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British and Australian
Labour Law: the Background
to the 1982 Bills

D.W. Rawson

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BY D. W. RAWSON

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THE BACKGROUND TO THE 1982 BILLS

Not for the first time, the law-makers have produced a measure that tries to make the unions 'responsible' but at the same time undermines their capacity to act effectively. [The Minister] appears to be schizoid about unions, wanting to weaken them and strengthen them at the same time.

Robert Taylor in The Observer (London) 18 April 1982

In the early months of 1982, bills for the reform of industrial relations law were introduced by conservative, or non-Labor, governments in both Britain and Australia. Both were strongly opposed by trade unions and, in some respects at least, were frankly designed to reduce the number of trade unionists and to alter the balance between unions and employers in favour of the latter. Both bills were referred to parliamentary committees and remain under the consideration of these committees at the time of writing.

In Britain, the Employment Bill appears almost certain to become law, probably without substantial amendment. The future of the Australian Bill, for a Conciliation and Arbitration Amendment Act 1982, is more doubtful. This is not only because its passage has been delayed in the Senate, where the Liberal-National Country Party government lacks a majority. During the course of this delay, there have been changes in the ministry. Mr Ian Viner, the Minister for Industrial Relations, has been replaced by Mr Ian Macphree, at the head of a somewhat enlarged Department of Employment and Industrial Relations. This is to lead to a more extensive review of the Conciliation and Arbitration Act and the present Bill will be seen in a different context and may be dropped

altogether. However that may be, any future developments must occur against the background and under the influence of the events and the ideas whose history will be sketched in this paper.

In some respects, it is not particularly surprising that moves to change industrial law should occur simultaneously in Australia and in Britain. Industrial relations in these two countries have much in common, as might be expected since one nation developed from a series of colonies of the other, which for much of its history was its principal source of people, capital and ideas. Both have been highly unionised, by the standards of most of the rest of the world, with rather more than half of all wage and salary earners now belonging to unions. Both have been undergoing periods of economic difficulty, marked by high levels of inflation and of unemployment, and in both it has been common for unions to be blamed for some part of this unsatisfactory situation and for the intractability of these problems. There has been some contact between the two governments as they wrestled with their industrial relations problems and each has noted the steps taken by the other. For all these reasons, they might be expected to be moving in similar directions.

But there is another side to the story, which also has its place in explaining the present situation. For most of this century trade unionism, and industrial relations more generally, developed under two quite different traditions of law and policy in Britain and in Australia; traditions which in some respects were polar opposites. In Australia, unions were seen as being part of a set of systems of compulsory arbitration, which operated at the federal level and also in most of the States. These systems were established as the outcome of ambitious ventures in public policy by governments of the early twentieth century, which consciously invoked the myths and the power of the law. Trade unions, and the corresponding organizations of employers, were made

subject to public regulation. Though they were not seen as part of the machinery of the state, they were seen as existing primarily to serve public purposes as defined by governments and by courts. Generations before whimsical British students of administration coined the term QUANGO, Australian trade unions were indeed supposed to be quasi-autonomous non-governmental organizations, serving public purposes from outside the boundaries of the state but entitled only to a 'quasi' autonomy in relation to the state and its instruments.

In Britain, by contrast, union autonomy was not only sought and defended with determination by the unions themselves but came to be seen as part of a more extensive autonomy, rightly enjoyed by the industrial relations system as a whole. This attitude of legal abstention and 'collective laissez-faire', set out and celebrated by Otto Kahn-Freund in the 1950s, was characteristic of a much longer period and, in classic owl-of-Minerva fashion, its heyday was nearly over when it was best described and most praised. Nevertheless, much of it remains, and it remains characteristically British. Certainly, to put the matter ethno-centrally, it is profoundly 'un-Australian'.

If either or both of these models had been entirely in accord with reality, the paradox of diametrically opposed legal principles in nations with so much in common would have been strange indeed. In fact, this could not be said of either model, and during the last twenty years both have lost more of their validity. In Australia, compulsory arbitration, that epitome of legal interventionism, has continued to lose some of the legitimacy and the mythic qualities which have maintained it for so long. In Britain, no-one any longer wants to minimize the role of the state in industrial relations. In both countries, just what should be done remains the subject of bitter political controversy; but as the contending parties struggle with each other, they

jointly move away from the old shibboleths and certainties. On the face of it, this might suggest that the two countries are coming together in some middle ground which is neither 'abstentionist' nor 'arbitrationist'; and, to some extent, so they are.

One would have to be a very uncritical believer in middle ways to suppose that such an outcome will necessarily be better for both, or for either. The prevailing atmosphere as regards industrial relations in both countries is one of anxiety if not of gloom, though this common state of mind is based on a variety of inconsistent arguments and expectations. The present conjunction of these two bills, with their similarities and their differences, shows both common and distinguishing factors at work. At a time of change and stress, ageing and creaking conventions and assumptions are being variously dismantled, chipped away and eroded.

Australia - The Retreat from the 'New Province for Law and Order'

This was the title of a paper which I originally wrote in 1975 (Tay and Kamenka 1980:290); but it seems good for a second airing. Indeed, 1975 could be said to have marked a temporary halt to the retreat, in that it saw the introduction of the system of wage indexation and its accompanying guidelines, which led to increased 'order' in wage negotiation and a revival, if not of the law, then of law-like statements and processes. However even this development, which after a surprisingly long life came to an end with the abandonment of indexation in 1981, represented no more than a blip in a much longer movement away from both the trappings and the reality of legal regulation.

This is not to suggest that the law has ceased to play a vital part in industrial relations in Australia, or even to deny that Australian industrial relations systems are more closely regulated by the law than those of the rest

of the world. It is merely to say that the contrast between present reality and the expectations with which the arbitration systems were founded is very marked indeed, and that this has been a long term change, though with some temporary reversals from time to time. Reality began to move away from the expectations of the system at such an early stage that we need to go back a long time to find those expectations in a clear form. One example is the very phrase the 'new province...', in which Justice Higgins, the principal founder of the system, sought to epitomise his hopes (Higgins 1922); another, the statement of Alfred Deakin, in introducing the first federal Arbitration Bill in 1903, that:

We now substitute a new regime for the reign of violence by endowing the State - which itself possesses a strength greater than that of either or both of the contestants - with power to impose, within the limits of reason, justice and constitutional government, its deliberate will upon the parties to industrial disputes (CPD 15: 2862).

A further example, with particular reference to registered 'organizations' of employers and employees, is the proposition of Justice Isaacs that such an organization '...is the creation of the Act and simply as incidental to its great purposes. It is permitted to come into existence for the very purpose, not of making the policy of the Statute under the Constitution more difficult of attainment, but of assisting to carry that policy into effect' (Australian Commonwealth Shipping Board v. Federated Seamen's Union of Australasia (1925) 35 CLR 462 at 475).

It is significant that we have to go well into the past for such forthright pronouncements. In comparison, the current statements of those who assert a strengthened role for the law have a distinctly cautious, even plaintive, quality. Consider, for example, this passage in the speech of Mr Ian Viner, the Minister for Industrial Relations until 7 May 1982, in introducing the Fraser

government's fourteenth amendment of the Conciliation and Arbitration Act in six years:

The notion that for some reason unions are so different that they and their members should stand beyond the law is untenable and at the root of much of the industrial trouble Australia has experienced in recent years (CPD,HR, Daily Hansard 25 March 1982, p.1472).

(We may note, in passing, that despite the very different traditions of labour law in Britain and Australia, virtually identical statements have been commonplace among British conservatives during the past twenty years.) Mr Viner has touched more directly upon the decay of the arbitration system as it was initially envisaged:

The days at the turn of the century when the Australian arbitration system represented a major innovation in the field are a long way off and the expectations that were once held for compulsory arbitration seem further than ever from being realised (Speech to the Institution of Engineers, Australia, 30 March 1982, CR 7.13, p.342).

