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THE CONTROL OF INDUSTRY IN A FEDERAL SYSTEM

A CHAPTER IN AUSTRALIAN CONSTITUTIONAL DEVELOPMENT

ERIC ARMOUR BEECROFT

Section 51.(xxxv) of the Australian constitution grants to the Commonwealth Parliament power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State." The Commonwealth Parliament's law-making authority over industry is limited to this one method; other means of control may be established only by the parliaments of the States.

Nothing would serve better than this clause to exhibit the confusion of thought and purposes which seemingly accompanies the working of a federation. Almost every word of this clause has been subjected to much judicial definition. It has been the subject of more litigation than any provision in the constitution; and, as a result of the judicial work of thirty years, an extraordinarily confusing mass of doctrine has been developed. To-day, as one eminent Australian lawyer has said, Australians must approach industrial unrest with "a series of tests which, however logical in the abstract, are almost grotesque in relation to the living facts of industrial life."2

One of the most significant phases of Australian constitutional interpretation, therefore, has arisen from the attempts of workers, lawyers, and politicians to make possible a common rule for Australian industry. These attempts have had to be made through the medium of constitutional reasoning in the High Court, because they were frustrated, first, by the failure to secure, by amendment, a Commonwealth legislative power over all industrial matters, and, secondly, by the decision of the High Court that the Constitution did not permit Parliament to confer such a general rule-making power on the Arbitration tribunal.3 Economic necessity, as felt and expressed by strong and well-organized group interests, usually begets a good deal of legal invention. As a result of the vigorous activities of national organizations of employers and employees and the legal ingenuity which has been at their command, legis-

1 Lecturer in Political Science, University of California at Los Angeles.
2 Menzies, in Portus (ed.) Studies in the Australian Constitution (1933) 60.
3 Australian Boot Trade Employees' Federation v. Whybrow & Co., infra n. 15.
latures and courts in Australia have been under persistent pressure to devise means for laying down uniform national rules governing industrial relations.

It is well-known that the labor movement was beginning to extend itself beyond the borders of individual colonies some years before federation. Strikes could be organized, and were organized, on a national scale, before any national political institutions had developed. Several classes of workers, including shearers, wharf laborers, and maritime employees, developed widespread and effective organization. Before 1900 a solidarity of both workers and employers, transcending local boundaries, had been effectively demonstrated to governmental authorities and to the public in a number of paralyzing strikes.4

The majority of the constitution-framers, therefore, saw their task as one of eliminating costly industrial conflict. The major problem was conceived, not as one of furthering either socialism or a repressive capitalism, but as the immediately practical problem of preventing and settling strikes. Since they had noted the interstate extension of unions, and the national industrial warfare, it occurred to them that there might be a division of authority, in keeping with the much-cherished federal principle and as a concession to the strong state-rights sentiment. It was thought that the migratory type of workers, who were less amenable to state remedies, would be covered under the new Commonwealth power.5

This illogical and somewhat artificial provision, section 51 (xxxv), was put under a great strain as soon as it was utilized. The pressure on the agencies of government to stretch the meaning of its terms was relentless, because, from an early stage, the rapidly growing national organizations with national aims, found themselves thwarted by the federal form of government,—especially by the somewhat artificial and limited provision for conciliation and arbitration. The Commonwealth powers seemed gravely inadequate almost from the beginning.6 Was the constitution framed without sufficient knowledge of the basic social conflict which, even before 1900, was ruthlessly ignoring state lines?

4 On industrial conditions in the '90s, see Coghlan, Statistical Account of the Seven Colonies of Australasia, esp. 35-38 and 379-462; Coghlan and Ewing, Progress of Australasia in the Nineteenth Century (1903) 406 et seq.; Report and Minutes of Evidence of Royal Commission on Strikes, New South Wales (1891); and Reeves, State Experiments in Australia and New Zealand (2 vols. 1923).
5 Lengthy debates on these matters took place in the constitutional conventions. See Convention Debates, Adelaide (1897) 782-793; Melbourne (1898) 160-215.
6 The most striking evidence of the dissatisfaction with the new instru-
The answer to this must, I think, be in the affirmative. There is ample evidence to show that the new system was ill-adapted to cope with the social conflicts peculiar to Australian life. It was the result of a good deal of erudite discussion of existing federal models, especially the American; and one may wonder whether some portions of it would have been better drawn by a body of contemporary labor leaders and industrialists less familiar with Lord Bryce's *American Commonwealth*, which was quoted more than any other work during the federation debates.7

