Does American Labour Arbitration Provide a Model for Australia?

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INTRODUCTION

The American industrial relations system, like those in many other nations, has been under great pressure during the last decade. Intensified foreign and domestic competition, increased employer opposition to collective bargaining, hostile presidential administrations, unstoppable technological changes, diminished public support, and a sharp recession in 1981–82 combined to batter unions. As the unions' bargaining power declined, so did their membership (now down to about 16% of the work force from a peak of 35% in the mid-1950s) and, in turn, their political influence.[1]

Amidst all this turmoil there has been just one continuing positive note, the commitment of labour and management to resolve their contractual interpretation disputes by voluntary arbitration rather than by work stoppages or litigation. Support for the arbitration system remains near-universal. Almost every collective bargaining agreement contains an arbitration clause, and almost all parties to collective agreements accept arbitration awards without the need to resort to legal compulsion.

American labour arbitration's unique status as a peaceable island in an otherwise stormy labour relations sea may make it of interest to Australians, whose own system of industrial relations has suffered some of the same pressures. Vocal critics, both inside academia and without, have condemned Australia's traditional forms of labour dispute resolution.[2] At both the federal and state level, recent legislation makes it easier for parties to avoid the rigidities of the existing system. In Queensland, for example, parties may now opt out of the arbitration system altogether if they comply with stringent conditions.[3] Federal legislation now virtually invites a creation of a private

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1 R Edwards and M Podgursky, 'Unraveling Accord: American Unions in Crisis', in R Edwards, P Garonna, and F Todtling (eds), *Union in Crisis and Beyond: Perspectives from Six Countries*, (Dover, Massachusetts, Auburn House Pub Co, 1986), 14.

2 Eg, *Arbitration in Contempt* (Melbourne, H R Nicholls Society, 1986); R Blandy and J Niland (eds), *Alternatives to Arbitration*, (Sydney, Allen & Unwin Pty Ltd, 1986); W Howard and C Fox, *Industrial Relations Reform: A Policy for Australia*, (Melbourne, Longman Cheshire, 1988); and J Niland, *Transforming Industrial Relations in New South Wales: A Green Paper* (New South Wales, Government Printer, 1989), Vol 1.

3 See *Industrial Conciliation and Arbitration Amendment Act* 1987; these conditions were tightened by *Industrial Conciliation and Arbitration Amendment Act* 1989; see Hall, 'Deregulating the Labour Market in the Pioneer State', (1988) 1 *Australian Journal of*

system of rights arbitration by providing that the Industrial Relations Commission will not arbitrate over matters contained in certified agreements.[4] Australia's mentor in compulsory arbitration, New Zealand, has abolished compulsion. Perhaps even more significant is the increasing recognition in Australia of the need to distinguish between disputes of interest and disputes of right.[5] Australians may therefore find something of use in the American experience of labour arbitration.

The primary objective of this article is to describe the practical aspects of American labour arbitration. It begins with some legal and factual background, but it focuses on the mechanics of the system, not its theory or the details of its history.[6] The article then describes the arbitrators, the hearing process, and the costs of labour arbitration. It concludes with a brief exploration of the possible utility of the American experience for Australia.

One preliminary distinction is critical. When one speaks of labour arbitration in America, the normal reference is to the resolution in the private sector of disputes of 'rights' or 'grievances' rather than disputes of 'interest'. The latter term concerns the determination of the terms of employment, the former only their interpretation or application. Although there is some interest arbitration in the United States, most of it occurs in a narrow field, namely the public sector in those jurisdictions which permit government employees to bargain but prohibit them from striking. The public sector also has quite a bit of grievance arbitration, but for the most part it does not differ from private sector grievance arbitration.

This article therefore concentrates on private sector rights arbitration, with comments where necessary about other types. American grievance arbitration also encompasses most of what other countries know as personal grievances. This is because American collective bargaining agreements contain specific rules on treatment of individual employees. In the area of employee discipline, for example, most collective agreements permit the employer to discipline or discharge employees for 'just cause' (or some similar term). Other provisions typically prohibit victimization or other forms of discrimination, specify the allocation of benefits like overtime or vacation choices, and so on. This results in the 'contractualisation' of individual disputes: the decisive issue becomes interpretation of a document rather than fairness or justice in the abstract. Vindication of one's individual rights in the work place thus becomes one with maintenance of the collective rights spelled out in the agreement.

Labour Law 59. [Ed note: See now ss 10.4 to 10.20 Industrial Relations Act 1990 (Qld).]

[4] *Industrial Relations Act* 1988 (Cth) s 116(1)(e); see A Stewart, 'Industrial Relations Act 1988, The More Things Change . . .', (1988) *Australian Business Law Journal* 103; R Mitchell, 'Labour Law Under Labour: The Industrial Relations Bill 1988 and Labour Market Reform', (1988) 1 *Labour & Industry* 486, 493.

[5] eg, Niland, supra fn 2.

[6] On the history of American labour arbitration see D R Nolan and R I Abrams, 'American Labor Arbitration: The Early Years', (1983) 35 *University of Florida Law Review* 373 and 'American Labor Arbitration: The Maturing Years', (1983) 35 *University of Florida Law Review* 557.

BACKGROUND

One can understand the rudiments of American labour arbitration without knowing much more about the broader labour relations system, but a description of the key differences between the American and Australian systems should enable the reader to better appreciate the reasons for grievance arbitration's success in the United States. Those differences may also suggest some necessary preconditions to the widespread use of private rights arbitration in Australia.

The first of the critical distinctions concerns union organization. In Australia, virtually any organization of the appropriate minimum size may become the registered union for employees in a given trade or industry, provided only that no other union claims to represent those employees. The affected employees have little say in whether they want union representation and if so, by which union. Once registered, the union remains the legal representative no matter how poor its performance. Except for the extremely rare case in which the government obtains a union's deregistration, the employees have no effective way to get rid of their representative or replace it with another. In the United States, by contrast, a union gains representation rights only with the consent of the affected employees, a consent that is usually expressed in a secret ballot election. If the union fails to satisfy the employees, they may obtain another election and (by a majority vote) 'decertify' the union.

