is in existence even though the dispute is not before the tribunal, say because it has

[77] B.Creighton W.Ford & R.Mitchell *Labour Law—Materials and Commentary* (1983) p. 471.

[78] C.P.Mills, "Penalties Against Strikes," *Australian Quarterly*, December 1965, 26 at 30.

[79] As noted earlier, "industrial dispute" is a defined term of special meaning in federal industrial law. It is not the industrial action itself, which is merely evidence of the dispute.

not been notified. It seems that sanctions for industrial action at that time are constitutionally permissible.[80] But, save in one situation, it may be questioned whether it is conducive to the effective operation of the system to impose them at that time, given that there is an obligation to notify industrial disputes to the Industrial Relations Commission[81] and given that notification can be made by the Minister or the Industrial Registrar as well as by a party, say the target of the dispute. The exceptional situation where adverse consequences for industrial action prior to notification may be justified is in the case where the issue in dispute concerns a matter which is already dealt with by an award of the Commission.

Another way in which the definition may be too wide is that it can apparently cover activity which occurs after the employment relationship has come to an end. There is a parallel definition of "industrial action" in the *Social Security Act* 1989 which has been held to operate in such a way.[82] With respect, the reasoning in that decision is not beyond argument, for some of the activities in issue in *Savage* seem to be such as could only be done by an employee. Even if the decision is correct in relation to the *Social Security Act* it does not follow that a definition with as wide an operation as that is appropriate to protect an arbitration system. It may well be that intimidatory or obstructive picketing by former employees which hinders current employees from working under a federal award is an apt subject for proscription. But beyond that, any attempt to attach adverse consequences to activities by ex-employees is of doubtful use and may even be unconstitutional.

The point is that the effective operation of the Act only seems to require that industrial action be somehow proscribed under the arbitration system where it pertains to a matter before the tribunal or to a subject dealt with in an award (or certified agreement) of the tribunal. To cast the statutory net wider than that is unnecessary.

Employer activities

Which employer activities require proscription to protect and preserve an arbitration system? For much of this century the legislation has been drafted on the basis that the lock-out is the main economic weapon which can be wielded by an employer. In fact, employers rarely if ever lock out nowadays. But there are other forms of economic and social pressure which they can bring to bear on unions and workers which are inimical to the integrity and proper operation of the system and which therefore should be subjected to whatever scheme of sanctions or consequences is adopted by the system. Save for "victimisation", most of them are not regulated at the moment, although there are some derelictions by

[80] *Stemp v. Australian Glass Manufacturers Co. Ltd* (1917) 23 C.L.R. 226 at 239-240 per Isaacs J.
[81] *Industrial Relations Act* 1988 (Cth), s.99.
[82] *Re Savage And the Director-General of Social Security* (1982) 5 A.L.D. 82. (Admin. Appeals Tribunal).

employers which can be called in aid as defences to otherwise impermissible actions by unions or workers.[83] Not unexpectedly, they rarely come before the courts or tribunals but are alleged to occur from time to time. The proper identification of these practices and an assessment of the extent of their use are essential to the further development of any sensible plan for the regulation of industrial activity. It is an area for future and fairly urgent research. Three of these alleged practices are provocation or incitement, refusal to communicate or discuss problems or plans, and failure to supply information.

The first of these involves action by an employer which falls short of a lock-out or industrial action but which is so unreasonable or provocative as to make it highly likely, that the workers will engage in industrial action.[84] It is a form of "constructive strike." A strike so caused places most of the legal responsibility on the union or the workers. They are the ones who have engaged in "industrial action," breached their contracts and so on. The employer runs little risk of incurring liability under the present rules of the system.[85] It is also possible that an employer who acts in such a way repudiates the workers' contracts of employment by acting in breach of the employer's implied contractual duty to co-operate, but this is not settled and in any event may provide the workers and the union with remedies of little practical use.

