

YALE LAW JOURNAL

Vol. XXVII

FEBRUARY, 1918

No. 4

THE JUDICIAL REGULATION OF INDUSTRIAL CONDITIONS¹

W. JETHRO BROWN

Industrial Court of South Australia, and Professor of Law,
University of Adelaide

HISTORICAL

For some time Australia and New Zealand have been engaged in a series of experiments which involve a wide extension of the "sphere of the state," in relation to the control of industrial conditions. The systems most in vogue in Australia involve a combination of wages boards and courts of industrial arbitration. The structure and functions of the wages board are now familiar to students of industrial progress. Courts of industrial arbitration have an appellate jurisdiction with respect to the determination of wages boards, and an original jurisdiction in industrial matters generally. Both the boards and the courts are parts of a system of control (as distinguished from the ownership or management) of industry by organized public authority. In earlier times, wages boards aimed mainly at the elimination of sweating; but the system of public control of industrial conditions now aims at securing justice to employers and employees by a progressive expansion of the rule of law.

The incalculable importance of the movement is indicated by the title of an article written by Mr. Justice Higgins, President of the Commonwealth Court of Conciliation and Arbitration, entitled *A New Province for Law and Order*.² It rarely happens in the history of mankind that the full importance of a great movement is realized until long after its initiation. Certainly, I think few people in Aus-

¹The following article has been written as part of a work on *Australia* shortly to be published. The writer has the consent of the General Editor that the present article should first appear in the YALE LAW JOURNAL.

² (Nov. 1915) 29 HARV. L. REV. 13.

tralia realize the immense significance of the effort of the organized community to determine industrial conditions by judicial or quasi-judicial tribunals. The causes which tell for an increasing importance of all questions relating to the organization of industry, and the fact that the relations between citizen and citizen which call for determination are more and more economic, imply that the new province for law and order is a province likely to become one of ever growing, if not of supreme, importance. Criminal law and civil law will remain; but alongside of them will be the great subject of industrial law. This law is, in point of fact, now being evolved out of a long series of conflicts and disputes relating to industrial matters. Even if one were to disregard for the moment such multitudinous issues between employer and employee as those relating to hours of work, sanitation in its widest sense, conditions of boy labor and apprenticeship; and supposing industrial courts dealt only with the single question of wages, the fact would remain that in the particular cases which come before a judge of an industrial court, the judge has to settle issues which, when capitalized, involve hundreds of thousands of pounds, and sometimes millions. In a recent case, a trade union secretary objected that the legal expenses incurred in the course of the hearing had been £200. I pointed out to him that the statement of claim of his organization as to wages alone had really amounted to a claim for £300,000! He answered, "Yes, but we did not get it." My rejoinder was, "No, you didn't get £300,000; you got only £240,000!" Of course, it is sometimes the other way. On occasion, I have had to reduce the rate of wage. But whether an industrial judge decreases or increases the rate of wage, though the amount seem small as regards the weekly earnings of a particular employee, the total result on the yearly earnings of the employees in the industry generally is apt to attain figures of such dimensions as to impose upon the judge a responsibility of the gravest character.

It is not, however, the money aspect that is necessarily the most important of the movement toward the public control of industrial conditions. The rapid progress of modern industry, the increase in the output of the worker (whether due to mechanical inventions, scientific research, improved business organization, or other causes), and the increased complexity of modern industrial organizations, necessarily create a thousand new problems of which many must be settled either by an appeal to law or by an appeal to might. After all, such weapons as the strike and the lockout are but forms of an appeal to might. The settlement of industrial differences by a wages board or industrial court involves an appeal to law. These differences have been so numerous and are so certain to increase with the progress of society, that the organized community ought to deal with them according to reason and justice through the action of impartial tribunals.

INDUSTRIAL LEGISLATION AND INDUSTRIAL LAW

The industrial legislation of Australia is scarcely more than a provision of machinery for the purposes of settling industrial disputes and dealing with industrial matters. The term "industrial law" may be used in the wide sense to include both the legislation which provides the machinery, and also the principles which that machinery from time to time formulates. The latter sense of the term, however, appears to me the sense most appropriate, and the subject-matter of greater interest to the general reader.

I propose, therefore, to limit myself in the present article to industrial law in the sense indicated. But further limitations follow almost as a matter of course. I have not space to speak of the work which is being done by wages boards. The settlement of industrial conditions by such bodies is necessarily of a more or less empirical, if not opportunist, character. To arrive at the code of industrial law, one has to pass beyond the determinations of wages boards, and beyond the important functions discharged by industrial courts acting as tribunals of conciliation with a view to effecting an amicable settlement of disputes. One must go directly to the awards of industrial courts in cases which have been heard before them, either in their original or appellate jurisdiction, with the usual judicial procedure as to argument by counsel and the evidence of witnesses. Further, there are several industrial courts in Australia, and, while it would be uncharitable to suggest that there are as many distinct codes of industrial law, yet the fact remains that some divergencies exist between the principles underlying the awards of the different courts. Limited as I am in the matter of space, I shall content myself with a statement of the general principles evolved or adopted in the particular court over which I preside.

SCOPE OF "INDUSTRIAL CONDITIONS"

In the South Australian Industrial Arbitration Act of 1912, the term "industrial matters" is defined in a sense so wide as to include almost every conceivable question likely to arise between employer and employee. It includes, for example, wages, hours of employment, sex, age, qualification or status of employees, apprenticeship, employment of children, the right to dismiss, the right to employ or reinstate in employment persons or classes of persons in any industry; and all questions of what is fair and right in relation to any industrial matter having regard to the interests of the persons immediately concerned and of society as a whole. The act defines "industry" in a broad sense—a sense which includes, according to a recent decision of the Supreme Court, the work done by employees of municipalities. The act provides machinery for punishing offences against the act; and

it prohibits the lockout and the strike under penalties of imprisonment and of fine (which *must* be made a charge on wages due or to be due, and *may* be made a charge on the association of which the offender is a member).