For instant purposes, the main consequence of this distinction is that fear of competition compels American unions to focus their efforts at the grass-roots level. In particular, the union must seek to satisfy local objectives in collective bargaining. Once the union negotiates a collective bargaining agreement, it must vigorously defend the employees' contractual rights. This in turn focuses extraordinary attention on the dispute resolution process.

The second of the critical distinctions goes far to explain American unions' traditional reliance on contractual rights. In brief, American unions are proportionately and politically much weaker than their Australian counterparts, and have been so for at least four decades. Union members constitute only about 16% of the work force in the United States, versus Australia's 40%. Moreover, the existence of areas with far less unionization than the average provides hard-pressed employers with a safe haven. For example, the 'density rate', as industrial relations scholars term it, in North and South Carolina is about 5%. Many employers faced with high labour costs in the 'Rust Belt' (as the unionized states of the Midwest and Northeast are known) can escape to the more hospitable labour relations climates of the 'Sun Belt' (as the relatively ununionized states of the South and West are known). Accordingly, the unions' bargaining power is less than even the 16% figure would suggest.

Nor do American unions have a labour party to protect their political interests. Despite their historically close ties with the Democratic party, unions have been unable to obtain labour law reform even when the Democrats controlled the Presidency and both houses of Congress. The lack of party

discipline means that Democratic congressmen and senators from areas where unions are weak can combine with Republicans to block the unions' legislative initiatives. Indeed, labour support sometimes amounts to political poison, as in 1984, when labour's early endorsement of Walter Mondale for the Presidency gave credence to Republican charges that he was the tool of the 'special interests'.

Lacking either economic or political power, then, American unions have had to rely much more heavily on contractual rights than would otherwise be the case. Rather than lobby, they negotiate; rather than strike, they arbitrate. The result is that the unions look to arbitrators to protect their interests when they themselves may not be able to do so.

The third key distinction is that American industrial relations rests squarely on collective bargaining. Neither party can count on the government or an interest arbitration tribunal to protect it from the other's demands. The parties must resolve their own disputes, even if that means one will win and the other lose a negotiation round. More commonly, of course, the parties reach a compromise somewhere between the two starting points.

Even when one side is far stronger than the other, the labour market exercises a stern discipline. If the employer drives too hard a bargain on wages, for example, it will lose its best employees and potential employees to its competitors. If the union drives too hard a bargain, it will force the employer to cut employment, close, or move. In consequence, the labour contract represents the parties' true (if grudging) agreement and accommodation to economic reality. Each party therefore has a greater loyalty to its terms than they would to a document imposed from outside. Over time, the collective agreement gains specificity as the parties refine it to deal with new or unanticipated problems.

By statute and decision the legal system reinforces the collective bargaining foundation. Federal law makes collective agreements legally enforceable and enables labour unions — which, at common law are not legal 'persons' — to sue or be sued over alleged contractual violations.[7] In addition, the Supreme Court has adopted a policy of deferral to labour arbitration. Courts are to withhold their normal powers pending completion of an agreed arbitration procedure and to enforce the resulting arbitration award.[8] The National Labor Relations Board, the federal administrative agency charged with enforcing federal labour laws, takes a similar position.[9] In sum, all three branches of government expect labour and management to solve their own problems by bargaining and will lend their support only to assure compliance with negotiated agreements.

The fourth of the critical distinctions is that the American system is one of positive rights and duties rather than one of legal immunities. One duty and one right are especially important to labour arbitration. The *duty* is that once a union obtains the right to represent a group of employees, the employer

[7] *Labor Management Relations Act* s 301 [hereafter referred to as the LMRA].
[8] See the discussion of the *Steelworkers Trilogy* at pages 29–30, below.
[9] See, eg, *Collyer Insulated Wire Co.*, 192 NLRB 837 (1971).

must bargain in good faith with (and only with) the recognized union in an attempt to achieve a collective agreement.[10] It may not deal with the employees individually or through any other representative. So strong is the commitment to *collective* bargaining that the negotiated agreement supersedes all individual contracts, even those providing extra wages and benefits.[11] This 'duty to bargain in good faith' applies equally to the union and thus pushes both parties toward the written agreement that makes rights arbitration possible.

The most important *right* is that the parties may use industrial action — strikes or lockouts — in support of their bargaining demands. It may surprise Australians to learn that the United States, where strikes are legal, has proportionately far fewer strikes and far less time lost due to strikes than Australia, where strikes are technically illegal.[12] The right to use industrial action reinforces the contractualism underlying American industrial relations because it guarantees that the resulting agreement will reflect the reality of the parties' bargaining power. A realistic governing document is one to which each party can hold fast.

In sum, the primary distinctions between American and Australian industrial relations systems combine to make America's contractualist. Once a union wins a contract, it then fights vigorously to maintain it. As will shortly become clear, private rights arbitration seems to both parties the obvious and most effective way for them to resolve the inevitable disputes over the meaning and application of their agreements.

SOURCES, SCOPE, AND FREQUENCY OF AMERICAN INDUSTRIAL ARBITRATION

Sources

In contrast to Australia's traditional approach to arbitration, America's is almost completely voluntary. With the exception of certain parts of the public sector, unions and employers in the United States are free to adopt or not adopt a grievance arbitration system. Although the federal statute governing labour relations, the Labor Management Relations Act (LMRA) of 1947, announces a public policy favouring private dispute-resolution systems, it makes no attempt to push the parties in that direction. (Indeed, so muted is the law's endorsement that its statement of policy avoids using the word

[10] LMRA s 8(a)(5).

[11] *J I Case Co.* v *National Labor Relations Board*, (1944) 321 US 32.

