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Recommended Citation
David S. Bogen, A Look at Labor Law in the Land Down Under: Industrial Relations in Australia, 41 Md. L. Rev. 103 (1981)
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol41/iss1/11

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A LOOK AT LABOR LAW IN THE LAND DOWN UNDER:
INDUSTRIAL RELATIONS IN AUSTRALIA

DAVID S. BOGEN*

The legal systems of Australia and the United States are alike in many ways. Each is a democracy with a federal constitution. They share a common law tradition and the same basic principles of contracts, torts, property and criminal law. Their labor laws, however, contrast sharply. A comparison of the two systems of industrial relations reveals fundamental differences in values. Thoughtful individuals in the labor relations field have suggested that each country adopt a process which is a central feature of the other’s labor law. For example, interest arbitration, a central feature of Australian labor law, has been proposed for public employment in the United States. At the same time, grievance arbitration, which is so prominent an ingredient of American labor relations, has been recommended as a panacea for friction in Australian industrial plants. In evaluating such suggestions, it is helpful to understand the values that each form of arbitration serves in the system of which it is a part. A little reflection cautions that any transplant will be rejected unless its new environment is hospitable.

* B.A. 1962, LL.B. 1965, Harvard University; LL.M. 1967, New York University; Professor of Law, University of Maryland. The author would like to express his appreciation to the Dean and faculty at the University of Sydney Law School for their hospitality during his sabbatical stay. In particular, Professor Derek Thomson was most generous in his advice and helpful in arranging meetings with participants in the Australian system. The author’s indebtedness to Justice Macken, Justice Alley and Deputy Industrial Registrar Hastings is apparent from the frequent references in the notes. Registrar Hastings also generously made suggestions and corrections to an initial draft of this paper, which prevented the most egregious errors (although new ones may have subsequently crept into their place). Professors William Reynolds and Gordon Young of the University of Maryland School of Law offered several helpful suggestions. My mother, Jane Skillen Rost, my step-father, Frederick Rost, and my sister, Elizabeth Tanner, have taxed the capacity of the postal system with newspaper clippings and prints of the latest decisions to keep me abreast of the most recent twists and turns of the Commission in wage fixation determinations. To all these kind people, my grateful thanks. The errors that remain and the opinions expressed are, of course, solely the responsibility of the author.


2. See P. BRISSENDEN, THE SETTLEMENT OF LABOR DISPUTES ON RIGHTS IN AUSTRALIA 125 (1966) [hereinafter cited as BRISSENDEN]; J. NILAND, COLLECTIVE BARGAINING AND COMPULSORY ARBITRATION IN AUSTRALIA 36-7 (1978) [hereinafter cited as NILAND].
A comparison of industrial relations systems demands a basic grasp of the major characteristics of each. Collective bargaining is the heart of American labor law. The model for the determination of wages, hours and conditions of work envisions a union, which has been selected by a majority of the workers in an appropriate bargaining unit of a company, reaching an agreement with the employer.\(^3\) Disputes over the interpretation or application of the agreement are resolved by a person chosen by the parties, and that person's decision is enforced by the courts.\(^4\) The focus of American labor law is the regulation of the pressures each side can exert in the process of organizing workers and negotiating and implementing an agreement.\(^5\) Since union representation depends on securing majority support, employees in many companies are not unionized. As a result, their conditions of work are established by the employer subject to prevailing economic factors, the common law of employment contracts, and the minimum requirements of social legislation such as minimum wage and hour laws. The possibility that dissatisfied workers will organize, however, is a significant consideration for any employer. Thus, the system of collective bargaining has an impact even on the large number of employment relationships in which the workers are not unionized.

In Australia, on the other hand, conciliation and arbitration is the core of labor relations. The Australian model relies upon an independent government body, the Australian Conciliation and Arbitration Commission, to play a critical role in the establishment of wages and conditions of work. Awards certified or made by that body may be enforced in the courts. The central concern of labor law in Australia is the operation of the Commission in certifying or making awards.\(^6\)

\(^3\) Labor Management Relations Act, Title I, 29 U.S.C. §§ 141-197 (1976). Section 9 of the Act governs the election of a representative of the workers, 29 U.S.C. § 159 (1976), while subsections 8(a)(5), 8(b)(3) and 8(d) define the duty to bargain, 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d) (1976). Although union certification as the choice of the workers in an election conducted by the National Labor Relations Board is the primary means to obtain bargaining rights, they may also be obtained through voluntary recognition by the employer of a union that has obtained authorization cards from a majority of the employees or through an order remedying certain unfair labor practices of an employer. See NLRB v. Gissel Packing Co., 395 U.S. 575, 597-98, 614 (1969).


\(^5\) This is the substance of the unfair labor practices proscribed by § 8 of the Labor Management Relations Act, 29 U.S.C. § 158 (1976).

practice, the wages paid are often above the award rate and many conditions of work are not dealt with in the formal awards process. Nevertheless, the conciliation and arbitration system influences the employment relationships that transcend it. The informal practices outside the award system, however, have a much greater impact on the operation of Australian labor laws than the non-union employment relationship has upon American labor law.

Australian lawyers often have a sketchy notion of American labor law, but few of their American counterparts are familiar with the land down under. Indeed most American libraries do not contain the materials necessary to learn about Australian industrial relations. Thus, much of this article is devoted to a fuller explanation of the Australian system. The first section sets forth the constitutional constraints underlying Australian labor law. The second outlines the industrial relations system in that country. The final section comments on the nature of the differences between American and Australian approaches to industrial relations and on the viability of grafting features of one onto the other.

I. CONSTITUTIONAL CONSTRAINTS

The Australian system of industrial relations is rooted in the Australian Constitution. That document reflects a national commitment to conciliation and arbitration for the resolution of industrial disputes, and it creates obstacles to radical change in the basic structure of Australian labor law. The Australian Constitution was greatly influenced by the American experience, but the path chosen by the Australians has had a significantly different impact on the power of their central government to regulate labor relations.

The Australian Constitution contains a commerce clause modeled after the American grant of power, but understood by its drafters to confer only limited power. The members of the Australian Constitutional Conventions held a narrow view of federal power similar to that

7. See pp. 122-28 infra.
8. Id. See text accompanying notes 83 to 85, 104, and 112 to 114 infra.
9. J. LANAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 273-75 (1972). The Australian Constitution was the product of a number of separate convention meetings at various state capitals.
10. “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) Trade and commerce with other countries, and among the states.” Austl. Const. § 5(i). Despite this power, Henry Bourne Higgins, urging the addition of a clause to provide for industrial disputes extending beyond the limits of any one state, stated: “Unless there is some clause of this sort put in, the Federal Parliament will be absolutely incompetent to deal with it.” National Australasian Convention Debates, Adelaide, Australia (Apr. 17, 1897), quoted in R. O’DEA, INDUSTRIAL RELATIONS IN AUSTRALIA 162 (3d ed. P. Moore 1974).
of the American Court at the turn of the century. During that period, the United States Supreme Court held the Sherman Anti-Trust Act inapplicable to monopolies in the manufacture of sugar.\(^\text{11}\) Reasoning that the production of goods did not constitute commerce among the several states but merely a preparatory step, the Court said that regulation of the production of goods was an indirect rather than a direct regulation of commerce. The Court indicated that indirect regulation might lie beyond Congressional power. This distinction between permissible direct and prohibited indirect regulation of interstate commerce persisted in American constitutional decisions well into the twentieth century.\(^\text{12}\) In Australia, major strikes among maritime workers, stevedores, shearers and miners in the 1890's convinced Australians that their central government needed more power to deal with industrial relations than American courts had found in the commerce clause.\(^\text{13}\) Therefore, in addition to a commerce clause modeled after the American one, the Australians inserted section 51, placitum xxxv in their constitution. Placitum xxxv grants the commonwealth parliament power "to provide for conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."\(^\text{14}\)

In the United States, narrow construction of the commerce clause eventually precipitated a constitutional crisis when President Franklin D. Roosevelt sought federal laws to combat the depression in the 1930's. At the time, the Supreme Court's narrow reading of federal commerce power was widely perceived as an impediment to essential national measures. Responding to the national emergency, and perhaps, to Roosevelt's drive to expand its membership, the Court reversed its direction.\(^\text{15}\) Soon vacancies caused by death and retirement enabled the president to appoint new justices who ensured a generous reading of federal powers. The Court abandoned the distinction between direct and indirect effects and upheld federal wage and hour leg-

\(^{11}\) United States v. E.C. Knight Co., 156 U.S. 1 (1895).
\(^{14}\) AUSTL. CONST. § 51, plac. xxxv. Australians use "placitum" to refer to subsections of their Constitution.
islation as well as other labor regulation. Ultimately, the Supreme Court held that Congress may regulate any activity that has a substantial effect on interstate commerce.

Placitum xxxv relieved the Australian High Court from much of the political pressure that led the American Supreme Court to a broad construction of the commerce clause. When the depression struck, Australia already had more than a decade of experience with a national system for regulating conditions of labor. Although the wisdom of the measures taken to combat the depression may have been questionable, the authority to take them was clear. In addition, placitum xxxv provides a textual argument for a narrow reading of commonwealth powers over trade and commerce. The liberal construction adopted in the United States allows national power to reach industrial disputes extending beyond the limits of any one state because such disputes exert a substantial effect on interstate commerce. This interpretation is unacceptable in Australia because it would render surplusage the grant of power in placitum xxxv to provide for the conciliation and arbitration of those disputes. Thus, placitum xxxv supports the high court’s restrictive view of commonwealth power under the trade and commerce clause.


