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The Constitutional History of Industrial Arbitration in Australia

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YEARS BEFORE Professor Hayek startled and enchanted the National Association of Manufacturers with his Portolano chart of the Road to Serfdom a British historian had confidently heralded the advent of the Servile State becoming inevitable through the very measures that "liberals" and "reformers" urged for the benefit of wage-earners. "The principle of a minimum wage involves as its converse the principle of compulsory labour. . . . Lastly, there is the obvious bludgeon of 'compulsory arbitration': A bludgeon so obvious that it is revolting even to our proletariat."2

It is probably needless to remind the reader that the leaders of the American "labor movement" have been adamant in their resistance to all suggestions looking toward any legal scheme of compulsory arbitration; and The New Republic during this past summer laid it down ex cathedra, that—"Compulsory arbitration . . . is not consonant with the practices of a 'free society' in which industry is privately owned and businessmen can make profits."3

The editors of "The New Republic" evidently could not regard Australia as a "free society" in which "businessmen can make profits"; although industry certainly is privately owned in that country and it is commonly considered to have one of the most
democratic of governments. It is said to be one of the most thoroughly unionized countries in the world; and its Labor Party has been powerful, and much of the time dominant in its politics for many years. But Australia also has enjoyed—or suffered—compulsory arbitration ever since very early in this century.

It is well known that the Australian constitutional system is much like our own, a federal set-up, in which the National ("Commonwealth") Government has only its delegated, enumerated powers which include, however, a comprehensive grant of "incidental" power; while the general, residuary power of government belongs to the States. But provisions of a "bill of rights" character for the most part are lacking in the Australian Constitution. It contains nothing corresponding to our "due process" requirements, nor any "impairment of the obligation of contracts" clause nor any guaranty against slavery or "involuntary servitude." Australian government can constitutionally become highly "totalitarian."

In its commercial provisions the Australian Constitution follows closely the American model. The Commonwealth Parliament has authority to "make laws . . . with respect to: (i) Trade and commerce with other countries and among the States." Regulation of intrastate commerce is thereby reserved (sub silentio) to the States. But in the field of labor relations the Australian Constitution de-
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parts markedly from its American prototype. It does not, any more than the American document, empower the Commonwealth to regulate conditions of employment or the terms of the employment contract directly by national legislation, except so far as that can be done "incidentally" as an adjunct of the commerce power. The Commonwealth Parliament, e.g., cannot enact a general minimum wage law for the country, although by manipulating its commerce power it can, like our own Congress, go a long way in that direction. Early in its history the High Court of Australia sustained Commonwealth legislation for workmen's compensation to seamen injured in foreign or interstate voyages. A later Commonwealth statute required employers to prefer members of recognized trade unions in hiring longshoremen and such-like waterside workers; and the High Court upheld the Act. Who should take part in foreign or interstate commerce could be determined by the legislative power that governed such commerce. "True, ... the provision adopts a description of the persons ... to be so preferred which has no apparent relation to any characteristic of interstate or overseas commerce. ... But ... it directly regulates the choice of person to perform ... work which forms part of it or is incident in" (such) "commerce." If Commonwealth legislation can thus control the persons who may work in interstate or foreign commerce it would seem it could equally control the wages to be paid them for such work. But of course its regulations on that basis could apply only to employment in foreign or interstate commerce, not to conditions of labor in intrastate commerce.

But while the Australian Constitution thus denies the Commonwealth an independent legislative authority over the relation of employer and employe, by another provision it confers upon the Commonwealth Government a comprehensive authority to "Make

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11 Huddart-Parker Co. v. Comm'th, (1931) 44 C. L. R. 492, per Dixon, J. (concurring). Cf. Starke, J. (diss.), that the "power ... is not to make laws with respect to employment in foreign or interstate trade, ... but to make laws with respect to foreign and interstate ... commerce as such." Cf. Ross, in 29 Va. Law Rev. 881, 911ff (1943).
12 Cf. Newcastle & Hunter v. A. G., (1921) 29 C. L. R. 357. So, in America, an act of Congress establishing employer's liability for injuries sustained by any employees of railroads engaged in interstate commerce was unconstitutional, since many employees of such railroads might themselves not be engaged in such commerce, First Employers Liability Cases, (1908) 207 U. S. 463, 28 S. Ct. 141, 52 L. Ed. 297; but an amended act which confined the statutory liabilities to cover only railroad employees actually engaged in interstate commerce was constitutional, Second Employers' Liability Cases, (1912) 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327. Cf. U. S. v. Darby, (1941) 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609.
laws... with respect to:... (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."18 The last clause of this subsection does not limit the Commonwealth’s arbitral power to disputes arising in foreign or interstate commerce, or in commerce at all. A national union of bricklayers, e.g., may get into a dispute with its members’ employers over their wages or working conditions, although it may be that none of the workers or their employers is engaged in interstate or foreign commerce. This national arbitral authority is an independent power, not derived from nor limited upon the Commonwealth’s commerce power. No provision of their Constitution has staked out an ampler or more remunerative Happy Hunting Ground for the lawyers of the Island Continent; nor, it may safely be assumed, engendered more severe headaches for its judges.

It will be noted that this arbitral authority is not self-executing, like the judicial power of the United States Supreme Court under Article III of our Constitution. The Australian Constitution sets up no constitutional tribunal to arbitrate labor disputes. The power granted is legislative, to “make laws with respect to” such arbitration (and conciliation). The scope, and the method as well, of exercising the arbitral function must be based and dependent upon Commonwealth legislation. Very promptly following federation of the Australian Colonies the new Commonwealth Parliament proceeded to establish a Commonwealth Conciliation and Arbitration Court.14 The Act did not give the individual workingman a right of access to the Court. Only a trade-union, registered and formally recognized as such, could be a party before the Court adverse to an employer or an association or organization of employers. The Court, in other words, was to deal only with “organized labor,” not with individual laborers.