This is not a new development. Compulsory arbitration never fulfilled the more ambitious expectations of its founders, in that it never became a branch of the law which had the same authority as the time-honoured branches of civil and criminal law. The fate of penal provisions in the federal Act provides clear evidence of this. The Act had originally provided for what were then very heavy fines of up to £1000 for the conduct of strikes and lockouts. When these provisions were removed by the Labor government of James Scullin in 1930, the only criticism from J.G. Latham, then leader of the opposition, was that the government was not going far enough in removing unenforceable, and therefore pointless, threats from the Act. Said Latham, 'These penalties are as a rule ineffective, as experience has shown'. He regretted that the government had not gone further, and also made it impossible for penalties against strikes and lockouts to be inserted in particular awards brought down by the then Court of

Conciliation and Arbitration (CPD 124, pp. 2839-40). It was in this latter form that 'penal powers' were to become part of the federal arbitration system, between 1951 and their collapse in the 'O'Shea case' of 1969 (See Rawson 1978: 113). Historically speaking, the exceptional period has not been the years since 1969, when the attempt to impose penalties for strikes has been almost entirely in abeyance; it was rather the 1950s and 1960s when, for the first and only time, a consistent attempt was made to enforce such penalties.

This is not the place for an extensive survey of the history of arbitration, but some other general points need to be made. The return of the Labor government in 1929, after 13 years in opposition, resulted from an election in which the maintenance of a federal arbitration system was the most prominent single issue. The attempt by the Bruce-Page government in 1929 to abolish federal arbitration led to the government's defeat, first in parliament and then at the election which followed. Latham, in 1930, conceded that the new government's determination to maintain a federal presence in arbitration was 'a fair interpretation of the result of the appeal to the people'. But this belief was not limited to that year, or to that generation. It has been widely accepted, from that day to this, that any attempt to do away with federal arbitration in something like its traditional form would be to invite electoral disaster. It may be pointed out that, for much of that time, it was believed with equal conviction that no government could survive if it provided public funds for church schools, or if it allowed the level of unemployment to rise above 2 per cent! The belief that federal arbitration was one of the great untouchables of Australian politics has survived longer than either of those. It is only very recently that it has been at all modified, and then only in indirect ways.

The most convinced opponents of compulsory arbitration in principle have always been communists and others of revolutionary leanings. As L.L. Sharkey, then president of the Communist Party of Australia, put it in 1942:

The communists regard the State-controlled Arbitration system as a pernicious, anti-working class institution, whose objective is to keep the workers shackled to the capitalistic state, i.e. eternally wage-slaves. We fight against this Arbitration, relying on the unity and organisation of the workers in the struggle to improve conditions and enforce collective agreements with the employers instead of legalised awards (Sharkey 1942:23).

This, however, has never been pursued consistently. It is no doubt correct that communist union leaders - though not them alone - have sometimes sought to emphasise direct bargaining with employers rather than make use of the arbitration machinery. However, no communist or otherwise radical union official has ever sought to take his union outside the arbitration system and those whose unions have been excluded from it, on the application of employers, have sought to rejoin it. Any threat to do away with arbitration in its traditional form had to come not from the union side but from the same place as it had come in 1929 - the conservative parties. And it would come because of the same belief which such parties had held then; that, to quote Latham again, the unions, despite their formal support for the system, had begun to 'challenge the whole principle of arbitration', which was that 'those who appealed to the arbitrator should obey his award' (CPD 124: 2838).

The abolition of arbitration is not, of course, the policy of the Liberal and National Country parties; even such very limited moves as can be seen in that direction are not unanimously supported and have become possible only after repeated unsuccessful attempts by such governments to restore, as they see it, a proper balance to the system by re-establishing greater legal control over the actions of the trade unions. (And once more we may note, in passing, a

similarity in the language of British and Australian conservatives facing what appear to be very different legal situations.)

The increasing urgency, if not desperation, of governments to 'do something' about arbitration is measured most crudely by the frequency with which the Act is amended. This has been going on for many years, which suggests that the problems are as old as the system itself. Nevertheless, the rate of amendment has become frenetic. The Act was amended 13 times between 1904 and 1930, and that was then regarded as excessive tinkering and evidence of some very deep-rooted problems. But by now it has been amended 64 times (assuming that the present Bill will become an Act in some form); and fourteen of these amendments have been during the six years of the Fraser government. Some of these amendments have been of a technical rather than a substantive kind. Some of them have been almost completely ineffective; others have had some significant effect. It would obviously be vain to expect such a process to reflect a completely clear and consistent strategy. Nevertheless, some clear intentions and tendencies do emerge, going back thirty years and in some respects much longer.

The Failure of Attempts to Restore Penalties

The most consistent, and least effective, of these has been the attempt to restore penalties to the system. The availability of such penalties was, as we have seen, a basic principle of arbitration as seen by its founders; and, as we have also seen, one which ran into difficulties almost from the start. The imposition of penalties during the one time when they appeared to succeed - the 1950s and 1960s - has never been properly examined. It is very desirable that it should be, since this relatively short period gave rise to lasting misunderstandings of what penalties could achieve. It is at least plain that

they were not as successful, in the sense of being effectively enforced, as they seemed to be at the time. It was not so clear then, for example, that some unions, such as O'Shea's Australian Tramway Employees' Association, never paid any fines imposed on them under the Act. Moreover, even the partial (in both senses!) application of penalties against unions during this time had every appearance of instability. That is, at least from the later 1950s, the imposition of fines, hostility among unions to the whole principle, and the number and severity of industrial disputes all rose together. It required the increasing imposition of penalties, at the cost of increasingly widespread and acute bitterness among the unions, to secure decreasing quanta of 'industrial peace'. If the system had not collapsed over O'Shea in 1969 it showed every sign of doing so quite soon in some other particular circumstance. And this, to repeat, was no more than a reversion to the 'normal' situation which had been recognized by conservatives such as Latham forty years before.

Latham's successors, however, could not bring themselves to admit it. In 1970 and 1972, the Gorton and McMahon governments brought in amendments to the Conciliation and Arbitration Act which were supposed to make the imposition of penalties less arbitrary and more equitable but which proclaimed those governments' continued adherence to 'sanctions' and even to what were bluntly labelled 'penal clauses'. It was more significant that these governments did not attempt consistently to secure the enforcement of such few penalties as were imposed in the post-O'Shea years. Then, while out of office between 1972 and 1975, the Liberal Party had the opportunity to think what could be done to restore sanctions against striking unions, free for the time of responsibility for having to see them enforced.

Two types of strategy emerged, from different sources within the party. Malcolm Fraser, as shadow minister for industrial relations, secured the adoption of an industrial relations policy which included a new move to revive the application of sanctions against unions. This was to be achieved by a 'third arm' of arbitration which, as originally conceived, was to be of equal status with the Conciliation and Arbitration Commission and the (then) Commonwealth Industrial Court. It was to have a brief to see that certain 'unfair practices' did not go unpenalised and would be free to launch prosecutions on its own initiative, as well as taking action at the instigation of employers or unions. The main reason for instituting such a body was to provide a statutory corporation which would give force to the anti-strike provisions of the Act. Neither the government, in the sense of the ministry, nor the employers had shown much stomach for reviving the application of legal action against strikes. Very well; this proposed new body, which was not directly subject to the wrath of penalised unions or of inconvenienced electors, would assume this role. This was the most genuinely innovatory step in the history of the system, which did not necessarily make it either desirable or practicable.

At much the same time, though not apparently from the same sources, the Liberal Party received another idea which also involved the provision of penalties against unions taking direct industrial action. This was the extension to unions of the Trade Practices Act, first passed in 1965 and considerably strengthened in other respects under Labor. Provisions of this kind had been considered when the Act was first passed but this was perhaps considered unduly provocative, if not an example of over-kill, at the time when the imposition of penalties under the Conciliation and Arbitration Act was at its height.

