Australian Compulsory Arbitration: Will It Survive into the Twenty-First Century?

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Abstract
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AUSTRALIAN COMPULSORY ARBITRATION: WILL IT SURVIVE INTO THE TWENTY-FIRST CENTURY?

By Richard Mitchell* and Richard Naughton**

Over the past decade Australia has struggled to come to grips with the decline of its traditional economic and industrial structures, and the need to accommodate itself to the international context. Since 1900 Australia has had an industrial relations system highly regulated by law. Economic and political pressures are challenging the continuing relevance of this system, and particularly its ability to adapt to the need for an "enterprise-based" industrial relations culture. This article examines the type of industrial relations system erected under compulsory arbitration in Australia, its impact upon various aspects of the labour market, and the incremental nature of the process of reform to the system.

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I. INTRODUCTION

Since the turn of the century, Australia has regulated its industrial relations through statutory systems of conciliation and arbitration. Though there are seven separate major systems, those of the Commonwealth and the six states, until recently the uniformity of regulation amongst them was quite pronounced. Each was compulsory in essence, and most provided for a system of union incorporation and regulation. Inevitably, however, this division of regulatory power made Australian industrial relations law complex, and the pursuit of a coherent and unified industrial strategy difficult.

Under the terms of the Australian Constitution, the national government has the power to make laws with respect to conciliation and arbitration for the settlement of interstate industrial disputes. This is a somewhat limited power. It provides no authority for the national Parliament to legislate on industrial relations generally, to prescribe conditions of employment, or to otherwise directly regulate the employment contract. While there are other constitutional powers available to the national Parliament whereby some of these objectives might be secured, intervention by federal statute into industrial

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1 The Commonwealth of Australia Constitution Act 1900 63 & 64 Victoria, c. 12 (U.K)—the covering Act—was the Act of the Parliament at Westminster, which took effect from 1901 and established Australia as a federal nation-state. The Australian Constitution, all 128 sections of it, comprises section 9 of the covering Act just referred to. All future references to the Australian Constitution refer to the document that forms section 9 of the covering Act.

2 Australian Constitution, s. 51(xxxv).

3 There has been some imaginative use made of constitutional powers other than s. 51(xxxv) in recent times. During 1992 various legislative provisions were inserted into the federal legislation, which allow the Industrial Relations Commission to review unfair contracts made with independent contractors. These provisions depend for their validity upon the corporations' power (Australian Constitution, s. 51(xx)). In December 1992 the national Labor government announced plans to establish minimum standards in areas of redundancy, equal pay, and unfair dismissal for all Australian employees. The proposed legislation will rely upon the external affairs power (Australian Constitution, s. 51(xxxv)).
Australian Compulsory Arbitration

relations has been largely confined to erecting machinery for conciliation and arbitration. On the other hand, the legislative powers of state governments are plenary and are held concurrently with national authority. All states, until recently, have chosen to exercise their legislative powers over industrial relations in a way broadly consistent with the approach of national governments. Conflicts between the laws of the national Parliament and of the state parliaments are resolved in favour of federal supremacy.4

Since the introduction of arbitration, the national system has emerged as the leading, or pre-eminent institution. The decisions of the national industrial relations authority, the Australian Industrial Relations Commission, directly cover only some 33 per cent of the workforce, compared with almost 50 per cent covered by state authorities. Until recently, major policy initiatives in industrial relations have tended to derive from the national authority and to flow into the state systems in a semi-automatic process. Since the early 1990s, however, some state parliaments have begun to experiment with industrial relations systems widely differing from the compulsory arbitration norm. To understand the processes of industrial relations and their interrelationship with economic and political matters, we must nevertheless focus on the federal system. That is the approach adopted in this paper, although for illustrative purposes we will make some reference to state systems, and particularly to various state-sponsored reforms of recent years.

The reasons for the introduction of the compulsory arbitration systems may be briefly stated. Throughout the nineteenth century, the economies of the Australian colonies were almost entirely reliant upon the export of primary commodities. From the 1870s onwards there were increasing efforts to encourage a domestic economy, but this policy was given greater prominence in the 1890s as a result of the arrangements made for the federation of the Australian colonies. The development of the manufacturing industry depended on a number of factors, one of which was the stabilization of industrial relations. During the 1890s, Australia was brought to the point of economic collapse by a series of major strikes and severe economic depression. Various systems of voluntary conciliation and arbitration were tried but were completely

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*4* Australian Constitution, s. 109.

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ineffectual in resolving the industrial relations crisis. Compulsory arbitration emerged as the solution. Under this system, unions had to be recognized and guaranteed some role in the process of industrial regulation. Also a scheme of tariff protection, based upon the payment of fair wages, innovations in social legislation—such as workers' compensation, pensions, housing, and education—and the exclusion of coloured labour, constituted the remainder of a system of economic reform. Arbitration was, therefore, but one element, albeit an important one, in a scheme devised to assist in the development of a strong and independent domestic economy.

II. AUSTRALIAN COMPULSORY ARBITRATION: THE SYSTEM

The introduction of compulsory arbitration legislation, at the national and state levels, did not replace existing sources of industrial law. The system was merely legislatively superimposed upon the existing network of common law principles, which applied in the industrial relations context, particularly contracts and torts. It was also superimposed upon existing trade union legislation, masters and servants legislation, factories legislation, and so on. Nevertheless, the new arbitration statutes quickly established themselves as the principal form of industrial regulation, and for most of this century compulsory arbitration characterized Australian labour law.

At this point, it is necessary to set out in brief the elements of the national system of compulsory arbitration. These are embodied in the Industrial Relations Act of 1988. The IRA establishes the Industrial Relations Commission (IRC), which is the successor to the Court of Conciliation and Arbitration (1904-1956) and the Conciliation and Arbitration Commission (1956-1988). The IRC is comprised of a president, a vice-president, seven senior deputy presidents, fourteen deputy presidents and forty-two commissioners. The IRA invests the Commission with wide ranging powers to investigate and settle disputes,

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8 1988 (Cth) [hereinafter IRA].
not according to legal forms and precedents, but according to notions of industrial fairness and equity. Its powers are compulsory, both in the reference phase, when control may be taken over a dispute without the consent of both or either party, and in the resolution phase, when the outcome of the dispute, the award, is enforceable against all parties to the award. The powers of enforcement available under the Act are extensive.

Although the IRC is an independent statutory authority and cannot be guided or directed by government to arrive at a particular outcome, there are some broad general constraints spelled out in the IRA, which impact upon the outcomes of the dispute-settling process. In this regard, it is most important that the Commission takes into account the national economy and the public interest, and has regard to the need for uniformity of terms and conditions throughout an industry.