A large body of opinion in the new Commonwealth Parliament felt the necessity for dealing uniformly with conditions of employment throughout Australia. The Conciliation and Arbitration Act was passed in 1904, and as I shall point out later, its operations soon gave rise to vigorous legal battles. Most labor leaders, in the unions and in parliament, soon came to favor a full grant of industrial authority to the central Parliament. There seemed to be a keen realization among these leaders that industry had developed in such a way as to increase state competition, rendering uniform industrial conditions more necessary than the framers of the Constitution had realized. Referenda were held in 1911 on proposals to enlarge the Commonwealth powers over trade and industry. But these were rejected.8 In 1913, six proposals were offered in another referendum; but all were rejected, though by trifling majorities.9

Frustrated, therefore, by the conservative instrument of the referendum, as well as numerous judicial decisions, the nationalizing forces exerted much pressure on the Arbitration Court and the High Court for the judicial expansion of the Constitution. The work of the judiciary, therefore, is of central importance in Australian economic, as well as constitutional, history.

*The Common Rule*

Parliament had placed in the Conciliation and Arbitration Act a clause 38f which purported to give power to the Arbitration

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7 The rather slavish dependence on the American model has been pointed out by Hunt, *American Precedents in Australian Federation* (1930).
8 *Quick, Legislative Powers, 19 et seq.*
9 *Ibid, 22 et seq.*
Court to declare an award to be a common rule for the entire industry, binding disputants and non-disputants alike.

This provision came before the High Court for adjudication at an early date in the Whybrow Case. A description of this case, from its origin as a dispute through the arbitration proceedings and, finally, through the arguments before the High Court, will illustrate the difficulties which were to face the judges for many years afterward. The organized boot trade employees of four states, who had been frequently in dispute with their employers, formed a federal body, the Australian Boot Trade Employees' Federation, in 1905. In June 1909, the secretary of this body wrote a circular letter to each employer demanding certain conditions and indicating that, if the demands were refused, application would be made to the Arbitration Court. Thus a "dispute" was created to enable the employees to bring the case before the Arbitration Court. When the "plaint" was filed and the "dispute" came on for hearing before the Arbitration Court, the employees claimed that the Court had no jurisdiction. They urged that the demand was prepared merely to approach the Court; not to get the demands conceded. Mr. Justice Higgins, President of the Arbitration Court, believed that there was a genuine dispute with respect to two of the twenty-three claims put forward. He emphasized especially that the employees, so long as they appealed only to the state wages boards, were hampered by the fear of the competition of manufacturers of other states.

He quoted the Queensland Wages Board as having declared this fear as the reason for fixing the minimum wage of 40 shillings instead of 45 shillings as in the southern states. Also, he pointed out, the New South Wales Arbitration Court had stated, regretfully, that, in common fairness to employers in New South Wales, it could not raise wages to the point which seemed just. To do so "would have put the manufacturers of Sydney under more onerous terms than those of Melbourne." Mr. Justice Higgins concluded that "no state court or board can do justice between employers and employees in any industry in that state if there are competitors in other states whom the state court or board cannot control."

Thus he made a strong case for federal control, though he

11 Ibid. at 8-9.
13 Supra n. 10, at 25.
admitted that, under the Constitution, his Court might lack the power to exercise that control. When he had made his award and the employers contested his authority to do so, on the ground that there was no dispute within the meaning of the Constitution, the High Court upheld his jurisdiction.\(^{14}\)

Later in the same year, the employees applied to have the award declared to be a common rule of the boot-making industry in five of the states. It was contended for the respondents, the employers, that section 38f, which purported to authorize the Arbitration Court to declare a common rule, was invalid. The declaration of a common rule was not conciliation or arbitration within the meaning of section 51 (xxxv) of the constitution. It was a legislative power which, under the Constitution, Parliament itself could not exercise and, \textit{a fortiori}, could not delegate to the Arbitration Court. Those arguments were presented to the High Court, when a case was stated for its decision.\(^{15}\)

The counsel for the employees, in supporting the validity of the common rule, contended that the constitutional provision, section 51 (xxxv), was framed for the protection of the industry and of the public; in every industrial dispute, there were concerned, besides the actual disputants, a large number of persons having various interests in the subject-matter of the dispute; the whole industry was affected. If arbitration was applicable to the prevention of disputes, then the common rule might be made use of in an arbitration to prevent disputes from arising.\(^{16}\)

The High Court's decision was unanimous—one of the few unanimous decisions in Australian constitutional cases—that the declaration of a common rule, binding the whole industry, was not conciliation or arbitration within the meaning of section 51 (xxxv). Chief Justice Griffith and Sir Edmund Barton were inclined to the view that there could be no arbitration to prevent a dispute. There must be parties and subject-matter and something to arbitrate upon.\(^{17}\) The former accepted fully the argument of counsel that section 38f of the Act was an attempted delegation of legislative authority which Parliament itself did not possess.\(^{18}\) The other three judges recognized that the object of section 51 (xxxv)

\(^{14}\) Rex v. Commonwealth Court of Conciliation; \textit{ex parte} Whybrow, \textit{et al}., 11 C. L. R. 1 (1910).