17. Perez v. United States, 402 U.S. 146 (1971). In Perez, the Court stated: “Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power ‘to excise as trivial, individual instances’ of the class.” 402 U.S. at 154 (quoting Maryland v. Wirtz, 392 U.S. 183, 193 (1968) (emphasis in original)). See Katzenbach v. McClung, 379 U.S. 294 (1964) (applying federal public accommodations law to local restaurant); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding marketing quota application to consumption of home-grown wheat).

18. Thus the Arbitration Court reduced award wages by 10% to combat the depression. Basic Wage & Wage Reduction Inquiry, 30 C.A.R. 2 (1931) (Decisions of the Commonwealth Court of Conciliation and Arbitration are officially reported in the Commonwealth Arbitration Reports).


Many other factors have affected the interpretation of the Australian commerce clause. For example, the American courts have interpreted the American clause through doctrines derived by implication—the prohibition on discrimination against interstate commerce by the states, Cooley v. Board of Wardens, 53 U.S. (1 How.) 299, 317 (1850) (dictum), and the limit on federal power of implied intergovernmental immunities, National League of Cities v. Usery, 426 U.S. 833 (1976). The Australian Constitution, on the other hand, expressly states that “trade, commerce and intercourse among the States . . . shall be absolutely free,” AUSTL. CONST. § 92, thus circumventing the need to draw implications from the
In view of the narrow scope of the commerce clause in the Australian Constitution, the Commonwealth Conciliation and Arbitration Act of 1904 was based primarily on the power granted in section 51, placitum xxxv.\(^\text{20}\) The language of that placitum assured the survival in the present statute of important characteristics of the system established by the 1904 Act: the independence of the government body engaged in conciliation and arbitration and its central position in the nation's labor law, that body's use of case adjudication rather than rule-making processes, and the importance of the states in industrial relations.

Placitum xxxv only grants the commonwealth parliament power to provide for conciliation and arbitration. Parliament cannot legislate wages and hours nationally.\(^\text{21}\) Terms of employment, including minimum wages and maximum hours, can be established only by an arbitral tribunal. The national power to provide for conciliation and arbitration allows parliament to prescribe the procedures to be used by the Australian Conciliation and Arbitration Commission, but not the outcome of its processes.\(^\text{22}\) This independence enables the Commission-
ers to pursue their understanding of the public interest with some immunity to immediate political pressure. Although the disinterested nature of the Commission may enhance public perception of its decisions as fair, the benefits of insulation must be weighed against possible obstruction of national programs and policies. For example, the Commission determines whether wages should reflect increases in the cost of living, but the Commonwealth government is responsible for policies to deal with inflation. Therefore, at times the two bodies work at cross purposes.

It may be possible to construe parliament's power to provide for conciliation to include the authority to enact laws that would assist collective bargaining. Nevertheless, such laws would be constitutionally questionable if they did not envision arbitration as the ultimate recourse of the parties. The constitutional argument that parliament has no power to provide for conciliation without arbitration, the political argument that arbitration is an important protection for economically powerless workers, and the inertial force of almost a century's experience of arbitration make national collective bargaining legislation unlikely in the near future. Unions and employers may, and sometimes do, bargain collectively in the absence of laws regulating the process.

23. In Waterside Workers' Fed'n v. Alexander, 25 C.L.R. 434 (Austl. 1918), the High Court held that the power to enforce awards of an arbitrator was judicial in nature and could only be exercised by a judge having the tenure in office required by § 72 of the constitution. In 1926 provision was made for life-appointment to the Arbitration Court. ACTS AUSTL. P. No. 22 (1926). When the High Court's decision in The Queen v. Kirby; (Ex parte Boilermakers' Society), 94 C.L.R. 254 (Austl. 1956), forced parliament to separate the functions of award-making and award enforcement, lifetime tenure was retained for commissioners as well as for justices of the newly created industrial court. See generally note 76 infra.

24. Following the January, 1981 wage indexation decision, The Federal Treasurer, Mr. Howard, said the 3.7 per cent national wage rise was disappointing and went in the face of the clear requirements of the Australian economy at the present time. The minister for Industrial Relations, Mr. Peacock, said such a large increase would add to inflationary pressures in the economy and jeopardize the current economic recovery. The Weekend Australian, Jan. 10-11, 1981, at 5, cols. 1-2.

25. "The power is limited to legislation with respect to a particular method of dealing with such disputes. The method so specified is conciliation and arbitration." Waterside Workers' Fed'n v. Alexander, 25 C.L.R. 434, 462 (Austl. 1918). The Alexander decision did not, however, decide whether measures supporting collective bargaining could be constitutionally viewed as conciliation.

26. See AUSTRALIAN LABOR READINGS, supra note 21, at 346-48. See also Isaac, The Prospects for Collective Bargaining in Australia, in AUSTRALIAN LABOR RELATIONS READ...
tensively regulated system, however, retards the orderly development of its alternative. Thus, placitum xxxv, the source of commonwealth power, provides significant support for continuing the system of conciliation and arbitration and discourages attempts to move to collective bargaining in Australia.

Placitum xxxv limits the conciliation and arbitration powers of the Australian Conciliation and Arbitration Commission to industrial disputes. The Commission cannot make rules of general application, but can only render decisions binding on the parties before it in a specific industrial dispute. Although an award may be based on a principle of general application, such as the forty-hour work week or time and a half pay for overtime, the principle cannot be enforced against anyone who was not a party to the award. A separate proceeding to which a given employer is a party will be necessary to make an award that binds him, although it is certain what principle will be applied in the subsequent award proceeding. The awards create law rather than declare it. They operate prospectively to govern future relations rather than to determine liability for the past. In this respect, awards resemble legislation more than adjudication. Parties argue what the rules governing employment should be, not what they are. Nevertheless, the procedure resembles the judicial model for conflict resolution and it shares many of the same virtues and vices. The concrete case sharpens the issues and is likely to be a good vehicle for dealing with specific disputes, but the award’s ramifications in other situations may be overlooked. Moreover, the timing of the decision may make the problem more difficult to resolve than a general rule that could anticipate conflict. Recognition of the potential effects of the award on other persons is a constant theme of Commission operations. Cases with obvious significant external effects will be taken by the full bench, and affected


28. Unlike the grievance arbitrator in the United States, who is bound to decide within the framework of the language of the collective bargaining agreement, the Australian arbitrator establishes the basic terms within which issues of interpretation can arise. “The function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the Arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.” Waterside Workers’ Fed’n v. Alexander, 25 C.L.R. 434, 463 (Austl. 1918).

29. “Both presuppose a dispute, and a hearing or investigation, and a decision.” Id. at 463.
intervenors may participate. Nevertheless, the form of the proceeding hews more closely to a trial model than to administrative rulemaking.  

Finally, commonwealth power is limited to disputes that "extend beyond the boundaries of a single state." The dispute itself must transcend state limits, not merely affect transactions in other states. A conflict at a single plant is not within the scope of the Commission's power no matter what effect it may have on the nation's economy. If an entire industry is concentrated in a single state, it is subject solely to the labor law of that state even though its product is essential to the operation of other industries that function nationwide. Consequently, the system gives wide scope to the operation of state laws governing labor relations. This has caused substantial friction and has promoted several attempts to amend the constitution. Indeed, in its recent unsuccessful national election campaign, the Australian Labour Party promised to establish a commission to consider both the possibility of a unified industrial relations system and the procedures necessary to accomplish it. There are, however, arguments favoring local regulation. State bodies provide more flexibility to deal with local conditions and to experiment with new approaches in labor relations. The states are not confined to case-by-case adjudication. They can legislate on labor conditions, and their arbitral commissions may create general rules.

30. In this connection, it may be appropriate to point out the controversial preference of the National Labor Relations Board in the United States for adjudication over rulemaking. See NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (plurality opinion). When considering basic changes in its principles of decision, the Commission may hold an inquiry akin to an administrative proceeding. See, e.g., Inquiry Into Wage Fixation Principles, Print E6000B (Austl. C. & A. Comm'n. Apr. 7, 1981) (Print number refers to the published document and is given where the decision has not yet been reported in C.A.R.). The principles announced, however, bind only the parties in the specific case to which the inquiry related. Its further application requires summary proceedings or coordination with state tribunals to achieve the effect of a common rule.


34. The Sydney Morning Herald, Sept. 16, 1980, at 12, col. 1: "The ALP promises an overhaul of the arbitration system following a major joint inquiry which would be carried out by the Arbitration Commission, the ACTU and national employers. The terms of reference would include: Whether a unity [sic] system of industrial regulation is feasible and how it might be achieved."

Further, some matters of substance can be dealt with only through state laws. For example, dues checkoffs can be granted by state bodies, but are not considered to be part of an industrial dispute that can be dealt with in a commonwealth award. The flexibility of the state authorities and the problems and potentials for coordination must be kept in mind in any consideration of the entire system. The focus of this article, however, is on the operations of the Commonwealth Act.

