Visit to Australia
Note on the observations of the working
of Conciliation and Arbitration Machinery.

Shri B.N.Datar,Member-Secretary,National Commission on Labour and myself we reached Australia on the morning of 26th February 1968, and landed at Sydney. From there we immediately proceeded to Melbourne. The Government of Australia had drawn a detailed programme of our discussions at Melbourne,Sydney, Canberra and Adelaide. The Government had arranged discussions with the Heads of the Commonwealth Department of Labour and National Services, their regional Directors at each place, Heads of Department of Labour of State of Victoria,New South Wales and South Australia, the Judges and Registrar of (1) Commonwealth Conciliation and Arbitration Commission, (2) Judges of the State Industrial Courts.

We had also discussions with the Commonwealth Minister for Labour and Minister for Labour and Industry of South Australia. Discussions were also arranged with the representatives of employers, the Chairman of the Associated Chamber of Industrial Manufacturers at Canberra, the President of the Australian Council of Trade Unions, and with the members of the Bar, Queen's Counsel practising before the Commonwealth - Commission and the Industrial Court We also called on academicians,professors of labour economics of the Australian National University and Monash University and Vice-Chancellor of the University of Flinders. A list of the persons with whom we had discussions is given in the Appendix. They formed a fair cross section of persons concerned with the system of industrial relations and conciliation and arbitration machinery. We returned after 17th March 1968.

The intinery also included visits to the factories. We visited International Harvester Co.,manufacturer of tractors

at Geelong, The Woollen Mills at Geelong, The telephone factory at Sydney and Vinery distilling wines at Adelaide.

The system of conciliation and arbitration in Australia differs from State to State as also in the spheres failling under the Commonwealth Conciliation and Arbitration Act, although the fundamentals of settlement or prevention of disputes by conciliation and arbitration are similar in every State but the methods differ in some respects from State to State.

Australia is a federation of sovereign States and according to the constitution of Australia the power to regulate industrial matters is divided between the Commonwealth of Australia (Federal Government) and the Government of each of the six States. Section 51 Placitum XXXV of the constitution gives the Commonwealth Parliament power to make laws for the prevention and settlement of industrial disputes extending beyond the limit of any one State by way of conciliation and arbitration. The grant and extent of this power has been tested from time to time in the cases before the High Court of Australia and the Privy Council and the limits of the powers of Parliament to enact laws have been confined only to "prevention and settlement of industrial disputes by conciliation and arbitration". The limits of the powers may be shortly stated as follows:

(a) The Parliament can act only through the provision of machinery for conciliation and arbitration.

(b) Arbitration and conciliation can be exercised only in cases where the dispute or threatened dispute extends beyond the limits of any one State.

(c) The dispute must be real and genuine in character and of an industrial nature.

(d)The arbitral and conciliatory powers are confined to resolving issues between contending parties and cannot be made general in application.

(e)The Parliament cannot extend the power of its tribunals beyond the actual power written into the constitution.

(f)The Parliament cannot make laws for the regulation of industrial matters. Its power is limited to referring disputes,interstate in character,to a third party for determination by conciliation and arbitration if the disputants fail to agree.

As regards the industrial disputes, existing or the threatened disputes, which may extend beyond the limits of any one State are dealt with by the machinery provided under the Conciliation and Arbitration Act,1904-66 (the original enactment was amended from time to time by the Parliament of the Commonwealth of Australia). In its present form the Act provides for the following forums to deal with the industrial disputes:

1)Commonwealth Conciliation and Arbitration Commission

2)Commonwealth Court of Conciliation and Arbitration.

3)Commonwealth Industrial Court.

The Commonwealth Conciliation and Arbitration Commission consists of the following members:

a)President

b)Not less than two Deputy Presidents.

c)A Senior Commissioner

d)Not less than five Commissioners.

The Presidents and Deputy Presidents,to qualify for appointment, must be barristers or solicitors of not less than five years' standing and hold office till they attain the age of 70 years. The Presidential members appointed before 1956, however, hold office until resignation or death. No specific qualifications are prescribed for Senior Commissioners and

Commissioners but on appointment they hold office until they attain the age of 65 years.