\(^{15}\) Australian Boot Trade Employees' Federation v. Whybrow and Co., 11 C. L. R. 311 (1910).

\(^{16}\) \textit{Ibid.} at 313-315.

\(^{17}\) \textit{Ibid.} at 324.

\(^{18}\) \textit{Ibid.} at 318.
and of Parliament in enacting section 38f of the Act was the maintenance of peaceful and orderly conditions of industry; but they implied that the constitution, by limiting the means to conciliation and arbitration, had failed to provide adequate means. According to Mr. Justice Isaacs, it was not for the Court to supplement the powers granted in the constitution, because the expected result had not been obtained.20

Now, one of the most remarkable developments in Australian constitutional law has been the judicial process through which, in the course of time, a majority of the High Court has arrived at approximately the same result which they had, seemingly, made impossible by their unanimous decision in the Whybrow case.

It is not surprising, in view of the Whybrow decision, that attempts should be made by employees’ organizations to extend the application of the awards by simply extending the area of the dispute. To do this required the collusion of fellow-workers in the various states in serving a “log,” or schedule, of claims upon employers. By the use of a directory, the entire industry could be included. Through this “expenditure of a few shillings in paper, ink, and postage stamps,”21 the effect of a common rule for the industry could be secured.

This subterfuge, of course, gave the judges a good deal of trouble. What constituted a dispute?

Not long after the decision in the Whybrow case, an attempt was made by the association comprising all the masters and officers of Australian coastal vessels, to extend a dispute by sending a letter to eighty-three separate ship-owners in different states, demanding certain specified conditions of employment. It was intimated that the Arbitration Court would be appealed to unless the demands were granted. Some of the employers replied, but none consented to any part of the demands. Several weeks after the letter was sent, a claim was filed22 in the Commonwealth Arbitration Court for the terms and conditions which the letter had asked. The award was made, whereupon the ship-owners applied in the High Court22 for a writ of prohibition to restrain its enforcement. The employers claimed that, prior to receipt of the letter from the union secretary, they had had no knowledge of any dis-

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20 Ibid. at 338.
22 Rex v. Commonwealth Court of Conciliation and Arbitration. 15 C. L. R. 586 (1912).
content on the part of their employees. A majority of the High Court agreed that, in this instance, there had been no real dispute, extending beyond a state; the letter was merely an artificial means of collusion in order to create a pretext for a claim before the Commonwealth Arbitration Court. The Chief Justice declared that the intention of the Constitution was,

"not to foment industrial war, or to interfere with the domestic affairs of the States, but to prevent or compose disturbances of industrial peace likely to affect the whole Commonwealth . . . ."

The majority appeared to ignore, rather than clearly dispose of the argument that the letter itself was evidence of demands and that the refusal of the employers to concede the demands gave rise to a dispute. While Mr. Justice Higgins, in the Arbitration Court, had expressed the belief that there was a dispute "fairly definite and of real substance," within the language of Conway v. Wade, Sir Edmund Barton referred to the same case as authority for the view that "a grumbling or an agitation will not suffice," and held that here there was "not evidence even of these or either of them."

The two senior Judges, Griffith and Barton, in many opinions, had resorted to an underlying theory of the federal system, which was expressed by the latter, in this case, as follows:

"This Court fulfils its highest obligations to the people, and truly keeps the trust which they handed to it to defend, when it insures that no attempt at unification on the one hand, and on the other hand no straining of what are called State Rights, shall be allowed to sap the sound foundations of the edifice."

The minority of the Court, Isaacs and Higgins, JJ., insisted that there was a dispute. This was shown, they believed, in the refusal

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22 Supra n. 21, at 13.
24 (1909) A. C. 506, at 510.
23 Supra n. 22, at 603-4.
26 Supra n. 22, at 604-605. As to the principle of "implied prohibitions," which determined so many of the decisions of the senior judges in the early days, see Kennedy, Some Aspects of Canadian and Australian Federal Constitutional Law (1930) 15 Corn. L. Q. 345, 352 et. seq.