The constitutional provision does not use the word “adjudicate” nor say in any explicit form that the Commonwealth may prescribe a scheme of “compulsory arbitration,” but it seems to have been taken for granted from the beginning that such a scheme was contemplated and would be within the constitutional power. From the beginning the arbitral tribunal has been called the Conciliation and Arbitration “Court.” But is it indeed a court? One who arbitrates an industrial dispute—is his award a judicial decision? The typical

18Aus’n Const., Sec. 51.
14Cf. the Comm’th Conciliation and Arbitration Act, 1904-1934.
judicial decision has a retroactive basis and effect, as Mr. Justice Holmes has pointed out.\textsuperscript{15} It determines that present rights and obligations have resulted from things the parties did in the past. Yesterday A drove carelessly and ran over B; therefore A today owes B a sum in damages. That mode of description does not seem to fit an industrial award, which looks wholly to the future; the employer \textit{henceforth} shall pay such-and-such wages for work to be done \textit{hereafter}. And the award prescribes these wages, not at all as a result of whatever the parties may have done in the past, but through the arbitrator's appraisal of present and probable future conditions. All that does not wear the aspect of a judicial decision.

But if it is not judicial, where does it belong in our (and Australia's) traditional and constitutional tripartite distribution of governmental activity? Of course, unless made legally compulsory, industrial arbitration is not an activity of Government at all. At common law, parties are not required to submit industrial disputes to arbitration; and even if they do submit them, they are not required to abide by the arbitrator's award, unless by contract in advance they have bound themselves to abide by it. Moreover, the scope of the common law arbitrator's award is subject to all existing laws. If a statute, e.g., forbids more than 10 hours work a day in bakeries, an arbitrator between employing and employed bakers cannot by award prescribe an 11 hour day. Does it alter that situation to make arbitration compulsory? The first Chief Justice of the High Court of Australia insisted that it did not. The Constitution had not given the Commonwealth any legislative authority over terms of employment. That remained exclusively in the hands of the States. The Commonwealth's power to make arbitration compulsory meant only that it could require employers and employees to submit their disputes to the Conciliation and Arbitration Court and to abide by its awards, but that Court could award only such conditions of employment as a common law arbitrator could award; that is to say, only such conditions as the parties might lawfully have prescribed for themselves by their own voluntary contract.\textsuperscript{16} The "real" point to all that was, that the Australian States have comprehensive legislative authority to regulate conditions of employment. By state statutes they can fix minimum wages and

\textsuperscript{15}Sc. (diss.) in Kuhn v. Fairmont Coal Co., (1910) 215 U. S. 349, 54 L. Ed. 228.

maximum hours; or vice versa, for that matter.\(^\text{17}\) Hence, said Chief Justice Griffith, if a state statute sets a minimum wage of ten shillings the Commonwealth Arbitration Court cannot by award enable employers in that State to pay only eight shillings. He was trying to preserve "State rights" in the field of labor relations. And so limited, this arbitral power of the Commonwealth, he said, was a judicial power.\(^\text{18}\)

From the outset some of the High Court Justices refused to accept this doctrine. They declared the Constitution intended to enable the Commonwealth Parliament to give its Arbitration Court complete authority effectively to settle industrial disputes, which meant authority to award whatever terms might be needful to that end, in disregard, if need be, of any inconsistent state laws. They freely admitted that on that theory the Arbitration Court's function was not judicial; rather, it was legislative. Its awards were tantamount, vis-a-vis state laws, to Commonwealth statutes.\(^\text{19}\) It is this theory that has prevailed, though the theoretical question recurs to vex the minds of Australian justices.\(^\text{20}\) It amounts in effect to this: The Commonwealth Conciliation and Arbitration Court is in a position to say to contending employers and employees who are before it: "These are the conditions of employment that you will observe, whether you like them or not; whether they are conditions that either of you would ever have agreed to by contract or not; whether, indeed, they are even conditions that you could lawfully have bound yourselves to by contract or not."

Some features of the Arbitration Tribunal's work are, however, held to be judicial. The statute under which it operates gives it power to fix and impose penalties for violation of its awards. The

\(^{17}\)I.e., maximum wages and minimum hours. Note that there is no "Thirteenth Amendment" to the Constitution of Australia. Cf. \textit{ante}, Note 8.

\(^{18}\)Whether such an arbitral power as Chief Justice Griffith postulated is "judicial" or not, is a fascinating question in theoretic jurisprudence. Although a judicial decision purports to determine "present" rights, it may equally well be described as a command to do something in the (immediate) future: to pay money, to deliver a deed, to stop picketing, or what-not. And students of the history of the common law are aware that to say the rights adjudicated have resulted from past events by virtue of "pre-existing" rules of law ignores the fact that the rules of the common law pre-exist only in the breast of the courts themselves. Any authoritative settlement of any dispute, whether the dispute were as to present rights under pre-existing rules \textit{vel non}, is a judicial decision, said Chief Justice Griffith. Cf. the cases cited \textit{ante}, Note 16.

\(^{19}\)Cf. especially, Isaacs, J., in the cases cited \textit{ante}, Note 16. A later Commonwealth statute will supersede inconsistent provisions of an earlier award of the Conciliation and Arbitration Court, \textit{(nem. con.)} Victorian Stevedoring Co. and Meakes v. Dignan, (1931) 46 C. L. R. 73.

Australian Constitution provides that federal judges shall be removable only by parliamentary address "on the ground of proved misbehavior or incapacity." The original arbitration statute provided that a Justice of the High Court should be designated by the Government to act as President of the Arbitration Court for a seven year term, without additional salary. The High Court held that the power given the Arbitration Court to fix and impose its own penalties was certainly judicial, which, therefore, could not be exercised by an appointee for a term of years. The statute thereupon was amended to provide for separate appointment of Justices to the Arbitration Court specifically, who were to be removable only on parliamentary address.

Although in making its awards the Arbitration Court is now deemed to act legislatively rather than judicially, yet it is only this "Court" that can legislate for the Commonwealth in that field. As already noted, the Commonwealth Parliament itself cannot by general legislation regulate the terms of employment contracts, except in relation to interstate or foreign commerce. And the Court's authority is limited to the settlement of particular disputes. Its awards can bind only adversary parties actually brought before it. It cannot enact any "common" or general rule to regulate the terms of employment in any given industry or occupation throughout the country.

21Sec. 72.


