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Decisions Affecting Industrial Relations

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Arbitration and Tradition

It is at least arguable that arbitration and tradition are incompatibles and that the quest for certainty in this field is phantasmal. But to men trained in the common law and occupying the strategic positions in arbitration tribunals the doctrine of precedent has so much the appearance of a natural phenomenon that its use is probably inevitable. Whether this be so or not, there are nevertheless some traditional "values" of Australian arbitration that are undergoing a sea change in the face of reality.

Federal and State Tribunals: Section 41(1)(d)(ii) of the Commonwealth Conciliation and Arbitration Act is one of the means provided for reconciling the elements in the dual constitutional situation. In 1928[1] Dethridge C.J. set forth certain criteria for deciding when a dispute should be left to the regulation of a State tribunal. The first four of the five criteria related to the existence of competition, employment of labour migrating between States, branches in States and exports or imports into Australia or a State. With hindsight, one can readily enough see that these are criteria that are likely in time to lose a certain relevance. In these circumstances, the fifth criterion, the existence of other circumstances making the intervention of a Federal tribunal more desirable than that of a State tribunal, has taken charge.

Already in 1944, Kelly J. (as he was then) said that he was inclined to take a broad view of what might comprise "other circumstances".[2] A Full Bench of the Commission (Sweeny and Nimmo JJ. and Senior Commissioner Taylor) in the *Woolclassers Case*[3] took the view that the first four factors were no more and no less cogent than any other factors justifying a national rather than a local outlook. "Cases involving the exercise of the discretion under section 41(1)(d)(ii) should not depend upon an attempt to construe the words of each of the first four paragraphs of the learned Chief Judge's observations as if they were statutory tests. . . ."

A later Full Bench, in a meat industry case,[4] went a bit further in saying that the five points had to be looked at in the light of modern circumstances. Australian industry had changed "dramatically" in the ensuing 40 years. Though the tests had been reiterated and applied in a number of cases, they should be used with care; and particular mention was made of the third and fourth points. But the main point made by the Full Bench was that the exercise of arbitral discretions should be left unfettered. "In our view it is preferable that no one bench of the Commission should attempt to formulate codes intended to control in any precise way the exercise in the future of discretions reposed in the Commission by the Act."

Wage Fixation: Here is another area where a tradition is being abandoned in the face of realities. The deliberations of arbitration tribunals have not at all times been at their happiest in stating principles of wage determination except, perhaps, where these have been of extreme generality or specificity. Certainly, some of the doctrines elaborated have not been entirely felicitous—and among the less successful must be put that propounded in the *Metalliferous Miners Case*[5] by the New South Wales Industrial Commission. The principle asserted, in brief, that a rate of pay in one award was not to be

accepted as a guide to the rate to be awarded in another unless the work is fairly comparable; and even where similarity of work has been established, the tribunal has still to look at the other conditions of the award, the circumstances under which it was made, and principles upon which rates and conditions were fixed.

The doctrine has been scrutinized by Mr J. R. Kerr (as he then was) in this Journal.[6] In the form in which it was stated by the Industrial Commission, it is at least open to doubt that it has ever been applied by the innumerable arbitrators who have made the required obeisance to the principle. And it was probably no more applicable in reality than was the doctrine in the *Teachers Case* (1964) which was given its death blow by the Industrial Commission in 1967.[7] It seems reasonable to assume that every well-informed arbitrator has in his mind some general picture of a wage structure from which he will not readily divorce himself; and, in any case, wage rates are not simply plucked out of the air.

Ultimately, one of the consequences of the 1959 amendment to the Industrial Arbitration Act by which the limitation to "fixing . . . the lowest rates of wages" was removed and section 23A was enacted, must have been a realization of the inadequacy of this doctrine; for a rate of wages can be seen to be "just and reasonable", in the terms of section 23A, only in relation to other wage rates. Conciliation Commissioners in some recent decisions have altered the form of their reference to the *Metalliferous Miners Case*[8] by adding a reference to the views expressed by Sheldon J. in the Industrial Commission upon the present relevance of the principle.[9]

Sheldon J. regarded himself, sitting as a single judge in the proceedings, as bound by the principle, thus treating it as a legal rather than an arbitral principle (though he did not limit his view upon it to the legal issue of the change in the statutory basis of wage determination in New South Wales). In his view, what the principle precludes is the "adoption" of rates from other awards where the comparison is not one of like with like. In fact, what was said in the case was that such rates shall not be used as a "guide", though perhaps this is a too "textual" approach to the matter. The decision, he said, "ought not to be read so literally as to place the arbitrator . . . in outer space forbidden to use even in a very general way his background knowledge of what awards provide without which . . . no sound evaluation can be made". This, which reads very like a description of the actual practice of arbitrators both before and after the *Metalliferous Miners Case*, would seem to be just what the original decision did preclude; and it is arguable that arbitrators have never proceeded by the simple process of "adopting" rates from other awards, other than on a like-for-like basis.

