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**Summary**

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**Glossary**
The idea for this thesis originated with an extended essay on the concept of "Status" written as an exercise during coursework for this M.A. In the course of this essay I noticed the distinct similarities between what some authors (particularly T.H. Marshall) had seen as evidence of the re-emergence of "status" relationships in modern society and the activities of the Commonwealth Arbitration Commission. At the same time, I concluded that the identification in much sociological writing of the concept "status" with the notion of prestige ranking was the product of peculiarly American conditions, and that a wider and historically more general concept of status was more fruitful in approaching some aspects of modern industrial society. For example, I felt the Australian Arbitration Commission could in some senses be viewed as the "bestower of status" in Australian society, as an Antipodean variety of preindustrial courts such as the French pre-revolutionary parlements which regulated the status entitlements of different estates. In Parsonsian terms, it represented an intrusion from the integrative sub-system of the polity into the interface of the economy and the 'latent pattern-making and tension-managing' household, which in capitalist societies is commonly occupied by a purely adaptive collective bargaining system. Initially, I had hoped to explore these ideas and in so doing delineate some aspects of the Australian value system, by carrying out a content analysis of published judgements of the Arbitration Commission.

Aspects of this initial scheme survive in what follows. Parallels between the Commission's actions and what Weber referred to as 'patricidal' justice are explored in Chapter 5, while Chapter 2 examines in an unsystematic manner the "work value" judgements of recent years. However, the main emphasis has shifted considerably. As I interviewed participants in the activities of the Commission and read both local and overseas work on the general topic of wage fixation and the forces which affect it, I became convinced that to understand what lay behind the apparently status-oriented actions of the Commission it was necessary to take a different approach.

Some of the suggestive facts or viewpoints which caused me to look for an alternative explanatory frame are mentioned below. None of these was, of course, conclusive or even particularly important in itself, but together they pointed the way to the approach I eventually took:
1. An important problem was where to place the Commission in the model of industrial relations systems advanced as universally valid by J. T. Dunlop (1958). Dunlop suggests that such systems always comprise three actors: employees, employers and government. The Commission is obviously an organ of government. But equally obviously it often functions in a way which, if not directly opposed to government policy, is at least out of line with it. Furthermore, in conversation with officials of government departments such as the Public Service Board and the Department of Labour and National Service it became obvious that in many respects the tail wagged the dog. Instead of government policy on, say, the purpose of wage differentials, guiding the Commission, the actions of the Commission caused reactions in government policy.

2. The members of the Commission themselves, while feeling they had a duty to act in the public interest, would often state that this duty required them to pay primary attention to problems of industrial relations, rather than the carrying out of the publicly expressed policy aims of the government.

3. The attitudes of employers and unionists towards the Commission were by no means symmetrical. Few unionists saw any reason to do other than exploit the Commission in the pursuit of wage justice, while the employers (or at least the leaders of their federations) saw themselves as needing to convince the Commission that they no longer simply opposed everything, but wanted to be constructive.

4. The famous formula that the general wage level should be set at the highest it is within the capacity of the economy to pay, while vague and capable of use in rejection of union claims, is in fact a much more direct statement of the primacy of the claims of wages and salaries to a fair share of the national income than is usually found in official pronouncements on the subject in Western market economies. (Turner and Zootweij, 1966 : 130).

5. It is difficult to see among Australian union officials the status insecurity which C. Wright Mills observed among U.S. union officials, and which he partly attributed to their ambivalent position as to some extent "government created" functionaries by virtue of the Wagner Act (Mills, 1948). This is so in spite of the fact that in many respects Australian unions are more directly dependent on government sponsorship and support than are American unions.

This thesis tries to deal with facts such as these and the general problem of the origins and functioning of the arbitral tribunals by suggesting that the tribunals are best seen as a part of the trade union structure itself, performing at least in part many of the mediatory functions between unions and the government; functions performed in Britain, for example, by the Trade Union Congress. To twist a marxism, the tribunals comprise the Executive Committee of the trade union movement. The "status" aspect of arbitral judgements
mentioned earlier is seen as an outcome of this symbiotic relationship, and leads to the connexion between status criteria (which Marshall claims dominate trade union wage claims in Britain) and Australian arbitration judgements. The "Australian values" expressed by the tribunals are thus seen as an expression of trade union values, and the "Australian egalitarianism" expressed in them contains the customary ambivalence which surrounds the egalitarianism of trade unionists generally.

This theme is pursued in five chapters, in each of which I examine a different aspect of the Commission's work. The first, "The Arbitrator as Collective Conscience", discusses the forces sociologists have seen as underlying the "rights of citizenship" in modern societies, and relates the Commission's place in Australian society to these. "The Arbitrator as Valuer" examines some of the criteria the Commission has used to determine the minimum wages it will award for particular occupations. The background to these criteria is explored in "The Arbitrator as Surrogate Unionist", which examines the relationship between the Arbitration system and unionism. "The Arbitrator as Adjudicator" examines the difference between the meaning of "industrial arbitration" overseas and in Australia, and the problems of applying overseas categories to the Australian tribunals. Finally, "the Arbitrator as Judicious Regulator" suggests that it may be profitable to view the Commission as a kind of law court, but a kind foreign to the usual definition of "legal" process in British legal tradition.

In this thesis I have had to accept the structural base underlying the Australian industrial relations system as given, for except in passing I do not deal with the question of the origins and basis of trade unionism in this country, or in industrialised market economies generally. However I do consider how the existence of the arbitration system has modified and strengthened the unions themselves. The extent it has been possible to deal with some key questions concerning the nature of solidarity in market economies reflects, I would suggest, the degree to which the industrial relations system is one of the "core" features of Western societies.

Finally, a point on terminology. In general, I have used the term "Commission" to refer to both the Commonwealth Court of Conciliation and Arbitration (which ceased to function in 1957) and its arbitral successor, the Commonwealth Conciliation and Arbitration Commission. Except where the context indicates otherwise, the word "Court" refers to the Commonwealth Industrial Court. The "Act" is the Commonwealth Conciliation and Arbitration Act 1904-1970.
CHAPTER 1
THE ARBITRATOR AS COLLECTIVE CONSCIENCE

1.1 Solidarity and Citizenship

The unique existence of an industrial arbitration system in Australia (and New Zealand), and its general acceptance cannot be accounted for in terms of the industrial relations system alone. The parties involved—employers, unions and governments—have all largely imitated institutional and ideological forms originating in Britain or (in the case of some employers recently) the U.S.A. Yet both Australian employers and unions on the whole uphold a system of industrial regulation which has failed to take root in any other country, although other social innovations introduced in Australia at the turn of the century (such as the old age pension) have long since been adopted and then surpassed elsewhere.

This discrepancy is commonly explained by emphasising the particular historical circumstances of Australia in the 1890s and 1900s. Particular emphasis is often placed on the channeling of working class political strength into parliamentary politics following the crushing of the great strikes of the early 1890s. (Gollan, 1960: 128-150). The origin of the Commonwealth Arbitration Court itself is ascribed to manoeuvres in the early 3-party Commonwealth parliament (Protectionist, Free trade and Labor), resulting in the compromise of Labor support for protection in return for Denkinite protectionist support for compulsory Industrial Arbitration. (See Alexander, 1967: 26-27 and McCarthy, 197

But such accounts, while vital if historical events are to be understood, cannot alone summarise the patterns of social life which these early events set going, and which still govern our lives. It is such continuing though historically determined patterns, not found in other societies with similar economic and political structures, which are the foundations that a sociologist must identify when seeking to understand the development and continuation of unique historical forms.

According to Talcott Parsons, the most important property of the modern nation, when looked at as the "core structure" of society, is:

"the kind and level of solidarity— in Durkheim's sense—which characterises the relations between its members. The solidarity of a community is essentially the degree to which (and the ways in which) its collective interest can be expected to prevail over the interests of its members wherever the two conflict. It may involve mutual respect among the units for the rights of membership status, conformity with the values and norms institutionalised in the collectivity, or positive contribution to the attainment of collective goals. The character of solidarity varies with the level of differentiation in the society, differentiation which is evident in the structure of the roles in which a given individual is involved, of the system's subcollectivities, and of its norms and specified value orientations."
The best known basis for specifying the types of solidarity is Durkheim's two categories, mechanical and organic". (Parsons, 1969 : 461).

Organic solidarity involves the integration of expectations which differ on a functional basis - between, say, the household's requirements for a regular and adequate income for the breadwinner and the firm's requirements for a flexible and cheap labour force. The industrial relations system of any society, which endeavours to achieve this integration, is thus an instrument of organic solidarity. Mechanical solidarity, however, involves an expectation of a uniform pattern of action from all units in the system: the units, relative to each other, are functionally undifferentiated segments. It is this basis of uniform expectation which will determine the form the industrial relations system will take, once the economic institutions and their ecological bounds are given. It sets the social boundary conditions which, combined with the boundary conditions set by economic requirements, specify the range of institutional frameworks within which the mechanisms of organic solidarity can manoeuvre. Obviously the functionally differentiated and functionally undifferentiated forms of solidarity will interact with each other, but for heuristic purposes it is worthwhile to consider each, at least initially, in isolation.

Parson's use of the term "mechanical solidarity" involves a secularising shift away from Durkheim's original usage. To Durkheim, the basis of mechanical solidarity was to be found in the "collective conscience", of which religion was "the eminent form" (Durkheim (1893) 1964 : 285). It was bound to decline in importance as the division of labour grew and with it organic solidarity: "There are here two contrary forces, one centripetal, the other centrifugal, which cannot flourish at the same time". (Durkheim (1893) 1964 : 130, see also 283). However, crime, the "prototypical violation of the obligations of mechanical solidarity" (Parsons, 1969 : 461), is of course found in modern differentiated societies as well as simpler ones, and in fact some of Durkheim's examples of criminal behaviour refer to modern society. As Parsons sees denominational pluralism as an example of organic solidarity (1969 : 462), he must look elsewhere than religion for the basis of mechanical solidarity in the modern nation. He claims to find it in citizenship: "At the societal community level in differentiated societies, the core of the system of mechanical solidarity lies in the patterns of citizenship, in T. H. Marshall's sense ....... In modern American society, the bill of rights and associated constitutional structures, such as the fourteenth amendment, comprise the most directly relevant institutions in this field." (Parsons, 1969 : 462).
The patterns of citizenship to which Parsons refers were outlined by an English social historian and sociologist, T. H. Marshall, in a series of lectures delivered at Cambridge in 1949. As Marshall outlined them, the patterns were specific to English society, as may be seen in Marshall's slightly apologetic introduction of his scheme:

I shall be running true to type as a sociologist if I begin by saying that I propose to divide citizenship into three parts. But the analysis is, in this case, dictated by history even more clearly than by logic. I shall call these three parts, or elements, civil, political and social. The civil element is composed of the rights necessary for individual freedom — liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice. The last is of a different order from the others, because it is the right to defend and assert one's right on terms of equality with others and by due process of law. This shows that the institutions most directly associated with civil rights are the courts of justice. By the political element I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as a member of the electors of such a body. The corresponding institutions are parliament and councils of local government. By the social element I mean the whole range from the right to a modicum of social welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society. The institutions most closely connected with it are the educational system and the social services. (Marshall, (1950) 1965: 73-74).

In Marshall's view the separation of the different components of citizenship occurred slowly from the twelfth to the seventeenth centuries. It was a consequence of the geographical centralisation of government combined with the separation of functions into different specialised institutions. In this way the distinct but usually localised status appropriate to the members of each feudal estate was broken down, and national institutions such as the courts and parliament came to be, in a formal sense, equally accessible to all men. But these processes proceeded independently: "...... when the institutions to which the three elements of citizenship depended departed company, it became possible for each to go its separate way,
travelling at its own speed under the direction of its own peculiar principles". (Marshall, (1949) 1963 : 75). In fact, Marshall suggests that the formative period of each can be assigned (very elastically) to a different century — civil rights to the eighteenth, political to the nineteenth and social to the twentieth. There is, of course, some "evident overlap", especially between the last two.

Parsons attaches considerable significance to citizenship as a base on which pluralistic society is grounded, and cites its development as a counter to the Marxian critique of American society as exploitative and unjust. In his most explicit discussion of the concept (in any essay titled Full Citizenship for the American Negro? (Parsons (1965) (1967)), he suggests that the three components of citizenship, which Marshall had arranged into a temporal series, from a type of hierarchy. At the top comes the civil or legal component, which concerns the application of the value system of the societal community to the relevant context, and results in "rights" to "equal protection of the laws" and "due process of law". The political component concerns participation in collective goal-attainment, through the right to vote for the leadership, and through free speech and assembly to lobby for particular policies. The social component concerns the resources and capacities needed to implement formal civil and political rights. It covers both guarantees of a minimal income, and the provision of the educational, health and other welfare services necessary to escape "the vicious circle of comparative disadvantage" possible in a competitive society (Parsons (1965) 1967 : 430-433). At the apex of this hierarchy are the values of the societal community which citizenship institutionalises. In America, the Declaration of Independence and Bill of Rights provides an explicit statement of these values, thus rounding off Parsons' analysis nicely.

It is interesting to note that Parsons' definition of the components of citizenship involves a subtle shift away from Marshall's analysis, particularly in respect of social citizenship. Parsons sees social citizenship as being explicitly directed to providing resources for the full exercise of civil and political citizenship: it is in a real sense subsidiary to the civil rights which stand "higher" in his hierarchy. Marshall, on the other hand, sees social citizenship as to some extent a challenge to civil citizenship, in that it involves a reversion from "contract" to "status" relationships. As it is on freedom of contract that the capitalist market economy is based, Marshall concludes that the development of social citizenship constitutes a challenge to the social classes which have profited most in the market economy.
Our main concern here is the extent to which the arbitration system in Australia can be considered an outcome of the sort of development which Marshall and Parsons are discussing. As it was established by legislative action with the support of the trade unions, a first approach is to examine the way Marshall and Parsons deal with the development of trade unions and the general exercise of political rights.

1.2 Unionism and Citizenship

Marshall sees the historical development of first political and then social citizenship as being a logical one. He claims that social rights developed from civil rights not by some direct acceptance of their moral duty by those in power but by the exercise of political citizenship: "the normal method of establishing social rights is by the exercise of political power" (Marshall (1949) 1963 : 97).

But Marshall's treatment of political rights is one of the weakest parts of his essay, probably because he is mainly interested in social rights, and political rights are important for his purposes not in themselves but because of the power they confer to create social rights. For example, he omits any mention of the failure of the Chartist movement of the 1840s, which was much more directly assertive of political rights than the slow expedient extension of the franchise which eventually occurred. As Marshall observes, manhood suffrage was reached only in 1918, and dual voting abolished only in 1948. Clearly the social rights Marshall discusses did not spread through the direct exertion of political pressure by a newly triumphant democracy, as many of the social rights he describes evolved simultaneously with political democracy - or even preceded them (Marshall (1949) 1963 : 98). Many in fact were inspired by Bismarkian Germany, where their nature as an aristocratic counter to Social Democracy was even more evident.

Just as Marshall fails to distinguish between the existence of civil rights and the ability to make use of them conferred by property and an elitist education, so he ignores the fact that organisation is required for political rights to be effective. The right to vote without the right or the capacity to organise effective groups is a nullity. Dictators have no fear of plebiscites. "Organisation" however requires a large amount of bureaucratic centralisation, which can contradict civil liberties and thus the very basis of civil citizenship. This contradiction is largely ignored by Marshall, and completely ignored by Parsons, by confining political rights only to the exercise of the vote.
Marshall's emphasis on political capacity being tied to the franchise rather than to the right and capacity to organise leads him into considerable difficulties when he comes to view trade unionism itself (as opposed to parliamentary actions supported by trade unions). Trade unions do not fit easily into Marshall's categories, and yet because the "fair wage" is one of the main examples of a social right, they are obviously important to an understanding of how these rights are asserted. Marshall does not regard unionism itself as a form of political activity, which in his scheme is confined to collective action through parliament and local councils. Instead he classifies unionism as an institution of civil citizenship, by which the privileges which incorporation gives to groups of property owners are extended to groups of workers:

(The trade unions can) exercise vital civil rights collectively on behalf of their members without formal collective responsibility, while the individual responsibility of the workers in relation to contract is largely unenforceable. These civil rights became, for the workers, an instrument for raising their social and economic status, that is to say, for establishing the claim that they, as citizens, were entitled to certain social rights. But the normal method of establishing social rights is by the exercise of political power, for social rights imply an absolute right to a certain standard of civilisation which is conditional only on the discharge of the general duties of citizenship. Their content does not depend on the economic value of the individual claimant. There is therefore a significant difference between a genuine economic bargain through which economic forces in a free market seek to achieve equilibrium and the use of collective civil rights to assert basic claims to the elements of social justice. (Marshall (1949) 1963 : 97-98.)

In Britain - and Australia - trade unionism, by concerning itself with claims to social rights, has moved towards what are essentially political activities in the industrial sphere. As Marshall himself puts it, "trade unionism has created a secondary system of industrial citizenship parallel with and supplementary to the system of political citizenship" (Marshall (1949) 1963 : 98). But he fails to follow through from this to the conclusion that in Britain official trade unionism in the industrial sphere has become politics under another name, outside the traditional institutions of political
citizenship. Knowing that "numbers were not the state," the trade unions sought to construct an "extra-legal" political system which would lay down their members "citizenship rights" as employees (though leaving them unprotected if they became unemployed). The most important part of this system was the right to recognition by employers, not as an economic combination but as a political combination. The act of recognition involved an acceptance of "social" standards of employment, but this was subsidiary to the recognition itself (and not, as Marshall suggests, the primary consideration behind unionism). The reason that recognition was so significant for unions was that it implied acceptance of their political role in the joint regulation of industry through collective bargaining. This view of trade union activity as being essentially political has been widely expressed recently, for example by Flanders ((1968) 1969), who cites Marshall's reference to industrial citizenship in support. Even in America, where references to unions as essentially economic institutions are still common, some authors have begun to challenge this framework:

1. This is a reference to Hancocks' classical statement of Australian democratic assumptions:

   What class, what tradition is there in Australia which can hold the State against the assault of numbers? Numbers are the State, and thankfully accept those traditions of its semi-competence which were built up by the military autocrats of early days. Circumstances would not in any case permit a complete break with these traditions; to attempt such a break is the last thing which the landless majority desires. For if, as a judge of the Commonwealth Arbitration Court once suggested, the machinery of the State exists for the sake of the "divine average", then the majority, controlling this machinery, becomes, after all, a master class.

   (Hancock, (1930) 1945: 61)

2. They sought the creation of a "working class estate" by extension downwards of the privilege which the powerful enjoyed of entering into combinations. The unions could not employ the direct exercise of political power, as the workers "either did not possess, or had not learnt to use the political right of the franchise" at the time. (Marshall (1949) 1963: 98).
The trade union ...... is not engaged in buying and selling. It does not make a profit if wages are set high, nor does it become bankrupt if wages are set low. It is a regulatory body engaged in determining the minimum standards under which production may continue, and is perhaps more nearly comparable to a government agency than to a business concern. (Reynolds, 1957: 196).

Parsons does not see trade unionism itself as an aspect of citizenship, presumably because to do so would be to contradict his view of political citizenship as confined to the franchise. His is a more-or-less conventional American view: "the prevalent type of labour movement has been that oriented primarily to "collective bargaining"." (Parsons, 1967: 110). In his joint work with Smelser on Economy and Society (1956), Parsons sees the trade union as having a non-economic role in helping the worker "to reconcile his inevitable involvements in both firm and household with each other" (Parsons and Smelser, 1956: 140). That is, the trade union is an institution of organic solidarity, facilitating the interchange between the firm (which is the goal-attaining subsystem of society's adaptive system, the economy) - and the household (which is the goal-attaining subsystem of society's Latent-Pattern Management and Tension Management system. See Parsons and Smelser, 1956: 68 and 119). As such however it still underpins the value system associated with civil rights, which are the pivot of civil citizenship. Parsons thus avoids a challenge to the universality of norms of mechanical solidarity from the admission of a separate type of "trade union" citizenship.

Here Parsons parts company from Marshall, who emphasises that criteria of wage determination at variance with the market spring from union influence on the wage structure. These criteria are the foundation of "official" British collective bargaining negotiations and agreements; and centre around "status": The claims of status are to a hierarchical wage structure, each level of which represents a social right and not merely a market value. Collective bargaining must involve, even in its elementary forms, the classification of workers into groups, or grades, within which minor occupational differences are ignored. As in mass schooling, so in mass employment, questions of rights, standards, opportunities and so forth can be intelligently discussed only in terms of a limited number of categories and by cutting up a continuous chain of differences into a series of classes whose names instantly ring the appropriate bell in the mind of the busy official. As the area of negotiation
spreads, the assimilation of groups necessarily follows on the assimilation of individuals, until the stratification of the whole population of workers is, as far as possible, standardised. Only then can general principles of justice be formulated. There must be uniformity within each grade, and difference between grades. These principles dominate the minds of those discussing wage claims, even though rationalisation produces other arguments, such as that profits are excessive and the industry can afford to pay higher wages, or that higher wages are necessary to maintain the supply of suitable labour or to prevent its decline. (Marshall, (1949) 1963 : 119 - my emphasis).

The question of whether Marshall’s description of the shape the wage structure will take is empirically correct will be examined later: there is evidence that market forces have greater influence than he suggests, though not necessarily in the way usually suggested by labour economists. There is however considerable evidence that such considerations dominate centralised wage negotiations in Britain and Australia. Barbara Wooten’s examination of the criteria advanced in wage negotiations in Britain reads like a detailed catalogue of the types of criteria sketched by Marshall (Wooten, 1962 : 125-120). Wooten emphasises that the classical analysis of wage structure is empirically inappropriate. One of her main targets is the 1948 White Paper on Personal Incomes, Costs and Prices (Great Britain, 1948), which urged that wage relativities be allowed to alter in order that labour be attracted to where it is most needed. This, however, is to be accomplished by voluntary collective agreement, which Marshall sees as an exercise of civil rights in the free market. Commenting on the same White Paper, he remarked:

Civil rights are therefore to assume political responsibility, and free contract is to act as the instrument of national policy. And there is yet another paradox. The incentive that operates in the free contract system of the open market is the incentive of personal gain. The incentive that corresponds to social rights is that of public duty. To which is the appeal being made? The answer is, to both. The citizen is urged to respond to the call of duty by allowing some scope to the motive of individual self-interest. But these paradoxes are not the invention of muddled brains; they are inherent in our contemporary social system. (Marshall (1949) 1963 : 120).
In this passage Marshall touches on a point unadmitted by Parsons in the works that have been cited: that in trade unionism there are tendencies—and values—which positively contradict those of the competitive achievement-oriented society, rather than simply alleviating its tensions. These tendencies achieve political effect through the system of industrial government which trade unions have been instrumental in establishing—in Britain almost completely independently of the legal system. (Kahn-Freud, 1954).

1.3 Arbitration and the Unions—the Ambivalent Syntaxis

To a large extent, the Australian Arbitration system took over this British "extra-legal" political system, using the "tradition of omnicompetence of the State" to institutionalise it in a Bureaucratic-administrative structure. Thus Australian unions, to the extent that they have operated through the Arbitration system, or occasionally (as in the Victorian Building industry since 1956) collectively bargained industry-wide in the English fashion, have not directly invoked their monopoly of labour-power to reach (to put it crudely) a "market agreement" on wage-profit share with employers. Instead they have asserted an employee's entitlement to a certain wage, no matter who employs him. This entitlement may be affected by productivity, but not by market power or privilege. All productivity does is to increase the amount of goods available for distribution: it does not follow that those who produced them are entitled to them. Nor are those whose employers get more than their fair share by realising the largest profits. (The 1965 General Motors Holden Case (Print B1606) states these principles most explicitly—see in particular Commissioner Winter's minority judgement, which castigates G.M.H. for exploiting both customers and workers, but still refuses the union request that the Commission award the employees a share of the profits as a contravention of "comparative wage justice". ) The reason for this is the urge to widen "wage contours" outside particular localities or markets—see Chapter 3.

