PRINCIPLE AND PRACTICE IN COMMONWEALTH INDUSTRIAL ARBITRATION : A FURTHER COMMENT

By K. SLOANE and
D. W. SMITH*

In the first issue of this journal, Mr R. E. McGarvie, Q.C., examined, 'from a lawyer's viewpoint the way in which Commonwealth industrial arbitration is operating sixty years after the commencement . . .' of the Commonwealth Conciliation and Arbitration Act.[1] Limiting himself 'to an examination of the working of the Commission in the exercise of its arbitral powers'[2] he nevertheless acknowledged that the system, the tribunal and the concept of Commonwealth industrial arbitration have been subject to a variety of criticisms.[3]

The purpose of this article is to survey the substance of what we believe to be the principal criticisms levelled against the concept and practice of compulsory arbitration. It does not pretend to be exhaustive nor to offer solutions to all the problems raised. But changes are being ever more widely discussed and the profession has an obvious interest in these proposals. Throughout the discussion comparisons will be made with the best known alternative to compulsory arbitration, the system of collective bargaining. Unfortunately, the literature in this field is not generally known to lawyers other than the relatively small industrial bench and bar.

The system of compulsory arbitration is too firmly entrenched in Australian life to be suddenly changed in important respects. However, this should not shut our eyes to the possibility of significant modifications being gradually engrafted onto the system either consciously, in the light of the criticisms made of the system, or involuntarily as a result of stresses between the system and changing industrial and economic conditions which have to be accommodated.

The discussion proceeds on two bases; firstly, the broad industrial relations implications of the compulsory arbitration system ; secondly, the formulation of wages policy. This division is somewhat artificial but serves for the purpose of exposition. A further simplification is that attention will be confined to the Commonwealth system even though many of the doubts apply to the State systems of compulsory arbitration.

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* K. Sloane, B.Econ. (Q'ld), Ph.D. (Duke); Lecturer in Economics, School of General Studies, Australian National University. D. W. Smith, B. Com., LL.B. (Melb.); Senior Lecturer in Law, School of General Studies, Australian National University.

[1] 'Principle and Practice in Commonwealth Industrial Arbitration after Sixty Years' (1964) 1 F.L. Rev. 47, 50.

[2] *Ibid.* 51.

[3] *Ibid.* 50.

I

A common misconception in comparing the influence of differing institutional arrangements on the state of industrial relations is to think in terms of some absolute standard of comparison. The standard is often idealistic and even utopian in that it envisages a situation in which there are no longer strikes and all disputes are settled harmoniously. Realistically, it must be accepted that whatever institutional arrangements are adopted conflict may well be inherent in present day industrial society.

> Owners and managers of industry and the wage workers whom they hire and direct can be expected to develop different orientations towards industry and different perceptions of their own interests. Despite heavy accent in recent years on *common* goals and on the virtues of industrial peace and harmony, the pursuit of opposed aims continues to cause strife. General agreement as to the desirability of high-level and continuous production does not prevent sharp disagreements over the way in which the production is to be achieved, the human costs it justifies, and the relative rewards due to the participants.[4]

But there is a tendency in some discussions of industrial conflict to take up extreme positions—either to over-emphasise the injurious effects of labour disputes, leading to demands for vigorous and even coercive action—or to play down the effects of disputes and to assert that existing arrangements work well.[5] The point is that given our state of knowledge of these processes a more neutral attitude is preferable. We need not only to accept the inevitability of many forms of industrial conflict but also to enquire what role they play in society. Such conflict may be functional in determining the direction of social change and result in greater scope for future co-operative relations.[6]

Moreover, an understanding of the conflict and how we should deal with it must take account of its less spectacular manifestations. There is still a tendency to focus attention on the strike, the most overt form of conflict, and to assume that strike statistics are a reliable indication of the state of industrial relations at a given time. A comprehensive classification of the subtle forms which conflict may assume should distinguish between manifestations of organised group conflict (union —management conflict) both in industry and society at large and manifestations of individual and unorganised conflict. The latter may include unorganised withholding of effort, intentional waste and inefficiency, excessive labour turnover, absenteeism and some forms of political opposition; the combined effects of these on production alone may in a given period be as great as those attributable to strikes.[7]

[4] Kornhauser, Dubin and Ross, *Industrial Conflict* (1954) 3.
[5] *Ibid.* 6.
[6] *Ibid.* 22.
[7] *Ibid.* 14.

It is worth recalling that not even the framers of the Australian Constitution envisaged the industrial power of the Commonwealth as leading to the creation of a system which could harmoniously settle all industrial disputes. Mr H. B. Higgins said in 1898 at the Melbourne session of the Federal Convention, ' I do not regard courts of conciliation and arbitration as likely to finally settle all industrial disputes, but I regard them as a very valuable means of mitigating the pain which an era of change will create '.[8]

The expression ' industrial dispute ' today carries a different connotation as a result of the expansive interpretation by the High Court of the words of section 51 (xxxv) of the Constitution in the sense that the existence of an industrial dispute created by the simple service and refusal of a log of claims attracts the Commission's award making powers. An award is in effect an industrial code for a particular group in industry.