23Cf. ante, Notes 10-12, and text; and cf. Waterside Workers v. Comm'th SS. Owners, (1920) 28 C. L. R. 209, especially, per Isaacs and Rich, J. J. (concurring).

24The award may, however, be made to bind assignees and successors of the immediate parties; cf. Hudson v. Aus'n Timber Workers, (1922) 32 C. L. R. 413; Amalgamated Engineering Union v. Metal Trades Ass'n, (1935) 53 C. L. R. 658. And it may bind employers who have no members of the Applicant union in their service; though it seems uncertain whether it can bind such employers with respect to the terms upon which they may employ such non-union workmen, if it permits them to run an open shop at all. Cf. Aus'n Timber Workers v. John Sharp & Sons, (1919) 26 C. L. R. 302; Burwood Cinema v. Aus'n Theatrical Employes, (1925) 35 C. L. R. 528; Amalgamated Engineers v. Alderdice Proprietary, (1928) 41 C. L. R. 402; In Re American Drycleaning Co., (1929) 43 C. L. R. 29. To an uncertain extent these decisions rest on statutory construction rather than on constitutional doctrine. For the scope of the dispute as limiting the possible scope of the award, cf. Aus'n Boot-trade Employes v. Whybrow, (1910) 11 C. L. R. 1, 311; Aus'n Workers v. Graziers, (1932) 47 C. L. R. 22; Federated Millers v. Butcher, (1932) 47 C. L. R. 246; Aus'n Tramways v. Comsnr., (1935) 53 C. L. R. 90.
ing of the word "dispute" in the constitutional provision. No sooner had the new arbitration tribunal been set up than trade-union officials began a practice of presenting to employers a "log" or specification of demands, with a notice that unless the employers assented to these demands within a stated length of time the union or unions making the demands would apply to the Arbitration Court to award the same, without any attempt or intent to negotiate with the employers, to arrive at any compromise or any agreement whatever with respect to the demands, other than their unconditional and unqualified assent to them precisely as made, *verbatim et literatim*; without any attempt, that is, to do anything that could fairly be called "bargaining" with the employers. Moreover, the union officials would do that "on their own," without any vote or other expression of the wishes of the general membership, or anything definitely indicating any discontent on the part of the employees with existing conditions. Confronted with such situations, the first Chief Justice of the High Court again insisted that such bare presentation of demands upon employers could not be considered a "dispute" that could give the Arbitration Court any jurisdiction to make an award. "Some real opportunity of" (for?) "discussion of an industrial claim ... must be afforded before it can develop into an industrial dispute." A "real and genuine dispute ... is not created by a mere formal demand and formal refusal, without more.... If ... there is in fact no real discontent existing, a mere claim or request made ... for the mere purpose of making a case.... before the Federal arbitration authority does not constitute a real industrial dispute. It is rather an attempt to promote strife, and a fraud upon the tribunal." 25 And in another early case two Justices asserted that submission of a "log" of demands to employers merely as "a step to the Court," and without "the expectation or even ... desire of obtaining any concession from" the employers could not be deemed a "dispute" to ground any jurisdiction

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25 Per Griffith, C. J., in *Ex partie Holyman*, (1912) 15 C. L. R. 586; and cf. the Felt Hatters Case, (1914) 18 C. L. R. 88, per Griffith, C. J. and Barton, J. (*concurring*). In line with this and his general point of view, Chief Justice Griffith urged further, that discontent however pronounced, with conditions of employment prescribed by a State law could not constitute an "industrial dispute," to enable the Arbitration Court to award inconsistent terms. Such discontent "cannot be described as a dispute;" it is only a "political agitation." Federated Employes v. Moore & Sons, (1909) 8 C. L. R. 465 (*ante*, Note 16). Cf., accord, Gavan Duffy, J. (*concurring specially*), in Waterside Workers v. Comm'th SS. Owners (*ante*, Note 23), that where an award specified that it should remain in force for a stated length of time, discontent with its terms during that time could not be a "dispute" justiciable before the Court.
in the Arbitration Court. The evident gist of the position was that the Court could have jurisdiction only to bring to a conclusion a process of *bona fide* "collective bargaining" which had failed to culminate in an agreement. But again, in these cases and throughout, that position met determined and persistent dissent and resistance from other Justices. Curiously enough, the position was taken by the very Justices who at the same time insisted that industrial arbitration was a "judicial" procedure. But one who has a legal cause of action is never required to attempt to compromise it with his adversary before haling the latter into court. Even bare demand and refusal are required only in some classes of cases. *Per contra*, the Justices who regarded compulsory arbitration as having a "legislative" character were the ones who would assimilate industrial demands to a justiciable "cause of action," requiring only their refusal to support the Arbitration Court's jurisdiction; such refusal, further, to be implied from failure to express assent.

It is not found that the early cases, whose disposition reflected on the whole Chief Justice Griffith's point of view, have been categorically and completely overruled. But his position involves this manifest practical difficulty: *how much* negotiation must parties conduct? How long and how persistently must they persevere in trying to work out an agreement for themselves before the matter can be deposited in the lap of the Court? The impossibility of any definitive answer makes it inevitable that the actual trend of the Court's attitude would be progressively to whittle down any requirement of preliminary negotiation, and to take jurisdiction more and more nearly on the basis of mere demand and refusal. In the final analysis it is believed safe to say that recourse to the Court has become in

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26The Tramways Case, (1914) 19 C. L. R. 43, per Gavan Duffy and Rich, JJ. (*concurring*). As an advocate for employes (or employers) "How can I be sure that the dispute will be regarded as a real one unless I succeed in importing into it a touch of acrimony?" Menzies, in Ch. III of "Studies in the Australian Constitution" (ed. by Portus; Angus & Robertson, Sydney, 1933), p. 62.

27Cf. especially, in the cases that have been cited, opinions by Justices Isaacs, Higgins and Rich.

