Canadian reader than the Australian, simply because the Canadian law dealt with in the book had never been dealt with in a comprehensive way before. The Australian reader, on the other hand, has had Hogg's *Liability of the Crown*[62] and, for instance, the chapter in Howard's *Australian Federal Constitutional Law*[63] entitled "Balance of Power", which, taken together, cover much of the Australian ground covered in the book being reviewed. To some extent, the author's treatment suffers by comparison to that of Hogg and Howard, because his is far less readable. At the same time, though, his account has the advantage of being more recent and of including some older Australian and much Canadian material not canvassed in theirs. In spite of my earlier criticisms of particular aspects of the book, I consider it to be a substantial contribution in its field and well worth the careful study that an understanding of it requires.

LESLIE KATZ*

Collective Bargaining and Compulsory Arbitration in Australia, by John Niland, Sydney, New South Wales University Press Limited, 1978, VII + 174 pp. (including Appendices I to V and bibliography). $6.75 (paperback).

Much of this book is directed to showing that, on balance, bargaining is preferable to arbitration as a method of resolving industrial disputes. As its author notes, academic intellectual analysis is unlikely to bring about a change in present practice, however much it may clarify issues and sharpen debate. This is just as well, for some of Professor Niland's theoretical analysis is unconvincing, although it occupies much of the book. His empirical work, based on a survey of 87 trade unions in New South Wales, is more persuasive, for it does seem to indicate that bargaining of some sort occurs now, outside and inside the present system, and that it has a fair measure of acceptance (at least when some form of arbitration is also available). The author's prediction that bargaining is likely to increase is plausible and one cannot disagree with his view that, this being so, we ought not ignore it but should consciously choose a policy to deal with it.

Professor Niland is Professor of Economics and Head of the Department of Industrial Relations at the University of New South Wales and has had experience of collective bargaining overseas where,

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[62] 1971.
[63] *Op. cit. supra* n. 39.
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in one form or another, it is common in industrialised western nations. Indeed Australia's system, although similar in principle to New Zealand's, is unique when regard is had to the constitutional framework in which it operates. It is therefore understandable that there is much confusion about the nature of collective bargaining, which is quite different from the process of conciliation and compulsory arbitration to which we are accustomed. Chapter 1 is necessarily devoted to removing some of the semantic and conceptual misconceptions likely to be found in an Australian reader. Bargaining (i.e., collective bargaining) is essentially a system of dispute resolution through direct negotiation between the parties, who must have a "philosophical commitment to direct negotiation in good faith". Third parties are involved to conciliate or arbitrate only with the consent of *both* parties, who must negotiate impasses as best they can, at least to the point where a deadlock threatens the public welfare. For such a system to operate, reasonably even power bases are required, and one of the functions of the legislature where bargaining exists is to ensure the emergence of appropriate power bases.

Does such a system offer any better prospects for dispute resolution than that which we now have? The Australian system is alleged by Professor Niland to reflect an "inordinate preoccupation" with strike prevention and settlement. In Australia the strike is, or can be made, illegal in most circumstances, but it is usually a permissible and legitimate element in collective bargaining systems. Indeed, in suggestions for a tentative framework to accommodate bargaining alongside arbitration, the author proposes that strikes and lockouts of up to 45 days might be allowed in non-exempt industries before arbitration could be invoked at the behest of one party only. Such a framework would shock many Australians. Professor Niland argues that it may not prove as bad as it sounds for "the incidence of strikes over the longer run, conceivably, may be reduced by allowing them to run their course in the short run". This speculation is not supported by any substantial evidence that such a result would or even might follow.

Australia is one of a group of western nations with poor strike records, if one can judge from such records as are available of strike days lost *per* 1000 employees (the statistics of the countries concerned are not always directly comparable because of the different methods of collection and classification of data). Most of the others have bargaining systems which have manifestly not put them in any better position than Australia. Some, such as the United States and Canada, are clearly worse off. As our statistics include as strikes stoppages which some other countries do not, we are probably better off than many others. But Australia's strikes tend to be of short duration and the book's treatment of this pattern of short strikes is puzzling. At page 51 the author seems to consider it almost a pity that the apparent economic impact on workers and management could be less where ten

man days are lost through ten strikes of one day each rather than in a single strike of ten days and that unions will probably get less out of the shorter patern and that less attitude change is generated by it. Many workers would see it as a distinct advantage to be able to strike for a shorter time and so not lose much pay because of overtime and management is almost certainly happier with shorter strikes. And it is fairly certain that the general public is happier also, in spite of the lame observation in Chapter 3 that "the evidence is by no means strong that through strike interdiction Australia has actually achieved a more favourable record on direct industrial action than many countries with collective bargaining". The onus is on Professor Niland to show we can do better under his proposals.

