THIRD PARTY INTERVENTION RECONSIDERED: AN INTERNATIONAL PERSPECTIVE

WILLIAM BROWN*

A hundred years ago Australia was but one of many advanced economies whose growing prosperity was threatened by industrial unrest. Canada, Sweden, Britain, Italy, Denmark, Belgium, Russia and the United States were other countries that were discovering at much the same time that strike action by relatively small numbers of organised workers could paralyse economic life. As befitted states with very different political pressures, their solutions to this problem were remarkably varied. The resilience of those solutions was also varied, with most countries changing their legislative framework more than once over the following years. Who would have predicted back in 1904 that the Australian response celebrated this year would be one of the most enduring?

Countries differed especially widely in the extent to which they provided for third party intervention in tackling the strike problem. Some left disputes for the courts to sort out; some created, in effect, special courts; some effectively took them out of the reach of the courts altogether; and some offered third party neutrals as an optional aid. But for none was the third party neutral role more central than for the Australian Commonwealth. There it developed and mutated like the marsupials. Australia was to become internationally distinctive because of the priority it gave to dispute avoidance as opposed to economic considerations in the management of the labour market (Hancock 1969). While other countries offered third party intervention as little more than a safety-net for working life and dispute settlement, the Australian industrial tribunals came to play a leading role in the conduct of the economy.

Third party intervention is a broad term that is used to cover all forms of neutral intervention in dispute resolution. It provides a flexible range of practices and procedures whereby outsiders can be brought in to break deadlocks and achieve settlements between employers and either organised labour or individual employees. It applies just as much to the persuasive efforts of conciliators and mediators as to the binding awards of arbitrators and industrial tribunals. In practice, these different forms of intervention often merge into each other. If, for example, conciliators fail to persuade the disputing parties to resolve their differences, then

* Professor of Industrial Relations, University of Cambridge, Darwin College, Silver Street, Cambridge, CB3 9EU, United Kingdom. Email: William.Brown@econ.cam.ac.uk The author would like to thank Joe Isaac, Clair Kilpatrick and Andrew Wareing for their help.

they may move on to help distil those differences into workable terms of reference for subsequent arbitration. Both formal and informal procedures have their part to play.

A decline in strikes has thrown the future of third party intervention into doubt in many countries in recent years. Since third party intervention was a response to the high levels of industrial disputes that characterised so much of the twentieth century, perhaps it is bound to wither as disputation diminishes. Just as the passing of horse transport meant that cities no longer required by-laws for the provision of horse troughs, so it may be that governments of developed countries no longer need to provide for dispute settlement.

I shall argue that this is not the case, and that there is still an important role for third party intervention in employment. But I shall argue that its nature has changed, and continues to change. And these changes are of direct relevance to the Australian industrial relations system as it looks to the future. I have been asked to give a perspective from 'beyond Australian shores' and my argument will do this in two quite distinct ways.

The first line of argument will simply be based upon what is happening in other developed countries. I shall give an overview of international trends. In so doing I shall pay particular attention to developments in Europe and especially in Britain. This makes sense because, until the innovations in Australia of a hundred years ago, the legal position of Australian trade unions had developed on 'lines nearly parallel to those of their English counterparts' (Yerbury 1971, p. 131). They may have grown far away from each other, but the British system is still the Australian arbitration system's closest relative.

The second way in which I shall argue that third party intervention is important for the regulation of employment draws on experience worldwide. It concerns the growing economic significance of the wider world to Australians themselves. I shall argue that as the Australian economy, like all other economies, becomes ever more exposed to international competitive pressures, the challenge of maintaining decent standards of employment will get tougher. The setting of international labour standards will tend to slip beyond the control of the individual nation state. We need to rethink not just the national, but also the *global* role of third party intervention.

