AWARD RESTRUCTURING
AND
INDUSTRIAL TRIBUNALS *

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A former member of the Conciliation and Arbitration Commission observed that arbitration tribunals were like coconut shies. He added:

 Governments build them and are able to hide behind them while the parties hurl at the tribunals their industrial disputations and criticisms of the decisions given. Sometimes the governments also join in to hurl criticism. All the critics barrack only for their own side and the press reports it all with an enthusiasm usually reserved for football matches. (Portus, Australian Compulsory Arbitration, Law Book co, 1979, p.xiii).

Clearly the lot of industrial tribunals is one of public scrutiny. This is as it ought to be. In today's economic climate and search for greater labour flexibility and efficiency, industrial tribunals are again in the spotlight. Their demise is eagerly awaited by some, emasculation sought by others, metamorphosis sought by others still. Elements in this metamorphosis include making tribunals less intrusive, more flexible, more decentralised and more market driven.

In the contemporary award restructuring debate it is important to determine whether tribunals are yet again being used as coconut shies, or whether they really are the cause of, or major contributors to, economic malaise and uncompetitive work practices. Are the problems associated with Australian industry and employment relations - poor work organization, a plethora of occupationally based unions, the crippling foreign debt, wage rigidity, high inflation and interest rates, poor quality control, etc. - the products or by products of tribunals? Assessment on this count will help determine what ought, if any, be the role of industrial tribunals and how the parties to industrial relations can use, rather than shy behind, tribunals.

It is also important to determine the role of tribunals from first principles, rather than from a grab-bag shopping list.

For these reasons the lessons of history should not be discarded. To do so would commit us to repeating the same mistakes. I would therefore like to commence this paper by highlighting the role of tribunals during a slice history with particular reference the Great Depression. Employers' call at this time for both a reduction in real wages and increased wage flexibility, and for increased labour productivity, have a contemporary ring about them. From this review a number of general observations can be made regarding the role of tribunals in the award restructuring process.
Arbitration - The Swings and Roundabouts

In my book *Holding the Line* I outline the hostility which employers brought to bear on the Commonwealth Court of Conciliation and Arbitration for the first three decades of its operations. By opting out of the system they allowed unions and governments to shape the major contours of the bargaining arrangements in Australia to that time.

Employer opposition reached a crescendo with the economic recession of the late 1920's which translated into the Great Depression by 1930. Largely at the behest of employers, the Bruce Government attempted to remove the Conciliation and Arbitration Act from the statute books. The government was forced to an election on the issue. Bruce not only lost government but also his seat of Flinders. The Scullin Government was sworn into office on October 22, 1929 - the day after the Wall Street stock market crash.

As the economy deteriorated, employer calls for the abandonment of compulsory arbitration intensified. Notwithstanding the equally dismal economic scene in other countries, they had little difficulty in blaming Australia's economic malaise on the arbitration systems. In 1929, the Central Council of Employers of Australia opined "that compulsory arbitration has largely failed, and that it has not achieved the purpose for which it was introduced. Having this in view, we consider that it should be abolished" (*Employers' Review* 28/10/29).

This Council's sentiments were shared by other employer bodies. The NSW Employers' Federation claimed that "after many years of intimate association with compulsory arbitration it had definitely arrived at the conclusion that this form of legislation must be entirely removed if the country and our industries are to be rehabilitated" (*Employers' Review* 30/6/30).

Arbitration, in this body's view, "was a greater curse than droughts, prickly-pear or any other curse in Australia" and had "done nothing else but cripple industry" (*Employers' Review* 30/8/30). It further contended that "years of experience with our pernicious system of compulsory arbitration has clearly indicated to all carrying on industry that the system must operate to the detriment of all concerned. Under its aegis laws are passed which do not put one extra penny in the pockets of employees ... Its actions and results are diametrically opposed to all our Economic Laws, and consequently the time must arrive when a change must take place" (*Employers' Review* 31/12/30).

The Associated Chambers of Manufactures expressed the view that arbitration was a burden which could only be supported during periods of prosperity and whose abandonment was inevitable during a major recession (Hall 1971:401-2).