A further major feature of the legislative framework for compulsory arbitration is that it requires the registration of unions. Unions are encouraged to register under the IRA in order to act as representative bodies in the arbitral process. They have also had a major role in policing and enforcing awards. Virtually all major unions are registered under the compulsory arbitration provisions.

The importance of unions to the system is underlined by the considerable advantages, which they obtain under the statutory framework. With registration, they secure a separate legal personality, more or less automatic recognition by the employer, and something approaching a monopoly of coverage in the industries or occupations for which they are registered. They are also entitled to receive preferential treatment in employment for their members. While, on the other hand, Australian registered unions are the subject of considerable regulation over their internal affairs, and to a lesser degree over their external powers and objectives, this regulation does not appear to have substantially diminished their independence and power.

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9 Ibid., s. 110.
10 Ibid., s. 149.
11 See, for example, ibid., Part VIII, Part X, and Part XI.
12 Ibid., s. 90.
13 Ibid., s. 94.
14 Ibid., Part IX.
15 This registration also includes many "State" branches registered under the State Acts.
A final feature of the statutory framework of compulsory arbitration concerns the restriction of industrial action. It follows from the theory of compulsory arbitration that industrial action is unnecessary—and there are considerable restrictions, in the IRA and elsewhere, upon strikes and other forms of direct action.\(^{17}\)

It is in relation to industrial action that we find a greater reliance upon *external* legal rights in the course of the settlement of industrial disputes. This aspect of the arbitral system has long been one of great contention, particularly since the virtual abandonment of the practical use of the penalties available under the *Act*. Where disputes are not resolved within the system, industrial action may occur on a protracted basis. Although it has been the tendency of the parties to seek compromise by continuing the use of the conciliation and arbitration machinery, resort is not infrequently made to common law powers to punish direct action, and to statutory powers dealing with secondary boycotts.\(^{18}\)

Two more issues need to be addressed before we can examine the impact of compulsory arbitration upon the labour market and the obstacles it presents to economic and industrial reform.

First, it is necessary to understand the important regulatory role played by the awards (outcomes) of the system. As the arbitration process has evolved in Australia, awards have virtually come to codify the legal terms and conditions of employment for about 80 per cent of the workforce throughout the private and public sectors of the economy.\(^{19}\) The bulk of these award terms concerns the wage/effort exchange—principal laying down work classification structures, basic rates of pay within those classifications, working hours, holidays, leave, conditions for termination, and so on.

This specification of terms and conditions has both a public and private legal operation. Awards and agreements establish the minimum standards below which it is unlawful for an employer to continue employing labour. This, then, represents a form of a *fair employment contract*, which public policy dictates as desirable and, which is enforceable through a criminal/penal process exercised principally by specific enforcement agencies or by unions. In addition to this, the award system impacts upon the contract of employment, enabling

\(^{17}\) See *IRA*, _supra_ note 8, Part X and Part XI.


employees to recover their award entitlements through private legal action.\(^{20}\)

Secondly, it is important to appreciate the nature of the process whereby industrial disputes are settled in the Australian system. In appearance there is no doubt that the process of arbitration has taken, and, to an extent at least, still takes a quasi-judicial form, although the statutes are often very specific about the non-legal nature of the proceedings.\(^{21}\) In part this judicial form is suggested by the legislation itself with different processes occurring in a logical sequence. Disputes are initiated by serving demands upon the opposing party, the tribunal is notified, an avenue of appeal against the decision is provided, and the decision is eventually legally enforced. These are all concepts redolent with the flavour of legal proceedings. The judicial appearance of arbitration has also been substantially manufactured in the methods of operation employed within the tribunals themselves. For example, parties to disputes may present evidence supporting their case, may be cross-examined on this evidence, and their argument may be supported by principles that have emerged from previous decisions.

The combination of these and other factors gave rise to the development of a general judicial theory of arbitration, which largely characterized the interpretation of the industrial relations process until the 1960s.\(^{22}\) Within this theory, the role of precedent and the objective of industrial justice were presented as the major determinants of the tribunal’s decision making, and other material issues such as the pressure of market forces, political pressures, bargaining power, and so on were accorded little importance.\(^{23}\)

The general consensus of opinion now is that this theory of arbitration was little more than a myth, although the judicial explanation of arbitration may have had greater efficacy in certain types of disputes than in others. Generally speaking, arbitration operated subject to the usual pressures placed on all industrial relations systems. However, it occurred in the context of the relationships and pressures formed by the unique institutions themselves, in particular by the need of the industrial

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20 See, for example, Gregory v. Philip Morris (1988), 80 A.L.R. 455.
21 IRA, supra note 8, s. 110; and Industrial Relations Act 1991 (N.S.W.), s. 354.
23 Ibid.
tribunals to guarantee their own role and by the existence of a peculiarly
dynamic relationship between the tribunals and trade unions.24

It follows from the above that it is unwise to attribute to the
compulsory arbitration authority the kind of autonomy and
independence that would usually be reserved for judicial bodies,
notwithstanding its legislative character.25 The federal tribunal's
autonomy has always been qualified to a degree by its economic and
political context, and, therefore, the extent of its autonomy has always
been relative, not absolute. Having made that point, it is pertinent to
note that until recently, generally speaking, national governments from
both sides of the political divide tended not to intrude too greatly into
the national tribunal's deliberations. A brief example will serve to make
the point. Of nineteen national wage cases brought before the
Conciliation and Arbitration Commission in the years 1953 to 1972, the
federal government, largely reserving its role to the presentation of
evidence and advice, indicated a preference for a money outcome in only
four cases.26 An extreme case may be seen in R. G. Menzies' Liberal
Government's response to the National Wage Case of 1952.27 Inflation
at that time was an unprecedented 20 per cent, and the employers' submission was that there should be a reduction in the basic wage, an
increase in the standard hours of employment, and an abolition of
automatic quarterly cost of living adjustments. The government refused
either to support or to oppose the employers' applications, the Prime
Minister stating in Parliament that it was a matter for the legal process
and not a political matter.28

To summarize, arbitration was a system introduced to facilitate the
settlement of industrial disputes and to regularize patterns of
industrial relations in Australia. It evolved, however, quite quickly into a
national system for regulating employment contracts by award, cloaked in a rather technical and legalized process. Compared to most other
industrial relations systems, the institutions, legislation, and awards of

25 Ibid.
26 See D. Brereton, Institutions in the Wage Determination Process: The Australian Conciliation and Arbitration Commission 1904-70 (Stanford University, Department of Political Science, 1989) [unpublished].
27 See Metal Trades Award 1952 (1968), 124 C.A.R. 463.
the Australian system were unique, as was their impact on the labour market.