Powers and functions of the Commission

The powers of the Commission are to prevent or setle industrial disputes by conciliation and/or arbitration. There is a division of this power between the Commissioners and the Presidential members in relation to industrial matters. The interstate disputes as regards

i)standard hours of work.

ii)basic wage.

iii)prescribing long service leave with pay.

iv)basic wages for females,

the Commission exclusively has the jurisdiction and the powers in the above matters are exercisable only by the Presidential members of the Commission. Therefore such disputes can be decided by a Bench consisting of the President and two Deputy Presidents or any Bench out of the three. All other disputes are dealt with by the Commissioners.

Commonwealth Court of Conciliation and Arbitration.

The Commonwealth Court of Conciliation and Arbitration, although it is so named in the Act, in actual practice it is a legal fiction. Before the Act was amended in 1956 the old Commonwealth Court of Conciliation and Arbitration exercised both the judicial and arbitration functions but in the Boilmakers case it was held by the High Court of Australia that the judicial and arbitration functions could not be combined in the same tribunal and that the functions should be separated. The Judges of the High Court preferred an appeal to the Privy Council but the same was rejected. But some of the Judges who belonged to the judiciary were appointed for life and they had

to be provided for. In the amended Act, the judicial and arbitration functions were separated. The judicial functions are exercised only by the Commonwealth Industrial Court and the arbitration functions are exercised by the Commonwealth Industrial and Arbitration Commission which consists of the Presidential members, for the purpose of certain disputes and Commissioners for other disputes. The Presidential members also hear appeals from the Commissioners or references by the Commissioners.

The Commonwealth Conciliation and Arbitration machinery hinges round the Industrial Registrar who is the Registrar to the Commonwealth Conciliation and Arbitration Commission and he is also the Registrar of the Industrial Court. He has manifold functions to discharge. As soon as the log of demands (charter of demands)is presented by a union to the employer, a copy thereof is sent to the Industrial Court Registrar. 90% of the disputes are about wages, very few cases of dismissal and reinstatement come before conciliator or arbitrator. The Registrar immediately registers the dispute and acting under the orders of the President sends the dispute down to the Senior Commissioner for conciliation or refers it to a single Commissioner or a bench of Commissioners as per the orders of the President. The parties are intimated on telephone. The Commissioner acts as a conciliator, has got the power to compel the parties to attend a compulsory conference. If the conciliation fails he submits a very brief report to the President as regards the failure of conciliation and the matter then is referred to any Commissioner for arbitration. Against the award of the arbitrator there is a provision for appeal to the Presidential members of the Commission. If there is a settlement

before the Commissioner who acts as conciliator the award is drawn up and released. Fifty percent. are consent awards. As a rule no ex-parte awards are made.

The powers of the Registrar also include the powers to grant registration to a trade union or an employers' association which when registered are called "registered organisations". He has also the power to cancel the registration of any - organisation (association of employers or trade unions) or to substitute one trade union for another trade union. The - Registrar is also responsible for the printing and releasing of the awards and also for getting them published as awards of Commonwealth Court of Conciliation and Arbitration.

When a dispute is raised the unions try to make it an interstate dispute, because there are craft unions which have got branches not only in one State but in more than one State. "To create an interstate industrial dispute requires that the same claims be made in more than one State and that such claims be rejected by other party"@

The functions of the Commonwealth Industrial Court.

The Commonwealth Industrial Court consists of one Chief Judge and not more than six other judges. The qualifications prescribed for the Chief Judge and other Judges are that -

a) he must be a Judge of the (former) Commonwealth Court of Conciliation and Arbitration;

b) he must be a presidential member of the Commission; or

d) he must be or have been a barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing.

@ Australian Labour Relation Readings - Edited by J.E.Isaac & G.W.Ford, 1966 p.270.