The most important difference from the British system is that in Australia the union, after presenting its case, has its award presented by the Commission. Unless the claim is granted in full, the union can proclaim its dissatisfaction. The union official's only inhibition about bringing pressure on the individual employer was (until recently) the threat of penal fines: a sort of state-imposed, inexpensive (to the employer) substitute for the lock-out, the usual counter-sanction overseas. In this Australian unions differ from the British, which having signed industry-wide agreements are obliged to maintain at least the pretence of adhering to them. Hence pressure on individual employers must be imposed by "unofficial" strikes, which, at least in theory (and often in fact), are not sanctioned by the central trade
Such tensions within unions can be expected to grow in Australia also if employers and unions attempt to regularise over-award payments by making industry-wide agreements: in March 1970 the Melbourne Trades Hall Council was threatening to expel the Builders Labourers Federation for breaking the Building Industry Agreement which has existed in that city since 1956.

This ambivalent relationship between union leaders and arbitral tribunals means that the usual state of affairs is an apparent continual defiance of the Commission by the unions. But a closer examination of the relationship of unions and the Commission will show that the two are in fact locked together in mutual need. Through the arbitration machinery the unions obtain legitimacy, bureaucratic powers over their members, and the power to extend uniform wages and conditions throughout the workforce. The Commission obtains from the unions the basic inspiration and social basis for its principles, and relies ultimately on the unions' political strength to guarantee its place in the state structure. But this mutual dependence also means that at any point in time the unions will usually stand to gain by attacking the Commission's awards as inadequate (as doing so will not jeopardise the benefits they receive from the system's existence, and may win them more). Conversely, the employers and the government, if they wish to discourage the unions from using directly the bargaining strength which their guaranteed position in the state structure has augmented, must uphold arbitration as the "correct" way to settle wage disputes. If they attack it they thereby legitimate direct action, not merely by waterside workers, but by public servants and nurses as well. The same applies if the Commission is seen by employees to take the employers' side, abandoning "just" wage principles which are at base union principles. The Canberra nurses struck because the Commission insisted on assessing them

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3. Such events do not fit Marshall's scheme of rights and reciprocal duties for unionists: in one of his few descents from impartial comment (1949) 1963: 133 he castigates wildcat strikers:

In some recent unofficial strikes an attempt has, I think, been made to claim the rights both of status and of contract while repudiating the duties under both these heads.

4. Attempts by conservative governments to restrict the full exercise of the ever-widening powers allowed to the commission by the High Court have been thwarted at least twice: in 1929 by the fall of the government on the issue, and in 1963 by the threat of a similar occurrence. (In the latter case it was a matter of white collar unions bringing direct pressure on liberal N.P's in a House with a government majority of one and thus thwarting the efforts of the N.S.W. labor government to have the effects of the 1961 and 1962 Professional Engineers Cases narrowed.)
as "female tradesmen", and denied the professionalism they had organised to promote. Such a reaction by unionists towards an award is the opposite of the "promotion of goodwill in industry" and is one the Commission must seek to avoid if it is to be successful. What is more, the Commission is not thanked if, by accepting the submissions of employers or government, it causes unrest to increase, because the cost of a strike to a particular employer will almost always be greater than the cost of an increase in award wages. This means that members of the Commission seek to detect "what the government means, not what they say".

A dramatic illustration of the embarrassment which can be caused by failure to take this consideration into account occurred in New Zealand in 1968. The court of Arbitration in that country consists of a judge and two lay members, one nominated by the unions and one nominated by the employers. In June 1968 the Court decided in a majority decision (the employees' representative dissenting) not to increase wages generally to compensate for a 7.6% rise in the cost of living. The grounds were the parlous state of the economy. There was such an outcry against this decision that two months later the nominated members raised all minimum wages by 5/2 (with a maximum rise of 82 for males, a lower maximum for females and juniors). The judge dissented from the extent of the order. (see Labour and Employment Gazette (New Zealand), August 1968 : 14). The absence of employers and employees nominees on the Australian Commission (or State courts) would make a similar compromise between the parties more difficult here, and it is even more imperative for the Commission to avoid such situations.

Even when employers welcome victories of principle in the Commission, they are aware that in the long term such "success" can be ambivalent, especially in a full-employment economy. The following report of part of an address by a former Victorian manager of the Metal Trades Employers' Federation and currently personnel manager of a construction company on the causes of industrial unrest in 1970 significantly avoids the facile explanation often offered that the cause of unrest is the non-enforcement of the penal provisions of the Act.

5. The statutory objects of the Act are given in section 2:

2. **Objects of Act** - The chief objects of this Act are -

(a) to promote goodwill in industry;
(b) to encourage conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes
(c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatening, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality.

(continued overleaf)
Mr Piesse said that, at the risk of over-simplification, he thought the present industrial unrest sprang direct from the successful decision of employer organisations in the mid-1960's to seek a total wage.

"It was a decision with which I agree because it was designed to stop the inflationary leap-frogging tactics of unions using basic wage increases to justify increases in margins and thus restore relativities between various classes of workers and vice versa."

"The price paid for that "success" was the announcement by the Conciliation and Arbitration Commission that the total wage would be reviewed in the spring of each year in what has now become the National Wage Case."

However, once traditional wage relativities were seriously disturbed, those who rightly or wrongly considered they were being left behind would become restive and bring pressure to bear on their union leaders to restore their own purchasing power.

This explained why, even three years after the Hotal Trades work value decision, that followed introduction of the total wage, the effects were still being felt.

Strike action against individual employers to obtain the desired remedy had been eminently successful, as indeed had been numerous applications to various tribunals which affected industries "across-the-board". (Australian Financial Review, October 29 : 6)

This quotation enunciates similar sentiments to those expressed in an article by Fox and Flanders (1969) on the causes of British industrial unrest, particularly the unofficial strikes discussed in the Donovan Report (1968). The authors suggest that at the base of current troubles in Britain is a breakdown of the normative order inherited from the nineteenth century. Up to then, changes, even in the industrial revolution, had been slow enough to be absorbed in the normative order without such question. Challenges to that order were generally made by employers, who when it came to the point had the power to prevail. Unions, at least initially, concentrated on defending

5. (continued)

(a) to provide for the observance and enforcement of agreements and awards made in settlement of industrial disputes; and

(e) to encourage the organization of representative bodies of employers and employees and their registration under this Act.

customary practices against change, and as they grew in strength at first adopted the slowly-changing standards of the times. Industry-wide agreements between employers' associations and unions attempted to keep any changes under control.

This stage of harmony had begun to disintegrate by the first world war, and collapsed completely in the period following it, when endemic depression caused a fragmentation of regulation which the unions were powerless to stop, and which bore most heavily upon those who were least powerful and articulate. The resultant collapse of normative regulation became visible in the post-war period, when inflationary fragmentation replaced deflationary fragmentation. In this situation, Flanders and Fox suggest, an anomic condition resulted, in which all must run to keep their place, with no normative goals to guide them. Hence the title of their essay: "The Reform of Collective Bargaining: from Donovan to Durkheim". The authors in fact use a quotation from Durkheim's Suicide to illustrate the state of affairs which they maintain has come to prevail in the "abrupt growth of power and wealth" (Durkheim's words) which has occurred since the war:

The scale is upset, but a new scale cannot be immediately improvised. Time is required for the public conscience to reclassify men and things. So long as the social forces thus freed have not regained equilibrium, their respective values are unknown and so all regulation is lacking for a time. The limits are unknown between the possible and the impossible, what is just and what is unjust, legitimate claims and hopes and those which are immoderate. Consequently there is no restraint upon aspirations. (Durkheim (1890) 1952 : 253).

This is the service that the Arbitration Commission has offered the Australian capitalist economy: to provide a "restraint upon aspirations" by offering the unions a target. Until the abolition in 1967 of the basic wage and margins as separate components the claims of the unions were almost all related to the re-attainment of some standard set in the previous fifty years, adjusted for subsequent increases in prices and productivity. Thus in the Petal Trades Margins Case of 1954, 1959 and 1963 the unions applied for the restoration of margins to their relationship with the basic wage in 1947, while the Commission preferred to restore the relationship set in 1937. Because these cases were highly visible, and because between them the union campaigns for over-award payments used these levels as a criterion.

6. Especially as the Commission accepted the existence of these payments as evidence of "capacity to pay".
the employers' main aim in their "constructive" approaches to the Commission in the 1960s was the ending of separate "leap-frogging" basic wage and margins cases, an aim in which they were successful for complex reasons. They were supported in this aim by economists who observed that most of the rise in wage costs came about through rises in award wages. But, if Piesse is right, the result was on a minor scale a recreation of the situation with which the English collective bargaining system has been faced in recent years. Whether the overall result has been an acceleration of wage drift and a consequent quickening in the rate of inflation is impossible to say. What is certain is that the President of the Commission, Sir Richard Kirby, has proclaimed his determination that the Commission will retain its relevance, and will participate in the setting of wages under the new circumstances, even if it involves abandoning consistency of principle (Australian Financial Review, 4 - 6 November 1970).

Thus, grossly simplified, we can see in the Australian Arbitration system the means for institutionalising trade union norms. Because the existence of the system has itself legitimised and increased union power, the Commission can depart from these norms only at the cost of seeing the unions use their power to gain concessions outside it. It is in the pronouncements of the Commission that the most explicit statements of union goals are to found, some of which (such as the Harvester judgement) have achieved an aura reminiscent of the Declaration of Independence in America. The Australian equivalents to the politically inspired foundations of mechanical solidarity overseas are to be found in the dicta of a quasi-legal tribunal. There is no obvious reason why such a tribunal should possess or retain such an aura, and in view of the conflict between the law and unionism which has been endemic in Britain (Nederburn, 1965 : 245-274) it is amazing that a legal profession so closely influenced by the English model should have been associated with this outcome. This paradox in analysed in the following chapters, in which the sort of judgements it issues, the sort of structural forces it creates (and by which at the same time it is constrained), and the sort of judicial regulation it exercises are consecutively examined.

7. Ramsey MacDonald told H.B. Higgins in 1914 that the British Labour Party would not consent to arbitration because the arbitrators were always chosen from persons of title and position, "saturated with the prejudices of the employing class", and because the workers thought "compulsory arbitration" would compel them to work at the wages prescribed. (Higgins, 1926 : 5).
2.1 The Meanings of "Work Value"

At the centre of the most dramatic cases before the Commonwealth Arbitration Commission in the 1960s lay the concept of "work value", the idea that the "value" of a particular task can be assessed in monetary terms, using criteria solely dependent on personal inputs into the task, and not economic output. These criteria have not changed much over the years:

writing in 1916 Higgins summarised as follows the criteria he had used for awarding margins above the "living" or basic wage:

The secondary wage is renumeration for any exceptional gifts or qualifications not of the individual employee, but of gifts or qualifications necessary for the performance of the functions, e.g. skill as a tradesman, exceptional heart and physique, as in the case of a gas stoker, exceptional muscular training and power, as in the case of a shearer, exceptional responsibility, e.g. for human life, as in the case of winding or locomotive engin-drivers. (Higgins, 1922: 6.)

In his judgement in the 1966-67 Metal Trades Work Value Case - a case which was thought at the time to deal with 15 to 20 per cent of all employees covered by Federal Awards1 Mr Justice Moore stated:

Factors taken into account are the qualifications necessary for the job, such as apprenticeship, the training required on the job, the attributes required in the performance of the job such as mental and physical effort and dexterity, innate or acquired; the responsibility for work and equipment and the safety of other employees, and any conditions of unpleasantness inherent in the job. (Moore, J. in 1966-67 Metal Trades Work Value Case, Print B2916: 167.)

The use of these criteria has been strongly criticised, especially by economists, as vague and meaningless. McFarlane considers work value a "meaningless concept" McFarlane, 1968: 193, while on the right-hand side of the ideological fence Samuel complains

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1. A subsequent survey shows that the Metal Trades Award directly affects 28% of the 640,000 males covered by Federal awards(excluding those in the Public Service) and 17% of the 248,000 females (Australia.Commonwealth Bureau of Census and Statistics, 1970).
... so-called work value cases seem destined to produce unprecedented confusion, litigation, inflation pressures and industrial strife ... The truth is that meaningful criteria for work value have never been determined. An economist asked to find some meaning in the term will say there is none, beyond the concept of "marginal productivity" (roughly the addition to revenues achieved by the employment of an extra man), and that is the same as market rates of pay. But rather than look at work value from the side of value of output the Arbitration Commission tries to determine it from the irrelevant side of the costs or inputs of the worker (his length of training, the nastiness of the job, the mental strain, etc.) Because the Commission's theory has never been developed systematically, it gives no way of quantifying or relating various criteria chosen, so after the Commission has done its detailed study of the work and workers it is no better off than when it started. It still has to pluck a figure from the air, and it will have to go on doing this unless it can work out what it means by work value. No one else can. (Samuel, 1968 : 15-16)

2. Other economists would dispute this statement, pointing out that, at least in the long term, the rate of pay offered will affect the supply of labour available by attracting labour to or from the occupation in question. That is, Samuel's statement inherently assumes a completely inelastic supply of labour with respect to price. This could only be postulated, it is argued, in the short term: over a longer period it may be argued that the supply is likely to expand or contract to meet demand provided the wage offered is sufficient. This "sufficient" wage is the "value" of the occupation.

3. This is not quite fair. Two of the three members of the bench of the 1966-67 Metal Trades Work Value Case which Samuel is attacking were at least partly in favour of the use of formalised job evaluation methods, but were faced with the opposition of both employers and unions (Print B2916 : 163, 254-262, 307-317).
Occasionally economists seem to have misunderstood what the Commission was trying to do, assuming that work value must mean "marginal revenue product or marginal social product" (Holmøyen (1962) 1967: 304). However, any attempt to measure this would involve the investigation of the marginal profitability of particular firms, and would be completely inapplicable in areas dominated by government employment if comparisons with other occupations were not allowed. Immediately after the reaffirmation of traditional criteria noted above, Moore J. rejected just such a contention on the meaning of work value:

The unions submitted that in addition to assessing the value of the factors just mentioned it is also proper to assess the value to the employer of the results of the work done by various classifications. This submission was strenuously opposed. If the unions' approach were adopted less skilled employees working in the direct flowline of production might receive more than skilled tradesmen working elsewhere in an establishment. This would be a revolutionary change in approach to wage fixation in this country but in any case there was no material upon which we could properly make assessments of the kind suggested (Print B2916: 157).

4. As the Metalliferous Miners doctrine seeks to ensure - see below, also Kerr (1963).

5. Commissioner Winter in the same case suggested there were two sides to work value, the second being "the worth of the employee to the employer", and obviously has in mind the revenue they bring.

To the employer the value of his employees may be tested by recourse to his payroll statistics, but their worth may be discovered in times of a rush of absenteeism, or of an epidemic of, say, influenza, or of an industrial dispute involving a lengthy strike.

Inactive and costly machines, equipment and plant bring home the real worth of employees. (B2916: 192)

Moore's opinion would however be the dominant one at the moment. It was adopted in the unanimous decision of the 5-member bench which heard the 1969 National Wage Case. This bench, which was presided over by Moore and included Winter, issued a unanimous summary of wage fixation principles which included the statement:

The task of fixing wages in work value hearings will involve consideration of the non-economic factors which used to be considered in considering the secondary wage, namely, things such as period of training, skill required, arduousness, conditions under which work is usually performed, etc. (runced judgement: 16).
2.2 Work Value and Net Advantages

Whole books have been written on the way these criteria for valuing skill input have been used in practice (for example O'Dea, 1959), and a full account is not possible here. Rather, certain possible explanations of the criteria used will be discussed briefly as a preliminary to a discussion of the structural restraints within which the Commission operates. As much of the detailed discussion of the Commission's actions has been written by economists, we will start with a closer examination of the criteria economists offer for wage differentiation.

As Wooten (1962: 15) has observed, the conventional economic model of the labour market is essentially circular in nature, with no clear causal factors involved - so much so as to make it conveniently untestable in many instances. At its base lies the theorem, first advanced by Adam Smith, that wage differentials emerge in a free market economy because of the tendency towards equalisation of "net advantages" - because, say, a doctor has to be compensated for the lack of income and exertion during his studies and his long hours of work, or else he would choose an easier life. Similarly, other things being equal, clean work will normally attract a lower wage than dirty work and so on. It is restriction on freedom of trade such as barriers on entry to trades or professions plus real differences in inherent ability which bring about 'real' differences in wages which are not just 'compensating' differences - differences which just compensate for non-wage differentials between jobs (Rottenberg (1956) 1968: 52).

5. (continued)

The bench followed Moore's example in the earlier case (22916: 163) and explicitly rejected the use of the concept of "teamwork" which Winter had advanced as a third adjunct to "work value" and "employee worth" in determining award wages (in the 1966–67 Metal Trades Work Value Case 22916: 192-3).

We do not think concepts such as teamwork can be relevant in work value assessment, except in rare cases. We think that teamwork must exist in some degree in all industries otherwise they would fail to function, and the results of teamwork and similar factors will be reflected in economic growth which will be properly considered in national wage cases (reasoned judgement: 18).

It was not mentioned, but the same obviously applied to "worth to the employer" - an issue reargued again in the 1970 Oil Industry Case.

6. The theory is more a conceptual framework than an explanation, but is still used as the latter occasionally.
It will be apparent that there are two aspects to this theory: a normative and essentially egalitarian one, and an empirical aspect. The normative aspect is that differentials should not be greater than required to equalise net advantages (see, for example, Isaac's attack on the increase in Australian differentials after 1954, in Isaac, 1967: 24-25). Conversely they should not be less than required to equalise net advantages either, which Timbs claims is what Australian arbitral tribunals have tried to ensure (Timbs, 1963: 239). This theory obviously provided the inspiration for the Davis and Moore (1945) theory of the functional necessity of social stratification, which sees status and material rewards as necessary compensations for the effort and self-denial needed for self-improvement.

There is, however, also an empirical aspect to the theory, which is that under free market conditions:

The whole of the advantages and disadvantages of the different employments of labour and stock must, in the same neighbourhood, be either perfectly equal or continually tending to equality. (Smith (1769) 1937: 99).

The equalisation will occur because people move from occupations with fewer net advantages to those with more. Thus an undermanned occupation or industry will need to increase its advantages to attract labour, and the easiest way to do this is to raise wages. Furthermore, the measure of whether it is undermanned is whether it is able to exploit a shortage of supply of its products in the market to make profits in excess of the ruling rate of interest. These excessive profits will attract new firms which, in the short term, will bid up the price of labour and so reduce profits. In the long term the expanded supply of labour attracted by these temporarily higher wages will cause wages to fall again, eventually reaching the long run supply price at which the net advantages of the relevant occupation make it equal in attractiveness with other occupations. In the meantime the expansion of supply brought about by the entry of new firms will have removed the opportunity to make 'abnormal' profits. Thus firms in profitable industries should pay higher wages than in those less profitable, in order to attract the labour which will expand production and so reduce both profits and wages to their equilibrium level. Consequently, the best guide to the most equitable wage rates will be found in long run equilibrium market rates. At any particular time, however, market rates can be higher or lower than the ethically justifiable level due to under or over supply of the particular category of labour. It follows that an authority which sets out to prescribe 'just' wage rates should seek to ascertain what the long run equilibrium market rates would be, in the absence of restrictions of entry into skilled or prestigious occupations.
This last proviso, always stated and then so often forgotten in discussions of wage rates, is what makes the empirical aspect of the theory so difficult to test in practice. In the real world restrictions on entry, combined with the advantages conferred by what Weber calls 'social class' (Weber, 1916: 1947: 424), so distort the wage structure that we will all be dead before the long run equitable equilibrium envisaged by the more idealistic economic theorists is achieved.

The Commission has, during its history, in fact relied on market rates as a guide to the differentials it has awarded for skill from time to time. Higgins, after setting his 'living wage' of 7s. a day, went on in the Harvester Case to base the differential for tradesmen of 3s. a day on prevailing rates in the industry. Other judges have referred to the use of market rates as the only adequate guide to what is otherwise a completely arbitrary process. But even the most firm proponent of this view, Kelly C.J., in fact abandoned it in the 1954 Metal Trades Harring Case (60 C.A.R. 3) when he did not like the contemporary trend to the narrowing of differentials.

In other words, market rates are only a guide in the absence of any other criteria, and will be abandoned if other criteria are available.

It is probably for this reason that there is really only one point at which the Commission's method of determination of "work value" overlaps at all with conventional economic theory of the sources of wage differentials. This is the idea that wage differentials should not be allowed to become so low that training for skilled trades is discouraged. Again the most vivid statements of these attitudes can be found in some of the judgements and articles written by Higgins. It is obvious however that what Higgins (and other arbitrators) had in mind was that the training of craftmen was a Good Thing on social grounds, rather than specific shortages in the supply of tradesmen for particular tasks:

One of the drawbacks of industry in Australia is that the lads do not learn their trades thoroughly - do not take the trouble to become perfect craftsmen. There is a tendency to be content with imperfect workmanship; to put up with the 'handyman', and his rule of thumb: to put up with what is 'good enough', and nothing should be done by the Court which would lessen the inducements to learn a trade and to learn it properly. (Higgins, 1922: 55).

This is emphasised by Higgins's determination to ensure that anyone doing tradesmen's work should be paid tradesmen's wages, and his dislike of:
... the deadly system of 'improvers' which has been permitted in certain States - 'improvers' who are kept on mere repetition work, who learn how to work at great speed one, or perhaps two, machines and become unfitted for anything else. The country needs fully trained craftsmen, and the lads need to learn their job all round. There has been much abuse of boy labour. Imprecious parents have been compelled to sacrifice their boy's careers by higher wages offered to 'improvers' (at the beginning) than to apprentices (Higgins, 1922: 133) 7

This doctrine received a vigorous reaffirmation in the decision of Gallagher J. in the 1966-67 Metal Trades Work Value Case, when he said: (Tradesmen) are in short supply, so much so that employers have been compelled to invest in machines which themselves perform skilled operations. But nevertheless tradesmen remain skilled employees and there is a clear necessity of inducing boys to serve apprenticeships and enter trades. When weighing considerations for and against the choice of a career the rate of wage prescribed by an industrial award could well be a decisive factor and it is important therefore that the award prescription for tradesmen should be such as recognises their training and qualifications, the value of their work and their status in the community.

(B2916: 93)

Such a view of the purpose of differentials is in accordance with the economic theory of net advantages, according to which forgone earnings and effort involved in training is balanced over a lifetime by increased wages. These considerations have led some authors (for example, Holm Hansen (1962) 1967: 306, supported by O'Dea, 1969: 151) to advocate that the Commission should adopt the practice of deciding broad priorities for attracting labour to different occupations, and then try to set salaries to allocate labour in the long term as required. This would have the advantage of providing a theoretically clear-cut criteria for salary determination, something which is lacking at the moment. However, only if the Commission gave priority to the

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7. See also Boot Factories Case (1910) 4 C.A.R. 1 at 18-20. It is ironical that similar considerations to those which inspired Higgins led a member of the Commission in 1967 to support increases in the differential between skilled and semi-skilled tradesmen substantially. In a full-employment economy the fears of tradesmen being squeezed out by the semi-skilled which Higgins expressed no longer applied, but it was still felt that an incentive was needed to encourage boys to enter apprenticeship (see Gallagher J., B2916: 93).
most productive occupation (measured by the market value of output) or at least to 'service' occupations which taxpayers were willing to pay for, would such criteria coincide with those usually regarded as "economically optimal".

