# VOLUNTARY COLLECTIVE AGREEMENTS IN AUSTRALIA AND NEW ZEALAND

Voluntary collective agreements [1] have been, and still are, of great importance in England, as can be gauged from the fact that in 1948 the wages and conditions of employment of more than ten million workers are governed by such agreements. In Australasia, on the other hand, these agreements are of minor importance, the great bulk of industrial regulation being achieved within the scope of the various arbitration systems. The patchwork structure which appears to exist in relation to the status of such agreements affords, it is submitted, sufficient reason for discussing them more fully.

What is a voluntary collective agreement? It may be shortly defined as an agreement relating to industrial matters made by a combination of employees with a combination of employers, or with a single employer. Industrial matters include such questions as wages, hours, conditions of employment, and the like. A collective agreement must be distinguished from the individual contract of employment. The latter is governed by the ordinary rules applying to such contracts, while the former is subject to entirely different laws, now to be discussed.

Before examining voluntary collective agreements in Australasia, it may prove helpful to make a brief survey of the relevant statute and case law in England. This can perhaps best be achieved by treating the problem from (A) the contractual aspect, and (B) the normative aspect.

(A) *Contractual aspect.*

At common law, a combination (hereafter referred to as a trade union) of workmen may enter into valid agreements, including, inter alia, a collective agreement with a trade union of employers. The term "trade union," although limited in common parlance to combinations of workmen, may extend to combinations of employers as well. This right of trade unions to enter into agreements is, however, subject to serious limitations. The agreement may be void or voidable, because one or both of the parties thereto is an unlawful association at common law, its objects being in restraint of trade.

[1]. Since the object of the writer is to deal exclusively with voluntary collective agreements made outside the framework of the various Arbitration Acts, no reference will be made to industrial agreements generally or to such agreements as are filed under the Labour Disputes Investigation Act 1913 (New Zealand) or similar legislation.

As most trade union rules contain clauses which are in such restraint, this constitutes a serious limitation to their powers. It is well to remember that a trade union is not, as such, an unlawful combination at common law. Whether it is unlawful or not, is to be ascertained from an examination of its objects or purposes. [2] If its objects are not in restraint of trade or otherwise unlawful, the trade union may enforce an agreement, as can an ordinary club, the jurisdiction being founded on a right of property vested in the members seeking relief. This right would extend to cover the enforcement of voluntary collective agreements.

The Trade Union Act of 1871 (England) [3] was passed expressly to give a measure of protection to trade unions and conferred on them certain optional privileges, such as registration. For the present purpose, the most important provisions are sections 3 and 4. Section 3 reads: "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." The provisions of this section are qualified by section 4, the object of which was to protect trade unions by keeping out of the courts the type of agreements to which they would most generally be parties. It provides, "Nothing in this Act shall enable any court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements—(4) Any agreement made between one trade union and another. But nothing in this section shall be deemed to constitute any of the abovementioned agreements unlawful."

Section 3 preserves the legality of agreements and contracts entered into by trade unions, which but for the 1871 Act would have been void for illegality. Section 4 sets out certain types of agreements and renders them unenforceable in any court, either directly or by granting of damages. Agreements which are not covered by section 4 are not subject to the limitations thereby imposed, and can be enforced either directly or otherwise. That section, it will be noted, expressly ensures that although certain types of agreements are thereby rendered unenforceable, their legality is unaffected. An agreement covered by section 4 cannot be directly enforced or damages recovered for its breach if one of the parties to it is a combination whose legality is protected by the Act.

Although the courts are precluded from directly enforcing any agreement, this has not prevented them from granting relief in certain cases, where such relief could not be held to amount to a direct

[2] *Gosney v. Bristol Trade and Provident Society,* (1909) 1 K.B. 901. *Russell v. The Amalgamated Society of Carpenters and Joiners,* (1912) A.C. 420; *Osborne v. Amalgamated Society of Railway Servants,* (1911) 1 Ch. 540

[3] 34 and 35 Vict., c. 31.

[4] *Russell v. The Amalgamated Society of Carpenters and Joiners* (supra); *Miller v. Amalgamated Engineering Union,* (1938) 2 All E.R. 517.

enforcement. Thus, injunctions have been granted to restrain expulsion from an association [5] and to prevent misapplication of funds. [6] A declaration has been granted as an alternative to an injunction, [7] while debts arising under agreements covered by section 4 have been held to be a valid foundation for an account stated. [8]

But the "ameliorating" influence of judicial interpretation has not extended to sub-section 4. That provision, to restate its terms, expressly renders unenforceable "any agreement made between one trade union and another." It has been before the Court in the case of *McLuskey v. Cole* [9] where an agreement as to membership made between two trade unions of workmen was held unenforceable.