[12] M P Jackson, *Strikes: Industrial Conflict in Britain, the USA and Australia* (Sussex, Wheatsheaf Books Ltd., 1987), pp. 13–17. American strikes are considerably longer than Australian strikes, chiefly because they occur during negotiations to set all employees' terms of employment for as long as three years. Australian strikes more commonly involve disputes over a single issue, frequently affecting only a part of the work force.

arbitration.[13]) As a result, private agreements are virtually the sole source of labour arbitration in the United States.

Despite the voluntary nature of American labour arbitration, the government is not simply a bystander. First of all, the government facilitates private arbitration by maintaining a roster of qualified arbitrators that parties can use to select an arbitrator. Much more importantly, since s 301 of the LMRA makes collective bargaining agreements enforceable in the federal courts, arbitration clauses in those agreements thus bind both parties. Finally, the courts have developed a firm practice (about which I will expand below) of deferring to arbitrators' awards. These policies have made arbitration almost irresistibly attractive to employers and unions alike.

The most recent studies report that about 95% of all collective bargaining agreements contain arbitration clauses. Why do the parties so universally select arbitration? The best answer is simply that arbitration is preferable to the only two alternatives, litigation and industrial action. More specifically, the parties find arbitration faster, cheaper, simpler and more expert than litigation, and less risky than strikes or lockouts. Each party has another reason:

(a) Unions wish to take final authority over contract interpretation matters out of the employer's hands and are willing to give up their main (if often ineffective) weapon, the strike, in order to do so. Given the difficulty of calling a strike over every small breach of contract, it probably is a good bargain for most unions.

(b) Employers wish to minimize the risk of strikes during the contract term and are willing to sacrifice the final word on interpretive issues in order to do so. Agreements run at least a year and often for two or three years, and that much security makes arbitration a good bargain for most employers.

The result is that an employer will agree to arbitrate grievances in return for a union's legally enforceable promise not to strike for the duration of the collective bargaining agreement. This is the famous *quid pro quo* referred to in a number of Supreme Court decisions as a reason for enforcing arbitration agreements.[14] So strong is the Court's belief in this express trade that in one case in which the collective agreement contained the *quid* (the employer's agreement to arbitrate), the Court *implied* the existence of the *quo* (the union's promise not to strike).[15]

At this point, a word is appropriate about the most obvious difference between American and Australian industrial arbitration. If the United States government favours arbitration and does so much to encourage its use, why does the counrry have a private system of arbitration rather than a public one? In fact, there once was a substantial free arbitration program offered by the

[13] LMRA s 203(d). This section states only that 'final adjustment by a method agreed upon by the parties' is 'the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.'

[14] Eg, *Textile Workers Union* v *Lincoln Mills of Alabama* (1957) 353 US 448, 455.

[15] *Teamsters Local 174* v *Lucas Flour Co.* (1962) 369 US 95. In a later case, *Gateway Coal Co.* v *United States Mine Workers* (1974) 414 US 368, the Court permitted enforcement of such a 'constructive no-strike agreement' by an injunction.

federal government. Congress abolished it in 1947, primarily because employers and unions alike worried that government arbitrators might not be completely neutral and that free public arbitration discouraged the parties from making serious attempts to resolve their own problems.[16] There was a widespread feeling that the parties' representatives sent all their difficult cases to arbitration because it cost them nothing to do so. Private arbitrators, in contrast to government employees, owed loyalty only to the parties, and even the modest cost of private arbitration encouraged the parties to reach a settlement before arbitrating a dispute. Since 1947, almost all arbitration has been private.[17]

Scope and Frequency

As mentioned above, the United States has traditionally maintained a sharp distinction between rights disputes and interest disputes. Arbitrators and the courts uniformly reject attempts to process interest disputes in the guise of a grievance, usually with a disparaging comment about the union's efforts 'to gain in arbitration what it could not get in negotiations'. The result is that arbitration governs only claims of alleged breaches of a collective bargaining agreement.

This still leaves arbitrators a lot of room. In order to protect their prerogatives, the parties usually limit the arbitrator's authority. Sometimes they do this by prohibiting arbitration of particularly sensitive subjects such as compulsory union membership clauses. At other times they restrict the range of possible remedies should the arbitrator sustain a grievance. Many contracts, for example, provide that the arbitrator may not alter the penalty imposed by the employer for an offence if he or she finds the employee guilty of the offence. Even more commonly, the collective agreement will state that the arbitrator may only 'interpret or apply' the agreement and may not 'add to, subtract from, or modify' the agreement. Because American collective bargaining agreements are quite detailed, often running to 50–100 printed pages, these provisions at once put a broad range of topics into arbitration and specify the principles governing their interpretation.

Only about 16% of the American work force is unionized, but the work force is so large that 16% works out to about 20,000,000 union members. Since almost all of them work under collective agreements requiring arbitration of all unresolved grievances, there are an enormous number of arbitrations. There are no official records, but informed estimates suggest there are between 40–60,000 arbitrations per year.

[16] See D R Nolan & R I Abrams, 'American Labor Arbitration: The Maturing Years', supra fn 6, pp. 579–80.

[17] There remain several programmes of public arbitration. Some states, eg, Wisconsin, provide state employees to arbitrate disputes, and the federal government hires outside arbitrators to deal with disputes in the railroad industry. Even where the state provides arbitrators, most parties opt for private arbitration. One reason is a widespread belief that outsiders are more competent or at least more neutral. Another might be the desire of some employers to drive up the costs of arbitration in order to discourage unions from using it too freely.

Many of these arbitrations, perhaps as many as one-half, concern discipline or discharge of employees, matters which other systems would have treated as personal grievances. There are practical reasons for this preponderance of discipline cases. First, as *economic enterprises*, unions expend their resources to gain the maximum benefit, and reversal of a discharge (or of a serious disciplinary action which might later lead to a discharge) is one of the biggest possible benefits. Second, as *political enterprises*, unions respond to constituent demands — to the 'squeaky wheel', if you will. There is no squeakier wheel than a sacked employee. Almost every agreement authorizes the employer to discipline or discharge employees for 'just cause' (or some such term). Determining whether some offence is sufficient 'cause' for the discipline imposed thus constitutes the bulk of the typical arbitrator's work load.