It will thus appear how multitudinous are the issues which may come before the industrial court. I propose to confine myself in the main to the most difficult of all issues—the *determination of rates of wage*. But before entering upon this subject, I venture a word on the topic of industrial conditions generally.

RESTRICTIONS UPON EMPLOYERS IN THE CONDUCT OF BUSINESS

While a large section of the employees object to a prohibition of the strike—a subject to which I shall refer later—a large number of employers object, if not to some public control over their business, at least to the scope of that control as exercised by industrial courts. In the *Carpenters and Joiners Case*³ I stated three general propositions which appear to me to be applicable to the question of how far the court ought to go in imposing conditions on the way in which employers should conduct their business. I quote the substance of the three propositions here:

(1) Reasonable conditions or restrictions which control the employers in an industry generally, and not merely particular employers, are in the interests of the reasonable employer. Few phenomena of industrial evolution have been more common or more distressing than that of the reasonable employer endeavoring to provide reasonable conditions for his employees, but prevented from doing so by competition with the less scrupulous employer. Indeed, where there are fifty employers in an industry, half a dozen of them, or even a lesser number, by standing out against the establishment of desirable practices and conditions of employment, may make it impossible for the great body of employers to effect desired reforms. It is intolerable, to take an extreme example, that an employer who desires to pay his workmen reasonable wages, or who desires to observe reasonable conditions generally, should be subject to the danger of losing his market as the result of competition with some other employer who is prepared to sweat his employees.

(2) Reasonable restrictions are not only in the interests of the reasonable employer. *They are the very condition of the well-being of the employee.* Of course, when speaking of restrictions on the conduct of a business, one is apt to think almost exclusively on such matters as wages and hours. There is a tendency at present in Australia to be obsessed by the question of wages and hours. But the

³ S. A. A. R. 1917—No. 10.

health, comfort, and general conditions under which a laborer works, are often of more importance to him than the question of wages and hours. They may involve, and in many cases do involve, a number of restrictions on employers. Their recognition and sanction are not the least important of the functions which an industrial court can discharge as an agency of industrial progress.

(3) The restrictions must be reasonable. In industries generally, there is need for a certain degree of elasticity. This is no doubt the reason why Mr. Justice Higgins has so frequently affirmed the principle of "non-interference with employers in the conduct of their business." One business might be conducted on quite legitimate lines, and yet not be conducted on the same lines as another legitimate business. One reasonable employer's methods may not be the same as another reasonable employer's methods. One locality is not the same as another locality.

"The appellants ask that a lock-up should be provided on all jobs. The respondents reply that, while this is generally done, there are many jobs on which a lock-up is not necessary, and some jobs on which it is not practicable. Cast iron regulations, or excessive regulation, may regulate reasonable employers, or even a whole industry, out of existence. Hence, with regard to several of the claims submitted, I propose to introduce in my award the words *wherever reasonably practicable*. Mr. Hargrave said, on behalf of the employees, that these words would stultify the value of the award, and throw upon the employees in a particular case the impossible burden of proving that the observance of the prescribed condition was reasonably practicable. I am unable to concur with Mr. Hargrave's argument. In the first place, if an employer fails to observe the conditions where he might reasonably have done so, I cannot see for a moment that it would be impossible in all cases, or even in the majority of cases, for the employees to prove to the satisfaction of the Court, that he had been guilty of a violation of the award. In the second place, even conditions which are qualified by such words as I have suggested, have a value as setting up a standard which an employer, even in his own interest, should respect. It is certainly not to the interest of an employer to act in a matter of this kind in a way that would be likely to give offence to his employees. One of the first conditions of successful business management is to keep on good terms with the employees. An employer, or a manager, who neglects this elementary principle by capriciously disregarding restrictions which are awarded by this Court, is not likely to get the best possible results out of his workmen. In the third place, if it should be shown that the introduction of such words as I have indicated have the effect of nullifying to a serious extent the value of the conditions to which the words are attached, then the employees have the right to come before this Court and ask the Court to vary its award, and to make conditions absolute which previously had been qualified."

WAGES: THE LIVING WAGE

Of all the questions which have arisen for decision in cases before me, the question of the rate of wage has been at once the most diffi-

cult and the most important. In the *Salt Case*,⁴ I referred at length to the section of the South Australian Industrial Arbitration Act of 1912 which precludes the court from awarding less than a *living wage*. An earlier decision by Mr. Justice Gordon had laid down the unchallengeable principle that the living wage must have regard to what is necessary for the maintenance of a married man with wife and children to support. The adoption of any other principle would have placed a premium on celibacy and infecundity. The act above referred to, section 22, defines a living wage as

"a sum sufficient for the normal and reasonable needs of the average employee living in the locality where the work under consideration is done or to be done."

I pointed out in the case cited that the words "normal and reasonable" qualify and complement one another. A wage might be normal which is not reasonable; it might be reasonable and not normal. The term "reasonable" has sometimes been described as a question-begging epithet. In the *Carpenters and Joiners Case*⁵ I elaborated the meaning of the term. An industrial court, when declaring the living wage in a particular community, should endeavor to give an award which will stand the following tests:

(a) A proper maintenance of margins for workers who have a claim to additional remuneration (on the ground of skill or circumstance), and for salaried employees generally, including management.

(b) A fair margin of profit for capital reasonably invested in industries efficiently conducted.

(c) The avoidance as far as practicable of the danger of increasing the nominal wage while decreasing the real wage. Any benevolently minded judge can raise nominal wages, but it may take much thought and the co-operation of many agencies, both public and private, to secure an enduring rise of real wages interpreted in the purchasing power of money.

