REGULATION OF INDUSTRIAL DISPUTES IN AUSTRALIA, NEW ZEALAND AND THE UNITED STATES

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Introduction

One can analyse comparative approaches to legal regulation in a number of ways. There is the "vertical" method, which describes each nation's system in detail and then notes similarities and differences between them. Alternatively, there is the "horizontal" approach, which deals with each issue in turn, noting how each nation deals with that issue before moving to the next issue. Both approaches require a lot of extraneous discussion and risk an unusual level of tedium. Finally, there is the structural method, which poses ideal types of regulation and then compares each nation's system with these ideals. This last approach is more theoretical but more economical; it is therefore the one adopted here.

This article investigates attempts to prevent and resolve labour disputes in Australia, New Zealand and the United States of America. It concentrates on *disputes of interest* (that is, disputes about the employment terms employers should provide) as opposed to *disputes of right* (that is, disputes over the interpretation or application of employment terms contained in an agreement or award). The article begins by describing the four ideal types of dispute resolution mechanisms. The next section classifies each country's forms and practices of labour dispute regulation according to the ideal types. Practices often differ substantially from the legal forms. In both form and practice, moreover, each nation uses a combination of elements from the ideal types. The final section critiques the types of regulation adopted in each country. It also describes the evolution occurring in each country's chosen regulatory system. As will become clear, common threads link developments in what initially appear as radically different systems.

Ideal Types of Regulation

Every country believes itself free to choose its own system of labour dispute regulation. In actuality the scarcity of available models severely limits that freedom. Until some creative theorist designs more possibilities, industrialised nations must pick from among four systems (although any

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country can modify the chosen model or combine elements from two or more models).

While remembering that no system of legal regulation is completely "pure", one can discern distinct models toward which actual systems approach. These ideal types make useful reference points in any attempt to understand contemporary practices and available options. Certain criteria mark each type: (1) the fundamental axioms, if any, on which the regulatory type must rest; (2) the degree of governmental control over labour and management organisations; (3) whether the system must mandate specific procedures or results for industrial disputes; and (4) whether the system requires centralisation of decision-making or standardisation of employment terms.

(i) Statism

As its name suggests, the statist model involves total government control of the terms of employment. A government can exercise this control in any of a number of ways — direct legislation, bureaucratic regulation, judicial or quasi-judicial rulings or corporatist arrangements. Statist regulation has just one axiom. It presupposes that the government can define and enforce employment terms to achieve its economic and social objectives, to the exclusion of the parties' conflicting concerns. Statism does not assume the compatibility of management's and labour's interests, for instance. Rather, it counts on the government's ability to make the industrial parties waive their independent interests in favour of the state's.

Because the state can act on its own, it need not *designate* labour and management organisations. Designated agents can be useful administrative agents, however, and unions in particular can help to ensure that employees comply with the government's dictates. If it recognises any role for unions or employers, however, effective statism requires tight *control* of the industrial agents. The statist approach invariably includes registration of unions, prohibitions on industrial action, and sanctions against departures from mandated terms.

Statism tends to be agnostic about procedures but single-minded about results. Procedures need not be specified because the statist object is obedience rather than procedural regularity. Almost any means to that end will do. Results, on the other hand, are crucial because any outcome other than the government's chosen one will contradict the very purpose of the exercise. There is no point to statist regulation if it does not actually accomplish the state's objectives.

Of necessity, the statist solution must be centralised. Decentralised decision-making would almost guarantee choices influenced by local conditions rather than the state's wishes; it is therefore anathema to the committed statist. Once the state determines the substantive standards, however, decentralised administration is quite possible. Employment terms in a statist system will usually be standardised, but only as a matter of administrative convenience. A single wage level is obviously much easier to announce and enforce than a series of wages varying between industries and regions. In theory, though, there is nothing implausible about a central authority establishing varying terms.

(ii) Compulsory Arbitration

In its ideal form, compulsory arbitration is the legally mandated submission of industrial disputes to impartial experts who use a formal and adversarial procedure to determine the "correct" terms of employment. "Correctness" can turn on almost any standard – economic efficiency, for example, or morality, history or established relativities. In both Australia and New Zealand arbitration tribunals first attempted to protect workers by providing a "living wage" as a floor. Both countries eventually fell back on maintenance of historical relativities as the primary test of fairness.[1] Now governments in both countries try to make arbitration tribunals weigh efficiency considerations.

Moreover, both governments occasionally used the arbitration system to carry out their economic policies.[2] A role as government enforcer obviously conflicts with the arbitration tribunals' dispute-resolution objective. If the government's policy displeased both parties, for example, arbitral attempts to apply that policy will hinder settlement of the immediate dispute. Application of governmental policies usually meant capping wage increases. Less commonly, arbitration tribunals accorded some weight to "capacity to pay". In short, compulsory arbitration can designate almost any test of "correctness".