The next largest category of arbitrations consists of seniority disputes. Seniority is a common issue because most agreements use seniority to determine or at least influence the distribution of important benefits like promotions, transfers, job assignments, and vacations. The remaining arbitrations involve fringe benefits (eg overtime, call-in, and premium pay, health and welfare benefits, and the like), job classification, incentive pay programmes, subcontrating disputes, and miscellaneous matters.

Under some agreements the employer may file a grievance and take it to arbitration, but this seldom happens in the private sector even where the contract permits. Presumably employers have more effective ways of dealing with alleged violations by employees or unions. Most contracts allow only the union to file grievances. One important reason for this is that the existence of an employer's right to arbitration might limit its access to other legal remedies for union breaches of the agreement. The most likely union breach is a strike in violation of a no-strike pledge. When this happens, an employer's first need is for an injunction to stop the strike and then for monetary damages. In *Drake Bakeries, Inc.* v *Local 50, American Bakery Workers*,[18] however, the Supreme Court held that courts should withhold their power until the parties complete any agreed-upon dispute resolution mechanisms. Understandably, then, most employers negotiate arbitration clauses that apply solely to union grievances.

THE LEGAL STATUS OF AMERICAN LABOUR ARBITRATION

As mentioned, the law encourages but does not require labour arbitration. Once the parties enter into an arbitration agreement, however, the full force of the law holds them to it. This is implicit in the statutory provision for legal enforcement of collective bargaining agreements (s 301 of the LMRA), but few observers fully appreciated it until a remarkable series of Supreme Court decisions in 1957 and 1960. The first of these, the *Lincoln Mills* case,[19] affirmed the obvious meaning of s 301 that arbitration agreements are legally

[18] (1962) 370 US 254.
[19] *Textile Workers Union* v *Lincoln Mills of Alabama* (1957) 353 US 448.

enforceable. More importantly, it held that the federal courts were to create a new common law governing the enforcement of collective agreements. The remaining three cases, the so-called *Steelworkers Trilogy*,[20] attempted to create a coherent framework for the relationship between the courts and the arbitration process.

The first two parts of the *Trilogy* expanded on the *Lincoln Mills* holding. In *American Manufacturing*, the Court reversed a lower court which had refused to order arbitration of a grievance it regarded as baseless. According to the Supreme Court, the lower court's function in such a case is extremely limited:

> It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

In the second case, *Warrior and Gulf*, the employer argued that arbitration was barred by a contractual exception for 'matters which are strictly a function of management'. That exception did not specifically refer to the problem at issue, subcontracting, so the Supreme Court reversed the lower court's refusal to order arbitration. According to the Supreme Court:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

It was in this case that the Court, speaking through Justice William Douglas, uttered the famous dicta explaining why arbitration is to be preferred to litigation of contract disputes. According to Justice Douglas, the parties select the arbitrator for his knowledge of 'the common law of the shop' and for his ability to bring to bear considerations which:

> may indeed be foreign to the competence of courts . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

The third part of the *Trilogy, Enterprise Wheel*, involved a union's effort to enforce an arbitrator's award. A lower court denied enforcement because it disagreed with the arbitrator's interpretation of the agreement. Once again the Supreme Court reversed, holding that judges should defer to arbitration after issuance of an award as well as before, lest they undermine the federal policy favouring arbitration. Justice Douglas did admit that the arbitrator's power is not unlimited. The arbitrator 'does not sit to dispense his own brand of industrial justice', he wrote. Rather, the award is legitimate 'only so long as it draws its essence from the collective bargaining agreement'. These rather delphic phrases, that the arbitrator may not dispense 'his own brand of industrial justice' and that his award must 'draw its essence' from the agreement,

[20] *United Steelworkers* v *American Manufacturing Co.* (1960) 363 US 564; *United Steelworkers* v *Warrior and Gulf Navigation Co.* (1960) 363 US 574; and *United Steelworkers* v *Enterprise Wheel and Car Corp.* (1960) 363 US 593.

are the only real limitations on judicial enforcement of an arbitration award.

The Court's support of labour arbitration climaxed in the 1970 case of *Boys Markets, Inc.* v *Retail Clerks Local 770.*[21] In the Norris-LaGuardia Act of 1932,[22] Congress prohibited the federal courts from issuing injunctions in labour disputes except in very limited circumstances. That law attempted to eliminate what had come to be known as 'government by injunction'. Faced with the plaintiff employer's request for an injunction to stop a strike in breach of a collective bargaining agreement, the Supreme Court held in *Boys Markets* that s 301 and other parts of the 1947 legislation favouring private dispute resolution procedures permitted injunctions in such circumstances, notwithstanding the strictures of the Norris-LaGuardia Act.

Judges find it difficult to restrict themselves to the modest role prescribed by Justice Douglas. Not surprisingly, they have sought loopholes in these decisions in order to review arbitrators' awards more closely. For the most part, the Supreme Court has rebuffed these attempts and has adhered to the *Trilogy*'s principles. The most recent debate concerned the so-called 'public policy' ground for judicial review. In several cases, arbitrators reinstated employees discharged for use of marijuana, violation of safety rules, and other sensitive matters. Some of these cases turned on the employers' failure to prove the charges while others rested on alleged violations of the employees' procedural rights. A few lower courts claimed the right to review these decisions, despite the *Trilogy*'s strictures, on the basis that they were against 'public policy'.

The Supreme Court rejected the argument, although not as firmly as Justice Douglas would have.[23] Several lower courts responded by stretching the exceptions listed by Justice Douglas, particularly the 'draws its essence' test, to explain refusals to enforce awards they disliked. The struggle between judicial authority and deference to arbitration is likely to prove unresolvable.