Its NSW affiliate was more empathetic: "The evil which now obstructs our path to better conditions is without doubt compulsory arbitration. This must be suspended for it has now completely failed us" (ibid: 445).
The other major NSW manufacturing employer association, the Metal Trades Employers' Association, agreed: "Away with it, and let us get back to the clear, open, economic rings" (Carboch 1958:192).

The evils attributed to compulsory arbitration were many. It was the major "cause of depression in general; it reduces output since wages are paid to employees irrespective of their worth; it causes high unemployment, high tariffs, high production costs, industrial chaos and industrial conflict in particular" (Employers' Review 30/9/29).

High on the employers' list of grievances was the system of wage fixation adopted by arbitration courts: this, by and large, did not incorporate the employers' preferred option of a system of payment by results. Increased overseas competition and a shrinking domestic market forced employers to reduce production costs. Because labour costs were based primarily upon the basic wage these costs were difficult to depress. Employers contended, however, that labour productivity could be increased by incorporating systems of piecework, incentive schemes and sub-contracting systems.

It was in this climate that in 1927 Mr Justice Beeby, against considerable union opposition, varied the Engineers' and Blacksmiths' awards to provide for payments by results. These awards were the forerunners of the present day Metal Industries Award and had the same benchmark role. Beeby J. claimed "that the time had come for a re-organisation of industry" including the adoption of "properly safeguarded schemes of payment by results without reduction of the status or earning capacity of skilled mechanics" (25 CAR 365).

Within a short period Beeby was able to claim that payment by results had become more widespread and that "even in the metal trades industries in which organised opposition has been most successful, piece-work largely prevails" (28 CAR 937). The evidence supports this contention (J. Hagan, The History of the A.C.T.U., Longman Cheshire, 1981, pp.83-5).

The Scullin Government, for its part, introduced Conciliation Committees which had powers to determine awards at the enterprise level. It is a monument to employers' short-sightedness that they challenged these provisions in the High Court where they were declared ultra vires.

Despite these changes, by 1930 employers were forced to change tack and seek a reduction in labour costs by way of reducing the "sacrosanct and irreducible" basic wage which had been declared to be "beyond bargaining". To that time the basic wage was automatically indexed. As prices fell, so too did the basic wage. Employers sought a reduction in real wages in the order of 30 per cent. The Arbitration Court order a 10 per cent reduction, this figure being based on the imputed loss of purchasing power as the result of falling export prices and the cessation of capital inflow.
In ordering this reduction, against Commonwealth Government opposition, the Court gave policy makers the basis for combating the Depression. The stone which the builders had rejected became the foundation stone of economic recovery. The then Professor of Economics at Melbourne University (Professor Copland) noted that the Court was the "first responsible authority" to pronounce on the economic crisis. He added: "The Court with its independent position and known sympathy in the past with the demand for as high a standard of living as the economy could afford, was well fitted to call attention to the economic position and to the need for general adjustments. (Copland Australia in the World Crisis, Cambridge University Press, Cambridge, 1934).

The "need for general adjustment" was taken up by the Premiers' Plan adopted in June 1931. This agreed to extend the 10 per cent wage cuts to other sections of the community including interest rates on mortgages, public service salaries, government loans and pensions. State tribunals followed, though in the case of New South Wales not until the dismissal of the Lang Government in 1932.

In April 1934 unions were finally successful in having the reduction restored. Economic recovery was accompanied by remarkable policy transformations on the part of employers - initially a reluctant acceptance "that the arbitration tree is rooted into the community"; then qualified support for uniform industrial standards regulated by the Arbitration Court, and finally a championing of arbitration as the appropriate mechanism for dispute handling. The NSW Employers' Federation stated:

We Australians, employers and employees alike, are a type - we should know how to work together, and if differences do arrive, we have an Arbitration Court to settle them. In our arbitration system we have machinery for settling disputes. This machinery has been built up over the past 30 years. It had stood the test of the Great War and the Great Depression. It had become part of the life of our democratic country ... If employers cannot get on without having strikes, they should question the ability of their managers. If employees cannot get on without strikes they should change their leaders. Disputes should always be settled by Arbitration (Employers' Review 31/12/38).