III. THE SYSTEM'S IMPACT UPON THE LABOUR MARKET

The pressures for change in industrial relations law and institutions must be understood in the context of the impact made by those laws and institutions upon industrial relations processes and labour market operation. These are complex matters and there is space here only for a brief survey of the major issues.

A. Wages and Conditions

From the time of its introduction, the system of industrial dispute settlement was basically concerned with the essence of the employment relationship—the wage/work bargain. The settlement of industrial disputes developed into a formalized process whereby increases in wages and other conditions of employment were obtained and passed on to other sections of the workforce. This process tended to be relatively centralized, with major national or industry cases showing the way. The standards adopted in those cases flowed into all federal awards and into state awards, where they were accepted by the state tribunals. This process helped maintain a uniform level of minimum employment guarantees throughout the country. Market forces were directly recognized only in the form of over-award payments, which were themselves usually subject to comparison and flow-on pressures. It is a point of interest to note that, notwithstanding this relative uniformity across occupations and industries, Australia is estimated to have one of the most flexible external labour markets among Organisation for Economic Co-operation and Development (OECD) countries.29

Much of the centralized control of the system depended upon the authority and status of the tribunals, particularly the federal body. Prior to the late 1960s, the legal constraints upon the use of direct action were extensive, and were implemented sufficiently frequently to lend credence to the so-called judicial model. Even when the enforcement powers were effectively curtailed in the late 1960s, the underlying central control of the tribunal—though from time to time demonstrated to be

questionable—was generally sustained by the influence of the key employer and union peak councils for much of the period from 1960 to 1990.30

 Generally speaking, this convention of centralized dispute settlement has provided a useful device whereby wages can be distributed on a national basis according to the level of unemployment and inflation. Thus, in the depression years of 1930-1932, the federal tribunal was able to bring about a uniform decrease of 10 per cent in award wages, and in the 1970s, it was able to implement a system of wage indexation which kept wage growth below the rate of inflation. On the other hand, it also follows that bargaining arrangements have tended to be at the industry rather than at the firm level, and that the focus of award fixation has tended to be upon the macro-wage level, downplaying or neglecting the conditions of individual enterprises and matters of productivity and efficiency at the work place level. These are features of the Australian system which have been subject to much recent criticism.31

B. Award Coverage

Another important outcome of the compulsory arbitration system is the pervasiveness of awards. Unlike other industrial relations systems, it has been virtually impossible for employers to escape the regulation of the award system in Australia. This is principally because the system of compulsory arbitration does not require union involvement at the place of work in order for employers and employees to be drawn into the process. At the national level, employers may be covered by award conditions when they are made parties to a dispute—a relatively straightforward procedure. They in turn will be bound in respect of all of their employees, whether unionized or not, and whether or not these employees are in actual dispute with the employer.32 At the national level, therefore, the award has acted as a de facto common rule. In the state systems awards are common rules de jure.

30 See Sheridan, supra note 22.


The implications of these arrangements are obvious. Leaving aside major industry where there is active unionism, Australia has about 580 thousand (non-farm) small enterprises, each with fewer than twenty employees. Seventy per cent of these have no union members, with 67 per cent of workplaces (of any size) in the private sector having none. On the other hand, the vast majority of workplaces are covered by award conditions. Approximately 80 per cent of all Australian employees are covered by awards.

C. Award Structure and Content

Australian award structure has been extremely complex, reflecting the complexities of trade union organization. Thus, awards typically have applied to occupations and/or to industries, and some employers have been covered by multiple awards regulating various parts of their workforce. While relatively few workplaces have had multi-award coverage, its impact, where it occurred, was pronounced because of the proportion of workers employed in these larger workplaces. Multi-award coverage has complicated the administration of enterprises and the industrial relations process.

In terms of content, awards deal most extensively with the wage/work exchange—principally with the rewards for labour under time-hire contracts (for example, wages, allowances, various forms of leave, and so on). As part of this regulation, hours of work are prescribed and certain other limited duties apply, but there has been no general performance requirement built into awards beyond the normal expectations of the principles inherent in the contract of employment.

In general, there are three areas in which it is agreed that awards have produced outcomes inimical to improving efficiency and productivity. First, job classifications specified in awards became very technical and, over time, narrowly defined. This in turn resulted in jobs lacking potential for career opportunity and hampered the employer's flexible use of labour. Second, severe restrictions upon the spread of working hours and the use of casuals and part-time labour in many industries has limited the employer's power to schedule and organize the work process. Thirdly, awards on the whole did not encourage the use of performance-based pay systems, either as an adjunct to, or a substitute for, the time-rate system. It is in these areas, which provide for internal

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33 R. Callus et al., *Industrial Relations at Work: The Australian Workplace Industrial Relations Survey* (Canberra: Commonwealth Department of Industrial Relations, ACPs, 1991) c. 3.
labour market flexibility, that Australia’s performance is said to be particularly poor.34

D. Union Influence and Growth

Several aspects of the compulsory arbitration system have contributed to the important and powerful position which unions hold in Australian industrial relations. First, their participation was seen as vital to the success of arbitration, and they were, therefore, bestowed with several legal advantages under the arbitration statutes. Registration brought with it automatic recognition, but benefits such as legal status, preferential treatment for union members in employment, and protection against discrimination further enhanced that position.35 The influence of arbitration may be seen in the rapid growth of unionism—both in terms of numbers of unions and density of union membership—between 1900 and 1920. Since then Australian unions have remained one of the most numerically powerful movements in the industrialized democracies, though suffering a steady decline in membership since the early 1980s.36

Aside from becoming numerically strong, Australian unions have been very influential in the industrial relations process because they are the organizations that, on the whole, have been responsible for processing claims, establishing awards, and supervising those awards. Furthermore, the terms of awards impose a far greater percentage of duties and responsibilities upon employers than upon employees. Those who claim that the system operates principally for the benefit of unions and their members are, therefore, in a sense correct, though this is by no means a valid criticism of the system as a whole. The key issue is whether in performing this function, the unions are fulfilling a valuable role on a broader social and economic scale.


35 See IRA, supra note 8, s. 192 (incorporation of organizations), s. 122 (preference power), and s. 334 (offence provisions where discrimination against members of organizations).