It is also said that employers sometimes neglect or decline to discuss matters with the union or workers.[86] Where there is an obligation in the award to consult, such action may be in breach of the award. But in most awards the obligation to consult is limited, say to situations where technological change is in train or redundancy is likely. However, a refusal to discuss any matter of concern when approached by the other side can be a source of industrial trouble even where no award breach is involved. It is akin to a refusal to bargain in good faith, which is regarded as an unfair practice in most systems of collective bargaining, and which, prohibited or not, is inimical to the effective operation of the bargaining process.

A third and related matter is the need for the union and the employees to have information, so that discussions or bargaining can proceed in an informed way. Often the relevant information is held only by the

[83] For example, the *Industrial Relations Act* 1988 (Cth), s.312 makes it an offence to incite persons to boycott a federal award, but it is a defence if the conduct charged was related to a failure or proposed failure by an employer to observe the award. The *Industrial Arbitration Act* 1940 (N.S.W.), s.100 imposes a penalty for an illegal strike, but s.101A provides a number of defences, one of which is if the employer "has by any unjust or unreasonable action provoked or incited the strike." In the model developed in this Chapter, such activity by an employer would not only be available as a defence, but would expose the employer to a liability for compensation.

[84] For an alleged use of this kind of tactic, see B. Creighton & A. Stewart *Labour Law An Introduction* (1990), p.219.

[85] Depending on the employer tactics adopted, it is just possible that they could constitute "industrial action" as defined in the *Industrial Relations Act* 1988 (Cth). Again depending on the facts, it is also conceivable that provocative employer action could be in breach of certain award clauses, say one which required consultation.

[86] Unions can also be guilty of this as where the employer does raise a matter for discussion and the union response is promptly to call for industrial action.

employer, who may sometimes be unenthusiastic about providing it to unions or workers, even where their rights or interests are clearly affected.[87]

These practices, mostly alleged to be committed by employers, have the potential to impair the effective operation of the arbitration system. There may be others as well. As well as the present "anti-victimisation" provisions, they need to be covered by the compliance mechanism of an arbitration system, just as much as "employee" industrial action needs to be covered, if that compliance mechanism is to be effective.

A common term

Indeed it is more convenient if the descriptive terms "industrial action" and "unfair practice" are replaced by one expression. It does not matter much what it is; "proscribed industrial activities" will do. Not only does this do away with the notion of "employer" and "employee" offences with their divisive overtones, but it recognises that some of these activities can be committed by both employers and unions, and it makes drafting simpler. Any definition of these activities should include the practices just discussed, normally alleged to be practised by employers, and some of the activities in the present concept of "industrial action", but narrowed as discussed earlier.

COMPENSATION FOR PROSCRIBED ACTIVITIES

The objective of industrial stability is served if these activities, properly identified and defined, are proscribed only where their occurrence runs counter to or threatens the operation or integrity of the arbitration system. This will be mainly where a dispute is before the tribunal or the subject matter of the proscribed activity is dealt with in an award of the tribunal.

What is to happen if commitment and self discipline fail and some proscribed industrial activity is committed at a time it should not have been? It seems clear that criminal or quasi criminal proceedings are likely to fail in serving the ends of the legislation. A different arrangement, more likely to prove workable, would see parties who engaged in proscribed activities made liable to pay compensation for loss arising from their actions if the activities were engaged in where the matter in contention was before the tribunal or was a matter covered by an existing award. This is a general statement. Obviously some elaborations are necessary.