THE CHANGED ENVIRONMENT

For most of the twentieth century, the industrialised democracies experienced fluctuating levels of disputes. From very high levels in the 1890s in many countries, the number of working days lost through strikes per year generally averaged out at several hundred per 1000 workers. Over the 1950s, for example, the average annual number of days lost per 1000 workers was running at around 500 for Australia, 650 for the USA, and 150 for the UK. By the end of the century, however, there had been a sharp fall. The comparable annual average figures over the 1990s were 90 for Australia, 40 for the USA, and 30 for the UK. Since the year 2000 the figures for these countries have fallen even lower.[1] In most Organisation of Economic Cooperation and Development (OECD) countries, industrial disputes, especially

in the private sector, have recently come down to levels that are far lower that at any time on record.

Diminishing strike activity has coincided with falling trade union membership. There has been a substantial drop in trade union members in most OECD countries—the main exceptions being in Scandinavia. Two extreme cases are Australia and the UK, where the proportion of employees who are members of trade unions has a fallen from a high point of just over half the employed workforce in 1980 to, respectively, 23 per cent and 29 per cent today.[2] In these, as in other countries, the fall in union membership has been particularly marked in the private sector.

An important question for the future of third party intervention is the permanence of this decline in strikes and unions. Is it a passing phase that may be reversed by some possible change in circumstances, such as an upsurge in world inflation? Or is an irreversible shift under way? This is best explored by considering the underlying forces. Let us start by reflecting on the ambivalent nature of trade unionism. Ever since they began, trade unions have deployed two superficially conflicting strategies to get the best for their members. The more conspicuous strategy was that of winning and defending benefits by threats of strike action. It was essentially confrontational with management, with unions attempting to bargain a better share of limited resources. The alternative strategy lay in engaging with management in a more cooperative way. By engaging in consultation, unions would give employers the opportunity to carry their workers with them in more productive working, and thereby, win more resources for all. Whether and how unions deployed these confrontational and cooperative strategies depended very much upon the managements and the markets they faced.

Trade unions are at their most effective in their confrontational mode in two broad circumstances. The first is when their target is all the employers competing with each other in a self-contained market for some good or service. By winning a pay rise that affects all the employers in this product market broadly equally, the union will not jeopardise its members' jobs at any single employer, and the employers should be able to pass on the cost to their customers without substantial loss of custom. This is why the main basis of collective bargaining in the twentieth century was industrial—an agreement (or award) would cover a country's whole steel industry, or building industry, or whatever. This was traditionally the way that what are generally referred to as 'labour standards'—that is, pay levels, working hours, safety conditions and so on—were set. The second favourable circumstance for a confrontational union is a single employer whose product market position is overwhelmingly strong, preferably one of monopoly. In these circumstances union success does not threaten the employer with bankruptcy, and the increased costs may be passed on to customers who have nowhere else to turn. This is one reason why trade unionism has traditionally flourished in public services.

The going gets hard for trade unions relying on collective strength and confrontation when they can no longer organise the workers of *all* the firms supplying a given market. If they only win benefits from those firms where they have union members, they place those same members' jobs at risk because their employers may be under-cut by competing firms with no trade union presence. Trade

unionism based upon collective coercion of employers is very vulnerable if the product market that its members serve becomes leaky to suppliers who follow inferior labour standards. And similarly, trade unionism relying on confrontation with an employer in a monopoly position becomes vulnerable once that monopoly position is weakened. For both situations, the union weakness is two-fold. First, strike threats become emptier, the more an employer's concession places that employer, and consequently the union's members' jobs, at risk. Second, the less the union is able to win for its members, over and above what they would earn in an unorganised firm, the less attractive membership becomes to them and the harder it is to achieve the high membership levels upon which union strength depends. In short, the less trade unions are able to organise *all* the firms in contention with each other, the less is gained from confrontational bargaining.

The scope for confrontational bargaining is drastically reduced by the internationalisation of the world's economy. This applies both to where things are bought and sold and to who owns the firms that buy and sell them. For the past half-century, both have increasingly operated across national frontiers. More recently, if we take the period 1990 to 2000, while world output has increased on average at three per cent per year, world trade has increased at double that amount, six per cent. In other words, an ever-growing share of what we buy comes from another country. The difficulty this poses for trade unions arises from their inability to organise effectively across national boundaries. Despite many attempts, all the evidence is that, even for strong unions, solidarity effectively stops at the frontier.