E. Union Structure

An important additional impact which arbitration legislation has had upon the union movement concerns the latter’s structure. At the turn of the century, Australian unions were organized along craft, industry, and general conglomerate lines, and the requirements for registration under arbitration legislation institutionalized such a varied organizational structure. Hence, subsequent rationalization proved very difficult to achieve. As a result of this, Australian workplaces are marked by multi-unionism, with the attendant problems of complex bargaining arrangements and demarcation disputes associated with that state of affairs. A distinct but associated problem concerns the fact that a high percentage of Australian trade unions are small in size and many have difficulty in adequately representing their members’ interests.\(^{37}\)

F. Industrial Action

Finally, it should be noted that, despite its apparent objectives, the arbitration system has been unable to eliminate, or perhaps even to reduce, the extent to which the parties to industrial relations resort to direct action in pursuit of their claims. For many critics, this single fact encapsulates the failure of the compulsory arbitration system—employers being effectively bound to comply with award conditions while unions are free to take industrial action to achieve over-award benefits.\(^{38}\) Although international comparisons of strike data are notoriously difficult to make with any degree of accuracy, the Australian record is certainly worse than many other countries, including many of those in which the strike weapon is accepted as a legitimate part of the industrial relations process.\(^{39}\) On the other hand, while the compulsory arbitration system has not reduced the incidence of strikes, it appears to have influenced the nature of strike action. The pattern of activity disclosed by the comparative data indicates that Australian industrial


\(^{39}\) See Committee of Review, *Australian Industrial Relations Law and Systems*, vol. 2 (Canberra: AOPS, 1985) (Chair: K. Hancock) at 130-38.
disputes are characterized by high numbers of short-term strikes, designed to bring to the tribunals’ attention the issues in dispute.40

IV. PRESSURES FOR REFORM

Since its introduction in 1904, the national system of compulsory arbitration has been subject to an almost continuous process of minor and major legislative amendment, culminating in a major reconstruction and re-drafting of the IRA in 1988,41 and followed by several key amendments in 1991 and 1992.42 Notwithstanding this process of change, however, the key elements of the system outlined earlier in this paper remain relatively undisturbed. Nevertheless, there is a steady, incremental process of reform underway, which, perhaps understated in the appearance of the legislation, is without doubt unprecedented in the history of the compulsory arbitration system.

What are the sources of this pressure for reform? First, Australia has clearly been influenced by international developments.43 Since the mid-1970s at least, there has been a strong trend in Europe and North America, and most recently in New Zealand, towards the deregulation of labour markets and industrial relations practices. In part, some of this pressure is purely ideological, with a resurgence of free market ideas emerging particularly in the United Kingdom and the United States.44 However, the principal cause of the change in industrial relations internationally has undoubtedly been the relative decline of the industrialized market economies. Among the reasons for this are the decline of many basic industries such as steel, shipbuilding, textiles and general manufacturing; the offshore activities of multi-national

40 Mitchell & Scherer, supra note 36 at 109.
41 IRA, supra note 8.
42 The chief amendments made in 1991 were a re-writing of the provisions dealing with union amalgamations and the insertion of section 118A, which clarified the RMC’s powers concerning the rights of unions to represent particular groups of employees (Industrial Relations Legislation Amendment Act 1990, Act No. 19 of 1991). In 1992 provisions were inserted in the IRA that allow the RMC to deal with contracts involving independent contractors; those sections dealing with certified agreements were repealed and replaced by a new Division 3A (Industrial Relations Amendment Act 1992, Act No. 109 of 1992).
corporations; a wave of new technology; and steady increases in unemployment. In other words, industrial relations reform has been seen as a necessary step towards economic restructuring.\textsuperscript{45}

Secondly, this process has been heightened by particular developments within Australia. Shielded behind tariff barriers, Australian manufacturing industry operated within a basically domestic market, while the economy was supported by earnings from the export of primary commodities, which were responsible for about 85 per cent of export earnings. However, earnings from exported primary commodities have long been on the decline, and over the past fifteen years efforts have been made to internationalize the economy with a gradual withdrawal of protectionist policies.

Until the 1980s these developments were slow to impact upon the labour market. However, in the early 1980s the Australian manufacturing industry, in particular, experienced a massive shakeout, which saw the loss of hundreds of thousands of jobs and a rapid increase in unemployment to a level of about 10 per cent in 1983. Employment in the manufacturing sector, which had peaked at about 28 per cent in 1950, declined to less than 20 per cent by 1983 and this decline has continued (15.3 per cent in 1990).\textsuperscript{46} These developments gave rise to a revised and much more pro-active approach in the Australian union movement towards the problems of industry and labour market policy and the associated questions of industrial relations.\textsuperscript{47}

During the 1980s these pressures had come to focus upon a set of common objectives associated with economic restructuring, shared by most sectors of the political and economic community. These objectives include shifting the focus of industrial relations strategy to the workplace (or enterprise), rationalizing award structure and content to enhance flexibility, rationalizing union structure and improving the skill levels and skill flexibility of the workforce.


V. THE PROCESS OF REFORM

A. Public Debate and Inquiry

Numerous official and private inquiries into the state of industrial relations laws, institutions and practices, and debates, which have developed around the activities of special interest and pressure groups, have underscored the process of reform in Australia. In this debate a private organization known as the H.R. Nicholls Society has adopted an extreme position. It advocates the dismantling of the compulsory arbitration system and the wholesale deregulation of the labour market, including the use of civil remedies against trade unions in the course of industrial disputes. These views are shared by one or two employers' associations. They are not, however, the views publicly taken by the major federal political parties nor of most major parties to industrial relations.

Of the many inquiries conducted at the national and state levels, very few have addressed the issue of industrial relations and its relationship to economic restructuring in more than marginal terms. The most important inquiry of the 1980s was that appointed by the national Labor government (under the Chairmanship of Professor Keith Hancock) in 1983. In its 1985 report, the Hancock Committee declined to make any recommendations for the radical reform of the compulsory arbitration system. It stated:

After an examination of all the material before us, we reached the conclusion that no substantial case had been made that industrial relations would improve if conciliation and arbitration were abandoned in favour of some other system, such as collective bargaining. Thus, we have concluded that conciliation and arbitration should remain the mechanism for regulating industrial relations in Australia.

We accept that the system is in need of revision and that efforts should be made to improve its operation.

This conclusion served to heighten debate rather than to assuage it. While it is true that the report was conservative—and did little to induce serious systemic change, especially at the workplace level—it did make certain recommendations for reform, which went some way towards addressing the pressing problems of centralism and union


structure. Many of these recommendations were carried through in the major revision of the system enacted in 1988.

Standing in stark contrast to the Hancock Report are the results of two other inquiries undertaken in the latter half of the 1980s. One of these, the Niland Report, was commissioned by the Liberal/National (non-Labor) New South Wales government in June 1988. The central thrust of the report was that industrial relations issues should be decentralized and dealt with at an industry or enterprise level. Several recommendations were made to facilitate collective bargaining, in general, and enterprise bargaining in particular. These included developing enterprise-based bargaining units and providing for special enterprise agreements. At a more general level, compulsory arbitration was to be maintained for disputes over rights only. Thus, the parties would have no access to state machinery for disputes over interests that would of necessity have to be settled by direct negotiation or through industrial action. Strikes would be legal only in interest disputes. The basis for these recommendations was to foster greater productive efficiency, to develop an awareness of the link between the prosperity of the enterprise and those who work in it, and to link wage adjustment to productivity or gain-sharing in the enterprise.