The powers of the Court are confined to judicial functions and include the powers of ordering compliance with an award, enjoining the organisation or persons from committing or continuing a contravention of the Act or breach of the award and to decide matters of law relating to the registration of organisations under the Act, the interpretation of the awards, interpretation of questions of law arising in any matter before Conciliation and Arbitration Commission, the hearing of appeals from the Judges of lower Courts in matters under the Commonwealth Conciliation and Arbitration Act, and take proceedings for an offence under the Act, and has power to punish for contempt of the Court, etc. In other words it can be seen that the Commonwealth Industrial Court is a purely judicial body exercising the powers of enforcement of law and interpreting the law. It is thus a forum or an authority for implementation of the award. It does not engage in any of the conciliatory or arbitrary functions provided under the Act, these matters being the exclusive province of the Conciliation and Arbitration Commission. The Industrial Court has also the power to ask the registered union to call back men to work or to face the cancellation of registration of the union, forfeiture of funds, or be liable to pay heavy penalty for contempt of Court.

The system of conciliation and arbitration differs from State to State. In New South Wales under the Industrial Arbitration Act, 1940, there is an Industrial Commission which consists of not more than 12 persons, one of whom is the President. For being eligible for appointment as a member a person shall be a judge of the Supreme Court, a District Court Judge, a barrister of not less than five years' standing or a solicitor of not less than seven years' standing.

There are in addition Conciliation Committees for industries. Each Committee consists of an equal number of representatives of employers and employees with a Conciliation Commissioner as Chairman. We were told that there are as many as 400 Conciliation Committees and one Conciliation Commissioner was the Chairman of not less than 78 Conciliation Committees. In the Conciliation Committees, the Chairman tries to bring about a settlement of the dispute and if there is a settlement there is a consent award and there is no appeal from such consent awards. Otherwise an appeal is provided if there is additional evidence which could not be brought before the Conciliation Committee. Such appeals are heard by a single Judge of the Commission.

The Act provides for appointment of not more than five Conciliation Commissioners one of whom shall be a Senior Commissioner. The Commissioner is empowered to call compulsory conferences and sometimes he also makes an award, if there is no agreement. The award shall have the same effect as an order or award made by a Committee. There is a right of appeal against the order of a Commissioner similar to that allowed against the Conciliation Committee. The Act provides for legal and illegal strikes and for the imposition of penalties by the Commissioner in case of illegal strikes, and also for registration of unions.

In the State of Victoria under the Labour and Industry Act, 1958, there is a provision for establishment of Wage Boards which consist of an equal number of employers' and employees' representatives presided over by a permanent independent Chairman. The Act provides that in determining wage rates the Wage Board shall take into consideration relevant awards of the Commonwealth Conciliation and Arbitration Commission. Wage Boards do not give reasons for their decisions unless there are

chances of appeal. The qualification for being eligible for appointment as a member of the Wage Board is that the member must be an actual employer or an officer of an employers' organisation in the trade, or an employee or an officer of an employees' organisation in the trade. No practising barrister or solicitor can be a member of the Wage Board, except in the case of a Board constituted to deal with the legal profession.

There is an Industrial Appeals Court which hears appeals from the decisions of the Wage Boards. The Appeal Court consists of three persons one of whom is the President who is a Judge of the County Court, and a representative each of employers and employees. In addition to hearing of appeals against the decisions of the Wage Boards it hears appeals against orders of Petty Sessions in cases of breaches of awards. The questions of law arising in Industrial Appeals are decided by the President alone. In Victoria there are about 200 Wage Boards and about 100 each are under one Chairman with a centralised secretariat. The Act does not provide for registration of unions. The Parliament of the State of Victoria has legislated for annual holidays and long service leave (vide Labour and Industry Act).

The arbitration and conciliation machinery in South Australia consists of an Industrial Court, the Board of Industry and a number of Industrial Boards under the South Australian Industrial Code. The Industrial Court consists of one President and not more than two Deputy Presidents, who for being eligible for appointment must be a Judge of the Supreme Court. The jurisdiction of the Court extends to all industrial matters for which an Industrial Board has not been appointed. The Court may act on its own motion, convene a compulsory conference in any industrial dispute and failing agreement, may arbitrate.