II. AN OUTLINE OF THE AUSTRALIAN INDUSTRIAL RELATIONS SYSTEM

The central features of the system of Australian industrial relations established by the Commonwealth Conciliation and Arbitration Act differ markedly from their American counterparts. The Australian system involves registration of associations of employees and employers, conciliation and arbitration of industrial disputes, and awards by the arbitral tribunal. This contrasts sharply with the American system which relies on certification, collective bargaining, and collective bargaining agreements. The Australian system bears a surface relationship to American minimum wage and hour laws, but it establishes different rates for different job classifications and has a far more pervasive effect on the terms and conditions of employment than do the minimum standards imposed under American social legislation.

A. Registration of Trade Unions

In Australia, the right to appear before the Arbitration Commission to represent workers is dependent on registration by the Industrial Registrar. Any employees' association may be registered if it has at least one hundred members in an industry or occupation where there is no other registered union to which the workers may "conveniently belong." The registration coverage relates to the whole of the industry or class of occupation, not just to employees of a single employer.

36. The High Court of Australia found union dues were a matter between the union and the employee, not one with which the employer is concerned. Thus, requests for dues checkoffs, a deduction in wages for union dues, are not disputes over an "industrial matter." Reg. v. Portus; (Ex parte Australia and New Zealand Banking Group), 14 ALJR 623 (Austl. 1972); see R. O'Dea, supra note 10, at 24; J. Macken, supra note 13, at 62. Many employers do check off union dues even though it is not a condition of employment under federal awards. Further, state awards generally do not contain such provisions even when the employer makes a practice of dues checkoffs. Interview with Mr. Justice James J. Macken of the New South Wales Industrial Commission in Sydney, Australia (Sept. 22, 1980).


38. The word industry is defined in the Act in the alternative by reference to both employer's business and employee's occupation. Id. § 4. General organizations cutting across
Thus there is a Federated Engine Drivers’ and Firemen’s Association as well as an Australian Meat Industries Employees’ Union. Unlike the United States, where union recognition depends on a showing of support from a majority of the workers in an appropriate bargaining unit, Australia does not require that a union secure a majority of workers as members before it can be registered. Registration then serves as a permanent bar to the registration of any rival association in the same industry.

An Australian union may have branches or subbranches responsible for several plants, but the union is registered on a national or statewide basis. The federal conference, which establishes overriding policy, consists of the branch secretaries plus delegates elected by the branches. Wages, standard hours of work, leave and basic conditions of work are established through the conciliation and arbitration process in which either the state or national union is a participant. Other matters may be resolved through discussions between employers and

several types of work and different industries also exist. They are less common because groups within such a general union may succeed in showing that the existing organization is too general to properly represent their interests and, therefore, is not one to which they may conveniently belong. At this late date in the operation of the industrial relations system, however, registration of new unions is rare, with only one or two applications per year. Interview with Deputy Industrial Registrar Selby G. Hastings of New South Wales Registry of the Australian Conciliation and Arbitration Commission, in Sydney, Australia (Sept. 17, 1980).

39. AUSTRALIAN LABOR READINGS, supra note 21, at 280.

40. Conciliation and Arbitration Act, 1904-1973, ACTS AUSTL. P. §§ 132, 142 (1973). Section 142 provides that the Registrar shall refuse to register any association if an organization to which its members might conveniently belong has already registered. In the United States, the union usually secures the status of representative by certification as the choice of a majority of employees in an election held under the auspices of the National Labor Relations Board. 29 U.S.C. § 159 (1976); see J.J. Case Co. v. NLRB, 321 U.S. 332 (1944). The representative status of the union in the United States may be challenged by a rival union twelve months after the last election, 29 U.S.C. § 159(c)(3) (1976), or, if the employer and certified union have entered a collective bargaining agreement of no more than three years duration, at the expiration of the agreement, General Cable Corp., 139 N.L.R.B. 1123 (1962).

41. AUSTRALIAN LABOR READINGS, supra note 21, at 109-11. One sore spot in union relations is the potential for the registered federal union to be a separate body, unrelated to the state-registered union in the same area. Thus, a recent arbitration hearing involved an attempt by a federal union of plumbers doing air conditioning work to secure an award in New South Wales that would preempt the award which the state union had received. Interview with Mr. Justice Stephen Alley of the Australian Conciliation and Arbitration Commission, in Sydney, Australia (Sept. 23, 1980).

42. AUSTRALIAN LABOR READINGS, supra note 21, at 106-07.

43. Hince, Unions on the Shop Floor, in AUSTRALIAN LABOR RELATIONS READINGS 192 (2d ed. J. Isaac & G. Ford 1971). Some of these conditions may be established through state legislation for businesses covered by state and not commonwealth decisions. Also, overaward payments are outside the award process. See text accompanying notes 102-04 infra.
the union branch, but there is virtually no authority delegated to union representatives at the shop level.\textsuperscript{44} Although a shop steward may be responsible for collecting dues and reporting problems in a plant, he has no power to resolve matters in the plant.\textsuperscript{45}

Registration under the Conciliation and Arbitration Act successfully avoids many of the problems that plague industrial relations in the United States. It leads to the exercise of union authority at a level higher than the individual plant. Thus, the employer in Australia has far less incentive to combat union organization of his workers than does his American counterpart. The Australian employer must meet the union in conciliation and respond to its arguments in arbitration even though none of his employees have become union members. Further, he may be bound by a Commission award, which the union can enforce, although his non-union employees have no personal rights. Union officials then have statutory rights to enter the plant to ensure compliance.\textsuperscript{46} Since no election is involved and awards are the product of an independent body not directly subject to union economic pressure, union organizing campaigns are not contested and generally receive little attention.\textsuperscript{47}

Although the statute pays little attention to the process of organizing workers, it carefully regulates internal union procedures, including the election of specific union officials. The Registrar may refuse to register a union or the Federal Court of Australia, Industrial Division, may cancel the registration of a union that fails to provide for internal union democracy or otherwise violates the Conciliation and Arbitration Act.\textsuperscript{48} The Act prohibits the Union from charging oppressive

\textsuperscript{44} Interview with Mr. Justice James J. Macken, \textit{supra} note 36; see Hince, \textit{supra} note 43, at 193 (a grievance or official union action comes from branch level on all matters). No unions as of the date of Hince's article had delegated power to the shop steward to initiate remedial action. Instead, the steward performs a watchdog's role, reporting to the branch. \textit{Id.} at 194-95.

\textsuperscript{45} Hince, \textit{supra} note 43, at 195.


\textsuperscript{47} One provision of the Act does, however, prohibit discrimination against union members. \textit{Id.} § 5(1)(a).

\textsuperscript{48} Sections 132-135 of the Conciliation and Arbitration Act deal with registration of associations by the Industrial Registrar. \textit{Id.} §§ 132-135. Section 132 refers to conditions with which associations must comply to register. \textit{Id.} § 132. Section 133 states one condition requiring that the rules of the organization or association provide for election by secret ballot of all union office holders and that all dues-paying members of the appropriate group be eligible to vote. \textit{Id.} § 133. Section 134 permits amendment of the rules to comply with objections during the application process, while § 135 makes the Registrar's certificate of registration conclusive evidence that the organization complied with the prescribed conditions for registration. \textit{Id.} §§ 134-135.

Section 143 of the Act provides for the cancellation of registration by the Court for a
dues, and membership dues are much lower (about twenty-five dollars per year) than in the United States, while the percentage of the workforce which are union members is much higher than in this country.49

B. Conciliation and Arbitration

About ninety percent of Australian workers are covered by awards of commonwealth or state tribunals setting forth wages, hours and working conditions.50 The process of making an award normally begins when a registered union serves a “log of claims” on an employer. An industrial dispute arises when the other party (employer, employers’ association or group of employers or employers’ associations) rejects the claim.51 An employer may also serve a log of claims on a union.52 Commonwealth jurisdiction can be established by serving the same log of claims on employers in more than one state.53

The logs tend to be greatly inflated and contain an enormous variety of requested conditions because the power of the commission is limited to the matters in dispute (the “ambit”); i.e., it cannot award more than requested in the log of claims, nor make or vary an award on any condition not set forth in the log of claims.54 The union represents only

variety of reasons including: 1) error in the original registration; 2) organization rules that are inadequate or contrary to law; 3) failure to observe the rules; 4) the imposition of rules that are oppressive, unreasonable, or unjust as administered; 5) financial neglect; and 6) conduct hindering the achievement of an objective of the Act. Id. § 143. For a discussion of the impact of such regulations on fostering union democracy, see Howard, Democracy in Trade Unions, in Australian Labor Relations Readings, 264 (2d ed. J. Isaac & G. Ford 1971).

49. Conciliation and Arbitration Act, 1904-1973, ACTS AUSTL. P. § 140(1)(c) (1973) prohibits rules imposing on members obligations that are oppressive, unreasonable or unjust. In 1972 the dues standard recommended by the ACTU was $20 per annum. Australian Labor Readings, supra note 21, at 121. In 1969, 50% of wage and salary earners in Australia were members of trade unions compared with 23% in the U.S. Id. at 97. Section 144 of the Act gives workers the right to union membership. Acts Austl. P. § 144 (1973). Thus the closed shop is forbidden, although § 47 of the Act permits awards that grant a preference to members of organizations with a special exception for persons whose “conscientious beliefs” do not allow them to become members. Id. § 47 (1973).

50. See Portus, supra note 33, at 397 (in 1968, 87.4% of Australian workers were covered by awards — 40.1% were commonwealth awards and 47.3% were state awards).