Compulsory arbitration rests on two key suppositions. The first is that for every industrial dispute there exists some determinable "correct" answer. (Of course in a less ideal and more pragmatic form, compulsory arbitration may aim only at producing *a* solution, one which will deter industrial action for a limited time.) The second is that a tribunal can mandate the correct terms to the exclusion of the parties' preferences. Compulsory arbitration adopts a "unitary" rather than "pluralist" view of industrial relations. In less technical terms, it presumes the compatibility of labour's and management's interests. The unitarist therefore regards industrial strife as wasteful and unnecessary. Thus the founding father of New Zealand's compulsory arbitration law, William Pember Reeves, revealed his contempt for strikes and lockouts by terming them "barbarism".[3]

The adversarial nature of compulsory arbitration obliges the government to designate parties to represent labour and management. The government has to decide in some way who the parties are to be – which union is

1 K F Walker, "The Development of Australian Industrial Relations in International Perspective" in *Perspectives on Australian Industrial Relations* 1 (W A Howard, ed, Longman Cheshire 1984); W Grills, "The Resolution of Industrial Disputes in New Zealand" in *Three Views of the New Zealand System of Industrial Relations* 1 at 9 (F Young, ed, Industrial Relations Centre, Victoria University of Wellington, 1984). So thoroughly has the concept of "comparative wage justice" come to dominate wage fixation that recently several heads of Australian government departments used it in attempts to obtain salaries as high as A$250,000: M Millett, "More Big Earners Push for Pay Rises" *Sydney Morning Herald,* 10 October 1989, at 40-42.

2 K F Walker, ibid, at 11; J Deeks and P Boxall, *Labour Relations in New Zealand* (Longman Paul, 1989) 40 at 42.

3 W P Reeves, *State Experiments in Australia and New Zealand* (Macmillan, 1969 orig 1902) Vol 1 at 70.

to represent which employees, for example, and who is to speak for an employer or group of employers. Employer representatives are relatively easy to identify but unions present a problem. Several may claim the right to represent a group of workers. Australia and New Zealand resolved the designation problem by registration systems in which one union gains the exclusive right to represent each group of employees. Once registered, the designated union is virtually immune from challenge (unless the government revokes its registration).

It also follows that the government must regulate the designated parties. It must prohibit strikes and lockouts or else the arbitration system could not be compulsory. It must provide redress for claimed breaches. Finally, it must ensure that registered unions operate fairly in order to guarantee the union members' loyalty to the arbitration system.

In direct contrast to statism, compulsory arbitration must be single-minded about procedures but can be relatively agnostic about results. Not only must the system "work" in the sense of effectively setting terms, it must be seen to work fairly. Hence compliance with established procedures is essential. If it lacks the appearance of objectivity, labour and management will regard it as arbitrary or a sham. In either case it would lose the credibility required to ensure acceptance of its awards. Fair procedures contribute to the perception of substantive fairness.

So long as arbitration's results satisfy the test of "correctness", however, it matters little what those results are. In form at least, arbitrators are truth seekers — the truth being the employment terms which will produce the desired efficiency, morality or other goal. Unlike the statist agents, arbitrators do not presume to know the outcome in advance, but rather seek to discover it. In both Australia and New Zealand, however, arbitration tribunals have unduly emphasised historical relativities. Once an arbitration system adopts a single standard of correctness, it is no longer completely agnostic about results.

Whether compulsory arbitration need be centralised and standardised depends on its adopters' purpose. If the object is simply to provide an alternative answer when labour and management cannot agree, neither centralisation nor standardisation is essential. Local resolution with unique terms would meet the need. (Such a system might produce practical anomalies, but it would not be theoretically unreasonable.) On the other hand, if the compulsory arbitration system has substantive objectives such as economic egalitarianism, "comparative wage justice", or raising the wage floor, centralisation and standardisation become critical. Without centralisation, wage determinations will drift from the substantive objective, and without standardisation, the system could neither control wage dispersion nor maintain relativities.

(iii) Collective Bargaining

In its simplest form, collective bargaining sets employment terms in bargains between one or more employers and one or more groups of employees. It requires no fundamental assumptions, except perhaps that labour and management will normally be able to resolve their own disputes. Unlike statism, collective bargaining does not assume that a government

can define and enforce employment terms to accomplish its economic objectives. Unlike compulsory arbitration, it does not require belief in a single correct answer to every industrial dispute. Collective bargaining systems implicitly accept the opposition between labour's interests and those of management. In technical terms, collective bargaining's view is pluralist rather than unitary.

Like compulsory arbitration, collective bargaining requires the organisation of labour and management but unlike arbitration it does not require governmental designation of bargaining agents. Since the parties will deal only with one another, government need not grant formal approval to any party. The parties themselves can decide with whom and at what level they will bargain. Disputes on those procedural questions are resolvable in the same ways as substantive issues. In practice, however, a procedure to determine a union's right to represent employees prevents some predictable disputes. Accordingly, most collective bargaining systems contain such a mechanism. In addition, a legal obligation to bargain may be essential if the government wishes to avoid a completely market-based system of wage determination.

Once the parties are organised, the government may set the rules of the game. The distinctive feature of collective bargaining is that the parties are then free to determine the terms and conditions of employment. There is thus no need for tight regulation of the bargaining parties, although the government could, consistently with the theory of collective bargaining, enact minimum controls to preserve the parties' independence.