It is interesting to note that, in the Federation Convention, in 1898, both Sir Edmund Barton and Mr. R. E. O'Connor, who were later to become High Court Justices, opposed the inclusion of the arbitration clause in the Constitution, mainly on the ground that it interfered with powers which rightly belonged to the States. See 1 Records of Australian Federal Convention (1898) 199-202.
of employers to concede the demands, despite the knowledge, which had been conveyed to them in apparent good faith, that the Arbitration Court would be appealed to if the demands were not granted. Mr. Justice Isaacs dealt at length with the contention of his colleagues that the absence of dissatisfaction prior to the despatch of the latter, was a determining fact. With his usual insight into economic realities he pointed out the absurd result which would follow from the employers’ argument, if, instead of filing a plaint in this case, the men had actually struck and thrown the whole Commonwealth into confusion. Still, according to the argument, there would be no dispute. It was not necessary, thought Mr. Justice Isaacs, “to strike or even threaten to strike in order to convince the Court there is a dispute.” He added that the interviews and meetings which had occurred in the various states afforded plenty of evidence that, “if a background of dissatisfaction was necessary, it existed in the present case.”

The majority had contended that a dispute could not extend beyond the limits of one state and become subject to Commonwealth adjudication unless the business was interstate. In this instance, it was shown that most of the respondent firms were operating an intra-state business. In answer to this, Mr. Justice Isaacs contended that “the question is not whether the industrial operations of the employer extend but whether the ‘industrial dispute’ extends.” Again, in opposing the view of the Chief Justice that the employers in different states lacked “a community of interest,” he declared that,

“if . . . the same industrial demand is made upon all employers in Australia, all these employers would have in a sufficient sense a community of interest in granting or refusing it.”

From this decision, and the opinion given, no clearly stated doctrine could be derived. It was evident, however, that the two senior judges, Chief Justice Griffith and Sir Edmund Barton, were devoted to a general state-rights principle in interpreting this phase of the federal scheme. Their opinions also showed, as indicated above, a well-marked tendency to view the issue through the minds of the employers. Mr. Justice O’Connor occupied an intermediate position. The two junior judges, Isaacs and Higgins, in keeping with their usual interest in furthering the demands

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27 Supra n. 22, at 613.
28 Supra n. 22, at 623.
29 Supra n. 22, at 624.
of the rapidly growing national labor movement, were clearly attempting to arrive at a workable formula for securing Commonwealth jurisdiction.

Some of the uncertainty appeared to be dispelled in 1913 when the High Court was called upon to decide a case similar, in some respects, to the one last described. A demand had been made by the employees on their employers and not conceded. The High Court now allowed the Arbitration Court to take jurisdiction, holding that pre-existing dissatisfaction communicated to or known by the employers before the demand is not always a necessary element to constitute an industrial dispute.20

About this time, however, another similar case arose. Felt hat employees in three states, through a federal organization, sent to all employers a schedule of wages and conditions and demanded a reply within fourteen days as to whether the employers were prepared to adopt the schedule or to grant a conference with the union. No response was made and the plaint was filed in the Arbitration Court.21

Here again, when a case was stated for the High Court,82 the Chief Justice and Sir Edmund Barton insisted upon making the issue one between the prevention and settlement of a "real" industrial dispute and "the creation of fictitious disputes with a view to their settlement by a Commonwealth tribunal." The Chief Justice again somewhat candidly revealed his employer-approach by declaring that attempts had

"sometimes been made to take advantage of this provision of the Constitution for the purpose of creating so-called disputes, not for the real purpose of preserving industrial peace but for the purpose of taking the control of industry out of the hands of employers."23

He added that "such attempts are a fraud upon the Constitution and ought to be so treated."

Mr. Justice Higgins, dissenting with Mr. Justice Isaacs, reiterated the view that the policy of the Act was to substitute conciliation and arbitration for strikes. "There is no need," he said, "for employers to strike, or throw the industry out of gear,

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21 ibid. at 94.
22 Felt Hatters' Case, 18 C. L. R. 88 (1914).
23 ibid.
in order to establish the fact of a dispute."\textsuperscript{34} Rather defiantly replying to the Chief Justice, he declared that he knew
\begin{quote}
"of no attempts being made to take advantage of the provision in the Constitution for the purpose of creating disputes, or for the purpose of disturbing industrial peace, or for the purpose of taking the control of industry out of the hands of the employers. This view seems to be based on \textit{a priori} utterances of partisan journals . . . . I cannot help thinking that there is frequently a confusion of ideas between the extension of discontent, which is usually reprehensible, and the extension of the remedy for the discontent, which is proper and laudable."\textsuperscript{35}
\end{quote}

In the \textit{Builders' Labourers'} case in 1914 a question arose as to whether the existence of a dispute extending beyond the limits of a state depended upon the nature of the industry. The Australian Builders' Labourers' Federation had filed a plaint\textsuperscript{36} against a large number of employers in different states. Some of the employers obtained an order in the High Court\textsuperscript{37} directing the claimant organization to show cause why the Arbitration Court should not be prohibited from further proceedings upon the award.