THE ARBITRATORS

Number and Qualifications

Several thousand people (perhaps as many as 6,000) refer to themselves as labour arbitrators. In fact, a tenth of that number, most of them members of the National Academy of Arbitrators, perform most arbitrations. Many of the rest never have a case, or get one only rarely. Arbitration is the purest sort of entrepreneurial activity. There is no licensing, no examination, no recognized course of study or pre-professional training. Anyone can claim to be an arbitrator and can offer his or her services to labour and management (subject to

[21] (1970) 398 US 235.
[22] 29 USC s 101 *et seq.*
[23] *United Paperworkers* v *Misco, Inc.* (1987) 484 US 29.

an ethical prohibition on advertising),[24] but not everyone is selected by the parties. What is it that makes for a successful arbitrator?

Reputation is the key factor. Some experience in industrial relations is essential, partly to demonstrate that one knows what one is doing, and partly to make the personal contacts that lead to selection. Most arbitrators thus began their careers as advocates for one side or the other, or served in related government positions. Most of the rest taught related subjects at the University level, although even these academics are likely to have had some practical experience.

Complete neutrality is at least as important as experience. The parties must agree on an arbitrator and neither will select a person it believes to be biased in the other side's favour. Accordingly, the normal course is for advocates to 'cleanse' themselves of perceived bias by service in government or academia, or by apprenticeship with an experienced arbitrator. Indeed, one who currently represents parties in labour relations matters is ineligible for appointment or retention on the rosters of labour arbitrators maintained by appointing agencies,[25] or for membership in the National Academy of Arbitrators.

Beyond experience and neutrality, an arbitrator must be perceived as reasonably intelligent, as fair, as calm, and as sufficiently competent to conduct an efficient hearing. These are just the objective requirements, of course. Even more important are the subjective factors, particularly one's previous contacts with those selecting an arbitrator or with those to whom they turn for advice.

Perhaps one-half of the mainline arbitrators work full time in the field of dispute resolution. The most active of these earn a very comfortable living helping others to resolve their disputes — 'doing well by doing good', as the phrase goes. The entrepreneurial nature of the profession, however, means that they have no guarantee of any income. Almost all of the rest are part-timers whose main occupations are as professors (of law, economics, industrial relations, business, or engineering), lawyers in other fields, or government officials. By scheduling arbitrations for days free of other commitments, these part-time arbitrators can combine careers and top up their normal earnings by engaging in an interesting and socially useful activity. Not infrequently, part-time arbitrators build up their arbitration practices over time to the point where they can drop their salaried positions and arbitrate full-time.

At least until recently, arbitrators were almost exclusively white males of mature years. In part this was due to the homogeneous nature of the recruitment pool. Labor union and employer advocates, academics, and government labour relations officers provided both the selectors and the arbitrators. Most members of these groups were white males of mature years. No doubt another

[24] *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, s 1(c)(3).

[25] See, for example, the regulations of the Federal Mediation and Conciliation Service. 29 CFR's s 1404.5(c)(2).

reason for the preponderance of white male arbitrators was prejudice on the part of the selectors. To some extent those attitudes remain today, but in recent years more women and members of racial minorities have made it into the ranks of the mainline arbitrators. Training programmes specifically aimed at women and minorities have assisted in diversifying the profession.

The bias in favour of age, however, remains strong. Few people enter the National Academy of Arbitrators until they are well into their 40s or 50s and, once established, arbitrators often remain active into their 70s or even 80s. As a result, the average age of the Academy (and by extension, of the nation's busiest arbitrators) is over 60.

Selection

Arbitrators can be *permanent*, *panel members*, or *ad hoc*. Parties select permanent arbitrators (sometimes called 'umpires') for a stated period of time, for the duration of a collective bargaining agreement, or for such other time as they continue to want the arbitrator's services. The term 'permanent' is thus something of a misnomer. The important distinction is that the parties select the arbitrator in advance of a specific dispute with the expectation that he or she will serve for a substantial period.[26] Permanent arbitrators were once the norm and several of the earlier ones exercised extraordinary powers, even to the point of setting wages and hours. As the parties gained confidence in their own abilities to resolve disputes, they moved away from permanent arbitrators.

Panel members are similar to permanent arbitrators in that the parties select them before a given case arises and expect them to serve for some time. The difference is that a panel by definition consists of several arbitrators, who will then serve in rotation. Use of a panel gives the parties more flexibility and variety than a single permanent arbitrator while still permitting arbitrators to develop an intimate knowledge of the enterprise, the parties, and their agreement.

In contrast to permanent and panel arbitrators, *ad hoc* arbitrators serve on a single case. While the parties may later select the *ad hoc* arbitrator to hear other cases, there is no formal, extended relationship.

Once the parties have failed to resolve a dispute in their internal grievance system, they can select an arbitrator in any of several ways:

(a) They may simply agree on some individual they know or know about. In the earliest days of American labour arbitration, for example, it was common for parties to select a respected clergyman, judge, or politician.

[26] For convenience, I write as if there were just one arbitrator for each case. That is in fact the normal situation. Some older bargaining relationships, particularly in public utilities, establish tripartite panels of arbitrators, with one member appointed by each of the parties and the third selected by the first two. The partisan arbitrators are not usually expected to be neutrals. To the contrary, they are usually employees or agents of the appointing party. There are even cases in which the union's advocate also serves as the union's arbitrator! Even where the agreement specifies a tripartite board, the modern tendency is to leave the neutral arbitrator free to decide the case without the participation of the partisan arbitrators.

Today, however, it is almost universal for the collective bargaining agreement to specify a method of selecting an arbitrator.

(b) The collective agreement or a separate understanding might name an individual as a permanent arbitrator or a group of individuals as a panel of arbitrators. If parties use a panel, they will choose one member of it for a given case by lot or by some other form of rotation.

(c) Finally, the parties may request a list of names from an appointing agency which maintains a roster of qualified arbitrators. The two main appointing agencies are the Federal Mediation and Conciliation Service, an agency of the Federal Government, and the American Arbitration Association, a private, nonprofit organization which fosters arbitration and mediation in many fields besides labour relations. These organisations and several smaller ones screen applicants for their rosters on the basis of educational background, relevant work experience, and recommendations from arbitrators and advocates. Their objective is a large pool of fully qualified arbitrators who are acceptable to both labour and management.