What is a trade union? It is defined by the Trade Unions Act as any "combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." Then follow three provisos which are not of importance here.

A trade union thus covers a combination of workmen, and, equally so, a combination of masters (employers), a fact supported by case law. [10] Section 4 (4) can therefore apply to render unenforceable an agreement made by a trade union of workmen with a trade union of employers, in other words a collective agreement. The only English case on this particular provision [11] has dealt with an agreement between trade unions of workmen, which no doubt was the intention of the original framers of the Act. But, in view of the meaning of the term "trade union," that decision would appear to be equally applicable to the case of a collective agreement between a trade union of employers and a trade union of workmen. Such an agreement is, although valid, unenforceable in any court. It is nothing more than a "gentleman's agreement" resting on the goodwill of the parties for its enforcement.

What of a collective agreement made between a trade union of workmen and a single employer? It is not covered by section 4 and would therefore seem to be enforceable in the courts, notwithstanding that the objects of the trade union were in restraint of trade, as the agreement would be protected by section 3 and would not be rendered unenforceable by section 4.

[5] *Kelly v. National Society of Co-operative Printers' Assistants*, (1915) 84 L.J.K.B. 2236
[6] *Wolfe v. Matthews*, (1882) 21 Ch. D. 194.
[7] *Yorkshire Miners' Association v. Howden*, (1905) A.C 256.
[8] *Evans (Joseph) & Co. v. Heathcote*, (1918) 1 K.B. 418.
[9] (1922) 1 Ch. 7.
[10] *Chamberlain's Wharf Ltd. v. Smith*, (1900) 2 Ch. 605; *Merrifield Ziegler & Co. v. Liverpool Cotton Association Limited*, (1911) 105 L.T. 97.
[11] *McLuskey v. Cole*, (*supra*).

(B) *Normative effect.*

What is the normative effect of a voluntary collective agreement on individual contracts of employment made pursuant to its terms? In other words, must the individual's contract of employment conform with the conditions set out in the collective agreement? And, further, must inconsistent terms in the individual's contract be replaced automatically by the provisions of the collective agreement? The answer to these questions is to be found in the degree of recognition given to collective agreements, a factor which varies from country to country and which may be given either by statute or by judicial interpretation.

Disregarding recent legislation in England which has no counterpart in Australia or New Zealand, let us examine the position as it stood prior to 1940. The leading, and one should add, only case on the question is *Holland v. London Society of Compositors* [12] where it was held that there was no right in an individual, a member of one association, to enforce an agreement made between that association and another. Such is the position under English law.

Turning now to Australasia, the first point to notice is that all the Australian States (but not the Commonwealth) [13] and New Zealand have passed Trade Union Acts which are substantially identical with their English model, and in particular, the all-important sections 3 and 4 and the definition of trade unions have been repeated almost word for word in every statute. What interpretation has been placed upon section 4 in Australia and New Zealand? The case law in both countries has adopted and followed that of England. The restrictive effect of section 4 has been considered and applied in several decisions. [14] In other cases the courts have, following English decisions, granted relief in the form of a declaration [15] or an injunction. [16]

The one decision directly on the point, that is, on section 4 (4), is *Railway Workers, etc., Association v. United Labourers' Protective Society.* [17] In this case, one registered trade union sued another such registered body on an agreement for amalgamation made between them. The court held that no action would lie on the

[12] (1923) 40 T.L.R. 440.

[13] The provisions as to organisations in the Commonwealth Industrial Arbitration Act are incidental to the power of "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" conferred by section 51 (xxxv) of the Constitution.

[14] *Nelson District Hopgrowers Co-op. Assn. Ltd. v. McGlashen,* (1932) N.Z.L.R. 308 at 313; *Riddell v. Doods and Others,* (1891) 9 N.Z.L.R. 210; *Railway Workers and General Labourers' Association v. United Labourers' Protective Society,* (1914) 14 S.R. (N.S.W.) 1; *Chinemuri Mines and Batteries Employees Industrial Union of Workers v. Registrar of Industrial Unions,* (1917) N.Z.L.R. 829; *Bread Manufacturers Ltd. v. Booth Ltd.,* (1937) 17 S.R. (N.S.W.) 500.

[15] *Amalgamated Society of Engineers v. Smith,* (1913) 16 C.L.R. 537.