These developments in Liberal Party policy later took legislative form. The first led to the establishment of the Industrial Relations Bureau by amendment of the Conciliation and Arbitration Act in 1977. The second led to the inclusion of a new Section 45D to the Trade Practices Act in 1977; the amendment of that Section in 1978; and its further amendment, together with the introduction of a further new Section, 45E, in 1980. These changes were intended to make possible injunctions and actions for damages against secondary boycotts organised by unions.

In such a rapid and general survey as this, it is not possible to consider the content and impact of these proposals in detail; but in some respects, at least, this is hardly necessary. It is certainly unnecessary, and perhaps would be unkind, to debate at length whether the Industrial Relations Bureau has fulfilled the functions which were expected of it as regards action against strikes. The Bureau has been subject to a variety of constitutional and other problems and delays, and it performs a number of functions of other kinds. However, for better or worse, it has never looked like restoring effective penalties against strikes to the arbitration system.

The amendments to the Trade Practices Act were, for a time, taken more seriously and it may be too soon to dismiss them as ineffective. Twenty-three actions under Section 45D had been brought by February 1980. In several cases the Federal Court granted interim injunctions requiring the cessation of union action, one permanent injunction was issued and it is generally accepted that these provisions have had some effect in inhibiting secondary boycotts. However, no fines have been imposed or damages awarded and in 1980 it became possible for the Conciliation and Arbitration Commission to become involved in such a case by seeking conciliation between the parties. While these measures have had some impact, and are of particular interest in the present context

because of nearly-contemporaneous legislation against secondary industrial action in Britain, they do not provide scope for any overall or comprehensive establishment of 'law and order'.

Trade Unions and Public Policy

Trade unions and organizations of employers are essential to any comprehensive system of conciliation and arbitration. Without them, there would be no-one to conciliate, or between whom to arbitrate. As Higgins said, 'The system of arbitration adopted by the Act is based on Unionism. Indeed, without unions it is hard to see how arbitration could be worked' (Higgins 1922:15). From the first, the 'chief objects' of the Act included 'to encourage the organization of representative bodies of employers and employees and their registration under this Act' (the present S.2(e)). This was more than a statement of what was socially desirable in a general sense. By providing that registered organizations became corporations the Act made the state responsible for their very existence, as Justice Isaacs was to point out. The governments which brought in the Act and which have maintained it ever since might criticise or attack particular unions but they could not escape being pro-union, at least in a formal sense. They could not be neutral as to whether unions should exist, and be strong enough to represent effectively at least a large section of the workforce. The Act committed them to favouring such a situation.

In return, the Act sought to lay heavy responsibilities on organizations and as time passed there were increasing complaints from ministers and others that some unions, or even the trade union movement in general, were not meeting these responsibilities. But the encouragement of unionism under the Act could not be repudiated without calling into question the logic of the entire arbitration system.

It was consistent with such a role for unions that they should be 'encouraged'; among other methods, by giving their members preference in employment. The 'encouragement' given to union membership under state and federal arbitration systems was undoubtedly the reason Australia became, in the years before 1920, by far the most highly unionised country in the world and maintained a relatively high level of unionisation thereafter.

The 'public' character of trade unionism under arbitration had another consequence which developed more slowly. If unions were not private associations but corporate bodies whose status depended upon the decisions of public authorities, then those authorities could be regarded as responsible for the proper conduct of a union's internal affairs. This attitude grew, from the original Act's general prohibition against rules which were 'in any way tyrannical or oppressive' to the highly detailed regulation and intervention which now prevails. This type of intervention is largely the product of the last 35 years. That is to say, it began to gain strength at much the same time as the use of 'penal powers' under the Act; but, quite unlike the history of the penal provisions, it has continued unchecked to the present day.

It is not surprising that the attempted imposition of penalties and greater control of internal union affairs should have coincided. There is no reason to doubt the sincerity of those who argued that greater control was necessary to eliminate malpractices and to make it easier for rank and file members to exercise an effective influence over their union. However, a powerful motive for most was the belief that such provisions would tell against more militant and more radical union leadership. Clyde Cameron, the Minister for Labour from 1972 to 1975, has drawn attention to the reluctance of the High Court to intervene in a dispute in the Australian Workers' Union in 1948 when a left-wing faction alleged improper conduct of the union's affairs. On that occasion

Latham, by now Chief Justice, referred to the union, which had been incorporated under the Act for decades, as 'a voluntary association' (AWU v. Bowen (1948) 77 CLR 601 at 608). Cameron says, it seems with some justice, 'It was not until the officials of the communist-dominated Federated Ironworkers' Association began to emulate their right-wing rivals that the courts saw a necessity to act' (Cameron 1981:16).

Governments, like courts, took part in this process of increasing intervention in union affairs. Here the most notable changes concerned union elections. Successively, rank and file unionists were enabled to bring charges of impropriety in the conduct of elections, to be followed, if the charges were proved, by a new 'court-controlled' ballot (1949); union leaders could themselves ask for such a ballot to be conducted (1949); members could petition for a 'court-controlled' ballot without having to establish impropriety in an original union-run ballot (1951); all elections had to be by secret ballot (1951); the cost of an externally-conducted ballot to the union was reduced and finally eliminated altogether (1973); and all rank and file votes had to be by postal ballot (1976).

The consequence of all this has been that, except for a small number of unions which have resisted on ideological grounds, the usual method of conducting a union election has been to hand the entire process over to the Australian Electoral Office, which acts on behalf of the Industrial Registrar. In nearly all cases, these elections are conducted not as a result of petitions by dissident members of the unions but at the request of the incumbent leaders. The proportion of members who vote at these elections is usually high by the standards of union elections at other times and in other countries. It is common for more than half the members to vote, and unusual for less than one-third to do so.

We have, then, the paradox that while the attempt to restore penalties to the arbitration system, which has been central to the purpose of non-Labor governments, has been an almost complete failure, an ancillary purpose, that of regulating the internal affairs of unions in great detail, has been very largely carried out and has attracted very little effective opposition. Part of this success is attributable to the fact that this has been much more a bi-partisan process. However, our present concern is with the non-Labor governments which have usually been in office; which leads us to ask whether this extension of arbitration to the control of union government has fulfilled the hopes of those generations of non-Labor politicians who saw it as a means of weakening militant and radical union leadership. This is not an easy question to answer briefly; and there is no doubt that some of these changes, especially the obligatory postal ballot, have threatened the position of particular radical leadership groups, most obviously in the Amalgamated Metal Workers' and Shipwrights' Union.

In general, however, it is clear that externally-controlled postal ballots, with their high voting levels, are quite likely to elect or to maintain in office union leaders who pursue militant policies and whose members make extensive use of direct action. The last five years, which have seen the very extensive use of the Electoral Office ballot, have also seen an increase in the number and length of strikes. More specifically, it is not difficult to find unions, such as the Transport Workers' Union and the Federated Storemen and Packers' Union, which are more 'strike-prone' than most, although their leaders have been elected in big polls in Electoral Office ballots. In short, the greater regulation of union elections has 'succeeded' whereas the attempt to restore penalties has 'failed'; but neither attempt has eliminated strikes or even, as far as can be seen, reduced them significantly. Thirty years of effort to bring the arbitration system into line with the hopes of non-Labor

governments and, let it be admitted, with the logic of the founders of the system, have thus failed. The system serves all kinds of useful purposes but it is not a new province for law and order if that means, as it meant to the founders of arbitration, the near-elimination of strikes. Nor is there any indication of progress in that direction. Mr Viner's reference to 'the expectations that were once held for compulsory arbitration' seeming 'further off than ever from being realised' shows a recognition of this.