52. See Mills & Sorrell, supra note 20, at 32.

53. Sykes, supra note 13, at 357.

54. Mills & Sorrell, supra note 20, at 32. See also Australian Boot Trade Employees’ Fed’n. v. Whybrow & Co., 11 C.L.R. 311 (Austl. 1910), discussed in note 27 supra. Section 55 of the Conciliation and Arbitration Act appears to give the Commission power to exceed the submission of the parties, but it has been applied narrowly to give only incidental relief and not to allow decision of new matters or decisions that are outside the scope of the dispute submitted for arbitration. See Acts Austl. P. § 55 (1973).
its own members, and awards are binding only on the parties to the dispute. Nevertheless, a union may claim that non-members employed in the industry must be covered by the award in order to remove incentives for hiring non-members. The award, then, will often extend to all employees in an industry although it is enforceable with respect to non-union employees only at the demand of the union or by government-appointed arbitration inspectors.55

Confronted with a dispute, the Commission proceeds in two distinct stages: first, it engages in conciliation; then, if necessary, it proceeds to arbitration. The active involvement of the Commission begins with a decision by a Deputy President of the Commission to assign the dispute to an individual commissioner on the panel of commissioners that has responsibility for the industry in which the dispute arises.56 He or she will determine whether an industrial dispute exists, who are the parties to such a dispute, and what are the matters in dispute.57 Upon finding that a dispute exists and that it extends beyond the limits of a single state, the Commissioner begins conciliation.58 If the parties reach an agreement during conciliation, it will be submitted to the Commissioner to be certified.59 In observing the conciliation process, the Commissioner will make statements or suggestions to produce agreement among the parties. It is difficult to disentangle statements reflecting the Commissioner's view of the accommodation the parties would eventually reach without assistance from those based on his appraisal of the result that is intrinsically preferable.60 The Commissioner may refuse to certify an agreement if he believes any of its terms are against public policy or beyond the powers of the Commission to award.61 Once certified, an agreement has the same status as an


56. The panels are organized so that a Deputy President presides over each panel. Conciliation and Arbitration Act, 1904-1973, ACTs Austl. P. § 23 (1973).

57. Id. § 24(1).

58. Id. § 25(4).

59. Id. § 28.

60. Depending on the significance of the dispute and its potential effect on other industries, the arbitrator may look to his own version of the merits. Interviews with Mr. Justice Stephen Alley, supra note 41, and Mr. Justice James J. Macken, supra note 36.

61. Conciliation and Arbitration Act, 1904-1973, ACTs Austl. P. § 28(2) (1973). With the abandonment of wage indexation, see text accompanying notes 79 to 85 infra, there are no guidelines for wages. Nevertheless, the Commission must take into account the "interests of society as a whole," ACTs Austl. P. § 4 (1973), and any matter before the full bench is subject to the requirement that the Commission have regard "to the state of the national economy and the likely effects on that economy of any award that might be made in the..."
award.\textsuperscript{62} If any issues cannot be resolved by the parties, the matter goes to arbitration. The Commissioner who conciliated may also act as arbitrator unless one of the parties objects.\textsuperscript{63} Arbitration proceedings are public. The Commissioner's decision will be in the form of an award that includes the disputed matter as well as all those resolved in conciliation. An appeal may be taken to the full bench from a Commissioner's decision.\textsuperscript{64} In addition, certain fundamental matters ultimately affecting all workers must be determined by the full bench.\textsuperscript{65}

C. \textit{Wage Fixing}

For most of this century, Australia has used an independent government body to determine the wages and conditions employers must afford their employees, but the methodology for making that determination has been subject to change. This year has been noteworthy because of the sudden shifts of position by the Australian Conciliation and Arbitration Commission in national wage cases. An understanding of recent developments requires a brief excursion into the history of wage determinations in Australia. The Act of 1904 established the Commonwealth Court of Conciliation and Arbitration (the C & A Court), the ancestor of the modern Australian Conciliation and Arbitration Commission. In the earliest proceedings before it, the C & A Court began by investigating what wage was necessary to procure the essentials of human existence, listening to arguments why the employees before them should be paid more than ordinary laborers and then hearing rebuttal.\textsuperscript{66} The portion of the process which inquired into essential needs became a separate decision formalized as the Basic Wage Inquiry. While the C & A Court announced that the Basic Wage was based on the needs of a family of five, it took care that the budget matched the wages paid unskilled laborers by existing "reputable" employers.\textsuperscript{67} In 1919 a Royal Commission reported that the actual cost of living according to reasonable standards of comfort was much higher than the C & A Court's Basic Wage, but the court ignored the report.\textsuperscript{68}
The Basic Wage was increased significantly in 1922 to keep pace with rising prices and reduced by ten percent in 1931 in the wake of the Depression.\textsuperscript{69} In 1937, the court found that economic recovery justified a "prosperity loading."\textsuperscript{70} By 1940, the court had acknowledged that the Basic Wage was not based solely on need. "In the end, economic possibilities have always been the determining factor," wrote Chief Justice Beeby, and "what should be sought is the independent ascertainment and prescription of the highest basic wage that can be sustained by the total of industry in all its primary, secondary and ancillary forms."\textsuperscript{71} The tradition of tying wages to worker needs, however, has made consideration of the cost of living an important factor in subsequent inquiries involving the Basic Wage.

From the outset, the C & A Court established additional payments, or "margins," to augment the Basic Wage as compensation for the extra skill, difficulty or responsibility entailed by particular jobs. In the original awards, the court relied on the customary rates paid by the "reasonable employer" to establish the proper "margin."\textsuperscript{72} With experience, the court began to pursue comparative wage justice — attempting to assure that work in different industries would receive the same pay if skill, responsibility and difficulty were substantially the same.\textsuperscript{73} It also wrestled with problems of relativity — how much more workers should be paid for substantially higher degrees of skill, responsibility or difficulty.\textsuperscript{74} The basis for changes in margins was likely to be either an increase in all margins or a determination that the particular job had changed so that it entailed more skill, responsibility or difficulty than before.\textsuperscript{75} In 1956, the functions of the C & A Court were divided.\textsuperscript{76}

\begin{itemize}
  \item \textsuperscript{69} Id. at 90-91.
  \item \textsuperscript{70} Basic Wage Inquiry, 37 C.A.R. 583 (Austl. 1937).
  \item \textsuperscript{71} Basic Wage Inquiry, 44 C.A.R. 41 (Austl. 1941).
  \item \textsuperscript{72} R. O'Dea, \textit{supra} note 10, at 95.
  \item \textsuperscript{73} Id. at 94.
  \item \textsuperscript{74} The dollar amount of the difference in margins was essentially an arbitrary figure. This very arbitrariness discouraged the Commission from changing the margin in one classification on any basis other than a change in the nature of the work involved or a change applicable to all margins. \textit{Id.} at 101.
  \item \textsuperscript{75} Although an application for an increase in the margin not based on changes in the work was limited to a single industry, other awards swiftly followed the new standards. For a variety of reasons, the metal trades margins became the key awards which all other margin awards followed. R. O'Dea, \textit{Principles of Wage Determination in Commonwealth Arbitration} 83-124 (1969).
  \item \textsuperscript{76} In The Queen v. Kirby; (\textit{Ex parte} Boilermakers' Society), 94 C.L.R. 254 (Austl. 1956), the High Court of Australia held that it was a violation of the separation of powers required by the Australian Constitution for the same body that made an award (a legislative function) to enforce that award (a judicial function). Thus the Conciliation and Arbitration Act was amended to create two separate bodies. \textit{Acts Austl.} P. No. 44 (1956). In further
The responsibility for award enforcement was given to a new body known as the Commonwealth Industrial Court. The Commonwealth Conciliation and Arbitration Commission was created to carry on the conciliation and arbitration functions of the C & A Court. Initially, the Commission did not radically change the process of making awards. It continued to decide the Basic Wage and the Margins in separate proceedings. In 1967 these separate determinations were merged into a determination of a Total Wage.²⁷

Today, Total Wage determinations are made by the full bench of the Arbitration Commission in "national wage cases." A national wage case arises as a test case in a particular industry where the issues are "predominantly related to the national economy" and are not peculiar to that industry.²⁸ The unions party to such a suit act through the Australian Council of Trade Unions (roughly equivalent to the American AFL-CIO) and through the Council of Australian Government Employee Organizations. Private employer organizations, the commonwealth and the state governments also participate in national wage cases.

In the last five years, the primary consideration in national wage cases has been increases in the cost of living. This was partially reflected in a Commission statement of principles of wage determination.²⁹ The principles called for a semi-annual decision adjusting awards in relation to movements in the consumer price index (CPI) plus an annual test case on national productivity, but no case on productivity has been heard since 1975.³⁰ In cases decided under these principles, unions objected to the Commission's failure to increase

amendments, these bodies were designated as the Australian Conciliation and Arbitration Commission and the Australian Industrial Court. Acts Austl. P. No. 138 (1973).

²⁷ National Wage Cases, 21 Indus. Info. Bull. 692 (Austl. C. & A. Comm'n 1966). The same economic factors were taken into account in Basic Wage and Margins cases, but the merger into a Total Wage assured that changes in margins would be on the same basis as changes in the Basic Wage, i.e., a percentage increase across the board or a fixed dollar amount added across the board. Although recently the national wage cases have all resulted in percentage increases, the possibility of opting instead for adding the same dollar amount to all awards requires the Commission to keep in mind the distinction between the Basic Wage and a Margin.