[16] *Bretnall v. Herrick,* (1928) N.Z.L.R. 788.

[17] See note 14 (*supra*).

ground (*inter alia*) that it was "an agreement made between one trade union and another" and was therefore covered by section 4 (4). It may be noted that both bodies in this action were trade unions of workmen.

In addition to the Trade Union Acts, the Commonwealth, New Zealand and each Australian State (except Victoria and Tasmania) have passed Industrial Arbitration Acts (under different titles) which provide for the registration of bodies of either workmen or employers of a single employer as industrial unions under the respective Acts. [18] The provisions in the New South Wales statute differ considerably from those in the other Acts and so must be considered separately; the remainder are very similar and may be conveniently examined together. Upon registration, such industrial unions are given additional rights and assume greater responsibilities than exist at common law or under the Trade Union Acts. Two provisions in particular deserve notice.

In the Arbitration Acts of the Commonwealth, [19] New Zealand, [20] and South Australia, [21] there is a provision enabling an industrial union to "sue or be sued for the purposes of this Act." The Western Australian Act [22] contains a similar power but the limiting words "for the purposes . . . ." are not included. The meaning of this provision will be discussed later when examining two High Court judgments.

In the second place, the Acts of the Commonwealth, [23] South Australia, [24] Western Australia, [25] and New Zealand [26] enable an industrial union to make rules providing for any matter not contrary to law. This provision has received a certain amount of attention from the courts. It has been held that its object, in so far as the Commonwealth at least is concerned, is to enable associations to be registered as organisations by complying with the requisitions of the Commonwealth Conciliation and Arbitration Act, and at the same time to retain lawful objects which are outside the jurisdiction of that tribunal. [27] It has been held wide enough to enable an industrial union to run a newspaper [28] and to sue in respect of advertisements. [29] New Zealand has applied the *ejusdem generis* rule of

[18] These registered bodies are also called "organisations" or "industrial associations" under two of the Acts; therefore the names may be interchanged as the occasion requires.
[19] Commonwealth Conciliation and Arbitration Act 1925-47, sec. 85.
[20] Commonwealth Conciliation and Arbitration Act 1925-39, sec. 19.
[21] Industrial Code 1920-43, sec. 68.
[22] Industrial Arbitration Act, 1912-41, sec. 15(1).
[23] Schedule B, clause II.
[24] Second Schedule, clause II.
[25] Section 9(5).
[26] Section 5(c) (xii).
[27] *O'Carroll v Australian Journalists' Association,* (1938) 39 Commonwealth Arbitration Reports 319
[28] *Australian Workers' Union v. Coles,* (1917) V.L.R. 332.
[29] *Australian Tramways Employees Association v. Batten,* (1930) V.L.R. 130.

construction and decided that this clause was inserted to enable cases to be met by the rules which come within the spirit but not the letter of the previous clauses. [30] This clause, too, has received attention in several High Court decisions to which reference will also be made later.

The Industrial Arbitration Act 1940-47 of New South Wales contains rather brief provision for the registration of industrial unions. The Act permits registration of associations of employers or individuals in the normal way but limits applicants on the workers' side to trade unions registered under the Trade Unions Act 1881-1926. An industrial union of workers must then go through the double process of registration. Furthermore, Part XI (secs. 107-117) of the Act confers certain rights and duties, but only upon trade unions and not upon industrial unions. Most interesting, from our point of view, is section 111 which reads:

"The Commission may entertain and adjudicate upon any legal proceedings instituted for the purpose of directly enforcing or recovering damages for the breach of any of the following agreements:

(c) Any agreement for the regulation of any business or industry as between employers and employees made by a trade union with an employer or employers.

(d) Any agreement made between one trade union and another. Provided that such agreements shall be in writing and that copies of them, verified as prescribed, shall have been filed with the Commission."

A trade union is defined by section 5 of the Act as being "a trade union registered under the Trade Union Act 1881-1936, and includes a branch so registered."

Some light has been thrown on the operation of section 111 by case law. Registration as a trade union at the relevant time is essential, [31] while the proviso to the section requiring the agreements to be in writing and that verified copies be filed is a condition precedent to enforcement. [32] On clauses (c) and (d) there is, unfortunately, no case law. It is interesting to note that in the *Railway Workers' Association Case* (*supra*), Cullen, C.J., considered that the Arbitration Act of 1912 (which contained in section 52E provisions identical with the present section 111) was not applicable in the circumstances. In that case, both unions were registered under the Trade Unions Act. Had the agreement between them been written and copies filed as prescribed, there is no doubt that the case would have come directly under section 52E (now section 111 (d) ).