These sentiments, which overturned three decades of hostility towards arbitration, were endorsed by other employer groups. Thus J. Heine, President of MTEA, who in 1928 had called for a return "to the clear, open economic rings", commented in his 1937 Presidential Address: "As far as the Arbitration Court is concerned ... the Association's view was that the Arbitration system was a sound one and that it would be a permanent feature of the Australian legal system" (Metal Trade Journal 25/4/37).

One reason for this conversion was easy enough to find. The economic recovery and buoyancy had altered bargaining relationships. Employers were interested in having the Arbitration Court hold down wages which shortages would have forced higher. Typical of many resolutions passed by associations at this time was that of the Victorian Chamber of
Manufactures "that no individual, firm, company or section of the Chamber should voluntarily promise or make any change in working hours, nor comply with demands of unions or groups of workers as to wages or conditions laid down by the Arbitration Court and/or Wages Boards" (VCM Council Meeting 27/4/36).

In short, employers sought flexibility during economic recession, centralism during economic buoyancy.

War was declared on September 3, 1939. It was to be accompanied by the greatest centralisation of industrial regulation ever exercised in Australia. The fact that much of this regulation emanated from Labor administrations only served to make the arbitration system, so long condemned, more attractive to employers.

In its effort to mobilise the war industries, governments, by executive action, fixed employment standards in those industries which were better than the conditions which generally prevailed. This conflicted with the Arbitration Court's approach based upon uniformity and comparability. Employers condemned this government interference with employment standards and registered their support for the arbitration system which they had historically derided. Under the caption "Arbitration - Not Regulation" employers sought the use of arbitration which entitled them to some input in the determining of awards. In 1944 employers successfully opposed the extension for five years of the wartime powers. In 1946 they also successfully opposed the referendum in which the Commonwealth sought control over conditions of industrial employment.
Characteristics of Wage Determination

It is not possible to review other epochs of wage determination in any detail. Such a review would suggest the following characteristics of Australian wage determination:

(i) A consciousness to maintain real wages where possible.
(ii) Concern for providing a floor or minimum wage, and the provision of the highest possible level of wages within economic capacity.
(iii) The existence of wage relativities and the ensuing obsession with comparative wage justice. This obsession has lead to a concern for uniformity and consistency.
(iv) Attempts to induce flexibility by way of work value - usually without too much success.
(v) The national distribution of productivity gains. Productivity has become a surrogate for capacity to pay.
(vi) The existence of a three-tiered wages system: national wage element, industry award element, overaward element. The existence of these has made it difficult for the Commission to control wages other than on the basis of consensus.

To overcome perceived problems with the wage determining system a number of alternative arrangements have been proposed. These include:

(1) Giving the Commonwealth greater industrial powers, thereby freeing it from its constitutional reliance upon industrial tribunals.
(2) The scrapping of the federal tribunal system and thus of the centralized wages system.
(3) The creation of "island industries" and special tribunals in an attempt to reduce comparative wage justice pressures.
(4) The adoption of a collective bargaining system in place of industrial tribunals.
(5) The adoption of a two streamed system which enables those wishing to do so to opt out of the arbitration sphere.
(6) The adoption of a two tiered system in which tribunals would determine minimum rates, thus leaving it to the parties to determine actual rates.
These alternatives are considered seriatim.

1. It is unlikely that Constitutional changes will be affected giving the Commonwealth greater industrial powers. There have been seven unsuccessful referenda, the last in 1973, seeking to increase the Commonwealth's industrial powers. The War-time experience detailed earlier indicates one reason why constitutional changes are not likely. Employers will be wary of the socialising potential of Labor governments. Employees are not likely to want to trust their chance with non-Labor governments. The war-time experience also indicates a further difficulty. Government actions to promote employment in industries of national importance could have repercussive effects in other industries. It should also be remembered that giving the Commonwealth industrial authority would not change the nature of the balanceing act required in wage determination. Policies would still be constrained by the need to take account of both the economic and industrial realities of wage determination.