As it is, the Commission has consistently refused to apply these criteria, particularly in instances when a clear responsibility for recruitment could be attributed to dominant employers such as the Public Service Board or to the Government itself. Examples are the Professional Engineers (S.M.E.E.A.) Case, (1953), 33 CPRAR 723, the Railway Professional Officers Case, (1958), 89 CAR 40, and two cases where the adoption of such criteria was unsuccessfully urged by O'Dea himself – the 1961 Professional Engineers Case (97 CAR 233 at 324) and the 1969-70 A.C.T. Nurses' Case. Also, tribunals have always refused to award "attraction" wages to compensate for short-run shortages of labour (Higgins, 1922: 98-99), and have at times resisted the incorporation into awards of high wage rates due to temporary labour shortages (e.g. Printing Industry (Commercial) Case, 1947: 59 CAR 278 at 287). In both cases, the reason for inaction was the expected dissatisfaction and unrest which would occur when the temporarily high wages had to come down again. But such dissatisfaction is an inevitable part of a flexible market economy which uses shifts in prices to allocate resources. By refusing to act as judges of labour resource requirements, the members of the Commission have abdicated at least part of the role they could assume, and have abandoned criteria for wage fixation which could be objectively discussed, if not always measured. It does not, of course, follow that they have been wrong to do so: many market-oriented economists would argue that at least short-term supply fluctuations should be left to market forces only.

8. It is possible that the absence of any dominant employer in the metal trades has made some arbitrators more willing to accept responsibility for ensuring an adequate supply.

9. This particular principle, together with others enunciated by Kelly J., in that case and in the 1942 Merchant Service Guild Case (46 C.A.R. 577 at 585-7) have been abandoned since Kelly's death in 1956 - most explicitly in the 1963 Metal Trades Margins Case (102 C.A.R. 138 at 140). Also, according to G.V. Fortus, a Conciliation Commissioner since 1944, they were not even followed by other arbitrators before then – Portus, 1969: 203.
2.3 Comparing Occupations

A further and more remarkable anomaly in the criteria supposedly used to determine work value is one already referred to in a footnote - the doctrine that rates of pay in different occupations cannot be compared unless the occupations are similar. This doctrine received its classic statement in the Metalliferous Miners Case in the Industrial Commission of N.S.W. in 1928:

"It must always be remembered that the rate of pay awarded in one industry is not to be accepted as a guide to the rate to be awarded in another, unless the tribunal is satisfied the work is fairly comparable. Even when similarity of work has been established it is not enough to look merely at the rates awarded apart from the other conditions of the award in which they are found. It is also necessary to have regard to the circumstances under which the award in question was made and to examine and consider carefully the principles upon which those rates and conditions were fixed in the particular award".

(1928, NSWAR at 407).

The use of this passage has had a peculiar history recently. It was quoted with approval in the 1961 Professional Engineers Case (97, CAR 233 at 326-9). In that context the Commission was endeavouring to answer the criticism that the decision (which in the Commonwealth Public Service involved increases in salary of about 34% for a newly graduated engineer and 27½ for an engineer with five years experience) would have inflationary effects through its emulation by other professions. The bench hoped that by forcing other professions to conduct work value cases and forbidding them to rely on comparison with engineers a general rise could be averted. In the event a series of work value cases followed which did result in other professions "catching up" with engineers.

One of these was the 1966-67 Journalists' Case, in which O'Dea appeared for the A.J.A. In this case the two judges and a Commissioner rejected comparisons with the Professional Engineers Case, but then included a clause which completely rejected the Metalliferous Miners doctrine:
Turning now to comparisons with other careers, it cannot be disputed that journalism differs from other professions or avocations. Nevertheless we do not think we should attempt to consider salaries for journalists in an industrial or social vacuum. We think it proper in this professional area to look at present salaries and past movements in salaries of employees with comparable educational qualifications who are called upon to display similar qualities in their work even though the work itself is dissimilar. (Moore, J., Mimmo, J., and Commr. Neil, 1969: 10).

The bench went on to select Commonwealth Public Service salaries as the basis of comparison, and to award substantial increases of up to 31½.

The view that comparisons of wages are ubiquitous in inter-industry wage fixation was forcefully put by Commr. Portus in an address delivered in April 1969:

Generally speaking, during the whole period of operation of the Commonwealth Conciliation and Arbitration Act inter-industry wage fixation by arbitration has been based on an assessment by the arbitrator of the skill and other attributes of the work performed compared with the attributes of other work performed in the community ... however difficult to do, comparisons must still be made. Rates cannot be fixed on work attributes without the use of a yardstick. (Portus, 1969: 204-5).

Jaybe, but one can always pretend. At the time he gave this address Commr. Portus was a member (with Moore, J., Wright, J., and Public Service Arbitrator Chambers) of a mixed bench¹⁰ which was in effect rehearsing the 1961 and 1962 Professional Engineers Cases in order to update the salaries of engineers. Towards the end of the case the Public Service Board unilaterally increased public service engineers' salaries by from 11½ to 15½. The increases were such that an engineer with five years' experience was on the same salary as the corresponding salary in 1959 would have been with adjustments for movements in the national price and productivity indices. Moore J. and Arbitrator Chambers

¹⁰ That is, there were two benches sitting together: Moore, Wright, and Chambers to hear claims for Commonwealth Public Service engineers, and Moore, Wright and Portus to hear the claims of engineers employed elsewhere.
subsequently issued a judgement which stated that because the 1961 and 1962 cases rejected comparisons with other occupations, no note could be taken of general movements in salaries now. However, they said, the Public Service Board's increases corresponded with their assessment of the change in work value which had occurred and they adopted them unaltered. Wright J. concluded that the P.S.B.'s increases were

"fixed contemporaneously with and in the environment of their association with what the Board considers to be other cognate or comparable professional groups."

(Roneod Judgement, p. 9)

and felt that this was the wrong basis for determining movements. He considered that work value had increased by much more than the Board had awarded, but to ensure uniformity between the public service and other employers he agreed to adopt its figures also. Only Commr. Portus maintained that there had been no change in work value, but he concluded that general movements in salaries had left engineers behind even compared to their position before the 1961 case, and would have awarded a small extra increase to the engineers in his jurisdiction (i.e. those outside the Commonwealth Public Service). Wright, however, felt uniformity between the Commonwealth and other employers to be the most important consideration, and so joined Moore in preventing this.

There was thus a 3-way split among the members of the bench who had also sat on the 1961 Case (Arbitrator Chambers, Wright J. and Commr. Portus). As in a sense all of them were interpreting a unanimous judgement in which they had all joined, the whole episode is a cautionary tale in the interpretation of the significance of particular joint judgements. In addition, the fourth member of the bench, Moore J., partly reversed the opinion on the relevance of salary comparisons in which he had joined in the 1966-67 Journalists' Case. In his case, however, the core of his reasons may be found in the following passage from his joint judgement with Chambers:

"... the awarding by us of an up-to-date salary scale for professional engineers should not, with some possible exceptions, raise in the mind of other groups the thought that another cycle of salary increases has commenced. In our view it is the end, not the beginning of a cycle."

(Roneod Judgement: 7-8).

How are these contradictory decisions to be accounted for?

There are several underlying factors at work. At base lies the trade union concept of "fairness", involving the belief that there should be at least a rank ordering of wages according to differences in skill, arduousness, and so on.
This accords with the theory of net advantages described above, but to conclude from this that work value is really long run supply price is, I think, to miss the point. A decision is acceptable as long as it is fair, and it is fair if it is acceptable\(^{11}\) to the workers involved. Thus market rates are accepted as a guide to award rates not because the forces of the market can be relied on to arrive at an equitable equilibrium but because, in the absence of evidence of coercion by employers' combines or the like, their existence is evidence of their customary acceptance by the employees themselves.

As long as the occupation under consideration is not a 'key rate' in the wage structure, the Commission can afford to take arbitral note of ruling rates in other occupations to assess acceptable wage rates, as in the Journalists' Case mentioned above. However, where the rate is a key rate, whether by convention (such as the fitter) or by circumstance (such as the Professional Engineer), the tribunals are in a quandary. If they set rates acceptable to the employees in question they will thereby raise the wage level which employees in other occupations will find acceptable, so that the whole wage level will rise, at least for that job cluster. On the other hand if they fail to raise wages to an acceptable level because of this they will fail to settle the industrial dispute before them, though they may prevent others. It is in an endeavour to settle the present dispute while preventing others developing that the Metalliferous Miners doctrine tends to be advanced in disputes about key rates. The passage quoted above from the judgement by Arbitrator Chambers and Moore J. in the 1969 Professional Engineers Case, referring to this being 'the end of the round', is evidence that at least these two had despair of the hope that such devices could prevent rises in key rates generating rises elsewhere.

As O'Dea (1969) points out, the whole problem of the explicit definition of criteria for determining "work value" only re-emerged as a problem in the 1960s. It is submitted, however, that the reason for this re-emergence is not the simple abandonment of "comparative wage justice" as a paramount criterion with the death of Kelly C.J. as O'Dea suggests, though his death obviously had an effect. It is more that the desire to do justice to each case according to "equity, good conscience and the substantial merits of the case", as S.40 of the Act requires, means that members of the Commission felt they had to do something to try to break up traditional "job clusters" in a way acceptable to unionists. They advanced the independent assessment of work value as the way

\(^{11}\) "Acceptable" in the restricted sense that a reasonable unionist would not feel compelled to strike against it.
to do so. At no time did they abandon the ideal of "comparative wage justice" geographically or between industries: to anticipate the terminology described in the next chapter they were willing to break up job clusters, but not wage contours. The refusal to break up a wage contour is vividly shown in the late Wright J.'s decision in the 1969 Professional Engineers' Case discussed above. The extent to which the Commission has been successful in breaking up the universal job cluster (which "bureaucratic - managerial" arbitrators such as Kelly C.J. regarded as ideal) is discussed further in our next chapter.

However, looking at the judgements themselves as we have been doing can at best give only a partial and often distorted picture of the pressures exerted on and by the Commission. It will be recalled that in Chapter 1 it was suggested that the Commission could best be analysed as an adjunct to the union movement itself. In the next chapter we will do this by examining the correspondences between the aims and principles of action of unions and the Commission. This leads to a discussion of the room for manoeuvre possessed by the Commission, and of the way these have affected the emphases in the assessment of work value we have been discussing.

12. The Association of Professional Engineers of Australia felt that it was so obvious that Wright J. had violated S.40 in his attachment to the preservation of the wage contour that they sought a writ of mandamus from the High Court, but Wright J. died before the case was heard.

13. See Chapter 5.
3.1 Registration and Union Recognition

A vital point about the Australian Arbitration system is that its very existence wins for the unions what in America and many other countries is their most important battle - recognition. This point, while recognised, is often underemphasised in discussion of the system. No union in Australia need fight for recognition once it has been registered; nor, generally, need registered unions fear another union trespassing on their membership. Similarly an employer has no choice about treating with the union once a log of claims has been served on him. At the very least he must appear to answer the claim in court, or risk having the claim granted in full. Also most awards, while not requiring preference to unionists, guarantee the union access to the employer's premises at lunch hour on union business (Hills and Sorrell (1969): 239). This guaranteed recognition is not an act of grace by the arbitral authorities selectively granted or withheld: it is structurally essential to the functioning of the system. Only unions can appear before the arbitral authorities; without unions to make claims on employers the whole system could not function. This means that while the arbitral authorities have occasionally deregistered unions which struck in defiance of them, on the whole they are locked in with the unions in mutual need. This assertion, of course, was not put to the test in the period 1951-1969, as in that period the potentially savage penal powers of the Act, which enabled unions to be fined $1000 for each day they remained on strike, effectively replaced deregistration as the coercive sanction. Should these now fall into disuse, the Commission and Court will have to choose between abandoning their "disciplinary" role in penalising strike action, or risk cutting off large sections of the workforce from the system altogether through deregistration.

There is a further reason for the support which the Arbitration tribunals have extended to unions, one touched on by Flanders and Fox (1969) in the discussion of British industrial relations referred to earlier.

1. This is an exaggeration: in theory employers could serve logs of claims on individual employees; this was in fact once done to airline pilots, and the procedure was upheld in the High Court. But it would be completely impractical against any more diffuse group.

2. The Court is unlikely to do so, being likely to adopt the attitude of Higgins:

Deregistration would not conduce to industrial peace, but would turn a public, responsible body into an underground, irresponsible combination. (Higgins, 1922: 67)
The authors are particularly concerned to answer Conservative Party charges that the main cause of unrest such as unofficial strikes is the growth of powerful but irresponsible trade unions. They point out that critics of trade union power cannot have it both ways: if they want the trade unions to be strong enough to control their members' behaviour and prevent unofficial strikes, they must permit the union to be externally strong as well, as the strength to exert sanctions on employers is inseparable from the strength to exert sanctions on disident employees. Conversely, "A union which is internally weak is normally one that is externally weak". (Flanders and Fox, 1969: 155). This has been recognised by the arbitration tribunals since the days of Higgins, and is an opinion which has, if anything, grown in favour over the last few years: it may particularly be seen in the favourable light with which Hawke's competent militancy is viewed by involved commentators such as Woodward (1970: 15), and conversely in the almost contemptuous dismissal by Kirby, C.J., Moore and Williams J. J. of the AMU's claim for a 40-hour week on 17 June 1970.

An important means of encouraging such internal strength has been the legal status and approval given to rules of registered organisations which centralise control in the hands of a national executive. The double-edged nature of this internal strength was illustrated in 1970, when the National Executive of the A.C.O.A. used its centralised authority to call and extend an overtime ban by Commonwealth Public Servants, in spite of considerable opposition in the strategic A.C.T. branch. That the other edge cuts too can be observed in the following remarks on English trade unions by the New Left writer, Ferry Anderson:

"... it is a rule in a capitalist society that any institution or reform created for or by the working class can by that very token be converted into a weapon against it - and it is a further rule that the dominant class exerts a constant pressure towards this end. There is a permanent social reversibility here. The reason is that any attempt to advance the cause of the working class, to win political power for it, must involve a preliminary winning of power over it, in the form of collective organization, whether trade unionist co-operative or political party in character."

(Anderson, 1967: 276)

For example, federally registered unions can and do sue in the ordinary courts for unpaid union dues.
It is therefore significant from our point of view that the unions themselves, however left wing, have always sought registration, and with the solitary exception of the Australian Air Pilots Association no union has ever actively sought deregistration. When deregistered against their will, unions (e.g. B.M.I.U.) have always sought to be re-registered. This is remarkable because, at least in principle, a strong deregistered union would be in no worse position than any union in, say, the United Kingdom. Its only important danger would be that another union could then obtain registration to cover its particular field and "raid" its members. This is certainly a severe threat to any union when unemployment is rife, but is no real threat to a strong union in a time of full employment, as the survival of the B.M.I.U. from 1948 to 1962 shows. A militant union opposed to the Arbitration system would be inconvenienced by withdrawal from the system, but if the advantages of doing so were at all compelling they should easily compensate for this.

This notion has, of course, to be put against the fact that deregistration is as a matter of tactics very difficult for a union to achieve, even if it wanted to do so. The attempt of the airline pilots to be deregistered was thwarted by the passing of an act which gave the Minister for Labour power to 'declare' an organisation of flight crew as, in effect, registered and subject to the Act, whether its members wanted it to be or not. This leads Mills and Sorrell to conclude that "it seems clear that it was never the intention that an organisation should be allowed to choose freely for itself whether it would continue to exist as a (registered) organisation or bring its existence as such to an end" (Mills and Sorrell, 1968: 44).

The attitude of militant trade union leaders on the issue is particularly interesting. Take, for example, J. Hutson, an official of the A.E.U. He cites the above facts when discussing de-registration as a means of escape from the penal clauses. However he shows that this is not the only reason for downplaying de-registration when he hypothesises:

4. As Higgins remarked:

It is curious, indeed, to observe how, under the southern sky, the position has been reversed, and the registration of unions, which nearly led to a labour revolution in France in Waldeck Rousseau's time, about 1884, has become a desideratum of the union, and is regarded by the unions as a privilege. (Higgins, 1922: 67).

5. As we have seen in the first section of this chapter, this is still so today.

Its use against the Waterside Workers Federation following a strike in 1928 left waterside workers at the employers' mercy during the 1930s - (Walker 1956: 283.)
"Assuming, however for argument's sake that the A.E.U. did become deregistered, or the members did form a voluntary non-registered association, the members would still not be free of the arbitration system. One problem would be that as members no longer had any award rights, any improvements in wages and conditions granted in awards covering their industry would not flow automatically to all members as they do at present. They would have to be obtained by the members from their individual employer, but even if they were successful in doing this it would mean that their energies could be mainly absorbed in maintaining award standards or improvements instead of as at present concentrating them mainly on obtaining above award conditions. Another problem could be caused by the existence of a number of trade unions in most industries, many of which have overlapping constitutions covering similar classifications. This could tempt a union to poach the members of a deregistered union whom it could cover, and there is no doubt that the employers would encourage this in order to have the workers squabbling among themselves rather than with them." (Hutson, 1966: 211).

Hutson goes on to advocate that the A.E.U. should continue to make minimal use of the arbitration system, and "as far as possible on our own terms and not that of the system" (Hutson 1966: 213). The above quotation shows, however, that he recognises the positive advantages that registration brings to unions, though it is unclear from the context whether he does regard these as outweighing the burden of the penal powers (which were still operating when he wrote). As the A.E.U. has for years prided itself on its militancy and downplayed the Arbitration system (see Perlman, 1954: 124) and still does, this admission of the benefits of registration is quite significant.

Similarly the application by B.H.P. to cancel the N.S.W. State registration of six metal trades unions in April 1970 was opposed with a vehemence which surprised officers of the (federally registered) Metal Trades Employers Federation. At the stop-work meeting held in Hyde Park on 14 April, 1970, the first day of the hearing, most speeches concentrated on the wage campaign which led to B.H.P.'s application. Where mention was made of deregistration it was equivocal: the secretary of the Painters' Union proclaimed "the day will come" when the union would withdraw from arbitration, but this would be when the union wanted to, not the bosses. Taking a different tack,
a Federal leader of the A.E.U., Jack Deveraux, claimed "deregistration would not change life at the B.H.P. at all", but went on to admit that it would mean the members and officials' time would be taken up in fighting "defensive actions". What he had in mind was illustrated in the pamphlet "Steel-workers Demand Wage Increase Now" distributed at the meeting, which related an earlier instance of deregistration:

"In April 1954 the FEDFA was deregistered because of a dispute between B.H.P. and members supporting it. Afterwards B.H.P. continued to observe the wages and conditions of the award so far as those members were concerned, but they found that they were denied rights of representation on the job ..."

"Like all penal powers the intent of deregistration is by the threat of penalties to force workers to comply with the interests of employers. In this case it is a threat to the very existence of those unions at B.H.P. - A.I.&S. plants who respond to their members' justified demands on the employer." (my emphasis)

It is important to recall that deregistration would do no more than have the unions revert to approximately the legal standing of British trade unions today and yet this is seen as "a threat to the very existence" of the union.  

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6. See Sykes 1960, 230-240, though the fact that all cases on this point in Australia have either assumed arbitration registration or have not been closely argued makes the legal position obscure.

7. Some allowance must, of course, be made for the political situation in which these statements were made. Many of the remarks at the meeting were aimed directly or indirectly, at the Federated Ironworkers Association, the union covering the unskilled workers at B.H.P., whose "moderate" leadership had dissociated the union from the craft unions' campaign and negotiated directly with B.H.P. Deregistration of some of the unions may have left their members liable to recruitment by the F.I.A. or 'moderate' craft unions, such as the A.S.E. and there is no "Tidlington Agreement" to protect the unions from their state-sponsored rivals. Also, the dispute occurred during the period when sanctions against breaches of Federal awards were suspended following the C'Shea case, and much of the militant unions' rhetoric was directed towards suggesting an analogy between such sanctions and deregistration. The fact that deregistration would make unions free of many (state) penal sanctions was not, of course, mentioned (see Sykes, 1960: 243).
3.2 The Causes and Effects of Union Power

The effect of ubiquitous registration of trade unions in a modern economy is not easy to assess, particularly as in Australia there is no section of industry unaffected by the Arbitration system. Examining the situation in comparable societies overseas involves the difficulty, always encountered with such studies, that no two societies are ever fully comparable. The difficulty is compounded by the fact that the most detailed studies of the effects of trade union power have been carried out in the U.S.A., a country where the development of trade union power has been much less uniform or widespread than in Western Europe or Australasia, largely because of political and judicial restrictions on the ability of unions to organise. However, this variability in union influence makes the U.S. a fertile field for studying the differential impact of degrees and kinds of trade union power. Provided the impact of institutional differences on union power is remembered, a review of studies of unionism in that country could prove suggestive for understanding the effects of the arbitration system.

One of the most important papers on trade unions and wage structure is by Kerr (1957), "Wage Relationships - the Comparative Impact of Market and Power Forces". Kerr divides wage differentials into five types: (1) interpersonal, (2) interfirm, (3) interarea, (4) interoccupational and (5) interindustry, and points out that

"for the first two types of differentials the impact of unionism has been substantial; for the third (at least in the limited situation of interarea product competition) significant, and for the last two, minor."

(Kerr, 1957: 181)

He explains this by two interrelated criteria:

"the impact of unionism on differentials has varied (1) directly with the strength of motivation of workers and their organisations to exercise control, and (2) inversely with the amount of power requisite to effect such changes (Kerr, 1957: 182)."

8. The oil industry, in which collectively bargained agreements predominated until this year, is a topical case in point.

Kerr argues that the motivation of workers is at its height when they see inequitable comparisons within their firms, and less forceful but still intense when the resentment of lowly paid workers in one firm is coupled with the fear of unfair competition in another. Outside the same geographic labour market area the coercion of wage competition is absent. Only the consideration of equity itself remains to motivate union pressure for uniformity. As far as occupational differentials are concerned, unions are ambiguous in their policies, with 'traditional skill differentials' competing for priority within unions with 'wage solidarity' principles. The same dilemmas confront unions with respect to inter-industry differentials. Those in higher paid industries want to retain their superiority and are encouraged in this by dissimilarity of work and skill requirements, as well as by less fear of competition.

Union achievements tend to correlate with these aims, Kerr claims, because where motivation is most intense, power requirements are least. Thus it is often to an employer's own advantage to rationalise his internal wage structure and minimise dissension. Similarly, interfirm uniformity in any particular area is in the interest of high-wage payers, being often a pre-requisite to uniformity of price in the product market. Interarea uniformity, however, requires much greater union organisation and may meet strenuous employer resistance unless increased labour mobility and widening product markets make interarea comparisons more like local interfirm ones. Occupational differentials are dominated by the changing nature of supply and demand in the labour market as industrialisation progresses, resulting in a secular levelling. Strongly centralised union federations, found only in Norway and Sweden, would be needed to effect this process. Unionism has in fact acted as an impediment to narrowing in Denmark, Australia and the Netherlands. Similarly, if anything union conservatism acts to preserve interindustry differentials against the same secular narrowing, by preserving traditional distinctions in skill requirements.

The way in which the union drive to uniform wage-rates is channelled and restricted by institutional forces has been summarised (though not explained) by Dunlop (1957), in his introduction to the volume in which Kerr's essay appears. Dunlop attacks attempts to reduce wage-setting to the problem of a single rate, claiming all wage rates do not move together either in the short run nor in the long period (Dunlop, 1957: 15). Dunlop is referring to the classical convention, used by Marx and Keynes, of expressing all skilled rates as consisting of so many 'units' of unskilled labour. (as we shall see, in contrast to Dunlop's strictures just such a concept of wage rates remained extremely influential in the Commonwealth Arbitration tribunals until the last few years.)
Instead, Dunlop concentrates on the wage structure itself as the central concept about which the theory of wages is to be built. To explore this structure he introduces two concepts, though their delineation is rather fuzzy. The first of these he calls a 'job cluster', which he defines as "a stable group of job classifications or work assignments within a firm (wage determining unit) which are so linked together by (a) technology, (b) the administrative organisation of the production process, including policies of transfer and promotion or (c) social custom that they have common wage fixing characteristics."