(d) The provision for the unskilled worker of a remuneration which will enable him to maintain himself and his family in health and efficiency. I may add that, under the various South Australian acts, special provision is made for *bona fide* cases of aged, slow, inexperienced or infirm workers.

Of course, these remarks as to the living wage have to be qualified in the case of apprentices and improvers under twenty-one years of age, or in cases where employees are "kept." The complex question of woman labor cannot be considered in the present article. Since

⁴ S. A. A. R. 1916—No. 1.

⁵ S. A. A. R. 1917—No. 10.

several cases are now pending before the South Australian Industrial Court in which it will be necessary for me to deal exhaustively with the subject of the wage for women, it would not be proper for me at the present moment to express my own preconceptions on the subject.

From the preceding sentences it will appear that the "reasonable needs" of a worker involve some reference to the question of an equitable distribution of the national income and output. While a court which took upon itself the part of a universal providence would introduce inconsistency and chaos in the industrial system, it is nevertheless true both that the "reasonable needs" of the worker in a community where the national income is high are greater than those of the worker in a community where the national income is low, and also that the judicial interpretation of "reasonable needs" must be affected by substantial variations in the national income.⁶ The judge of an industrial court must not lose his head because he sees some employers, or even some industries, making large profits. Nor, on the other hand, must he allow his estimate of the living wage to be affected by the existing wage in a sweated industry.

WAGES: THE MINIMUM WAGE

I distinguish between the living wage and the minimum wage for unskilled labor. The living wage is the bed rock below which the court cannot go; it applies to all industries irrespective of whether the industry can afford it or not, and in fact, irrespective of how much such industries can afford to pay. The claims of a struggling industry which it is desirable to retain in the community, but which cannot pay a living wage, are matters for the consideration of the legislature or the government, which in manifold ways may subsidize the industry until it has become established on a sound financial basis. On the other hand, the minimum wage applies solely to a particular industry. The wage may be affected by considerations of expediency which would be irrelevant in the calculation of the living wage, *e. g.*, the fact that a certain rate of wage has already been agreed upon by the parties; possibly, the fact that the work in a particular industry is peculiarly responsible, laborious or disagreeable, or possibly the fact that the particular industry (as distinguished from a particular business concern) is flourishing. All these considerations, and even others, may be relevant for the purpose of determining the minimum wage. Further, I distinguish not merely between the living wage and the minimum wage, but also between the living wage and *nominal variations of the living wage*. Intermittent labor is an obvious example. If, in a particular industry, a worker obtains an average of only forty

⁶ See *The Plumbers Case*, S. A. A. R. 1916—Nos. 6 & 10, at pp. 5-10.

hours' employment per week, and some days ten hours' work and some days four, a living wage of 9 shillings per day of eight hours means not 1s. 1½d. per hour, but say 1s. 4d. per hour. It is similar in industries seriously prejudicial to the health of the worker, or seasonal industries, or again, industries which involve an exceptional charge on wages—for example, as a result of a necessity to keep up appearances.

WAGES FOR SKILLED LABOR

It has been my custom in fixing wages for the skilled laborer, to be guided mainly, though not exclusively, by customary margins hitherto prevailing in the industry concerned between the unskilled and the skilled rates of remuneration, and by the rates of remuneration existing for comparable work in kindred industries. The most common difficulty has been to determine whether labor is skilled or not. In illustration I may quote from my judgment in the *Salt Case*:⁷

"The arguments for awarding a higher wage for skilled labor need no statement. . . . The labor engaged in the salt industry generally is unskilled labor. Much evidence has been adduced to show that the various classes of workers so engaged are skilled. But the evidence has been quite unconvincing. I do not know of a single occupation that does not require some kind of skill in a sense. It even requires some skill to blow one's nose. But I have to distinguish between the knack, to be learned for example in carrying a bag of salt with the minimum expenditure of energy and with the minimum discomfort, and that positive skill which implies training or special aptitude, and which alone can be taken into consideration, when awarding a higher than the minimum wage."

THE APPLICATION OF WAGE PRINCIPLES

Anyone at all acquainted with economic problems will realize how difficult must be the application of the foregoing general principles in terms of money. But in undertaking this difficult, important, and delicate task, an industrial court has a good deal of assistance, not merely from custom (as evidenced, for example, by family budgets of weekly earnings and expenditure), but also both from the precedents of other industrial courts, commonwealth and state, and also from the carefully tabulated investigations of the commonwealth statistician as to variations in the purchasing power of money, industrial conditions, the national savings, output, and income. Further, there are certain correctives which at once afford a hint to an industrial judge and a temporary palliative in case of errors of miscalculation which he may make. Apart from the possibility of governmental action in

⁷ S. A. A. R. 1916—No. 1, p. 14.

relation to the promotion of industrial efficiency—an action particularly appropriate in the case of struggling industries—there exists in Australia the power to subsidize an industry either by bounty, or by promoting facilities for transport and marketing, or by raising the tariff, etc. Of all the corrective measures the most obvious is an increase in the price of the commodity produced. Although an increase in wages should come as far as possible out of profits, it may sometimes be necessary where wages are raised to pass on the increase in the cost of production to the consumer.