As Fullagar J. said in *The King v. Blakeley*—

> A log of claims was served on employers, and that claim was rejected or not granted. Whatever other view may initially have been open, it is now well settled that a demand and refusal of this kind is sufficient prima facie to constitute a dispute. . . . Of course the demand must be genuine in the sense that it is seriously put forward for serious consideration. . . . The existence of a dispute cannot depend on the degree or extent of dissatisfaction or discontent with existing conditions.[9]

If there is no absolute standard by which to judge the performance of a system of compulsory arbitration as a mode of dealing with the various forms of industrial conflict, there is equally no standard by which we can compare the results achieved by different systems. International comparisons of statistics of industrial disputes are of limited use if only because of differences in the indirect effects of stoppages, the relative importance of particularly strike-prone industries and, perhaps most important, the role which other expressions of industrial unrest play. In any case, comparisons over a period of time of the incidence of strikes do not reveal any unequivocal case either for, or against, arbitration.[10]

Recently there has been increased interest in comparative studies of differing institutional arrangements for dealing with the problems of industrial relations. These are not based on empirical evidence, being largely impressionistic, but they do raise important matters of principle. The alternative system most frequently contrasted with compulsory arbitration is that of collective bargaining as understood both in the

[8] *Convention Debates*, Melbourne 1898, Vol. 1, 180 cited in the *Report from the Joint Committee on Constitutional Review* 1959, para. 640.

[9] (1950) 82 C.L.R. 54, 93-95.

[10] Hancock, ' Compulsory Arbitration *versus* Collective Bargaining: Three Recent Assessments ' (1962) 4 *Journal of Industrial Relations* 20, 21.

United States and the United Kingdom. Bargaining arrangements differ, of course, between these countries in ways which are important in relation to some problems, for example, the extent to which the parties are compelled by law to bargain, the size and inter-relation of bargaining units, the degree and methods of government intervention and the influence of political affiliations on bargaining behaviour. Further, collective bargaining and arbitration are never found in idealised forms but elements of both are normally associated in the one system. However, differences remain between the two systems which are so fundamental that they cannot be ignored.

Collective bargaining may be defined as the method of determining the terms and conditions of employment and resolving differences arising out of those terms and conditions by direct negotiation between union(s) and employer(s). By contrast, under a system of compulsory arbitration, the terms of employment are imposed by a third party—the arbitrator. It is, of course, perfectly compatible with the concept of collective bargaining that the negotiating parties may agree to use the good offices of a third party to assist in hammering out their agreement. The point is that under compulsory arbitration the arbitrator may impose his decision upon the parties. This basic difference between the two methods has recently led some writers to question whether there is any prospect of modifying our compulsory arbitration system in ways which will introduce the advantages which are thought to attach to collective bargaining. These have been said to lie in the process of settlement, the nature of the settlement and the means by which the settlement is enforced rather than simply in the actual terms of the settlement.[11]

It is convenient to consider each of these points separately. Ideally, in the process of settlement—

> The parties deal with each other and must impress each other both with the merits of their respective claims and their strength to stand by them. It is a process not only of mutual coersion but also of mutual enlightenment. Concession is made in return for concession, emphasizing the mutual dependence of the parties. The object of negotiation is to narrow differences and thus to reach a mutually acceptable settlement.[12]

On the other hand it is claimed that under compulsory arbitration, differences tend to be exaggerated. Each of the disputants is placed in the position of trying to influence the decision of a third party—the arbitrator. The parties are, therefore, encouraged to take extreme positions rather than to seek common ground. This tendency is

[11] Isaac, 'Dr. Hancock on Collective Bargaining' (1962) 4 *Journal of Industrial Relations* 141, 144.

[12] Isaac, 'The Prospects for Collective Bargaining in Australia' (1958) XXXIV *Economic Record* 347, 349.

strengthened by the rule, stemming from the Constitution, that the arbitrator can only make an award within the ambit of the dispute. Admittedly, under collective bargaining the parties may also, at least in the initial stages, find it expedient to adopt widely separated positions.[13] However, it is claimed that the distinction between the two systems is still likely to be important at least for the reason that with collective bargaining the process necessarily involves a shifting of positions in the course of negotiation.[14]

With respect to the nature of the settlement it is claimed that under collective bargaining the parties bear the ultimate responsibility for the settlement which, *ex hypothesi*, is the product of their direct negotiation. The settlement is arrived at on the understanding that each will abide strictly by its terms, and seek agreement relating to any grievances arising from its operation. Indeed, most collective bargaining agreements contain a procedure, settled in advance, for dealing with such issues. With compulsory arbitration, the tribunal determines the settlement in the form of an award which has the force of law. A settlement of this nature is thus seen as resulting in the parties bearing little responsibility for the terms of the settlement and their enforcement. Trade union leaders will have little incentive to explain the reasons for the decision to their members; they may even strengthen their position by this shift of responsibility for the decision. Management, on the other hand is entitled to insist on the strict performance of the award and, where appropriate, to invoke the penal provisions of the Act.[15]

In short, although it is admitted that these features of the two systems in practice may not appear with such clarity, ' the outstanding difference between compulsory arbitration and collective bargaining is in the degree of responsibility imposed on the union and management for the settlement of disputes and for the manner of observance of the terms of settlement '.[16] While occasionally it may be an advantage for the union leader, both during the process of negotiation and after a settlement has been achieved, not to be responsible to the members for the results,[17] it has been questioned whether the result is conducive to good industrial relations if union members remain discontented with the outcome and there is poor communication between members and officials.[18]

The evaluation of these points is not easy. One assessment queries whether they provide any basis for preferring one system to the other.[19]

[13] Hancock, *op. cit.* 28.