However they select their arbitrator, the parties then notify him or her and arrange a convenient date and place for a hearing.

THE HEARING PROCESS

The Participants

The typical arbitration hearing involves the grievant, the arbitrator, and one or more advocates for each side. The advocates may or may not be lawyers. Employers use lawyers more often than do unions, but even they do so in only a minority of cases. The advocates often use one or more 'technical advisors', local people familiar with the dispute. There may also be a court reporter to transcribe the proceedings, although this happens in only a small percentage of cases. There will almost always be witnesses to testify about the facts of the dispute or about the meaning of the collective agreement. Finally, there may be observers from management or from the bargaining unit.[27]

Order of Procedure

Once introductions and other preliminary matters are out of the way, the hearing begins. By custom, the employer proceeds first (and bears the burden of proof) in discipline cases, while the union does so in all others. Hearings vary in degree of formality depending on the wishes of the parties and the

[27] My first case as an arbitrator took place in a small town in the mountains of western Virginia. The hearing was in a large hall above the volunteer fire department. Word about the hearing spread quickly, as news does in small towns. By the start of the hearing the hall filled with local citizens who apparently had nothing better to do than watch an arbitration hearing. Most hearings are quite private, however, and usually take place in a conference room at the business, in a nearby hotel, or in a hearing room provided by an appointing agency or government department.

arbitrator. Predictably, proceedings are more formal when lawyers represent the parties, when the bargaining relationship is relatively new, and when the stakes of the dispute are high. Even at its most formal, though, arbitration is less so than a court. At its least formal, arbitration more resembles a meeting of a small committee than a legal proceeding.

Almost all arbitrations have these steps:

(a) Agreement on the issue to be arbitrated and on any stipulated factual matters.
(b) Introduction of joint exhibits such as the collective bargaining agreement, the formal grievance, and the employer's response to the grievance.
(c) Opening statements by the beginning and responding parties.
(d) Direct and cross-examination of the beginning party's witnesses.
(e) Direct and cross-examination of the other party's witnesses.
(f) Direct and cross-examination of any rebuttal witnesses.
(g) Closing arguments by the parties.

There may also be visits to the plant or to other locations, if appropriate. Finally, either party may submit a post-hearing brief in addition to, or instead of, a closing argument.

The judicial rules of evidence do not apply in arbitration, so examination of witnesses and introduction of evidence is often quite loose. Most surprisingly to lawyers, there is regular use of hearsay evidence and of unauthenticated documents, and non-expert witnesses may offer opinions as well as facts. Most arbitrators try to ensure that the evidence is pertinent and not unnecessarily repetitive. When in doubt, though, they accept challenged statements or documents rather than leave the impression that 'technicalities' prevented a full hearing. As Justice Douglas commented in one of his decisions, arbitration serves a 'therapeutic' purpose as well as a quasi-judicial one. To fulfill the therapeutic objective, it is important that all participants feel that they have had their 'day in court'.[28] Arbitrators foster that impression by liberally accepting evidence (and, not infrequently, by listening patiently to utter gibberish or blatant lies).

The Award

Depending on the terms of the rules governing the arbitration, the arbitrator will issue an award within 30 or 60 days of the close of the hearing. Like arbitration hearings, awards vary widely in length and formality. Most arbitrators know that the award has to be read and applied by workers and first-line supervisors. The good arbitrator thus tries to write simply and clearly. On the other hand, disputes often involve complicated and technical issues which defy efforts at simplicity. Moreover, arbitrators know that often

[28] In *United Steelworkers of America* v *American Manufacturing Company* (1960) 363 US 564 at 568, Justice Douglas ordered lower courts to require arbitration even of claims they regard as frivolous. The processing of such claims, he said, 'may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.'

senior management and union officials will be the ones to read and apply the award. One or both may even present the award in court. As a result, even the most conscientious arbitrator may not be able to write as simply as he or she might wish.

The typical award is about 8 to 20 double-spaced typed pages. It consists of two main parts, an 'opinion' in which the arbitrator reviews the evidence and states his reasoning, and an 'award' proper, which is a brief order. The opinion contains several subdivisions. Typically these include a summary of the evidence, a statement of the agreed issue, quotation of pertinent contractual provisions and other authorities, a summary of each party's arguments, and the arbitrator's own evaluation of the evidence and arguments.

Since arbitration is a private matter between the parties, there is no requirement that awards be registered or otherwise available to the public (except for public sector awards which may be of public record). With the consent of the parties, though, arbitrators may submit awards to publishers. In this way, many awards are published and indexed and thus become available to arbitrators and other interested parties. One result of publication is a loose form of *stare decisis*.[29] Arbitrators often find guidance on interpretive issues in the decisions of those who have dealt with similar cases. Many of arbitration's supporters regard this development as providing needed consistency; critics complain that it represents another aspect of the 'creeping legalism' affecting the arbitration process.

As noted above, the arbitrator has wide latitude provided he or she purports to apply the collective agreement. Obviously, the contract's express language controls disputes, but if the language were indisputably clear the case would not be in arbitration in the first place.[30] When the language is ambiguous, the arbitrator will look to the parties' past practices, but these are seldom conclusive.

Arbitration precedents may help with interpretive questions, even though they are not binding as a matter of law. The most persuasive precedents are those on the same question, under the same agreement, and between the same parties — but once again, if matters were that clear, the parties would not likely be in arbitration. Parties may also introduce awards from other enterprises as if they were authoritative. They seldom are. Contractual provisions, past practices, and factual situations differ widely. What language means in one context may not be what it means in another. Even if the parties find cases

[29] A Latin legalism literally meaning 'to stand decided'. In practice, it refers to the doctrine that once a case establishes a legal principle, decision makers should decide identical cases in the same way.