WAGES AND PRICES

From the remark at the end of the preceding paragraph, it will be inferred that the subject of the price of commodities is one which must be ever present in the mind of an industrial judge. The relation of wages to prices involves questions of such difficulty and importance for the purposes of industrial arbitration, that I make no apology for quoting at length from my own judgment in the *Carpenters and Joiners Case*.⁸

“The fixing of wages is among the most important functions of the Industrial Court. If the Court is to discharge the function wisely, it must act in accordance with general principles to some of which I have referred in previous cases. It is a part of the work of the Court to enunciate these principles, not merely for the purpose of explaining or justifying its award in a particular case, but also for the purpose of simplifying or preventing litigation in the future. If an omniscient legislator could frame a complete code of Industrial Law, applicable to all conditions, and to the future as well as the present, the delays and expenses of litigation might be altogether avoided. The omniscient legislator, however, has yet to be found. Meanwhile the Industrial Court, fallible though it be, has to do its best to make good the deficiency, and to give form and substance to the conception of Industrial Law as a body of progressive principles regulating the relations of employer and employee. In pursuance of this function, as well as incidentally to a just settlement of the present case, I regard it to be my duty to refer very briefly to what I may call the ‘Theory of the Pernicious Circle.’ Briefly stated the theory is this: (1) That prices of commodities vary with the cost of production; (2) that an increase in wages is reflected in an increased cost of production; (3) that a Court of Industrial Arbitration, which awards an all-round increase of wages, necessitates an increase in the prices of commodities; (4) that when this increase has taken place the Court must revise its previous estimate of wages, in order to maintain its standard interpreted in the purchasing power of money; and (5) that again the cost of living must go up. And so on, *ad infinitum*.

“While this theory is sometimes used to discredit the whole system of industrial arbitration, it is of course used more especially as an

⁸ S. A. A. R. 1917—No. 10, pp. 3-8.

argument against proposals for awarding an increase in the rate of wage. The theory, in one form or another, and with many variants, has caused amongst employers a good deal of unrest and uncertainty, with a corresponding disinclination to take those risks which the efficient functioning of industry demands. Among employees, too, there has been an attitude of unrest and discontent, sometimes amounting to despair. 'What is the good,' the employee asks, 'to get an increase of wages if the increase may be rendered merely nominal by decrease in the purchasing power of money?'

"For the reasons just mentioned, and for others that I might indicate, I think I ought to state certain facts: (1) This Court has never admitted that wages should necessarily be either increased or decreased in arithmetical ratio to the purchasing power of money. (2) The theory in question overlooks the variety and relative importance of the factors which go to determine the purchasing power of money. It is, of course, quite true that wages in Australia have been generally and substantially raised in recent years. In order to be consistent with pre-established standards, Courts of Arbitration have had from time to time to adjust what is called in this State the living wage. But this readjustment has been an effect rather than a cause of the increased cost of living. An eminent American economist, Irving Fisher, writes: 'The shrinkage of the dollar, amounting to more than one third in the last 18 years, is due to the inflation of money and credit, or, in other words, to the fact that the means for conducting trade have outrun the volume of trade to be conducted thereby.' (*Why the Dollar is Shrinking* (1914) 189.) Speaking of Australian experience, it is safe to say that, while increased rates of wage have often contributed to an increase in the price for particular commodities, the general rise in the cost of living is mainly due to world prices and world influences. But supposing other factors than wages should remain the same, an increase in wages does not necessarily mean a decrease in the purchasing power of money. The increase in wages may come out of profits, where profits of an industry admit of this being done; or again, increased efficiency by employers or employees may more than make good the difference in wages. It is the duty of Price-Controlling Authorities to see that any increase in wages is not made a pretext for an undue enhancement in the price of commodities. Such authorities, in arriving at a decision in any particular case will naturally take into consideration the question whether the increase in wages could reasonably come out of profits, and even the question whether, assuming the increase in wages could not come out of profits of the industry as previously conducted, an increased efficiency, a better organization, or better work by the workmen, would not enable the higher wage to be paid without charging higher prices for the commodity produced. (3) Most of those who use the 'Theory of the Pernicious Circle' as an argument against the system of regulation of wages by public authorities, probably fail to realise that they are, by implication, advocating a return to supply and demand, or to collective bargaining, with its corollary of appeals to lawless force. The public regulation of wages does not eliminate supply and demand, but it qualifies their operation. For example, it precludes, or should preclude, anything in the nature of sweating. *Per contra*, since the Courts only prescribe minimum rates for all workers, they do not preclude the operation of supply and demand in favor of the more efficient worker. (4) Some socialists use the argument of the 'per-

nicious circle' as a proof against the possibility of progress under private-owned industry; but without expressing any opinion as to the relative merits of private and public-owned industry—which is a question for the High Court of Parliament—it ought to be apparent that under any scheme of socialism which is likely to prove at all workable, increased rewards for services rendered, whether called wages or not, would be liable to a like danger of enhancing the costs of production and the charges for the commodity produced.

"The element of truth in the 'Theory of the Pernicious Circle' is that, at a given stage in the history of a particular society, there is a limit to the amount which should properly be awarded for wages. I use the term wages here in a very broad sense to include not only the living wage for unskilled labor, which is partly ethical in the sense that it discards the value of the work produced by particular workers, and is based on *normal and reasonable needs*, but also to include the superstructure of wages or salaries for other classes, all of which of course affect the cost of production. Both wages and profits have to be paid for out of the price paid by the consumer. If, whether by collective bargaining, or by strike, or by judicial regulation on the part of public authorities, an attempt is made to narrow unduly the margin of profit on capital, then there is likely to be a period of industrial dislocation, and every class of the community is likely to suffer. I am not now thinking of the fact that, in a young country like Australia, we are largely dependent upon the allurements of capital from abroad, although this fact is significant. I will suppose for the sake of argument that our community is self-contained. Even in such a case, if a fair return on capital is not allowed, the immediate result is the crippling of industries generally. Employers, instead of expanding their business, scrapping old machinery, and taking the risks necessary to the efficient functioning of capital, will 'sit tight.' All classes are likely to suffer—probably the employees most of all. *Per contra*, conditions in a particular community favorable to the investment of capital mean a multiplication and expansion of industries, an increased demand for labor, and an increased opportunity for labor to obtain rates above the minimum rates fixed by law, custom, etc. Parenthetically, I may remark that I am here holding no brief for individual capitalists. It is no part of the duty of this Court to keep down wages in a particular industry, so as to ensure to all capitalists engaged therein a margin of profit. Again and again, this Court has said that if an industry cannot carry on without recourse to sweating it must go under, unless indeed, the community sees fit to subsidise it by bounty or tariff. Further, it is no part of the duty of this Court to act as a protector of the inefficient capitalist. In its estimate of marginal profits, the Court is justified in assuming a reasonable degree of efficiency on the part of those who control capital. Every day individual capitalists are going to the wall. It is equally true, of course, that some capitalists make extraordinary returns. It would conduce to lucidity of thought if the distinction between capital and individual capitalists were more generally appreciated.