The second inquiry of note was that undertaken by the Business Council of Australia. In 1987 it established an Industrial Relations Study Commission to look into the advisability of an enterprise-based industrial relations system. Its report, *Enterprise-Based Bargaining Units: A Better Way of Working,* is as explicit as the Niland Report in its enthusiasm for an enterprise focus, but unlike the other reports examined, it does not regard legislative change as being vital to the achievement of that objective. On the contrary, its research data disclose management to be the central force for change and, therefore, identify the shift to enterprise industrial relations as a management problem. Enterprise bargaining units and agreements are seen as being attainable within the existing legislative framework.

These various reports have provided the main focus for debate over the need for industrial relations reform. Others have taken a

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51 See Niland, *supra* note 43 at 17 and at 19.


different approach to questions affecting Australian industrial relations. One prominent example is the Australian Council of Trade Unions' (ACTU) *Future Strategies for the Trade Union Movement* (1987), which proposes a restructuring process based upon the amalgamation of unions into twenty major industry groups as a means of both securing trade union survival against legal attack and providing improved and more efficient services to members. In accordance with the ACTU's policy of restructuring, the number of federally registered unions has fallen from 142 in August 1989 to seventy-two in July 1993. It is anticipated that the number of unions will drop to approximately fifty-five by the end of 1993.

**B. Legislative Reform**

In order to anticipate the potential legal developments in the 21st century, it is necessary to identify those trends of the late 20th century, which are both ongoing and relevant. However, separating out some legislative developments from others, particularly in a very active field, is an arbitrary process. For argument's sake one might postulate that the process of economic restructuring has been underway since the mid-1970s at least, and that, therefore, the legislation of that period is worthy of close examination. It is the contention of this paper, however, that the onset of a fundamental reappraisal of the role of compulsory arbitration in the Australian economy began in the Australian Labor Party and the union movement as late as the mid-1980s. It is, therefore, from the legislation of around this time that most inferences as to the future should be drawn. Having established that standpoint, however, it is relevant, if not vital, to reappraise the position to take account of earlier developments.

There is evidence from some late 1970s and early 1980s legislation that the compulsory arbitration system and its structures might no longer be regarded as inviolable. Examples appear both at the national and state levels. They include the virtual abolition of the jurisdiction of compulsory arbitration over the electricity industry in Queensland and its replacement by a tribunal with greatly reduced powers, and the decision of the national Labor government to

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54 *ACTU*, supra note 37.


56 *Electricity (Continuity of Supply) Act* 1985 (Qld.); *Electricity Authorities Industrial Causes Act* 1985 (Qld.).
introduce special legislation to de-register a radical building union, rather than rely on the powers available under the IRA. More important was the approach of the national Liberal/National Party coalition (non-Labor) government (1975-1983) to industrial relations in the public sector in the late 1970s and early 1980s. Legislation introduced at this time included the abolition of the rights of arbitration in respect of a number of managerial functions, which were principally related to the reduction of expenditure and the increase of efficiency in the public sector.

We may draw from these incidents the conclusion that governments were becoming increasingly willing to make laws to by-pass the compulsory arbitration system when necessary. As yet, however, no political party had evinced an intention to introduce legislation which went much further than evading the system. The most recent and important reforms to the national system occurred with the introduction of the IRA in 1988, and the subsequent amendments to it in 1991 and 1992. It was noted earlier that the recommendations of the Hancock Report, which formed the basis of the new legislation, made no proposals for a radical attack on the essence of compulsory arbitration. There were, however, some new provisions which attempted to meet criticisms of the existing framework. These included provisions which impacted upon enterprise industrial relations—among them, an emphasis upon the inclusion of grievance procedures in agreements, and a new procedure for certified agreements in industrial disputes.

These agreements, originally known as “section 115” agreements, allowed the parties, in theory at least, to conduct their industrial relations outside the compulsory arbitration system—cutting off their terms and conditions from the centralized award conditions. But the procedure that was introduced in 1988 remained a half-hearted gesture. Agreements were not required to be “enterprise” or “industry” in nature, and they remained subject to scrutiny by the national IRC. It was necessary, for example, for the agreement to satisfy a public interest

57 Builders’ Labourers’ Federation (Cancellation of Registration) Act 1986 (Cth).
58 The Public Service Arbitration Amendment Act, 1980 (Cth); Commonwealth Employees (Redeployment and Retirement) Amendment Act, 1980 (Cth).
59 IRA, supra note 42.
60 Committee of Review, supra note 49
61 IRA, supra note 8, ss. 115-17 and in particular s. 115(8).
Criticism about the inflexibility of the procedure led ultimately to the repeal of section 115 in 1992 and its replacement by an entirely new division (Division 3A) of the IRA dealing with certified agreements. The only general requirement that must be satisfied under this new division is that the agreement is not disadvantageous to employees taking their employment conditions as a whole. In circumstances in which this test is satisfied, the IRC is obliged to certify the agreement. Importantly, the new provisions also require that a union or unions must be a party to any "single business" agreement, and thus the possibility of direct negotiations between an employer and a single employee or between an employer and a group of employees at the enterprise level is obstructed, unless those agreements are at least endorsed by a trade union.

A second area in which the IRA might be said to have signalled serious reform concerned the issue of union structure. Broadly speaking, the policy of the Act was twofold: first, to reduce the number of unions, (especially the small ones) and second, to bring about a rationalization of union coverage of particular industries. Newly formed unions could no longer be registered unless they had at least 10,000 members and were "industry" in nature. It was recognized, however, that dealing with existing registered unions presented greater difficulties. Those with fewer than 10,000 members could either justify their continued registration or be excluded from the system. However, in general terms the policy of the government and the union peak council (ACTU) was to reduce union numbers drastically to something in the order of twenty "super" industry unions. This strategy was assisted in two fundamental ways. First, simplified amalgamation procedures were designed to assist smaller unions to become larger organizations.

Secondly, the IRA provided for a form of union restructuring by an order of the IRC in the course of settling industrial disputes. Under this latter

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63 IRA, supra note 8, ss. 134 A-N.


65 It is unlikely that this minimum size requirement will remain in place, however, following the success of a complaint made to the International Labour Organisation Committee on Freedom of Association by Australian employer associations that the stipulation violated these principles (Committee on Freedom of Association, case no. 1559). The Committee formally upheld the complaint at its meeting in November 1992 (see 284th Report of the Committee, paras. 200-63).