The Board of Industry consists of a President who shall be the President or the Deputy President of the Industrial Court and four Commissioners, two of whom shall represent employers and two shall represent the employees. The functions of the Board of Industry are (1)to constitute or dissolve the Industrial Boards, (2)transfer classes of employees from one Board to another, (3)declare the living wage for South Australia and (4)to perform such other functions as may be determined by the Parliament.

On the advice of the Board of Industry, the Minister may constitute an Industrial Board for an industry, a division of an industry, or a group of industries. The Industrial Board shall consist of a Chairman and an equal number of employer and employee representatives. An independent Chairman is to be nominated by such members. If they are not able to nominate the Chairman shall be nominated by the Industrial Court. The functions of the Board consist of determining rates of pay, hours of work, overtime rates for work performed on holidays, proportion of apprentices to be employed and any other industrial matter. The Act permits registration of organisations of employees. Applications for registration are dealt with by the Registrar of the Industrial Court in the first instance. Lockouts, strikes and picketing are prohibited by the Act, and penalties are provided for non-observance of awards of the Court.

In some States there is a practice of appointing Boards of References for dealing with matters connected with work value assessment or classification of employees. They perform the same task as do the assessors under the Industrial Disputes Act in our country.

From the perusal of the above system of the Commonwealth and three different States which we visited it is clear that although the machinery differs from State to State, the fundamental principle is common,viz.,prevention and settlement of industrial disputes by the process of conciliation and arbitration. In 1896 Wage Boards were established in Victoria. Western Australia was the first to introduce compulsory arbitration in 1900. New South Wales followed suit in 1901, Commonwealth in 1904, the State of South Australia in 1906, Queensland in 1908 and finally Tasmania established Tribunals in 1910,modelled on the Wage Boards of Victoria. The conciliation and arbitration machinery works hand in glove and the conciliation machinery does not function independently of the arbitration as in our country, because Conciliation - Commissioners are under the administrative control of the President,Industrial Court. The Industrial Registrar whether of the Commonwealth or the New South Wales or any of the States is the main prime mover round which the whole system revolves. In the Commonwealth the dispute is referred by the Registrar with the orders of the President to the - Conciliation Commissioners. The same procedure is followed in New South Wales and South Australia. In the Commonwealth system if there is no settlement the Conciliation Commissioner makes a brief report to the President, while in New South Wales the Chairman of the Concliation Committee or the Conciliation Commissioners are authorised to make an award which is subject to the right of appeal to the Industrial Court or the Industrial Appeals Court as the case may be.This is a very good system which we think should be recommended for adoption in our country because there is no time lag between the decision of the Conciliator and the matter going to arbi-

-tration or in appeals if need be. The Conciliators and Commissioners are matured persons with grey hair beyond the age of fifty. They carry weight and are able to influence and impress the parties with their view points in bringing about a settlement. Some of them have left the service in private - sector and have joined Government service. We also noticed that the conciliation and arbitration machinery is independent of Government and does not function under the Labour Department. The Labour Department has no hand either in making a reference of the dispute to conciliation or arbitration or releasing or publishing the awards. The conciliation machinery is closely connected with the arbitration machinery.

Another significant feature of this system is that in the arbitration machinery the judicial members at times sit with the non-judicial members but the latter influence the former in matters of decisions.

There are differences of opinion among the persons with whom we had discussions as to whether the non-judicial members should include a few economists of repute. Some academicians are of the view that the economists would prove to be of value in determining the questions of national wage policy as they will take into consideration the repurcussions on the nation's economy when the questions of revision of basic wages are before the tribunals. Others are of the view that the economists would not properly fit in in the legal frame work of the machinery where there are also judicial members. It is necessary at times to have impartial judicial pronouncements. The Commissioners' proceedings are informal. Dr.P.H. Cook,Secretary, Department of Labour and National Service, said that although the system looks "legal" underneath it is "informal". But this is true so long as there is an effort

on the part of the Commissioner or the Conciliator to bring about a settlement of the dispute between the parties. But when the matter goes before the Commissioners or Court, we were surprised to find that there is voluminous recording of verbatim proceedings and oral evidence extending over 2200 typed pages. The proceedings thus tend to be lengthy. Industrial disputes are not criminal trials or long-cause commercial suits and it is not necessary to have such elaborate recording of evidence.