"I may give point to my previous remarks by referring to my estimate of 9s. od. per day, as the living wage for South Australia, in the *Tinsmiths Case*. In that estimate, I assumed an abnormal economy on the part of the worker owing to war conditions. But, for the moment, and in order to clarify the present issue, we will suppose that

the 9s. od. per day was a fair and reasonable estimate of the living wage, apart from the call for economy resulting from war conditions. By that I mean that 9s. od. per day represented what, on a comprehensive view of the output of the community, it was safe for the Court to fix as a *bed rock*, below which wages must not be allowed to go. Suppose that, despite the reasonableness of the estimate of 9s. od. I had decided that at current prices 12s. od. should be declared the living wage. What would have happened? I will assume, of course, no intention to interfere with the just margin involved in the maintenance of the superstructure of wages for other classes than the unskilled laborer. It might be reasonably anticipated, I think, that there would be great, possibly a frantic, effort on the part of employers to meet the new conditions by increased efficiency of organization, management, and industrial mechanism generally. The beneficial results of such an effort are hypothetical; the probably certain result of awarding 12s. would have been as follows: (1) A period of dislocation would follow, involving much unemployment, and the ruin of many establishments. (2) Some industries not absolutely essential to the community would die out, leaving their employees to swell the ranks of unemployment. (3) Many industries essential to the community would have to be supported either by increased tariff (in which case the consumer pays directly), or by increased taxation (in which case the general public contributes indirectly). In so far as taxation involves a levy on industry, it affects, or is likely to affect, the costs of production, and therefore the costs of commodities. A wise Legislature may do much to bring about an equitable distribution of the national income by a carefully reasoned scheme of taxation. But if it oversteps a certain margin, it increases the costs of production and the costs of the commodities produced. Returning to the question of the effect of an increase of the tariff in raising the cost of living, it does not follow that the employees only pay the increased price of the commodity in proportion to the quantity of the goods which they consume. In the *Tinsmiths Case*, at pp. 23 and 24, I said: 'Whether wages rise through an award of the Court, or through the operation of supply and demand, is immaterial with respect to the effect of the rise of wages on prices. To put the matter rather crudely I will suppose a self-contained community in which wages go up by an amount indicated by the symbol X. Suppose in the same community that the laboring class consume three-fifths of the commodities. It would be natural to argue that, even if the whole of the increased cost of production is passed on to the consumer, the laborers will receive a net gain. As consumers, they would pay three-fifths of X; as employees they receive the whole of X. Unfortunately the matter does not work out in this easy arithmetical way. In the long course of production from the raw material to the finished article for consumption, there are many parties involved; and we certainly cannot assume, especially in view of the difficulty of dealing in fractions of a penny, that each party will only add an exact proportion. He would be more likely to add a little extra. The net result might be that the laboring class, while receiving X increase of wages, would pay more than X increase in the cost of living.'

"It will be apparent from the preceding paragraph that the cost of living would, in all probability, be largely increased as the result of the decision of a living wage of 12s. under the circumstances indicated. In the course of time, and probably a very short time, to

maintain the same standard wage interpreted in the purchasing power of money, it would become necessary for the Court to fix a much larger sum as the living wage; and this, again, would lead, in all probability, to a further rise in prices. And so on, *ad infinitum*.

"There is thus an element of truth in what I call the 'Theory of the Pernicious Circle.' But that theory comes into operation where there is a miscalculation by the Industrial Court, or a failure on the part of Price-Controlling Authorities to supplement, by wise supervision, the operation of the determinants of the prices charged for commodities. In this connection I may again mention my award in the *Tinsmiths Case*. In that case I increased the living wage from 8s. to 9s. per day. I am not aware that there has been an all-round increase in the cost of living since that award, although undoubtedly the cost of some commodities has gone up, mostly owing to war conditions. The evidence goes to show that, in declaring a living wage of 9s., I was keeping within the margin of safety. One reason why the rise in wages should not have been reflected in an increased cost of living was that, in a large number of industries, the employees were already receiving at least 9s. per day. The effect of my decision was to bring other industries into line. Further, it was probable that there was some diversion of profits to wages. In any case, it is the duty of an Industrial Court, if it is going to raise the *living wage* (which is the basis on which it works with regard to the secondary wage for the other classes), to have regard to any increase in the cost of living which may reasonably be anticipated to result from such action. If the Court declares X as the living wage, and, *as an immediate result the general cost of living goes up*, and no allowance has been made for such increase, then the estimate of the living wage will need to be reviewed. Such a revision would mean a confession of miscalculation."