Chief Justice Griffith, now in a minority, repeated his views, as expressed in the \textit{Felt Hatters'} case:—"The work to be done in that industry," he said, "is essentially local in character, and the conditions under which it is carried on are essentially dependent upon local conditions."\textsuperscript{38} From this assumption, he and Sir Edmund Barton argued that there were in reality several distinct disputes which had never become a single dispute. The Chief Justice again made use of the so-called "implied prohibition" doctrine,—that the grants of Commonwealth power contained in section 51 of the Constitution should be construed as limited to cases with which the states could not deal.

Mr. Justice Isaacs answered this view pragmatically: "Can each State effectively settle the controversy within its own borders?"\textsuperscript{39} His reply to the pedantry of the Chief Justice was very emphatic:

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"We have consequently to consider the actual circumstances of the industrial relations of the parties concerned, un-
\end{quote}

\textsuperscript{34} \textit{Ibid.} at 109.
\textsuperscript{35} \textit{Ibid.} at 111.
\textsuperscript{37} The Builders' Labourers' Case, 18 C. L. R. 234 (1914).
\textsuperscript{38} \textit{Ibid.} at 229
\textsuperscript{39} \textit{Ibid.} at 240.
embarrassed by legal theories that find no place in the words conferring the power, that do not and cannot alter economic realities and have no power to satisfy the material requirements of the contesting parties, or to supply the public wants in case of interruption. . . ." 40

An important case involving the attempts to secure extension of a dispute arose when, during certain Arbitration Court proceedings, 41 statements were submitted, signed by certain employees stating that they had no dispute with their employers and were satisfied with their conditions of labor. 42 Mr. Justice Higgins, strongly suspecting that the statements had been exacted under threats, ignored them and made an award, purporting to bind even the employers who had claimed the non-existence of a dispute. The High Court, in Holyman's case, 43 subsequently prohibited the enforcement of the award so far as it related to the employers and employees who had claimed to be satisfied. Mr. Justice Isaacs dissented. Chief Justice Griffith followed his reasoning in the Builders' Labourers' case. Though he mentioned the statements, he considered them made in good faith and apparently ignored all possibility of coercion. 44 Mr. Justice Isaacs, on the contrary, emphasized the element of coercion and supported his views with convincing statements of fact. 45 He also urged, as he was to do in later cases, that, where prohibition is asked for and the jurisdiction of the tribunal is in question, the burden of proof is upon the applicant.

The decision in Holyman's case seemed to establish an effective obstacle against the extension of disputes "on paper" and to non-unionists. It was difficult, however, owing to the nature of the economic factors involved, to find any satisfactory formula by which "disputes extending beyond the limits of any one state" could be recognized beyond question, except by relying on the "implied prohibition" theory, which prevailed on the bench until 1920. With the formally proclaimed abandonment of this doctrine in the Engineers' case 46 and the change in personnel on the High Court, it was to be expected that a different view would be developed for the definition of disputes.

40 Ibid. at 244.
42 Ibid. at 97 et seq.
43 18 C. L. R. 273 (1914).
44 Ibid. at 279.
Mr. Justice Isaacs had, in his dissenting opinions in the cases previously discussed, urged the necessity for considering the object of the arbitration clause, section 51 (xxxv) of the Constitution, as the maintenance of stable industrial conditions by the peaceful cooperation of capital and labor. He had also pointed out the fallacy which he felt was involved in any attempt to limit this object by reference to an implied protection of "state-rights." That his views would ultimately prevail in these cases concerning disputes, as in many other matters, was indicated rather clearly by the decision in *Hudson's Case* in 1923.\(^4\) The question was as to the validity of section 3 of the Commonwealth Conciliation and Arbitration Act, as amended in 1921, which provided that an agreement between the parties to a dispute operates as an award and binds, not only the parties to the agreement, but also the successors and assigns of the business of an employer bound by the agreement. The validity of the section was upheld.