28The situation illustrates the modern psychologists' maxim, that the "good reasons" advanced are not always one's "real reasons," although the real reasons of the respective factions here are plainly enough disclosed in their opinions. As already remarked (*ante*, Note 18, and text), Chief Justice Griffith and his supporters wished to maintain "State rights" and curtail the authority of the Commonwealth and its Arbitration Court; while the real animus of the contrary opinions was to augment the effective power of the Commonwealth in the field of labor relations. The controversy is as perennial in Australia as it has been in this country. Cf. the present writer, in 29 Va. Law Rev. 881, 911ff, 941ff (1943).
effect available as a complete substitute for the entire procedure of collective bargaining, and not merely as a supplement thereto or final step in that procedure. The trend undoubtedly has been assisted by the fact that the constitutional provision authorizes Commonwealth "conciliation" as well as "arbitration," and the "prevention" as well as the "settlement" of industrial disputes. So it is held that the Arbitration Court may take cognizance of a dispute that is merely "threatened or impending or probable."

To be subject to compulsory arbitration the dispute must be an "industrial" one. The High Court of Australia followed the United States Supreme Court in distinguishing generally between "industry" and "commerce." But does the term "industrial dispute" then include only such as arise between employers and employees engaged in some sort of manufacturing, fabricating or processing occupation? Are the sales clerks in a department store "industrial" employees? In the sphere of private employment the term has not been narrowly confined. A dispute between a bank and its officers and employees, such as branch managers, tellers, security clerks, cashiers, is an "industrial dispute," as is one between an insurance

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29The Justices of the High Court of Australia have the bad habit of insistently writing their individual opinions in extenso, both concurring and dissenting, in important cases. This beclouds constitutional doctrine. The true ratio decidendi of the decision is likely to be obscure and difficult to disentangle. Cf. Portus, Australia, an Economic Interpretation (1933); "Not even body-line bowling has caused as much discussion in Australia as compulsory arbitration... The existing jumble... has resulted in a huge game of hide-and-seek, in which perspiring union secretaries run after justices suspected of radicalism, while equally perspiring company lawyers endeavor to head them off.... Until... regulation of industrial conditions is placed wholly in the hands of National authorities, it cannot fairly be claimed that the system of wage regulation has had a fair trial in Australia." pp. 80-83. Cf., accord, Powers, J., in The Tramways Case (ante, Note 26), that if employes were to continue to resort to the Arbitration Court instead of to strikes, the "bog of technicalities" that had come to envelop the field "must be cleared out of the way." Cf. Aus'n Tramways v. Comsr., (1937) 58 C. L. R. 436, especially, per Evatt, J. (concurring).


company and its agents, inspectors and clerks. But the High Court held, to begin with, that a state could not be summoned before the Commonwealth Arbitration Court. When after some years that doctrine was overruled the Court still insisted that a State could be compelled to arbitrate only its disputes with its "industrial" officials or employees. The railways in Australia are owned and operated by the States, and it was immediately held that a State must submit to the Arbitration Court disputes with its employees working on its railways. The same year the High Court required submission of disputes with State employees serving under the public harbor authorities. In later cases which were not carried to the High Court the Arbitration Court held itself competent to subject to its jurisdiction a dispute between the State of New South Wales and the employees in its Government Printing Office, and a dispute with State health inspectors, and to make an award fixing salaries of the executive managers of state owned railways. But in 1929 the High Court elaborately reconsidered the whole problem and held that the public school teachers were not "industrial" employees of their States; and during the present war the High Court has reiterated that the Commonwealth, even under the defense power, cannot compel arbitration between a State and its general "public service" employees engaged neither in war work nor in any "industrial" activity. But any general definition of the term "industrial" remains extremely obscure. In the Schoolteachers' Case the Court pretty much threw up its hands. Probably it were wiser, said Mr. Justice Rich (concurring), not to attempt

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32 Aus'n Ins. Federation v. Accident Ass'n; and Bank Officials Ass'n v. Bank of Australia, (1923) 33 C. L. R. 517. For journalism, see Daily News v. Journalists' Ass'n, (1920) 27 C. L. R. 532.

33 The constituent members of the federated Commonwealth of Australia are called the "States" as in America.

34 Federated Amalgamated Ry. Ass'n v. N. S. W. Ry. Employes Ass'n, (1906) 4 C. L. R. 488.


40 Note 38, ante.
“any full definition.” “It is not necessary to define what is a dog
when we determine that a certain animal is a dog.”41 Nor can it
be said that the later cases have materially clarified the point,
though the latest one that has been found does hold explicitly that
the assessors who value land for the State’s property tax are not
“industrial” employes.42 And in the Schoolteachers Case Mr. Justice
Isaacs (dissenting) had conceded, and indeed emphasized, that
undoubtedly “Crown officials” “administering true, essential gov-
ernmental authority” are not “industrial” employes of the State.
“No one has ever thought that Treasury employes performing duties
under the State railway systems are within the Commonwealth
jurisdiction; though the trading employes are. . . The primary
and inalienable functions of a constitutional Government . . . are
impossible of performance by private individuals and pertain solely

41And further, that “It is difficult to suppose that any person not indo-
ctrinated by a long course of quasi-philosophic and quasi-economic dissertations
would ever apply the term ‘industrial’ to” the occupation of teaching school.
The opinion of three Justices, which comes closest, therefore, to representing
the “Opinion of the Court” in the case, reviewed definitions or characteristics
of “industrial” employment that had been discussed or suggested in earlier
cases, from any relation “in which the relation of employer and employe sub-
sists,” which they declared was “too wide,” to employments involving “manual
labor,” which they agreed was “too narrow.” But anyhow, the “occupation of
the State schoolteacher is not industrial.” Isaacs, J. (diss.), pointed out that
such persons as musicians, actors, tramway employes, ships’ pilots, street-
lighters, movie operators, barbers, hair-dressers, cab drivers and furniture
movers, seemed without challenge to have been regarded as industrial employes;
and so, how could teaching school possibly be excluded? Education is no State
monopoly in Australia any more than in America. “Any private individual
could do, and private individuals in fact do, all that is done under the educa-
tional schemes of Victoria and Tasmania;” and that “governmental functions”
(e.g., penalizing truancy) are “called in aid” of the State’s educational ad-
ministration doesn’t alter its “fundamental” character. If it is a function that
a private person could lawfully do, and being so done, would be industrial,
then it is industrial when the State does it. In rebuttal, the three Justices men-
tioned above replied “shortly,” that “a private person could no more carry on
the system of public education than he could carry on His Majesty’s Treas-
ury;” and if he could, then “he would no more carry on an industry than the
State does now.” The educational activities of the State, they insisted, “bear no
resemblance to an ordinary trade, business or industry. They are not directly
connected with or attendant upon the production or distribution of wealth;”
and “there is no cooperation of capital and labor in any relevant sense.” So,
per Rich, J. (concurring), that teaching school for the State lacks the “im-
portant element” of “capital and labor cooperating to produce a result which
is the outcome of their combined efforts.” Though education may be requisite
to “industrial efficiency,” it “cannot be said that the industrial system could
not exist without national education;” “teaching does not, like banking and
insurance” (Cf. ante, Note 32), “play a part in the scheme of national in-
dustrial activity.” The latter are “indispensable portions of the general in-
dustrial mechanism. . . . They directly furnish an essential instrument of pro-
duction. This element is totally lacking in the profession of teaching.”