So far as ownership goes, over the period 1990 to 2000 the average rate of growth of foreign direct investment per year was 12 per cent – twice that of world trade and four times that of world output. A reflection of this growth is the fact that half the one hundred largest economies in the world are not nations but are multi-national companies. As a result, ever fewer of us are ultimately employed by firms based in our own country. The difficulty this poses for trade unions lies in the potential lack of commitment of the firms' owners to any particular country. Owners can increasingly wander the world, choosing the labour cost structures that suit them best; and these tend to suit established trade unions least.

For trade unions working with public sector monopolies the picture is not quite so bleak, but even for them it is generally far more difficult than 20 or so years ago. In most developed countries there has been a tendency to privatise where possible and, failing that, to outsource aspects of the work to the private sector. Public sector trade union membership has generally remained high relative to private enterprise, but any appetite by the unions for confrontational bargaining has been much tempered by a realistic fear of further privatisation.

It is, then, hardly surprising that both strike levels and trade union membership have fallen across the world. It is not only trade unions but also national governments that are losing influence over labour standards as the world economy becomes ever more open. There is no reason to suppose that this will go into reverse. Where, then, does this leave third party intervention? Certainly, traditional dispute resolution is unlikely to regain the significance it had through much of the twentieth century. But that does not mean that the agencies responsible for third

party intervention are becoming redundant. What appears to happening is that they are discovering new roles, to meet the new needs of a more internationalised economy.

CHANGES IN THIRD PARTY INTERVENTION

Wise politicians intervene in employment relationships with extreme reluctance. They know that, as with well-meaning attempts to repair other people's marriages, intervention is liable to yield no more than the hostility of the contending parties. Despite this, there are two main circumstances under which governments have traditionally felt obliged to intervene. The first is when unresolved industrial disputes have caused unacceptable disruption for the wider society. The second is when low standards of employment have threatened the health and welfare of citizens with, again, costly consequences for the wider society. The result in both cases has typically been the creation of quasi-judicial institutions, insulated from the whims of politics. Their purpose is to achieve the resolution of disputes and, sometimes as part of the same process, but sometimes not, to establish acceptable labour standards.

Even within the European Union, the variety of such third party institutions is substantial, not least in the extent to which they are dominated by the judiciary, as opposed to non-legal specialists, and representatives of employers and labour. It might seem ridiculous to attempt any generalisations about them. But such is the inter-connectedness of the modern world that, despite the very different legal and political backgrounds of European countries, there are some important common patterns (Valdés Dal-Ré 2003b). A reflection of this is a softening in this diversity. The once sharp contrast between countries avoiding direct legal intervention, and those depending on it is diminishing. For example, once 'voluntarist' Britain has seen increased statutory regulation of disputes, while France and Spain have seen a shift to a less judicial approach.

The most important trend is a growing preference for voluntary, rather than judicial means of settling disputes. There is a growing tendency in most pre-2004 European Union countries to try to solve labour disputes without resorting to court proceedings. The benefits lie in lower costs and faster resolution, and also in greater flexibility of outcome. But in the long run what is most important is that voluntary solutions can build greater commitment and self-reliance for the disputants. One authoritative analyst has compared unfavourably 'the winner–loser outcome that a legal process always produces' with 'the capacity of conciliation and mediation formulas to generate or renew agreements and to create a stable negotiating channel and synergies for continuing negotiation' (Valdés Dal-Ré 2003b, p. 46). It was with this in mind that the European Commission in 2000 proposed to encourage the spread of voluntary conciliation, mediation and arbitration procedures for dispute resolution.

In general, the more exposed industrial relations are to competitive markets, the more voluntary procedures can be relied upon to resolve disputes. Confrontational bargainers may be able slug it out for weeks in the shelter of a monopoly, with their customers suffering impotently. But once their product market becomes competitive, a prolonged strike may drive their custom elsewhere, never to

return, and the incentive to reach a settlement becomes much sharper. Britain and Holland are but two examples of countries that have seen greatly increased success in strike avoidance through voluntary means in response to a harsher competitive environment (Goodman 2000; de Roo 2003). The behaviour of markets, in terms of loss of business and jobs, carries more clout in the long run than the decisions of judges and tribunals.