2. The scrapping of tribunals is pushed hard by the New Right but is not official policy of any major political party. Politicians are not likely to forget the fate of Bruce, nor are they likely to dispose of convenient coconut shies. Further, the removal of the federal tribunal may not achieve much. In law, former federal tribunal award respondents would find themselves under the provisions of state tribunal awards. Thus, the elimination of tribunals would require concurrent action by both federal and state governments. Such joint action has not been a feature of the political scene to date. Further, as the brief history indicates, employers do find value in tribunals at different phases of the economic cycle. This should suggest the need for a long term strategy rather than short term ad hocery.

3. The creation of specialised tribunals, such as the Coal Industry Tribunal, presupposes the ability to compartmentalise industries ("island industries"). This arrangement seeks to minimise changes to the existing institutional machinery while at the same time reducing comparative wage problems and giving greater flexibility for the industries concerned. Whether specialised tribunals can operate in a sui generis fashion is debatable. Coal has always had a distinctive system of labour relations. The creation of specialised tribunals for public servants, academics, flight crew officers, and the maritime and stevedoring industries would suggest that flow-on problems would not be eliminated but rather exacerbated.

Under the 1988 amendments to the federal Industrial Relations Act most specialised tribunals have been absorbed into the Industrial Relations Commission. A reason given by the Hancock Committee for such absorption is that the panel system which operates within the Commission is capable of providing a degree of specialisation.

4. The movement away from a centralised system to a decentralised one in which wages are determined by sectional collective bargaining has also been advocated. Such an approach, it has been claimed, would enable wage rates for particular industries to more closely approximate market conditions for those Industries. Two observations may be made on this score:
(i) The federal Act has always provided employers with the capacity to enter into collective bargaining relations with unions. The former Part X of the Act provided for what today are called "opting out" provisions. This is mirrored in Section 115 of the present Act. The fact that many employers (and unions) chose not to opt out requires some explanation. On the union side this can be put down to administrative convenience. In the case of employers it illustrates a more fundamental consideration. It confirms the view of many economists that employers do not seek "to take labour out of the market". In other words, companies usually prefer to standardise wages and compete on the product market. Some of the normative reasons given above help explain this phenomenon. It is also easy enough to understand why employers do not like competitors to undercut their wage rates. Labour market flexibility creates both potential benefits and problems for companies. As a result, companies will not always choose flexibility.

(ii) The periods of major collective negotiations in Australia, 1967-74 and 1981-83, do not suggest the adjustment of wage levels according to the conditions of different industries. The earlier period resulted in Australia having the worst of all possible worlds: collective bargaining in which unions in strategically placed industries set the pace and an institutional system in which tribunals flowed on the gains to weaker unions. The adoption of wage indexation in 1975 was an attempt to redress the wage wilderness resulting from the lack of institutional norms.

The abandonment of wage indexation ushered in the Fraser Government's preferred policy - "a policy of no policy". The result was a uniform flow of the "Metal Industry Standard". That standard was a high one. Though the Treasury argued that this was but the price of moving onto a new learning curve, the government baulked at having a second round. In December 1982 the government sought the imposition of wages freeze, the most centralised of all wages regimes.

Advocates of a decentralised collective bargaining system would need to demonstrate why history would not repeat itself.

5. The two streamed approach enables parties to opt out of the arbitration system. Those in the non-arbitration sphere would enter into legally binding agreements for a specified period of time. Several variants of this approach have been promoted. In its earlier formulation Coalition policy provided for the opting out by large firms. Its present policy provides for small firms to opt out. Some variants require agreements in the non-arbitration sphere to be certified, others do not consider this necessary nor desirable.
Several implementation problems would appear to accompany these proposals. The fact that the Commonwealth may not have power to enact general legislation with respect to collective bargaining (the non-arbitration sphere) is overlooked. It was on this ground that the Conciliation Committees established under the Scullin Government were declared ultra vires.

Account will also have to be taken of the fact that the common rule would continue to apply in the state systems. The notion that unions would adhere to no further claims and no strike clauses may be wishful thinking. If the arbitration sphere cannot compel them to do so, why should the non-arbitration sphere? The metal industry agreement of 1981 may be instanced as an example in which no further claims clauses were successfully introduced. I would suggest that the concessions made by employers for this one year agreement in winning the no further claims clause are not capable of being replicated on an annual basis.