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to the Crown in its regal character... the legislative power, the administration of the laws, the... judicial power.” Although the majority opinions do not say so, their point of view would seem to have been influenced materially by the fact that the State public school systems are not operated for revenue. Yet, as already noted, the High Court itself had already authorized compulsory arbitration of a State’s dispute with its public harbor employees who, the report discloses, conducted a non-profit activity of the State.\textsuperscript{43}

In view of this history it may be pertinent to suggest that if compulsory arbitration were to be adopted into our American political and legal system it had better be made applicable comprehensively to the relation between employer and employe, at least between private employers and their employes, regardless of any “industrial” character of the employment.

The final requirement of the Australian constitutional provision is that the dispute must be one “extending beyond the limits of any one State.” A trade union consisting of employees of the railways owned by the State of New South Wales applied to the Commonwealth Arbitration Court for registration. Objection to its registration was carried to the High Court. That Court remarked a doubt whether any dispute between this union and the State of New South Wales, the sole employer of its members, could be a dispute extending beyond the limits of that State, but without definitely deciding that point, denied the registration because the employer, a State, could not be subjected to the Commonwealth’s arbitral jurisdiction.\textsuperscript{44} Two years later the High Court considered the application of a trade union of coal miners in Victoria. The High Court approved the registration, but without prejudice to any questions that might arise later as to its propriety or its constitutional scope or effect.\textsuperscript{45} The Court noted, however, that the constitutional provision does not require that any of the employers or employes in-

\textsuperscript{42} Cf. (ante) Note 36. Cf., accord, the Arbitration Court’s own assumption of jurisdiction in the cases cited under Note 37 (ante). In those latter cases the Arbitration Court of course might be deemed to have erred, especially if Mr. Justice Isaacs’ point of view in the Schoolteachers’ Case were to prevail. In the case cited from 25 C. A. R. 1054 (ante, Note 37), it appeared that the salaries in question were fixed directly by legislation, not by the State’s “Railway Commissioners.” In an earlier case a State had inaugurated some kind of an “ever-normal granary” system and the High Court had held that the employees that administered it were not “industrial” employees, Aus’n Workers v. Adelaide Milling Co., (1919) 26 C. L. R. 460. Cf. Federated Municipal Union v. City of Melbourne, (1919) 26 C. L. R. 508.

\textsuperscript{43} The Railway Servants’ Case, (1906) 4 C. L. R. 488; cf. (ante), Note 34.

\textsuperscript{44} Jumbunna Coal Mine v. Victoria Coal Miners, (1908) 6 C. L. R. 309.
involved in a dispute be operating or working in more than one State, but only that the dispute that arises shall extend beyond the limits of any one State. A few years later the High Court prohibited the Arbitration Court from arbitrating a dispute between unionized tramway employes and their employers, who severally operated streetcar systems in cities in different States. Chief Justice Griffith (concurring), observing that the tramway systems in the several States were wholly separate and unconnected, declared it was "prima facie, if not impossible, at least in the highest degree improbable, that a dispute in any one State should extend to another;" though "such an extension is in the abstract possible." The same year, over Chief Justice Griffith's dissent, the High Court upheld the Arbitration Court's jurisdiction of a dispute between a national union of employes in the building trades and their employers, although each employer operated only locally and the terms of employment that were in dispute differed from State to State. The decision apparently contradicted assertions of the Chief Justice in an earlier case that there must be a "common interstate ground," a "common subject matter" of dispute. If the whole dispute in one State, e.g., were over wages, and in another State over the closed shop, there could be no interstate industrial dispute within the Commonwealth jurisdiction.

Chief Justice Griffith's point of view apparently would make it impossible for the Commonwealth Arbitration Court to entertain a "dispute" consisting of a purely sympathetic strike in one State to support demands made upon employers in another State, but like all the rest of his constitutional doctrines respecting the Federal arbitral power, this one too has progressively gone by the board. More and more, effective authority over industrial conditions has concentrated in the hands of the Commonwealth Arbitration Court.

An arbitration system cannot fairly be called compulsory without provision for applying legal coercion, if need be, to make the

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46 The Tramways Case, (1914) 19 C. L. R. 43.
47 Ex parte Jones, (1914) 18 C. L. R. 224.
49 Cf. the Sawmillers' Case (1929) 43 C. L. R. 185; Caledonian Collieries v. Aus'n Coal Employes, (1930) 42 C. L. R. 527, 558, distinguished, per Evatt, J. (concurring), in Aus'n Tramways Ass'n v. Comm'rs, (1937) 58 C. L. R. 436, "An individual dispute which at first does not extend beyond one State may be the origin of a genuine interstate dispute. . . . In Australia as elsewhere, serious and extensive industrial disputes have often arisen from local disputes which at first seemed of trifling importance."
parties abide by the award. In the case of the *Wolff Packing Co. v. the Kansas Court of Industrial Relations* the United States Supreme Court invalidated a compulsory arbitration statute of the State, largely on that ground. The Court remarked that to require the employer to abide by the award was tantamount to requiring him to stay in business; which might mean, at a loss, so that the ultimate effect would be confiscatory. At that time the Court held general minimum-wage laws to be unconstitutional. Now that the States, and the United States Government too, in the District of Columbia or in the field of interstate commerce, may by statute prescribe minimum wages, why may they not adjust them through the procedures of compulsory arbitration? However, a minimum-wage law, *simpliciter*, has no such drastic effect as compulsory arbitration. The former does not require an employer either to engage or to retain any employe in his service, nor to stay in business. At any rate, ever since the original *Kansas Case* it seems generally to have been taken for granted in this country that compulsory arbitration might be unconstitutional and so, as is well known, while our more recent labor relations laws require employers and employes' organizations to “bargain collectively,” they have carefully refrained from undertaking to require them to arrive at any actual agreement with each other.