[14] Isaac, ' Dr. Hancock on Collective Bargaining ' (1962) 4 *Journal of Industrial Relations* 141, 145.

[15] Isaac, ' The Prospects for Collective Bargaining in Australia ' (1958) XXXIV *Economic Record* 347, 349.

[16] *Ibid.*

[17] Hancock, *op. cit.* 25.

[18] Laffer, ' Compulsory Arbitration and Collective Bargaining ' (1962) 4 *Journal of Industrial Relations* 146, 148.

[19] Hancock, *op. cit.* 29.

Another maintains that with collective bargaining—'The closeness of the relationship between the leaders on both sides and the responsibility resting on them are *likely* to be more favourable to co-operation and industrial peace than the joint operation of advocacy and imposed awards of compulsory arbitration'.[20]

Whilst these differences in the nature and process of the settlement achieved under the two systems are of major importance there remain other criticisms of arbitration, not necessarily related to these aspects which have been canvassed. Some of these will be discussed in summary fashion below.

Process of arbitration

Arbitration is at a disadvantage in comparison with collective bargaining for the reason that it must be rare to find an arbitrator who possesses all the qualities necessary to act successfully in a particular industry. The argument proceeds on the ground that although the interpretation of the terms of employment (the award) is amenable to the judicial process and is not predicated upon a first hand knowledge of all aspects of the particular industry, the making of the terms of the employment is a very different matter.

> Under collective bargaining, the terms are arrived at by pressure, compromise, and self interest. But a competent 'legislative' arbitrator must in the first place be as familiar with the economic and technical aspects of the industry as the disputing parties; secondly he must be able to formulate clear-cut principles on which to base his award; and thirdly, he must be able to apply these principles consistently and unequivocally to arrive at the 'right' and 'just' award. Even if the first requirement is fulfilled, it is doubtful whether the last two will usually be satisfied.[21]

This reasoning should not be pushed too far. Experience has shown that members of the Commonwealth Conciliation and Arbitration Commission 'comprehend and handle the very *minutiae* of working conditions, including matters that would generally be considered too particular and even too trivial to deserve the attention of the bargaining officials under collective bargaining'. In any event an obvious solution in part would be to appoint sufficient members of the Commission to allow the degree of specialization thought desirable.[22] However, there is a somewhat related problem which is less clear. Empirical evidence suggests that the industries which experience the greatest unrest and dislocation of industrial relations tend to be the same regardless of the

[20] Isaac, 'Dr. Hancock on Collective Bargaining' (1962) 4 *Journal of Industrial Relations* 141, 145. Also Laffer, *op. cit.* 147.

[21] Isaac, 'The Prospects for Collective Bargaining in Australia' (1958) XXXIV *Economic Record* 347, 350.

[22] Hancock, *op. cit.* 24, 30.

institutional framework.[23] There is the possibility that different industries may require different forms of regulation. Case studies of particular industries suggest there may be good reasons for ensuring that some have the minimum of regulation under a collective bargaining environment whilst others may require a degree of control which extends beyond our present concept of compulsory arbitration. Indeed, the industrial relations problems of some industries may be virtually insoluble, whatever form of regulation is adopted, 'without modification of their economic and technological organization on lines that go far beyond the traditional limits of Australian compulsory arbitration'.[24] This dilemma is also referred to in the Report from the Joint Committee on Constitutional Review. The Committee pointed out that if industrial matters are to be dealt with by the Commonwealth under its industrial power, 'either conciliation or arbitration must be used even though neither may be suited to the circumstances of the industry or particular branch of industry involved'.[25]

Arbitration less demanding

Arbitration does not make the same demands upon either trade union leadership or management as collective bargaining. 'There is no need for union or management to have a sophisticated understanding of the nature of industrial conflict and their accommodating role in this conflict.'[26] The 'art' of industrial relations so far as union and management are concerned lies in the application of the awards of the arbitral tribunal.[27] On the other hand, the greater involvement of trade union officials in the process of industrial decision-making is likely to demand more positive and flexible leadership. The same reasoning is also said to apply to the development of managerial skills. It has been questioned whether this lack of negotiating skills is necessarily a disadvantage if union and management are operating under a system in which their role is to convince a third party—the arbitrator, of the validity of their claims and counter-claims.[28] But this is probably only a partial answer to the criticism, at least for the reason that leadership skills other than those of negotiation may be fostered better under a collective bargaining environment.

Arbitration hinders conciliation

The possibility of resort to arbitration hinders and often displaces the possibility of resolving disputes by conciliation. Despite the emphasis on resort to conciliation in the Conciliation and Arbitration

[23] Kerr and Siegel, 'The Interindustry Propensity to Strike—An International Comparison' in Kornhauser, Dubin and Ross, *Industrial Conflict* (1954) 189-212.

