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# THE JOURNAL OF INDUSTRIAL RELATIONS

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## ARTICLES

# Penal Provisions Under Commonwealth Arbitration[1]

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SINCE 1961, the Commonwealth penal provisions have been administered more frequently, more heavily and more widely than in any previous period. In the 12 years ending 1961,[2] there were 203 applications for orders under S109 and its precursor S29. Of these, 109 orders were made absolute. These represent an annual average of 17 and 9 respectively and may be compared with 67 and 50 for 1962, in which year a larger variety of unions than usual, numbering 20, were involved as respondents in these proceedings. And the annual average for the first half of 1963 is nearly twice the corresponding figures for 1962. In the same 12 years,[3] 50 fines were imposed under Sections 29A and 111 amounting to £13,800. In 1962, there were 28 fines amounting to £9,150. More than half of this amount was incurred by the Waterside Workers' Federation, the rest being borne by eight other unions. And in the first half of 1963, 23 fines amounting to £9,200 were imposed.

These penal provisions are administered under the Commonwealth Conciliation and Arbitration Act and are directed at registered organisations which, in the cases mentioned, have been unions. Another set of Commonwealth penal provisions operate under the Stevedoring Industry Act (S52A) and are directed at the individual workers who go out on strike. Between June, 1961, when S52A was inserted, and the end of May, 1963, 200 declarations were made under this section and over 200,000 workers were penalised.[4]

Legal sanctions against strikes[5] are not confined to the Commonwealth industrial jurisdiction. Each State has its particular armoury which, in some cases, are more formidable than the Commonwealth's.[6] But the controversy about penal sanctions mainly concerns the provisions of the Commonwealth Acts since these tend to be used more frequently than the sanctions of the States.

The provisions under the Stevedoring Industry Act are fairly straightforward and are limited to only a small part of the work force. Briefly, under S52A, a declaration could be made by the Stevedoring Industry authority if 250 men or one-third of the port's registered workers go out on strike, whereupon the striking persons would lose their entitlement to four days' attendance money for every day of the strike; and, until a clause in this section of the Act was rescinded in the middle of





1962, the strikers would also have their long service leave postponed by the number of days up to a maximum of 30 days on which they were on strike. Far from being a deterrent to stoppages, these provisions have tended to produce strikes in protest against them. Since these provisions aim directly at the pay of individual workers, it is not surprising that they are interpreted as an attempt to drive a wedge between the individual members and their union. The militant and solidary character of this union should have made it clear that such an attempt would have been strongly resisted. Moreover, once members have lost their entitlement to a large number of attendance payments, resistance turns into defiance. He that is drenched does not fear the rain!

The penal provisions of the Commonwealth Conciliation and Arbitration Act work in a more roundabout manner. These sanctions are directed against the striking union and in what follows attention will be focused exclusively on this class of sanctions.

The starting point in the use of penal sanctions is the insertion in an award of a so-called "bans and limitations" clause forbidding the unions covered by the award from being a party to a strike or to a limitation of work, as, for example, by a restriction of overtime work.[7] This approach to penal sanctions began when the bans clause was put into the Metal Trades Award in 1950. It has since found a place in a large number of key awards which have been subject to strikes. Discretion lies with the Commissioner as to whether the bans clause shall be inserted or not. Such discretion has tended to be influenced by the prevalence or otherwise of strike action in the industry covered by the award. The wide incidence of this clause shows that Commissioners have generally been persuaded of the wisdom of applying this restriction on the power to strike.

When a strike or limitation of overtime occurs, the employer may take action under S119 for a penalty to be imposed on the union. For reasons which are not entirely clear,[8] employers have tended to make an alternative and less direct procedure to the standard course of action. This procedure requires the employer to apply to the Industrial Court under S109 (and, before 1956, S29) for an order enjoining the union from committing what is in effect a breach of the award. Although the Court has discretion whether to make the order or not, in practice it appears to make the order freely. And so long as the injunction is in force the employer may draw the attention of the Court to any strike action (or limitation of overtime). Here, almost regardless of the merits of the union's case, the Court has tended to convict or fine the union under S111 for contempt of court, a separate fine (maximum £500) being imposed for each day of strike.

The injunction may be lifted on evidence of "good behaviour" by the union and the employer; or, what is becoming more common, the injunc-

tion may be limited to a period of six months. However, any strike action following the lifting of the injunction could recall the injunction. The freedom[9] to strike is, therefore, for practical purposes removed by Sections 109 and 111 once the bans clause finds its way into the award. Indeed, in a recent Stevedoring Case the Court has applied an injunction of indefinite duration for all ports.