Where a State is the employer the Australian courts have been forced to recognize that they cannot make the employing State pay the wages awarded since disbursement of public funds, as in this country, depends on legislative appropriation. It is suggested again, that if compulsory arbitration were ever to be put into operation in this country, it had better not be made to cover Government employes, Federal, State or municipal. But in the field of private employment the Australian Constitution, as already noted, does not disable the Commonwealth from equipping its arbitration system.

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50(1923) 262 U. S. 522, 43 S. Ct. 630, 67 L. Ed. 1103; (1925) 267 U. S. 552, 45 S. Ct. 441, 69 L. Ed. 785.


53Cf. (ante), Note 50.

with as ample and formidable a set of teeth as Parliament may deem requisite.\textsuperscript{55}

To prevent strikes and lockouts is a prime objective of any system of labor arbitration, and the Commonwealth Arbitration statute from an early date, if not from its very beginning, forbade "any person" to do "on account of any industrial dispute, anything in the nature of lockout or strike," under criminal penalties. On appeal from a conviction thereunder the High Court upheld the statute.\textsuperscript{56} An accompanying Commonwealth enactment penalized anyone who should "incite" others to strike or lockout, and authorized enjoining any newspaper publishing such an incitement. These provisions likewise were sustained in the High Court.\textsuperscript{57} A strike of course does not intend to dissolve the relation of employer and employee. The very purpose of a strike is to maintain that relationship and to resume work upon terms more advantageous to the strikers. So in an early case the High Court said that the Arbitration Court's award of a minimum wage scale imposed upon the employees no obligation to accept (nor, a fortiori, to continue in) employment at that scale or at all.\textsuperscript{58} In other words, while an employee must not go on strike, he might quit the job after the Arbitration Court had made its award if he found that the terms of employment which the award authorized the employer to maintain were disadvantageous to himself. The resulting precarious effectiveness of the awards and general instability of such a situation are obvious enough. It has already been noted that the individual employee had no access to the Arbitration Court. Only registered trade unions could make "plaint" to it.\textsuperscript{59} But to what point would wage scales, hours, sanitary conditions, rest periods, vacation allowances, and so forth and so forth, be awarded, if the award imposed no binding obligation on the individual members of the union that had invoked the Court's jurisdiction? The Australian States already had statutes to penalize employees who quit an employment in breach of contract.\textsuperscript{60} Does not the Commonwealth Arbitration

\textsuperscript{55}Cf. (ante), Notes 7, 8, 17 and text.
\textsuperscript{56}Stemp v. Aus'n Glass Mnfrs., (1917) 23 C. L. R. 226.
\textsuperscript{58}Comm'th SS. Owners v. Waterside Workers, (1916) 21 C. L. R. 642.
\textsuperscript{59}Cf. the Act (ante, Note 14), sec. 55; and cf. sec. 19.
\textsuperscript{60}Under our Thirteenth Amendment, quitting one's employment in breach of contract probably cannot be made a crime in this country, though it will of course ground a civil cause of action for damages and, in certain cases for negative injunction forbidding acceptance of any other employment; and per-
Court's award have at least as much force as a party's own voluntary contract? Under the Act the awards are expressed to continue in force for a stated length of time, and it has already been noted that the Act authorizes the Arbitration Court to prescribe penalties for violation of its awards. Conceivably such penalties might be directed only against the union "as such"—a fine to be collected out of the union's treasury; a cancellation of its registration, which would deny it future access to the Arbitration Court. Actually it goes farther than that. A federal award having prescribed penalties for its violation, a member of a trade union that was party to the award quit the employment in breach of a contract made pursuant to the award. The State of New South Wales convicted him of violating its own statute penalizing such breach of contract. The High Court reversed the conviction on the express ground, however, that the penalties fixed by the award itself were exclusive and under the paramount Commonwealth authority superseded the State statute as to persons bound by the award. The decision gives the Commonwealth Arbitration Court's award a legislative force, overriding "inconsistent" State laws.

In its present form the Arbitration Act forbids any employe to "cease work in the service of his employer" because his employer is a member or officer of an employers' organization or has testified in an arbitration proceeding, under penalty of a fine which may amount to 25 pounds, a hundred dollars or more. It is further provided that, in any prosecution for so doing, if it is shown that the accused did quit the employment, "it shall lie upon" him "to prove

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Footnotes:
61 Cf. (ante), Note 22, and Cf. the Act, sec. 38. According to Chief Justice Griffith's original ideas, employes' discontent with the terms of an award could not enable their organization to apply to the Arbitration Court to change the terms before expiration of the time for which it had been promulgated. Such discontent, he insisted, was not an "industrial dispute." It was not indeed a dispute at all; it was merely a desire to act illegally. Likewise, in his view, any dispute as to the interpretation of an arbitral award was not an "industrial dispute" for the Arbitration Court to settle; but presented merely a question of law for the ordinary courts to adjudicate. Cf. his opinions in the cases cited (ante), Notes 10-12, 16, 20, 24-26. But like the other features of his doctrine, already discussed, so these contentions too did not prevail after he had ceased to be a member of the Bench.