66 IRA, supra note 8, s. 189, s. 193, and Part IX Div. 7 (introduced into legislation by Act no. 19 of 1991. See supra note 42).
provision, union memberships were exchanged by order so as to bring about a form of "industry" unionism.67

The confusion of purpose in these provisions is self-evident. One strategy is to encourage rational organization on industry lines, another is to reduce the numbers of unions by allowing amalgamations, which may draw members from diverse industries and occupations. Except in the large-industry sector, enterprise unions are unable to be registered. By and large these developments are out of step with the current push for an enterprise focus, which is argued to be heavily dependent upon the reduction of multi-unionism.

The legislative steps taken at the federal level, while undoubtedly more important from a national policy point of view, have been outflanked by more adventurous and far-reaching changes at the state level.68 The most important developments have taken place in the states of Victoria and New South Wales, and these have been underscored by the deregulation of industrial relations by the current government of New Zealand. The Employee Relations Act 199269 was one of the first legislative initiatives of the newly elected Victorian Liberal/National Party (non-Labor) government. This radical piece of legislation abolished the system of compulsory arbitration in Victoria and replaced it with an employee relations system based upon individual and collective employment agreements. All existing awards of the former industrial tribunal were abolished, and the new statutory tribunal, the Employee Relations Commission, may only exercise its powers to settle disputes and make future awards when all parties consent to it becoming involved in the matter.70 The legislation attempts to facilitate the process of direct negotiations between employers and employees. A collective employment agreement may be made between an employer

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68 One early example of these legislative measures was the Voluntary Employment Agreement (VEA) procedure introduced by the National Party (non-Labor) government of Queensland in 1987. This legislation allowed for direct negotiation of enterprise agreements between employers and groups of employees. For commentary, see L. Boulle, "Voluntary Employment Agreements: A Queensland Essay" (1990) 3 Ausl. J. Lab. Law 247.


70 Employee Relations Act, supra note 69, ss. 92(2) and 98(2).
and some or all of its employees, while an individual employment agreement is able to be made with a single employee.\textsuperscript{71} These agreements are subject to certain minimum requirements (for example, hourly rates of pay, annual leave, and sick leave).\textsuperscript{72} Apart from these limited statutory requirements, however, the Employee Relations Commission has no power to scrutinize the agreements and there is no overriding public interest test. Unions have a strictly limited role under this new Victorian regime. The legislation contemplates that unions may be appointed as the bargaining agent for an individual employee or group of employees, but they are not entitled to be parties to these employment agreements.\textsuperscript{73} There is no obligation upon an employer to engage in bargaining, nor to recognize a bargaining agent authorized by employees to act on their behalf.

Enterprise-focussed reforms have also been attempted in the state of New South Wales.\textsuperscript{74} The \textit{Industrial Relations Act} of 1991\textsuperscript{75} specifically provides for the negotiation of enterprise agreements to regulate the conditions of employment of persons employed in a single enterprise (defined to mean the business of a single employer). Employee parties to an enterprise agreement may be a group of 65 per cent of the employees in an enterprise, or a works committee representing the employees in an enterprise. There is no general requirement that an enterprise agreement must be in the public interest, and such agreements may override all or any of the conditions set out in New South Wales' awards, although there are safeguards spelled out in the \textit{Act} preventing the undercutting of minimum conditions, such as standard hours, work, holidays, sick leave, and so on.\textsuperscript{76} Enterprise agreements must be registered to be enforceable, and there is a Commissioner for Enterprise Agreements, whose role is to counsel the parties and to promote the use of enterprise agreements generally.

These provisions contain important distinctions from their counterpart in the federal \textit{IRA}. In particular, they enable non-unionized groups of workers to make agreements through a works committee, which in effect is a form of enterprise unionism, and they exclude a

\textsuperscript{71} \textit{Ibid.}, ss. 8 and 9.
\textsuperscript{72} \textit{Ibid.}, Schedule 1.
\textsuperscript{73} \textit{Ibid.}, ss. 8 and 9.
\textsuperscript{74} \textit{Industrial Arbitration (Enterprise Agreements) Amendment Act}, 1990 (N.S.W.), s. 131(3).
\textsuperscript{75} (N.S.W.) (ch. 2, pt. 3, div. 2).
\textsuperscript{76} \textit{Ibid.}, s. 122.
general overriding public interest test whereby the industrial tribunal exercises its authority over the content of the agreement.

The strategy for enterprise-focused agreements and bargaining units also formed the basis of the Liberal/National Opposition parties at the time of the 1993 federal election, which was fought, to a not inconsiderable degree over the future of the Australian industrial relations system. The federal coalition parties had planned to implement industrial legislation based upon the Jobsback policy, which was announced in October 1992. The general strategy outlined in Jobsback was very similar to the provisions of the Employee Relations Act 1992 (Vic). It proposed to replace compulsory arbitration with an industrial relations system based upon employment agreements that were directly negotiated between employers and employees. The regulation of terms of employment by award was only to be an option where all parties agreed to "opt-in" to the award system. Jobsback referred to workplace agreements that were able to be negotiated between employers and either individual employees or some or all of the workforce. In essence, this would allow for a form of enterprise bargaining by individuals or by non-unionized groups. According to the coalition policy, the IRC would be retained, but was likely to play a considerably reduced role in dispute settlement. It was, for example, only empowered to make an award or settle disputes when all parties voluntarily submitted to its jurisdiction. Another important aspect of Jobsback was its emphasis on principles of freedom of association, most particularly the right of an individual not to join a trade union. Compulsory unionism and "closed shop" arrangements were to be outlawed and the IRC was to be prohibited from including preference clauses in workplace agreements or awards. The Jobsback policy also favoured the development of enterprise unionism through the removal of the 10,000 minimum membership requirement currently expressed in the IRA.

A further source of influence upon future non-Labor governments might be found in the New Zealand Employment Contracts Act of 1991. This Act, which has attracted much interest in Australian business circles, and formed at least, in part, the conceptual inspiration for the Victorian legislation, provides no institutional support for parties
negotiating their employment contracts other than the right to appoint a bargaining agent, which may or may not be a union.\textsuperscript{79} At a broader level, there are other relevant areas of legislation that bear upon the general reform of Australian industrial relations. One point that emerges from the foregoing discussion is the potential divisiveness between state jurisdictions and between state and national jurisdictions. As long as the system remains split in this way, a coherent strategy for the reform of industrial relations will continue to be obstructed by a combination of constitutional and political problems.