³⁰ "National productivity rises have not been considered since the introduction of indexation in 1975." The Sydney Morning Herald, July 8, 1981, at 2, col. 4. "As a matter of history, partial indexation has occurred more frequently than full indexation, and no Principle 6 [productivity] case has been before the Commission." Inquiry Into Wage Fixing Principles, Print E6000B, slip. op. at 9 (Austl. C. & A. Comm'n Apr. 7, 1981).
awards by the full amount of increases in the CPI while the commonwealth government expressed fear that the increases granted fueled inflation.  

In the spring of 1981, the Commission announced a substantial change in its practices in national wage cases. Under the new system, the first semi-annual national wage case was to award eighty percent of the semi-annual increase in the CPI, absent extraordinary circumstances. The second semi-annual case, the “Final Review,” was not to make an automatic adjustment, but to consider all relevant factors — any rise in the CPI, the number and economic effect of strikes, any increases in productivity, and demands for shorter hours as affected by productivity. Yet on Friday, July 31, 1981, the Commission announced that it was abandoning the guidelines it had announced less than four months earlier. When the guidelines were announced, the Commission had indicated its hope that their application would reduce the level of industrial disputation. This hope was shattered by the continuing high level of strikes. In abandoning the policy of indexing wage increases to rises in the cost of living, however, the Commission did not give a clear statement of the policies it would follow in the future. The next national wage case will be heard in

81. “The thrust of the unions' submission is that full indexation and the restoration of wage and salary earners' purchasing power would help to ensure the maintenance of private consumption growth, a key factor in economic recovery.” National Wage Case, Dec. 1979 & Mar. 1980 Quarters, Print E3410, slip op. at 7 (Austl. C. & A. Comm'n July 14, 1980). In the same case, the Commonwealth argued that “if the acceleration in the rate of increase in wage costs is to be reversed the present situation requires no national wage increase on this occasion. A decision otherwise . . . will have adverse implications for economic recovery.” Id. at 26. The CPI increased 5.3% during the period in question, and the Commission's award of 4.2% satisfied no one. Id.

82. In the National Wage Case, June & Sept. 1980 Quarters, Print E5000 (Austl. C. & A. Comm'n Jan. 9, 1981), the Commission announced the abandonment of its previous system. “While no one has asked in terms that the system be abandoned, it is apparent from the submissions before us that the system in its present form has broken down.” Id. at 8. That decision called for a public inquiry into wage fixation principles. The inquiry resulted in the abandonment of the new system on April 7, 1981 as part of the Commission's decision in the national wage case for the June and September 1980 Quarters. Inquiry Into Wage Fixing Principles, Print E6000B (Austl. C. & A. Comm'n Apr. 7, 1981).


84. The Commission said that it expected “barring compelling circumstances, the new Principles will apply for a period of two years,” but it noted, “In the event of industrial actions taking place on a scale such as to signify general rejection of the Principles, the Commission will declare these Principles to be formally abandoned.” Inquiry Into Wage Fixing Principles, Print E6000B, slip op. at 65, 67 (Austl. C. & A. Comm'n Apr. 7, 1981).

85. The National Times, Aug. 2-8, 1981, at 3, col. 1. The President of the Commission, Sir John Moore, indicated only that future claims would be processed according to the provisions of the Conciliation and Arbitration Act. The Act, however, does not and cannot constitutionally establish the substantive principles for making wage determinations.
February of 1982, and the Commission must decide then what factors it will consider and what weight it will give them.

National Wage cases are given a nation-wide effect when parties to existing awards apply to vary their awards in accordance with the test case decision. The variance is made summarily, but each union must request a variance to each award to which it is a party and must notify all employers and associations party to the award to make it binding on them — a laborious and cumbersome task that is necessary because the constitution limits federal arbitration power to "industrial disputes."\(^{86}\)

The national wage cases are not the only methods by which wage awards are altered. The Commission makes new awards or varies existing awards based on factors peculiar to a particular industry. Prior to last July's decision, the primary source of wage increases in particular industries or job classifications was a "work value" case. Increases were justified in these cases on the grounds that the nature of the work had changed since the last award and was more demanding in some fashion.\(^{87}\) Work value cases in key industries such as the metal trades

86. Portus, \textit{supra} note 33, at 390. One procedure to avoid these problems is to grant state tribunals authority under § 41(l)(d) of the Act for many industries. The state can then proceed by common rule to adopt the terms of the specific award in the national wage case. Interview with Mr. Justice James J. Macken, \textit{supra} note 36.

87. 7. In addition to the above increases [in national wage cases], the only other grounds which would justify increases in wages or salaries are:

7.(a) Changes in work value

Changes in work value arising from changes in the nature of the work, skill and responsibility required, or the conditions under which the work is performed. Except for an award which has not been subject to averaging or across-the-board increases since 30 April 1975 it is not permissible under this Principle to alter the rates of all classifications or the substantial proportion of classifications or employees covered by an award unless the Anomalies Conference has found that there is a special and extraordinary problem.

(i) Prima facie the time from which work value changes should be measured is the last movement in the award rates concerned apart from National Wage and Indexation. That prima facie position can only be rebutted if a party demonstrates special circumstances and even then changes can go back only to 1 January 1970.

(ii) Changes in work by themselves may not lead to changes in the value of work. The change should constitute a significant net addition to work requirements to warrant a wage increase.

(iii) Where a significant net addition to work value has been established in accordance with this Principle, an assessment will have to be made as to how that addition should be measured in money terms. Such assessment should normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work. However, wherever appropriate, comparisons may also be made with other wages and work require-
could be referred to a full bench.\textsuperscript{88} The accumulation of individual work value decisions often resulted in major wage discrepancies between jobs of similar requirements. These were reconciled in Anomalies Conferences.\textsuperscript{89} Finally, special needs of particular jobs justified "allowances" — for example, reimbursement for the purchase of uniforms.\textsuperscript{90} Other terms and conditions of employment peculiar to a

\begin{itemize}
\item[(iv)] The expression "the conditions under which the work is performed" relates to the environment in which the work is done.
\item[(v)] Re-classification of existing jobs is to be determined in accordance with this principle.
\end{itemize}


\textsuperscript{88}. Conciliation and Arbitration Act, 1904-1973, ACTs AUSTL. P. § 34 (1973) provides that a party to a dispute being heard by the Commission may apply to have the matter decided by the full bench on the grounds that the dispute is of such importance that, in the public interest, it should be so handled.


\textsuperscript{90}. 8. Allowances

Allowances may be adjusted from time to time where appropriate but this does not mean that existing allowances can be increased extravagantly or that new allowances can be introduced the effect of which would be to frustrate the general intention of the Principles.

8.(a) Existing allowances

(i) Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.

(ii) Existing allowances which relate to work or conditions which have not changed may be adjusted from time to time to reflect the movements in wage rates as a result of national wage decisions.

(iii) Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of Principle 7(a).

8.(b) New allowances

(i) New allowances will not be created to compensate for disabilities or aspects of the work which are comprehended in the wage rate of the classification concerned.

(ii) New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.

(iii) New allowances to compensate for changes in the work or conditions will be determined in accordance with the relevant provisions of Principle 7(a).

(iv) New allowances to compensate for new work or conditions will be determined in accordance with the relevant provisions of Principle 9.

8.(c) Service increments

Service increments shall not be introduced or altered except in accordance with the following provisions:

(i) Existing service increments covered by federal awards may be adjusted in the manner prescribed in (a)(ii) of this Principle.
specific industry or even a subgroup within that industry were determined in individual award proceedings, but awards tailored to the specific conditions of an individual plant have always been precluded because commonwealth power is restricted to disputes extending beyond the limits of a single state.\textsuperscript{91}

The principles that the Commission used in individual award proceedings were shaped by the Commission's policy in national wage cases.\textsuperscript{92} As the Commission said,

In the ten years or so before 1975, sectional increases flowing from individual awards, without centrally determined constraints, were generally as important as national wage increases. It was principally to avoid the damaging economic and industrial effects of these sectional increases which led the Commission to embark on the more centralized system of the indexation principle.\textsuperscript{93}

During the period that the Commission used the indexation principle, economic factors were dealt with on a national basis and, therefore, the Commission strictly limited the grounds for individual award increases—essentially focusing on the propriety of reclassifying the work. The abandonment of wage indexation last July, however, has drawn into question the criteria for individual awards. After delivering the Commission's decision last July, the President of the Commission announced the termination of the anomalies conference procedure.\textsuperscript{94} He gave no further significant guidance on policies to be followed in individual award proceedings, however, and considerable uncertainty is likely, at least until the next national wage case is decided.\textsuperscript{95}

Although all awards are varied in the wake of national wage cases,

(ii) New service increments to compensate for changes in the work or conditions will be determined in accordance with the relevant provisions of Principle 7(a).


91. See notes 31 to 34 and accompanying text supra. Last July's decision on wage indexation may affect work value cases, but it is difficult to predict in what way the practices of the Commission may change.

92. See notes 87 & 90 supra.


94. "After reading the judgment, Sir John Moore said that with the end of indexation the anomalies conference procedure was also terminated." The Sydney Morning Herald, Aug. 1, 1981, at 1, col. 2.