[30] *Lee v. Amalgamated Society of Railway Servants' Industrial Union of Workers,* (1919) New Zealand Gazette L.R. 489.
[31] *Graziers' Association v. Meares,* (1922) Arbitration Reports (N.S.W.) 141.
[32] *Shields v. The Australian Clerical Association,* 34 Industrial Gazette (N.S.W.) 34; note also *Simpson v. Tinning,* (1941) Arbitration Reports (N.S.W.) 41 and *Tinning v. Simpson,* (1942) Arbitration Reports (N.S.W.) 384.

Sub-section (c) appears to have been intended to cover collective agreements. "The regulation of any business or industry . . . ." is perhaps the main purpose of a collective agreement. "Trade union" in this clause is presumably intended to refer to a registered body of workmen, although the definition in the Act of course permits the substitution of an association of employers. Sub-section (d) covers the case of an agreement between two trade unions, both of whom are registered under the Trade Unions Act. This clause is no doubt meant to cover agreements between trade unions of workmen, but as mentioned earlier, it can equally well refer to an agreement made between a trade union of workmen and a trade union of employers, or in other words, a collective agreement. There thus appears to be an apparent overlapping between the two clauses which, though potential more than actual, still does in fact exist.

Apart from the statutory provisions already referred to, voluntary collective agreements have been discussed in several High Court decisions. The cases in question are the *Musicians' Case* [33] and the *Australian Agricultural Company's Case,* [34] both of which dealt with industrial agreements made under the Commonwealth Act. Of interest, however, are the statements made by the judges as to the operation of such an agreement if it did not conform to the statutory requirements. Could it operate at common law as an ordinary, voluntary, collective agreement?

In the *Musicians' Case,* several matters came up for discussion. Firstly, could an organisation make a collective agreement on behalf of its members? Secondly, could such an agreement be enforced, and how? Griffith, C.J., [35] made the following remarks: "Section 55 [36] provides that certain associations may be registered as organisations on compliance with the prescribed conditions. The conditions, which are set out by Schedule B, include a condition that the rules of an association seeking registration must provide, *inter alia,* for the mode in which industrial agreements and other documents may be executed by or on behalf of the association, and may provide for any other matter not contrary to law. Amongst such matters is, I think, included a power to make a collective agreement on behalf of the members of the association." And on the following page: "But if it is not (an industrial agreement within the meaning of the Act), I can see no reason for doubting that it may be a valid agreement at common law. An association of any number of persons is permitted by law . . . ."

Barton, J., [37] took a similar view to the Chief Justice, but Isaacs, J., [38] expressed "grave doubts as to whether such an

[33] *J. C. Williamson Ltd. v. Musicians' Union of Australia,* (1912) 15 C.L.R. 636.
[34] *Australian Agricultural Co. v. Federated Engine-Drivers & Firemen's Association of Australasia,* (1913) 17 C.L.R. 261.
[35] at p. 643.
[36] now section 70 of the 1904-47 Act.
[37] At 648.
[38] At 657.

organisation as the defendant had any power to contract at common law, that is, apart from the agreements mentioned in the statute, to bind its members present and future to fixed industrial conditions."

On the question of enforceability, Griffith, C.J., and Barton, J., held that such a common law agreement could be enforced, whilst Isaacs, J., took the opposite view. Griffith, C.J., said, [39] "It is true that such an association cannot sue or be sued by its collective name without statutory authority, but that is a merely forensic difficulty, and is obviated by the incorporation of the association now in question for the purposes of the Arbitration Act."

Isaacs, J., [40] on this question also differed from the majority opinion. "Then section 66 [41] says—any organisation may sue or be sued for the purposes of the Act in its registered or other name. But, it will be observed, only for the purposes of this Act; and that limits the purposes of the litigation, but not the court in which the litigation may proceed."

The *Australian Agricultural Company's Case* in the following year reversed the decision in the *Musician's Case*. Gavan Duffy and Rich, JJ., expressly adopted the reasons in the dissenting judgment of Isaacs, J., in the *Musicians' Case*, while Higgins, J., went on to express similar ideas and to doubt very strongly the right of an organisation to enter into a common law agreement. In view of the weight of judicial opinion against them, the statements of Griffith, C.J., and Barton, J., must be accepted with great caution.