This definition is derived from the fact that while the structure of wage differentials in a plant is not rigidly fixed, the individual wage rates do not change randomly, but divide up into groups or clusters. Each of these clusters will consist of one or more key rates and several associated rates. The key rates tend to be constant in job composition both over time and between firms, and to be the focus of labor-management negotiations.

In Australia, the existence of such key rates is extremely prominent, as sheer necessity if nothing else forces arbitration authorities and public employers to concentrate on particular classifications (such as the fitter in the metal trades, the 5-year graduate 'experienced engineer', the new graduate in the diplomatic service, the base grade clerk in the public service).

It is important to note that Dunlop, who insists on the importance of market forces in determining wage structure, implicitly abandons any attempt to explain the internal structure of job clusters by market supply and demand:10

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10. This approach is different from the conventional approach, which starts with the premise that the differentials within each job cluster 'should' be equal to the marginal supply price of skill: if they are any less they will be economically inefficient, if more, inequitable (see, for example, Isaac, 1967: 24). Short-term departures from this ideal will be sorted out by long-term movements in the labour force. The conventional approach, discussed in Chapter 2, seems to explain differentials within each job cluster by a tendency equalise 'net advantages': when this equalisation is achieved the differential equals the marginal supply price of the skill in a competitive labour market, leading to the axiom that (in the words of a Catholic apologist for the Arbitration System) "that which is economically correct guides to that which is morally right" (Timbs, 1963: 54).
"From the analytical point of view, these job clusters are given in the short period by the technology, the managerial and administrative organisation of the wage determining unit, and by the social customs of the work community. Thus, the employees on a furnace or mill may constitute a job cluster (technology); so may employees in a department (administrative organisation) or the women in an office (social custom). Wage theory, for the short period, does not seek to explain these job clusters. For the longer period, it is essential to show that the scope of a job cluster within a rate structure may be expanded, restricted, or divided as a consequence of changes in the technology, administrative organisation, or social customs in the plant. (Dunlop, 1957: 16)."

Dunlop's second conceptual category is the "wage contour", which he defines as "a stable group of firms (wage determining units) which are so linked together by (a) similarity of product markets, (b) by resort to similar sources for a labour force or (c) by common labour market organisation (custom) that they have common wage-making characteristics" (Dunlop, 1957: 17). The emphasis is on "wage determining units", however, and a particular firm employing a professional chemist, a pattern maker and clerk will in fact be part of three quite different contours. That is, job clusters themselves constitute one of the dimensions of wage contours, others being the industrial sector associated with a particular product market and the geographical area associated with a particular labour market.

Just as a job cluster contains a key rate, so a wage contour contains one or more 'key bargains' not by the largest firm, the price leader or the one with labour relations leadership. This 'key bargain' is analogous to the 'key rate' within the job structure. The focus of contemporary wage theory is to be on the strategic rates established when the 'key-rate' of the job cluster is fixed in the 'key bargain', rather than on reducing the wage structure to a single rate.

11. In 1969-70, the Public Service Board attempted to give a 6.6% increase in wages to tradesmen but not to other workers, such as draughtsmen, who worked in traditionally related occupations. The increase was intended to match the ruling rates for tradesmen in the labour market. The decision to attempt to confine the increases to related workers can be seen as an attempt break up a traditional job cluster so that each fragment was tied to a different external wage contour (see below), and would henceforth move in response to external market forces. The attempt was unsuccessful: the Board was forced by industrial pressure to give an increase to the other groups, though it found other grounds for doing so than merely matching the 6.6% increase.
Dunlop's categories can be related to Kerr's discussion of the relative impact of union and market pressures on the wage structure. In brief, Kerr's argument can be rewritten to read that unions are able to bring about uniformity within a wage contour, but not across them. The main additional contribution which Dunlop's terminology offers is that Dunlop is more explicit about the source of the resistance which unions must overcome as they seek to widen the wage contour over which they have influence. Dunlop insists on the primacy of the product market in determining the bounds of wage uniformity. He exhibits the following table of hourly wage-rates for truck drivers in Detroit in 1951:

**TABLE I**

**UNION SCALE FOR MOTOR-TRUCK DRIVERS**

(Boston, July 1 1951)

<table>
<thead>
<tr>
<th>Category</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Magazine</td>
<td>2.25</td>
</tr>
<tr>
<td>Newspaper, day</td>
<td>2.16</td>
</tr>
<tr>
<td>Oil</td>
<td>1.965</td>
</tr>
<tr>
<td>Building construction</td>
<td>1.85</td>
</tr>
<tr>
<td>Paper handlers, newspaper</td>
<td>1.832</td>
</tr>
<tr>
<td>Beer, bottle and keg</td>
<td>1.775</td>
</tr>
<tr>
<td>Grocery, chain store</td>
<td>1.679</td>
</tr>
<tr>
<td>Meat-packing house, 3-5 tons</td>
<td>1.64</td>
</tr>
<tr>
<td>Bakery, Hebrew</td>
<td>1.595</td>
</tr>
<tr>
<td>Wholesale</td>
<td>1.57</td>
</tr>
<tr>
<td>Rendering</td>
<td>1.55</td>
</tr>
<tr>
<td>Coal</td>
<td>1.516</td>
</tr>
<tr>
<td>Garbage disposal</td>
<td>1.50</td>
</tr>
<tr>
<td>General hauling</td>
<td>1.50</td>
</tr>
<tr>
<td>Food service, retail</td>
<td>1.475</td>
</tr>
<tr>
<td>Ice</td>
<td>1.45</td>
</tr>
<tr>
<td>Armored car</td>
<td>1.405</td>
</tr>
<tr>
<td>Carbonated beverage</td>
<td>1.38</td>
</tr>
<tr>
<td>Waste paper</td>
<td>1.38</td>
</tr>
<tr>
<td>Linen supply</td>
<td>1.342</td>
</tr>
<tr>
<td>Lovers, piano and household</td>
<td>1.30</td>
</tr>
<tr>
<td>Scrap, iron and metal</td>
<td>1.20</td>
</tr>
<tr>
<td>Laundry, wholesale</td>
<td>1.20</td>
</tr>
</tbody>
</table>


- (after Dunlop, 1957: 21)
Dunlop's comment on these figures deserves quotation:

"In a significant sense, the case constitutes a kind of critical experiment. One type of labour performing almost identical work, organised by the same union, is paid markedly different rates by different associations of employers in the truck transportation industry. Why the wide range in wage rates? Are the disparities temporary? Do they arise from 'friction' or 'immobilities' in the labour market? Are they primarily the consequence of a monopolistic seller of labour discriminating among types of employers? I believe the answer to these several questions is in the negative.

Basically each rate reflects a wage contour. Each is a reflection of the product market. Within any one contour the wage rates will tend to be equal. As among beer distributors, construction firms, ice deliverers, or scrap iron and metal haulers, there will tend to be few differences in rates. But there are sharp differences in rates as among contours. Fundamentally the differences in the product market are reflected back into the labour market. (Dunlop, 1957: 20)."

This, Dunlop would claim, is the reason unions have varying success in achieving inter-regional uniformity of wage rates, and none in achieving it between industries. A product market and its attached labour market may extend over a wide geographical area (for airline pilots it is world-wide), but it is usually a contradiction in terms to talk of a common product market covering several industries.

In a later book, Dunlop points out that rules on compensation are part of the wider network of rules and the machinery for making them which make up an 'industrial relations system' (Dunlop, 1958: 89n). Product market

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12. An industrial relations system is defined by Dunlop to consist of 3 actors: (1) a hierarchy of managers, (2) a hierarchy of workers, and (3) specialised government agencies, interacting in respect to three aspects of their environment: (1) Technological characteristics of the work place, (2) market or budgetary constraints impinging on the actors, and (3) the locus and distribution of power in the larger society. An illustration is the distinct arbitration system of the American railroads: an Australian counterpart would be the special system set up for airline pilots - see Dunlop, 1958: 7-9, 18-23.
constraints, (or budgetary constraints for non-market employers, especially government instrumentalities) tend to determine the boundaries of these wider systems too, even when formal rule-setting is wider:

"When the formal organisations for rule-setting ... are wider in scope than the area of product-market competition, as is frequently the case in continental European countries, the industrial relations systems that develop confront pressures for specialisation of some rules along the contours of market competition ... Regardless of the formal organisation, the product-market context or budgetary constraint is likely to be significant in influencing the scope of a set of rules, that is, the sector of work places over which a common web of rules is in fact applicable. (Dunlop, 1958: 74)."

Finally, Dunlop's job clusters help summarise, though not really explain, the ambivalence of unions about narrowing occupational differentials which Kerr notes. The occupational differentials over which a union could expect to have influence would, according to Dunlop, lie within a particular job cluster, and so in a sense lie outside not just the field of wage theory but also the field of wage bargaining, which tends to centre around the key rates to which other rates are related.13 The attitudes of the Australian arbitral authorities to job clusters, and the peculiar twist which their decisions have given to the meaning of this concept in Australia, are central to this thesis, and will be discussed at length later.

Before doing so, however, it is essential to note that Dunlop's analysis of the predominance of product markets in determining the shape of wage contours has been extensively challenged. One of the earliest challengers was A.H. Ross, (1948) to whom the articles by Dunlop cited above were in fact answers. Ross argued that the key to wage determination under trade unions was the decision-making process inside trade unions, which are essentially political institutions operating in an economic environment.

13. In Australia, the Arbitration Commission has relieved the unions of the need to make hard decisions about to which group of their members wage increases should go. In an interesting exchange between Moore J. and the employers' counsel, J.R. Robinson, during the 1969 National Wage Case, Moore asked Robinson how wage increases should be distributed between different classifications in order to preserve what he called "vertical comparative wage justice" - that is, "just" differentials. Robinson suggested that it should be left to the unions to decide amongst themselves to whom the increase was to go - an obvious dig at the fact that the ACTU had asked for a flat increase, while the white collar unions had (for the first time) asked for a percentage increase. (1969 National Wage Case Transcript: 594).
He saw the primary objective of the trade union leadership as maintaining the union itself as a viable institution, with a secondary objective of maintaining the leadership's political position within the union. These objectives involved reconciling the pressures and aims of 'interest groups' including the rank-and-file membership, the employers and, in some instances, the government; they were best secured by concentrating on criteria of 'equity' or 'fairness', as shown by the levels of settlements achieved by the same or a related union in the same or a related industry.

According to Dunlop, economic criteria (specifically the product market) primarily determine which are 'related unions and industries'. They are also the primary determinants of the 'key bargain' within the wage contour so defined. Dunlop concedes that it is Ross' political forces which bring about the rapid spread of the key bargain throughout the wage contour and also the pattern of relativities within the job cluster surrounding the 'key rates'. But these political forces, he argues, can operate only when the economic climate permits them - in particular when there is no threat of unemployment if the 'key bargain' is implemented elsewhere. Empirical studies by Schultz and Myers (1950), Seltzer (1951) and Levinson (1960) in particular American industries tend to bear this out. Other studies of the comparative effect of unionism on the wage level in various American industries suggest that unionisation does raise wages, but only in industries with high profit rates and high concentration of the market in a few firms. These studies did not have available measures of the rate of unemployment by industry, but did indicate that related variables such as rates of change of employment or physical productivity showed less association with changes in the wage structure than did conditions in the product market (see Levinson, (1966) 1969: 98-102).

In an important re-examination of this question, however, Levinson (1966) 1969) suggests a different interpretation of the evidence, backed up by new empirical studies of his own. In his words "the key to the relationship between product market structure and wage movements lies primarily in the effects of the former on the ease of entry of new firms into production outside the jurisdictional control of the union" (Levinson (1966) 1969: 105, his emphasis). Previous studies had shown a direct relation between market concentration, high profits and high wages because they were confined to manufacturing industry. In highly concentrated industries the barriers to entry of new firms imposed by the nature of the industry itself ensured that the union, once firmly established in existing firms, faced little threat from non-unionised firms. But Levinson was also able to show that unions were able to make gains in the highly competitive maritime and trucking industries, and that this was because the necessary geographical concentration of these industries forced new firms to come to cities where the union was strong. Unlike competitive manufacturing firms, they could not relocate in some non-unionised area such as the Deep South.
Levinson's conclusions on the importance of the political pressures on union leadership tend to confirm Dunlop, concurring only marginal importance to the effects of rivalry and factionalism inside unions, though these may be dominant in determining wages in certain isolated situations. Also "while the presence of strong political pressures provided, in several instances, a greater motivation to the unions to negotiate large wage-fringe improvements, the ability of any union to translate these motivations into effective action depended upon the 'permissiveness' of the basic economic or pure power environment within which the union was functioning (Levinson (1966) 1969: 111)."

It follows that Ross' inter-industry' orbits of coercive comparison' break down if the prosperity of the respective industries gets out of alignment - if, in other words, the industries belong to different wage contours.

Levinson, however, goes on to suggest that the preoccupation of other studies with Dunlop's and Ross' "economic" and "political" variables masked the most important set of variables, which he calls "pure power" variables, and defines as "those that effect the strength and stability of the bargaining institutions themselves - the union, the individual employer, or the employers' association. These factors included primarily those that affected the union's ability to undertake, and the employer's ability to resist, strike action" (Levinson, (1966) 1969: 104). Such factors must include the degree and successfulness of union militancy, as well as the simpler measures of union power such as the proportion of employees covered by the collective agreement. This power variable is important on the employers' side also, and means that highly concentrated industries will be better able to withstand union pressures than competitive but unqualified industries such as trucking. It is obvious from his context that to Levinson a "powerful" union will necessarily be a militant one, though he specifically does not try to explain how militancy varies amongst different unions.

It is important to note at this point that many of the American authors cited above wrote with the particular concerns of economists in mind - and American economists at that. Their primary concern is the determination of the wage rate. For this purpose "collective bargaining" is made analogous to individual bargaining prior to making a contract. Such a view is, of course, an inadequate one for full appreciation of trade unionism as such, and consequently for a proper understanding of wage determination under collective bargaining as Flanders (1968) 1969 amongst others has observed. It would be an impossible basis for studying adequately such a politically oriented system as the Australian arbitration system. But it is still a useful starting point for examining the economic constraints acting upon a wage fixing system, and
can help delineate their areas of manoeuvre. In particular, "job clusters" and their associated "key rates", and "wage contours" and their associated "key bargains" are very useful for the analyst of the Australian wage structure, and the tribunals themselves use such concepts both implicitly and explicitly in their work. It is and always has been a fundamental principle for the Commission that "wage contours" should be as wide as possible, extending nationwide where practicable. This principle does not proceed from statutory constraints, in spite of the fact that Section 51 of the present Act prescribes:

"In determining an industrial dispute, the Commission shall provide, so far as possible, and so far as the Commission thinks proper, for uniformity throughout an industry carried on by employers in relation to hours of work, holidays and general conditions in that industry."

However, as Hills and Sorrell point out, the discretionary nature of the clause and the latitude allowed in the definition of "industry" leave it with little practical importance (Hills and Sorrell, 1968: 289-290) Rather, the principle of "comparative wage justice" evolved by the tribunals independently of this clause, a principle followed in the State tribunals as well, has provided the force towards the widening of wage contours. At least in theory, and frequently in practice, comparative wage justice is to be applied across industry boundaries as well, thus working to widen wage contours further than the statutory clause would require. The reasons for this principle, and its contradictory effects, were discussed further in Chapter 2. Its legitimacy is accepted by all parties today; debate carefully centres about how wide the "wage contours" to be encompassed by the wage determinations should be. Indeed the principle sometimes applied by employers and government to oppose increases isolated to prosperous industries as being unjust, unworkable, or both.

3.3 Unions and the Establishment of the Arbitration Court

Before examining the way in which the Commonwealth arbitration authorities have widened the wage contours in various occupations, it is necessary to note an apparent legal impediment to this widening which in fact made it more likely. This is Section 51 placitum xxv, of the constitution under which the Conciliation and Arbitration Act operates, which reads:

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ....

(xxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."

In order for the Arbitration Commission to act, therefore, there must be a dispute, which is of an industrial nature, which a third party can conciliate or arbitrate and which extends beyond one State. All of these requirements
have been (and are) the subject of numerous and lengthy High Court interpretations which themselves would make an interesting exercise in the sociology of law (for a good summary see Lane, 1964: 52-73). The relevant requirement for present purposes is the last one: that the dispute be, in effect, interstate.  

There can be little doubt that the original drafters of the Constitution in 1898 intended that this clause of the Constitution would only be used for settling disputes in interstate industries, such as shipping and shearing. It was in these industries that the strikes of the 1890s occurred, with their great accompanying social upheaval. Disputes in other industries were seen as State matters (Hawke, 1956), 1967: 37). The 1904 Act made provision for the widest interpretation of powers that the High Court would allow, but it seems to have been assumed that the restrictions envisaged by the Convention would apply (Hawke (1956), 1967: 39). However, the High Court has interpreted the clause much more broadly, and this has been exploited in the growth of inter-state unionism. Hawke summarises developments well:  

"In the Convention and original parliamentary debates the tendency had been to think of industries which were interstate in character and as these were strictly limited the potential jurisdiction of the Court was minimized. Interstate disputes are another thing and the High Court in making this distinction provided the theoretical grounds for enhancing the Arbitration Court's responsibility. At the same time trade union development has ensured that this theoretical possibility became an accomplished fact. (Hawke (1956), 1967: 58)."  

Hawke emphasises that the catalyst which released the latent energy of the Arbitration system was the growth of nation-wide trade unionism. That this would be the outcome of the establishment of the system was anticipated by very few people at its inception. Hawke claims that only one member of parliament in the original debates, a South Australian labor senator, anticipated the way in which unions would take advantage of the provisions.  

In terms of our analysis, the development is not surprising. Kerr, Dunlop and Levinson all emphasise that only restrictions on union power prevent the geographical widening of wage contours, though they differ as to the most important source of this restriction.  

In this case a new source of union power  

14. Though not literally: it could, for example, be in N.S.W. and the A.C.T. The important point is that it extends beyond the bounds of one State.  

15. Dunlop and Kerr emphasise the restrictions caused by restraints in the product market (or budgetary restraints for non-profit-making concerns) while Levinson emphasises the main restriction as lying in the militant strength of the union concerned.
to achieve uniformity in wage rates emerged from this constitutional requirement. If the only disputes the Commonwealth tribunal could hear were interstate disputes, and if the whole purpose of the hearings was "the prevention and settlement" of disputes, then the basis of settlement must be one which would be uniform throughout Australia. Thus, while in theory an award could have been made which settled each dispute according to the varying prospects and circumstances of each State (or even each firm within each State), in fact such a practice would quickly have involved the Court in anomalies which would have caused more disputes than it settled.

Furthermore, such a procedure would have been in conflict with the principle which underlay the whole wage structure which the early Court built up: the principle of the minimum or living wage. This was the principle that a tribunal directed to fix a "fair and reasonable remuneration" (Harvester Case 2, CAR 1) could not reasonably award a wage less than that required to provide "the normal needs of the average employee, regarded as a human being living in a civilised community". Furthermore, "treating marriage as the usual fate of adult men, a wage which does not allow of the matrimonial condition and the maintenance of about five children in a home would not be treated as a living wage" (Higgins, 1922: 3, 5). ¹⁶

¹⁶. There has been much controversy about the true origins of the "Harvester Wage" (the 7s. per day which Higgins awarded in 1907 and which subsequently became the basis of the basic wage). A current Deputy President of the Commission has asserted (before his appointment) that the test used in determination of the basic wage had always been "what is in fact being paid in industry" (H. E. Moore, 1952, 18) - ever since Mr Justice Higgins fixed his amount in 1907. This was also claimed by the ACTU advocate in the 1969 National Wage Case, who produced evidence from Victorian Government Year Books of the time to show that the average wage paid by 'reputable employers' - particularly government instrumentalities and similar bodies - was approximately equal to the wage awarded by Higgins. McCarthy in an extensive study of the circumstances surrounding the Harvester Case, has argued that the actual amount of 7s. a day was in fact a restoration of the prevailing labourer's wage rate prior to the depression of the 1890s. (McCarthy, 1967a)

This modifies somewhat, though it does not contradict, Higgins' contention: "I think that I am close to the mark when I say, even for men in regular work, the average wage was not more than 5s. 6d. per day, 33s. per week. This would mean that the standard was raised by over 27 per cent in 1907" (Higgins, 1922: 97). But it is also largely irrelevant to our purpose. Whatever the actual historical basis, the fact remains that Higgins thought he was awarding a wage determined by family needs, and that this belief passed into popular acceptance.
This doctrine did not initiate with the Harvester Case, but was fundamental to trade union thought of the period. The Webbs had formalised the underlying theory in their book *Industrial Democracy*, where they advocated a National Minimum Wage as the logical extension of the trade union device of the common rule, as well as being in accord with National Minima already established in fields such as sanitation or female and child labour (Webb and Webb (1897) 1913: 776-784). In Australia, the ideal of a living wage had been propounded as far back as 1890 by Sir Samuel Griffith, Premier of Queensland (Labour Report No. 52, 1965-66: 120). The trade unions had won acceptance by the early 1900s of a 'living wage' of 7s. a day for all unskilled men employed on public works (McCarthy, 1967a: 75). In New South Wales, two years before the Harvester Case the new president of the state Arbitration Court had proclaimed in his first case:

"Every worker, however humble, shall receive enough to lead a human life, to marry and to bring up a family and maintain them and himself with at any rate some small degree of comfort. (N.S.W. Sawmill and Timberyard Employees' Association Case (1905) 4, NSM AR 309 - cited in McCarthy, 1968, 194)"

17. As an introduction to the 1902 edition of *Industrial Democracy*, the Webbs include a laudatory account of the Victorian wages boards and the New Zealand compulsory arbitration system (Webb and Webb, 1913: xxxvi-liv). The New Zealand Industrial Conciliation and Arbitration Act of 1894, though inspired by Kingston's largely unsuccessful proposal for such legislation in South Australia advanced in 1890 (see Wadham 1953, 31-46, especially 45) established the first compulsory arbitration system in the world. Its success undoubtedly motivated the adoption of this method in New South Wales, the Commonwealth, and then other States. It is interesting that the Webb's comment on the practical consequences of the New Zealand act can be applied to the Commonwealth Act as well - and in fact is quite similar to the comments by Hawke quoted above: "Although New Zealand attacked the problem from the other end, aiming practically at the prevention of strikes, this has worked out, in practice, to the Victorian solution of enforcing by law certain definite minimum conditions of employment throughout each trade" (Webb and Webb, 1913: xlii).
Finally, the genuine plight of the unorganized unskilled worker, even when wages for skilled workers were improving, had brought about acceptance of the need for a prescribed minimum wage:

"For more than a decade and a half, with but one brief respite, Australia experienced conditions of high unemployment. And for more than a decade and a half there occurred an unbroken series of 'monster demonstrations', protest meetings, well-publicized deputations to governments, rallies of the unemployed, 'revelations' at industrial arbitration hearings, exposes by the Anti-Sweating League, social welfare oriented public debates - the whole drawing attention to and eliciting sympathy for 'the unskilled labourer'. Understandably the Bulletin concluded (28 Nov. 1907): 'the public ... has had "living wage" so much dinned into its ear that it has come to regard a base "living wage" as the proper wage for a working man to get'. (McCarty, 1965: 82)"

The important contribution of the Harvester Case, then, was not the propounding of the idea of a 'living wage', but Higgins' adoption of the standard as an absolute one. It was not only to be invariant with respect to the prosperity of any particular industry, but was to be a real standard to be adhered to whatever the general economic conditions. The standard was maintained by adjustment according to movements in the cost of living index. This was a definite departure from the practice which had been adopted by Heydon in the N.S.W. Arbitration Court, who in his early judgements "seems to have taken the general rate paid for unskilled work in rather less well-paying sections of private industry" (McCarty, 1968: 195), and who subsequently raised and lowered the real living wage according to general economic conditions until his retirement in 1920 (McCarty 1968: 198-202). The formation and registration of interstate unions to take advantage of Higgins' more sympathetic attitude laid the foundation for the widening of the Commonwealth tribunal's influence.