Modern society is becoming increasingly inter-dependent, and lengthy strikes can have most serious repercussive effects. Moreover, these effects are likely to be worse in a country such as Australia which has one of the most highly urbanised populations in the world and one of the most unionised work forces. If the Australian system has been instrumental in producing a pattern of shorter strikes that may well be an advantage we should not lightly abandon. We should pause before adopting a system which has produced demonstrably worse strike patterns in some places and which can result, for example, in mountains of rubbish accumulating for weeks on the streets of a city, as in the strike by members of NUPE in England early in 1979: only the unusually severe winter averted a serious threat to health. Further, legislation has an educative effect. What is permitted tends to become accepted and indeed a norm. As with plot ratios in local government legislation a statutory maximum becomes the minimum expectation in practice so that if there were a permissible strike period of up to say 45 days, strikes of the maximum allowable length would become more acceptable and would tend to become a usual ploy. Professor Niland's apparent answers are the speculation already mentioned, namely that we may be better off in the long run, and that certain industries would be exempt from this right to strike. However, there would need to be many exemptions, given our inter-dependent and urbanised society; and one may be sure that many unions would not accept such a scheme just as they have resented provisions for the protection of essential service industries such as those in sec. 8A of the New South Wales Industrial Arbitration Act, 1940.

More fundamentally Professor Niland sees the Australian haste to terminate strikes as likely to lead to quick settlements which do not, however, really solve the dispute or cause any change of attitude. But this is not supported by his own analysis of cited causes of disputes at pages 46-7, which indicates that almost three-quarters of Australian strikes in the first half of 1975 involved grievances arising within ongoing awards or agreements. This suggests that the arbitration system settles and resolves interest disputes fairly well (i.e., disputes over new

matters). An obvious way to reduce the incidence of grievance disputes is to introduce improved grievance procedures into awards and to ensure that union officials and employers' representatives are trained in their use — needs which Professor Niland sees in any case. The figures are even better for the first half of 1976, where only 19.8% of strikes occurred over new matters. It would be interesting to see a comparable analysis for countries with direct bargaining systems, but the book supplies none. One suspects that a much higher percentage of strikes would be found to have arisen over new matters; such a result would be expected because the strike is a legitimate tactic in most such countries. The relatively confined task of improving grievance procedures in Australia could, if successful, dramatically reduce Australia's strike record. It is probably the single most promising step which could be taken in industrial relations today and could be done almost at once and largely within the existing system and practice.

Legalism and stability are treated in Chapter 9 where we fiind rehearsed the now familiar arguments alleged to demonstrate that the present Australian system is too legalistic and too dominated by lawyers. The most disturbing feature of these arguments is that they reflect an inadequate understanding of the limitations and strengths of judicial method and legal technique. This is not the place to rake over the coals of the debate, but one may point to the simplistic statement on page 77 of the way in which precedent operates and the apparent failure to grasp why legal standards and "technicalities" are present and must always be present in any system which purports to be ordered and regulated by a constitution and a statute, as even a collective bargaining system must be. Elsewhere (at pages 36 and 38) there appears to be a misunderstanding of the role of advocates. If an arbitration case proceeds to finality with the parties merely directing evidence to their own cases and not coming to grips with the other side's case, then that is bad advocacy (and bad arbitration) and not the fault of the system. It may be an indication for greater use of trained advocates who are well aware of the need to answer what is put forward by their opponents.