Collective bargaining can be agnostic about procedures and must be so about results. It can be agnostic about procedures because its sole objective is a negotiated agreement. How that agreement comes about — whether through formal procedures or informal, with or without mediation, with or without economic pressure or even through some form of voluntary arbitration — is of no concern. Collective bargaining *must* be agnostic about results, however, because it shares neither the statist notion that economic actors must follow the government's direction, nor the arbitrationist belief in a single correct answer to every industrial dispute. Collective bargaining defines success as a negotiated agreement, regardless of what that agreement contains.

Collective bargaining requires neither centralisation nor standardisation. A single set of negotiations might produce a national agreement, but local bargaining is far more likely. Without a statutory obligation to bargain, bargaining which does occur will almost certainly be decentralised, and will logically produce non-standardised results.

(iv) The Labour Market

Strictly speaking, even if a government imposes no system of labour dispute resolution the result is not necessarily laissez-faire. The parties will still be subject to the control of the labour market, which can be a powerful force indeed. If an employer sets wages too low, it will not be able to hire enough employees of the desired quality. If it sets wages too high (as when it fears the power of a union), it will attract too many applicants to employ and will have higher operating costs than its competitors. In a competitive environment, the parties cannot escape the laws of the market.

Labour market resolution of industrial disputes thus refers to the establishment of employment terms according to the dictates of supply and demand.[4] In its purest and least realisable form, this would require daily negotiations between each employee and employer. In a more practical form it could involve periodic negotiations between an employer and each employee or group of employees. In our usual experience, however, individual "negotiations" consist only of an offer by an employer and an acceptance or rejection by the putative employee. The "negotiation" is thus implicit, as cumulative individual decisions shape the employers' next offers. Negotiation with a group of employees resembles the collective bargaining model but the differences between the two models are sharp.

As in other market transactions, there is no legal obligation that the parties deal with one another. The success of the enterprise depends solely upon the ability of the employer to engage the necessary employees, not on its achieving a collective agreement or furthering the government's economic or social policies. Lastly, by definition the only pertinent criterion of wages is the market value of the services offered. This contrasts sharply with the typical concerns of collective bargaining for maintenance of relativities, adjustments in wages to account for increases in the cost of living, and the like.

Although sometimes perceived as unprincipled, labour market theory rests on several important axioms. The key one, of course, is that economic laws of supply and demand will produce employment terms sufficient to attract the required services. The second is that the resulting terms will contribute to profitability and thereby expand employment opportunities and societal wealth. The third, seldom stated openly, is that market terms will be sufficiently attractive to obviate social unrest.

In contrast to the other forms of labour dispute regulation, the labour market requires no governmental designation of participating parties. Whether employers or employees act individually or in concert is immaterial. It may (and almost certainly will) establish "rules of the game", but these will be the ones governing all economic actors, chiefly prohibitions on the use of force or fraud.

It necessarily follows that the labour market *must* be agnostic about both procedures and results. With such a limited test of success, any road will do and, in theory at least, the outcomes are inescapable. On the other hand, the labour market must be hostile both to centralisation and to standardisa-

4 Of course the laws of supply and demand do not operate perfectly in the labour market. As labour economists are quick to observe, lack of information, lack of mobility, the development of labour markets 'internal' to the firm, the bureaucratisation of large corporations, and many other factors distort the market's operation. Thus neither wages nor employment levels respond immediately and proportionately to changes in supply and demand. They are, in the economists' jargon, 'sticky'. Similarly, legal regulations such as wage-related taxes on employers, legally-mandated provision of employee benefits, and restrictions on dismissals of employees discourage employers from automatic responses to labour market signals. For present purposes, however, it is sufficient to define the labour market as an ideal type, like the other three previously discussed.

tion. It must oppose centralisation because no central power could accurately determine the pertinent economic factors in every location. It must oppose standardisation because differentiation and change, rather than uniformity and stability, are the principles of the marketplace.

Typology of the Subject Countries

If we were to place these ideal types on a continuum according to their degree of government involvement they would appear in the order just presented. Statism rests at one end (point A), followed by compulsory arbitration and collective bargaining at points B and C, with the labour market at the other end (point D). With that arrangement in mind, it is simple to plot the locations of the subject countries' regulatory systems.

(i) In Legal Form

In legal form, Australia falls between points A and B. It has an ostensibly compulsory arbitration system but state controls on procedures and results heavily influence that system. This can be seen in the government's detailed regulation of the arbitral process, in its periodic restrictions on wages, in the influence the government's economic policy has on arbitration tribunal judgments, and in the frequent corporatist negotiations (most recently exemplified by the Accord).[5] Moreover, statutory carrots and sticks ensure that virtually all unions register to participate in the arbitration system. Once they register, the law closely regulates their organisation and activities.[6]

New Zealand (which until 1984 was in the same formal position as Australia is today) would in 1989 fall between points B and C. Its current law provides for a collective bargaining system, but strong residual legal and practical pressures force many parties to use the nominally voluntary arbitration system. Arbitration awards can extend beyond their expiration dates, for instance, and both the arbitration agencies and the Minister of Labour retain substantial powers to limit labour disputes. Perhaps most importantly, parties working through the arbitration system can force their bargain on the entire industry (or, with craft unions, across industries), thereby moving toward a cherished union objective, "taking wages out of competition".[7] The result might be termed "quasi-compulsory" arbitration.