The parties that is the registered organisations of both employers and employees (i.e. trade union)appear by their officers, or lawyers or labour law practitioners who are popularly termed as "bush" lawyers.

Trade Unions

As regards the registration of trade unions there being no Trade Unions Act of the Commonwealth or the Federal Government, the trade unions are registered by the Registrar of the Industrial Court of Commonwealth Commission under the Commonwealth Conciliation and Arbitration Act. Similarly the Registrars of the State Industrial Courts have been authorised to register unions under the State laws with the result that some of the unions in South Australia and Queensland have to seek double registration both under the Commonwealth law and under the State law. As pointed out above some of the trade unions in the State are interested in making certain issues as interstate disputes where the unions have branches in the different States.

Nearly 60% of the work force are members of the trade unions. Unions which are centrally organised have high - bargaining power. It is claimed that arbitration system has strengthened the trade union movement. There are very few

industrial unions and the majority of the unions are craft unions which have got branches not only in one State but in different States. The result is that the employee in one single industrial concern, say for example carpenters may be - governed by the awards of the Commonwealth Conciliation Commission whereas other employees working in the foundry in the same plant may be governed by the State award with the result that having two awards operating in the same industrial unit there are no proper differentials in wages between one class of employees and the others in the same concern.Moreover, federal awards do not provide for matters like health and safety. However, a tendency is now growing for amalgamation of craft unions into industrial unions but there are many difficulties in the way. Moreover, the younger generation has not much interest in the organisation and the growth of the trade union movement mainly for the reason that the conciliation and arbitration machinery in Australia in the affluent society is working on the basis of full employment economy where out of 10 million population 4.1/2 millions is the total work force and 1.1/2 millions is only the factory workers.

Enforcement or Implementation machinery.

In our country there is no separate enforcement machinery either for awards or other benefits. In Australia, the Commonwealth Industrial Court, or the State Appeals Court or Industrial Magistrates are appointed for enforcing and implementation of the awards given by the Conciliation Commissioners or other bodies. We think in our country we may authorise the same tribunal or the Labour Court which gives the award to enforce implementation in case an application is made for non-observance of the award by the employer within a reasonable time and the Labour Court or the Tribunal may be

authorised either to enforce the award by a suitable order or by application of penal clauses.

Strikes

Akthough the strikes are not prohibited by law, and certain State laws make a distinction between legal and illegal strikes, many federal awards contain "ban" clause meaning "banning limitation on the performance of work". The strike is often spontaneous. The workmen resort to it to focus attention and to impress about urgency of their demands (often for wage rise).But the unions are in embarrassing position. The Court issues notice on the union asking the unions to call men back to work, otherwise the union runs the risk of losing registration of the union, foreiture of funds and heavy penalties for contempt of court. The Australian economy cannot afford to have prolonged strikes. The procedure is a good corrective measure to end strikes quickly. During our visit there were spontaneous or wild cat strikes of postal van drivers, men working under electricity Commission, in air transport services and in metal trades. But they were called off. The Australian method of calling off strikes does create respect for law and authority. In our country strikes prolong at times much to the detriment of interests of workers, employers and community.

Each State has worked its system for nearly sixty years, and people have lived with it. It is not possible for them to change over to any other system,although some critics advocate collective bargaining in place of arbitration. In the Australian system there is also the element of collective bargaining but in the presence of a third party,namely, the Conciliator,Commissioner,Wage Board or Industrial Court. There is also scope for collective bargaining outside the law and there are many agreements of "over award" payments. ".... Whether one system is better than another depends to an important

extent on its greater acceptibility to the parties in industrial relations; and this may mean that given the historical - circumstances which led to the establishment of a particular system, with the passage of time the parties have become - accustomed to it. Custom breeds preference!"*

Adoption of uniform system for the whole of Australia will mean amendment of the constitution. Previous attempts to amend the constitution with a view to enlarging the powers of the Federal Government to enact laws for the whole country were not successful as the proposed amendments were not - supported in the referendum in States.

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* Ibid.

Bombay, dated 23rd March 1968.