Any move by governments away from traditional conciliation and arbitration has been gradual, incomplete and even inconsistent. This arises in part from hesitation in tackling a time-honoured national institution. Mr Viner, who was more willing than most to contemplate fundamental changes in the system, was well aware of the fate of the Bruce-Page government in 1929 saying, on one occasion, 'I do not intend to preside over that kind of eventuality' (CR 6.40, p. 1269). That this would be a real danger is suggested by a 1982 survey which found that 64 per cent of a sample of voters favoured a central role in determining conditions of employment for the Arbitration Commission; compared with 32 per cent who favoured direct negotiations between unions and employers (Age 20 May 1982). Even apart from such considerations, non-Labor politicians share with the rest of humanity a wish to have their cake and eat it too. Just as most union officials want to see penalties imposed on employers who breach award conditions but reject the justice of any penalty imposed on striking unions, so many members of the non-Labor parties would like to remove the public sponsorship and encouragement of union membership, which has traditionally been a part of the arbitration system, while leaving the system in operation in other respects and even, hopefully, looking for some restoration of effective penalties against strikes.

Such a combination of hopes was first expressed not in the federal arena but in the Western Australian Industrial Arbitration Act of 1979, which extensively revised the state arbitration system. There was nothing very new in the proposition raised by the state government, that no union was obliged to enter the system but that, having chosen to do so, it should be liable to penalties for failure to obey arbitral tribunals. There seemed no more likelihood of penalties being consistently enforced under such a principle than under the blanket ban on strikes which the previous state legislation contained. Of more practical importance was a provision in the new Act that the state Industrial Commission could not grant preference in employment to unionists. Moreover, this change was explained in an interesting way. Mr R.J. O'Connor, the Minister for Labour and Industry, said:

Another important element concerns the change in the position unions occupy under the legislation, and the relationship between the respective rights of unionists and individual employees. The current Act [i.e. that which was being replaced] recognized, in common with legislation elsewhere in Australia and New Zealand, that the existence and viability of unions of employees was crucial for the operation of the system of conciliation and arbitration. As a result, special privileges were extended to them under the law. An important difference between the Bill and the existing Act is the fact that the Bill regards unions simply as bodies which the community recognizes (WAPD 226:3618).

The last sentence was an appropriately cloudy statement of an uncertain attitude. Under the new Act, unions remained incorporated and hence, as Isaacs would have said, the 'creation' of the state. Their operation and internal affairs remained regulated in many ways. But the idea that the state owed them positive encouragement, because they were essential elements of the arbitration system, was rejected in principle and, by preventing the granting of preference to unionists, in practice as well.

The operation of the new Act has in fact been accompanied by a significant decline in union membership in Western Australia. According to the Australian Bureau of Statistics, the number of unionists in that state fell by 3.2 per cent between 1979 and 1981. Over the rest of Australia, during the same period, the number of unionists rose by 4.9 per cent (ABS, 'Trade Union Statistics, Australia, December 1981'. Catalogue No. 6323.0).

It may be significant that it is in Western Australia that ministers have come closest to hinting at the abandonment of compulsory arbitration. Very recently Mr O'Connor, now the Premier, said that the state Industrial Commission's granting of a 38-hour week for metal workers under state awards had 'placed the industrial arbitration system in jeopardy by saying that unionists would get something if they went on strike' (West Australian 26 April 1982).

Similar combinations of attitudes came to characterise the federal government, especially as represented by Mr Viner (a West Australian) as Minister for Industrial Relations from April 1981 to May 1982. It is too soon to see Mr Viner's brief tenure in full perspective. It is no more than the truth to say that he was neither successful nor popular. He was already unpopular among trade union leaders when he took this portfolio and this unpopularity both deepened and widened. He was not well regarded by many public servants in the department. In April 1982, when he contested the vacant deputy leadership of the Liberal Party in the federal parliament, he received five votes - a derisory number. When the ministry was reshuffled three weeks later, he was demoted to a less important ministry and lost his place in the cabinet. His removal was publicly welcomed by the president of the ACTU and much more generally applauded in private.

Because of this unhappy record, there may be a tendency to disregard all that he said and did as minister. This would be a mistake. Whatever people thought of his personal capacity, his views were widely shared among Liberal and National Country Party politicians and elsewhere. Much of what he put forward was not personal idiosyncrasy but followed from the political situation facing the government and the long and tangled history of arbitration. Neither of these factors has changed significantly. Mr Viner has been replaced by Mr Ian Macphee who, as a former official of the Victorian Chamber of Manufactures, has grown up within the arbitration system and is much better attuned to it, faults and all. As such he is much more congenial not only to the leaders of the ACTU but to all who have shared this background, whether as employers' spokesmen, public servants or members of tribunals. How much difference Mr Macphee makes in practice remains to be seen. Mr Cliff Dolan, the ACTU president, captured a part, though only a part, of the situation in his reaction to Mr Macphee's appointment:

He's a bloke you can speak to, at least, but his success in the portfolio depends on how Fraser allows him to operate (Sydney Morning Herald 8 May 1982).

Mr Viner never proposed the abolition of compulsory arbitration. Indeed, he appeared to take the conventional Liberal view that the restoration of penalties against unions was necessary to re-establish the proper operation of the system, and even claimed to be doing something to make this a reality;

In an effort to restore some confidence in the resolution of government to uphold the law, I sought and obtained from the Government an endorsement of the policy that it would see that any sanctions or penalties obtained by employers for contravention of the Act would be enforced, including the collection of fines with all that that implied (Speech to Chamber of Manufactures, New South Wales, 7 October 1981. CR 6.40, p. 1270).

On the other hand, he asked in the same speech, 'Is it too radical a thought to suggest that there is even a place for non-unionised enterprise?' And whatever answer one gives to that question, there is surely no place in an arbitration system for non-unionised enterprise. The proposal in this year's amending Conciliation and Arbitration Bill to follow Western Australia in prohibiting clauses in awards granting preference to unionists need not imply a wish to see 'non-unionised enterprise' become the norm. It is, however, a step back from the belief that governments had a positive duty to build up the strength of unions as part of the arbitration system.

On another occasion, he pointed out that the arbitration system could 'be disbanded tomorrow and something different created in its place'; and, less radically, that 'the Parliament could create a window into existing legislation or pass entirely new legislation linked in some way to conciliation and arbitration allowing for different kinds of dispute settlement which, without defining terms more precisely, might be referred to as collective bargaining' (Speech to American Chamber of Commerce, Brisbane, 4 November 1981, CR 6.44, p. 1447).

The Bill which Mr Viner introduced in the House of Representatives on 25 March 1982 illustrated some of the complexities which affect current attitudes to the arbitration system and its concomitants. One section which directly limited the functions of the Conciliation and Arbitration Commission (S.6) provided that in certain businesses, which could be said to fall within the scope of the Constitution on grounds wider than the conciliation and arbitration power, employers could unilaterally stand down employees who could not be usefully employed because of industrial action. This would have reduced the powers of the Conciliation and Arbitration Commission, in that the consent of the Commission has been required for the provision of such stand down orders.

Most of the important sections, however, were intended to affect, and in most respects to weaken, the position of trade unions within the system.

Although the 'chief objects' of the Act were to continue to include 'to encourage the organization of representative bodies of employers and employees and their registration under this Act', this was to be followed by the new object, 'to safeguard the freedom of persons to choose whether or not to be members of organizations of employees so registered'. This aspiration, and the measures which were to give effect to it, were summarised in Mr Viner's second reading speech:

Nobody should be under any pressure to join a trade union. There should be a completely free choice of whether to join or not to join a union. This is a central feature of the Bill now before the House. It introduces to the principal Act this right of choice. It removes from the jurisdiction of the Australian Conciliation and Arbitration Commission the power to grant preference to unionists and it provides avenues of redress against both employers and unions in the event of victimisation of individuals who do not want to join a union (CPD, HR, Weekly Hansard, No.5, p. 1474).