5 Writing a few years ago, Peter Scherer described Australia's industrial relations system as syndicalist rather than corporatist. In his view the unions run the show, using the arbitration system as the "executive committee of the labour aristocracy". "The Nature of the Australian Industrial Relations System: A Form of Syndicalism?" in *Australian Labour Relations: Readings* (G W Ford, J M Hearn and R D Lansbury, eds, Macmillan, 4th ed, 1987) 81. Even discounting the statement for literary hyperbole and for the effects of the pilots' strike, he has some claim to a core of historical accuracy. On many occasions Australian unions have been able to opt out of the arbitration system when it suited them while at other times using it against employers.

6 D Yerbury, "Legal Regulation of Unions in Australia: The Impact of Compulsory Arbitration and Adversary Politics" in *Perspectives on Australian Industrial Relations,* supra n 1 at 82.

7 K Hince & M Vranken, "Legislative Change and Industrial Relations: Recent Experience in New Zealand" (1989) 2 Australian Journal of Labour Law 120 at 127-29.

Formal regulation in the United States falls between points C and D. Like New Zealand, it has a formal collective bargaining system applicable to unionised employees. Unlike New Zealand, however, there is no provision for extension of negotiated agreements to other parties and no legal requirement that employees join a union. More important still, the vast majority of the work force – about 84%, in fact – remains non-union: their employment terms are set by the labour market through individual negotiation.[8]

(ii) In Practice

Reality is far more complicated, so no linear graph can fully present the positions of the three nations. Although already positioned between two ideal types, each country's formal system contains important practical elements of a third or fourth.

Thus collective bargaining dominates Australia's industrial relations in several different ways, despite the formal statist and arbitrationist elements. Some parties simply ignore the arbitration system altogether or opt out of it on certain occasions. When permitted by the government to do so, arbitration tribunals tend to rubber stamp deals negotiated by labour and management. Much of the purported conciliation or arbitration activity is in reality bipartite or tripartite bargaining. Bargaining and arbitration thus alter one another, producing complementary hybrids rather than strict alternatives. Arbitration becomes "accommodative" rather than "normative", and bargaining heavily influences arbitration decisions.[9] As one scholar put it,

> in practice there is a mingling of negotiation, conciliation and arbitration in what is in effect a process of legislation in which the parties participate with the object of shaping the outcome in accordance with their objectives.[10]

Finally, labour market realities have a disconcerting way of imposing themselves on the parties, however much the parties would wish it otherwise. As unemployment rises, the unions' ability to achieve real wage increases will diminish; if real wages do rise faster than productivity, unemployment will likely rise, too.

Similarly, even though New Zealand formally combines collective bargaining with compulsory arbitration, government preferences still influence bargaining results. Some of these influences are direct, for example the government's decisions on wages for its own employees and the attempts to negotiate a kiwi Accord. Since 1984, the influences have more often been indirect.

Government policies in several other areas (e.g. taxing and spending, deregulation and removal of import controls) placed informal but very real constraints on labour and management. Collective bargaining results

8 Subject, of course, to the sorts of imperfections in the labour market mentioned in n 4 supra.

9 J E Isaac, "The Coexistence of Compulsory Arbitration and Collective Bargaining" in *Perspectives on Australian Industrial Relations,* supra n 1 at 129.

10 Walker, supra n 1 at 9.

continue to influence rulings of the ostensibly independent arbitration tribunal. Finally, New Zealand has no more than any other nation been able to escape the strictures of the labour market. Competitive pressures and the resulting unemployment have limited wage gains in some industries, while shortages of certain skills in others have produced some steep rises.

There are fewer non-lineal complications applicable in the United States, but even there governments exert some direct controls. The federal and local governments unilaterally set the terms for most of public employees (one out of every seven American workers) because many are not unionised and because public sector bargaining laws often exclude wages from bargaining or arbitration. In other jurisdictions public employees are subject to compulsory arbitration systems much like Australia's. Moreover, government policies about public employees inevitably influence the labour marketplace which governs the wages of most other employees. Minimum wage laws and requirements for premium pay for work over forty hours in a week apply to virtually all employees. Even in areas less influenced by government regulation, the line between collective bargaining and market results is faint: collective bargaining results influence the non-union sector, and vice-versa.

In sum, the American system of labour dispute resolution, like those of Australia and New Zealand, is a composite of the different models. The United States relies more heavily on collective bargaining and the labour market, to be sure, but retains distinct statist and arbitrationist elements.

Critique and Evolution of the Regulatory Types

Each of the ideal regulatory models has its limitations. That is one obvious reason why no country has adopted the pure form of any single model. The various admixtures may well be due to attempts to correct problems stemming from the preferred model. Statutory "escape hatches" from Australia's compulsory arbitration system may be intended to ease arbitration's rigidities, America's statist elements surely aim at some of the harsher aspects of the labour market, and so on. Even in the best of times, this tinkering is a never-ending process, if only because different parties with different ideologies alternate in control of the government.