[24] Walker, *Industrial Relations in Australia* (1956) 374.

[25] *Op. cit.* para. 691.

[26] Isaac, 'The Prospects for Collective Bargaining in Australia' (1958) XXXIV *Economic Record* 347, 355.

[27] *Ibid.*

[28] Hancock, *op. cit.* 26.

Act and the guarded references to its success contained in the annual reports of the President of the Commission the parties to a dispute, at least in respect of important issues, may not be prepared to exchange concession for concession in order to arrive at agreement. Concessions so made may rebound against the party making them if the other refuses to give way and takes the dispute on to the arbitral stage.[29] Moreover, as remarked before, both may be glad to be relieved from the responsibility of justifying to their constituencies the concessions made.

Ideally, many differences should be resolved quickly and amicably at the plant level and, indeed, many are; but compulsory arbitration provides a strong tendency to centralisation. The difficulties which many Australian unions experience with unauthorised stoppages and the disciplining of shop stewards is symptomatic of the pressures inherent in the system of taking disputes up to the arbitral stage.

This factor, in conjunction with the operation of sections 109 and 111 of the Conciliation and Arbitration Act can have doubly unfortunate consequences for the prospects of settling disputes by conciliation. If, for example, an award contains a bans and limitation clause and an unauthorised stoppage occurs at the plant level, the union could find the provisions of the Act invoked without having the opportunity of attempting to settle the matter by the process of conciliation. Recently, this has been a common criticism levelled by trade unions against the operation of the 'penal provisions' of the Act.

Role of sanctions: the penal provisions

The so-called penal provisions of the arbitration system are a constant source of discontent within the trade union movement and often result in compulsory arbitration promoting rather than resolving conflict.

From its inception, the system has had to grapple with this problem. Its genesis lies in the plausible notion that if the state has provided machinery for the settlement of industrial disputes, then, once that machinery has been used and an award made in settlement of a particular dispute, stoppages in defiance of the award are quasi-criminal acts. In practice, it is the employer who assumes the initiative in the application of sanctions and this would seem appropriate given the difficulty of distinguishing between disputes concerning the establishment of new rights and the interpretation of existing rights. The compulsory arbitration system makes no distinction, applying the judicial process to both types of strikes. Despite the division drawn by the Act between the Commission and the Industrial Court, as far as penalties for strike action are concerned, it is immaterial whether a strike relates

[29] Isaac, 'The Prospects for Collective Bargaining in Australia' (1958) XXXIV *Economic Record* 347, 355.

to new rights (in effect, the variation of an existing award) or interpretation of an award. Under collective bargaining it is realistically accepted that there is a distinction; the judicial process being appropriate to interpretation but not to the creation of new rights—the use of economic coercion being part of the bargaining process. Similarly, in terms of this analysis, there appears to be no reason to distinguish between ordinary strikes and those which may create a national emergency. It follows that sanctions are inherent in the concept of compulsory arbitration.[30]

The incidence and severity of the sanctions imposed on unions are likely to rise steeply in periods of full or over-full employment when unions are attempting to use their bargaining strength to the maximum to extract concessions from employers by way of over-award payments. The recent history in this respect of the metal trades unions is in point. But this feature of arbitration is undoubtedly embarrassing to the tribunals as well as to the unions which suffer the penalties imposed. To deny the right to strike is seen by the trade union movement as a threat to the basis of that movement. Punishing unions for striking may reduce the incidence of strikes but will exacerbate industrial unrest. Union and management must still work together after the imposition of punishment.[31]

And is it right to characterize all strikes as criminal acts *simpliciter* ?

> It is very difficult to treat conduct as a criminal offence unless there is a substantial consensus of community opinion that the conduct really is criminal. Such a consensus does not, I think, exist in Australia in regard to ordinary strikes. This is indicated by the chequered history of strike penalties in Commonwealth legislation and the varying extent to which the different States prohibit strikes and hold unions responsible for their members' actions. The law is not invoked in the case of most strikes, and when it is invoked it is usually as a means of putting pressure on the union to get its members back to work, rather than as actual punishment for a criminal offence. Proceedings are seldom continued after work resumes, unless there is a fear of some immediate recurrence of the strike. The penalizing of strikes is usually committed to special industrial tribunals and not, as in the case of acts really regarded as criminal offences, to a judge and jury.[32]

The same author also characterizes as ' unfortunate ' the method of penalizing strikes now adopted in the Commonwealth system. In his view this method ' does no good either to industrial relations or to

[30] Isaac, ' Penal Provisions under Commonwealth Arbitration ' (1963) 5 *Journal of Industrial Relations* 110-119.

[31] *Ibid.*; Isaac, ' The Prospects for Collective Bargaining in Australia '(1958) XXXIV *Economic Record* 347, 350; Laffer, ' Problems of Australian Compulsory Arbitration ' (1958) LXXVII *International Labour Review* 417, 430.