95. As the Federal Secretary of the Storeman and Packers' Union, Simon Crean, pointed out, the Commission has given no clear indication of what its approach will be to claims for industry-wide increases or rises based on comparative wage justice or for increases in work value or increases negotiated in productivity bargaining between the parties.

The National Times, Aug. 2-8, 1981, at 3, col. 3.
new awards in a given industry (as opposed to variations with respect to a particular term) occur, on the average, every six or seven years.\textsuperscript{96} While the term stated in an award for its operation will not exceed five years, it will continue in force beyond that time until a new award is made.\textsuperscript{97} Applications to vary an award may be made at any time while the award continues in force, but any matter not within the terms of the original log of claims requires service of a new log of claims.\textsuperscript{98}

Awards of the Australian Conciliation and Arbitration Commission are treated as orders of the government and are enforced through penalties for their breach.\textsuperscript{99} Under the Australian version of separation of powers, the Commission that makes awards has no power to interpret or apply them. Enforcement may be obtained through the Federal Court of Australia, Industrial Division (which succeeded to the powers of the Commonwealth Industrial Court), or a state court.\textsuperscript{100} The federal court normally confines itself to issues of interpretation.\textsuperscript{101}

D. Beyond the Award — The Informal System

The award system established by the Act does not resolve all the problems of industrial relations in Australia and informal arrangements have developed that address those issues. For example, the terms of the award are minimums, enforceable through the mechanisms of the Act. Employers are free to pay more than award rates for any reason. They may wish to reward better workers or attract workers from other employers, other industries or even other states. Finally, they may make overaward payments to avoid threatened job action by their

\textsuperscript{96} Interview with Deputy Industrial Registrar Selby G. Hastings, supra note 38.
\textsuperscript{97} Conciliation and Arbitration Act, 1904-1973, \textit{ACTS AUSTL.} P. § 58(1) (1973), states that an award continues in force for a period specified in the award, not to exceed five years. Section 58(2) adds, however, that after the specified period expires, the award shall continue in force until a new award has been made. \textit{ACTS AUSTL.} P. § 582 (1973).
\textsuperscript{98} \textit{Cf.} Conciliation and Arbitration Act, 1904-1973, \textit{ACTS AUSTL.} P. § 58(5) (1973). An existing award does not prevent the Commission from making an award to settle further disputes even on the same subject matter that was determined by the first award. But the Commission is restricted to the ambit of the log of claims. \textit{Mills \& Sorrell, supra} note 20, at 32-35. A new filing of a log of claims is, therefore, necessary. \textit{See Sykes, supra} note 13, at 367.
\textsuperscript{99} Conciliation and Arbitration Act, 1904-1973, \textit{ACTS AUSTL.} P. § 119(1) (1973). Employees may also recover for underpayment below the award rate. \textit{Id.} § 119(3). Penalties may be recovered by a party, but they are rarely requested. \textit{Id.} § 119(2).
\textsuperscript{100} \textit{Id.} § 119(1). Recently the Court has decided that proceedings seeking punishment for breach of an award are civil rather than criminal in nature. Thus the applicable burden of proof is the lesser burden imposed in civil proceedings. Robert Leslie Grapes v. Commercial Bank of Austl. Ltd., 11 Austl. Indus. L.R. 415 (Austl. 1979).
\textsuperscript{101} J. MACKEN, C. MOLONEY \& G. MCCARRY, \textit{THE COMMON LAW OF EMPLOYMENT} 206 (1978) [hereinafter cited as \textit{MACKEN, MOLONEY \& MCCARRY}].
workers.\textsuperscript{102} Such payment may simply be announced by the employer, stated in writing, or placed in an agreement with a trade union. Unlike the award, such an agreement has no special procedures for its enforce-
ment. It will be a matter of state contract law.\textsuperscript{103} Overaward payments are seldom litigated because the pressures that lead an employer to promise overaward payments normally compel him to keep that promise.

Overawards are useful in accommodating market pressures. Their prevalence, however, greatly complicates the task of arbitrators striving to make the award system work. If award rates lag too far behind over-
awards, they become irrelevant. If two jobs have the same award rate because the Commission has found their work value to be the same and there is a substantial overaward for one and not the other, the claim of "wage equity" vanishes in the light of reality. Yet if the Commission simply increased all awards to match the highest overaward payment made by any employer for comparable work, that action would defeat the market purposes of overaward payments, fuel inflation, and strain the capacity of industry to pay the award rates beyond the breaking point.\textsuperscript{104} Australia now faces the highest rates of inflation and unem-
ployment it has had in decades; thus the dilemma facing the Concilia-
tion and Arbitration Commission challenges the creativity of its members.

Wages and hours are not the only critical items in the industrial relationship. New rules of conduct for employees, changes in the phys-
cical conditions of work, the introduction of new machinery, suspen-
sions, discharges and layoffs are important to every worker. Disputes over such matters in a single plant, however, are not disputes "ext-
tending beyond the limits of a single state."\textsuperscript{105} Issues peculiar to partic-

\begin{footnotes}
\item[102.] Australian Labor Readings, supra note 21, at 349; see Sykes, supra note 13, at 355, 365-66.
\item[103.] MACKEN, MOLONEY & McCARRY, supra note 100, at 104. See Steele v. Tardiani, 72 C.L.R. 386 (Austl. 1946) (stating that statutory restrictions governing the enforcement of awards do not apply to enforcement of overaward agreements).
\item[104.] Attempts to absorb overaward payments in subsequent awards have been notably unsuccessful. When overaward payments exist, the parties tend to add all changes in award rates to them. See R. O'Dea, supra note 75, at 242-65.
\item[105.] If the dispute is covered by the terms of the award and one party claims the award is determinative, enforcement may be obtained in state court. New situations are often not covered by the award, however, and the union may desire a resolution of the issue outside the language of the award. If the dispute were similar in two states, a log of claims with sufficiently broad ambit might permit the Commission to take the matter, or if the claim in a single plant is within the ambit of the original log of claims, the Commission might resolve the matter. The Commission's decision, however, would be a rule of prospective application and reinstatement or retroactive remedies suggest a judicial role that is not proper for the Commission. See Brisenden, supra note 2, at 48.
\end{footnotes}
ular plants are not typically dealt with in awards, even in state awards, in which jurisdiction may more easily be found. Nevertheless, the parties are often willing to have the matter decided by a Board of Reference or the Commissioner for the industry. A Board of Reference is a body that may be established by the award.\textsuperscript{106} It usually consists of representatives of the employers and the relevant union, with the Industrial Registrar or Deputy Industrial Registrar as Chairman. Its proper function is to deal with minor matters concerning the application of an award, such as the correct classification of employees, exemptions from particular requirements, etc. Its authority is to "apply" the award, not to interpret it or to deal with issues not covered by its terms.\textsuperscript{107} Nevertheless, both Commissioners and Boards of Reference often respond to the parties' request for them to decide serious problems.\textsuperscript{108} A strike or threat of strike in an industry for which a Commissioner is responsible raises the possibility of an industrial dispute that the Commission should investigate. When the dispute is limited to problems in a particular plant, there may be no jurisdiction in the Commission to proceed. Discussions with the parties may convince the Commissioner to decide the problem anyway. His decision will normally be followed, although it is not enforceable.\textsuperscript{109} The Arbitrator's effectiveness is based on the willingness of the parties to accept his decision, and this frequently results in mediation efforts or compromise.

\textsuperscript{106} Conciliation and Arbitration Act, 1904-1973, \textit{Acts Austl.} P. § 50 (1973). A Board of Reference may also be established by the Commission upon application of a party bound by an award.

\textsuperscript{107} See Brisenden, \textit{supra} note 2, at 89.

\textsuperscript{108} See deVyver, \textit{Australian Boards of Reference}, in \textit{Australian Labor Relations Readings} 544 (2d ed. J. Isaac & G. Ford 1971) (describing types of disputes handled by such Boards). See also \textit{Australian Labor Readings}, \textit{supra} note 21, at 327.

decisions. 110

Strikes and other forms of job action play an important role in both overaward payments and settlement of other disputes, but their form is substantially different from strikes in the United States. The strike, *per se*, is not illegal in Australia. 111 Awards may, however, include a "bans" clause that forbids striking. 112 As a result of union reaction to the jailing of a union official during the late 1960's, however, the procedure for enforcing the bans clause has become more complex, and fear that its enforcement will provoke widespread retaliatory strikes has left strike penalties largely a dead letter. 113 Today a "bans" clause is rarely included in an award. Any attempt by an employer to obtain one would be met by intense worker protest. 114 Both employers and commissioners seem to agree that resolution of the dispute is better than punishment of the strikers and that punishment would merely aggravate the problems. The strikes, however, tend to be of very short duration and are designed to address individual problems during the period of the award rather than to provide leverage to get a higher award. 115 For example, one strike in New South Wales protested the downgrad-

110. See MACKEN, MOLONEY & MCCARRY, supra note 94, at 192. See also BRISSENDEN, supra note 2, at 73. The Australian situation is interesting to compare with the late Professor Shulman's suggestion that grievance arbitration decisions should not be enforceable. See Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955). Professor Shulman argued that a decision unacceptable to one of the parties would produce undesirable friction in the operation of the business that could be avoided by further negotiation rather than by allowing the party that prevailed in arbitration to enforce the award. The Australian mechanisms for grievance resolution also point to minimizing the problems of the plant rather than insisting on established rights, but negotiations after an unacceptable decision of the Commission or Board of Reference take place in a context quite removed from the continued bargaining in the American system that Professor Shulman favored.