K.R.Wazkar,
Member-Secretary,
Study Group on Labour
Legislation.

List of persons with whom discussions were arranged by the Govt. of Australia.

MELBOURNE

1)Dr.P.H.Cook,Secretary,Department of Labour and National Service.

2)Mr.J.A.J.Caine,First Assistant Secretary, Industrial Relations and General Division.

3)Mr.K.C.McKenzie,
Assistant Secretary,
International Relations and General Branch.

4)Mr.A.D.Fogarty,
Assistant Secretary,
Industrial Relations Branch No.2.

5)Dr.I.G.Sharp,
Industrial Registrar

6)Mr.W.B.Wilson
Conciliator of Commission and Assistant to Commonwealth Public Service Arbitrator.

7)Mr.P.J.Fogarty,
Assistant Director (Industrial Relations) Victoria Region,Department of Labour and National Service.

8)Mr.George Polites,
Director,
Australian Council of Employers' Associations.

9)Mr.A.E.Monk, President.)
10)Mr.H.J.Souter, Secretary) Australian Council of Trade Unions.

11)His Honour Judge G.L.Detheridge,
President,Industrial Appeals Court (of Victoria)

12)Mr.W.Allen,
Regional Director,Victorian Region,
Department of Labour and National Service.

13)Prof.H.A.J.Ford,
Dean of Faculty of Law,University of Melbourne.

14)Prof.J.E.Isaac,
Faculty of Economics and Politics,
Monash University.

15)Prof.F.G.Davidson,
Professor of Economics,Latrobe University.

16)Mr.A.E.Woodward,
Q.C.

17) Mr.M.Walsh,Secretary,Victorian State Department of Labour and Industry.

18) Sir Richard Kerby,
President,Commonwealth Conciliation & Arbitration Commission.

SYDNEY

19) Mr.R.Smee,
Regional Director (N.S.W.)
Department of Labour & National Service.

20)Mr. A.C.Mills,
Assistant Director (Industrial Relations),
Department of Labour and National Service.

21) Hon.Leslie Bury,M.P.,
Minister for Labour and National Service.

22) Mr.T.J.Kearney,
Under Secretary,
Department of Labour and Industry.

23) Hon.R.B.Marsh,M.L.C.
Secretary,Labour Council of N.S.W.

24) Mr.Justice A.C.Beattie,
President of Industrial Commission of N.S.W.

25) Hon.F.W.Bowen,M.L.C.

26) Prof.H.R.Edwards,
Professor of Economics,Macquarie University.

27) Mr.J.T.Ludeke
of the N.S.W.Bar.

28) Mr.J.H.Wootten,
Q.C.

29) Conciliation Commissioner Mr.Burns.

CANBERRA

30) Mr.K.Grainger,
Commissioner,Public Service Board.

31) Sir Henry Bland,
Secretary,Department of Defence.

32) Mr.R.W.C.Anderson,
Director,Australian Chambers of Manufactures.

33) Dr.K.Sloan,
Senior Lecturer,Department of Economics,
School of General Studies,Australian
National University.

34) Mr.C.Weston,
Parliamentary Legal Draught-man,
Attorney-General's Department.

35) Mr.K.C.O.Shann,
First Assistant Secretary,
Department of External Affairs.

ADELAIDE

36) Mr.W.F.Sharpe,
Regional Director (S.A.),
Department of Labour and National Service.

37) Mr.J.Nagel,Assistant Director (Industrial Relations)
Department of Labour and National Service.

38) Mr.L.B.Bowes,Secretary,
Department of Labour and Industry.

39) His Honour Judge L.H.Williams,
President of Industrial Commission and of
Industrial Court.

40) Professor P.H.Karmel,
Flinders University.

41) Professor K.J.Hancock,
University of Adelaide.

42) Hon.Mr.A.F.Kneebone,M.L.C.,
Minister for Labour and Industry.

43) Mr.K.D.Hilton,
Registrar of the Industrial Court.

44) His Hon.Mr.Justice Williams,
Judge of the Industrial Court and President
of the Industrial Commission.

45) Mr.E.White,
Department of Labour and National Service.