But these have hardly been the best of times. Each economy has faced remarkably similar pressures which have combined to strain every settled form of industrial relations. Increased economic interdependence, intensified international competition, and domestic deregulation have forced even the stodgiest employers to search for efficiencies. Dramatic demographic changes in the work force have altered patterns of labour supply. Labour supply changes in turn provided employers with the incentive and the means to experiment with part-time, casual, and contract labour. Technological innovations have erased traditional job demarcations and have played havoc with patterns of labour demand.

Predictably, then, the pace of change in labour relations has quickened. Each country had undergone more and greater reforms in labour relations in the last decade than in the preceding three. The changes have, however, not been random. The strongest single force in each country has been the

same: a tendency to rely more on market forces and less on statist direction.[11]

(i) Statism

In every instance in which it operates, statism has proved unworkable, inefficient, or both. The events in Eastern Europe are only the latest confirmation of this truism. If a government seeks to control inflation by reducing real wages or profits over the long term, its dictates will eventually fall to constituent pressures. If instead it seeks labour peace by surrendering to the demands of the stronger unions, it will sacrifice economic efficiency as labour costs inhibit sales of goods and services. More often statism proves *both* unworkable and inefficient. This was always so, of course, but the flaws became glaringly apparent only under the recent pressures described above.

So complete has been the intellectual sea change that a return to broadly interventionist policies is virtually unthinkable in any of the three nations, whichever party holds the reins of government. Each fully realises that the key to prosperity in an era of international markets is productivity, not stability. Every government that wants its economy to compete in world markets will eventually have to reduce its attempts to control the employment terms.

In the United States this has long been obvious. Not in fifteen years has a government seriously attempted an "incomes policy". It has been even longer since any administration regularly intervened in private sector labour disputes. Apart from a few remaining restrictions such as a minimum wage law, the United States government has virtually abandoned efforts at direct control of private-sector employment terms.

In New Zealand the shift is more recent but equally obvious. Not only has the government abolished the compulsory arbitration system, for the last five years it has studiously refrained from either setting an incomes policy or intervening in private sector labour disputes. Even more startling has been its delegation of authority to "corporatised" government agencies to settle their own labour disputes. It has even tolerated disruptive labour disputes in those agencies.[12] The recent refusal by seamen to operate the inter-island ferries is only the most obvious example. There remain in New Zealand more substantive controls on employment terms than in the United States, but in all other respects the same tide washes both shores.

Australia has not gone so far. Indeed, given the government's insistence on its wage limits during the pilots' strike, one could argue that statism

11 R Edwards & M Podgursky, "The Unravelling Accord: American Unions in Crisis" in *Unions in Crisis and Beyond* (R Edwards, P Garonna, and F Todtling, eds, Auburn House Publishing Co, 1986) 14; Hince & Vranken, supra n 7; P Berry & G Kitchener, *Can Unions Survive?* (Building Worker's Industrial Union, 1989); J Niland & K Spooner, "Structural Change and Industrial Relations: Australia" Proceedings of the 8th World Congress of the International Industrial Relations Association (1989) Vol II at 97-114; *The Need for Change: Challenges for the Trade Union Movement of Today* (New Zealand Council of Trade Unions, 1988).

12 See generally Hince & Vranken, supra n 7.

is alive and well. This may be misleading. Even the pilots, one suspects, could have accomplished much more had they not been so blatant about breaking the government's guidelines. Certainly other unions have managed to do so. Moreover, the more effective the government's regulation – that is, the more it succeeds in reducing real wages – the more the unions will chafe at it. Prime Minister Hawke has been surprisingly successful in holding the unions to the Accord, but does anyone believe that can last for long? And once the unions have had enough, how effective will the government's dictates be?

Historically, incomes policies fail either because unions refuse to abide by them or because governments, fearing non-compliance, water down the policies to the point of meaninglessness. The same will happen in Australia. When it does, the next step will initially involve moves toward a more independent arbitration system. Farther down the road there will doubtless be attempts to incorporate collective bargaining and market forces in the arbitration system.

Indeed, although it did little else, the new Industrial Relations Act 1988 has already moved in that direction. It gives some recognition to party autonomy over both procedures by providing (in sections 115-117) that certified agreements will prevail over any award. It also encourages the formation of industrial unions through amalgamation, a development which will make awards and agreements more attuned to the special factors affecting each industry.[13]

(ii) Compulsory Arbitration

At first glance compulsory arbitration seems to be more objective than statism, hence more flexible and efficient. Its fundamental premises, however, are fallacious. There is no single "correct" answer to industrial disputes, nor is there any way to set employment terms without regard to the parties' perceptions of their own interests and their economic power.

The extreme reliance in Australia and New Zealand on historical relativities (or "comparative wage justice", the Australian term) exemplifies the practical limitations of the search for the "correct" wage scale. The force of the argument for relativities is the assumption that a relationship between the wages of two job classifications has merit in itself, and therefore ought to continue, perhaps forever. The idea is fundamentally mistaken, of course. An increased demand for one job category requires an increased supply of workers, but why should workers shift from one classification to another if there is to be no monetary reward? Alternatively, why should buggy whip makers get a raise simply because the economy needs more electricians?