By the reasoning in this case, the majority of the High Court indicated that it was attaching more importance to the standing and functions of the organizations, as such, in industrial disputes, and that it regarded "arbitration" as being not confined to definite persons who are parties to the dispute, as in an ordinary action at law, but to the organizations, whose membership is continually changing. Mr. Justice Isaacs stated the view as follows:

"... what persons are intended to be affected as represented by the formal disputants, as well as what conditions are to affect them and for what period of time? This at once avoids the 'common rule,' which is an extension of the superficial area of dispute, and gives full effect to an award in respect of the 'industrial dispute' by making it effective throughout the whole period of operation of the award for and against those who, during the period are, or voluntarily come, within the area of the dispute."\(^5\)

This reasoning gave promise of providing the long-sought formula for permitting virtually a common rule in inter-state industry, or at least allowing extensive benefits, under the awards, to non-organized employees. And, indeed, the elaboration and further application of the formula were soon made in the *Burwood Cinema* case in 1924.\(^6\)

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\(^4\)Geo. Hudson v. Australian Timber Workers' Union, 32 C. L. R. 413 (1923).

\(^5\)Ibid. at 440.

\(^6\)35 C. L. R. 528 (1924).
THE CONTROL OF INDUSTRY

This case is remarkable for the fact that it was made the occasion for lengthy judicial exposition of the relations of persons engaged in industry. As we have observed, the Court had been finding itself in difficulty in making section 51 (xxxv) of the Constitution work effectively. The time had come for bringing some kind of guiding principles out of the mass of conflicting precedents and technicalities. Mr. Justice Isaacs' gift for lucid statement and his penetrating analysis of social situations once again served to establish new and influential principles of interpretation for the Court. In few passages in Australian law reports do we find the judge giving such a systematic and deliberate exposition of his concepts of social institutions. It seems justifiable, therefore, to quote from this opinion at some length.

"Every employer that enters the competitive field of industry is co-operating to carry it on, in the broader sense in which the people of the Commonwealth are interested. That sense is national service and supply, the interruption of which is the evil dealt with in pl. xxxv. So also is every employee a co-operator in the same sense, for his labor is not to be looked upon as a mere commodity, as if he were a machine, animate like the horse or inanimate like a steam-engine. The nexus of all the co-operators is the industry itself, irrespective of how its ownership or its operative arrangements are subdivided. If we confine our attention for the moment to disputes between employers and employed, we have to visualize the disputants respectively as portions of groups representing capital and labour. 'Employer' and 'employee' are terms which denote not individuals contracting with each other whose industrial relations arise out of and are limited by their specific contracts, but membership of a group with which the individual has identified himself in relation to a given industry. The concept has grown out of the necessity for collective bargaining and collective action, involving organization more or less formal and more or less complete. Long before 1900 the identification of the individual with the group was thoroughly established. In 1892, in Dr. Garran's report on New South Wales, it was stated 'the federation of labor and the counter-federation of employers is the characteristic question of the epoch. Without such identification there can never be effective action to meet the difficulties of modern industrial life.'

Then Mr. Justice Isaacs quotes the following passage from the Whitley Report of Great Britain:

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50 Ibid. at 540-541.
51 Cd. 8606 of 1917, par. 23.
"... an essential condition of securing a permanent improvement in the relation between employers and employed is that there should be adequate organization on the part of both employers and work people. The proposals outlined for joint co-operation throughout the several industries depend for their ultimate success upon there being such organization on both sides; and such organization is necessary also to provide means whereby the arrangements and agreements made for the industry may be effectively carried out."

The learned justice then asks: "Why is 'organization' an 'essential condition'?

"Plainly," he said, "because an 'industry or some selected branch of it' is for the purpose regarded as one entity. It is impossible to isolate the competitors and segregate their industrial interests. Every competitor acts and inter-acts, and more or less affects the rest of those on the same fields. If, then, section 51 (xxxv) of the Australian Constitution is to be faithfully applied in the broad sense already adopted, so as to be effective to cope with the destructive evil of industrial warfare, it must necessarily be competent to provide by conciliation and arbitration for the essential condition referred to. That is to say, while the 'common rule' as one extreme is excluded, so a limitation to individual contract as the other extreme is also excluded. Employers who voluntarily enter and compete on the same field of industry and thereby affect the industrial relations of all others on that field—unionist and non-unionist—cannot escape the result of their voluntary action by merely excluding union labor."