[32] Wootten, ' The Community's Interest in Trade Unions ' in *Trade Unions in Australia* (1959) edited by John Wilkes and S. E. Benson, 89, 109-110.

respect for the notion of contempt of court, which it is important not to have belittled '.[33]

The effect which the automatic penalizing of strikes can have on the prospects for conciliation was referred to above. But there are other facets to the problem of sanctions, some favourable to arbitration, which should be considered. The possibility of the imposition of penalties could provide a useful weapon for trade union officials to use in the control of their membership[34] and this factor may be of particular importance in the case of stoppages not authorised by the union. Although union leadership in Australia is notoriously weak at the plant level, the growth in influence and authority of the shop-steward is an unwelcome development to many Australian unions and the threat of incurring penalties may serve union officials as a means of controlling this movement. However, this is a dubious method of achieving strong leadership.

Whatever system is adopted for the regulation of industrial relations, there is general agreement that it is desirable to control, by means of penalties, two types of strikes; those which may disrupt the economy on a wide scale and those which are not concerned with genuine industrial issues but rather serve as a vehicle for the imposition of particular political policies on the Government.[35] Even in these respects, however, an advantage has been claimed for the method of collective bargaining. This lies in the fact that in England and the United States of America, with some differences of method between the two countries, the parties are uncertain as to the manner and method of Government intervention. This uncertainty may be useful in persuading the parties in dispute to negotiate.[36]

Excessive legalism

Compulsory arbitration leads to an excessive degree of 'legalism' which is not conducive to good industrial relations. Admittedly, this is, in part, inevitable given the constitutional issues which arise from the federal compact and the particular form of the Commonwealth's industrial powers. The criticism stems from the basic form of compulsory arbitration, that industrial problems should be solved by the essentially legal procedure of hearing parties and imposing settlement. Some of these aspects have been dealt with above in examining the process of settlement and the role of sanctions in the system. The

[33] *Ibid.* 111.

[34] Laffer, 'Problems of Australian Compulsory Arbitration' (1958) LXXVII *International Labour Review* 417, 430.

[35] Wootten, *op. cit.* 111.

[36] Isaac, 'The Prospects for Collective Bargaining in Australia' (1958) XXXIV *Economic Record* 347, 352-353.

most frequent source of criticism in this context relates to the Commission's major economic cases and will be discussed in the latter part of this article.

There remain some features of our compulsory arbitration system which have attracted widespread approval. The enactment of the Commonwealth Conciliation and Arbitration Act in 1904 led to a rapid growth in the proportion of the Australian work force who were organised in trade unions. This early growth avoided many of the problems associated with recognition and legal status which beset the trade union movement in most other countries at this time. Australia still being one of the most highly unionised of all countries with virtually all unions registered under the Arbitration Acts, Commonwealth and State, unions enjoy a status which Fullagar J. described in *Williams v. Hursey*,[37] in relation to a federally registered union, as 'the full character of a corporation'. Similarly, the high degree of centralisation in our compulsory arbitration system facilitated acceptance of the provisions relating to control over union rules and elections and entitlement to membership. These aspects of the legislation have been almost entirely successful. Although such protection is not ruled out under collective bargaining arrangements, their fragmented nature makes it extremely difficult to introduce and administer. Much weight has been placed on the protection which the system affords weaker groups of workers and this will be discussed later.

Although the foregoing suggests that it is difficult to justify a position in which one system is preferred to the other, it is worth reiterating that a consideration of the differences and similarities of the two systems in relation to their impact on industrial relations may be extremely important in assessing proposals for change. It will be seen that to some extent the same applies to a consideration of the economic implications of wage fixing by the two systems.

II

At the outset of his article Mr McGarvie referred to the perennial controversy whether the federal arbitral machinery is simply a mode for the settlement of disputes or is, in effect, an economic legislature with wide ranging influence. Apart from mentioning the judicial differences of view which have been expressed concerning the 'jurisprudential characterisation' of the Commission's functions he stated that it was outside the scope of his article to enter into this controversy.[38]

However, this issue has weight in any assessment of our existing institutional arrangements and in proposals for change. It was pointed

[37] (1959) 103 C.L.R. 30, 52.
[38] McGarvie, *op. cit.* 49.

out in the first section of this article that the expression 'industrial dispute' carries a very different meaning in the context of our arbitration system from that normally implied in the field of industrial relations. In fact, it is frequently descriptive of nothing more than the formal technique required within the arbitration framework for bringing about alterations in wages and conditions. The fact that these alterations have far reaching economic effects is being increasingly acknowledged by the Commission and the parties directly involved, and it is therefore easy to appreciate why some take the view that the procedure for settling 'disputes' should not be regarded as a judicial process when it involves 'a highly complicated and somewhat speculative assessment of the course of economic events in the past and more importantly, in the near future; in the light of which the appropriateness of particular wage increases must be determined'.[39] This necessarily involves the Commission in a more sophisticated role than the mere settlement of industrial disputes.

This role as economic legislature has not been borne very happily by the Commission. It is fair to say that it did not seek this development but has been compelled into it by pressure of events. A necessary result has been a far less direct commitment to consideration of economic questions than in countries where the system of wage determination is equally centralised but not based on arbitration.[40] Indeed, to some it is the implicit and incomplete nature of this commitment which is a major source of difficulty. Certainly, periodic insistence that the tribunal's function is the settlement of disputes, even admitting the repetition of the 'public interest' qualification, does not remove the problem nor lessen the economic significance of its decisions.