Reliance on relativities virtually eliminates considerations of ability to pay and of productivity. Because of their tendency toward ossification, moreover, the relativities themselves

13 A Stewart, "Industrial Relations Act 1988, The More Things Change . . ." (1989) 17 Australian Business Law Review 103.

> frequently bear no correlation to actual skills in comparative industries, and technological changes effecting [sic] relative skills often render the mathematical relationship totally without rational foundation.[14]

Similar problems beset every other suggested standard of correctness.

Furthermore, to the extent that compulsory arbitration is "impurely" influenced by overt political considerations, compulsory arbitration suffers from the same problems that beset statist solutions to labour disputes. It quickly becomes unworkable, inefficient, or both. Governments concerned about competitiveness or faced with the refusal of labour and management to work within the system will either abandon compulsory arbitration or revise it to incorporate collective bargaining and the labour market.

If those were not problems enough, neither Australia's nor New Zealand's compulsory arbitration system ever accomplished its prime objective. Both countries adopted compulsory arbitration primarily to prevent strikes, yet strikes not only continued but placed Australasia among the most strike-prone areas of the globe.[15] Worse, the problem is insolvable within a true arbitration system because attempts to punish striking unions and employees are usually ineffective or even counter-productive.[16] What good is an arbitration system that imposes inefficiencies without achieving labour peace? The movement away from compulsory arbitration has thus been understandable and even predictable.

Again, the process of change is most obvious in the United States and New Zealand. The United States experimented with compulsory arbitration many times during this century. Both World Wars saw extensive mandatory arbitration programmes. After the Second World War, several states imposed arbitration on "essential" industries and still more did so on the public sector. Only the last experiment continues today, and even it lacks consensus support. Few new states have moved to compulsory arbitration in this decade and some which have had it in place now seek to avoid it.[17]

Similarly, New Zealand abandoned its compulsory arbitration system in 1984 and the government has rigidly refused to return to it even during recent potentially serious strikes. To the contrary, a key mark of the Labour Government's industrial relations policy has been its attempt to push labour and management toward self-reliance. As part of this strategy, the government has distanced itself from day-to-day industrial relations and has

14 Grills, supra n 1 at 8.

15 M P Jackson, *Strikes: Industrial Conflict in Britain, the USA and Australia* (Wheatsheaf Books, 1987) 13, 15, 17; S W Creigh, "Australia's Strike Record: The International Perspective" in *Alternatives to Arbitration* (R Blandy & J Niland, eds, Allen and Unwin, 1986) 29.

16 C Mulvey, "Alternatives to Arbitration: Overview of the Debate" in *Alternatives to Arbitration* ibid at 17; A Geare, "Penalties for Strike Action" [1982] NZLJ 361.

17 D Nolan & R Abrams, "American Labor Arbitration: The Early Years" (1983) 35 University of Florida Law Review 373 at 407-11, and "American Labor Arbitration: The Maturing Years" id at 557, 559-77, 580-81; J J Loewenberg, "Compulsory Arbitration in the United States" in *Compulsory Arbitration: An International Comparison* (J J Loewenberg, ed, Lexington Books, 1976) 141.

resisted union calls for a corporatist approach to wage fixation. Already there has been a notable increase in the flexibility of wage settlements and other outcomes.[18]

Australia is unlikely to prove much different. Even there, how long will the unions tolerate an arbitration system which reduces their real wages? What sanctions could the government use against a general union revolt? Given Australia's historic commitment to compulsory arbitration, however, it is not likely that any Australian government could simply abolish compulsion as New Zealand did. Far more likely is reform of the arbitration system to incorporate elements of collective bargaining and decentralisation. The object will be to make labour market forces play a bigger role in wage fixation.

Small steps in these directions can be found in the new Commonwealth Industrial Relations Act 1988 and in Queensland's Industrial Conciliation and Arbitration Amendment Act 1987. Both laws make it easier for parties to avoid the arbitration system's rigidities.[19] More steps will likely follow, in practice if not in law.

By far the most significant Australian development is the crumbling of the old consensus in favour of compulsory arbitration. A good example of the intellectual trend is the Niland Report[20] which may influence the shape of industrial relations in New South Wales. Another sign is the Business Council of Australia's recent study, *Enterprise-based Bargaining Units: A Better Way of Working.* That study made a strong case for replacing centralised arbitration with enterprise bargaining in order to enhance productivity. As radical as the suggestion was in the Australian context, the Business Council's study drew enthusiastic editorial endorsement in leading newspapers.[21] Many others have voiced similar criticisms of compulsory arbitration.[22] The Opposition coalition has already adopted similar policy objectives, so its increased strength after the recent election may speed transition to collective bargaining and a market-driven industrial relations system.[23]

There has been some recent research suggesting that the Australian arbitration system produces economy-wide wage results roughly similar to

18 Hince & Vranken, supra n 7, at 124-125, 137-139.

19 A Stewart, supra n 13; R Mitchell, "Labour Law Under Labour: The Industrial Relations Bill 1988 and Labour Market Reform" (1988) 1 Labour & Industry 486; Hall, "Deregulating the Labour Market in the Pioneer State" (1988) 1 Australian Journal of Labour Law 59.