Clause 7 of the Bill said simply, 'Section 47 of the Principal Act is repealed'; this being the section headed 'Power to grant preference to members of organizations'. It was also proposed to replace the existing Section 144A, providing for conscientious objection to union membership, with a comprehensive new section providing that an employer should not dismiss or in any way injure an employee for the reason that he was not a unionist. A union was not to 'advise, encourage or incite' an employer to take any such action. Anyone who suffered loss or damage as a result could recover damages from the employer, the union or both. The Western Australian Industrial Arbitration Act 1979 had provided only for action against an employer. In this respect, as we shall see, the parallel to the Bill is to be found rather in the British Employment Act 1980.

Other sections of the Bill were designed to encourage the restructuring of unionism. This was to be done by the selective weakening of sections of the Act which, since 1972, have put extreme difficulties in the way of union amalgamations. Following discussions on the National Labour Consultative Council, the then Minister for Industrial Relations, Mr A.A. Street, announced in 1980 that amalgamations would be made easier (by requiring that one-quarter, rather than one-half, of the members of the unions concerned must vote in a ballot on amalgamation) if the Conciliation and Arbitration Commission certified that there was a community of interest among the unions. This was repeated in the Prime Minister's policy speech prior to the federal election of October 1980. Subsequently, however, opposition within the government parties prevented such a move. Instead, the Bill proposed that this lowering of the barriers should apply only to amalgamations which would lead towards the establishment of a single union in each industry. The problems of defining an industry were to be dealt with later, by regulation. Other sections of the Bill facilitated the registration of such industrial unions.

Mr Viner had previously suggested the desirability of 'enterprise unions' in at least some circumstances, and had suggested in a parliamentary statement in February 1982 that they too would be facilitated by the forthcoming Bill (CPD, HR, Weekly Hansard, No.1, 1982, p. 40). These provisions were dropped from the draft Bill before its presentation to parliament.

The Bill also sought to prevent a union which had been de-registered under a State arbitration system making use of the federal system instead; and provided for a variety of small changes, including some dealing with casual vacancies in union office and the provision of financial assistance to people who bring proceedings under the Act.

The common purpose behind these policies of non-Labor governments, both those which purport to strengthen the arbitration system and those which weaken it, is the reduction of the strength of the trade unions in general, and of militant and radical-led unions in particular. Mr Viner would not have objected to being included among the 'many' who, he said, '...suggest that the "balance of power" has moved too far in favour of the unions' (CR 6.40, p. 1270). In the past, Australian governments have sought to redress this balance along the lines suggested by Deakin at the very beginning of the arbitration era - that is, by invoking the power of the state, that 'strength greater than that of either or of both of the contestants', against the unions. Such attempts have increasingly appeared to be hollow threats; but they have not been entirely abandoned, let alone repudiated. Instead they come to be combined with what is in principle a quite different and even an inconsistent tactic - to remove any public sponsorship for unionism and so allow it to sink to a lower level, at least numerically.

In some dealings with its own employees, where its legal powers are much more extensive, the federal government has shown a further movement away from unequivocal endorsement of arbitration and therefore, in principle, of unionism. Faced with the increasing use of strikes and work bans by some of its non-manual employees, the government brought in the Commonwealth Employees (Employment Provisions) Act 1977, giving its employing authorities power to suspend or dismiss those who took such action.

Although the conditions of federal public servants continued to be determined by the arbitration system, this Act was a considerable unilateral modification of the rules of the system by the government in its role as employer. In 1981 the government over-rode a decision of the Conciliation and Arbitration Commission with regard to federal public servants, securing the

parliamentary disallowance of one of the Commission's findings which conflicted with the government's administrative policies. And, in a number of cases, following the use of direct action by unions, the government has withdrawn its provision of 'check-off' facilities, under which union dues are automatically deducted from members' salaries. This is a further example of stepping back from the assumption that unionism is to be encouraged.

We should not forget that the other type of legal intervention in union activities which has followed from the arbitration system - the regulation of internal union government - has been far more successful than the attempted suppression of strikes. Non-Labor governments tend to believe - often in a naive and exaggerated fashion but not entirely without cause - that fostering rank and file union activity by legal means will tend to tell against radical leaders and militant policies. As long as they believe this, they have an additional motive for maintaining this aspect of the arbitration system. If these governments' principal aim is to weaken radical and militant forces within trade unionism, rather than unionism at large, it can be argued that their removal of preference clauses is counter-productive. The relaxation of legal pressure to join unions is most likely to reduce the membership of unions such as those of clerks and shop assistants, which are usually under right-wing leadership, and so to increase the relative strength of more radical forces within unionism as a whole. The abolition of preference clauses under the Western Australian State arbitration system seems to have had this effect.

We see, then, a mixture of motives, not all of which are consistent, affecting current non-Labor policies. How are we to explain their appearance and development? It is certainly not the case that the non-Labor parties have been acting simply as the instruments of 'the employers', if only because the latter term covers an even greater range of interests and attitudes than does

the term 'the trade unions'. In fact most organized groups of employers, like most trade unions, have long since adapted themselves to the supports and the limitations which arbitration systems provide, and view the possibility of substantial change with dismay modified by scepticism. They would be interested in effective government support for their resistance to union demands but they have long since learned that such governments are more given to talk and to legislative gestures than to action.

Governments, like employers, trade unions and other groups, are primarily concerned with their own interests. In this situation, they see that 'anti-union' measures which stop short of provoking severe industrial conflict are not only consistent with their principles but are likely to be electorally advantageous. Most of their members not only view 'the trade unions' unfavourably but see that this attitude is shared by a large section of the community including many union members. They have an interest in appealing to this anti-union sentiment and also in strengthening it. Such community sentiment stops short of a willingness to accept severe industrial conflict for which, according to the circumstances, the government in office may be blamed. A serious attempt to restore the consistent application of penalties against strikes might produce such a situation. But, as long as such situations are avoided, a low-level but widespread hostility to unions may be an important factor in the winning and losing of elections.

One crude, but surely significant, measure of limited support for unionism among unionists themselves is the proportion of what we have called 'unwilling conscripts'; that is, those who say that they belong to their union only because they must do so in order to retain their job. The Australian National University's survey of union members in 1976 suggested that these made up about one-quarter of all unionists - a sufficiently alarming figure (Rawson 1978:43).

The corresponding figure from a survey in 1979, which will appear in the forthcoming second edition of Don Aitkin's Stability and Change in Australian Politics, is nearly one-third! This is not only one fragment of evidence, among many others, of widespread lack of enthusiasm for unionism; more specifically, such a situation strengthens those who wish to remove the legal pressure on workers to join unions.

Such is the jumble of interests and objectives which have led the Australian industrial relations system far from the expectations of the founders of arbitration and have produced a curious patchwork of old and new. Let us now consider how Britain, from a very different basis of legal assumptions, has produced a somewhat similar jumble.

Britain - the Rise and Fall of 'Collective Laissez-faire'

The dominant tradition in British labour law was in some respects quite contrary to Australian aspirations for an industrial relations system marked by 'law and order'. This tradition emphasised the autonomy of employers and trade unions from legal restraint, and did so both as a statement of fact and as a normative judgement. The most celebrated and influential statements of this view were made in the 1950s by Otto Kahn-Freund, then professor of law at the London School of Economics. Perhaps the most celebrated statement of all was in his 1954 chapter in Industrial Relations in Britain (Clegg and Flanders 1954: 43-4).