An attempt is made in what follows to indicate the types of economic implications of existing wage fixing arrangements which have caused concern and to raise some of the resulting suggestions for modification of the system. Some comparisons will again be drawn with the method of collective bargaining. It is not appropriate to consider here economic arguments in detail although the weight of the case for the Commission being considered explicitly as an economic legislature rests largely on these considerations. This course glosses over the fact that economists are not always unanimous in their analysis of the economic background against which the Commission's work is set nor agreed on the relative importance of the economic objectives of wage policy. Nevertheless, it must again be stressed that these factors do not reduce the fundamental importance of the questions involved.

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[39] Isaac, 'The Machinery of an Incomes Policy' in *Wages and Incomes* (Sixth Autumn Forum of the Economic Society of Australia and New Zealand, Victorian Branch, 1964) 44, 48.

[40] This comment would apply particularly to Sweden, the Netherlands, Norway and, to a lesser degree, Britain.

The general level of wages and inflation

While the Commission's influence on the general money wage level particularly through variations in the basic wage and general level of margins, is important in periods of economic recession or depression, at present it is usually considered in the context of inflationary situations. This can involve consideration not only of the central problem of price stability, our main concern here, but also the related effects of such situations on the balance of payments, economic growth and the distribution of income.

It now is accepted fairly widely that the decisions of the Commission will be, at most, of secondary importance in an inflation due to general excess demand—put simply, the situation where the demand for goods and services exceeds the supply. The periods of most rapid inflation have commonly been of this type and here responsibility is seen to lie primarily with federal government monetary and fiscal policies. However, there is also fairly general agreement that other types of inflationary situations, broadly referred to as 'cost inflation' can not be fully controlled by these methods.[41] Conceptually, cost inflation is a tendency for money incomes to rise faster than real income, or output, even in the absence of general excess demand. Restrictive monetary and fiscal policies may be effective in curbing wage and price increases but only at the cost of a higher level of unemployment than is likely to be tolerated and, possibly, the retardation of economic growth. Where inflation takes this form the determination of money wage levels can be crucial and many economists see a need to act directly on such determinations. It should be emphasised that their aim is not to restrain increases in *real* wages but rather to avoid the price rises, and thus the offsetting of at least part of the increase in money wages, which could be expected if money wages were increased more rapidly than output (productivity) is increasing.

Two types of approach have been suggested. First, and most commonly in centralised systems of wage determination, a national wages (or more broadly, incomes) policy could be adopted. In the Australian context it usually is envisaged that such a policy would be implemented primarily through a modified Commission. Second, it is suggested that by a system of decentralised bargaining money wage determination would be governed to a much greater extent by 'local' economic considerations. This would act to restrain excessive wage increases by reducing the high degree of interdependence in wage determination and by making it more difficult for individual employers to pass on wage increases in higher prices.[42] Practically, this second

[41] *E.g.*, Isaac, 'The Machinery of an Incomes Policy' 44.

[42] In the Australian context see Downing and Isaac 'The 1961 Basic Wage Judgment and Wage Policy' (1961) 37 *Economic Record* 480, 492-494.

solution may be dismissed at least in the short-term, for the reasons that such a radical change in our institutional arrangements is hard to contemplate and even if it were brought about there is no guarantee that bargaining could be decentralised to this extent permanently. In Australia, with a strong tradition of the relativity of wage payments, interdependence of bargains could be expected effectively to bring about a high degree of centralisation of wage determination.

We are, therefore, at present left with the choice between an explicit national wages policy, in which the Commission would continue to have a central role, and the present situation where a wages policy, not always consistent and not integrated with other economic policy measures, is unavoidably implicit in the Commission's actions. It would be naive to proceed as though there were one generally accepted view as to the detailed nature of a desirable wages policy. Some believe that money wages should be geared directly to changes in productivity, supplemented in important ways by other governmental policy measures, rather than adjusted according to some imprecise notion of capacity to pay.[43] The inexactness of the capacity to pay principle is illustrated by the wide differences in the quantum of wage changes considered appropriate by individual members of the Commission. Mr McGarvie pointed out that although the Commission is not bound by the doctrine of precedent this is often not made clear. He suggests that—

> [I]t would be much better for the Commission in its judgments to make it clear that there has been a change in its approach and policy and to give the reasons for that change. This would avoid the frustration experienced by an organization which presents a case in reliance on a principle which appears to have been established by an earlier decision but is then told by the Commission that no such principle has been established.[44]

But the point is that the basis of this lament is likely to persist so long as the Commission attempts to adhere to its interpretation(s) of capacity to pay.

Others, while having a gearing principle implicit in their recommendations, believe that a broader incomes policy with a much greater range of supplementary measures is necessary before any departure from existing procedures would be acceptable.[45] No attempt will be made here to compare these approaches but it is important to remember that under either approach changes in the Commission's principles and procedures would be necessary.

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[43] *E.g., ibid.*

[44] McGarvie, *op. cit.* 65.