It is not easy, however, to break away from a judicial system of dispute resolution. Generally, the more specialist is a country's industrial judicial arrangements, the less is the incentive to develop non-judicial conflict resolution methods. On this spectrum, the Mediterranean countries are at the specialist end, while Britain, Ireland and Holland are the less judicially constrained. Much also depends upon whether there is a strong tradition of collective bargaining and what in Europe has come to be called 'social dialogue'—that is, substantial consultation between employer and trade union bodies. Denmark, Sweden, Holland and Finland have such mature bargaining relationships that third party intervention mainly gives a stamp authority to solutions already reached independently by the parties themselves. By contrast, France and Portugal still rely heavily upon the legal system to deal with industrial problems (Valdés Dal-Ré 2003b).

The shift of emphasis from judicial to voluntary means of dispute resolution is also evident beyond Europe. It can be seen as a symptom of a wider demand for what is commonly called 'alternative dispute resolution'—that is, the resolution of disputes without recourse to legal procedures. In response to this, established industrial third party resolution bodies have even been called on to apply their industrial skills to the wider society. Thus, for example, the US Federal Mediation and Conciliation Service (FMCS) has helped develop procedures for the negotiation of highway routes through native American reservations, and the British Advisory, Conciliation and Arbitration Service (ACAS) has advised on procedures to forestall intercommunal disputes in Northern Ireland.

Accompanying this shift to voluntary dispute resolution, the most important development in the context of employment has been the growth of an advisory function for third party agencies. This advisory role reflects a wider change in conception, evident for many public services, that prevention is better than treatment. In Britain, for example, this is altering the priorities of fire brigades, police forces, and prison and health services. In industrial third party intervention, the purpose of the advisory role is to move on from helping to settle disputes through conciliation, to preempting future disputes by encouraging good procedures and employment practices. It is a change to be found in many countries. For example, the US FMCS has moved from a position 20 years ago when all the mediators' time was devoted to current dispute resolution, to a position where 35 per cent of their time is now concerned with conflict prevention. The Canadian FMCS offers a 'labour management partnership programme'. Recent legislation is moving the New Zealand system towards a more facilitative and advisory approach. The Irish Labour Relations Commission and the Northern Ireland Labour Relations Agency have both developed advisory services to help propagate best practice, not only in dispute resolution, but also in employment practice more generally.

No agency has thrown itself more whole-heartedly into this pre-emptive advisory work, over and above dispute resolution, than the British third party intervention agency Advisory, Concilliation and Arbitration Service (ACAS). Last year, for example, its 800-plus staff, operating out of regional offices, completed nearly 500 advisory projects with individual companies on subjects such as managing change, employee involvement, partnership, and bargaining arrangements. They ran over 2000 training events reaching 30 000 smaller employers. They disseminated, through booklets and their website, hundreds of thousand of copies of best-practice guides. Their telephone help-lines are currently dealing with around 800 000 individual queries per year from both employers and employees. And they have been helping to develop similar services in, among other places, Poland, Slovakia and South Africa (ACAS 2003). Unsurprisingly, one of ACAS' slogans is 'when we're not working on today's cures, we are working on tomorrow's preventions'

One aspect of all this ACAS advisory activity of particular interest concerns the encouragement of what in Britain have come to be called 'partnership' arrangements. Strongly supported by both the present government and the Trades Union Congress (TUC) these arrangements are the embodiment of the cooperative mode of trade union activity I referred to earlier. Many employers have, in effect, been willing to re-negotiate the basis on which they offer union recognition, on condition that trade unions forgo a confrontational approach. Unions have been willing to accept this providing they gain, in exchange, a secure and active consultative role (Oxenbridge & Brown 2002; 2004). In organisations where trade unions were traditionally strong, this transition is not easy. ACAS conciliators have been playing a crucial facilitative role, combining their conciliation and advisory techniques. They have been running workshops of managers and union representatives within the workplace at which new arrangements have been thrashed out, and then helping with subsequent staff training programs. Although long active in the private sector, ACAS is increasingly being brought fruitfully into the hitherto often self-contained (and sometimes rancorous) worlds of the public services. Prisons, hospitals, fire, postal and even civil services are now major users of ACAS conciliators. Some impressive partnership relationships have been the result.