The paragraphs I have quoted represent, I believe, an approach to a carefully elaborated statement of the prevailing political philosophy in Australia. They are, indeed, among the few abstract expositions one can find of the practical policies of a people who have habitually acted without doctrines. It has become a commonplace that, in the federal systems of the modern world, it falls to jurists to formulate social theories. Courts, in such a system, become battlegrounds for clashing social forces. They cannot, therefore, remain entirely unaware of the major social issues which are being fought out before them and which are, at least temporarily, settled by their decisions. The able judge in a federal system, therefore, feels impelled to give thought to the social effects of his work. This awareness of social consequences in turn makes it impossible for him, in his own conscience at least, if not in his official capacity, to escape responsibility for those consequences.
Mr. Justice Isaacs (now Sir Isaac Isaacs, Governor-General of Australia) has been the ablest and most articulate of those who have striven deliberately, through judicial formulas, to adapt the federal system to economic realities. In the light of the Constitution, the decision in the Whybrow case had seemed inescapable, even to the judges who were entirely convinced of the social advantages of the common rule. Yet, after much vacillation and confusion, a formula was discovered permitting the extension of awards to employers and employees who are not parties to the dispute. In the Burwood Cinema case, the High Court frankly over-ruled Holyman’s case in part and made possible, in some instances at least, the actual effect of a common rule in interstate industry.\(^{52}\)

Numerous awards now include the so-called "drag-net" clauses. Though these clauses do not directly declare a common rule, they often have the same effect; for unions, in applying for them, made all employers in the particular industry respondents, whether they employed any members of the union or not.\(^{53}\)

In what respects do such awards now fall short of the common rule? There is still much uncertainty with respect to the rights and obligations of parties. Much confusion is caused to employers who have a variety of employees. The employers of a firm may, for example, be members of three different unions subject to three different awards. Some employees may be non-unionists or may be members of more than one of the unions.

Two decisions in recent years indicate that there are still substantial limitations on the Arbitration Court’s authority to extend the effect of an award beyond those persons immediately in dispute. In the Allerdice case the question was whether employees in one union could be bound, as to hours, by an award secured by another union. The High Court was unanimous in deciding that they were not so bound.\(^{54}\) The grounds for the decision, however, were very diverse. When a similar case arose later,\(^{55}\) the Court divided. The question was whether an award of the "drag-net" type was bind-

\(^{52}\) Further discussion of the Burwood Cinema and later cases may be found in Kelly, Arbitration Awards Affecting Non-Unionists (1928) 1 Australian L. J. 296-298.


\(^{54}\) Amalgamated Engineering Union v. Allerdice Pty. Ltd., 41 C. L. R. 402 (1928).

\(^{55}\) American Dry Cleaning Co. v. Amalgamated Clothing and Allied Trades Union of Australia, 43 C. L. R. 29 (1929).
ing on an employer who employed no persons who were parties to the dispute as members of the claimant organization or represented by it. Three of the judges held to the view which they had expressed in the Allerdice case that the Arbitration Court lacked power to extend the award to cover employees who were neither parties to the dispute nor members of nor represented by an organization which was a party to that dispute. Sir Isaac Isaacs dissented. He suggested reopening the Allerdice case, on account of the confusion concerning its effect.\(^{55}\)

The decisions in these two cases seem to limit the effect of the principle declared in the Burwood Cinema case. Yet the opinions have been so inconclusive that one cannot say what line of interpretation may be taken in the future. Perhaps it is worth remembering, however, that, it is after such periods of confusion that, in the past, judicial minds have finally found themselves forced to enunciate clear-cut principles. These clear-cut principles have usually led to an extension of Commonwealth powers and greater freedom for the development of a national economic policy. Where it is difficult to find a reasoned justification for a compromise, the Court has not unnaturally given way to the pressure of practical economic necessity.

It is interesting to notice that the Commonwealth Parliament attempted in 1928 to take advantage of the encouragement offered by the recent High Court decisions. It passed an amendment to the Arbitration Act to facilitate the serving of claims on numerous persons; in other words, to enable the organizations to save the expenditure on "paper, ink and postage stamps" which Chief Justice Griffith had once said could not be permitted, because it would enable "mere mischief-makers" to create a dispute.\(^{56}\) By this amendment, clause 19B of the principal Act\(^{57}\) now provides that the Arbitration Court may make an order appointing "representative respondents" and that, the order having been published in the Commonwealth Gazette, all documents served on the representative respondents shall be deemed to have been served on all the interested persons specified in the order, and further, that any award of the Court made in the matter should then be binding on those interested persons. This legislation, of course, could not

\(^{55}\) A discussion of the Allerdice and American Dry Cleaning Co. cases may be found in Ross, \textit{Attempts to Establish a Common Rule in Interstate Industry} (1930) \textit{A} \textit{U} \textit{s} \textit{e} \textit{r} \textit{i} \textit{a} \textit{n} \textit{i} \textit{a} \textit{n} \textit{L. J.} 79-76.