[45] Cochane, 'Aims of an Incomes Policy' and Isaac, 'The Machinery of an Incomes Policy', in *Wages and Incomes* (Sixth Autumn Forum of the Economic Society of Australia and New Zealand, Victorian Branch, 1964) 8 and 44.

A central problem in the evolution of a national wages policy, as well as in the present activities of the Commission, is the fact that it sets minimum wage rates only and thus does not have complete control over movements of actual money wages. This tends to be a major problem in any centralised system of wage determination. The most discussed source of difference between award and actual wages is over-award payments, some of which are employer-initiated to attract labour, but which increasingly are the formal result of collective bargaining outside the arbitration system. The experience of other countries suggests that attempts to prescribe both minimum and maximum rates would be ineffective so long as these are not consistent with labour market conditions and there is not the degree of co-operation from unions and employers that might be expected during periods of national emergency. Also experience in Australia and elsewhere shows how difficult it would be to administer such a scheme when disguised wage changes are possible through the media of up-grading, reclassification and other inducements, all of which are likely to influence labour costs. Mr McGarvie drew attention to the ambiguity in the Commission's consideration of evidence of over-award payments.[46] And the manner in which the Commission has considered this factor together with its desire to prevent those actually on award rates lagging behind has probably added to the pressure of cost inflation.

Recognition of the development of direct bargaining outside the arbitration system seems unavoidable. Two of a number of recent cases illustrate this point. Under the Melbourne Building Industry Agreement employers agreed to a wide range of over-award payments. Although the Commission refused to certify a memorandum of this agreement under the Act, it remains a prominent factor in the building trade in Melbourne. In the strike at General Motors Holden's plants the Commission was not called upon by either party. The penal provisions of the Act were invoked only as a means of achieving a return to work, neither removing the causes of the dispute nor settling the new over-award rates. Indeed, the arbitration machinery being concerned with the prescription of minimum rates was virtually by-passed in a dispute which centred around determination of wage rates.

The foregoing discussion suggests that these problems may never admit of an easy solution but that the difficulties are likely to be greater within the existing arbitration structure and procedures. The development of direct bargaining outside arbitration may weaken attempts to develop a national wages policy but this cannot be overcome by simply ignoring this bargaining. The question for the immediate future is whether the results of attempting to implement a national wages policy would be preferable to the outcome of the present system. One view

[46] McGarvie, *op. cit.* 64.

is that something in the way of income restraint would be better than nothing at all[47] and this appears to be a view in most western countries. Moreover, a certain amount of initial experimentation could be expected and this should be acceptable in view of the Commission's numerous, though sometimes disguised, changes in principle in recent years.

Relative wages

It is frequently claimed that the Australian system of wage fixation tends to bring about a greater degree of uniformity in wages for various types of labour than do less centralised systems. Admittedly, evidence to support this contention is again largely impressionistic but it is widely accepted as correct.[48] However, there is much less agreement concerning the significance of this feature of arbitration.

Mr McGarvie discussed the factors taken into account by the Commission in its assessment of work value for the determination of particular margins.[49] In the economic sense, this can be seen as, broadly, an attempt to establish a long-term structure of wage rates and to maintain relativity between them. Short-term economic considerations, in particular changes in demand for various types of labour, are discounted. Evidence of unemployment and unfilled vacancies and of over-award payments may reflect the short-term demand situation but this usually has been admitted in the context of general changes, either basic wage or general level of margins, rather than changes in the margin for a particular type of labour. Some economists do not attribute a great deal of importance to this aspect as they believe that short-term wage differences are not very effective in promoting mobility in the labour market[50] and thus that uniformity does not adversely affect efficiency in the allocation of labour. Even if this view underrates the importance of short-term factors it can be argued that the Commission's award structure is sufficiently modified, for example, by direct bargaining for over-award rates and by employer-initiated rates, so that the structure of actual wages could still perform this function. But this modification may not be enough. Whilst it is true that it is virtually impossible for the Commission to impose a complete set of relative wages through its award structure because of the existence of over-award payments and the practice of up-grading and reclassification, there are occupations where a number of factors rule out these possibilities. For example, in most government services and government instrumentalities over-award payments are not possible and in some private sectors of the

[47] Isaac, 'The Machinery of an Incomes Policy', 47.

[48] Laffer, 'Compulsory Arbitration and Collective Bargaining' (1962) 4 *Journal of Industrial Relations* 146, 146-147.

[49] McGarvie, *op. cit.* 75.

[50] Isaac, 'The Function of Wage Policy: The Australian Experience' (1958) LXXII *Quarterly Journal of Economics* 115, 129.

economy there is a strong tradition against such payments. Similarly, in both public and private employment there may be restrictive barriers, due largely to traditional organisation and work rules, which militate against wage changes *via* up-grading and reclassification. Where both factors operate strongly, the Commission may be able to control short-term as well as long-term movements in relative wages but labour market forces may then be worked out in the form of longer-term changes in the quality of labour supplied to these occupations. There is little doubt that for these essentially institutional reasons considerable differences exists between sectors in the ease with which wage adjustments can be made outside the arbitration framework and this could have important effects on the allocation of labour.