Despite these sanctions an increased number of strikes occurred last year. This is not surprising. The right to strike is the life blood of unionism. To restrict it beyond a certain point is to turn the union from its traditional role as an instrument of economic pressure to a mere administrative agency. It is true that the initiative in the application of these sanctions lies with the employer and many do not avail themselves of these sanctions. But the greater frequency with which these sanctions are being invoked makes it necessary to ask again whether we are fully aware of the implications of such penalties in the sphere of industrial relations. Are these sanctions desirable? Are they necessary?

It is not easy to give clear answers to these questions. On the one hand, the ease with which penal sanctions are applied is a little disquieting. On the other, the logic in the argument that it is undesirable to have compulsory arbitration without legal sanctions applicable to *both* sides is difficult to refute. To remove the existing legal sanctions means in effect that since the awards of compulsory arbitration provide only *minimum* conditions, the sanctions apply only to the employer. Such a one-sided arrangement does not impose any obligations on the union to prevent strikes and, furthermore, leaves it free at any time to apply economic coercion on the employer for over-award conditions. The absence of bilateral obligations might not be objectionable in itself if the employers' obligations were based on unequivocal "minimum" criteria such as, for example, the American national minimum wage. But the kinds of criteria adopted by arbitrators in the settlement of industrial disputes implicitly or explicitly assume maximum terms: a "just" settlement, the highest wage or the best conditions consistent with economic circumstances. The employer is, of course, free to pay more than the award. But if he is unable or unwilling to make such concessions he should be entitled to the protection of the law. The logic of compulsory arbitration, as has been repeated so many times since its inception, is to displace the "rude and barbarous process", to quote Mr. Justice Higgins, of the strike, by the orderly and just procedure of the law. There is no place for both.

One finds oneself, therefore, in a very uncomfortable position between the compelling logic of such an argument and the more realistic and expedient view of what is feasible in industrial relations. The doubts about the place of penal sanctions in industrial relations may perhaps be



better understood by a closer examination of certain features of our system.

First, the Australian arbitration system does not discriminate between strike action involving the *making* of the terms of employment and strikes connected with the *interpretation* and enforcement of these terms. The division between the Commission and the Industrial Court is essentially a division of jurisdiction as between two types of disputes. Since the Boilermakers' Case, a distinction is made between arbitral and judicial matters. But in so far as penalties exist for strike action, it matters not whether such a strike is connected with attempts to establish new rights or whether it is concerned with the interpretation of existing rights. The system does not question the appropriateness of the judicial process to both types of strikes.

It is interesting to contrast this with the position in Sweden, a country whose industrial relations arrangements deserve our close attention. In Sweden,[10] a sharp distinction is drawn between what are known as "economic" or "interest" disputes involving the making of terms of employment and judicial or justiciable disputes concerning the interpretation of these terms. For the former type of dispute there is virtually[11] no restriction on the right to strike (or to lockout). Here collective bargaining *par excellence* prevails with the right to economic coercion basic to the process of reaching agreement. Government mediation services are freely available but these strictly avoid any attempt to dictate the terms of settlement. Once the agreement is signed it is legally binding on both sides for the full duration of the agreement, normally one or two years. No stoppage is allowed during this period on the terms of the agreement. Any grievances must be settled by negotiations between the parties or, if no solution is reached in this way, the matter is taken up by the Labour Court for what is in effect compulsory arbitration. The sanction against strike action during the life of the agreement is in the nature of civil damages, such damages being related to the loss suffered by the employer during the strike. The Labour Court also has powers to order the cessation or fulfilment of certain actions in accordance with the terms of the agreement.

The basis of this system then is not only the full acceptance of the judicial process in disputes about the nature of existing rights as laid down in the agreement, but also the prohibition of strike action in such disputes. Once the agreement has expired, however, the Labour Court will not be drawn into disputes about establishing new rights, even at the request of the parties. The underlying philosophy here is that such questions as how high wages should be, how many persons should be expected to man a particular machine or what must be regarded as the minimum performance in any task are not matters which can be decided by legal processes. Such matters must be resolved by the relative

economic strength of the parties and their assessment of the gains and losses of resorting to economic force.

It is not difficult to accept the legal sanctions of this arrangement. The parties have wide powers to use economic coercion in order to exact the best possible terms; but once having put their seals to the contract, they must forswear the use of strike or lockout to settle their grievances until the contract has run out. And it should be noted that the life of the contract is long enough for business planning with the assurance of industrial peace, but not too long as to frustrate the ambitions of unions for improvements in the terms of employment.