111. AUSTRALIAN LABOR READINGS, supra note 21, at 338. Secondary activity may run afield of § 45 of the Trade Practices Act of 1974, ACTS AUSTL. P. § 45 (1974), but it has not yet been enforced against the unions. State laws may restrict the right to strike, but the restrictions are usually ignored for the same reasons that strike bans are not inserted in awards. See text accompanying notes 113 to 114 infra.


113. AUSTRALIAN LABOR READINGS, supra note 21, at 340-44. See Cupper, supra note 109, at 359-62, noting that between 1969 and 1975 the Presidential Members of the Commission issued only six certificates under § 33 of the Act to initiate proceedings for breach of an award as a result of a bans clause. Moreover, applications for such certificates have been decreasing. Interview with Mr. Justice Stephen Alley, supra note 41. See generally Conciliation and Arbitration Act, 1904-1973, ACTS AUSTL. P. § 33 (1973) (bans clause enforcement procedure).


115. NILAND, supra note 2, at 46 (strikes primarily grievance in nature); ld. at 49-52 (on
ing of a position from supervisor to foreman although the foreman received a higher rate of pay than the previous supervisor. The workers feared the replacement was the first step towards downgrading positions and slowing opportunities for advancement to higher levels.\textsuperscript{116}

In addition to the short strike, unions may also place work bans on particular tasks — the workers perform all but one or two of their normal functions so they continue to be paid while the neglect of particular duties serves as a sharp reminder of their dissatisfaction.\textsuperscript{117} Another protest form is the “stop work meeting” in which workers meet to discuss the issues and determine whether to take strike action. Even if they decide against a strike, the meeting may have the same effect as a brief strike if it is held during working hours.\textsuperscript{118} These protests reveal the depth of feeling about particular issues and serve as a spur to other mechanisms for dispute resolution. Even if employers or arbitration commissioners refuse to proceed until the stoppage ceases, the workers will have made their point. Direct action enables the workers to obtain the satisfactions of personal protest instead of forcing them to rely on representatives to argue their points.

In contrast, an American strike is a bargaining tool to be used until the employer is forced to offer better terms. Unions employ every form of economic pressure possible, including picketing to prevent others from dealing with the struck employer. Employers often respond by hiring replacements for strikers. The union usually offers to surrender its right to strike for the duration of an agreement in exchange for employer concessions on wages or other conditions. Workers recognize that the ability of the union to negotiate depends on its ability to keep its own promises. Thus strikes in the United States tend to center on the bargaining period and may be of long duration, although the contract period is relatively strike free.

In Australia, the strike seems to serve less as an instrument of economic force and more as a means of communicating dissatisfaction. In

\textsuperscript{116} Interview with Mr. Justice James J. Macken, supra note 36.

\textsuperscript{117} For example, during the plumbers dispute, see note 41 supra, a ban was called on sprinkler system work although plumbers continued to perform all other forms of work. It is interesting to note here also that the work ban was a tactic to pressure the Commission and demonstrate strength vis-a-vis the federal union, not an act calling for a response by employers.

\textsuperscript{118} The “stop work meetings” seem a fixture in the perennially troubled railroad industry. For example, during the brief visit which led to this article a stop work meeting halted all trains in Sydney between 10 a.m. and 2 p.m. Similar incidents were discussed in an arbitration hearing attended by the author in which railroad air conditioning maintenance workers sought increases.
effect, the strike and other job actions are part of the argument that wages or conditions of work are intolerable and need to be changed. They are a constant feature of Australian life and may occur at any time. Both employers and workers tacitly accept the communicative nature of the short job action in Australia by confining its scope. Strikers rarely picket their employer or attempt to stop others from doing business with him. In turn, employers do not attempt to secure replacements to continue operations during the strike.

Lengthy strikes to secure concessions are much less frequent in Australia than in the United States for a variety of reasons. First, although Australian unions do have strike levies, their financial position is much weaker than their American counterparts. Consequently, the Australian worker is far less able to withstand the effects of a long strike. Further, the award system may be partially responsible for the low number of long term strikes designed to force the employer to agree to more favorable terms. Union leadership is geared to argument in the conciliation and arbitration process rather than to negotiation in the collective bargaining mode. Finally, the public is not likely to support long term strikes for wages that would put the strikers out of step with other workers.

The system of conciliation and arbitration grew out of the desire to avoid the severe difficulties exemplified by the great strikes of the 1890's, and to some extent it succeeded in the past. Nevertheless, the disruptive effect of constant job interruptions and the impact of overawards on the arbitration system has produced a crisis. The Commission recently abandoned wage indexation in response to the perception that workers are increasingly seeking to secure better wages and conditions through economic pressure rather than resorting to award proceedings. Indeed, the present ferment might be a transitional stage between the traditional system and one incorporating collective bargaining. Such a transformation, however, faces formidable constitutional, institutional and psychological obstacles.

The constitutional difficulties in moving toward collective bargaining have been discussed in the first section of this paper. Further, the existence of a Commission to resolve industrial disputes is itself an ob-

119. AUSTRALIAN LABOR READINGS, supra note 21, at 121.
120. Professor Niland has proposed that unions be able to choose whether to be governed by collective bargaining or the award system. Instead of the present procedure in which informal arrangements supplement the awards system, he proposes two separate, entirely self-contained systems. The union would select one system, and it would be bound by its choice. NILAND, supra note 2.
121. See text accompanying notes 25 & 26 supra.
obstacle to major change. Parties will continue to apply to the Commission, and it is unlikely to refuse their business. Although a Commissioner will not make an award unless conciliation fails, the Commissioner cannot refuse to act when the parties are unable to agree without abdicating his responsibility to arbitrate disputes. Most unions are reluctant to rely solely on the economic power of the strike and desire an arbitral decision when the employer's final offer is not satisfactory. If the arbitral award does not reflect the wages paid similarly skilled workers who have a stronger bargaining position, it is likely to be regarded as unfair. Comparative wage fairness, on the other hand poses economic problems that will result in pressures to resist collective bargaining.

Finally, Australian labor unions are not geared to engage in collective bargaining. For example, the use of a strike as a tactic to pressure employer concessions generally involves particular issues either not dealt with in awards or dealt with unsatisfactorily. The single issue focus of an Australian strike sharply distinguishes it from attempts to obtain a comprehensive agreement of lasting duration. The Australian public apparently still believes an independent third party is necessary to protect the worker from substandard wages and to assure fairness in wage comparisons between jobs. Labor representatives fear that collective bargaining favors the strong to the detriment of the weak and cling to the awards system as the best way to protect the average worker.122

The present picture of industrial relations in Australia is not one of uneasy truce, but one of open conflict. On the one hand, there is the publicly supported awards system; on the other, there are labor and management economic interests that lead to overawards and economic pressure outside the system. The result of that conflict is still uncertain.

III. COMMENTS ON COMPARISONS

The centerpiece of Australian industrial relations has been the input theory of the value of work. Under this theory wages should be determined by the nature of the work performed, the skill required, the responsibility assumed and the difficulty of the working conditions.123

122. For example, Bob Hawke, who formerly headed the ACTU and is presently a labor party representative in Parliament and industrial relations minister in the shadow cabinet expressed “[regret] that the Commission's decision [abolishing wage indexation] could lead to collective bargaining arrangements which advantaged the strong unions and disadvantaged the weak. There could, he said, be a widening of the gap between the lower paid and higher paid workers.” The National Times, Aug. 2-8, 1981, at 4, col. 1.

123. National Wage Case, June & Sept. 1979 quarters, Decision No. 2, Print E2370, slip op. at 38 (Austl. C. & A. Comm'n Mar. 28, 1980). The considerations of work value are added to general economic concerns affecting the level of all wages in national wage cases,
This theory explains the legal system's focus on the substantive determination of wages and working conditions on a nationwide basis. The Australians rely on an impartial third party to determine the terms and conditions of labor, not on bargains struck by workers and employers. However, this system does not deal with the daily problems of employee relations in individual plants. Instead, these problems must be resolved through informal mechanisms that are designed only to deal with the immediate subjects of dispute rather than to determine rights based on previously established norms. Despite current difficulties, the Australian public still clings to the vision of a new province for law and order in which an impartial and independent government body dispenses labor justice.

In America, on the other hand, the heart of the system is the agreement of the parties. Labor is worth the wage employers can be persuaded to pay. The system emphasizes the process of reaching an agreement, not the terms of an agreement that result. In addition, the agreement itself provides norms to resolve disputes during its lifetime. The Australian system emphasizes avoiding strife over establishing fundamental terms of the employment relationship. In contrast, the American system regards such strife as an integral part of establishing fundamental terms and instead aims at industrial peace during the period after agreement has been reached. These differences in values and purposes, reflected in each country's industrial dispute mechanisms, affect the suitability of those mechanisms for use in the other country.

A. Resolution of Disputes During Award or Agreement — Of Grievance Arbitration

The profusion of short strikes in Australia is surely irritating and may in the aggregate be as damaging economically as a smaller number of prolonged strikes, but each instance of short stoppage appears to the public as more of an irritant than a threat to the public interest. Some observers, particularly American observers and Australians familiar with collective bargaining, have urged unions to delegate more power to the shop level and to press for grievance procedures similar to those embodied in most American collective bargaining agreements.\(^{124}\) The parties have not rushed to embrace this solution, and it is not at all clear that it is wise in the Australian context.