\(^{56}\) \textit{Supra} n. 20.

\(^{58}\) Clause 18 of the amending act (No. 18 of 1928).
affect in any way the validity of the awards that might be made under this type of procedure. It merely made easier the method which had already developed for extending the area of disputes and which had received encouragement from such decisions as those in the Burwood Cinema case.

The serious results of the present system of industrial control are apparent in the Coal-miners' cases in 1930. A very bitter dispute between employers and miners arose in the New South Wales coal fields in 1929. Fearing that a great national dispute was imminent and that such a dispute would be beyond the power of any one state to control, Chief Judge Dethridge of the Commonwealth Arbitration Court, directed Judge Beeby to summon a conference of owners and employees of New South Wales. The conference was held but was ineffectual. Judge Beeby then referred the dispute to the Arbitration Court for hearing. An interim award, affecting the conditions of employment in New South Wales, was made in December, 1929. The employers contested the validity of the award on the ground that the dispute did not extend beyond one State. The High Court held that the Arbitration Court lacked jurisdiction and the award was invalidated. Some of the majority believed that the circumstances did not justify the intervention of the Arbitration Court.

Sir Isaac Isaacs, in one of the most vigorous dissenting opinions of his career, declared that "the circumstances not only justified, but loudly demanded, the intervention of the Arbitration Court." To support this belief, he described the events leading up to the dispute, drew attention to the imminence of a sympathetic strike in Queensland and Victoria and showed that for many years the coal-mining industry of these three states had been working under Federal awards made by the Coal Tribunal under the Industrial Peace Act of 1920.

After this decision, the matter came before the Arbitration Court again in a different manner: by the presentation of a log of claims upon the employers in New South Wales. In adjudicating upon this case, the majority of the High Court (Sir Isaac Isaacs again dissenting) held that the log was not sincerely propounded to employers in New South Wales as a demand upon which the employees were resolved to insist, but was regarded by all parties...
as nothing but a step toward enabling the Arbitration Court to deal with the trouble.

Sir Isaac Isaacs gave great emphasis in both of his dissenting opinions to a point which he had made in earlier cases: namely, that the party demanding a writ of prohibition against the Arbitration Court must make a clear case. He felt that, on the matter of jurisdiction of that Court to make an award, Judge Beeby's view "ought not to be overridden unless he was clearing wrong." In the second case he said:

"It would be a valiant heart that would maintain that Judge Beeby, with his special and extensive experience of the subject was 'manifestly wrong.' On the contrary he appears to me to have been manifestly right." 62

The majority opinion that the claims were not genuine, the dissenting Justice apparently did not share, for he declared that

"when . . . . the claims are in earnest and are persisted in to the fighting point, notwithstanding firm refusals, we are not to wait for casualties to convince us that the combat is real." 63

Sir Isaac Isaacs complained, as he had in earlier cases that, "in the present intricate state of legislation," parties to the disputes could raise "meticulous technicalities suggested by ingenious legal minds." 64 He went somewhat out of his judicial role when he spoke despairingly of the apparent failure to invest the Arbitration Court with power to decide authoritatively and finally the fact of a dispute, "the very foundation of its arbitral proceedings." He apparently felt that any attempt to apply technical limitations in defining industrial disputes was bound to be unworkable.

It is needless to say that the present results of judicial interpretation are perplexing in the extreme to those who are concerned with the solution of industrial problems. When a serious strike occurs or is threatened, endangering the peace and material welfare of the entire Commonwealth, a question must be settled as to whether the Commonwealth tribunal may intervene. The Arbitration Court, and later the High Court, in case a question of law is raised, must determine (1) the geographical extent of the dis-

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61 Ibid. at 540.
62 Ibid. at 568.
63 Ibid. at 571.
64 Ibid. at 540.
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The dispute (whether the dispute "extends" over more than one state and is not two or more separate disputes, merely occurring at the same time); (2) the intentions of the parties to the dispute (whether they are engaged in a "real" dispute or merely engaged in "paper" formalities in order to establish the jurisdiction of a supposedly favorable Commonwealth tribunal), and often many other matters.

Early in his experience in the Arbitration Court, Mr. Justice Higgins complained of the immense amount of the time of his Court which was occupied with lengthy and complicated arguments as to the facts which tend to show that there is or is not a dispute, as well as with other matters which had no bearing on the merits of the case. The discussion of the merits cost relatively little in terms of either time or expense.65

This administrative inefficiency is, however, a relatively minor problem. The great maze of legal technicalities, some of which have been presented above, divert the attention, not only of the parties but of the entire public, from the basic issues of industrial control.