18. Higgins began regularly adjusting the basic wage as each award was made in 1913, a year after the Commonwealth Statistician began publishing a cost-of-living index. In 1921 the practice of regularly adjusting the basic wage for changes in the cost of living every quarter was introduced, and was adhered to until 1953. It was reintroduced in a modified form in 1961, and was finally dropped in 1965, as was the basic wage itself two years later.

19. After an extensive inquiry in 1914, Heydon justified a lower standard than the Harvester wage by observing that Higgins had based it on the needs of a family of 5, while census data showed that the average Australian family had no more than two children (McCarty, 1968: 200). The same controversy entered into the 1969 National Wage Case, when the ACTU produced a letter from Professor Enkel which showed the average size of a completed family is 3.22 children; while the employers tended child endowment data which showed the average number of children per family receiving endowment is 2.2. The difference elicited lengthy questioning from Commissioners on the bench as to its significance (1969 National Wage Case Transcript, 968-971).

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We can see from this the crucial role the tribunals played in turning the ill-defined generally accepted norm of a living wage into an operational concept, as well as the contribution of the unions in this process through the transference of their allegiance to a federal tribunal which conformed more closely to their needs and aspirations. The foundation of this expression of mechanical solidarity was not egalitarianism as a value nor its expression in the norm of a living wage but the way the unions were able to use the state to recognise them as a legitimate force and to recognise their principles of action. I have tried to show from overseas examples that the Commission's principles were essentially union principles. It is therefore unnecessary to invoke Australian egalitarianism, as Lipset (1964: 199-203) does, to explain the sort of policies which the tribunals have followed. Both the irresponsible inflationary increases in wage costs decried by economists and the class-collaborative reformism denounced by Marxists are characteristic of "responsible" union leadership everywhere and not just of Australian arbitral authorities. Members of the Commission and union leaders share in complex fashion the 'management of discontent', which C. Wright Mills saw as the role of the union leader alone:

"He organises discontent and then sits on it, exploiting it in order to maintain a continuous organisation ... He makes regular what might otherwise be disruptive, both within the industrial routine and within the union he seeks to establish and maintain."

(Mills, 1948: 9)

3.4 Comparative Wage Justice and the Delineation of Job Clusters

The American authors cited all discuss the development of the wage structure in terms of union strength. In our case, though, the existence of the Arbitration tribunals adds a further factor to the consideration of the way: political, market and pure power forces interact.

The way the arbitration system through its system of registration strengthens the unions has been remarked on previously in the course of relating how unions value registration, and will not be further enlarged on here, except to note that the concurrent existence of federal and state arbitration systems means that unions have of necessity a federal aspect in their government. The need for unity of approach when instigating "interstate disputes" (if only on paper) means that most unions are federal in character, with one federal union registered with the federal Registrar, and some state branches registered with state authorities.20 The State branches in most cases

20. This dual registration leads to unions possessing complicated and tortuous legal personalities - see Rawson and Wrightson, 1969.
retain predominant responsibility for running day to day union affairs, centralising them in state offices so that there is little place for "union locals" as in America.

This means that the role of the arbitration system in making wages more uniform throughout Australia is unlikely to be due to the strengthening of trade union power through registration alone. If the only effect of the system on the wage structure were to make it easier for unions to organise, one would expect a perpetuation of geographic wage differences for the reasons which Kerr advances. Even unions with guaranteed rights to organise would be unable by themselves to bring about interstate uniformity in wages in such obviously localised industries as tramways or electricity supply, or in occupations as fragmented as professional engineering. By themselves the most unions could hope to achieve would be uniformity within each city and surrounding area; wage contours would then be confined to the area encompassed by a day's journey to work. Uniformity could only be expected in industries of an inescapable interstate character, such as interstate transport, and also perhaps large scale industry with a few large firms competing in a nation-wide product market such as vehicle construction and the oil industry. In fact, of course, the existence of the system has been associated with a substantial amount of uniformity in wages throughout Australia, though as is observed at the end of this chapter it is not possible in this study to prove that this uniformity was caused by the existence of the tribunals.

Kerr's analysis of the correspondence between power requirements and motivational strength indicates how the existence of the tribunals acts to widen geographic wage contours. Obviously, given the motivation, the existence of official tribunals regulating wages represents a powerful addition to the power available to achieve nation-wide uniformity of wage rates; a uniformity particularly difficult to achieve by direct union pressure alone in a nation as vast as Australia. But it is also true that the motivation to uniformity itself is increased greatly over the mere considerations of equity which, Kerr claims, are the only motivational forces for localised unions. In this case, the motivation lies in the need for the Federal tribunals - and the federal unions which they created - to justify their very existence. It is suggested in the next sections of this chapter that the principles of action of the Federal tribunals were and are at least partly motivated by what Ross would describe as 'political' considerations. These are aimed at ensuring the acceptance of trade unionists for the federal tribunals and thereby strengthening the arbitration system.\(^21\) This grew into the general acceptance of wide wage

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21. Nolhysen (1962: 1967: 304) suggests the strengthening of the arbitration system as a possible justification for the extension of jurisdiction of the Federal tribunals brought about by the 1961 Professional engineers case - an extension difficult to justify on the face of it merely on the grounds of settling an industrial dispute, as it might be argued that a divided and weakened profession would be less likely to cause disputes.
contours mentioned earlier. Eventually, of course, the expectation that wages will be uniform nation-wide comes to be shared by the rank and file unionist, so that, for example, Victorian electricity workers will strike if their wages get too far out of line with their counterparts in New South Wales.

In contrast to the agreement about the geographical width of wage contours, however, the tribunals have been decidedly ambivalent about the desirable amount of linking of different jobs into job clusters, partly because of the vexed problem of "flow-on" from the periodic determinations of wages in the Metal Trades award. This gives rise to two distinct questions. The first is the extent to which all occupations of the same level of skill are to be seen as part of the same wage contour. Should, for example, a carpenter's wage be increased because the wage of a metal trades fitter has risen? The second question is the vertical range of the job clusters themselves: should the salary of a professional engineer rise because the wage of a metal trades fitter has risen? Further should wage relativities themselves be stable over time? Should the fitters' wage retain the same relationship to the basic wage?

In general the tribunals have tended to answer both questions consistently. The 'Yes' answer has been dubbed by O'Dea (1969) as the "comparative wage justice" approach, and the 'No' answer as the classification-by-classification "work value" approach. But events have cut across this consistency. At least in the short-run, the tribunals have been able to alter relativities and 'unlatch' the award wages of (say) professionals and academics from those of tradesmen, or of the semi-skilled from the skilled, but not to avoid "flow-on" of the rate for traditionally equivalent classifications from one award to another. In the aftermath of the 1966-67 Metal Trades Work Value Case the Commission increased drastically the differential between tradesmen and the semi-skilled (a differential which remains today, though it may have been decreased gradually through flat rate over award payments). But in spite of insistence in the judgement that the case had been confined to the Metal Trades only, increases identical to the $7.40 granted to metal tradesmen began to appear very quickly in other awards. (see for example the employers' account of the process in the 1969 National Wage Case Transcript: 519-537 and 581-512). 24

22. In Chapter 5 we will discuss the views on the regulatory role of the tribunals which led to these two opposing viewpoints, while in Chapter 2 we have looked at the difficulties involved in formally implementing the "work value" approach.

23. In fact, the Canberra nurses went on strike when the Commission refused to do this for them.

24. It should be noted, though, that the fact that the Metal Trades award itself contains a rate for carpenters, and that this classification was awarded the same increase although no examination of its "work value" had been carried out, meant that the judgement itself contained blatant examples of "flow on".
These events confirm Kerr's analysis of the motivation of unionists towards uniformity in wages. "Equal pay for equal work" is a fundamental demand of unionism, especially a unionism struggling to establish itself. None of the authors cited deny this, their concern is rather to analyse the forces which help and hinder the unions in achieving this aim. But, as Kerr in particular observes, unions are decidedly ambivalent on the issue of differentials. Expressions of concern for the plight of the lowest paid worker sit uncomfortably with the fact that, generally, it is the skilled worker who has the greatest bargaining power. Furthermore, it is difficult to reject increases even if they create divisions among members by increasing differentials. Conversely, the same ambivalence can mean that the Commission has more latitude with vertical differentials than with horizontal ones: the Commission can bargain with the unions over differentials. An explicit recent example was the bargaining between the Commission and the A.C.T.U. during the 1969 National Wage Case on the question of raising the minimum wage by more than the total wage. The presiding judge, Moore J., addressed the following question to the A.C.T.U. advocate, Ralph Willis:

"Assume for the moment that we reject the first part of the unions' application for restoration of the basic wage but we are prepared to contemplate an increase in wages.

Suppose we contemplate doing what you do in your alternative proposal of giving $x$ to the total wage and $(x + y)$ to the minimum wage. Could we assume that the $y$ bit would not be sought to be applied to the total wage at large?

I ask because on a number of occasions both you and Mr Hawke used the word "foundational" as applying to the minimum wage; and of course that was a word used for the basic wage.

Could we assume that if we gave preferential treatment to the minimum wage, the difference of the award to the minimum wage would not be sought to be added to all wages?"

(1969 National Wage Case Transcript: 1004)

The president-elect of the A.C.T.U. came specially to the Commission the following day to deliver the following reply, which was reproduced in the judgement handed down:

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25. Moore J. has summarised this distinction by differentiating between 'vertical' and 'horizontal' wage justice.
"The Commission will appreciate our alternative application contemplates a larger increase in the minimum wage than for total wage rates which of course represents the traditional particular concern the trade union movement has felt for the lower paid sections of the community. We would therefore welcome any action taken by this Commission which could be regarded as a significant attempt to improve the lot of the people concerned by a substantial increase in the level of the minimum wage. As we say, an increase in the minimum wage of an amount above that awarded to total rates generally would, to coin a phrase, be not incompatible with our alternative application.

We would not therefore in such circumstances seek, as a movement, to use a differential increase in the minimum wage as a basis for a similar increase in all total rates.

Obviously Your Honour who asked the question and other members of the bench would appreciate that the wages policy of the ACTU which is reflected in the application before the Commission is based upon the fact that award rates of themselves do not provide full wage justice for the workers of this country. I understand Your Honour, in asking the question, would not expect that our answer to your question involves a moratorium upon the discharge of the obligation we have to seek over-award payments that together with awards fixed by this tribunal will provide a proper remuneration for our people at all levels of skill and responsibility. Having, as I think the tribunal will agree, properly made that point, I repeat: we, as a movement, would not in the circumstances I have referred to seek to use a differential increase in the minimum wage as a basis for a similar increase in all total rates."


There are two important features about this exchange: firstly, the Commission felt it necessary to seek assurances from the unions about claims in respect of award wages: implicit in the question is a doubt in the Commission that they could prevent the addition of the increase in the minimum wage to all wages if the unions set out to achieve it. Union acquiescence was necessary for the new departure they envisaged. Secondly, the A.C.T.U. felt able to
give an assurance that they would not seek "vertical" flow-on, an assurance which they almost certainly would not have been able to give with respect to "horizontal" flow-on. In other words, they could envisage flexibility in the definition of vertical job clusters but probably not in the definition of horizontal wage contours. 26

Anomalies have of course occurred. For example, since 1961 the Public Service Board has adopted a 'group by group' approach to wage fixation in the public service, involving matching groups in the Service with comparable groups outside the service. Particular job clusters - for example, clerical and administrative grades in the Third Division - move in accordance with movements in key rates outside the service - in this case, movements in the market rate for a matriculated clerk. But the unions do not necessarily agree with the Board's assessment of the relevant key rates, especially as, unlike the New Zealand Department of Labour, the Board does not make public the surveys on which it bases its comparisons of market rates. In July 1969, postal workers from levels 1 to 4 were given rises of 4½ to match rises for similar unskilled workers outside the service, while those from levels 5 to 13 were given rises of 10½ to match rises given to the Administrative and Clerical grades of the third division. In December, the Board departed from its previous practice and agreed to pay a straight over-award payment of 6.6½ to tradesmen and related workers, but refused to extend this to lower level postal workers. They in turn struck against this departure from the tradition of horizontal "flow-on" from metal trades awards, and after a confused sequence of events the Public Service Board itself lodged an appeal against a decision in its favour by the Deputy Public Service Arbitrator, 27 finally a full bench of the Commission (Kirby, C.J., Moore and Wright J.J.) was asked to sort out the mess.

The Commission saved the Board's face by not granting the 6.6½ flow-on, but satisfied the union by giving the same rise (10½) to levels 1 to 4 as had been given to levels 5 to 13, resulting in an actual increase almost identical to that demanded by the union. The union was thus able in fact to enforce its

26 This conclusion coincides with the results of a study by Jackson and Turner (1959), which showed that countries with centralised wage fixing bodies such as New Zealand exhibited much more variability in wage differentials than countries such as Great Britain with decentralised bargaining as the norm. Australia was not included in their study.

27 The reason for this given by Sir Frederick Wheeler, the P.S.B.'s chairman, was that the decision to lodge an appeal was reached at a conference between the Board and the unions when the statutory time for lodging an appeal was about to expire, and only the Board was able to lodge the necessary documents in time.
demand that horizontal equivalence be preserved, through the preservation of a vertical job cluster which neither the union nor the employer had regarded as crucial. Once again, the Commission perceived its main task as achieving a solution which would obtain the acquiescence of the union, with a secondary goal avoiding loss of face by the other parties.

The interaction of humanitarian principles acceptable and useful to unionists and the direct self-interest of the most powerful unions can be seen in the absence of wide differentials. This absence is often cited as a manifestation of egalitarianism, but, as Perlman points out, it "emanates from the humanitarian features of the basic wage, and from the desire of the tradesmen that their jobs be protected by forcing the employers to overpay, relatively speaking, the semi-skilled." (Perlman, 1954: 179). Conversely, given prolonged full employment, the greater differentials are, the better-off are skilled workers. This fits in with the failure of differentials to decline in Australia in the post-war period, unlike other countries — a fact noted and deplored by Isaac (1967: 19-25). This trend continued in the spectacular increase in differentials following the 1966-67 Metal Trades Wages Case which occurred after Isaac's book was published. The continuation, and extension, of wage differentials is not contradicted by the humanitarian concern of the bench in creating and increasing the minimum wage. The one policy tends to increase differentials and the other to decrease them, but they are not in contradiction because "just differentials" is not an aim of the Commission. Their aim is to set just wages, and any differentials which emerge are a secondary manifestation of this aim. Marshall makes a similar point in relation to the extension of social services:

"The extension of social services is not primarily a means of equalizing incomes. In some cases it may, in others it may not. The question is relatively unimportant; it belongs to a quite different department of social policy. What matters is there is a general enrichment of the concrete substance of economic life ..."

(Marshall (1950) 1963: 107)

Unless a conscious decision is made to reallocate wage income, the sharing out of increased "capacity to pay" between different groups of wage earners will generally result, in existing differentials being maintained (unless there has been a change in the composition of the work force).

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Thus, the most spectacular changes in relativities have occurred in judgments such as the 1961 Professional Engineers Case and the 1966-67 Metal Trades Work Value Case which were intended to be confined in application to isolated sectors of the work force. However, in both these cases the horizontal rigidity of job clusters discussed above counteracted the Commission's intention. The difficulties caused by horizontal job clustering have produced the inconsistent doctrines surrounding the assessment of work value, described in Chapter 2.

3.5 A Note on Comparative Wage Structures

The discussion by Ross, Dunlop and Levinson of the constraints on the achievement of union goals opens unexplored possibilities for testing in the case of Australia and New Zealand, possibilities which there is only space to mention here. We have already mentioned how the force of "coercive comparison" relied on by Ross receives additional official sanction here, but there is evidence in both the U.S.A. and in Australia that this by itself is not decisive. But it is certainly the case that both wage rates and average weekly earnings are much more uniform geographically in Australia than in the U.S.A. or Canada, when the rates in different states are compared. Take for example the following table:

<table>
<thead>
<tr>
<th>TABLE II</th>
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<tbody>
<tr>
<td>MINIMUM WAGE RATES, AUSTRALIA AND U.S.A.</td>
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<tr>
<td>COEFFICIENTS OF VARIATION (%)</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Busdrivers</th>
<th>Bricklayers</th>
<th>Builders' Labourers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia 1965-67</td>
<td>3.3</td>
<td>5.1</td>
<td>6.0 (a)</td>
</tr>
<tr>
<td>U.S.A. 1967</td>
<td>11.0</td>
<td>6.6</td>
<td>19.2 (b)</td>
</tr>
<tr>
<td></td>
<td>8.6</td>
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<td>- (c)</td>
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(a) 6 capital cities, pooled over 3 years.
(b) variation between averages for 9 regions.
(c) variation among Pacific region cities only.

United States of America. Dept. of Labor.

It is interesting that only among tradesmen does the nation-wide variability in the U.S.A. reduce to Australia's level. Labourers' wages in the same industry show a much greater local variation in America, but not in Australia.
Similarly, the wages of bus drivers show much greater variability even among the cities of the (relatively homogenous) Pacific Coast region than is found between Australian capitals. As far as actual earnings are concerned, United States figures do not separate males from females, but in Canada the average weekly male earnings in manufacturing showed a coefficient of variation of 16.1% over ten provinces in 1967, compared with a corresponding Australian figure over six states of 4.2% (Australia. Commonwealth Bureau of Census and Statistics, 1969. Canada. Dominion Bureau of Statistics, 1969). There seems, however, to be much less difference in the variation between industries.

The full implications of these few statistics cannot be adequately explored here, but they do suggest a potentially intriguing line of investigation. How much of the difference is accounted for by the higher rate of unemployment in North America? For our purposes however, the main conclusion is that, if Australian uniformity is due to the arbitration system, Levinson’s conclusion that the ability of unions to enter an industry is the crucial explanatory variable is supported — unless it can be shown that Australian tariff policies and Section 92 of the constitution somehow make Australian product markets much more uniform than those overseas. With the data at hand, it is not possible to judge conclusively which is the correct interpretation.

The structural restraints on the Commission which we have been discussing in this chapter do not of course predetermine the actions of the tribunals. There are many ways in which the tribunals can react to the demands made on them, and particularly in the short term, individual differences in approach by members of the Commission have had a substantial influence on what it did. Without considering the effect of the system’s judicial origins on the things it has done, our picture of the Commission’s activities must remain incomplete and inadequate. This is therefore the subject of the next, and final, 2 chapters.
4.1 The Arbitrators and the Judges

We turn to the workings of the Commission itself. How is it that its doctrines and principles of action came to supplement to a large extent the functions of union leaders, leaving local union leaders free to faction-fight (if they wished) or pursue other interests? This question particularly centres around the type of tribunal the Commission is: how is it that a body whose senior members are recruited from a conservative legal profession came to box, as I have alleged, to union demands, or even to serve union purposes?

At first sight, the influence of the legal system on the arbitration system, and on its functioning, is all-pervasive. The leading figures of the Commission have always been judges, recruited solely from the legal profession. With the exception of the brief period 1947 to 1952, lay Conciliation Commissioners have either had their decisions subject to appeal by a judge, or in major cases have sat on joint benches with judges, to whom they generally defer in argument as well as status. Though since 1957 Presidential Members of the Commission have not worn their judicial robes in Court, the actual method of conducting hearings has continued to be closely modelled on the law courts. In such circumstances, it could be supposed that the professional

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1. There is a practical reason for this. The constitutional limitations on the Commission's powers have always left it very susceptible to prohibitions or other rebukes from the High Court, which can be curt with the errors of non-lawyers — such as the present Flight Officers' Industrial Tribunal, Prof. Isaac (an economist).

2. Two major exceptions spring to mind. First, there is the Commissioner in charge of metal trades industries, responsible for the award which includes the rate for the fitter (a. Winter since 1964). Also prominent is C.V. Portus, a Commissioner since 1944 and now a member of the Commission longer than anyone, the author of a standard text on trade union law, whose connection with the metal industry dates back to 1922 when he was NA director responsible for publishing Higgins' A New Province for Law and Order.

3. Deviation is given to members of the bench by the customary method of address, and the practice of boxing when entering or leaving the roon. This deviation to judicial standing is demanded even by those members most sociologically oriented — see, for example, the exchange between loore J. and the ACISDA advocate, Richardson, in the 1969 National Wage Case, in which a direction was made to withdraw remarks interpreted as threatening by loore (1969 National Wage Case Transcript: 215).
socialisation of the members of the bench would determine their approach.

Until recently the Commission's concern with "correct" principles reflected an attempt to maintain that all decisions were compatible with those which had gone before, and that those which clearly were not used "incorrect" principles. R. J. Hawke's critique of the contorted reasoning which this involved (Hawke, (1956) 1967) was initially responsible for his recruitment as a research officer for the ACTU and his subsequent success in advocacy in National Wage Cases at the beginning of the 1960s. Hawke's attacks on the rigidity of this type of legalism, combined with the fierce and open dissection among members of the bench in the 1965 National Wage Case, have led to a recent abandonment of even the pretence of consistency of principle. It can also be argued that the assertion of "correct" principles was an idiosyncracy of Kelly J., and in fact out of character with the general history of the old Court, which was itself more pragmatic (see for example Comrn. Portalis's (1969) discussion of the actual rigidity of "comparative wage justice" as practised by Kelly J.'s contemporaries).

Furthermore, the High Court has always held there is a clear distinction between the functions of the Commonwealth arbitral authorities and those of a court of law. In 1918, in *Alexander's Case* (25 C.L.R. 434) the High Court held that the judges appointed for seven years to the Arbitration Court could not constitutionally exercise judicial power but that this did not affect their function as arbitrators, which was non-judicial. *Conkurn's Case* (1926) 37 C.L.R. 466 held that awards of the Arbitration Court were to be regarded as legislation and therefore under S.103 of the Constitution overruled State laws in the same field. Finally, and most dramatically, the High Court in 1956 extended the reasoning of *Alexander's Case* to conclude that under the Constitution the mixing of judicial and non-judicial functions was not permitted (in *Boilermakers' Case* 94 C.L.R. 254), thus forcing the dismemberment of the old Court into the Arbitration Commission and the Industrial Court, with separate personnel.

4. This was particularly true of Kelly J., a member of the old Commonwealth Court from 1941 and its chief judge from 1947 to his death in 1958.

5. Important full benches of the Commission still lay down principles for the guidance of Commissioners in charge of various industries, but are at pains to emphasise that these do not purport to be immutable over time (see for example, the "work value" principles laid down in the 1963 National Wage Case judgement).
These decisions — and particularly the *Foilworkers* Case — were the product of the High Court's peculiar method of interpretation of the words of the Constitution rather than any attachment to a doctrine of separation of functions. But their practical significance remains. They give added force to the declarations of "administrative" arbitrators such as Foster J. that the Commission's use of adversary procedures was inappropriate to its task, especially in major cases.

4.2 Arbitration in Australia and Overseas

More importantly, however, they underscore the difference between the meaning of arbitration in Australia and in countries where collective bargaining is the "settled" method of fixing wages. Particularly in America, but also in countries even more strongly unionised than Australia such as Sweden, arbitration is generally confined almost solely to "grievance arbitration" — that is, arbitration of disputes about the meaning or practical implementation of collective bargaining contracts themselves. (See Herman and Stone (1960) 1969 and Johnston (1952) 1969.) In legal terms, this supposed to be confined to arbitration of "rights" conferred by the collective bargain, and is to be contrasted with disputes about "interests", which are best settled by free bargaining between the parties.