[30] This statement needs one qualification. There is a widespread belief that parties occasionally take worthless cases to arbitration for 'political' reasons. A union may do so to show that it is vigorously representing its members, for example. An employer may do so to demonstrate support for its supervisors. This perception has increased with the development of 'fair representation' litigation, which holds unions liable for failing to represent their members 'fairly', eg, *Vaca* v *Sipes* (1967) 386 US 171. Some have argued that unions now find it cheaper to arbitrate cases they know lack merit than to defend a suit brought by the disgruntled member. It is impossible to verify these charges, let alone quantify them, but my personal experience and my conversations with advocates on both sides convince me there is some truth in them.

'on all fours' (as lawyers put it) with the instant dispute, the awards are likely to differ in result. With some truth, critics of arbitration often say that diligent research can unearth some arbitration award on either side of any issue.

In the end, therefore, the arbitrator usually falls back on his own judgment. Consider these typical issues:

(a) May the employer discharge employee A, who has twelve years of seniority and a good but imperfect perfect work record, for missing work without a valid excuse six times in the last year? (Remember that the normal contract permits discipline for 'just cause'; the issue, therefore, is whether this absenteeism constitutes 'just cause'.) Most arbitrators would want to inquire whether there is a specific, announced rule on attendance requirements, whether the employee received warnings and other forms of 'progressive discipline', and whether the employer treated other employees comparably.

(b) Is employee B, who suffered a back injury last month, able to return to work? B's doctor, a general practitioner, says that he is. The employer's doctor, a specialist in occupational medicine, says that he is not. An orthopedic surgeon to whom the employer referred the employee says that he cannot be sure. Only the employer's doctor testifies; the other doctors send notes of varying degrees of comprehensibility. Most arbitrators would accept the written evidence but give it less weight than actual testimony. They would also weigh more heavily the specialist's opinion and would probably resolve doubts in favour of the employer, who will bear the risk of liability if a return to work aggravates the back problem.

(c) Is employee C, an electrician with ten years' seniority, more qualified for promotion than employee D, a technical school graduate in electronics with only three years' seniority? The collective agreement, let us hypothesize, obliges the employer to promote the senior employee 'if other qualifications are relatively equal'. Arbitrators often deal with such grievances by applying a 'head and shoulders' test. That is, arbitrators will hold that the senior employee merits promotion unless the employer proves that the junior is 'head and shoulders' above the senior in the pertinent qualifications.

(d) Did the employer breach the agreement by subcontracting the installation of sewer pipes to a non-union firm? The employer's own employees have never installed sewer pipes, but they have repaired them and have installed other sorts of pipes. The agreement, we will assume, is silent as to subcontracting. Most arbitrators would hold that the employer is free to subcontract, absent a contractual limitation. Most would qualify this principle by an implied limitation if the union showed the employer used the subcontract to undercut the collective agreement or to weaken the union.

These are only indicative of the cases faced by American arbitrators. Actual issues can be even vaguer and more complicated. Obviously, there is no single 'right' answer. What the parties ask is the arbitrator's best judgment — ex-

actly what the Supreme Court disparagingly termed 'his own brand of industrial justice'.

Results of arbitrations are notoriously difficult to quantify. Several studies suggest that employers win roughly 50% of arbitration cases outright, unions about 30%, and the remaining 20% are split in some fashion (eg, by reduction of a discharge to a disciplinary suspension). These results do not surprise American students of industrial relations, nor do they suggest an anti-union bias on the part of arbitrators. Employers bring greater resources to arbitration and less frequently will arbitrate for 'political' reasons rather than because of the merits of the case. Moreover, most contracts contain broad 'management's rights' clauses giving the employer authority to run the business except as specifically limited by other provisions of the agreement. In these circumstances, employers should win most cases before a neutral decision maker. The only surprising fact is that, despite these factors, unions win such a high percentage of cases at least in part.

THE COSTS OF AMERICAN LABOUR ARBITRATION

Time

The parties are in almost total control of their own arbitration system. They can make it as formal and complicated, or as informal and uncomplicated, as they choose. For minor cases in which having almost any quick answer is more important than what that answer is, they may well construct an 'expedited' arrangement. They may use an abbreviated grievance procedure, for example. Or they may select an arbitrator by rotation from an existing panel, membership on which requires that the arbitrator hear and decide disputes within a few days. Moreover, they may agree to dispense with transcripts, lawyers, and post-hearing briefs. In an expedited system, a decision may follow within a few weeks of the decision to arbitrate.

On the other hand, they may want the full panoply of legalisms, especially for crucial cases. This may involve a lengthy, multi-step grievance procedure; selection of a well-known but extremely busy *ad hoc* arbitrator from an appointing agency's list; use of outside lawyers with all of the attendant scheduling problems that entails; a formal hearing procedure with many arguments about the admissibility of evidence; a transcript; and lengthy post-hearing briefs containing references to many arguably relevant arbitration precedents. Under such a system, it may take a year or more from the decision to arbitrate to the issuance of the award. Passage of time often raises the stakes, of course. By the time an arbitrator decides a discharge case, for example, the employee might have missed a year's wages.

Money

Similarly, the parties largely control their own costs. An expedited system like that described above might involve no out-of-pocket costs other than the

arbitrator's fee. Use of a novice arbitrator whose per diem fee may be as low as US$250, or otherwise capping the arbitrator's remuneration, can limit each party's total cost to only a few hundred dollars. A formal system, on the other hand, will involve very substantial expenses for attorneys, transcription of the hearing, staff time, and so on. If the parties also insist on engaging a 'mainline' arbitrator, who may charge as much as US$700 for each day of hearing, travel, and study time, plus expenses, the costs go up dramatically.

In fiscal year 1988, the average arbitration case administered by the Federal Mediation and Conciliation Service consumed one hearing day, two days of study time, and about a third of a day for travel. The average per diem was a little over US$400. The total charge for fee and costs was almost US$2100.[31] If the arbitrator comes from out of town, which is often the case outside the heavily unionized areas, travel costs will raise the total considerably.