\(^{124}\) See note 2 supra.
A grievance procedure may be a useful tool for permitting employees to vent their feelings and for informing employers of the causes of employee dissatisfaction. Yet informal mechanisms for these purposes are likely to develop in the absence of a formal procedure, and it is a poor manager in Australia who is not aware which policies offend his workers. The depth of feeling about an issue, however, may often be difficult to gauge either formally or informally. Part of the effectiveness of the grievance procedure comes from the assurance that the employer will discuss problems rather than ignore them. Another factor in the effective operation of the process is the ability of the worker to get a hearing before an impartial third party if the employer’s response is not satisfactory. This last step in American grievance arbitration assumes that the problem is a dispute over the existing rights of the worker and that the strength of employee feeling is irrelevant to its resolution. Willingness to abide by a determination of existing rights is intimately tied to the system of collective bargaining in which that determination may be overthrown in subsequent negotiations, and present acceptance aids the later negotiation.

These conditions for successful grievance arbitration in the American style do not exist in Australia. The award applicable to an industry in Australia may not reflect the parties’ agreement, and acceptance of any determination of rights under it may not enhance the union’s ability to get better terms at a later date. This is particularly true when the problems are local, since negotiations in the conciliation process are conducted at a level higher than the individual plant. The Australian workers want sore spots in the employment relationship to be eliminated immediately, not postponed to a subsequent round of negotiation. As a result, grievances that the parties cannot resolve swiftly will often be presented to a Commissioner, either state or federal, or to a Board of Reference. The Commissioner may have no legal authority to act, and the true issue may not involve a dispute over interpretation of an award or indeed over a matter dealt with by the award. Thus, the Commissioner is often forced to seek a compromise resolution of the problem. The emphasis is on eliminating the difficulty rather than on vindicating rights.125 The intervention of the public official who seeks the best resolution resembles the quasi-legislative mode of arbitration, although the lack of enforcement power serves to place the public offi-
cial in a role similar to a mediator's. The same emphasis on resolution rather than rights prevails in the Boards of Reference. The Chairman may be attempting to bring the other members of the Board, who are representatives of opposing sides, to a compromise agreement.

The unofficial acts of the Commissioners have not been widely studied, nor have Boards of Reference been given the attention they deserve. These mechanisms may prove more compatible with industrial relations in Australia than grievance processes imported from America. At least, research and consideration of means to improve the current role of the Commission and Boards of Reference in resolving employment grievances may be a more fruitful means of improving the employment relationship than adoption of a process rooted in collective bargaining.

B. Fixing Terms of Employment — The Relevance of Interest Arbitration to the Public Sector in the United States

In the United States, there appears to be widespread acceptance of collective bargaining to set the terms of employment in the private sector, but unions object that the process for fixing terms of employment in the public sector is unfair. State governments usually proscribe public sector strikes, and unions insist they need a substitute to place economic pressure on the public employer to reach fair terms. Third party interest arbitration is often proposed for this purpose. Interest arbitration in the public sector in the United States, however, faces an array of problems beyond those encountered in Australia.

The system of wage determination in Australia has a protected position under the Australian Constitution. Insulation from political pressure assists its preservation, and the longevity of the Commission in turn makes it an even more acceptable institution. American interest arbitration would be a novel experiment with no constitutional shelter. If an arbitrator's decision greatly displeased one of the parties, that party might readily wreck the system. Australians, by contrast, accept the idea that a proper wage exists for each job, and the Commission has been designed as the best means to discover it. The American proposals for arbitration proceed from a different premise. The concern of American industrial relations is not with discovering an ideal wage, but with fairly structuring the process of wage determination. The trade union history and structure in the United States has been tied to self-determination. The frequent suggestions for last offer arbitration, in

126. The best study of Boards of Reference is the somewhat dated study of Professor deVyver. See deVyver, supra note 108.
which the arbitrator must choose between the last proposal of each side and cannot compromise, demonstrate that it is the hope of securing leverage in wage negotiations, not the end result, that makes arbitration in the public sector seem attractive.\textsuperscript{127}

American public sector unions who favor public sector interest arbitration expect it to produce negotiated settlements instead of unilaterally imposed terms. At least they anticipate acceptable awards. If that hope is frustrated, the unions will not hesitate to abandon the process. Union success, however, may be equally threatening to the survival of interest arbitration in the public sector. If government perceives its basic budget decisions are controlled by a third party in a disadvantageous manner, it is likely to repudiate the system.\textsuperscript{128} Acceptance of interest arbitration depends on agreement by both government and labor that the results are fair. This is quite unlikely. The Australian experience illustrates the obstacles to successful interest arbitration as a nationwide policy, and arbitration for a single sector of the economy faces even greater difficulties.

First, determination of the proper wage standard is more feasible in a comprehensive system like that of Australia where the Commission can control the relationship each award has to every other award. Any attempt to determine wages in the public sector alone raises the difficult problem of a proper standard of comparison. If the public sector interest arbitrator turns to pay in the private sector as a basis for determining wages in the public sector, he faces an array of wages for a particular job depending on employer and location. Any wage selected will be either higher or lower than the wage paid some employees in the private sector for the same work and thus will be readily subject to attack for unfairness. Further, many public sector jobs are unique. Wages for police and firemen could be set by analyzing skill requirements as in Australia, but such an analysis is likely to result in comparison with disparate private sector work that provides sharply different wages. A choice reflecting lower wages will be certain to cause public employees to cry "unfair;" a decision to pay government workers high wages will evoke similar charges from the lower paid private sector.


\textsuperscript{128} Even a single official may wreak havoc with an arbitration system. In Prince Georges County, Maryland, the County Executive's displeasure with shouldering obligations under the statute led him to dismantle the Board that enforces the provisions of the county's act.
workers whose taxes pay the public workers salary. 129

A second problem of fairness arises out of the economic factors considered by the interest arbitrator. The Australian arbitrator is able to adjust all awards on the basis of the national economy. All workers will be injured or aided alike. The American public sector arbitrator must consider the effect his decision will have on the operation of the government. His concern is not the capacity of the nation to support a particular wage level, but the capacity of the relevant level of government to support it. Even interstate comparisons of public sector jobs must take into account the different tax bases. Alabama cannot support the public sector wages that are paid in richer, more industrialized states, even if workers in private sector white collar jobs there are paid at rates equivalent to their northern counterparts. Wages fixed by an arbitrator are, once more, likely to provoke dissatisfaction either on the part of public sector labor or the general public.

In short, if the government finds arbitrators award more than the government would otherwise pay, the government supported by the taxpaying citizens will repeal the arbitration provisions. If the union believes the award is below the amount that may be secured by other forms of economic pressure, it will ignore the decision.

Two conditions must be met for interest arbitration to have a reasonable chance of surviving. First, the public employer must be willing to forego unilateral implementation of terms because it fears the strike. Second, the public worker must be reluctant to invoke the strike out of concern for its impact on the public. These conditions should also encourage negotiations and settlement, but an independent body might be helpful as a last resort. Thus, arbitration for police and firemen has achieved limited acceptance here, and support for arbitration for those limited groups may increase. 130 Government is likely to discover that strikes by other employee groups are tolerable, however, where the alternative is loss of control over the budget to a non-elective body. 131 This does not mean that strikes by such employees will be legal, only

129. If parties are able to agree on the proper measure of comparison, arbitration may be satisfactory, but arbitration then concerns factual determinations rather than Australian-style interest resolution.

130. In 1979, 27 states had some provision for interest arbitration in the public sector. Nine simply permitted parties to agree to submit disputes to binding arbitration. The remainder mandated it for some groups of public employees, usually confined to police and fire. J. Grodin, D. Wollett & R. Alleyne, Collective Bargaining in Public Employment 273 (1979). There has been virtually no job action by firefighters and police subject to compulsory arbitration to date. Id. at 274. These groups have a long tradition of rejecting the strike as a bargaining tool, however, because of their fear of its impact on the public safety.

131. The air controllers strike and the action of President Reagan in discharging the strik-
that government will not be forced to install interest arbitration to forestall them.\textsuperscript{132}

\textbf{Concluding Remarks}

This analysis of the Australian system should be taken with a heavy dose of skepticism. Dangers attend any attempt to describe a foreign system. A formalistic description of Australian labor relations might over-emphasize the strike ban because it plays a large role in the statute. In practice, however, it is no more than a minor tool of persuasion for the Commissioner attempting to secure a peaceful resolution of the dispute. A student of industrial relations literature might miss the importance of the role of the Commissioners in resolving grievances. This foreign observer is certain to have run aground on even more treacherous shoals than these, although even now he does not know what they may be. The justification for the frail vessel which the reader now holds lies in the belief that even an inadequate outline of another system will provoke fresh consideration of the values and procedures of our own and in the hope that it will lead to further study and investigation by both Australians and Americans interested in understanding and improving industrial relations.

\textsuperscript{132} In the limited circumstances where public sector arbitration may work in the American setting, it may prove more successful than in Australia. The intense desire on both sides to avoid strikes may give arbitration a chance to work while the heritage of collective bargaining may make the grievance procedures of the civil service system or other agreed grievance systems work more effectively here than in Australia.