In the United States, such arbitrators have usually been, at least since 1947 private appointees and not government officials, and have usually charged a fee for their services. Some of these, particularly officers of the American Arbitration Association (which was originally concerned with legal and commercial arbitration) have claimed that arbitration should be "judicial" in nature, using the same criteria and rules of evidence as do judges of the law courts — or at least as do the private quasi-judicial arbitrators of disputes over business contacts. Arbitration, they claimed, provides the "judicial" branch of industrial government, the contract the legislative branch, and the day-to-day contacts of the parties the legislative branch.

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6. See for example Foster's call in the 1959 Basic Wage Inquiry (91 CLR 630) for the adoption of procedures more akin to those used "in the political-administrative arena where national policies are determined and administrative and legislative decisions made". Foster also urged the abandonment of the litigious approach, with its "burden of proof" element, and the accompanying limitation of opinions to those the several parties chose to present to the Commission.

7. From when the Federal administration was prohibited by the Taft-Hartley Act from providing such services.
This was challenged by those who maintained that the arbitrator had a responsibility beyond contract interpretation— in particular a responsibility to ensure that the relationship of the parties continued to be an amicable one. Such a "political" approach to arbitration would be helped by the appointment of a permanent arbitrator to handle disputes in a particular industry. "Judicial" arbitration is as well served by ad hoc arbitrators appointed by the parties to handle particular cases and has become more common in recent years (see Herzog and Stone (1960) 1969: 212-214, 216-219).

The same distinction between types of arbitration has been made by Lockwood (1952). Looking primarily at the English scene, Lockwood claims "there are only two theories of arbitration and they are in conflict", and he christens them "judicial" and "political". Neither, he claims, is capable of dealing with the most serious type of industrial conflict— conflicts about the institutional framework within which the struggle for economic goods will take place. Indeed, the very acceptance of arbitration, which conferred equal status on employers' and employees' representatives, implied that employers would accept collective bargaining. Modern "institutional" conflicts concern jurisdictional issues, the "unofficial" strike, and conflicts over the "open" versus the "closed" shop, and require governmental type action either by the central trade union

8. This brief outline underscores a potentially confusing difference in terminology between this country and overseas. As we shall see, here awards or registered agreements take the place of collective bargains overseas, so that the disputes over the interpretation of awards are analogous to disputes over the interpretation of bargaining in America. By dictum of the High Court, however, the judicial interpretation of awards has since 1957 been performed by judges of the Commonwealth Industrial Court, whose judgements in such cases therefore correspond formally to the awards of private arbitrators in the United States. The courts in the United States do take action to enforce the awards of arbitrators, but in doing so are usually concerned with ensuring the arbitrator acted fairly and in accordance with his powers under the collective bargain, and not with the merits of the decision (Herzog and Stone (1960) 1969 : 226).
federation or by the central government itself. They are not susceptible to settlement by third parties.\(^9\)

Judicial arbitration is, Lockwood claims, accepted and appropriate where the rights of the parties are settled in an agreement or bargain. \(^10\)

He maintains it is also possible in conflicts about interests, which in turn depend mainly on the way a "fair wage" is defined. There are, he suggests, three possible definitions of a "fair wage". The first, suited to arbitration, centres around the maintenance of the hierarchy of relativities, combined with the granting of increases to balance rises in the cost of living. The second aims to make the wage hierarchy conform to some economic (or social) criterion of

9. The existence of the Australian arbitration system ensures at least one sort of institutional conflict - those over the recognition of trade unions - is solved in the unions' favour. Other of Lockwoods' institutional conflicts are in fact arbitrated by the Commission or the Court (for example, jurisdictional disputes).

10. A serious barrier to the "political" arbitration of grievance disputes involving workers under Australian federal awards is the fact that such disputes, say over the dismissal of a particular employee, are often confined to a particular establishment and are therefore not "interstate disputes". It follows that such disputes can only be conciliated or arbitrated by Commonwealth authorities with the consent of the parties, and that any arbitration will not be enforceable in the courts if either side refuses to accept it. The President of the Commission has urged in his Annual Reports (Eighth and Ninth Annual Report of the President of the Conciliation and Arbitration Commission) the insertion in federal awards or agreements of clauses authorising binding arbitration in such cases, but these suggestions have not been widely adopted. Woodward, a successful private arbitrator of interests on the waterfront, has suggested that as an alternative federal arbitrators be given state office (Woodward, 1970: 12).

It is significant that once again here both unions and employers are leaving it to the Commission to explore such remedies, probably because the present vacuum, at least until recently, suited both parties. Employers were able to secure injunctions and fines for strikes over such issues from the Industrial Court. Conversely, the general power of the employer to conduct his own business is such under most federal awards that almost any dismissal could be justified under the terms of the award. As well as conforming to the principle leaving the employer authority over his own affairs, this restraint is probably necessitated by the fact that federal awards cover such a multiplicity of employers that general rules would be quite difficult. However, it follows arbitration of grievances under the terms of the award would rarely favour the unions.
efficiency or rationality. The third, used by trade unions, is essentially a rationalization of "all we can get" : an expression of the assumption that shares between capital and labour are indeterminate and a matter for experiment, and that the more the workers get the "fairer" things will be. Thus by invoking the concept of the "fair wage" Lockwood is able to reduce the arbitration of rights and interests to the same sort of problem: to the preservation of a previously agreed relationship between the parties.

Lockwood sees very little place for the political arbitration of even of interests. Those who need assistance in maintaining their relationship, he maintains, are more likely to turn to conciliation than arbitration. This is certainly not the view of other analysts of the voluntary arbitration of interests, who view such arbitration as successful if it correctly assesses the relative strengths and desires of the parties so that neither will prefer open hostility next time. The obvious way to do this, of course, is to make the award correspond to the "going rate" in collective bargains. There is evidence (Lecarthy, 1968) that, in England at least, even compulsory tribunals do just that. Note that such a procedure does not necessarily coincide with Lockwood's first "fairness" criterion, as collective agreements themselves are likely to be affected by "economic rationalisation" agreements that, say, wage differentials should be widened to attract more labour, and also by the amount of union power brought to bear.

In the United States the voluntary arbitration of wages and terms of new contracts has rarely been popular. It has occasionally been found in industries in economic difficulties such as textile manufacturing, where it is useful to union leaders who feel it necessary to accept no wage increase or a wage decrease (Hersog and Stone, 1969 : 228). Something approaching compulsory arbitration is occasionally found in United States public utilities, where strikes cause hardship to the public and rates are set by public agencies. Those few Americans who advocate the compulsory arbitration of disputes involving the national interest envisage ad hoc arbitration of such disputes, arguing that grievance arbitration required under contracts involves compulsory arbitration anyway. For example, Phelps (1964) uses arguments about the restricted implementation of compulsory procedures which are reminiscent of the legislative founders of the Australian system. More typically, authors such as Northrup (1965) who warn about the dangers of government involvement through compulsory arbitration see it as a dangerous prop to union demands and an invitation to economic irresponsibility, citing Australia with its high strike-involvement-per-worker rate as a cautionary example (Northrup, 1966 : 192).
Differences between British and American analysts of arbitration and collective bargaining reflect differences between the industrial relations systems of the two countries. In America, it has been possible to view wage fixation in largely economic terms, in which the "haggling of the market" dominates the process. The main (if not the only) sanction possessed by unions is the right to strike, and their ability to bring pressure on employers is restricted by federal and state laws which hamper (or even forbid) union organization, combined with an endemically high rate of unemployment. In Britain, by contrast, the unions have achieved a significant degree of recognition as interest groups to some extent privileged to function outside the law (see Kahn-Freud, 1954) - at least until now. Principles of fairness and equity are universally accepted as applicable to wage bargaining, though there has recently been discussion about what those principles should be. However, even today it is difficult to envisage a British analyst seriously adopting the following approach as a workable method of managing industrial relations (however much he may agree with the sentiments the approach expresses).

The words are those of an American critic of government interference in industrial disputes:

"The employment relationship is, and must remain, an economic one. What is economically desirable or even necessary for the good of the business and therefore for the continued employment of the work force may be quite different from what would be personally pleasant or satisfactory to workers .... If the uneconomic is insisted upon by union strength or permitted by government intervention, the net result can well be a decline in the competitive position of the company and a loss of employment to the union members. (Northrup 1966 : 120).

It will be noticed that Northrup bases a large part of his case on the cost in unemployment of "uneconomic" actions. Similarly, a Professor at Harvard School of Business Administration has observed that the employers' power and willingness to dismiss employees engaged in "wildcat" strikes has led to the acceptance by unions and workers of grievance arbitration. Although the courts are willing to enforce arbitration awards, this is not, he claims, the key to their success. (Australian Financial Review October 1970). The protection against arbitrary managerial action which an arbitration clause in a contract

11. This means that union strength varies greatly with type of industry, locality and product market, a matter discussed at length in chapter 3.
provides is sufficiently valuable to American unions for them to surrender part of their freedom of action. By contrast in Britain (and Australia) the unions have not felt it necessary, or perhaps possible, to discipline their members in the way voluntary "judicial" arbitration between union and management requires. Nor, in the full employment climate prevailing since the war, have employers been able to force them to do so, though in Australia the penal sanctions of the Arbitration Act acted as a substitute for such agreements. It should not be concluded, however, that judicial arbitration is a sign of weak unionism: it is successful in Sweden where unions are stronger than in Australia.

4.3 Administrative and Antagonistic Arbitration

The Australian definition of arbitration as a non-judicial process has led to considerable difficulty. In spite of Foster J.'s claim that the arbitral procedure is essentially an administrative-legislative one, it retains features which make it distinct from the elected legislatures or the executive branch. Like the courts in their interpretations of constitutional law, federal arbitral tribunals cannot be subjected to legislative direction by parliament as to the form their awards should take. Since the awards of the Commonwealth tribunal displace those of state tribunals if they cover the same field, (Corbun's Case (1926) 37 CLR 466) it follows that this is an area of "legislation" unrestrained by democratic direction (see Hancock, (1930) 1961: 95-96 for a trenchant summary of the situation). Nor fundamentally is it restrained by the application of legal principle, since legal procedure in Australia relies on the interpretation of "the law" which is to be found either in the statutes or in the implementation of precedents set down in the reasons for decisions in past judgments.

In the Commonwealth Commission either there has been no statutory direction or, it has been unconstitutional or ignored where it has been attempted. As noted above, attempts by the chief judge of the old Court, Kelly J., to tie the tribunals to a rigid set of wage fixing principles analogous to the "court-created" common law have since been repudiated. Also it is possible to show that some of the Kelly J.'s major judgements - particularly the Metal Trades Awarding Case judgement of 1954 (60 CLR 3), contradict his own criteria (O'Dea, 1969: 101).

12. For example, the Bruce-Page government legislated in 1928 to direct that the Arbitration Court should take the economic conditions of industry into account in setting all wages except the basic wage. In 1930 the Scullin government removed this clause, but a few months later the Court reduced the real value of all wages by 10%, including the basic wage which even a conservative parliament had directed should be sacrosanct. Similar refusals to accept legislative direction have occurred where the legislature did theoretically have power to direct the tribunal - for an early New Zealand example see Woods, 1962: 70, concerning a dispute between Arbitration Court and parliament about coal miners' conditions from 1902 to 1907.

13. In this case, the bench gave an award which drastically increased the margin between skilled and unskilled tradesmen, in contrast to the pattern of
How then are we to classify the sorts of decisions made? In perhaps the most perceptive book ever written on the Australian Arbitration system, *Judges in Industry*, Mark Perlman (1954) suggests two distinct streams in the Commission's (or Court's, as it then was) approach to its task. Both derive from theories of industrial relations developed overseas by "administration minded" and "institution minded" theorists:

"The former most frequently think in terms of social justice and social efficiency; they have sought to give to industrial societies bills of human rights and to provide judicial protection for these rights. Frequently these "planners" have talked in terms of legislative enactment by the normal legislative bodies to bring to industry the benefits of parliamentary democracy. This order which they aim at establishing is a system of due process administered impartially by a disinterested party ....

The second group of theorists, the "institution minded", base their systems on the assumption that concerned parties, through trial and error, must slowly evolve their own patterns of bipartite mutual trust or balance of forces if peaceful industrial government is to develop. The role of the "outsider" in the latter case is limited to that of an advisor to either or both of the major parties or institutions." (Perlman, 1954: 1).

It will be seen that these two approaches to industrial relations are reflected in the two methods of voluntary arbitration discussed above. It is the "administration minded" who will tend to favour "political" arbitration consciously aimed at improving relationships between the parties, while the "institution minded" will adhere to the bounds of possible settlement voluntarily agreed to by the two parties and arbitrate "judicially".

Perlman claims that in Australia these two approaches coincide with two opposing views on the desirability of governmental participation in social affairs found in Australia:

13. (continued)

over-award payments at the time. Kelly's famous dictum that the Court should be "the interpreter not the censor of the social conscience" puzzles those now on the bench, who see him as perceiving the "social conscience" in the law itself and nowhere else.
"One, often called "socialistic" in Australia, where political cliches reflect the dreams of a civilisation of self-confessed working people, emphasises centrally controlled administrative development. According to this view, the "third party" or public authority is considered to be the administrative guardian of the public economy and dispenses just and efficient economic shares.

The other view envisages a society where the developmental shares are left primarily in the hands of the two major interested parties, the employer and the organised employed. The function of the public authority in this instance is associated more with matters of limited judicial procedure than with quasi-legislative economic planning. Though this second view is frequently characterised as having only a judicial emphasis, the essence of it is not the mere formality of its trappings, but its fundamental nineteenth-century liberalism, rewritten in terms of twentieth-century collective action."

(Perlman, 1954 : 30).

Perlman argues that the first of these views is expressed in the philosophy of "administrative" arbitrators, the most important of whom were Higgins and Foster. Their concern, he argues, has been to provide the guidance to industry by legislative enactment which "administration minded" theorists from the Webbs onwards have thought necessary, and which constitutional restrictions prevent the Commonwealth parliament itself from providing. To them he contrasts "autonomous arbitrators", such as O'Hara and Kelly, who worked within the institutional order as given. They harnessed the self-interest of the parties rather than taking the initiative for reform themselves.

At this point, however, the analogy which Perlman draws between "institution minded" theories of industrial relations and the approach of those who Perlman calls "autonomous" arbitrators is weak. As has been noted, arbitration of differences between autonomous institutions has been seen overseas as requiring a "judicial" approach, treating the prior collective agreement of the parties as legislation which is to be interpreted strictly on its own terms.

But how can this judicial approach be applied in a jurisdiction where there is no prior agreement? Perlman does raise the question of whether there really can be judicial settlement of basic labour disputes, but relates the problem to practical issues, principally the dilemma of choosing whether to end a dispute quickly but inconsistently with other decisions. Lack of power to enforce decisions means that the alternative expeditious administrative approach is compromised. Hence, he claims,
"This supports our assumption that, if the system has worked it has been largely because the parties have needed it or because the wise judges have not overdone their desire to legislate when a specific industry has resented it."

(Perlman 1954: 45).

This, in fact, amounts to an assertion, enlarged on in the course of his book, that the Court had only been "successful", apparently in the sense of achieving acquiescence from both sides, to the extent that it administered as much as the parties wanted. It ignores the problem of determining how to apply the "judicial" approach when the parties do in fact want their conflicts of interest arbitrated but cannot agree on the criteria - profits, needs, capacity to pay - which are to be applied.

The solution offered by Lockwood - that certain principles of justice are inherent in community attitudes, and that these tend to manifest themselves whenever arbitrators deal with this sort of question - is the one which has been adopted by the Commission. The three factors he mentions (a) a "living" wage as a minimum standard of living, (b) the principle of a "fair" wage and (c) a standard of industrial efficiency which sets limits to distribution (the ability of industry to pay) have all been used by Australian tribunals, as have his three criteria for determining a "fair wage". But it will be seen that Lockwood's criteria have in fact been used even more by Australian "administrative" arbitrators - especially Higgins - than "autonomous" arbitrators. In fact, the latter are characteristically portrayed by Perlman as adjusting their decisions to the strengths of the parties, which is a feature of political, not judicial, arbitration.

Apart from this apparent contradiction between the criteria used for arbitration and the different approaches to arbitration the distinction between the approaches themselves can be questioned. Perlman accepts at face value statements made by Kelly to the effect that the function of the Court was not to bring about social change, but to settle disputes according to "the recognised rules of human life and fair dealing":

"...... As I conceive them, there is in the function of an Industrial Court no room for experiments such as may originate in the realm of politics or in the fertile field of sociological ideals. The Court is constituted to remedy injustice. The injustice must be proved in terms of facts and of the recognised rules of human life and fair dealing. These will, of course, vary as civilisation progresses; but until they are accepted by the community as part of the regulative code for its transactions, they must be treated by the Court as not having emerged from the regions of social idealism. The Court has no right to assume the role of reformer. Having discovered an injustice, however, it is bound to devise a remedy."
But the remedy should be sufficient for its purpose and nothing more, for further interference by the Court is unwarranted and, in my view, beyond the limit of its jurisdiction."


In sum, the Court regarded itself, according to Kelly J. as "the interpreter and not the censor of the social conscience". (Merchant Service Guild Case (1942) 48 C.A.R. 577 at 587). Kelly C.J. accepted the institutional groups as he found them:

"Mr Justice Kelly's view is not dissimilar to that of James Madison in the tenth Federalist Paper that government had to function in an environment of pressure group formations and that it must leave to these pressure groups the initiative for making changes. Kelly C.J. accepts these institutional groups as he finds them with the single exception that he has interfered on the behalf of a minority fraction when he felt that it had had no chance to present its case to the membership. Specifically, interfering to aid a gagged moderate fraction in a Communist-demoniated union is in one sense a departure from a strict "autonomous" position. But his reasons for so doing were undoubtedly associated with a conviction that revolutionary unionism is sui generis and the ordinary rules do not apply - particularly in a period of Communist-fomented strikes." (Perlman, 1954 : 38).

It is important to note, however, that the period in which Perlman observed the operation of the Court was (until December 1949) one in which a Labor government held Federal office. In these circumstances, intervention by the Court was likely to be in sympathy with the prevailing political climate, and, particularly in the 40 Hours Case, was. However, over the next six years Kelly was Chief Judge of a Court given the power in 1951 to impose severe penalties against unions breaching awards - the famous penal powers.

Kelly's comments on these in his annual report as Chief Judge in 1952 are most revealing:
"No human law or charter can itself create, nor can it induce, the spiritual quality of goodwill in a community. Its purpose is fulfilled if, by curbing the excesses of self-interest and the abuses of power, it brings about an environment in which the community virtues may flourish. In order is the foundation of peace among the people, so is observance of the law, insofar as it provides a method for the just settlement of controversies, a condition precedent of happiness. No human polity can, however, ensure that individuals or groups within it will, whilst pursuing and protecting their rights, recognise their obligations in the service of the common end. The promotion of goodwill in industry and the encouragement of the continued and amicable operation of orders and awards made in settlement of industrial disputes are complimentary. The authorities constituted under the Act can promote goodwill only by acting so as to encourage the observance of their decisions. To this end, their actions must be informed with wisdom and fairness; and they must be reached with an expedition consistent with a proper investigation of the issues involved and with a faithful regard not only to the interests of the contesting parties but also to those of the public weal. The task is instant; the responsibility constant. When the task and the responsibility are shared by many, the need for a co-ordination of efforts is of primary significance. For the acceptance of determinations of similar and related issues will ultimately depend upon their consistency. Inconsistency and apparent discrimination in the laws tend to discourage willing obedience. When provision has been made for ensuring in matters of importance a substantial measure of comparative justice in the field of industrial award-making, none will deny that it is appropriate that the Parliament which has set up with such a safeguard the machinery of arbitration should also provide that the resulting awards be enforceable in all respects against those who would, whether directly or indirectly, repudiate or seek to evade the obligations which they impose, and against those who may, by act or omission, encourage repudiation or evasion."

(Commonwealth Court of Conciliation and Arbitration. Chief Judge. 1952: 15).

The approach is judicial, but it is hardly autonomous. It can, I think, be reasonably concluded that Perlman wrongly assumed that the judicial kind of
arbitration which, in the U.S., respected the autonomy of the parties would also be "autonomous" in a system where the Arbitration is compulsory.

The most telling evidence of Kelly's non-autonomous approach is the substantial rejection by the Commission of Kelly's approach since his death. In the first place, the way in which the old Conciliation and Arbitration Court was split between the Conciliation and Arbitration Commission and the Commonwealth Industrial Court was inspired by a desire to get rid of Kelly's influence as well as the necessity to split it brought about by the High Court's decision in Boilermakers' Case. Kelly's practice of refusing to certify agreements which were felt to be contrary to the public interest has been abandoned as contradicting the aim of conciliation, even if the agreements have contravened the principles which the Commission upholds in its arbitral awards. Perhaps most significant has been the almost explicit rejection of the principles of fixation for margins set down by Kelly in the Merchant Service Guild Case (1942) C.A.R. and the Printing Industry (Commercial) Case (1947) C.A.R., contained in the following much-quoted passage from the Metal Trades Margins Case (1963) 102 C.A.R. 140:

14. As may be seen from the fact that the government introduced the new Conciliation and Arbitration Act before the Privy Council had heard its appeal from the High Court's decision.

15. The Oil Industry was governed by such consent awards from 1956, when the Commission rejected contentions by the Metal Trades Employers Association and others that to make the agreement into an award would cause problems in other industries (91 C.R 212). The Commission's willingness in the Oil Industry Case (1970) to arbitrate when negotiations for renewal of the agreement broke down was a further significant example of "autonomous" arbitration, but by a bench which included several judges who see themselves as fundamentally departing from the Kelly mold.
"We would not ourselves have said some of the things that were said in the past about the fixation of margins nor would we have done some of the things which were done. In particular we think that any attempt to provide a detailed code of principles of marginal fixation is not helpful. However convenient it may seem to attempt to lay down for all time precise rules or formulae for the fixation of margins, the assessment of particular margins at particular times must be an act of judgment by the person or persons making the assessment in the light of current knowledge and practice both of which are themselves susceptible of change. Current knowledge includes of course knowledge of what has happened in the past and of the reasons which have been given for past decisions." (102 C.A.R. at p.140)."16

This rejection was in particular aimed at the monolithic system of relative wages which, at least in his later years, Kelly tried to set up:

"The assessment of each margin should be made in relation to each other margin, so that the margin awarded to each man should bear, as far as possible, its proper monetary comparison with that of every other man awarded a margin, having in mind the various matters which in each case should be weighed in assessing the margin. Metallurgists' marginal Case (1954) 80 C.A.R. 3 at 24."

The reason for this rejection has been the inflexibility which such an approach involves; if followed through to its logical conclusion it would involve the Commission in the attempt to prevent any change whatsoever, allowing no play for changes in the relative importance of various occupations.

It might be argued, of course, that Perlman's analysis was not incorrect, but that he misclassified Kelly. That is, Kelly was himself an "administrative" arbitrator, but one with different sympathies from those of Higgins and Kelly's contemporary, Foster. (In contrast to the above quotation, for example, Foster regarded the penal clauses as "objectionable and unnecessary" – Eriksen, 1960 : 516). The reason that his approach has been dropped, it might be argued,

16. These developments have dated several accounts of the Australian Arbitration system, particularly those of Roonander (who was in fact quoted by Kelly in the 1947 Case) and Simms (1963). Both of these authors used Kelly's dicta as the basis for their perceptions of the system of job hierarchies. It is a tribute to Perlman's work that it remains timely, the main reason obviously being his use of concepts from outside the system.
is that it was in fact an administrative approach to arbitration as well. However, it did not appear to be so to Perlman because he observed the Court at the close of a period when Kelly's drive to administer unruly unions was overshadowed by the Commonwealth Labour government and the relative lack of authority of the Court itself due to the 1947 Act. These circumstances reinforced Perlman's initial inclination from American experience to view "judicial" arbitration as "autonomous".