It is worth noting, too, that Great Britain — a "collective bargaining" country — has adopted in recent years various reforms or procedures which have an air of familiarity to an Australian and which may well mark a move towards a greater measure of compulsion and arbitration in that country. For example, Schedule 11 of the Employment Protection Act, 1975, permits one party to go to the Central Arbitration Committee and claim enforcement of recognized or generally applicable terms and conditions. And what the Committee does is called arbitration (although it looks very much like adjudication) and can result in an enforceable award against an employer. The Schedule is alleged to have been used not only to deal with pockets of low pay, but also to subvert government pay policy. Also, the work

load of the government's Advisory, Conciliation and Arbitration Service (reference to which is generally by consent only) has been growing apace in recent years, and although its impact on national wages is small it is beginning to work out pay structures for industries. Finally, some form of notional interest appears to be behind the *ad hoc* establishment of the Standing Commission to deal with wage comparability — a Commission which, incidentally, seems to have been used as a face saving way to end strikes in the winter and spring of 1979. So some of the supporting structure for collective bargaining starts to look like some of the institutions with which we are famiilar under different names. This, too, should cause us to be cautious in accepting Professor Niland's enthusiastic case for moving towards collective bargaining.

It is not until Chapter 10 that one gets to what is, in this reviewer's opinion, the most interesting chapter in the book. Here, from the survey of trade unions mentioned above, Professor Niland detects strong signs that the incidence of collective bargaining has, in fact, been growing. His findings confirm what many practitioners believed to be the case. He argues convincingly that this trend will continue, mainly as a consequence of the heightened taste for self determination and participatory decision making engendered by the rising standard of education in the community. He considers that this process is likely to grow in importance "beyond the indexation phase".

How are we to handle this likely growth in bargaining? Of the available options Professor Niland argues that we should structure a system of dual procedures involving compulsory arbitration and collective bargaining. This sounds reasonable and preferable to what will probably happen, namely, a drift "through benign neglect . . . toward dispute resolution outside the tribunal system". The author then considers how a dual system might be set up — what framework and strategic factors will facilitate stable bargaining? His suggested framework is tentative, which is probably just as well for some of it will be misunderstood and some of it will prove highly controversial. To avoid needless misunderstandings it is necessary to grasp again the essential features of collective bargaining — to realize how different it is from what we have hitherto experienced. A re-reading of Chapter 1 may be useful at this stage, noting carefully the need for a philosophical commitment to collective bargaining before it can begin to work. This review has already referred to what is likely to be one of the most debated suggestions in the book, namely the establishment of a framework which would institutionalise and legitimate strikes of up to 45 days in all save designated industries. The author's arguments do not establish a *prima facie* case for such an arrangement, but one should ask the more basic question whether strikes are really an essential and necessary ingredient in a collective bargaining system. If we are to

accommodate collective bargaining can we not work towards a "strike free" or at least "strike inhibiting" version? Setting up the proposed structure would also involve constitutional difficulties of an acute type and other legal "technicalities", like it or not. Moreover, it would open up further potential sources of dispute and strike action, e.g., in trying to force an employer to "agree" to enter the bargaining sphere, or in inducing the Department of Labour not to appeal. But it is an interesting and constructive list, worthy of consideration and debate.

The author's ten strategic factors for stable bargaining are things which he argues should be built into whatever framework is adopted. Some are self evidently beneficial and could be used now in an arbitration system, e.g., that which suggests enhanced research facilities and training for practitioners, especially from unions, and that which argues for better grievance handling procedures. Professor Niland makes an immediate contribution to better training by publishing, in Appendix III, his own collective bargaining simulation exercise designed for Australian conditions. But as he observes, commitment to the agreement achieved and to the process will be more difficult to facilitate. The circumstances, or crises, in which collective bargaining should be suspended would also prove difficult to define.

In summary, much of the early part of this book is unconvincing and annoying, especially to a lawyer. But do not fling it aside half way through, as the reviewer was tempted to do. If bargaining of some type is emerging and likely to continue, it is important that we do not simply assume that "she'll be right mate". "She" may very well not be right. Professor Niland has performed a useful function in drawing attention to this emerging trend. One may find fault with some of his analysis and disagree with his suggested framework and strategic factors (as do some of those quoted in Appendix V), but the author will almost certainly achieve one of his stated objectives, namely the stimulation of "further examination of alternative approaches to industrial conflict in Australia".

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The Law of Restitution (2nd ed.), by Robert Goff and Gareth Jones, London, Sweet & Maxwell, 1978, lxxxiii + 614 pp. (including index). $60.50 (hard cover only).

This important book, now in its second edition, is the only comprehensive work on the restitution of unjust benefits in English jurisprudence. Since this work was first published in 1966 it has exerted

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