20 *Transforming Industrial Relations in New South Wales — A Green Paper* (Government Printer, New South Wales, 1989) Vol 1.

21 "Business Council Plans a Better Way of Working," *The Weekend Australian,* 7-8 October, 1989, at 20; "A Changing State of the Unions", *Sydney Morning Herald,* 9 October, 1989, at 14.

22 W Howard & C Fox, *Industrial Relations Reform: A Policy for Australia* (Longman Cheshire, 1988); *Alternatives to Arbitration,* supra n 14; *Arbitration in Contempt* (H R Nicholls Society, 1986).

23 Berry & Kitchener, supra n 11 at 33-39.

those collective bargaining would yield.[24] While these studies show a degree of wage flexibility comparable to the United States and Britain, they deal only with the broadest patterns. They offer no evidence about inter-firm and inter-industry differences, which are the most important measures of labour market flexibility. Indeed, if the Australasian arbitration systems have any effect at all, they must produce more wage rigidity. What could be less flexible than a "blanket clause" setting a wage rate applicable to every firm in the industry? Even that research, moreover, demonstrates that arbitration tribunals have produced a more compressed wage structure than would otherwise exist.[25]

New Zealand shows more labour market flexibility than Australia, but this may reflect the lessened reliance on the arbitration system since 1968. Even there, the most comprehensive study concluded that

> the New Zealand labour market is not as inflexible as is often alleged, but . . . we could probably achieve a more efficient and equitable use of our resources by enhancing the role of bargaining and providing more freedom to choose different bargaining patterns.[26]

In other words, the Australasian arbitration systems at the very least constrain the shape of wage outcomes, even if they do not produce higher average wages.

Furthermore, what flexibility there is comes despite the arbitration system rather than because of it. Both arbitration systems allow some parties to ignore the system, permit others to negotiate above-award payments, disguise bargaining agreements as awards, and encourage raises keyed to productivity agreements. This is no answer to the complaints about arbitration's rigidity, of course. The unresolvable paradox is that arbitration's flexibility depends upon its toleration of escapes from its clutches. To put it concisely, the arbitration system "works" (in the sense of avoiding inflexibility and outright revolts) only because it does not work (in the sense of substituting "right for might").

(iii) Collective Bargaining

Collective bargaining is not immune from evolutionary pressures. Here the key is incorporation of market forces into bargaining results. This is what the current term "labour market flexibility" is all about. The greatest economic flaw in collective bargaining is this: precisely to the degree that it is successful according to the unions' terms — that is, to the degree that it "takes wages out of competition" by setting "the rate for the job" and enshrining "comparative wage justice" by means of "relativities" — collective bargaining silences the market signals needed to alert individuals

24 Some of the studies are discussed in C Mulvey, supra n 16, at 17, and in K Whitfield "The Australian Wage System and Its Labour Market Effects" (1988) 27 Industrial Relations 149.

25 Mulvey, supra n 16 at 17; Whitfield, ibid at 158.

26 *Labour Market Flexibility: Report No 7* (Economic Monitoring Group, New Zealand Planning Council, 1986) 57.

and businesses to changing needs. Without the signals, of course, adaptation becomes impossible. Depriving the labour market of wage signals merely guarantees a misallocation of both labour and financial resources, with a net loss to society and no net gain even to the workers.

These problems can be minimised within the bargaining context, but only by eliminating centralised decision-making and standardisation of terms. Enterprise-level bargaining, for example, forces each party to consider more market factors – supply and demand of labour, raw materials, and product, local costs of production, and so on. Similarly, true productivity bargaining (as opposed to the sham bargaining used to avoid statist caps on wage increases) produces real efficiency gains which quickly translate into real income gains. Note, however, that these accommodations undercut the very idea of collective bargaining. The results are less "collective", for one thing, and the "bargaining" becomes more an adaptation to the market than a simple struggle between two players in a zero-sum game. On this point, at least, the far left of the labour movement has it right. Contractualism in general, and enterprise-level productivity bargaining in particular, represent pacts with that despised devil, the market.

Nevertheless, and despite predictable resistance, collective bargaining systems are likely to continue their evolution toward labour market mechanisms. If they do not, the only alternative is extinction, as efficient producers drive out the dinosaurs. Subsidies and import restrictions can delay the evolution but cannot stop it. Eventually consumers and governments catch on to the game – that some special interest groups are using the public's money in a futile attempt to stop the clock. The international industrial relations landscape is littered with the remains of unions and businesses that failed to evolve – automobile manufacturers, printing establishments and coal mine unions in Britain, unionised construction and textile firms in the United States, and steel producers in Western Europe, among many others.

The changes are apparent in each country. In the United States, unions have signed collective bargaining agreements containing terms that would have been unthinkable only a few years ago. Consider, for example, recent elimination of job demarcations and of inefficient work rules; "multi-skilling" provisions in labour agreements; two-tier wage systems; productivity or profit-related wage increases; and quality circles and other forms of employee involvement. These and other practices have made it far easier for market forces to work their way through the employment relationship. Since the American bargaining structure has long been decentralised and since American unions retain power only in a few geographical and industrial pockets, no governmental changes were necessary.