What tentative statements can be made after an examination of the foregoing material? Each of the Australian States and New Zealand have passed Trade Union Acts which are, for our purposes, practically identical with their English model. Australasian case law has not served to change but only to reinforce the English decisions on the operation of the relevant sections in these statutes. Collective agreements made outside the scope of the various Arbitration Acts would then appear to stand on the same footing as they did in England prior to 1940, namely "gentlemen's agreements" not directly enforceable in any court of law. This applies, of course, only to collective agreements made by a trade union of workers with a trade union of employers and not to one made with a single employer. Support for this submission is to be found in the Australian case of the *Railway Workers' Association*, and in the English decisions of *McLuskey v. Cole* (*supra*) and *Holland v. London Society of Compositors* (*supra*). But this statement must be made subject to several important reservations. In the first place, there is the Industrial Arbitration Act of New South Wales, section 111 of which allows certain agreements to be enforced directly provided

[39] At 644.
[40] At 657.
[41] Now section 85 of the 1904-47 Act.

they comply with the requirements of the Act, and provided also that one or both of the parties, as the case may require, is a trade union registered under the Trade Unions Act 1881-1936. From their wording, both clauses (c) and (d) would seem applicable to the case of a collective agreement, although a distinction can be made between them—a matter which has already been discussed. Furthermore, there are the words to be found in four of the Arbitration statutes enabling an industrial union to have a rule providing for "any other matter not contrary to law." Does this power enable such a body to make voluntary collective agreements outside the scope of the respective Arbitration Acts? The interpretation placed upon this clause has been for the most part restrictive, particularly so in New Zealand, where its usefulness has been curtailed by the application of the *ejusdem generis* rule. Add to this the views of Isaacs, J., and the majority judgments in the Australian Agricultural Company's Case, and the right of an industrial union to exercise this power seems very doubtful. However, if an industrial union has power to enter into a voluntary collective agreement, which is rather doubtful, could it enforce such an agreement? In three Arbitration statutes is found a power enabling an industrial union "to sue or be sued for the purposes of this Act" while another Act contains this right but without the restrictive words. What are "the purposes of the Act?" According to Griffith, C.J., an industrial union may by its rules provide for any other matter not contrary to law, and such a power includes the right to make collective agreements outside the scope of the Act. Such agreements could then be enforced because their enforcement would be "for the purposes of the Act." This view, also held by Barton, J., was overruled by a majority of four to two in the Agricultural Company's Case. There does not appear to have been any discussion of the power conferred by the Western Australian Act. If one can hazard a guess, it would probably be interpreted in the same manner as clauses in the Acts already discussed; in short, it would be limited to matters within the scope of the Act.

Finally we come to the most important reservation of all. A system of State regulation of industrial relations does not lightly countenance variation of its standards by agreements made outside the scope of its provisions, particularly if such variation tends to lower or undermine standards which it has proclaimed.

All the Australian systems provide for the making of awards and/or determinations which prescribe the minimum conditions to be observed in an industry, and which will override any inconsistent contract or agreement. Such awards and determinations in many cases operate *de jure* or *de facto* as a common rule and it would then appear that only by the parties and the tribunal abstaining from exercising respectively their powers and jurisdiction could a voluntary collective agreement be made to govern conditions in an industry. A further limitation is that both Australia and New Zealand have passed a number of statutes such as Factories Acts, Minimum

Wage Acts and the like, which also prescribe minimum conditions to be observed, and to which any voluntary collective agreement made outside the scope of the arbitration system would necessarily be subject. This leads to the final point. The conditions laid down by awards and statutes are minimum conditions, and there is nothing to prevent the parties making an agreement providing for better terms; but any attempt to oust the jurisdiction of the appropriate tribunal will be of no avail. [42] These last statements have been broad and sweeping by nature, and no doubt, in detail, inaccurate. [43] Their purpose is to illustrate the difficulties besetting any attempt to regulate industrial relationships by voluntary collective bargaining in Australia or New Zealand, the birthplace and stronghold of compulsory arbitration.

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[42] *Australian Saddlery etc. Employees' Federation v. Carter Patterson & Co.*, (1925) 21 Commonwealth Arbitration Reports 892; see also Isaacs, J., in *Musicians' Case*, (1912) 15 C.L.R. 636.

[43] Special problems exist in Australia because of the division of industrial and arbitral power between the Commonwealth and the States; for example, as to the extent to which an award of the federal Court of Conciliation and Arbitration will oust State law from the field covered by the federal award (see *Clyde Engineering Co. Ltd. v. Cowburn*, (1926) 37 C.L.R. 466, followed in *Ex parte McLean*, (1930) 43 C.L.R. 472). But these questions are too large for the limited compass of this article.