What is in effect a similar arrangement operates in America. The right to strike in the course of contract negotiation is guaranteed by the law (subject to emergency disputes limitations) but once the contract is signed, the terms must be observed without a stoppage. There is no Labour Court or its equivalent to process grievances or to act as final arbitrator, but a breach of contract suit could be entered by the aggrieved party in the ordinary courts. This is rarely done, largely because the importance of avoiding stoppages during the life of the agreement is fully recognised by the parties, and it is usual for the contract to contain details for processing grievances with ultimate resort to arbitration. And, indeed, very few stoppages arise during the life of contracts.

In Britain, contracts are skimpy documents usually without a definite life. As a result, the distinction between disputes about new rights and existing rights becomes blurred and the grievance procedure, so successfully handled in Sweden and America, tends to be neglected—a factor which may partly account for the prevalence of "unofficial" stoppages in a number of industries. There is some talk at present about the desirability of adopting the Swedish system of civil sanctions for breaches of contract, but this would require giving unions full legal status and making collective bargaining agreements legally binding.[12] It is doubtful if the unions would like to see these changes brought in.

To return to the Australian system. The parties must accept the awards imposed upon them by the arbitrator; they must submit their grievances to arbitration; and the awards never run out. To be sure, new awards may be made on the application of one or both parties. But again the power to use economic coercion is not allowed. Neat and logical, but is it based on realistic assumptions? Are we wise, in our attitude on the right to strike, to ignore the distinction between disputes about the making of new rights and disputes about the interpretation of existing rights?

The second difficulty about our penal sanctions is whether they distinguish sufficiently between strikes which seriously threaten the



public interest and those which, while being a nuisance and inconvenience and even imposing economic hardship, are not of the kind which may be reasonably regarded as seriously threatening human life or the national economy. The object of our penal sanctions appears to be to prevent stoppages or, if stoppages occur, to shorten their duration. The reduction of strike activity becomes an end in itself. The implications for industrial relations in the broader sense of the attitudes of the parties to each other, the morale of the workers and ultimately the effect on productivity—all these matters are either neglected or assume secondary importance in the philosophy of penal sanctions.

When a strike, because of its incidence or scale, seriously threatens the public interest, the paramount problem is how to prevent the strike or to effect a resumption of work as soon as possible. Considerations about the impact on industrial relations must be pushed aside in favour of the undoubtedly more urgent task of keeping the economic machine going. Industrial relations may be said to have broken down completely and the urgency of using legal action to force the resumption of industrial relations, however artificial, cannot be questioned by the most ardent supporter of the right to strike. No responsible government, however strike tolerant, could allow industrial action to proceed beyond certain limits. Sweden, the United States, the United Kingdom, all have powers to deal with emergency disputes. But very rarely has there been any need to resort to them.

In Australia legal action against strikes of this nature, if not covered by state law, can be adequately handled by the Commonwealth under S30J of the Crimes Act and, if necessary, by special legislation to meet a particular emergency such as, for example, the coal strike of 1949. That these powers are very rarely used is a sign that strikes of such dimensions do not occur frequently. This may be due to the unwillingness of trade unions to engage in strikes of this nature for a variety of possible reasons, ranging from a sense of social responsibility to a realistic calculation of the costs involved. Another reason may be the existence of the penal sanctions under the Commonwealth Arbitration Act already mentioned. Some of the stoppages against which these sanctions have been applied, although initially small in scale, could have developed into more serious stoppages in the absence of legal restraint. It is difficult, however, to justify Sections 109 and 111—at any rate in the way they have been used—as a means of preventing the risk of large-scale stoppages. Only the most morbid pessimist would anticipate that every strike, whether in a brewery, in an engineering workshop or on the waterfront, is likely to lead to a state of national emergency.

The second difficulty, then, is whether in applying penal sanctions it is wise not to make a real distinction between emergency disputes and other disputes. The point about making this distinction is that as the law

now stands it encourages some to be so obsessed and so impatient with trying to stop all strike action as an end in itself that two important matters are inclined to be neglected. First, to seek out the more fundamental causes of industrial discontent, of which strike action is only a symptom, and to provide more effective machinery for alleviating discontent without the use of penal sanctions. Treating symptoms is not the same as treating causes, as anybody with a persistent headache well knews when offered an aspirin. Secondly, industrial relations are a continuing relation, and it is important to keep on asking what effect sanctions have on such relations. Are we in danger of throwing the baby out with the bath water? It is not enough to say that the use of penal sanctions is not very widespread. Its frequent use, even in a limited area, is bound to evoke a general sympathetic response among workers. Moreover, the effect of inter-union pressure through the Trades Halls and ACTU for a return to work is greatly weakened by general resentment to the use of penal sanctions.