The emerging picture seems clear. The opening up of the world economy and of public services to wider competition is changing the nature of third party intervention. There is diminishing scope for employers and trade unions to battle out their differences in the sheltered arena of a national market or monopoly service. To do so is to risk annihilation. Trade unions are being forced to shift their manner of operating away from confrontation, towards a much greater reliance on cooperation with employers. This has always been a part of their behaviour, but external competitive pressures are forcing it to become dominant. The implications for third party intervention agencies are far-reaching. There is less call for them to resolve collective disputes by judgements according to some legal code or abstract principles of justice or precedent. The contesting parties increasingly need to be guided to a settlement that reflects the very practical and evident demands of the market pressures bearing down upon them. The question to be

resolved becomes not what is legally correct, but what will work because it is felt to be fair.

Why, then, is it necessary to have state supported third party intervention at all? Is it not another candidate for privatisation? Cannot collective bargaining, like any other business transaction, be facilitated by commercially motivated brokers? All the evidence suggests that it cannot. However much the outcome may be constrained by harsh competitive necessity, it is unavoidably bound up with notions of fairness and of natural, if not legal, justice. Settlements that are perceived to be 'unfair' undermine employee morale and sour the employment relationship. Consequently, a major part of the conciliator's task is to help the protagonists, and those whom they represent, to adjust their expectations, and their perceptions of what is 'fair', to the shifting realities of the markets in which their business is located. Central to the arbitrator's task is giving each side a fair hearing and making the award on the basis of evidence that both sides have seen, heard, and provided. Notions of 'fairness' in employment are usually locally formed and are best locally maintained.

These third party roles only carry credibility when those who hold them are clearly independent. They have to be seen to be independent of employers, and of trade unions, but also of governments, which often have their own agendas. They have to be independent in terms of finance and of allegiance. This is necessary if one-off conciliations and arbitrations are to be successful. It also appears to be essential for the sort of advisory and relationship-building work into which third party intervention is moving in many countries. It is because of this, for example, that the neutrality of ACAS staff is fiercely protected by a governing Council that has equal numbers of experienced people of trade union and employer backgrounds, as well as some independents. The Council's decisions require its members' full support to maintain this independence (Brown 2000). Although ACAS's budget comes from the government, it has never been used to influence ACAS policy, even though some recent governments have been openly hostile to collective bargaining. Governments have learnt that a third party intervention agency will only be effective if it is widely perceived to be independent.

MAINTAINING LABOUR STANDARDS

'By far the most interesting institution in Victoria is the fixing of a minimum wage by law in certain sweated trades'. So wrote the British social reformer Sidney Webb in his diary in October 1898 on his visit to Australia with his wife Beatrice (Austin 1965, p. 78). Their favourable impression was influential when, 10 years later, Britain followed suit by establishing very similar Trade Boards. It is important, thus, to recall Australia's pioneering role in the use of third party intervention to uphold decent labour standards in response to what Webb called the 'woes' arising from 'scandalously low wages'.

Since then, governments all over the world have had to deal, with varying vigour, with the fact that, left to themselves, labour markets do not necessarily deliver terms of employment that are acceptable to prevailing standards of decency. The preferred device for many countries, especially in Europe, became one of giving trade unions rights to bargain terms and conditions for their members, and

then allowing the resultant agreements to be extended to cover non-members. A structure of industry-wide agreements developed, country-by-country which, by mid-twentieth century, provided fairly comprehensive coverage of the employed workforce, augmented in many countries by statutory minimum wages. But, for reasons already discussed, arising from the internationalising of competition, these collective bargaining arrangements have come under great strain. Powerful competitive pressures have encouraged many firms to move away from the industrial agreements they followed in the past. They have increasingly dealt with terms and conditions of employment not as members of employers' associations, but in isolation, as individual enterprises. Sometimes they have carried their trade unions over into enterprise bargaining; but increasingly they fix pay autonomously, and without union involvement. A once stable set of institutions for setting labour standards is thus now in jeopardy in many countries or even, as is the case in Britain, has broken down altogether.