The difficulties presented by the presence of a dual structure in Australian industrial relations have been the subject of much discussion.\textsuperscript{80} As early as 1983, legislative steps were taken by the federal government to improve the level of cooperation and coordination between the federal and state systems. Among these amendments were the facilitating of joint proceedings of federal and state tribunals; reference of disputes by the federal tribunal to a state tribunal; and provision for members of the federal tribunal to deal with particular state disputes on request by a state tribunal.\textsuperscript{81} New measures to further this process, including the dual appointment of persons to both federal and state tribunals and regular meetings between the heads of the state and federal tribunals and the Registrars of these tribunals, were made in 1988.\textsuperscript{82} While none of this establishes an integrated system as such, it provides assistance in promoting greater consistency and uniformity in amending awards.

Finally, national government has provided support for a national training policy aimed at improving the skill base of the workforce. The argument that Australian workforce skills are too low and that new award structures—less rigidly defined in job terms—should be designed to encourage mobility of employees within organizations as they gain increased skills and a greater range of skills, underpins the thrust of award restructuring. The Labor government's \textit{Training Guarantee Act} of 1990\textsuperscript{83} and associated legislation establishes a scheme whereby employers with an annual payroll of more than $220,000 must spend at

\begin{footnotes}

\textsuperscript{80} See Committee of Review, vol. 2, supra note 39, c. 6.

\textsuperscript{81} \textit{IRA}, supra note 8, s. 173.

\textsuperscript{82} \textit{Ibid.}, ss. 13-14 and ss. 171-75.

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least 1.5 per cent of their total payroll on training activities which are employment related.

C. The Accord

Important though these various legislative experiments may have been, undoubtedly the key to understanding the process of industrial relations and labour market reform in the 1980s is the Accord between the Australian Labor Party and the ACTU.84 The Accord was established shortly before the 1983 general election, which saw a national Labor government elected to office for the first time since 1975. Nominally the Accord was an agreement between the political and industrial wings of the labour movement on prices and incomes. However, in reality it was a wide ranging political agreement covering economic policy generally. In its early years, the Accord was principally a vehicle for controlling the outcome of National Wage Case decisions. Thus, each case was preceded by extensive negotiations between the government and the ACTU in which arrangements were made for a desirable "package" of wage outcomes and other social benefits, which might be presented to the national tribunal (the IRC).

The Accord proved remarkably successful in restraining wage outcomes in the context of continued economic problems, including adverse trade balances and the collapse of the Australian dollar. Under it, the unions were restricted to a level of indexed increases and bound by a commitment not to seek further increases. In return, the government agreed to institute various social measures, including a form of price control, re-establishing a programme of government health insurance, reforming the tax system, and increasing the level of minimum wages. Unions that attempted to break out of this centralized system were generally unsuccessful, as there was no support from the ACTU or other unions for any anti-Accord strategy. Only one union, the radical Builders' Labourers' Federation, persistently defied the no-extra-claims commitment, and it was removed from the compulsory arbitration system by a process of de-registration in 1986.85

Prior to 1987 the Accord process relied upon a highly centralized approach to industrial relations reform. The National Wage Decision of

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84 ACTU, Statement of Accord, supra note 47.
March 1987 brought major change to that strategy by linking the process of wage fixation with microeconomic reform in a very detailed manner.

The 1987 case introduced a two-tier wage system. Under the first tier, the workforce was granted a discounted wage increase of a flat sum. Under the second tier, unions and employers were required to bargain for a further increase of up to 4 per cent under a "restructuring and efficiency" principle. This required the parties to show that restrictive work practices, formal and informal, were being eliminated and that these were equivalent, in productivity terms, to the increase being sought. This principle was very effective in removing restrictions on working time, overtime, use of casual and part-time labour, and other work-related restrictions. It also brought about changes in award structures, payment systems, and the use of internal disputes procedures.

This process was taken a step further in the National Wage Decision of August 1988. A new principle, "structural efficiency," was introduced to replace the two-tier system. Under this principle, unions were granted an increase in wages upon the condition that they undertook a complete restructuring of their existing awards (particularly in content, job classification, and wage relativities). That process commenced in 1988 and is ongoing.

Throughout the 1980s the national tribunal (the IRC) endorsed, with some minor qualification, the tenor of these various Accord arrangements—a process which has been described as "managed decentralism." This practice seemed to have come to an end with the decision of the IRC in the National Wage Decision of April 1991. In essence the arrangements under the Accord submitted in this case were for a twelve dollar increase and for the possibility of a further 4.5 per cent to be paid as a result of enterprise bargaining for productivity increases. The IRC refused to follow this formula in making its decision, and thus, failed to enforce this further step towards enterprise

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87 Ibid.
90 T. McDonald & M. Rimmer, "Award Restructuring and Wages Policy" (1989) 37 Growth 111, CEDA.
91 (1991), 36 I.R. 120.
bargaining. The IRC granted a 2.5 per cent increase and provided for the continuation of the structural efficiency process, which is far from complete. It declined to opt for the additional level of wage increases for enterprise bargaining, citing as reasons the Australian economy's inability to sustain further wage increases, the lack of an enterprise industrial relations culture in Australia, and the problem of calculating the amount of productivity increases. The decision was condemned by the union and government parties, and the key elements of the Accord policy were subsequently pursued in direct negotiations with employers outside the compulsory arbitration system. However, in its National Wage Case of October 1991, the IRC consented to the notion of enterprise bargaining agreements in setting down a series of principles designed to give greater emphasis to arrangements made at the individual enterprise level. These included the requirement that enterprise-level wage increases reflect efficiency gains made through the operation of the structural efficiency principle, that the agreement be negotiated through a single bargaining unit in an enterprise or section of an enterprise, and that it be for a fixed term. Further, enterprise agreements were not to involve reductions in ordinary time earnings, standard hours of work, annual leave, or long service leave as determined by the awards of the IRC. Following the June 1992 amendments to the IRA, the capacity of federal unions to pursue enterprise agreements that varied the conditions laid down in awards was placed on a clearer legal footing.

One major lesson to be drawn from the development of the Accord process in the 1980s is that it is possible to bring about substantial reform to the labour market by legal means, but without resorting to legislative change. Since the outcomes of the compulsory arbitration process (the awards) are legally enforceable and wide-reaching, they serve as a form of delegated legislation through which economic policy may be passed more simply and quickly. This fact has not been lost on many critics of the Australian system who have noted that the legislation and awards of Australian industrial relations are not per se major obstructions to workplace reform. However, the award restructuring process inevitably relies upon the close proximity of government policy and the policy of the IRC, which, as noted earlier, is an independent statutory authority. When it chooses to exercise its

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93 See above at pp. 286-87.
94 See, for example, BCA Report, supra note 52.
independence in a manner contrary to government policy, as it did in the National Wage Decision of April, 1991, then the prospect for government directed reform is lost. This inevitably places in question the continuing role of such an institution in the rapidly changing Australian economic climate. There is no doubt that both the Labor government and the ACTU envisage a considerably reduced independent role for the national tribunal in the emerging new industrial relations framework.