Given the difficulty of eliminating over-award payments, the incompleteness and haphazardness of these short-term adjustments may be reduced by enlarging the scope and equalizing the opportunities as between occupations for bargaining outside the arbitration system. The experience of countries which practice collective bargaining suggests that a greater diversity of wage payments could be expected but this is unlikely to be as great as might be expected if collective bargaining were no more than isolated trials of strength; a pattern of payments emerges.

Wage justice

Wage justice is an expression frequently encountered but seldom defined in discussions of the Australian arbitration system. Substantially, the concept variously refers to the protection of groups of workers with little bargaining strength, the feeling that there is a 'just' or 'equitable' set of relativities between wages and a 'just' distribution between wages and other forms of income. Again, there is no absolute standard indicating what is just or fair and attempts to elaborate on the concept soon lead to the making of value judgments. But in practice it often finds expression as little more than a further strengthening of the tendency for uniformity of wage payments and attempts to retain past distributions of income. It is difficult to find any evidence of the superiority of arbitration in achieving in the long-term a particular distribution of income or particular structures of relative wages. Even market-determined relative rates would in the long-term tend to reflect community standards of value of work. Moreover, the possibility of exploitation of isolated weaker groups will tend to decline in the long-term to the extent that mobility of labour increases with time. Thus the main advantage of arbitration on the score of 'justice' probably lies in the protection it affords weaker groups and possibly the imposition of a 'just' set of relative wages in the short-term. Bargaining outside the system has reduced the extent to which this is achieved and, as discussed earlier, attempts to impose a particular set of relative wages

which is not in accord with economic conditions may involve a substantial cost. Nevertheless, although most collective bargaining systems do attempt to afford some protection to weaker groups by such devices as minimum wage legislation, the performance of arbitration in this respect is seen as an important achievement.

Emphasis on wage justice tends to encourage centralisation of wage fixing arrangements and, in turn, such centralisation conditions and strengthens these attitudes. The prominence of the wage justice concept probably owes as much to the effects of centralisation as to traditional community sentiments. At least so long as we have centralised arrangements there will be stress on wage justice and thus the virtual inevitability of conflict between this objective and others, for example, wage restraint in the formulation of a national wages policy and, possibly, short-term flexibility of relative wages in order to promote labour market mobility.

III

There are obvious dangers in adopting the somewhat artificial division between industrial relations and a variety of economic aspects when discussing the performance of compulsory arbitration or any other system. Many of these facets are interrelated, for example, the interdependence of the question of relative wage rates and wage pressure as a factor in cost inflation; the relationship between the state of industrial relations and productivity or economic performance; and, where great importance is attached to wage justice, the frustrations engendered by inequalities which may react adversely on harmonious relationships. This interdependence of factors complicates the assessment of the performance of arbitration and its comparison with other systems of wage fixation and dispute settlement. Further, it would be necessary to make some judgment as to the relative importance of the various objectives when their fulfilment may, at points, conflict. One assessment has been that there is no decisive argument for preferring collective bargaining to compulsory arbitration as a means of achieving good industrial relations; and, although the Conciliation and Arbitration Commission has, in recent years, shown a lack of appreciation of the role of wages policy 'it does not follow from this that the record under collective bargaining would have been better or that the tribunal cannot mend its ways'.[51] Others have contended that collective bargaining is more likely to promote good industrial relations and this factor must have weight if there is no clear preference for either system on economic grounds.[52]

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[51] Hancock, *op. cit.* 30-31.

[52] Isaac, 'Dr. Hancock on Collective Bargaining' and Laffer, 'Compulsory Arbitration and Collective Bargaining' (1962) 4 *Journal of Industrial Relations* 141 and 146.

The discussion suggests that we are not getting the best of either world and should, therefore, think of viable ways of modifying our system. No one can seriously contemplate wholesale or sudden change as being practical. But it does seem that the arbitration system will have to be modified to accommodate a degree of bargaining within its framework. For the Commission and the federal government this would involve the explicit recognition and encouragement of bargaining rather than the present negative attitudes. The need for greater flexibility and experimentation in our institutional arrangements was recognised by the Joint Committee on Constitutional Review and, indeed, part of the Committee's proposals for change include the elimination of the limitation requiring disputes to be settled by conciliation and arbitration.[53]

Mr McGarvie cited a dictum of Kinsella J. of the Industrial Commission of New South Wales. Speaking about the practice of that tribunal the learned judge referred to the desirability of admitting innovation and to the dangers of rigid and static concepts in this jurisdiction.[54] We may add that this applies with equal force to the whole framework of arbitration and not only to its practice. Referring to the more flexible British system one writer has said—

> Events will compel change in our traditional approach to industrial relations. There is much to be said against precipitate action that might undermine, even destroy, the sound elements in our system of industrial relations. But there ought to be much more room for experiment, much more flexibility, much more vigorous discussion amongst the participants, than there has been in the recent past. The pace of economic, technological and social change is likely to be more, not less, rapid in the next twenty years and whether we like it or not we will be compelled to adapt our institutions and methods to the needs of the contemporary society.[55]

We believe that in the mid-sixties the same can be said of the Australian scene.

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[53] *Op. cit.* paras 748-750.

[54] McGarvie, *op. cit.* 52.

[55] Roberts, *Industrial Relations: Contemporary Problems and Perspectives* (1962) 26.