A formal arbitration may, therefore, cost each side several thousand dollars for out-of-pocket costs alone. Arbitration may not be as expensive as litigation or strikes, but it is hardly cheap.

A MODEL FOR AUSTRALIA?

Australian readers may well wonder why the arbitration system I have described is so popular in the United States. The simplest answer is that it suits the needs of a nation whose labour relations rest on contractualism. If the agreement is the fundamental authority, some method of interpretation is essential. Compared to economic pressure and litigation, arbitration, for all its faults, looks quite attractive. Whether contractualism is the proper basis for labour relations is quite another question, but once a nation chooses that base, arbitration becomes highly likely if not inevitable.

In its native environment, then, American labour arbitration thrives. But does it provide a model for Australia? The answer to that question must be in two parts. First, given the necessary preconditions, a private arbitration system of the American sort could function as well in one country as in the other. It would provide a quick, inexpensive, and expert means of solving routine disputes of right. It would almost certainly be demonstrably superior to litigation or strikes. There is nothing so inherently peculiar about labour arbitration as to prevent its transplantation on the other side of the Pacific.

The second and more problematic part of the answer concerns the necessary preconditions. Rights arbitration presupposes a decentralized labour relations system, a commitment to contractualism, detailed and clear collective agreements, and judicial enforcement of (and reasonable deference to) collective agreements. In short, there must first be a widespread governmental and private consensus that collective bargaining is preferable to government intervention before *any* means of resolving contractual disputes can operate successfully. If either party regards the agreement as binding only

[31] Federal Mediation and Conciliation Service, 'Arbitration Statistics, Fiscal Year 1988' (1990).

on the other, or if either insists on using its economic muscle to beat the other whenever a dispute subject to the agreement arises, arbitration will be useless. Similarly, if the government is unwilling to accept the sometimes displeasing results of private bargaining, arbitration will be no more than advisory.

Obviously Australia lacks those preconditions at the moment. True collective bargaining plays only a subsidiary role in Australia's conciliation and arbitration system. Even that bargaining is highly centralized. Neither labour nor management nor the government has committed itself to contractualism. Far from regarding agreements (or awards, for that matter) as sacrosanct, the parties follow them only so long as they find it convenient. In this respect there is little appreciation of the distinction between disputes of interest and disputes of right.

Nor does either party expect that a single agreement will contain all the principles necessary to resolve their future disputes. Accordingly, they do not even attempt to make their agreements or awards sufficiently detailed to provide an adequate basis for definitive arbitration.[32] Partly because of the rudimentary nature of most Australian agreements, neither the states nor the federal government have made collective agreements legally enforceable. To judge by the experience of the country's industrial tribunals, even if they were to do so, the judges would not be inclined to defer to arbitrators' decisions.

It would therefore be premature to institute rights arbitration on any wide scale. Such an attempt would almost certainly collapse, tainting arbitration in the process.

That does not mean that labour arbitration could never succeed in Australia. To the contrary, there are already instances in which parties have resorted to labour arbitration in order to prevent industrial action. When they do so, they often use the same people who would provide the corps of arbitrators in any arbitration system of general application. It does mean, though, that some preliminary steps are required to provide the proper foundation for rights arbitration.

Some of these preliminary steps are already under construction. The recent Commonwealth and Queensland laws mentioned earlier encourage more collective bargaining, for example. If more states follow this path, the spread of collective bargaining will create a need for efficient mechanisms for interpretation of the resulting agreements. Productivity arrangements created as an offshoot of the existing interest arbitration process represent another move toward decentralized bargaining and a consequent local emphasis on contractualism. Although not yet fully appreciated, the distinction between rights and interests is conceptually quite simple. Moreover, as one recent article pointed out, it

> approximately parallels the Australian dichotomy between the ascertainment of existing rights (a matter to be dealt with pursuant to the judicial power exercised in a court) and the determination of appropriate rights for the future in a discretionary way (the process of conciliation or arbitration

[32] M Rimmer, 'Transforming Industrial Relations in New South Wales — A Green Paper', (1989) 2 *Australian Journal of Labour Law* 188, 191.

to be dealt with in an arbitration tribunal). Such a disjunction was forced on the federal system of conciliation and arbitration by application of the doctrine of separation of powers, requiring the legislative and judicial arms of government to be exercised in separate forums or tribunals. This was the effect of the *Boilermakers* case ((1956) 94 CLR 254).[33]

Other parts of the foundation for rights arbitration are not even in the planning stage. The chief of these is a joint commitment by labour and employers to resolve disputes by a binding contract. Employers are the more likely of the two to make such a commitment. The value of an enforceable no-strike pledge should be as apparent to Australian employers as to their American counterparts. The price they would have to pay for such a pledge, an agreement to let a neutral expert decide interpretive questions, would be well spent if it guaranteed several years of production uninterrupted by labour disputes.

Unions are less likely to be enthusiastic about contractualism, but even so outside pressures may push them in the right direction. If the unions cannot get their way in rights disputes by economic force, arbitration will appear an attractive second choice. Several factors now make reliance on economic force less profitable than it used to be. The modern decline in union membership as a percentage of the Australian work force from 60% to about 40% suggests that the labour movement can no longer expect automatic and widespread public sympathy for industrial action. Splits within the labour movement as exemplified in the pilots' strike show that the movement can no longer even present a united front. The perceived failure of the Australian Labor Party to toe the union line deprives labour of an important ally in its struggles with management. Finally, signs of intensified employer hostility to unions found in the growth of the New Right and in landmark cases applying common law and statutory sanctions to unions should warn labour of trouble to come.

The decision is thus in the hands of the parties themselves. American labour arbitration can provide a model for Australia — but only if unions and employers decide they need a new model.

[33] J W Shaw and M J Walton, 'The Niland Report and Labour Law: a Critical Response', (1989) 2 *Australian Journal of Labour Law* 197, 198.