... there exists something like an inverse correlation between the practical significance of legal sanctions and the degree to which industrial relations have reached a state of maturity. The legal aspect of those obligations on which labour-management relations rest is, from a practical point of view, least important where industrial relations develop most satisfactorily. There is, perhaps, no major country in the world in which the law has played a less significant role in the shaping of labour relations than in Great Britain and in which today the law and the legal profession have less to do with

labour relations. In the writer's opinion, this is an indication that those relations are fundamentally healthy ... Such legislation as has been passed has been mainly designed to remove obstacles to the shaping of industrial relations... To this extent it can be said of the law that it stands aside, that it seeks neither to hinder nor to help.

Such an attitude is at the opposite pole from that of the founders of the Australian arbitration system. Here is a specific disclaimer of any desire to see 'a new province for law and order'.

Why were these very different models accepted in countries which resembled each other in so many ways, including other aspects of their industrial relations? As far as the trade unions were concerned, we can say that Australian unions had less reason than British unions to be suspicious of the law and what could be done by courts. Despite a scattering of anti-union decisions in the later part of the nineteenth century (e.g. Serle 1971:97) and more particularly in the 1890s, it was easy enough for Australian unions to follow other Australian interests in seeing the law as something which was there to be shaped by those who could gather the strength to do so and then to be exploited. In Britain, by contrast, the law and the courts were seen as essentially hostile to unionism. British unionists were unlikely to be responsive to any move for the legal regulation of industrial relations at the time the Australian arbitration courts were being established. Their concern then, in the aftermath of Taff Vale, was to do just what Kahn-Freund described and celebrated half a century later; that is, to get the law off their backs, rather than to enlist it on their side.

One of Kahn-Freund's principal successors at the London School of Economics, K.W. (now Lord) Wedderburn, has explained this attitude in terms of the period between the Royal Commission on Trade Unions in 1867 and the Trade Disputes Act of 1906, the formative period in which 'the organic relationship

between law and industrial relations was established' (Wedderburn 1980:71). This period in Britain was marked by three relevant factors: the growth of relatively strong but wholly 'industrial' trade unions; the absence of a working class party; and the gradual and incomplete extension of the suffrage to male manual workers. Hence there was an emphasis on what could be achieved by the unions themselves and, at this stage, no great expectation of what they could achieve by political action. Their concern with the law, including potential changes to the law by statute, was concentrated on removing legal limitations on unions rather than on seeking new statutory means of pursuing union ends. Wedderburn has argued against the suggestion that the common law system, as such, was an important factor in bringing about this tradition of legal restraint; and pointed out that other common law countries, including Australia, have established 'legally regulated collective labour relations' (Wedderburn 1980:72).

This is quite persuasive, as regards the differences between British and Australian circumstances at that time. The contrast between the negative spirit of the British Trade Disputes Act and the positive, not to say inflated, expectations which underlay its near-contemporary, the Commonwealth Conciliation and Arbitration Act, hardly requires emphasis. Despite the great difference in the populations of the two countries, by the standards of that time both could be said to have had relatively strong trade unions. Australia, however, had had manhood suffrage since the 1850s and adult suffrage applied by the time of the Conciliation and Arbitration Act. The Australian colonies established Labor parties before Britain; and, more notably, the Australian Labor Party gained strength much more rapidly than labour parties in Britain or anywhere else, to win a parliamentary majority by 1910 (see Rawson 1966:4). Wedderburn cites the early extension of the franchise in the United States as an explanation of the greater readiness of American than of British unions to seek political, and

thereby legal, means of protecting and advancing their members' interests. This would seem to apply with at least as much force to Australia.

This may help to explain why British unions favoured minimizing the role of the law; but why should this for a time have become characteristic of employers, the courts and others? Here Wedderburn suggests that it was the period of union weakness between the failure of the general strike in 1926 and the end of the second world war which facilitated general (including judicial) acceptance of the principle of legal abstention from the regulation of industrial relations (see Davies and Freedland 1979:604). Even when the unions regained strength, there was a continuing period of general restraint, during not only the post-war Labour governments of 1945-51 but the Conservative government which immediately followed, and which has since been described as having a '...policy of steering clear of trouble with the trade unions, regardless of cost' (Seldon 1981:203).

From that time, however, the courts showed an increasing willingness to intervene, and to do so in an 'anti-union' direction. 'During the late fifties and sixties', note Davies and Freedland, '...common law hurdles [protecting those engaged in trade disputes] were gradually lowered' (Davies and Freedland 1979:605). In Rookes v. Barnard [(1964) AC 1129] and Torquay Hotel Ltd v. Cousins [(1969) 2 Ch. 106] the torts of intimidation and of interference with contractual relations were revived and broadened more decisively.

In 1965, Wedderburn used the phrase 'the golden formula' to describe the words 'in contemplation or furtherance of a trade dispute', used in both the Conspiracy and Protection of Property Act 1875 and the Trade Disputes Act 1906 to set out the area in which protection would be afforded to those engaged in industrial conflict (Wedderburn 1968:236). At that time, as he pointed out, 'there was not so much an "abstention" on the judges' part as an exclusion of

them; the counter-attack by trade unions and their supporters used political power to exclude them by legislation' (Wedderburn 1968:20, 222). In what might be termed the golden age of the golden formula, from the 1920s to the 1950s, the question of such exclusion had not arisen because the courts had acquiesced in the situation as then established. That time, however, came to an end with Rookes v. Barnard, if not somewhat earlier.

The unions responded much as they had to the Taff Vale case of 1901, by securing statutory changes to exclude the courts from intervention; and, with the Labour Party in operation and, as it happened, newly returned to office, they were able to act much more promptly on this occasion. The Trade Disputes Act of 1965 followed the time-honoured practice of shielding certain types of union action from legal threat, by providing that breaking a contract of employment, or inducing someone else to do so, was not actionable as long as it was 'in contemplation or furtherance of a trade dispute'.

By now, however, there was a more widespread demand for positive legal restrictions on some union activity; so widespread, indeed, that the first threat of action came from a Labour government. In April 1969 the Wilson government announced a Bill which would enable unions to be fined for refusing to obey government orders in cases of 'unconstitutional' strikes. These 'penal clauses' - for the term which at that time was all too familiar in Australia was also applied to them - were withdrawn in response to bitter hostility from the unions and elsewhere within the Labour Party (Clegg 1979:319); and the principle of 'voluntarism' was precariously restored. In this account of widely differing movements in the law in Britain and in Australia, it is an interesting coincidence, if no more than that, that within a period of months in mid-1969 'penal clauses' were in effect defeated at both ends of the earth by united trade union opposition.

The survival of 'voluntarism' seemed for a time to have been short-lived; for in 1971 the Conservative Heath government introduced an Industrial Relations Act which sought to involve the law very extensively in industrial relations. Its provisions included the specification of a variety of 'unfair industrial practices', most of which were likely to be practiced by trade unions; established legal remedies for the victims of such practices; and, somewhat after the pattern of the original Australian Conciliation and Arbitration Act, set up a special court, the National Industrial Relations Court, to hear such cases. Contemporary Australian events would not have suggested a bright future for such a system and it collapsed in the face of union hostility and non-cooperation long before the Act was repealed, to general relief, by the incoming Labour government in 1974. Even in Australia, the Conciliation and Arbitration Court had never established anything like the authority and legitimacy of the courts which presided over the more securely-held provinces of law and order. Its British counterpart never had a chance. It is significant that two later writers, albeit Marxists, should simply declare, as a self-evident truth, that 'we could all see that Sir John Donaldson's Industrial Relations Court was not a proper court' (Corrigan and Sayer 1981:36. *Emphasis in original*).