62 Ex parte McLean, (1930) 43 C. L. R. 472.

63 Cf. (ante), Notes 16-29; and text. Cf. accord, the present writer in 29 Va. Law Rev., (1943) 881, 899f, 904, n. 16.
that he was not actuated by the reason alleged in the charge."64 The Act further authorizes the Arbitration Court to cancel, wholly or in part, an award it has made in favor of any organization a "substantial part" of whose membership "refuses to accept employment" either at all or on the terms awarded, and the Court may order each individual member of an organization to contribute personally to any penalty the Court has imposed on the organization, not to exceed 10 pounds per member.65 Such provisions tie the union workman to his organization and to the terms of employment awarded by the Arbitration Court for (or against) his organization, and tend to make him continue in the employment upon the terms awarded.66 The whole scheme of the Act also subjects all workmen to great pressure to be union members, since only trade unions can obtain awards, from the employees' side. On the other hand an individual employer may apply for an award if he employs at least a hundred employees in "any industry."67 But the tendency of course has been to agglomerate both employees' and employers' organizations into huge nation wide bodies through which the Commonwealth Arbitration Court's awards control employment and the terms of employment throughout ever widening industrial areas.68 The Act finally enables the union dues and fines assessed under

64 Sec. 9(2), (4); and cf. sec. 58BA, that no officer or agent of any organization shall "advise, encourage or incite" any member of the employees' organization to "refrain from" accepting employment or working in accordance with the terms of the award, under penalty of a fine, to a maximum of 20 pounds.

65 Secs. 38D and 69; and cf. sec. 49, that "no person shall wilfully make default in compliance" with any order or award of the Arbitration Court, under penalty of a fine, to 20 pounds maximum. Reciprocal provisions, it should be mentioned, forbid an employer to dismiss an employee or threaten him with dismissal or "prejudice him in his employment" because he is a union member or official or has testified before the Arbitration Court. Sec. 9(1).

66 The Act however does allow a member to resign from his union by "changing his industry" or by three months' notice, with full payment of his union dues. Sec. 61.

67 Cf. (ante), Note 59. By Sec. 55 of the Act, a trade union must have at least 100 members to be registered with the Court.

68 An employees' organization is to comprise at least 100 members in "any industry or industries;" so, an "agglomeration of separated and differing enterprises or occupations may . . . be an 'industry' for the purposes of the Act;" per Latham, C. J. (concurring), in Melbourne and Metropolitan Tramways Board v. Municipal Officers' Ass'n of Australia, (1944) 68 C. L. R. 628. The rules of the Municipal Officers' Association declared it to be an organization of employees engaged in "the municipal industry;" which the rules further defined as employees of any "local Government authority" working as "clerks, secretaries, engineers, surveyors, architects, electricians, inspectors, receivers, paymasters, treasurers, accountants, auditors, valuers, rate-collectors, registrars, foremen, overseers, curators, draftsmen, superintendents, typists and stenographers."
union rules to be sued for and recovered by action in the Arbitration Court or any other court, but the union can expel a member only on application to and approval by the Arbitration Court. All this manifestly turns the unions into Government agencies, as were the Guilds of the Middle Ages, and makes imperative a measure of Government control over the internal management and policies of the unions. So, to be registered under the Arbitration Act a union must submit its constitution and by-laws to the Arbitration Court's approval, which may "disallow" any rules that are illegal or "tyrannical or oppressive" or unreasonable, and may also cancel the registration of any union whose rules do not "provide reasonable facilities for admission of new members," or whose accounts have not been "duly audited" or fail to disclose its "true financial position." And to abolish the early abuse by which union officials would make demands and "plaint" to the Arbitration Court without reference to the membership or evidence of discontent on the members' part with the existing situation, the Act now provides that without the Court's own approval plaint shall be made only pursuant to resolution of the general membership adopted in meeting or by ballot, or on written consent signed by a majority of the organization's "Committee of Management." To implement these provisions the Act now opens the Arbitration Court to individuals. At the Court's discretion it may allow "any person" to be heard in any proceeding under the Act, and "any person interested" may apply to the Court to declare that any State law or award made by State authority is invalid for inconsistency with an award of the Commonwealth Arbitration Court. The Court itself, whenever it deems it desirable, may summon "any person" whatever to a "conference" by subpoena, and, if the conference fails to reach an agreement, the Court has immediate jurisdiction at its own

60Secs. 68 and 70; and cf. sec. 88E, that the Court may order individual members to comply with the organization's rules, under penalty of a fine to 50 pounds maximum (about $250). It is said that Mr. Henry Ford (Sr.) some years ago, before he had made his peace with the C.I.O., admonished his employees to remember, that if they submitted to closed-shop unionization the ultimate effect would be, that a few men, representing the automobile companies and the union, would sit down around a table in New York City and fix the terms of employment for the industry; "and you" (the individual workmen) "will be able to work and will have to work anywhere in the industry only on those terms."

70Cf. secs. 58D, 60.
71Cf. (ante), Note 25 and text.
72Sec. 22. Cf. sec. 24, that the Court may adopt and give the force of its award to a settlement made by agreement of the parties.
73Secs. 18B and 30A.
74Sec. 16A.
discretion, i.e., without formal "plaint" by any of the parties. Finally, the Arbitration Court now may entertain any industrial dispute at the request of any State, or which is certified to it by its own Registrar "in the public interest."

A number of the provisions that have been recited apply to employers' as well as to employees' organizations. If an employer continues to maintain conditions of employment contrary to the terms of an award he may of course be prosecuted. To that extent the Act is readily enough implemented against employers. But suppose—pursuing the suggestion of the United States Supreme Court in the Kansas compulsory arbitration case—an employer finds or believes that he can do business in conformity to the award only at a loss that will eventually bankrupt him, and so proposes to go out of business? If he sells out to a successor who continues the business the award will be held binding upon him. The awards thus become fixed charges against the business enterprise as a continuing entity through changes in its ownership. That, to be sure, might make it impossible for the luckless owner who was the original party to the award to find a purchaser. Or, if he simply moves his business to another locality, the award doubtless could be held personally binding upon him there. But suppose instead, that he just abandons business and dismantles his plant? Employers are fond of threatening to do that whenever they profess to find union demands intolerable. The threat usually is mere "bluff." But not always.