A reasonable assessment of the two streamed approach would suggest that unions might want to opt out in good times and return to the wage stickiness of arbitration at other times. The historic review presented earlier would suggest a contrary approach by employers.

This raises the interesting question as to which party should determine who could opt out: unions, employers, employees or some specified combination. A major variant of opting out is the Voluntary Employment Agreements under Queensland law. In that case opting out is supposedly on the basis of agreement between employers and their employees. At the federal level it is a mute point whether non-registered organisations can opt out. Comparative wage justice would still need addressing: why the non-arbitration sphere would not want general wage increases; and why gains obtained in this sphere would not spread to the arbitration sphere.

6. Several variants of the two-tiered have been suggested over the years. One variant advocated by Bob Hawke for many years seeks to return to the bifurated wages system which operated prior to the abandonment of the basic wage in 1953. The Commission would concern itself with determining general minimum standards. Industry or enterprise awards, determined by agreement, would build on this standard. The catch in this schema is that tribunals of necessity become involved when agreement cannot be reached. Where determinations to resolve disputes have to be made, they will have precedence value.

The other variant is one which was implemented in recent national wage cases: increases to minimum standards and provision for the parties to negotiate other specified increases. This approach has sought to improve the standards of law income earners, induce local negotiations, and prevent comparative wage difficulties by providing a cap to local negotiations.

Of these alternative suggestions two can be dismissed immediately: the Commonwealth is unlikely to obtain increased industrial powers; it is also unlikely that industrial tribunal will be dispensed with. The creation of industry tribunals would also go against the current tide, but remains an option. Opting out has been provided for in the system since its inception. The potential flexibility provided by advocates of opting out is, and has
been, available to the parties since 1904. The two-tiered wages system was a feature of wage determination from 1907 to 1953 and, in a different form, has been used to good effect in recent wage rounds.

Flexibility

In the current debate it is important to stress that flexibility is a relative rather than absolute consideration. It should also be noted that existing arrangements provide for flexibility. This can be illustrated in a number of ways.

(i) In 1976 a major award survey by the Central Industrial Secretariat indicated that over the period 1970 to 1975 the number of federal awards increased by 179 or 42%. The survey noted "there were very few first-in-the-industry awards made in the five years surveyed. The increases have been caused almost wholly by the fragmentation of industry-wide coverage awards and, in particular, by the splitting of single-company awards from a parent one". The report estimated that 27% of federal awards were single company awards. In addition the survey identified a 75% growth in the total number of agreements while the number of single establishment agreements grew by 153%. Industries or areas in which the movement to single plant awards was apparent were the aircraft industry, aluminium, chemical, and vehicle manufacturing, and for professional engineers and storemen and packers.

The CIS analysis was replicated in 1989. By that time the proportion of single company/employer federal awards had grown to 53 per cent indicating that the fragmentation identified by the 1976 survey had accelerated. In 1989 the proportion of single establishment agreements had increased to 67 per cent of all federally registered agreements. As Rimmer has noted, enterprise awards lead to the possibility of flexibility on a number of fronts: wage flexibility, functional flexibility and numerical flexibility. (Rimmer, "Enterprise and Industry Awards", in Enterprise-Based Bargaining Units & A Better Way of Working, Business Council of Australia, Melbourne, 1985).

(ii) Another form of fragmentation is the increased proportion of the workforce coming under state awards and the increasing proportion of award free members of the workforce.

In 1954, 42.5 per cent of the workforce came under the provisions of federal awards. A further 47 per cent came under the provision of state awards. By 1974 the proportion of federal award respondents had fallen to 34.7 per cent and by 1985 to 32.6 per cent. The proportion of state award employees has increased to 50 per cent of the workforce over the period. Since 1954 the proportion of award free members of the workforce has increased form 10.5 to 17.7 per cent.
Section 115 of the Industrial Relations Act provides for opting out procedures where the parties chose. The only constraint on the parties is the public interest test. This test specifically excludes “general Full Bench principles” - presumably national wage guidelines.