Proscribed activities by both parties

If proscribed industrial activities were identified and described in the manner discussed earlier, it is possible that departures from the norms of the system could be committed by both parties in some situations. For example, a union might call a strike in respect of a claim before

[87] For a discussion of the English experience, see R.Craig and G.George "Disputes Arising from Non-disclosure of Financial Information to Trade Unions" (1988) 30 *J.I.R.* 83.

the tribunal, but the strike might have been provoked by unreasonable acts of the employer. In that situation, each party would have a right to seek compensation from the other. There is no inherent difficulty in this. Cross claims are a common occurrence in other areas. If both succeed, there is a set off, one against the other. In addition it is simple enough to provide that the commission of proscribed industrial activity by a claimant could be a basis for a proportionate reduction in the compensation otherwise payable, rather in the way contributory negligence will reduce the damages otherwise payable by a defendant in a negligence action at common law. In short, the occurrence of proscribed industrial activity would be a shield as much as a sword. So, in the example given, the union if subjected to proceedings for compensation might be content to show that the loss flowing from the activity was largely caused by the employer's own action. Or the union might wish to claim for losses it could show had occurred as a result of the employer's actions, but in that case the employer would no doubt plead the union's strike as a basis for a proportionate reduction in the amount of compensation otherwise payable.

A limit on compensation

A more difficult matter is to decide whether, in such a system, there should be an upper limit on the amount of compensation which might be obtained. Compensation is compensation, and in principle, the full amount of the loss proved to have been caused by proscribed industrial activity should be recoverable from the defaulting party. However, the amounts of compensation could be very high, running into millions of dollars if assessed according to conventional principles. This possibility runs counter to rather than supports the policy of preserving the integrity of the system and its awards. The regular bankruptcy of unions and employers is not a desirable outcome of an industrial relations system. So an upper limit on compensation may be justified on this basis.[88] How to calculate the limit would be difficult. Obviously a fixed sum would be crude, for a compensation order which would bankrupt one entity could be shrugged off by another. Possibly a formula geared to the net annual income of the compensation payer would be effective.

Relationship to common law actions

The one act of proscribed industrial activity could clearly also give rise to liabilities at common law, say for one or more of the economic torts. Some adjustment would therefore be necessary to avoid the possibility of double recovery. One possibility is to abolish tort liability in respect

[88] Such limits on compensation or damages can be found in other areas. For example, in New South Wales the cost of damages actions arising from motor vehicle accidents and industrial accidents rose to such levels that alternative methods of compensation had to be examined. These have included limits on the amount of general damages available for such occurrences. Compensation is also provided for in anti-discrimination legislation, but again it is subject to an upper limit.

of any situation which gives rise to liability for compensation under the model under discussion. If there is no cap on compensation available under the model then the case for barring tort actions is very strong. If there is a cap, the matter could be met by a provision to the effect that compensation for which an order had been or, if sought, could have been obtained under the system would, to that extent, be available as a set off against any tort action which might be brought in respect of the same incident.

Other remedies

Some other remedies were discussed briefly earlier in the Chapter. They included cancellation of registration and variation of award entitlements. There is scope for these in any scheme to support an industrial relations system. Their existence and use in defined circumstances has not attracted undue difficulties in the past and should not be expected to do so in the future if their use continues to be governed by the principles which have hither to prevailed.

Administration

There is one last aspect of the model which requires further comment, and that is the apparatus for its administration. This was touched on earlier when attention was drawn to the potential for abuse of remedies, even those of a non-criminal nature such as compensation or loss of benefits, if they can be engaged only by the parties. This suggests that the invocation of remedies should not be solely in the hands of the parties. But where else to accommodate an initiating entity? There are obvious difficulties in giving the tribunals any significant role in initiating proceedings quite apart from the separation of powers requirements imposed by the Constitution at federal level. For if the tribunal, or one of its arms, is to assess compensation as well as to conciliate and solve problems, there is potential for a role-conflict which could compromise the dispute resolution process, although Fisher seems to see some merit in keeping the two processes together, to the extent that the Constitution allows that.[89]

One answer is to have an independent person or body charged with the power to institute proceedings of its own motion for compensation (or for de-registration or loss of benefits or whatever remedies are available), and to be responsible for giving leave or consent to any party who wished to proceed independently. The consent would be a pre-requisite to the individual's ability to go ahead. This need for leave—usually of a tribunal—has been present at various times in the past and is useful