It is not found that Australia as yet has been brought face to face with this aspect of the problem. But surely in the long run it will not be possible to force employees to stay on the job under terms awarded, without correspondingly forcing employers to maintain the job. This in the extreme case would mean Government subsidy to the employer or adopting some other means insuring his

75 Sec. 19(d).
76 Sec. 19(a), (c). And in any proceeding the Commonwealth Attorney-General may intervene in the public interest; sec. 18B. The Arbitration Court's Justices and their agents have comprehensive authority to visit and inspect places, works and documents, sec. 41; and in all proceedings the Court is to act according to "equity and good conscience and the substantial merits, without regard to technicalities or legal forms," and is not bound by "any rules of evidence, but may inform its mind in . . . such manner as it . . . thinks just"; sec. 25.
77 Cf. (ante), Note 50.
78 Cf. the cases cited (ante), Note 24.
79 If the writer recollects correctly, that is what the Strutwear Knitting Mills did, after the severe labor difficulties it encountered in Minneapolis.
80 Cf. the case of Mr. Higgins, as recently exploited in the newspapers.
ability to stay in business. “If, as and when” the situation comes to that, will not Mr. Belloc’s Servile State have arrived? It may be remembered that shortly after Pearl Harbor Australia’s late Premier, Mr. Curtin, assured the United States that, as an ally, it would find that the Australian Government was one that could give “orders” and command obedience. Mayhap he was alluding to the “bill of rights” limitations that restrict American political power in the field of labor relations. Regulations issued under war time legislation authorized a Commonwealth “Director” to direct “any person resident in Australia to engage in employment under . . . the employer specified in the direction,” as well as forbidding an employer to engage an employee except under permit from the Director, and the High Court sustained the regulation. Otherwise, it is not found that the “defence power” under war conditions has served greatly to expand the Commonwealth’s authority under the industrial arbitration subsection.

Whatever Australian businessmen may think, it cannot be said that the Australian situation has proven obnoxious to the wage-earning population of the country. Premier Curtin himself was the head of a Labor Party Government and every attempt to amend the industrial provisions of the Constitution has been defeated.

81 Cf. (ante), Note 2.
82 Reid v. Sinderberry and Reid v. McGrath, (1944) 68 C. L: R. 504. Under our Thirteenth Amendment it is probably doubtful that even the “war power” would enable the United States Government to enforce such comprehensive “industrial conscription.”
83 The High Court has held that in war-time the Commonwealth Arbitration Court can be empowered to settle any “industrial dispute,” even though it does not extend “beyond the limits of any one State.” Cf. (ante), Notes 44-49, and text; and cf. Victoria v. Comm’th, (1942) 66 C. L. R. 488; Vict. Chamber of Mfrs. v. Comm’th, (1943) 67 C. L. R. 347, 413, per Williams, J., that the defense power isn’t “paramount” to all others, and that the “Constitution does not become in war-time a unitary constitution.” And per Latham, C. J., that exercise of the defence power does not mean, that “all governmental power in Australia may . . . be concentrated in Commonwealth authorities,” Ex parte APMEU, (1943) 67 C. L. R. 619, holding “jurisdictional disputes” subject to the Arbitration Court’s jurisdiction. It is not necessary that a dispute be one of employers against their own employes; and under the defense power it is immaterial whether the dispute be one extending beyond the limits of any one State, vel non; Pidoto v. Victoria, (1943) 68 C. L. R. 87. The Arbitration Court may be given jurisdiction over any “industrial matter” which in a Minister’s opinion “has led or is likely to lead to industrial unrest” (in war-time), even though no actual dispute subsists; Ex parte Victoria, (1944) 68 C. L. R. 485. Cf. (ante), Notes 30, 39, 42.
84 Tramway employes demanded that they be allowed to wear their trade-union badges while on duty. This being refused, and the matter brought before the Arbitration Court, it was objected, that this could not be deemed an “industrial dispute.” The High Court held that it was; but the “rugged individualism” of the typical “independent” businessman was perhaps expressed by acting Chief Justice Barton (dissenting), that the Constitution did
The actual relation of the individual Australian workingman to his trade union appears to be fundamentally political in character. It resembles strikingly the relation of the single citizen to the Government of the Republic, to-wit: He takes part in choosing the officials who govern him and the conditions under which he lives and works, and he may also have a vote in the direct determination of legislative measures, or trade union policy; yet in the large and at the last, he must conform himself to decisions made by others, by the officials whom he has voted for (or against) or by the majority of his fellow citizens or fellow members (of the union). That situation no doubt may fairly be called "economic democracy." It corresponds to our political democracy, but it lends point to the remarks quoted from a Melbourne newspaper in comment on the British Labor Party's recent victory at the polls, that the British workingman evidently had decided to exchange an economic order of personal liberty for one of "socialized regimentation." It is perhaps not impossible that our American workingmen may arrive some day at the same conclusion.  

not enable the Commonwealth Arbitration Court "so far to encroach on the powers of the States as to place the general control of industrial enterprises in the hands of employees in place of the owners because the Court is satisfied that otherwise the employees will not rest in that contentment without which it is feared that industrial peace will not continue. I think further, that the owner of a business has still the right, subject to the law of his State, to decline to contract for the services of any man unless he wants him. . . . It follows, that he need only accept a man's services on such terms as in his own judgment are not calculated to injure his business. . . . Strange as it may seem to some, the employer may decline to give the man the right to have wages from him unless the man will agree to obey any lawful orders" (of the employer), "even as to matters . . . not part of the employment itself" (e.g., such matters as wearing a trade-union badge while on duty) ; Aust'n Tramway Employes v. Prahan Tramway Trust, (1913) 17 C. L. R. 680. But Mr. Justice Barton's "hedging remark" may be noticed, "subject to the law of his State," because any one of the Australian States could unquestionably do any of the things he was insisting the Commonwealth could not do.

Notwithstanding the progressive insertion of "teeth" into Australian compulsory arbitration and the outlawry of strikes and lock-outs, it seems that they have not been too effectively avoided. Australia has suffered severe and violent labor disturbances; and the Minneapolis Star Journal has very recently told of a Commonwealth-State conference called to consider ways and means for composing "spreading strikes in New South Wales." Issue for November 13th, 1945, p. 17, under the heading—"On the Worldwide News Front."