As already noted, the Act, since 1904, has provided for some form of opting out. For many years this was Part X of the Act. The lack of opting out has been of the parties’ choosing.

In the year February 1989 to February 1990 25 Section 115 agreements were certified by the Industrial Relations Commission. There are over 8,000 agreements under the comparable section of the New South Wales Act.

The recent wage guidelines have sought to promote decentralised bargaining with parameters established by national wage cases. There is evidence that in some industries the Commission has required this bargaining to take place at the enterprise level. The recent Draft Order pertaining to the Metal Industry Award Structural Efficiency Adjustment, for example, requires the establishment of enterprise consultative mechanisms to handle a number of matters previously determined on a global basis.

Propositions for Tribunals

On the basis of the foregoing a number of propositions may be suggested which might determine the role of industrial tribunals in contemporary wage determinations:

1. A totally free or flexible market is not possible, nor probably desirable.

2. At different time, tribunals, employers, unions and governments will find benefits in systems which provide for conformity and uniformity.

3. Wages are always sticky in a downward direction. The Depression and current experience suggest that tribunals have some capacity to depress real wages. This generalised sharing the economic burden should have greater social appeal than the harsh, discriminatory and selective adjustment by way of induced unemployment.

4. The Depression and current experience would also suggest that tribunals do have the capacity to engineer systems of administered flexibility. The degree of utilisation of such systems, however, ultimately rests with the other parties to industrial relations.

5. Tribunal control over wages is tenuous and limited. In the absence of agreed wage norms tribunals should be wary of applying perceived egalitarian principles in which gains are flowed from the strong to the weak.
6. Comparative wage justice is a fact of industrial life. This does not mean that its role should be highly institutionalised or that it is empiric to educative and restraining influences. The tribunals' efforts in recent years to curb the use of this "doctrine" should continue.

7. Wage ceilings may be set by the strongest market element or by institutional means. History suggests that the latter is more benign.

8. The maintenance of wage relativities is an important part of the political process of wage determination. History would suggest that flat amounts of wage increases which compress relativities are not sustainable and lead to problems. Tribunals should retreat from their recent sorties of awarding higher flat increases to lower income earners.

9. The sixty year experience with the bifurcated wages system provided wage adjustment mechanisms which were both industrial acceptable and economically viable. Appropriately formulated two-tiered systems have a place in inducing a flexible and acceptable wages system.

10. Industry award negotiations have been an established part of the wage fixing system since its inception. In the recent past such negotiations have been suppressed or overly regulated. Tribunals would do well to build on the experience of the past four years in which national wage cases have devolved negotiations to this tier.

11. It has been recognised that flexibility and restructuring are essentially enterprise level activities. While national wage guidelines and industry award negotiations play important roles in providing an orderly basis for such activities, tribunals should insist on the devolution of negotiations to the enterprise level.

12. Recognition needs be given to the desire to maintain real wages over time. Tribunals should act in an educative role on the need to take account of the international influences on prices, and the repercussive effects of full indexation. The role of indexation ought to be limited. Imported inflation ought to be discounted.

13. Where tribunals attempt to establish their own norms, the requirement for union and employer compliance should form a part of such norms.

14. Opting out agreements should have their own form of compliance in the way of no further claims clauses.

15. Tribunals ought to facilitate the use of Section 115 (and state equivalents) of the Act. There is a need for the reinstatement of the former Section 28 provisions.

16. Conversely, tribunals should be wary of sanctioning roping-in awards which have the aim of standardising employment standards unduly.
17. Tribunals should not sanction paid rates awards. They should give consideration to the potential role of over award payments.

18. Tribunals should guard against the award-free sector of the workforce coming under tribunal awards without good reason.

19. Relatedly, where possible, state tribunals should administer the common rule provisions on an exclusive rather than inclusive basis.

20. The federal tribunal should exercise restraint in extending federal jurisdiction to state award employees.

21. State tribunals should continue their complementary role in the provision of wage guidelines. Any capacity for unions to treat different tribunals as "rival shops" does not accord with the rationale for such tribunals.

22. The federal tribunal should use its new powers in relation to trade unions to effect a union structure which minimises frictions to structural and economic changes.