To a certain extent such an argument would be justified. There is no doubt that the Commission has since 1956 abandoned both the idealistic interventionism of Foster and the legalistic interventionism of Kelly. But to claim that this has been a reversion to purely "autonomous" arbitration would be to distort considerably the type of process Perlman had in mind, and would certainly be denied by several of the arbitrators themselves. Especially during the 1960s, many of the most contentious of the decisions made were at least initiated by the Commission without either of the parties suggesting them. These include the introduction of the minimum wage, the hearing on equal pay for women, the initiation of work value inquiries and particularly of the Metal Trades work value inquiry of 1965-67, and the attempt following that inquiry to have over-award payments absorbed in the increases granted. It is only for the first ten years or so after 1956 that the Commission more or less avoided initiatives of its own accord, but even then after three years the Commission chose (particularly in the 1959 Metal Trades Margins Case, the 1961 Professional Engineers Case and the 1961 Basic Wage Inquiry) to adopt union submissions in large part or at least reach decisions which the unions accepted though neither employers nor government did. The dissension between members of the bench shown from 1964 to 1967 was itself to some extent an outcome of this "activist" trend in the Commission, and might have been avoided had a more quiescent path been followed.

All this points to the conclusion that Perlman's attempt to pattern contrasting styles of arbitration around certain individuals must be rejected as inadequate. He was perhaps on firmer ground when he claimed that the style of arbitration depended largely on its acceptability to the industry in question, but his evidence can also be used in support of the proposition that the Court was successful when it conformed with union demands as to the role it should play. This is in fact the theme of this thesis - that the Arbitration tribunals mediate between the unions and other interest groups in such a way that if they are to be successful they must to a certain extent adopt a "trade union consciousness" themselves. To see the factors which contribute to this state of affairs it was necessary to examine more closely the sort of roles trade unions themselves perform, as was done in earlier chapters. But we are still faced with the question: if the Commission is not a court of law, if it does not behave like a legislature, and if its actions cannot be classified by the criteria used to describe arbitrators abroad, what is it?
CHAPTER 5

THE ARBITRATOR AS JUDICIOUS REGULATOR

5.1 Gesellschaft Law and Gemeinschaft Regulation

In his recent book *Equality and Authority*, Encel remarks on the unexplored similarities between Australia and other countries where bureaucratic state intervention has been dominant:

"Australia gives an example of the effect of politics on society, a phenomenon which was counter to the assumptions alike of liberal individualism and Marxism, but which is more common than these dominant philosophies would have us suppose. The history of France, with its deliberate creation of new elites after the Revolution, and of Russia, with its recurrent cycles of attempts to remake society by state action, have more relevance for Australia than might appear on the surface. (Encel, 1970: 104-5).

Encel goes on to draw a parallel between the substitution of the impartiality of officialdom for the impartiality of a leisured class (noted by the N.S.W. labor leader up to the conscription split, Holman) and Trotsky's warnings about the danger of "substitutism" through government action because of the weakness of the Russian middle classes.

With this in mind it is suggestive to look at a recent comparative analysis of legal systems made by Tay (1969, 1970). In the course of this analysis, Tay presents a typology of "ideal types" of social regulation. Apart from "domination-submission" (the "proto-legality" of a gangster or a Stalin), Tay distinguishes three other ideal types of social regulation: the Gemeinschaft-type, the Gesellschaft-type, and what she calls the "bureaucratic-administrative" type.

The distinction between the first two originates with Weber's analysis of the contrast between the "estate" type of patrimonial princely justice found in medieval Europe, and the "patrimonial" type of patrimonial princely justice found in the Orient. The former eventually developed into the adjudication of disputes about "rights" which is the hallmark of capitalist law, but in the latter justice is "parental" rather than "adjudicative", "oriented towards situations rather than individual rights, toward settlement of disputes rather than definition of claims". In terms of the distinction made famous by Tönnies, it is the law of a Gemeinschaft and not of a Gesellschaft: it is based on the primacy of individual social relationships and not on the primacy of the right-and-duty-bearing individual, on social ties rather than contractual obligations" (Tay, 1969: 156).
"The contrast between familiar and rational-legal ways of settling disputes and defining claims, of which both Weber and Tönnies were extremely conscious, has become more evident and socially relevant even within Western society as the internal structure of corporations, industries, universities, etc. engages our attention as much as the external relations between them. Within these institutions, the internal social ties are often seen as more important than the strict definition of legal rights: in practice, e.g. "industrial law" becomes "industrial relations" rather than formal-legal adjudication. As I write this article, the Mayor of New York is frankly spending a great deal of his time trying to prevent a number of important matters - illegal strikes, parity between unions, charges of intimidation by Negro militants in a New York school - from coming up for legal determination because this would inevitably polarise the issues and the contending parties and lead to a breakdown in social relations ..... (Tay, 1969 : 156-7n)."

This distinction is important in two ways. First, it suggests a basis for the type of "justice" which the compulsory arbitration of interests involves.1 Observe, for example, the parallels between Weber's description of "rigorously patriarchal princely justice" and the procedures of the Commonwealth Conciliation and Arbitration Commission:

"..... the rigorously patriarchal princely justice negates the formal guarantee of rights and the principle of strict adversary procedure in favor of the attempt to settle an interest conflict objectively "right" and equitably.

Although the patriarchal system of justice can well be rational in the sense of adherence to fixed principles, it is not so in the sense of a logical rationality of its modes of thought but rather in the sense of the pursuit of substantive principles of social justice of political, welfare-utilitarian, or ethical content. Again law and administration are identical, but not in the sense that all administration would assume the form of adjudication but rather in the reverse sense that all adjudication takes the

1. It also suggests why it is that the arbitration tribunals have kept the form of courts rather than legislatures even in those jurisdictions (the Australian states and New Zealand) where it would have been constitutionally possible for them to become subordinate legislatures like the wages boards of Victoria and Tasmania.
character of administration. The prince's administrative officials are at the same time judges, and the prince himself, intervening at will into the administration of justice in the form of "cabinet justice", decides according to his free discretion in the light of considerations of equity, expediency, or politics. He treats the grant of legal remedies to a large extent as a free gift of grace or a privilege to be accorded from case to case, determines its conditions and forms, and eliminates the irrational forms and means of proof in favor of a free official search for the truth. The ideal example of this type of rational administration of justice is the "Khadi-justice" of the "Solomonian" judgment, as it was practiced by the legendary hero as well as by Sancho Panza when he happened to be governor. (Weber (1918) 1954 : 264)."

It also is significant in view of the observations made in Chapter 3 concerning the parallel between union aspirations and the consequences of the existence of the Arbitration system. The union drive towards a "fair" wage structure is at base an assertion of Gemeinschaft values in the world of the industrial Gesellschaft. As the institutions of a market economy cannot themselves offer alternative "familial" norms for uniform regulation of employment conditions (such uniformity of behaviour being in contradiction to the liberty of the market), tribunals seeking a basis for "just" wage decisions have been forced to seek them in the demands of the unions themselves.

The Arbitration tribunals were established at the time of reaction from the triumph of Gesellschaft-type law illustrated by the crushing of the strikes of the 1890s, with the massive accompanying use of the Masters and Servants' Acts (which made criminal any incitement to violation of contracts of employment) reinforcing the employers' demands for freedom of contract. It was clear to all that (in the words of an early Soviet jurist) "the Republic of the Market concealed the Despotism of the Factory" (Tay, 1970). There was probably no conscious intention to break altogether with the principles of the "rule of law" as traditionally understood, and certainly arbitral tribunals were, and are, subject to challenge in the ordinary courts if they exceed their powers. But with this proviso, the principles of action of the ordinary law courts were felt to be inappropriate to an Arbitration court. Lawyers were discouraged from appearing before the early Commonwealth Court other
than with the consent of both parties while in the New Zealand Arbitration Court they still rarely appear in such cases, as both parties rarely consent (Syddall, 1960: 142). The reason for this perceived inappropriateness of the process of the ordinary law-courts is, I think, summarised by Tay when she remarks that Gesellschaft-law "has difficulty dealing with the State or State instrumentalities, with corporations, social interests and the administrative requirements of social planning or a process of production unless it reduces them to the interests of a party confronting another party on the basis of formal equivalence and legal interchange-ability (Tay, 1970):

Therefore it was implicitly a "Gemeinschaft"-type legal system, it is submitted, which Higgins had in mind when he envisaged "a New Province of Law and Order" replacing industrial warfare. In particular, it was obvious that "formal equivalence" between the parties was an unworkable distortion of the relationship between employer and union, let alone the relationship between employer and employee. Because Higgins saw the employers as the modern "barons" whose power was to be lessened by imposition of the King's justice, he necessarily turned to the promotion of unionism and the acceptance of the legitimacy of its aspirations as the basis of his new system.

2. A provision restricting the right of counsel to appear is still included in the Act (Section 63), but has fallen into disuse, especially as in cases in which the Commonwealth intervenes the right to be represented is almost automatic. This has given rise to complaints by unions about the domination of the Commission by legal manoeuvres, though often these complaints are theoretical in intent as well as substance. For example the following account was related to me with glee by an executive of an employers' association. At the annual convention of the AMU in 1970 the federal President, Mr Jim Dougherty, attacked the extent to which lawyers dominated and delayed the Arbitration Commission. At that time an application by the AMU for a change in the hours of work in the pastoral industry from 44 to 40 hours was listed for hearing. When the President of the Commission heard of Dougherty's attack he offered to have a full bench convened within a week or two to begin hearing the case. The AMU, however, requested that the commencement of the hearing be postponed, as they needed time to brief Counsel. Not that it did much good, as the AMU lost the case (although the Commission observed that conditions in the industry were "feudal"). Having observed the unions' briefed Counsel in action, I might add, I was not surprised.

3. The responsive cord he struck in unionists by his actions may be observed even today, when militant officials from the AMU specifically exhort him from the general rule that concessions have only been obtained from the Arbitration tribunals by pressure. He is revered as a dispenser of Princely Justice.
5.2 The Bureaucratic – Managerial Challenge

However, Higgins’ successors on the bench of the old Court came to try to abandon to a considerable extent his assumption of the prima facie acceptability of reasonable union demands, and to consider instead as primary the effect of their decisions on the economy and the smooth running of industry. The prevention of disputes by avoiding unsettling precedents and by crushing strikes through penalties came to predominate in importance over their settlement by an activist improvement of industrial conditions. Hence the tribunals came to concentrate on Tofts’ third ideal-type of social regulation, "bureaucratic-administrative" (which, to avoid confusion with Perlman’s 'administrative' arbitration, we will rename "managerial" regulation).

"In the bureaucratic-administrative type of regulation, the presupposition and concern is neither an organic human community (as for Gemeinschaft-type law) nor an atomic individual (as for Gesellschaft-type law); the presupposition and concern is a non-human ruling interest, public policy or on-going activity, of which human beings and individuals are subordinates, functionaries or carriers. The (Gesellschaft-) law concerning railways is oriented toward the rights of people whose activities may infringe the rights of the owners or operators of railways seen as individuals exercising individual rights. (Bureaucratic-administrative) regulations concerning railways take for their primary object the efficient running of railways or the efficient execution of tasks and attainment of goals and norms set by the authorities and taken as given. Individuals as individuals are the object of some of these regulations but not their subject; they are relevant not as individuals having rights and duties as individuals, but as part of the railway-running process and its organisation, as people having duties and responsibilities. Such people are seen as carrying out roles, as not standing in a horizontal relation of equivalence to the railway organisation or to all their fellow-workers, but as standing in defined "vertical" relations of subordination and sub-subordination.

Bureaucratic-administrative regulation, thus, is quite distinct from both Gemeinschaft and Gesellschaft law, but it does not stand in quite the sharp uncompromising opposition to them that they do to each other; pursuing different aims, it nevertheless finds points of contact and affinity with each of the other forms. The bureaucratic-administrative emphasis on an interest to which individuals are subordinate, on the
requirements of a total concern or activity, brings it to the same critical rejection of Gesellschaft individualism as that which is characteristic of the Gemeinschaft; it gives a similar interest in maintaining harmonious functioning, in allowing scope for ad hoc judgment and flexibility, in assessing a total situation and the total effects of its judgment in that situation. This is why the growth of corporations has produced Gemeinschaft-like features in the internal direction of the corporation, even while the corporation maintains Gesellschaft relations with its external counterparts.

At the same time, bureaucratic-administrative regulation is a phenomenon of large-scale, non-face-to-face administration, in which authority has to be delegated. As the scale grows, bureaucratic rationality - regularity and predictability, the precise definition of duties and responsibilities, the avoidance of areas of conflict and uncertainty - becomes increasingly important. This requirement of bureaucratic rationality in the bureaucratic-administrative system stands in tension with Gemeinschaft attitudes, unless they are strictly limited in scope. It finds a certain common ground with the distinguishing features of Gesellschaft law in the emphasis on the universality of rules and the precise definition of terms, in the important role ascribed to the concepts of intra and ultra vires, in the rejection of arbitrariness and of the excessive use of ad hoc decisions to the point where they threaten this rationality. (Tay, 1970).

This framework provides a much more adequate typology for analysing the judgements of the Arbitration Commission than do frameworks (such as Perlman's) derived from a context where it is a matter of choice for the employer whether he submits to arbitration or not. The power of the Commission

4. In Australia, it is still to some extent a matter of choice for the union whether it trusts in arbitration or relies on direct action. It is also (at least initially) a matter of choice for the union whether to register as an "organisation" for the purposes of the arbitration tribunals and in which jurisdiction. Finally, Federal awards arising from claims by employers against a union can only bind the members of that union; so that non-unionists can then be entitled to high wages if the relevant State determination specifies them. (Portus, (1963) 1966 : 324-329).
to "legislate" in opposition to the desires of both parties makes such a framework *prima facie* inadequate, and the contradictions related above show it to be inadequate in practice.

In sum, many of the conflicts in wage fixation principles which have been evident over the years in the Commission have been basically conflicts between "Gemeinschaft"-type social regulation and "managerial" regulation. These two methods can both be distinguished from *Gesellschaft*-type law as practiced in the ordinary law-courts. However, the requirement of bureaucratic rationality "finds a certain common ground with the distinguishing features of the *Gesellschaft*-law" while standing in tension with Gemeinschaft attitudes. For this reason arbitrators who emphasise this approach, such as Kelly, tend to see themselves and to be seen by others as "lawyers' lawyers" who over-emphasise the formal, structural rigidity of the system of established principles. Thus Kelly's claim that the old Court was "the interpreter not the censor of the social conscience" is puzzling to those who worked closely with him, who would claim that he was "the interpreter, not of the social conscience, but of what the law had decided the social conscience should be". Where the statutes were silent, this law was often made by the dicta of Arbitration judges, including Kelly himself. But it was the "given norms or goals" (given in this case by Kelly's perception of the social conscience) which were paramount, so if necessary the dicta could be overridden. Decisions such as the abolition of quarterly cost-of-living adjustments to the basic wage in 1953, and the reversion in the following year in the 1954 *Metal trades bargain Case* (60 CAR 3) to the relative wage structure of 1937, opposed as the first was to one of the "recognised rules" of Australian wage regulation, and contrary as the second was to the current market rates which Kelly had previously (in the 1942 *Merchant Service Case*, 48 CAR 577 at 585-6, and in the 1947 *Printing Industry (Commercial) Case* 50 CAR 278 at 283-8) stated to be the main criterion for the determination of margins, can only be understood as an attempt to regulate industry in the interests of "higher goals". These included economic stability, the avoidance of inflation and the restoration and securing of the "proper" place of every worker in the hierarchy of relative wages. These higher goals and not any particular dicta, constituted the "social conscience" which the Court was to interpret. Their origin lay not in the attitudes of either of the parties, but in a corporate "social conscience" transcending in both. They could therefore be used to justify, as in the 1954 *Metal trades bargain Case*, an ad hoc flexibility in the interpretation of dicta reminiscent of the interface between "Gemeinschaft-type" and "bureaucratic-administrative" regulation touched on by Far. But in general the two approaches are in opposition.
The distinction between Gesellschaft law and "bureaucratic-administrative" regulation lies at the heart of the separation of functions demanded by the High Court between the Arbitration Commission and the Industrial Court. For example, a section of the Act (s.140) which confers certain powers on the Court to regulate the rules of a registered union had to be changed to remove "complete discretion based wholly on industrial or economic considerations" (100 CLR 277 at 289) which it formerly tried to give to this judicial body. (The amendments purport to set out the grounds on which, for example, a rule could be held to be "oppressive, unreasonable or unjust", rather than leaving the decision purely to the discretion of the judges; how much these grounds will in fact change the working of the clause is another matter, of course. (Hills and Sorrell, 1968: 411-418). But decisions whether the rules "impose upon applicants for membership, or members of the organisation, conditions, obligations or restrictions which, having regard to the objects of this Act and the purposes of the registration of organisations under this Act, are oppressive, unreasonable or unjust" (S.140(1)(c)) often require a choice as to whether the rights of members to democratic participation - that is, individual rights - or the right of the union to manage its affairs efficiently - that is, bureaucratic-administrative requirements - are to be given most weight. These questions often centre around the rules for elections, and on how much the need for the executive of an organisation for continuous and effective control of its affairs should be allowed to prevail over the rights of members to participation in its government. Some of the most important cases concerning this clause have concerned the ANU, a union which is cited byPerlman as one of the main supporters of "administrative" arbitration. The Court has quashed a rule which allowed the executive council of that union to dismiss the elected executive of a regional branch if in the council's opinion such a course was in the best interests of the union and its good government. (Knight V. ANU 7 FLR 148 at 152). On the other hand the judges accepted a rule which requires candidates for office to have been members of the union for five years and financial members for three years. The passive interpretation of union democracy favoured by the Court is well illustrated by the following remark by Kerr J, from the latter case:

"The essence of democracy in institutions such as trade unions is rather to be found in the right to participate in the selection and control of leaders than in the existence of widespread aspiration for office.

(Watson v. ANU (1967) 10 FLR 347 at 363). Hills and Sorrell summarise the situation as follows:

..... the final test of whether the rules are oppressive, unjust or unreasonable, lies in the answer to the question whether the members have ultimate control over the union, its executive, its policy and its administration. The members cannot have day-to-day control, and the test will in the long run emerge as a subjective judgment on the appropriate compromise between the rights of the members, and the rights of the executive, to control. (Hills and Sorrell, 1968: 418).

It will be noted that this whole approach involves balancing the *Gesellschaft* rights of individual members of the union against the bureaucratic-administrative requirements of the leadership. There is no place for the rights of the collective union membership as a "community" to control the union - for the rights of the working class *Gemeinschaft*. Whether or not such a community exists in the days of the affluent worker, it is certainly believed in by some union leaders, who oppose the interference involved in "court-controlled" ballots even when they win them. At a less mystical level, the shadow ALP Labour Minister, Clyde Cameron, has himself been a party to some of the challenges to the AWU leadership mentioned above, some of which were only partly successful. This has led him to advocate more extensive judicial guarantees of membership rights:

"As already indicated, membership participation and responsibility will become the cornerstone for the success of any plan for a negotiated settlement of industrial disputes. For this reason, I feel that consideration should be given to writing a Bill of Membership Rights into the Conciliation and Arbitration Act. The United States of America has already done this, and Canada is now considering the matter. The Industrial Court would then have to ensure that union officials and union policy remained under the effective control of the membership. (Hansard 30 Sept 1970: 1926.)

But the policies of the Industrial Court are to some extent a side issue, it being a field where the "communal" rights of unionists receive little recognition. It is in the arbitration of interests of unions and employers, in which the collective self-interest of the union's members can be assumed, that the "rights of the *Gemeinschaft*" have come closest to recognition, and so it is to this we now turn."
By its very nature, the Gemeinschaft-type of regulation is harder to identify than the other two, as it involves neither the clearly detailed listing of rights on which Gesellschaft law depends, nor the clear definition of goals involved in bureaucratic management. In fact, it is perfectly possible to assert that no such strain exists: that the occasional Gemeinschaft-like aspects of some decisions - aspects such as the vigorous attempt to ensure "comparative wage justice" by having all over-award payments absorbed in 1968, or the revived concern for the under privileged worker shown by the introduction of the minimum wage in the face of uninterest from both unions and employers - are simply evidence of the assertion of other bureaucratic - managerial goals than, say, the maintenance of the economy at a price-equilibrium level of activity.

There can be no logical basis for either assertion: the main criterion must be which conceptual frame is most useful in analysing the events which have occurred. The argument which follows could be written in terms of two contradictory goals for the "bureaucratic ascendancy" (Engel's phrase) which the Commission represents - a "managerial" goal and a dispute-settling "Gemeinschaft" goal. The main reason I have not done this is that behind the goal of an industrial "Gemeinschaft" lies the acceptance of the legitimacy of many trade union aspirations. These include some which, when applied to concrete problems of wage determination, produce "substantively" rational decisions which are difficult to reconcile with the "formal" economic rationality ideally characteristic of most managerial decision-making in a market economy. That this should be so is a logical outcome of the contradiction lying at the base of the modern market economy which is remarked on by Weber: "... the maximum of formal rationality in capital accounting is possible only where the workers are subjected to the authority of business management. This is a further specific element of substantive irrationality in the modern economic order" (Weber (1918) 1947: 248).  

It is this 'substantive rationality' which, I have argued, is expressed in the Gemeinschaft strain in judicial regulation. By contrast, the "managerial" goal fits so well with bureau-cratic criteria that a "bureaucratic-managerial" duality seems a logical ideal type.

Formally rational criteria are not necessarily unambiguous. In particular, they will differ from one type of organisation to another once

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5. By formal rationality Weber means "the extent to which it is possible to carry through accurate rational calculation of the quantities involved in economic orientation ... and hence to act on the results of such calculation. By substantive rationality, on the other hand, he means the extent to which it is possible to secure what, according to a given system of values, is an adequate provision of a population with goods and services, and in the process remain in accord with the ethical requirements of a system of norms". (Parsons' introduction to Weber (1918) 1947)
Weber's assumption of perfect competition no longer applies. For example, as has been noted earlier since 1961 the Public Service Board has followed a policy of matching the salaries of public servants to equivalent groups outside. Though motivated primarily by a desire to ensure the Commonwealth Service is competitive in the employment market, the policy has also been bolstered by a feeling among the employees of the Board that market rates were the only true measure of work value - that, as Timbs put it, that which is economically correct guides to that which is morally right. Until the retirement of Sir Henry Bland as its Secretary, the Department of Labour and National Service opposed the application of this policy if the occupation in question was covered by an award rate, as it did not want the Government to be seen as encouraging the spread of over-award payments. Thus only at the end of 1969 did the Public Service Board, having at last obtained the blessing of the Dept. of Labour and National Service, match the average market rate for skilled tradesmen. An important factor in this change in policy was the shift in attitudes by the Commission itself on the subject, a shift which in turn grew out of the unions' victory over absorption of over-award payments after the 1966-67 Metal Trades York Value Case.

5.3 The Employers' Democratic-Managerial Initiative

The contrast between Gemeinschaft and managerial approaches was dramatised spectacularly in the disagreements among members of the bench which occurred in the 1960s. In the Commission itself - and particularly in the famous 1965 National Wage Case - two parties formed which hurled public polemics at each other in their judgments. The origin of these events lay in the 1961 Basic Wage Inquiry (97 CAR 376) in which Kirby C.J., Ashburner and Moore J.J. reintroduced the principle that the basic wage should be adjusted to cost-of-living changes unless it was shown this was undesirable. Every three or four years, they added, it should also be adjusted for productivity changes. This was attacked by both government and employers as inflationary, an attack joined by Gallagher and Kimmo J.J. in 1964, though they were overruled by Kirby C.J. and Moore J.J. (all judges then living except Wright J. were on the bench; the President had as it were a "casting vote" to break a tie).