To the foregoing, I may add that the commonwealth statistician's figures relating to the decrease in the purchasing power of money in Australia in recent years require a good deal of qualification when considering the question of the actual increase in the cost of living.⁹

RESULTS OF INDUSTRIAL ARBITRATION IN AUSTRALIA

While the public control of industrial conditions has been of undoubted advantage in multitudinous ways to employees, and has also protected the great majority of employers from competition with employers who show a disposition to regard the wage earner as a mere machine for turning out profits, the system cannot be said to have been an unqualified success. One proof of the fact may be found in the number of strikes in Australia, a number which in 1916 was so high as to constitute a record. Nor are things better in 1917. This is a grave indictment, and suggestive of serious imperfections. A lockout or a strike is an antiquated method of settling industrial

⁹ *The Tinsmiths Case*, S. A. A. R. 1916—No. 2, pp. 5-10.

disputes, is costly to the community, and involves a substitution of force in the place of an appeal to reason and justice. Economic relations, like civil relations, have to pass through three stages. In the first stage, the person wronged must take the chance of being able to redress the wrong by appeal to force. In the second stage, tribunals of conciliation are instituted, and these, while undoubtedly saving much injustice, are still quite inadequate. In the third stage, the settlement of disputes, industrial no less than civil, must be according to law. I do not say that strikes in the past have not fulfilled useful functions. Nor do I say that even to-day at a particular moment in a particular industry the workers may not on occasion get more easily what they want by a strike than by law. But looking at the interests of the employees as a whole, and in the long run (to say nothing of the interests of the employers and of society), it has yet to be realized in Australia how greatly those interests depend upon loyalty to the reign of law as distinct from the dominance of unregulated force. Employees who resort to force bring contumely on the whole system of industrial arbitration. They alienate that general public sympathy which has hitherto contributed towards the legislative redress of grievances or ill conditions under which the workers have suffered. They besmirch the whole class of wage earners. They are false not only to the common good, but, ultimately, to those very interests which they profess to champion. In a given case, both employee and employer should consider not only his own particular grievance; he should consider also the welfare of the class to which he belongs; and again, he must consider society. If he neglects to do so, and resorts to force in derision of the law, he is not merely a disloyal citizen; he betrays the real and abiding interests of his class and of society. *His betrayal is none the less dangerous because he may be acting in accordance with what he believes to be good motives, or because he does evil in the hope that good will come of it.*

Notwithstanding what I have just said, the public control of industrial conditions has not been signally successful in Australia generally, although it has gone far to supersede the strike and the lockout in South Australia—a result for which much is due to the efforts and tact of trade union secretaries. Until it is a success in superseding the strike and the lockout, it must be regarded as being in an experimental stage. I propose to indicate some reasons why, in my opinion, the public control of industrial conditions in Australia has yet to make good in the particular respect indicated.

Quite a number of causes might be suggested all of which have more or less influence: the discontent shared by Australian workers with workers in a great part of the civilized world against the capitalistic system; a complacent view with regard to the issue of the present war (accompanied by a tendency to regard loyalty to class interests as the supreme loyalty); and the effect of increasing wages

both on prices and the *morale* of the worker. To these causes may be added, since the recent division in the labor party on conscription, an irritation against coalition governments which do not include adequate representation of the official labor party, and a comparative lack of the restraining influence of wise leadership amongst the body of employees. I content myself, however, with dealing at length with three special causes which appear to me to have had a wide influence over a period of years.

In the first place, the existing legislation is imperfect. The functions of wages boards are too limited. State industrial courts, though having wider powers, are not infrequently hampered as regards either their jurisdiction or their functions. Further, while there is a Commonwealth Court of Conciliation and Arbitration, as well as state industrial courts, no machinery has been provided for securing an approximate harmony between the decisions of the commonwealth and state tribunals. The state court has jurisdiction to deal with state industrial disputes. The Commonwealth Court of Conciliation and Arbitration has jurisdiction to deal with disputes which extend beyond a state. The state courts have necessarily to defer to the possibility that an award which they might think just in a particular case would cripple an industry which is in competition with the same industry in other states where a low rate of wage exists. On the other hand, the commonwealth court, though it may be unhampered by considerations of competition between industries in one state and those in another, is unable to declare a common rule. One of the most urgent requirements of the moment is the constitution of a commonwealth court of industrial appeals, representative of both commonwealth and states, and empowered to grant leave to appeal from a state award or an award of the Commonwealth Court of Conciliation and Arbitration, to hear the appeal, to take fresh evidence where necessary, to establish a common rule, and generally to rectify the errors or limitations of the court below, and to secure an enduring harmony between the existing commonwealth and state industrial courts.

In the second place, the increase in the cost of living, the progress of popular education, aspiration and ideals, and world-wide influences such as the syndicalistic movement, have combined to create, if not a divine discontent, certainly a considerable discontent. In particular, literature of a somewhat syndicalistic character is imported into Australia. Although such literature may find its more energetic exponents among recent immigrants from foreign nationalities which have never enjoyed the measure of political, civil, and industrial freedom and justice which is enjoyed in Australia, the contagion spreads; conclusions, possibly applicable in some older countries under a despotic sway, are accepted in all their force as if they were as applicable in Australia as in the country of their origin.

In the third place, I fear it must be admitted that a large proportion

of the workers in Australia do not realize the complexity of the interrelation between capital and labor. It is not apparent to them that an indiscriminating attack on capital reacts unfavorably on themselves. As I remarked in the *Tug Boats Case*,¹⁰ if it is desired to increase wages generally and substantially, it becomes necessary to increase national production—a fact which concerns employers, employees, and the general community alike. To increase national production, we must keep industries going, and we must attain a maximum of efficiency in each industry. This maximum of efficiency is apt to be associated in the minds of the employees with the distrusted process of "speeding up." But, as a matter of fact, efficiency experts in America are more particularly concerned to make suggestions as to greater intelligence in the management, and increased intelligence in the worker, so that every ounce of effort attains the maximum of result. A maximum of national production, again, demands a spirit of initiative on the part of the employers, a willingness to scrap old machinery, to extend plant and premises, to extend business, even to speculate. If the industrial tribunals of Australia, or the price regulation authorities of Australia, should fail to proceed with due regard to the facts just stated, the result would be to justify the criticism which has been so frequently made against them—that they are instrumentalities for the restriction of national production. In the net result, the community suffers, the employers suffer, and the employees suffer.