The practice of arbitrators has been summed up, in effect, by Sheehy J. in the *Crown Employees (Administrative and Clerical) Case*[10] in these words: "In the case of the positions dealt with in the evidence of [certain witnesses] it does seem possible and permissible to make comparisons. However, they are not identical in the nature of the work and responsibilities involved, and no question could arise of adopting the Victorian rates and to do so would offend against the principles of the *Metalliferous Miners Case*." In other words, the Victorian rates are to be used as a "guide", or as one of a number of guides, in determining rates for jobs that are not like with like.

Prerogatives of Management: This, however, is one area where tradition has been resoundingly affirmed by the Commonwealth Commission, or at least by Wright J.[11] It has been known since at least 1955 that with the

introduction of computers it was likely that shift work would spread to office employment.[12] It seems reasonable to suggest, then, that the approach of the union in these proceedings which amounted, in effect, to the hearing of an application to prohibit shift work upon computers in the Bureau of Census and Statistics, was unduly simplified and left the way open for the Commission to reject the claim. In the course of their joint judgment, Williams and Franki JJ. said that the issue in this case raised the proposition of the right of an employer to manage and regulate his own business, unless in doing so he imposes unjust or unreasonable demands upon his employees. This was spelled out by Wright J. who felt that the reasons given by his colleagues did not lay as much emphasis as he did personally on the preservation of management's rights and responsibilities. "Precedent" dating back to the first volume of the *Commonwealth Arbitration Reports* was invoked by His Honour in support of the principle.

Automation

In deciding the Clerks Case (*supra*) the Commission has imported into the area of clerical employment principles that have been applied previously in continuous process industries. This seems to be apparent from the reference to the *Glassworkers Case*[13] where earlier decisions were reviewed by the Court. The approach is based upon the efficiency of the undertaking conceived in a fashion consistent with the emphasis placed upon the prerogatives of management. In the *Glassworkers Case* the judges said, "And it is well established that the incidence of weekend work is properly compensated for by such additional payment". This assumes that the social and individual effects of shift work are well understood—which is still debatable territory. The approach is quite as unduly simplified as that of the union.

The Commission was concerned in these proceedings with only the general issue of shift work or no shift work, and the fine print is left to be written in by proceedings before the Public Service Arbitrator for whom some guide lines appear to be emerging. When in 1967 Commissioner Finlay varied the Clerks (Breweries) Award, 1962, to permit the employment of clerical workers on shift work where they are employed in connexion with the operation of a computer, he awarded shift allowances of 10 per cent (day shift), 20 per cent (afternoon shift) and 25 per cent (night shift).[14] Conciliation Commissioner Burns, faced with the same question in the form of applications to exempt various employers from the hours provisions of the Clerks (State) Award,[15] prescribed the same premium for afternoon and night shifts.[16] Remuneration is important.

Unfortunately, it is only on this one aspect of rates of pay and in the matter of redundancy[17] that guide lines do exist. Quite apart from whether or not the guide lines are adequate or well conceived, this leaves many important areas at which the tribunals seem to have no disposition to look. The parties in industry must see that the design of jobs is negotiable. Only if this is so can the decisions of industrial tribunals reflect this need; for the tribunals, even if they are competent to do so, are not otherwise going to intrude in the area.

Equal Pay

The "equal pay" decision was hardly that. It is even arguable that, since the tests to be adopted are those already operative under State legislation, it gave nothing to women employed under Federal awards that the Commission would not, in the end, have had to give. When the Government of New Zealand set about implementing equal pay in the state services of that country it set up a committee under the Judge of the Workers' Compensation Court to make recommendations which were substantially accepted by the Government. The Dalglish Committee proceeded on the understanding that its function was to rate all female employments in the state services in terms of male employments. Here, in fact, an effort was being made to give equal pay for work of equal value. Whether the committee quite achieved that aim is beside the point. In the best New Zealand tradition, it was a tripartite committee, and there was almost certainly an element of bargaining in the result arrived at. And, of course, there are the obvious difficulties in trying to find what is, in effect, a male rate for typists, and machinists, and district nurses. But the committee did adopt what would seem to be the only completely tenable approach to equal pay.