Another important development has been the increase in direct involvement of governments in setting or protecting minimum labour standards. There is nothing new in this. Most developed countries had factory inspectors upholding health and safety standards over a century ago. But the pace has accelerated in recent years, with legislation on gender discrimination, for example, coming in 30 or so years ago, and on, for example, paternity leave, disability and age discrimination much more recently. The pace has been particularly fast in the European Union because a comprehensive floor of minimum labour standards is a necessary political and economic precondition for a free trade area.

The result has been that, whether or not they are well served by collective agreements, employees in most developed countries have a substantial and growing number of individual rights, provided by law. How far, and how well, these rights are upheld where unions are not present varies greatly. Many countries have labour inspectorates, but accounts of their effectiveness vary. In Britain, ACAS plays an active role conciliating for those individual employees who have the courage (or union support) to appeal that their rights have been breached—it deals with over 100 000 such cases per year. But Britain has no comprehensive labour inspectorate, having only inspectors for the specific topics of health and safety, and the recently introduced National Minimum Wage. The enforcement problem has been increasing in many countries recently because cross-border migration has been increasing—more than half the increased migration in the world since 1910 has occurred in the last 30 years—and for various reasons, migrants are particularly vulnerable to exploitation. It can be argued, although it is controversial, that the growth in individual statutory rights has contributed to the decline in trade union membership. Whether or not this is the case, the decline in union membership has reduced the ability of employees to defend their rights.

All nationally-based systems of establishing minimum labour standards are exposed to the challenge from international competition. Whether there is collective bargaining, or whether the state fixes minimum entitlements more directly, there is a growing threat that lower labour standards in other countries will lure away customers and investment. There is a very real danger of a 'race to the bottom' that would benefit no-one. This poses a major challenge to the legal support of

labour standards (Hepple 2002). It would be attractive to think that the International Labour Organisation might fill this gap, but without powers of inspection and enforcement, it is not equipped to do so. In recent years the World Trade Organisation has talked of linking trade liberalisation to labour standard enforcement. But developing countries have rejected that, on the reasonable grounds that it is covert protectionism by the developed world. One of the more effective devices to inhibit the exploitation of labour internationally has been consumer campaigns, naming and shaming brand-name companies whose suppliers have poor employment practices. These campaigns have prompted companies such as Gap, Wal-mart and Ikea to heed the marketing implications and to develop their own inspection systems for their suppliers. But with so much of the world's manufacturing capacity moving to largely unregulated countries, including China, effective international governance of labour standards is still a fantasy.

CONCLUSION

Where does this leave the future of third party intervention 'beyond Australian shores'? Such intervention has traditionally been concerned with two distinct activities: dispute resolution; and the establishing of minimum labour standards. So far as dispute settlement is concerned, the answer seems clear. As the level of strikes falls, third party intervention is becoming less judicial, and more concerned with facilitating voluntary settlements. It is becoming more focussed on improving employment practices, and on facilitating cooperative approaches to collective bargaining.

What of the other aspect of third party intervention, the establishment of decent labour standards? Here, the future is less clear because the threat posed to existing national institutions by unregulated world markets is growing. But it is no answer to a toughening market context to abandon all regulation of labour standards. If that were done it would quickly lead to a more disorderly, and more unequal, national labour market that was widely perceived to be unfair. The adverse effects in terms of motivation and training would probably make it inefficient as well. Indeed, it is a feature of a civilised society that it attempts to maintain decent labour standards, rather than abandon everything to the whims of world markets. The rougher the markets that countries find themselves in, the more they need to protect the minimum labour standards of their citizens.

ENDNOTES

1. Sources for strike data: Clegg (1976); Oxnam (1971); US Department of Labor; UK Department of Employment; Australian Bureau of Statistics.
2. Sources for trade union membership data: UK Department of Employment; and Australian Bureau of Statistics.

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