We were thus denied the remarkable paradox of seeing the principles of the early Australian arbitration system successfully established in Britain at the time they were being thoroughly vanquished in Australia. Nevertheless, we did not see the full re-instatement of 'abstentionism' either. Some of the Labour legislation of the 1970s was indeed designed to restore, and if possible to extend, the immunities which unions and their members had previously been given against actions for civil conspiracy, inducement of breach of contract and intimidation within the 'golden formula'. Much of this was done by the Trade Union and Labour Relations Act (TULRA) of 1974, when Labour lacked a majority in

the House of Commons. The 1976 amendment to TULRA made further extensions along the same lines and in particular extended immunity for inducement of breach of contract from contracts of employment to contracts generally. Events then followed their usual course, with the courts, specifically the Court of Appeal, imposing restrictions on the extent of the immunity apparently provided by the Act. This time, however, the House of Lords eventually ruled favourably to the interests of the unions. As Lord Scarman put it in one such judgement:

So far as the Act of 1974 is concerned, the legislative purpose is clear; to sweep away not only the structure of industrial relations created by the Industrial Relations Act 1971, which it was passed to repeal, but also the restraints of judicial review which the courts have been fashioning one way or another since the enactment of the Trade Disputes Act 1906 (NWL v. Woods, (1979) ICR 867 at 886).

Further legal control over the unions, therefore, required new legislation designed to that end. This was forthcoming from the Conservative government elected in 1979.

In other respects, however, the actions of the Labour government and of the unions themselves had been of a less traditional kind. Under the so-called social contract, established with the Labour Party while the Conservatives were still in office in 1973-4, the unions had offered a considerable measure of industrial restraint under a Labour government. To make this bargain look at all reasonable to their members they had to get something in return; and so they asked for and obtained not only the removal of legal dangers and threats to the unions but all kinds of positive intervention in employment matters, especially such as took form in the Employment Protection Act 1975. It could be argued that this did not really breach the principle of what Kahn-Freund had called 'collective laissez-faire' because such measures were aimed to benefit individual workers, rather than trade unions and their members as collectivities; but this was a dubious distinction where it was not simply incorrect (see Lewis 1979:219).

There was general agreement by 1979 that there had been a 'trend towards greater legal regulation of industrial relations' (Simpson 1979:84). Wedderburn, while conceding this much, said that it would be premature to say that there had been a fundamental change (Wedderburn 1980:84). Shortly before, in his last work, Kahn-Freund had asserted that there had indeed been such a 'fundamental change', and speculated on its causes. One factor, he thought, had been the increased importance of white-collar workers, who were likely to look for legal protection where manual workers had been more likely to rely on custom and practice (shaped, no doubt, by their industrial strength). More generally, trade unions had become more powerful; the implication, presumably, being that attempts to control them were more to be expected and perhaps also more justified. He had so far departed from the views he had held in the 1950s as to say that what he had called 'collective laissez-faire' 'may be in need of adjustment more than any other part of the British heritage'. And he said (without elaboration, unfortunately) that the example of Australia was among those that should be considered (Kahn-Freund 1979:72, 86-8).

Though it can well be argued that to this point 'much of the statutory framework could...be regarded as bipartisan' (Lewis and Simpson 1981:12) there were signs of renewed disagreement. There was not to be a new consensus favouring 'abstention' as regards unions but 'intervention' on behalf of their individual members. The Employment Act 1980 confirmed that this was so, though as much by the reaction which it produced as by its actual content. The Act made no attempt to set up a general system of industrial regulation on the 1971 or the Australian model, though some of its provisions roughly paralleled Australian developments. The Act sought to expose 'secondary action' to attack by removing immunity against consequent legal claims, much as had been attempted by the Trade Practices Act in Australia a few years earlier. It provided for very limited government subsidies for postal ballots in union elections and for

workplace ballots on industrial matters, though it fell far short of requiring postal ballots for elections (as in Australia since 1976) or of enabling unionists to require a secret ballot on industrial action (as in Australia, so far ineffectively, since 1981). The scale of picketing was limited by the Act itself and by a 'Code of Practice' issued under it and approved by parliament. Under the Act and a similar 'Code of Practice', new 'closed shop' or 'union membership' agreements were to require an affirmative vote of 80 per cent of the workers concerned; and it became 'unfair', and therefore actionable, to bring about the dismissal of an employee on the grounds of his refusal to join a union if he had been employed since before the agreement was made or if he genuinely objected to belonging to trade unions in general or to the particular union involved. By a 'joinder' provision, an employer could seek to have part or all of such a liability transferred to the 'trade union or other person' involved (Lewis and Simpson 1981: 69-70). 'Union labour only' contracts were rendered unenforceable.

The Trade Union Congress rejected the Act and sought assurances from the Labour Party that it would be repealed by a Labour government. The title of a TUC pamphlet, 'Bargain to Beat the Act' is an indication of its hostility and of what it saw as 'the urgent need for unions to win back through collective bargaining the rights and advantages snatched away by the Employment Act' (TUC 1981:5).

Two able lawyers sympathetic to the unions wrote, 'The Employment Act and the Closed Shop Code embody a massive onslaught on the organizational strength of trade unions' (Lewis and Simpson 1981:223). To many Conservatives, on the other hand, the Act seemed no more than fine tuning, and a good deal too fine at that. There was an interlude during which the government published a Green Paper on 'Trade Union Immunities' (Cmd. 8128; January 1981) which left its

options open except for declaring against making collective contracts legally enforceable; and also during which Mr Norman Tebbit replaced Mr James Prior as Secretary of State for Employment. This change was regarded as presaging a more hostile approach to unionism.

Mr Tebbit made a statement to the House of Commons on his proposed Employment Bill on 23 November 1981 and the Bill itself was published on 28 January 1982. As with the Australian Bill, one of its principal targets was the closed shop; but in this respect it was somewhat less ambitious. Mr Tebbit said, in the second reading debate:

I regard the closed shop as a very unhappy arrangement. I am a practical man, who believes in reform step by step, as public opinion supports it. Since we have the closed shop institution, the best thing we can do at present is to provide protection and redress for those who are damaged by it (House of Commons, Parliamentary Debates, 8 February 1982, p. 740).

The Bill reinforced the provisions of the 1980 Act. The level of compensation available to those who suffered 'unfair dismissal' because of their refusal to join a union was substantially increased, and could be sought for dismissals between 1976 and 1980. It was made easier for such an employee to obtain damages from a union which had secured his dismissal. 'Union labour only' contracts were further discouraged, by making it unlawful to discriminate in favour of such a contract. The conditions required to establish a legally-valid closed shop were made more rigorous. Such agreements had to be endorsed every five years by a ballot of the workers concerned in which at least 80 per cent, or at least 85 per cent of those who voted, favoured the closed shop.

In other respects, the very different backgrounds to industrial relations legislation in Australia and Britain meant that there was little formal similarity between the two Bills. The British Bill removed union immunity for unlawful actions which were not 'in contemplation or furtherance of a trade dispute', including action declared unlawful by the 1980 Act and by the Bill itself. The meaning of the term 'trade dispute' was narrowed to refer only to disputes which were wholly or mainly concerned with conditions of employment and to exclude disputes which were 'mainly political or personal in character'; which were between different groups of workers; or which related solely to matters occurring outside Britain.

The British Bill does not involve any important intervention in the internal management of unions, of the type which has gone so far in Australia. However, Mr Tebbit did not rule out a future measure of this kind:

Rightly or wrongly, I have not sought to use the law - this time at any rate - to reform the structures or internal affairs of trade unions, though there may come a time when there is great public pressure to do that. Indeed it is manifest already ... However, I have resisted that pressure, because to carry out such reforms would raise many issues that would be best dealt with - if at all - in a separate Bill (House of Commons, Parliamentary Debates, 8 February 1982, p. 744).