6. The Chairman of the Public Service Board has attacked the unions (and, by implication, some members of the Commission) for adhering to a "monolithic" model of wage hierarchies. (Wheeler, 1970). It can be argued, of course, that because, for historical reasons the Australian wage structure is monolithic, attempts by the Board or other bodies to shift wages in isolation cannot succeed. (See John Edwards, Australian Financial Review 10.7.70).
In 1965 a joint judgement by Nimmo, Gallagher and Sweeney J.J. (the last newly appointed to the Commission) outvoted Kirby C.J. and Moore J. and accepted the basic aim of price stability for wage determination. The degree of ill-feeling on the bench may be seen in the following remark in a ruling by the President on an (unsuccessful) application by the unions for an immediate review of the decision:

"It happened in the event that I was in the minority when I was informed of the opinion of the majority on the day judgment was delivered." (Print B429 : 92).

By contrast, in his judgement Kirby states he has read, and agrees with, Moore's opinion.

The following year, another bench (Wright, Moore and Gallagher J.J. and Comm. Winter) reversed the previous years' decision, accepted for the first time in the Commission's history that relative shares between capital and labour was relevant and was affected by their decisions, and introduced the minimum wage. The other two members of the 1965 majority, Sweeney and Nimmo J.J., never again sat on a National Wage Case, nor on any other major case for that matter, and ultimately resigned from the Commission in 1969 to join the Commonwealth Industrial Court. The President was able to justify this exclusion from major cases by reference to the convenience of the parties and the undesirability of changing the benches on various long drawn-out cases, especially in view of the express wishes of the parties. (Commonwealth Conciliation and Arbitration Commission, the President, 1967 : 16.) But/should be recalled that such deference to the parties in effect meant giving the unions a veto over the changes. It is certainly the general opinion of union leaders and advocates sympathetic to them that the President, to protect the Commissions' credibility with the unions, in effect squeezed Sweeney and Nimmo out by giving them nothing to do.

The immediate issue under debate in these cases may be summarised in a heading from the Presidents' 1965 judgement: "Dominance of Objective of Preservation of Purchasing Power of Basic Wage - versus - Dominance of Price Stability for Community at Large" (B429 : 16). This involved the more fundamental issue of the extent to which the Commission should act as an instrument of "incomes policy", holding award wages down to the extent necessary for conformity with the expressed economic goals of the government. This issue was polarised in the period we are discussing because in 1964 the employers, for the first time, offered a wage increase in order to implement their theorem that wages should be increased for productivity, but not prices. In support of their theorem they were able to cite in support Australia's foremost labour economists, including Dominy and Isaac (1961), Hancock (1960) and (in the 1966 case) the Vernon Committee Report (1965). To this the President responded in his 1965 judgement as follows:
"Price stability for the community at large should of course be considered, as Moore J. has said, but to give it dominance rather than influence as one factor to be considered is in my opinion not only wrong policy but also something this Commission was not created to do, should not do and has not the competence or power to do. The Commonwealth and public bodies such as the Reserve Bank are in an entirely different position. They can and should give to price stability the dominance in their respective planning they think proper. This Commission should not as we have frequently stated act in a way so as to frustrate governmental policy but it must give priority to its task of fixing just and reasonable wages. Experience has shown that the Court and this Commission have done their jobs well when sticking to their own last; and that, though those who direct governmental economic or monetary policy may occasionally have been given problems to solve by just and reasonable wage decisions, the problems have been solved, and the flow of just reasonable wage fixation has gone hand in hand with Australia’s progress and expansion. (Kirby C.J. in 1965 National Wage Case, B429 : 17).

It will be seen that there are two strains in this passage: the insistence by Kirby on the independence of the Commission from the government, and the point that the promotion of good industrial relations and the day-to-day supervision of the economy sometimes conflict, and in that case it must be the former which is paramount. These remarks are significant, not in themselves, but because they were made in a context of strong pressure from the employers to adopt a policy in wage fixation which offered justice within the constraints imposed by the "managerial" requirements of the economic system as the main aim of any set of principles of wage fixation.

It can be questioned, though, whether Kirby was in fact right in his assertion that the main matter in debate was the question of price stability vs the maintenance of real wages. This was certainly a question which arose, and was in fact the principle concrete issue with which the Commission dealt. But behind it was a deeper question: was the tribunal mainly an instrument of bureaucratic-managerial management, or did it exist primarily "to promote goodwill in industry", as the chief object of the Act is phrased (s. 2(a)).
If the latter was true, then what should be done if, in the opinion of the Commission, goodwill in industry would best be promoted by measures inconsistent with a "managerial" role. The dilemma, and the conventional answer, was put by Moore J. in 1965 and 1966:

"It is a question of competing priorities: whether the Commission should act as if its primary function were to attempt to create or sustain a favourable economic climate and its secondary function were to attempt to resolve problems of industrial relations or whether the last is the Commission's primary function and the first its secondary. In my view the Commission should always give priority to problems of industrial relations."


Behind these events lay the attempt of the National Employers Policy Committee during the 1960s, (mainly under the inspiration of its Executive Director, G. Polites, and its main industrial advocate, Mr J. Robinson) to break out of the old role which the employers had played of merely opposing union applications, never admitting that award wages should be raised. This view of the employers' role was summarised in the following passage from the Standard Hours Inquiry (1947) 59 CARR 581 (a passage usually attributed to Foster J.):

"It has been the historic role of employers to oppose the workers' claims for increased leisure. They have, as is well known, opposed in parliament and elsewhere every step in this direction, and this case is no exception. The arguments have not much changed in 100 years. Employers have feared such changes as a threat to profits; an added obstacle to production; a limitation upon industrial expansion; and a threat to internal and international trade relations. Steadily, first in one country and then in another, this opposition has been overcome ...... And history has invariably proved the forebodings of employers to be unfounded." (Drake-Brockman C.J., Foster and Sugarman J.J., 59 CARR 581).

The employers set out in the 1960s to challenge this obstructive image, not in the eyes of the unions (a task they would have felt to be impossible) but in the eyes of the Commission. They began to systematically urge the rationalising of the award wage structure, by urging two major changes in the Australian federal award structure, later joined by a third.

(1) the simultaneous hearing of both basic wage and margin cases, in order that "double counting" of "capacity to pay" through "leap frogging" in the two sorts of cases could be avoided. This was conceded in 1966, and for defensive reasons the unions made claims for both in 1966 also.
(2) the amalgamation of basic wage and margin in a "total wage" in order that such "leapfrogging" would be impossible in the future. This was conceded in 1967. However the victory was short-lived, as the first major "total wage" decision resulted in increases of 16% to tradesmen, increasing their differential over non-tradesmen and so upsetting traditional relativities. This in turn resulted in employers proposing:

(3) a "National Wage Charter" under which "work value" considerations would be restricted to "classification reviews" of the correct position of certain skills in the hierarchy of relative wages. General wage rises would only be granted in annual National Wage Cases. The "Work Value Principles" set out in the 1969 National Wage Case judgement, while claiming to reject the "National Wage Charter" as too rigid, in fact incorporated most of its major points.

These direct efforts of the employers in National Wage Cases were supplemented by the outcome of other cases, in particular the 1965 General Motors Case mentioned earlier. In this case the Commission enunciated the principle that the productivity of a particular company or industry was taken into account in National Wage Cases, and hence that a claim for wage increases based on the profitability of a particular company or industry could not succeed. Similarly, in the 1969 Equal Pay Case the National Employers Policy Committee was successful in joining with the Commonwealth to persuade the Commission to adopt nine restrictive "equal pay for equal work" principles, rather than simply eliminating the old $6.20 difference in male and female wages which originated in the basic wage (as the ACTU requested).

7. Though it is plausibly argued by Hawke that this was a by-product of the decision to award a minimum wage, rather than an acceptance of the employers' arguments (Hawke, 1968: 112).

8. The 1970 Gil Industries Case judgement, while upholding the GMH Case principles, recognised they were not attained in practice largely due to overaward payments, and sanctioned departure from them if the parties agreed (or had agreed) on it. As Kenneth Davidson has pointed out (The Australian 17.10.70) adoption of the unions' submissions that the GMH Case principles be completely abandoned would have severely compromised the ACTU in National Wage Cases.

9. In pursuing this course the MEPC clashed sharply with dissident affiliates, including the Australian Metal Industries Association, the Australian Council of Retailers and a number of big foreign-owned meat-packing companies. At one point, J.H. Wooten, who appeared for the last two groups, attacked J. Robinson for seeming to imply that if the unions had applied for "equal pay for equal work" the employers would generally agree. Wooten suggested that Robinson would properly be seated at the unions' end of the bar table (ACTU Bulletin V.6 No. 3 Jan.-June 1969: 19-20).
5.4 Unionist and Gemeinschaft-type Regulation

At first sight this series of successes (culminating in Robinson's elevation to the Bench in 1970) would seem to pose a serious threat to the unions, as the intent behind them was to restrict as much as possible the ways in which unions could win increases in award wages. But in fact union leaders were not particularly perturbed about them (with the exception of the GTH Case, which was interpreted by many arbitrators as disbaring them from arbitrating disputes about over-award payments). The reason for this, I suggest, is that the unions knew that such an attempted bureaucratic-managerial role would always be modified by the pressure of "industrial facts" in industries where unions were strong (such as the metal trades), unless the principles precluded members of the Commission from arbitrating on these facts. Disputes are required to be brought to the notice of the Commission as soon as they occur or are likely to occur (section 28 of the Act), and so members of the Commission know that they will be required to deal with the strikes which will arise if they ignore union demands completely. Also, the members of the Commission are well aware of the pressure from some militant unionists such as Laurie Carmichael of the AES to bypass the Commission completely and rely solely on the strength of union solidarity to extract concessions. They believe strongly enough

10. This was the main breakthrough in the Oil Industry Case, I would suggest. After that full bench decision arbitration of market rate disputes has received the seal of approval. See John Edwards in the Australian Financial Review 6.11.70 for a similar opinion.

11. As was the case with over award payments until 1970.

12. At the conclusion of the Oil Industry strike Carmichael urged that the unionists accept the Employers' final offer, and the ACTU recommendation that the workers go to arbitration was accepted by a majority of 271 to 258, with workers in Melbourne and Adelaide voting 171 to 80 and 72 to 14 respectively against the ACTU recommendation (Sydney and Brisbane voted 68 to 5 and 109 to 10 in favour) - Australian Financial Review 23.7.70.
in the value of their role to be unwilling to obstruct union demands which on
the grounds of "equity, good conscience and the substantial merits of the case"
seen reasonable - even if doing so is inconsistent with some of the principles
laid down for general guidance in test cases. These complementary statutory
goals and political constraints provide the structural conditions for the
"Gemeinschaft" strain in arbitral regulation, the strain to which unions
appeal in their demands for wage justice.

Once the unions win a breakthrough in a particular industry in the
manner suggested, the consistency of principle to which the employers often
appeal turns against them. The spread throughout industry of the rises
supposedly confined to the Metal Trades Award after the 1966-67 Work Value Case
is a typical example. This process is helped considerably by the irrational
award structure itself, which ensures that workers governed by different awards
under different Commissioners will frequently be working alongside each other.
Such a situation is inimicable to "goodwill in industry", and in fact will often
be regarded as anomalous by the employer himself, who will grant the concessions
to all employees by consent award or by over-award payment. Without doubt the
existence of the arbitration machinery contributes considerably to the widening
in Australia of what Dunlop calls "wage contours" to a greater extent than
elsewhere, producing the "egalitarian" image noticed by so many. This
egalitarianism, however, is the egalitarianism of the skilled unionist, not the
leveller: equal pay for equal work but differential pay for differential work.
In promoting this principle the Gemeinschaft of skilled workers and the
bureaucratic-managerial social order complement each other.

It will be observed that, at least in principle, these two arbitral
strains are consistent with the stated goal of the prevention and settlement
of disputes. However, it is probably true to say that managerial arbitration

13. An example of this sort of appeasement of union demands is the decision
by Comr. Winter to extend equal pay to process workers in the metal trades
(and hence to all other females covered by that award, which affects 17% of the
females affected by Commonwealth awards - see Commonwealth Bureau of Census and
Statistics: Survey of the Incidence of Industrial Awards, Determinations and
Collective Agreements, 1966 (Bulletin No. 2). Winter's decision was made
in spite of the failure of the unions to really attempt to prove that the case
under discussion was covered by the nine Equal Pay principles - in fact he
supplied the justification himself in his 100-page reasons judgement. An appeal
by the employers to a full bench failed, in spite of the employers that
Winter's decision could not be justified on the Equal Pay criteria, and in
spite of the full bench's rebuke to the unions for their failure to satisfactorily
argue their case.
emphasises the prevention of disputes, while the *Gemeinschaft* - oriented
arbitrator tries to settle them. But the ambivalent result of the employers'
success in having 'leap frogging' basic wage and margins cases abandoned
(described in Chapter 1) illustrates that decisions which prevent disputes in
the short run can disrupt the normative framework. In the long run, this causes
even more disputes due to the resulting state of *anomie* in which there is no
bound to the claims made. More important, there are no accepted criteria for
determining which claims are unreasonable - criteria which formerly even the
unions accepted as just (Fox and Flenders (1969) claim this is what has happened
in Britain since the war).

The conflict between the two approaches to dealing with disputes was
highlighted in an address delivered by G. Polites, Executive Director of the
National Employers Policy Committee, to a seminar conducted by the Committee for
the Economic Development of Australia (CEDA) (Polites, 1968). Polites attacked
the attitude expressed by the President of the Commission, Sir Richard Kirby,
that the primary function of the Commission was to settle disputes as they arose.
Polites argued that Kirby's aim was futile, as disputes about wages are never
settled, but are followed by fresh claims. As was noted by John Edwards in the
Financial Review (Nov. 4, 1970), the accelerated rate of increase of both
award wages and weekly earnings since the 1969 National Wage Case has tended
to confirm Kirby's views and discredit those of Polites, who regarded the 1969
Case's Work Value Principles as vindicating his stand.

There have been occasions when the following through of a particular
arbitral principle has caused more disputation than existed before. A classic
example of this was the serious wave of strikes in January 1968 over whether the
sharp increases in award wages for skilled tradesmen granted in the *Metal Trades
Work Value Case* were to be absorbed in over-award payments. The ignominious
climb-down of the Commission on this issue the next month vindicated the union
stand, and made the fines imposed on unions for striking against absorption
appear blatantly oppressive and unjust, and so vulnerable to an assault such as
O'Shea's. In this case the drive for bureaucratic rationality was initiated
by two members of the Commission, Gallagher J. and Combr Winter, who were
by no means unsympathetic to unions, and who were obviously chiefly motivated
by a concern to help employees receiving no over-award payments as much as they
could. The failure of this attempt, in spite of the solidarity of the employers,
was a telling illustration of the relative powerlessness of the Commission in
the face of widespread union resistance. It also indicates that unions as much
as the employers are liable to incur long-term strategic disadvantage for
short-term tactical gain, since their "victory" precluded them from using the
level of over-award payments in future as a ground for award increases,
previously a very productive argument.
If we look again at the criteria for the "judicial" arbitration of disputes over economic interests described by Lockwood, we will see "managerial" and Gemeinschaft attitudes are distinguished, though they are not labelled as such. Firstly, Lockwood suggests that discussion of what constitutes a "fair" wage is circumscribed by two constraints: the lower limit set by the principle of the "living wage", and the upper limit set by "the ability of industry to pay" without cutting into the investors' reasonable share. Both of these constraints, which are essentially Gemeinschaft-rules, have been adopted by the Australian tribunals, the first being raised by the Commission in the 1960s in spite of initial lack of interest even among the unions (1961 Basic Wage Inquiry). Secondly, Lockwood's three criteria for a "fair wage" can be tied to our typology also. The first, the maintenance of the hierarchy of relativities combined with the granting of increases to compensate for rises in the cost of living, has in general been associated in Australia with "managerial" arbitration. This has particularly been the case since 1953, when automatic adjustments of part of the wage for changes in the cost of living were abandoned, and the "capacity of the economy to pay" was made a matter to be discussed afresh each year. While on the whole wages have since been adjusted at least enough to keep up with increases in the cost of living, the abandonment of automatic adjustments has meant that the payoff to the unions contained in Lockwood's first criterion is no longer present, leaving it an instrument for holding union demands in check. Wage rises to compensate for cost of living increases have become a concession, not a right.

The challenge to this managerial restraint comes from the third of Lockwood's opposing criteria for a "fair wage": the demand of the unions that the more the workers get the "fairer" things will be. The compulsory nature of the proceedings and the role of the unions as initiators mean that the natural tendency of arbitrators to "maintain existing standards and relativities" is constantly being stretched. Unions can and do use their power (including their power to influence State Labor governments) to change existing standards and conditions to new ones which the arbitrator must subsequently adjust to if he wishes to remain relevant to the real industrial world. But the unions' power depends largely on their members' solidarity, which is a function of their perception of wage justice, which is in turn affected greatly by the actions of the tribunals. This symbiotic relationship between the tendency of arbitrators (to maintain standards) and the desire of unions (to improve them) provides the dynamic Gemeinschaft-type strain in Australian arbitral regulation.
But the symbiosis is a symmetrical as between unions and employers, because the assumption of voluntarism which Lockwood makes ("arbitration is a symbol of the community of interests among those who freely make use of it" - Lockwood, 1952 : 345) does not apply. For both legal and structural reasons, the unions generally set the pace in the system. 14

Finally we return to the theme which inspired this thesis. A view of the Commission as an instrument of Gemeinschaft-type regulation coincides with the observation made as early as 1900 by the New Zealand Court of Appeal, that "The Act ...... in effect abolishes "contract" and restores 'status'." (18 NZLR 876). Such an observation conforms to Marshall's view of the emergence of trade unionism and the accompanying assertion of social rights as a re-emergence of "status" after its submergence in the high flood of nineteenth century individualism (Marshall (1949) 1963 : 96-100). It is in deliberate contrast to Maine's observation in Ancient Law (1885) that the trend from status to contract had been characteristic of progressive societies "hitherto". However, as Sauer observes, Maine was referring to the freeing of citizens from control by mater familias (Sauer, 1965 : 66), and the sort of dominance he was referring to is hardly appropriate to the bureaucratic-managerial regulation to which the modern organisation man or unionist more or less voluntarily submits. Ginsberg remarks that many of the English minimum wage regulations can best be seen as a method for equalising bargaining power in order that contracts can be more satisfactorily made rather than status-rights (Ginsberg, 1965 : 149) - they serve as the "non-contractual" elements of the labour contract (Parsons and Smelser, 1956 : 111).

14. There is little or no sign in Australia of any attempt to consciously make the wage structure conform to some economic (or social) criterion of rationality or efficiency which is, Lockwood's second criterion for a 'fair wage'. The consequence would be to attempt to create artificially the wage structure which would obtain under conditions of perfect competition. The failure of the Commission to adopt such criteria, remarked on in Chapter 2, may be put down to a healthy skepticism about the validity of the economic theory itself, but this is unlikely to be the reason for the failure of the government (or the employers) to advocate it. Rather, I would suggest that this is evidence of acceptance by the government of managerial norms, as opposed to competitive Gemeinschaft norms, for the regulation of the labour force.
In view of these reservations about the general applicability of the "contract to status" reversion suggested by Tannenbaum (1952) (see also Flanders 1968: 25, and Schneider 1969: 360), it is significant that Sawyer, who is familiar with the Australian Arbitration system, feels that the description can validly be applied here: "In a country like Australia with its long collectivist tradition, the area for private agreement is relatively less .... In sociological terms (this system is personal mobility with relational stability" (Sawer, 1965: 68-69). The distinction between Gemeinschaft-law and quasi-contractual bureaucratic-managerial regulation provides a guide to why it is more valid to see elements of status-society in Australian industrial regulation. Sir Richard Kirby may not be rather familiar (as Higgins perhaps was), but he is certainly avuncular.
The main argument of this thesis can be summarised as follows: in industrial society the unions are important upholders of principles of 'substantive' rationality which can be contrary to the 'formal' rationality demanded by the market exigencies and (Weber would claim) by the very nature of capital accounting. The reason for this lies basically in their role as mediator between the requirements of the household and the requirements of the firm, but in Britain and Australia it also lies in their claim to a neo-feudal status as a 'workman's estate'. These principles of 'substantive' rationality can be analytically viewed as providing the basis for a 'social' component of citizenship. The norms which express the values of this component of citizenship can become the expression of functionally undifferentiated 'mechanical' solidarity if they are firmly enough implanted in the institutional structure.

In Australia, this is achieved in part through the Arbitration system, which by guaranteeing the unions a share in the state (as it were) and providing for the legitimation of some of their 'a-economic' principles of action leads to the Commission acting as a pivot of social regulation in Australia. This has the same effect on the wage structure as American studies would predict would occur through an extension of trade union power. The means by which these effects have been brought about are suggestive as to the relative importance of institutional and market forces in determining the distribution of incomes in a modern market economy.

The institutionalisation of trade union values through the arbitration system is at the same time enhanced and concealed by the need of the arbitral authorities to function as independent tribunals. Unable to challenge union principles and aspirations directly, governments, employers and the state bureaucracy itself have attempted to impose on the Commission a managerial role which would require it to subordinate the acceptance of trade union demands to other goals. Their success in achieving this has been affected in the short term by various factors, including the personalities of the judges themselves, the amount of acceptance of 'responsibility' by the union leadership and the connected factor of the degree of dependence by that leadership on the authority conferred on them by the arbitration system. But as a general tendency, the Commission's inherent urge to seek a 'just' solution which will be accepted as just by 'reasonable unionists', combined with the desire of individual employers to avoid trouble (especially if responsibility for concessions can be shifted to the Commission) means that in day to day practice the successful arbitrator
uses Gemeinschaft criteria rather than managerial criteria to decide his actions. This can apply even if the general principles laid down in test cases conform to the managerial criteria suggested by employers and governments.

It is through the spread of Federal trade union power and influence that the Commonwealth arbitration tribunals gained the opportunity to extend their influence. At the same time the recognition of the legitimacy of union power laid ground rules for the conduct of industrial disputes in Australia which conceded what in other countries unions have had to struggle for. These ground rules, in fact, provide the implantation in the institutional structure referred to above which acts to convert these sectional values into part of the institutions of solidarity for the society as a whole. To the extent that these values give rise to rules for regulating industrial conditions as such they are contributing to organic solidarity, but because the paramount prestige of the Arbitration tribunals leads to general acceptance of their principles of dispute settlement, they also inspire some of the functionally undifferentiated norms which together comprise the system of mechanical solidarity. At the base of this acceptance of the ground rules of unionism, though, lies the knowledge that if they are not accepted, the unions will eventually cease to deal with the tribunals and they will become irrelevant to the actual working of society.

The complex way in which these trends come through in practice may be seen in the vacillations of the Commission about the concept of work value. Though having a surface relationship to the economist's wage which will equalise net advantages, the Commission's attempts to find the 'value' of particular professions are better understood as responses to the demands of 'reasonable' unionists for acceptance of their status rights. Some of the more extraordinary accompanying doctrines are best seen as attempts to control the power to broaden these decisions outside their original intent which the system itself has given to the unions through its acceptance of the doctrine of comparative wage justice.
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GLOSSARY

CAR  Commonwealth Arbitration Reports
CLR  Commonwealth Law Reports
FLR  Federal Law Reports
NSWAR  Arbitration Reports (New South Wales)
NZLR  New Zealand Law Reports

The "prints" quoted in the text are pamphlets, published by the Commonwealth Industrial Registrar, which are subsequently compiled into the Commonwealth Arbitration Reports. These Reports tend to be four years or so behind in publication, and so print numbers must often be used for recent references. For the most recent decisions, for which at the time of writing not even the prints were available, the rough texts issued on the day of the decision were used.

Abreviated accounts of cases and decisions are given more quickly in the Australian Industrial Law Reports (AILR) and the Industrial Information Bulletin (IIB). These have not been used as references in this thesis.