[89] W.K.Fisher, *op. cit.* The reference to the constitutional limitation arises from the circumstance that assessment of damages or compensation or the imposition of a penalty or the granting of an injunction according to defined criteria would very likely involve an exercise of judicial power. At Federal level this cannot be invested in a body which also exercises non-judicial functions, such as the making of arbitral awards.

to prevent abuse of the processes, but, without more, is not enough for it still leaves the initiative wholly with the parties. That is why the body proposed should also have power to act on its own motion in proceedings for compensation (or whatever remedies were available).

This suggested body would need to be not only independent, but professional and apolitical, basing its decisions mainly on the prima facie strength of the case in question. Generally, all cases which could properly be brought would be brought, either by the body proposed or by parties acting with its leave. Leave could be expected unless there was an indication of abuse of process or a virtually complete absence of evidence of proscribed industrial activity. The presence of such a body would also reduce any inclination towards the unhelpful sabre-rattling which can surface when industrial action occurs.

There is probably no entity in the present institutional structure which could carry out this function. Possibly the Industrial Registrar comes closest, but not close enough in that the Registrar is now part of the Commission at Federal level. The body which had the potential to discharge these functions was the short lived Industrial Relations Bureau. It performed few if any of the dastardly deeds its critics feared, and was steadily and quietly growing in independence and professionalism. However, it was removed pursuant to an electoral promise soon after labour came to power in 1983. Thus a new body would need to be brought into being to fulfil the role proposed.

Award making bodies could, as now, be left with some power to act of their own motion, which would not require leave or party initiation. This power would probably need to go no further than enabling the award maker to cancel or vary an award clause for failure by the defaulting party to adhere to conditions or bargains which were the basis on which the clause in question was granted. For example, if an employer gained altered work practices in an award on the footing that the employer would provide certain training and then the employer neglected or declined to supply the training, it would be useful to be able to restore the status quo, that is to vary the award so as to allow the old practices to continue until training was put in place.

THE FOURTH ENGINE

Any system for regulating industrial relations will operate well if the parties who use or are required to use it have commitment to the system and to the integrity of its solutions. Unless a system permits unrestricted use of economic force it will also need to define kinds of behaviour which are permissible and those which are not. The Australian system seems to have set out with the objective of making all, or almost all, industrial action unlawful. It failed to achieve this policy. From this has grown the notion that the policy was and is unattainable. The main reasons why the policy was not achieved were first, the criminal or quasi-criminal nature of the sanctions provided; secondly, the absence of any adequate

method for consistent and even handed enforcement of such sanctions as were in place; and thirdly the assumption that the main form of disruptive employer behaviour requiring regulation was the lock out. Paradoxically, the failure of the policy to achieve its stated aims has been a factor in its success in achieving other desirable outcomes. The failure has been influential in forcing many parties into more co-operative and trusting ways of behaviour in recent years. Still, the question remains what is to happen when co-operation and trust fail and parties will not abide by the norms of the system? If it is desired to start that fourth motor on the latest version of our 1904 flying machine, a compensation based model, rather than a system of punishment, might be worth considering. The refinements outlined in the Chapter would be necessary. The main ones were accurate identification of employee and especially employer behaviour which threatened the integrity of the process and of the award, and an independent and professional person or entity to administer the scheme. Other aspects, such as the relationship of compensation payments to damages from other causes of action, would also require attention, and suggestions have been made as to how these matters might be accommodated in the scheme.

It would have been expecting too much for something along these lines to have been devised in 1904. That legislation was radical enough as it was. But the nature of the sanctions in place then and since goes much of the way to explaining why they were not much used and to explaining why, when they were used, they proved less than efficacious. But the failure of an inappropriate mechanism does not justify the conclusion that something more attuned to the objectives of the system could not make a useful contribution to the regulation of industrial relations in Australia.