Union opposition to the 1982 Bill has been even more definite than in 1980. The TUC plans to render the eventual Act inoperative, much as occurred to the Industrial Relations Act. There is certainly no guarantee that it will be successfully applied. The unions have an obvious political interest in hoping for the return of a Labour government, though they probably exaggerate the practical, as distinct from the symbolic, effect which such a change would have on their situation. But that is not the only way in which they are subject to political factors. Though union leaders have been as united in opposition to

the Bill as could ever be expected, some are uneasily conscious that they are not backed by all their members. No attempt has been made to measure directly the proportion of 'unwilling conscripts' in British unions but it is no doubt considerable. And even those who willingly belong to unions include many who reject much of the political stance of British unionism. When the TUC called a special conference of unions to consider the Bill on 5 April, there was overwhelming support among these union spokesmen for a policy of opposition and confrontation. But the TUC General Secretary, Mr Len Murray, thought it necessary to say that 'they had to scotch Mr Tebbit's attempt to drive a wedge between unions and their members' (The Times 6 April 1982).

Common Themes and Common Influences

The very different historical backgrounds to labour law in Britain and Australia continue to produce differences in the legislative methods used by governments of similar ideological persuasion. However, this brief account surely confirms that similarities have increased and differences have been reduced, as each country moves further away from its characteristic model of labour law. It is possible that the gap will close further. As we have seen, the possibility of legal regulation of the internal affairs of British unions on something like the Australian pattern cannot be dismissed; while there are important forces tending to weaken the distinctive aspects of the Australian arbitration system, which implies a movement towards the less constraining systems characterising Britain and, for that matter, most of the rest of the world.

The common purpose of at least the non-Labor governments in both countries has been, usually quite frankly, to weaken the institutional power of trade unions as against both employers and individual workers. The very consistency

of these governments in this purpose has required them to act inconsistently in other ways, as they seek to avail themselves of both traditional and innovatory legal possibilities. The 1982 Bills illustrate this inconsistency. The Australian Bill continues the ever deeper and more detailed involvement in the structure and government of unions, a process which is legitimated by their necessary role in the arbitration system. On the other hand, it renounces the encouragement of union membership and, though it continues to endorse arbitration, it removes an important instrument (provision for standing down employees) from the Conciliation and Arbitration Commission and returns it, as it were, to the private sector.

As indicated by the quotation from Robert Taylor with which we began, the British Bill and its antecedents have also been described as inconsistent. On the one hand the Bill seeks to reduce union membership by giving at least some of the 'unwilling conscripts' to unionism a way out. On the other, it hankers after making the unions 'responsible' by forcing their leaders to discipline and suppress militant sections of their rank and file for fear of crippling assaults on the unions' funds following 'unlawful' strikes. The first motive is individualist and its consequence will be to reduce the size of the unions. The second is anti-individualist in the sense that it requires the suppression of inconvenient minorities within the unions; and to be effective it requires that unions should be numerically strong.

In Britain as in Australia, the situation which gave rise to the new legislation and which will determine its future is dominated by political influences. Organized employer support is at most half-hearted. Political principles are a more important force behind the Bill and they need not be insincere merely because they are closely related to calculations of electoral popularity. Trade unions are unpopular organizations. They are unpopular even

among trade unionists. A government which sounds in favour of reducing union influence will tend to improve its electoral position as a result. A government which goes beyond this, and actually behaves in an anti-union manner, undertakes much greater risks, as the Heath government in Britain discovered. The Thatcher government has learnt this lesson and has proceeded with much greater caution. Similarly, in Australia the Fraser government has spoken loudly but carried a small stick and, except perhaps among its own white-collar employees, has used it with great discretion.

These British and Australian stories are not such as to point to simple or immediate solutions. 'Law and order', 'abstentionism' and, for that matter, the solidarity of unionism as a mass movement are equally weak reeds, at best out-dated if not essentially misconceived. 'Law and order' dropped out of the Australian debate decades ago. 'Abstentionism' has ceased to be a general British principle. No-one really wants to minimize 'the law'; they want the repeal of particular laws. If there is a common theme it is the increasing role of political factors, and the politics of the late twentieth century have become increasingly autonomous and more complex in their relation to unionism, class and other phenomena which seemed much clearer in the days of the Trade Disputes Act 1906 and the original Commonwealth Conciliation and Arbitration Act 1904.

But it would be a pity to seem to imply the common, over-simplified grievance that there is 'too much politics' in industrial relations and that somehow things would be better if 'politics' could be excluded. There is an important place for politics, including election-winning, in industrial relations as well as in every other aspect of social life. It is both unrealistic and undesirable to suppose that the industrial relations system should be entirely insulated from the opinions of ordinary people, as expressed by their votes. Governments will, and should, consider which of the courses

open to them is most likely to keep them in office. One hopes that if they are too blatantly concerned with symbolic gestures aimed at pleasing their own supporters and capturing undecided votes, the electorate will lose patience with them, and such activity will be electorally counter-productive. 'One hopes' indeed; for it is not self-evident from the recent history of industrial relations legislation, in Australia particularly, that most electors are willing and able to distinguish real action, for good or bad, from symbolic posturing. But perhaps, one way or another, there is a better time coming...

REFERENCES

CAMERON, Clyde 1981 'Industrial Labor and Political Labor: the Experience of 1972-1975', G. Evans, J. Reeves and J. Malbon (eds), Labor Essays 1981, Richmond, Drummond.

Ch. Law Reports: Chancery Division.

CLEGG, H.A. 1979 The Changing System of Industrial Relations in Great Britain, Oxford, Blackwell.

CLEGG, H.A. and FLANDERS, A. 1954 The System of Industrial Relations in Great Britain, Oxford, Blackwell.

CLR Commonwealth Law Reports.

CORRIGAN, P. and SAYER, D. 1981 'How the Law Rules: Variations on Some Themes in Karl Marx', in B. Fryer (ed) Law, State and Society, London, Croom Helm.

CPD Commonwealth Parliamentary Debates.

CR Commonwealth Record.

DAVIES, P. and FREEDLAND, M. 1979 Labour Law: Text and Materials, London, Weidenfeld and Nicholson.

HIGGINS, H.B. 1922 A New Province for Law and Order, London, Constable.

ICR Industrial Cases Reports.

KAHN-FREUND, O. 1979 Labour Relations: Heritage and Adjustment, London, OUP.

LEWIS, R. 1979 'Kahn-Freund and Labour Law: an Outline Critique', 8 Industrial

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Law Journal 202.

LEWIS, R. and SIMPSON, R. 1981 Striking a Balance? Employment Law after the 1980 Act, Oxford, Martin Robertson.

RAWSON, D.W. 1966 Labor in Vain? Croydon, Vic., Longmans.

RAWSON, D.W. 1978 Unions and Unionists in Australia, Sydney, George Allen & Unwin.

SELDON, A. 1981 Churchill's Indian Summer: the Conservative Government, 1951-55, London, Hodder and Stoughton.

SERLE, G. 1971 The Rush to be Rich, Melbourne, MUP.

SHARKEY, L.L. 1942 The Trade Unions, Sydney, Communist Party of Australia.

SIMPSON, R. 1979 'Judicial Control of ACAS', 8 Industrial Law Journal 69.

TAY, A.E-S, and KAMENKA, E. (eds), 1980 Law Making in Australia, Melbourne, Edward Arnold.

TUC 1981 TUC Handbook on the Employment Act 1980, London, Trade Union Congress.

WAPD Western Australian Parliamentary Debates.

WEDDERBURN, K.W. 1968 The Worker and the Law, Harmondsworth, Penguin [First published 1965].

WEDDERBURN, Lord (K.W.) 1980 'Industrial Relations and the Courts', 9 Industrial Law Journal 65.

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R3842

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Law Journal 202.

LEWIS, R. and SIMPSON, R. 1981 Striking a Balance? Employment Law after the 1980 Act, Oxford, Martin Robertson.

RAWSON, D.W. 1966 Labor in Vain? Croydon, Vic., Longmans.

RAWSON, D.W. 1978 Unions and Unionists in Australia, Sydney, George Allen & Unwin.

SELDON, A. 1981 Churchill's Indian Summer: the Conservative Government, 1951-55, London, Hodder and Stoughton.

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