It is too soon to draw firm conclusions as to the economic and industrial benefits arising from the period of award restructuring, which has taken place since 1987. On balance there is no doubt that it is in this area, rather than in legislative change, that the most far-reaching reforms have taken place. There is acknowledged progress across a wide spread of industries, which has seen the broad-banding of job classifications, the reduction of many restrictions on the scheduling and organization of work, and the development of other aspects of an enterprise focus, including performance-based pay, multi-skilling, retraining, and so on. However, it is also believed that many of these innovations are mere changes on paper, and that effective workplace change in practice has come more slowly.

VI. CONCLUSION

This paper presents a picture of a confused and hesitant programme for industrial relations reform in Australia. The impression created by the build-up of developments in the 1980s is that we are on the verge of a major policy redirection in industrial relations institutions and practices. However, the point of absolute departure from compulsory arbitration has not yet been reached, it is obvious that the groundwork for a major switch in policy has already been laid. There is

95 Supra note 91.

For a general survey see R. Mitchell & M. Rimmer, “Labour Law, Deregulation and Flexibility in Australia Industrial Relations” (1990) 12 Comp. Lab. L.J. 1. However, further legislative reforms are anticipated in late 1993. These are likely to see a considerably enhanced role for bargaining and a subtle lessening of the award/compulsory arbitration system. Some guidance in this area was given in a speech by the Prime Minister, Mr. Keating, to the Institute of Company Directors on 21 April 1992. See, for example, T. Burton, “Keating’s IR Revolution,” The Australian Financial Review (22 April 1993).

97 For a study of the progress of award restructuring, see R. Curtain, R. Gough & M. Rimmer, Progress at the Workplace: An Overview—Workplace Reform and Award Restructuring (Monash: National Key Centre in Industrial Relations, Monash University, 1992).
a broad consensus amongst policy makers that Australia’s future depends upon its integration into the international economy, and a number of economic policy decisions have been made on this assumption, including the deregulation of the financial sector and the privatization and de-monopolization of other sectors of the regulated economy, such as airlines and telecommunications. However, international surveys seem to indicate that even in the most pressing of times, radical structural change in established industrial relations systems occurs infrequently, and the Australian position (though not New Zealand’s we should note) seems to be a case in point.

As the paper indicates, it is in the field of award regulation that the most far-reaching reforms to Australian industrial relations structures and practices have taken place in the second half of the 1980s. The process of award restructuring, which has redirected the focus of industrial relations to enterprise-based performance, flexibility, and productivity, has been managed within the centralized processes of the existing system, and there is no doubt that this approach has the support of most major parties to industrial relations. There is compelling evidence that managers believe the major obstacles to workplace reform to be managerial rather than structural in nature, and that the existing system allows both for flexibility and variety between enterprises.

The availability of this process may adequately explain why it has been unnecessary for the federal government to introduce major legislative change in the Australian system. But the lack of uniform legislative reform throughout the country is also a measure of some critical political aspects of Australian industrial relations. Two key obstructions to legislative reform are apparent. First, the division of government between federal and state authorities makes coordinated industrial relations reform problematic, particularly because unions may opt to switch between federal and state industrial jurisdictions. Secondly, the system provides an important protective net for the minimum paid worker and also provides for much of the power base, authority, and security of the union movement. While there is evidently a process of slow and incremental reform to the compulsory arbitration system in progress, it is unlikely that the ACTU and the union movement would disown the system to the extent of intentionally facilitating its

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98 Niland & Clarke, supra note 45.

99 See A.C. Evans, Managed Decentralism in Australia’s Industrial Relations (Melbourne: MTHA, 1989); Callus et al., supra note 33 at 200 and at 212.

immediate abolition. The general direction of the Labor-sponsored changes, however, continue to place the IRC in a compromised position and to call into question the long term relevance of compulsory arbitration as a general system.

Clearly, the uncertainty of the political juxtaposition of Labor and conservative governments, the problems of a constitutionally divided industrial relations structure, and the relative power of the trade union movement make any prediction of future trends in legislative change difficult, to say the least. Assuming that federal Labor remains in office and committed to continuing its programme of decentralized enterprise bargaining, it is difficult to see what role envisaged for the IRC will justify the maintenance of such a large and expensive structure. On the other hand, there is only a remote possibility that Labor is (despite some recent comments suggesting otherwise) interested in dismantling the system and erecting some alternative devices for the settlement of industrial disputes. Nevertheless, one must remember that a federal government is not compelled by the constitution to legislate under its head of power at all, and secondly, that section 51 (xxxv)\(^{101}\) does not require the establishment of permanent conciliation and arbitration tribunals or a system of compulsory conciliation and arbitration. While there might be some difficulty in the construction of a system based primarily upon enterprise bargaining, it is unlikely that the terms of the constitution will be an insuperable barrier.

Assuming that a sudden and absolute systemic break with the past will not occur under Labor, the most likely scenario is that legislative change will continue in the present mode. We might expect to see, for example, further attempts to establish a Labour Court, a revised set of sanctions, and some provisions securing a (modified) right to strike in the context of a bargaining system. The award system will remain an option for those unions lacking the power to exploit the bargaining system.

There remains, however, the prospect of more radical reform in the longer term—the abandonment of compulsory arbitration over disputes and the abolition of the IRC. Noting the changed approach by governments to the Commission's powers and role, commentators have raised the possibility that the system no longer has a guaranteed position in Australian economic and industrial relations regulation. Political and industrial developments following the recent National Wage Decision of

\(^{101}\) Commonwealth of Australia Constitution Act, supra note 2.
April 1991\textsuperscript{102} have confirmed that forecast and confirmed that the Accord, rather than the IRC, is presently the principal institution for determining the level of macro-wage outcomes and the direction of industrial relations reform. For reasons outlined earlier, it is most unlikely that Labor will go beyond this point and undertake a repeal of the compulsory arbitration system. For its part, the Liberal-National Party has stated that it is not its intention to abolish the IRC. However, there is no doubt that the developments of the 1980s have created the conditions wherein such a move is no longer necessarily undesirable or inconceivable. It would be ironic, indeed, if the developments under the Labor/ACTU Accord\textsuperscript{103} had created the conditions under which the arbitration system could be safely politically dismantled.

\textsuperscript{102} Supra note 91.

\textsuperscript{103} ACTU, supra note 47.