In its decision[18] the Commission has said that ". . . it is a question of principle which we should decide, namely, whether there should be equal pay for equal work". But here are some of the implications of the nine principles suggested by the Commission for the determination of whether equal pay should be granted. Some may be more theoretical than real; but they are all involved. Women employed to do the same work under different awards may get different rates of pay. This follows from the stipulation that the men with whose work that of the women is being compared should be employed under the same award or determination. Women doing work of greater intensity or duration may conceivably get lower rates than women employed under the same award to perform work of lesser intensity or duration where there are no male employees under the award with whom to compare them. When there are separate awards for men and women (e.g., Aircraft Flight Stewards Award 1968 and Airline Hostesses Award 1966) there may arise quite unwarrantable divergencies. The express reference to work performed under the same conditions suggests the possibility of taking into account State regulation of the conditions of employment of women (e.g., *Factories Shops and Industries Act (N.S.W.)*, Division 6) even where the same conditions are granted by the employer to male employees.

The problems, then, presented by the Full Bench of the Commission to the individual Commissioner charged with the task of applying the decision are very real. Directions laid down for them are uncertain; and because of the considerable diversity of industrial situations they are almost bound to encounter such questions as those raised above. The case is still properly in the process of determination, and comment upon eventual outcomes is premature until Commissioner Gough's report to the Commission is determined and until the Public Service Arbitrator, Mr E. A. Chambers, has made his determinations. The Commission has, furthermore, still to determine the reference under section 34 of the Federal Act of the Bank Officials (Federal) 1963 Award; but it would seem that, with the emphasis placed by the Commission upon comparisons within the scope of the same award, and upon the like-for-like nature of the work being done by men and women, that this is no more than a fairly small step upon the way to equal pay. It is perhaps a nice point whether the Full Bench did or did not affirm the principle.

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16. See too *Re Clerks (State) Award*, 1968 A.I.L.R. Rep. 38.
17. See *Re Brickmakers (State) and other Conciliation Committees*, 1965 A.I.L.R. Rep. 446; *Re Clerks (Oil Companies) Award, 1966*, 1968 A.I.L.R. Rep. 92; 23 I.I.B. 358; *Clerks (State) Award*, 1969 A.I.L.R. Rep. 249.
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The A.C.T.U. Congress of 1969

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"I HAVE now to announce to you my retirement as President of the A.C.T.U." With this one brief sentence, characteristically dropped without warning at the end of his presidential address, Albert Monk formally opened the contest for the presidential succession on the first day of the biennial congress. Effectively, however, the contest had begun more than two years earlier. Since then, R. J. Hawke, A.C.T.U. Research Officer, and H. J. Souter, A.C.T.U. Secretary, had emerged as the leading contenders;[1] and the five-day congress that opened in Sydney on Monday, September 8, had been preceded by months of intense lobbying, particularly after the evening in March when Mr Monk foreshadowed his retirement announcement. The attendance of 754 delegates (101 more than at the preceding congress) was one outcome of this, as each side sought to maximize its voting strength by securing the affiliation of new unions and by increasing the number of members on which other unions were formally affiliated.

The contending factions continued to manoeuvre for tactical advantage on the floor of congress during the first two days, before voting began on the Wednesday morning. The manoeuvring was felt to be necessary because, for all the confidence expressed by both sides, neither could be completely sure that the promises they received would in fact be translated into a majority in a secret ballot. Both had a hard core of support. Mr Hawke's extended from the left wing of the unions and Mr Souter's from the right. But for each, the support of politically middle-of-the-road union leaders was essential, and they were less unequivocally committed, for the most part, than those on the extreme left and the extreme right. This is not to say that the commitment of either extreme group stemmed from an identity of outlook with the candidate supported. There is no doubt that Mr Hawke is of a more radical caste of mind than Mr Souter, but neither stands far from the centre. By the same token, there is no doubt that the extremist leaders on each side would ideally have preferred another candidate from their own camp—provided there had been some prospect of his succeeding. Because there was not, they threw their weight behind Mr Hawke and Mr Souter respectively. Both men were thus compromise candidates who drew support from the extremes of the A.C.T.U.'s political spectrum because they were also capable of attracting votes from the vital centre. In each case, moreover, the active lobbyists on their behalf included some moderate union leaders who identified strongly with them often for personal as well as politico-industrial reasons. Thus while it is not altogether inaccurate, with reference to both their own attitudes and the major source of their hard-core support, to describe Mr Hawke as a left-wing candidate and Mr Souter as a right-wing candidate, the description can be deceptive if it is not qualified by the observation that each man stands between the centre and one extreme in terms of both his appeal and his personal outlook.

The manoeuvring began on Monday afternoon once the process of approving delegates' credentials had been completed. The Credentials Committee set up at this point traditionally consists of the Returning Officer and the two official scrutineers. This time, however, the Interstate Executive, dominated by Hawke supporters, recommended a differently constituted committee. The point of