A final difficulty. The sanctions are so framed that the initiative for their application rests with the individual employer. The Court appears to behave as if it has no discretion, no matter where the justice of the case lies. In a sense, this is proper. The individual employer suffers the direct impact of a strike and he should decide whether it is necessary to seek legal aid to stop the strike. If he is shortsighted enough to ignore his long-run interests, that is his business. The other side of the argument is whether the individual employer should be entrusted with the use of such a powerful social weapon with implications spreading well beyond his own sphere of activity.

It will be clear that the three difficulties are interrelated. They are parts of the same problem: that is, if we grant that in the use of legal sanctions there is no point in distinguishing between disputes about establishing new rights and interpretations of existing rights; and, further, that there is no reason to distinguish between ordinary stoppages and emergency stoppages; then there is no sound reason to doubt the appropriateness of the employer's initiative in the application of sanctions. This is why it is so difficult, if not impossible, to prescribe alternative courses of action which do not involve the abandonment of compulsory arbitration in the sense in which it is widely accepted in Australia. Hence, any realistic proposal for reform cannot afford to sweep away penal sanctions as such.

Where do we go from here? One course is to leave the penal provisions unchanged but to hope that they collect a lot of dust as employers develop a greater sense of discrimination in the use of sanctions and patiently explore all avenues with trade union officials in a spirit of compromise, using legal sanctions as a very last resort. In addition, is it possible to hope that the Court acts with much more



discrimination in its application of sanctions? Is it too simple-minded to believe that in this way greater co-operation can be obtained in the long run from the unions and especially from the ACTU and the Labour Councils?

The second course is to try to adapt some of the features of other systems to our own without losing too much of the basic framework of our system. It should be clear that just as the human body violently repels attempts to graft foreign tissues on to it, so the social body does not readily take to the transplantation of foreign institutional arrangements. What works well in Sweden need not work well in Australia. However, for purposes of discussion the following proposal in broad outline may be ventured.

In disputes on the establishment of new terms of employment, compulsory arbitration should be much less automatically and freely available to the parties. There should be no limit to conciliation, although perhaps disputing parties should have some say in the choice of conciliator in a particular dispute. Voluntary arbitration should, of course, be readily available if requested. But compulsory arbitration in such matters should only be used when the dispute assumes emergency proportions. When this point is reached is, of course, a matter of judgment but it should be interpreted not far short of the circumstances in which, for example, the Crimes Act might be invoked.

In disputes about the interpretations of existing rights, while parties should be encouraged to develop their own machinery for settling such disputes, compulsory arbitration should be readily available. To make the distinction between disputes about new rights and existing rights meaningful, agreements and awards should be binding only for a defined period, preferably not longer than two years.

This approach to the settlement of disputes should, of course, be linked to the way in which penal sanctions are applied. A strike on the terms of an award or agreement should be subject to penal sanctions—whether of a criminal or civil nature is a matter for argument. Such an arrangement should encourage the development of orderly grievance procedures with compulsory arbitration only as a last resort.

A strike in the course of negotiations about new terms should be free from sanctions until compulsory arbitration has been ordered. Only then should the order to return to work be covered by penalty provisions.

The early days of such an innovation would probably see an increase in strike activity. Given time, however, it could work satisfactorily. No doubt other problems would arise. For one thing, something would have to be done to accommodate the "engineered" disputes on national

wage policy matters—the basic wage, standard hours, key margins, etc. It is surely possible to devise a formula short of constitutional amendment to enable such cases to be heard without stoppages.

TABLE 1

*Orders under S29 (1950-56) and S109 (1956-62) of Commonwealth Conciliation and Arbitration Act*

| *Year* | *No. of Applications* for Orders* | *Orders Made* Absolute* |
|---|---|---|
| 1950 | 6 (6) | 2 (2) |
| 1951 | — | — |
| 1952 | 4 | 3 |
| 1953 | 5 | 4 |
| 1954 | 24 | 15 |
| 1955 | 14 | 8 |
| 1956† | 5 (5) | 2 (2) |
| 1957 | 20 (13) | 15 (10) |
| 1958 | 37 (21) | 21 (10) |
| 1959 | 40 (16) | 9 (7) |
| 1960 | 27 (19) | 17 (13) |
| 1961 | 21 (15) | 13 (10) |
| 1962 | 67 (50) | 50 (39) |

* Several orders may be issued in connection with the one dispute. The figures in brackets show the actual number of disputes involved.
† All orders under S109.
*Source:* Dept. of Labour and National Service.