What are the prospects of the public control of industrial conditions superseding the strike and the lockout in the near future? Personally, I am optimistic as regards the answer to this question. More just legislation is promised, and popular education and experience are at work with respect to certain antisocial influences just mentioned. At present, public opinion in Australia is inclined to hold that the *lockout and the strike are wrong*. I think that the day is not far distant when the great body of workers will recognize *that the strike does not pay*. When this day dawns, the militant unionist will find an outlet for his zeal in such forms of social amelioration as are referred to below. Those who take a pessimistic view of the future of compulsory arbitration are apt to refer to the impossibility of imprisoning a large number of strikers. But there are many other forms of penalty besides imprisonment—*e. g.*, power to summon compulsory conferences (and in case of obstinacy to refer the matter into court); deregistration of unions; fines on individuals and on associations; variation or cancellation of awards. The ultimate efficacy of such forms of socially regulated force, like the law against duelling, will depend upon public opinion. In the meantime the advocate of compulsory arbitration has the consolation that occasional violation of a law is no proof that it is worthless, and that compulsory arbitration,

¹⁰ S. A. A. R. 1916—No. 20, pp. 3-4.

while aiming at eliminating the lockout and strike, has also various other objects. All these objects may be subsumed under the heading of "substitution of reason and justice for appeals to unregulated force." But the variety of the objects should not be overlooked: the haphazards of collective bargaining, the elimination of sweating, the creation of a new status of employee, the protection of the fair employer from competitive tactics of the unfair employer.

CONCLUDING REFLECTIONS

(1) *The Progressive Character of Industrial Law.*

In the course of my experience in industrial court work I have frequently had occasion to emphasize the necessity for an observance of *legality*, in the sense of uniformity, consistency, and conformity to reasonable expectancy, in the application of rules to varying industrial disputes. If an industrial judge decides without reference to the guidance of general principles, the substitution of law and order for unregulated force is not achieved. I heard one capable observer say that so far as he could see, the main function of industrial courts was to give to the wage earners just enough to keep them quiet. Such an attitude is conceivable in very early stages in the history of an industrial court; but as the institution develops and precedents broaden, an industrial judge is driven towards the goal of a coherent and enduring body of principles, if he is to ensure industrial stability. But the point which I am most anxious to emphasize here is that the principles so formulated must not be regarded as a kind of cast-iron code. A great judge, Jessel, M.R., did not shrink from describing civil law as a body of progressive principles. Certainly, industrial law ought to be so regarded. It is a body of principles worked out from precedent to precedent, and *adapted from time to time to meet the needs and aspirations of a progressive society*. I do not here advocate an unlimited discretion, which might be paraphrased as unfettered caprice. I do not advocate an equity which will vary according to "the length of the lord chancellor's foot." But between the extreme of cast-iron regulation and unfettered discretion or caprice, there is a middle course which it is incumbent upon an industrial judge to follow.

(2) *The Potential Economy of High Wages.*

There are several limitations upon the natural ambition of an industrial court to raise the rate of wage. Apart from the danger to which I have previously referred, that high wages may affect the prices of commodities in such a way as to neutralize the advantage of the increase of wages, an Australian tribunal has to remember that the rural industries are the mainstay of the country; that those

industries have to be carried on in competition with other industries all over the world; and that to raise the wage in such rural industries so as to make them unprofitable, or to raise wages in metropolitan areas to such an extent as to achieve the same results indirectly, would tell for national bankruptcy. Subject, however, to limitations such as I have indicated, the potential economy of high wages, so often insisted upon by economists, cannot be ignored by industrial courts. It is not to the interests of employers that wages should be kept down to a bare subsistence level. In order to make possible a high state of industrial efficiency on the part of the employees, it is necessary that the wages should be such as to ensure the workman sufficient to maintain him in a high state of industrial efficiency and to provide his family with the necessities for physical health and physical well-being. The mistake is often made by private employers—which is often, and I fear justly, attributed to governments—the mistake of *seeking efficiency through economies rather than economies through efficiency*. But the argument does not stand on this basis alone. It stands also on the broader basis of the interests of society. Malnutrition, whether of the workman, or of his wife and children, spells for national inefficiency. Further, although in the past large families have been commonly associated with the lower paid workman, in a community like Australia where a fairly high standard of popular education exists, a low estimate of the living wage places a premium both on celibacy and on a low birth rate,—a consequence of immense significance in view of the fact that Australia needs a large increase of population for its defense and the development of its resources. Finally, as economists have frequently pointed out, high wages mean an increase in the demand for those commodities which involve a maximum of employment.

The preceding paragraph was written in reference to the present time. But looking at time to come, it is reasonable to anticipate an increase in the productivity of industry resulting from the progress of mechanical inventions, improved methods in the organization of industry, or an increased efficiency of the worker. No one will deny the right of the worker to share in this increased productivity of industry. It is true, of course, that the workers themselves may fail to co-operate with the employers for the purpose of securing the maximum of output; and such failure might neutralize the good results which would otherwise follow from new inventions or improved methods in the conduct and organization of business concerns. But assuming that the workers as a body recognize, or come to recognize, the fatuity of failure to co-operate with employers in the processes of production, there should be a progressive rise in wages without precluding a proper margin for profit on capital reasonably invested in concerns efficiently managed.