In Australia and New Zealand, in contrast, governmental changes were essential. In both, legal reforms were needed to permit escape from the arbitration system. Even outside of arbitration, restructuring of awards and agreements, and reorganisation of the unions which obtained them, were also important. If market forces were to have greater play, there had to be some way to discover and implement productivity improvements at

the local level. In Australia, this first occurred through a national wage award which required decentralised productivity bargaining if unions were to obtain the maximum wage increase. In New Zealand, the first step was the particularly bold one of making arbitration voluntary. Both countries, New Zealand by statute and Australia by court judgments, are expanding the permitted subjects of collective bargaining.

Reorganisation of unions was desirable, if not essential, and thus both countries encouraged amalgamation along industry lines. In both, governments imposed a new minimum size for unions and removed old restrictions on amalgamation. The clear objective is industry-based bargaining. Nevertheless, the laws do not require the resulting unions to limit themselves to a single industry or even guarantee that a single union will represent all of an employer's employees. However well-intentioned, the reforms in union structure seem both halting and confused. They nevertheless signal a desire to move toward a bargaining structure which can accommodate differences between industries, if not differences between individual employers.

Both countries have also enacted laws which threw some formerly protected segments of the labour force into the general arena of collective bargaining. The most notable examples are the watersiders, whose cosy statutory employment schemes are changing into normal employment relationships. In the public sector, New Zealand's reforms are especially striking. Many thousands of employees in "corporatised" government commercial activities such as airlines, railways, mining, electricity production, and forests are now subject to the same labour law governing their private sector counterparts.[27]

Finally, both countries reveal broad intellectual and political currents supportive of deregulation and decentralisation of labour relations. The Australian evidence has already been mentioned.[28] Similar forces are at work in New Zealand.[29]

Paradoxically, Australasian movements toward freer bargaining and smoother responses to labour market pressures required new types of regulation. If the regulation proves to be no more than a change in structure, the paradox will disappear once the change is in place.

(iv) The Labour Market

So far the thrust of this discussion has been that regulation of industrial disputes in Australasia and the United States has moved and continues to move from government-controlled, centralised and standardised mechanisms to party-controlled, decentralised and market-driven mechanisms. The movement is, not coincidentally, from the "left" on my hypothetical graph to the "right". Were the labour market itself immune from outside intervention, I might conclude with a prediction of the

27 Hince & Vranken, supra n 7 at 131-134.
28 Supra nn 20-23.
29 Eg S Upton, *The Withering of the State* (Allen & Unwin New Zealand Ltd, 1987.)

eventual triumph of market forces, either through individualised bargaining or through charades of government policies, arbitration awards or collective bargaining. Nothing in this world is quite so simple.

Although the market will produce more efficient allocations of labour resources than any of the other regulatory models, its operations depend on the protection and toleration of the government. Inevitably the market will demand change, particularly in those situations long subject to government regulation. Deregulation of the skies threw American airline companies into industrial relations turmoil, and withdrawal of farm subsidies in New Zealand bankrupted many farmers. Economists argue that these are "teething problems" which will gradually disappear and that subsequent changes are likely to be more gradual since the market will exert its pressures daily.

Even if the economists are correct, it is no use talking to politicians of the "long run" when the next election is a year or two away. If the market's allocations produce too much political pain in the present, any government will withdraw its toleration. Any market-dominated industrial relations system will occasionally produce results unacceptable to the government of the day. Wages in one industry will drop too fast. Labour costs in another will outpace inflation. Employment will disappear in a third. A fourth will suffer long and bitter strikes which inconvenience the public or other producers.

When these things happen, any government will act. The government might exercise direct control of employment terms (a partial return to statism), or act through an ostensibly impartial arbitration system (a partial return to compulsory arbitration). Alternatively, it might simply adjust the power relationship between labour and management (an official thumb on the scales of collective bargaining). In short, the labour market will prove to be no more pure than any other form of industrial dispute resolution. If the labour market retains its vitality, however, it will enhance the production of the wealth out of which real earnings must come. As alternative forms of regulation prove less efficient, international competition will continue to pressure governments to rely more on the labour market.

Conclusion

Like most other industrialised nations, Australia, New Zealand and the United States attempted to adopt clear models to prevent and resolve labour disputes – compulsory arbitration for the first two and collective bargaining for the last. From the start, though, each formal system contained important elements from alternative models. In Australasia, statism coloured the arbitration systems; in the United States, federal law deliberately left most workers outside the collective bargaining relationship. The actual practices of labour relations in each country were even more complicated. Collective bargaining quickly came to dominate the ostensibly independent Australasian tribunals, for instance, and governmental choices influenced collective bargaining outcomes in the United States. In all three nations, labour market pressures tightly constrained the other dispute-resolution systems' formal freedom to set employment terms.

In recent years all three countries faced similar challenges — increased international and domestic competition, changes in the work force, and technological developments. Given their radically different starting points, it is most surprising that all three responded in the same fashion. Each moved away from statism toward free and responsible collective bargaining and a greater receptivity to labour market developments. It would be rash to predict complete harmony among the three labour relations systems, but they are already closer together than ever before — and they are moving closer still.