TABLE 2

*Fines Imposed under S29A (1950-Sept. 1956) and S111 (1956-62) of Commonwealth Conciliation and Arbitration Act*

| *Year* | *Union* | *No. of Times* | *Total Amount* |
|---|---|---|---|
| | | | £ |
| 1950 | Amalgamated Engineering Union | 1 | 100* |
| 1951 | | nil | — |
| 1952 | Waterside Workers' Federation | 1 | 500 |
| 1953 | | nil | — |
| 1954 | Amalgamated Engineering Union | 5 | 1,850 |
| | Federated Ironworkers' Association | 1 | 100 |
| | Sheet Metal Working Union | 2 | 350 |
| | Boilermakers' Society | 1 | 500 |
| | Blacksmiths' Society | 1 | 150 |
| 1955 | Amalgamated Engineering Union | 1 | 250 |
| | Federated Ironworkers' Association | 1 | 500 |
| | Boilermakers' Society | 1 | 500 |
| 1956† | Seamen's Union | 3 | 900 |
| 1957 | Amalgamated Engineering Union | 1 | 50 |
| | Coal and Shale Employees' Federation | 1 | 50 |
| 1958 | Boilermakers' Society | 2 | 150 |
| | Gas Employees' Union | 10 | 500 |
| | Air Pilots' Association | 4 | 2,000 |
| 1959 | Australian Tramways & Motor Omnibus Employees' Association | 1 | 100 |
| 1960 | Seamen's Union | 4 | 1,800 |
| | Waterside Workers' Federation | 4 | 1,600 |
| 1961 | Glass Workers' Union | 1 | 350 |



| | | | |
|---|---|---|---|
| 1962 | Waterside Workers' Federation | 11 | 4,800 |
| | Federated Ironworkers' Association | 1 | 50 |
| | Moulders' Union | 2 | 200 |
| | Liquor Trades Union | 4 | 1,300 |
| | Amalgamated Engineering Union | 4 | 1,300 |
| | Transport Workers' Union | 3 | 1,100 |
| | Electrical Trades Union | 1 | 100 |
| | Boilermakers' Society | 1 | 100 |
| | Wool and Basil Workers' Union | 1 | 200 |

* Quashed by High Court.
† Under S111.
*Source:* Dept. of Labour and National Service.

## FOOTNOTES

1. The substance of this note was given in a paper to the 1963 Terrigal Conference of the Industrial Relations Society. Minor changes have been made in the light of comments at the Conference.
2. For annual figures, see Table 1.
3. See Table 2.
4. The same person being in many cases counted more than once.
5. For convenience, it will be assumed that all stoppages are due to strikes.
6. See E. I. Sykes, *Strike Law in Australia* (Law Book Co., 1960), Ch. 6; J. H. Portus, *The Development of Australian Trade Union Law* (M.U.P., 1958), Ch. 15.
7. For example, Metal Trades Award contains: S19 (ba) (i) No organization party to this award shall in any way whether directly or indirectly be a party to or concerned in any ban limitation or restriction upon the performance of work in accordance with this award. (ii) Any organization shall be deemed to commit a new and separate breach of the above sub-clause on each and every day in which it is directly or indirectly a party to such a ban, limitation or restriction.
8. The maximum penalty under S119 is £100 whereas under the alternative course it is £500. Furthermore, legal costs are likely to be much heavier in the latter. On grounds of imposing the heaviest financial burden on the unions for striking, it would appear that the alternative course might be preferred by employers as constituting the greatest strike deterrent. Moreover, whereas the alternative method of sanction can only be administered by the Industrial Court, S119 may also be administered by Magistrates, District, County and Local Courts. To ensure that disciplinary action is kept within the industrial jurisdiction, employers may have avoided using S119. It is sometimes argued, somewhat in opposition to these reasons, that whereas S119 necessarily involves the imposition of a fine if a strike is proved, the alternative course gives the union an opportunity to "mend its ways". The union is given a "warning" that any continued or renewed strike activity will result in a penalty which, should it be applied, would impose a heavier burden on the union. It is difficult to see why a "warning" cannot also be given by the employer before applying S119.
9. Of course, the union would be free to strike as often as it liked if it were prepared to continue paying fines.
10. See T. L. Johnston, *Collective Bargaining in Sweden* (Allen & Unwin, 1962), Ch. VI.
11. Virtually, because there are limits when the strike produces a situation of national emergency.
12. See, for example, B. C. Roberts, *Industrial Relations: Contemporary Problems and Perspectives* (Methuen, 1962), p. 12.