(3) *Complementary Agencies of Social Amelioration.*

Some workers appear to hold that upon wages boards and industrial courts rests the whole burden of ameliorating the conditions of the working class. Hence a good deal of recrimination, which a great statesman has described as the easiest and least expensive form of self-indulgence. As a matter of fact there are a number of compulsory agencies, to some of which I may refer here. In the first place, industrial courts prescribe only minimum rates of wage, together with what are considered just conditions of labor generally. But the prescribing of minimum rates of wage does not prevent the operation of supply and demand in favor of the more competent worker, or indeed, in times when labor is scarce, or capital abundant, in favor of all workers. In the second place, the action of industrial courts does not preclude the possibility of such schemes of social amelioration as distributive co-operation, profit-sharing, or copartnership (in the sense of a share in the profits and control of business concerns). Objection to profit-sharing or copartnership which has told against their adoption in other countries does not apply in Australia with its public machinery for the regulation of hours of labor and rates of wage. The systems could be grafted on the present system of public regulation to the advantage of all parties and of the community in general. In the third place, there is an immense field for legislative and administrative activity in the way of increasing industrial efficiency by provision of public departments of research; by raising the standard of popular education; by adjustment of the incidence of taxation (with special reference, *inter alia*, to the man with a family to support); old age pensions; schemes for insurance against unemployment; the public control of monopoly or quasi-monopoly prices.¹¹ It has been sometimes said that the chief function of wages boards and industrial courts is to prevent sweating. While, as a matter of fact, both industrial courts and wages boards go far beyond this end, they still leave an immense field for the activity of private and public agencies along the lines just suggested. It has been well said that

"The working class has four legs, and unless it has all four at once it cannot stand upright. These four are the trade union movement, the co-operative movement, education, and the political movement."

Industrial courts may be regarded as a particular application of the political movement. Those courts constitute but one of many agencies in the process of social amelioration. If some of the energy which is occasionally spent in criticising the industrial awards was diverted into other channels, the results would prove more beneficial.

¹¹ Cf. W. Jethro Brown, *The Prevention and Control of Monopolies*.

BIBLIOGRAPHY

I have some hesitation in making suggestions as to reading for the benefit of students who may desire to go into the subject more thoroughly than it has been possible for me to do within the compass of a single article. My hesitation is certainly not the result of a paucity of materials. I may, however, refer especially to the awards of the various Australian industrial courts; to the article, already cited, by Mr. Justice Higgins on *A New Province for Law and Order*; to the report of Mr. A. B. Piddington, K. C. (now chairman of the Interstate Commission) printed in 1913, on *Industrial Arbitration in New South Wales*; to the various reports of Mr. Stewart from time to time, extracting the essence of the decisions of the Commonwealth Court of Conciliation and Arbitration; to the published contributions of Mr. J. B. Hammond; and to Mr. Hamilton's *Compulsory Arbitration in Industrial Disputes*, published in 1913. In the article of Mr. Justice Higgins, the reader will find crystallized in the briefest possible form the principles upon which the Commonwealth Court of Conciliation and Arbitration acts. Two of these principles may be quoted here:

"The principle of the living wage has been applied to women, but with a difference, as women are not usually legally responsible for the maintenance of a family. A woman's minimum is based on the average cost of her own living to one who supports herself by her own exertions. A woman or girl with a comfortable home cannot be left to outbid in wages other women or girls who are less fortunate.

"But in an occupation in which men as well as women are employed, the minimum is based on the man's cost of living. If the occupation is that of a blacksmith, the minimum is a man's minimum; if the occupation is that of a milliner, the minimum is a woman's minimum; if the occupation is that of fruit-picking, as both men and women are employed, the minimum must be a man's minimum."

Since writing the above article, Mr. Murphy, Secretary of the Department of Labor, Melbourne, has published a most interesting book on *Wages and Prices in Australia*. The book may be recommended to the general reader although there are some parts which, in my opinion, require to be read with caution. For instance, on page 11 the author quotes Mr. Knibbs' figures for the purpose of proving that, taking the years 1901 to 1916, the rise in the cost of living in Australia had been 50 per cent., while the rise in wages is only 39 per cent., thus showing a balance against the worker. The figures of Mr. Knibbs relate to the purchasing power of money and have to be taken with considerable qualifications with regard to the cost of living. (See *The Tinsmiths Case*, S. A. A. R. 1916—No. 2.) Further, the author neglects to point out that the increase in the cost of living is largely due to the war and to world prices. It seems fair to assume that after the war prices will go down without a corresponding reduction in wages. I wish to dissent also from the suggestion made in various parts of Mr. Murphy's brochure that industrial tribunals have given their awards on an empiric and opportunist basis rather than upon scientific formulae. Of the two formulae suggested by the author, the earlier has been adopted in substance—at any rate in this state. On page 38 the author suggests handing over to the commonwealth complete and exclusive jurisdiction of certain matters, reserving other matters to the states. Such a division of the field of industrial enterprise would lead to a good deal of litigation in order to determine in particular instances which employees were under commonwealth jurisdiction and which were under state jurisdiction; and it would not, moreover, provide any means for securing an approximate harmony between the decisions of the commonwealth and state courts. The lack of such harmony in the past has probably been a more fruitful

cause of discontent and of strikes than any other single cause. On page 55 the author says that penal laws in Australia with respect to strikes have not been carried out. The remark does not apply to South Australia—a fact which may have some bearing on the relatively small amount of wages lost in industrial disputes in South Australia for the years 1913-1916. Whereas the loss suffered by each individual worker in New South Wales for that period is put at £3.8.8, in South Australia it is put at only 5s. 11d. At various places in Mr. Murphy's brochure there are references to the increase of output as compared with the increase in wages. There is a failure to recognize that the tendency of modern industrial organization is in the direction of machinery which is increasingly costly and has to be scrapped from time to time, and that other causes of a like nature exist which all tend to diminish the amount paid in wages relating both to capital invested and to the value of the output.