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Some Comparisons Between Compulsory Arbitration and Collective Bargaining[1]

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IT was a pleasure and a privilege to have been asked to speak in Brisbane to members of the Industrial Relations Society. The pleasure and privilege, however, did not make it easy for me to select which aspects of arbitration I should talk to you about. As President of the Commission it is not practicable to discuss decisions of the Commission in regard to the basic wage, standard hours of work, quantum and terms of long service leave, and the like. This is not only because these subjects are controversial, and that speaking for myself, as I do tonight, I must not embarrass my colleagues for whom I do not speak. It is also because these decisions are part of one constant continuing case rather than the series of separate cases they appear in outward form and cannot be modified, expanded or interpreted by one member. This sort of subjective prohibition prevents my discussing tonight some economic aspects of conciliation and arbitration which would interest those who wish to gaze into the crystal ball. However, I thought it might help if I gave some general views on compulsory arbitration as we have it, as well as some very general comparisons of our system with collective bargaining.

I am delighted to say that well qualified and intelligent critics of both the Australian system, and the decisions of those who run it, have recently had occasion to debate publicly on paper the relative merits of compulsory arbitration and collective bargaining. It happened in this way: Dr. Foenander wrote a paper in the *International Labour Review* in 1957 which it is fair to say favoured the Australian compulsory arbitration system against collective bargaining. Then Professor Isaac in the *Economic Record* a year later proclaimed his preference for collective bargaining, likewise Professor Kingsley Laffer in the *International Labour Review* in the same year. After these three

papers had appeared Professor Hancock of the University of Adelaide entered the fray and with evident detachment, but I would say a great deal of enjoyment, proceeded to pull each paper, if not each author, apart. His medium was the *Journal of Industrial Relations*. Whereupon Professors Isaac and Laffer, in articles conveniently published side by side in that journal, separately defended themselves against what they obviously regarded as Professor Hancock's attack. As far as I know Dr. Foenander has been willing to let his case rest, as our American friends say. I commend the papers of these four distinguished authors to you if you are interested in coming to anything like a final conclusion as to which system, or lack of system, should be preferred. Professor de Vyver of Duke University in the United States, at present Fullbright Lecturer at the University of Western Australia, has in May of this year made a valuable contribution to the subject in his Edward Shann Memorial Lecture.

One of the difficulties in comparing systems is that, generally speaking, they are not created by instantaneous waves of magic wands and are therefore not constructed in a consistently orderly and logical form. Rather, like the British Constitution, systems just grow like Topsy and are the rather untidy creatures of the individual histories of the countries concerned. As an example I think we have our Australian system of arbitration because of the fortuitous circumstances existing at the arrival of our nationhood. In the last couple of decades of the last century there had been a wave of strikes, the important ones running beyond State boundaries so that they passed beyond the control of a particular State. Some States and New Zealand had legislated to prevent strikes and favoured some sort of arbitration system to do so and promote industrial justice and, according to Mr. Justice Higgins, "the theory generally held at the time of our constitutional convention was that each State should be left to deal with its own labour conditions as it thought best. But an exception was made, after several discussions, in favour of labour disputes which pass beyond State boundaries and cannot be effectually dealt with by the laws of any one or more States".[2] The Constitution following the conventions gave to the federal parliament power to legislate with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The learned Judge went on to say: "Just as bush fires run through the artificial State lines, just as rabbits ignore them in pursuit of food, so do, frequently, industrial disputes. In pursuance of this power an Act was passed in 1904, constituting a Court for conciliation, and where conciliation is found impracticable, arbitration. The arbitration is compulsory in the sense that an award, if made, binds the parties. The Act makes

a strike or a lock-out an offence if the dispute is within the ambit of the Act—if the dispute is one that extends beyond the limits of one State. In other words, the process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all in the interest of the public".[3] These words of a great Australian spoken with the knowledge gained as one of the authors of our Constitution and also as second President of the Arbitration Court need only be changed because of the passing of the years in one respect. The Parliament repealed the legislation prohibiting strikes and lock-outs and there later followed the present methods of sanctions which consist first of the insertion in an award of the well-known bans clause forbidding breaches of the award which may be followed by Court action in the event of breach.

Higgins' concise account of the commencement of the Australian system might make it appear that it *was* created by one smart wave of the magic wands of constitutional and legislative power. But it is most probable that the authors of the sonorous compromise reflected in the placitum of the Constitution I have recited did not fully appreciate what would be the eventual scope of the power so given to the Australian Parliament. I doubt if they thought it would create a tribunal which could, by virtue of High Court and Privy Council interpretations, rule over the national system we have today. The tribunal today prescribes the minimum pay and conditions of employment of half the Australian work-force spread through the various States. In addition it exercises, if not economic powers, powers which result in important economic sequels. These in some cases can appear to have as great an impact on Australia's existing economic destiny as an important part of a Government's budget. Moreover the decisions of the tribunal are not in any way under the control of the government of the day.

The Government of course can and does have its say, but the say must be made in open court and succeeds or fails on the tribunal's own assessment of it. Thus one may think that the present powers were not in reality created instantaneously but that their growth has been gradual. For example it was not at once clear that there was no confinement to disputes and strikes of the "bush fire" and "wild rabbit" variety, and that the concept of paper disputes would extend the power as it has done. Thus it may be said that we owe our present system to the fact that just before we were a nation, disputes and strikes going beyond one State existed in such a way as to convince the framers of our national Constitution that legislative power was necessary to

deal with them. Also the timing was such, that in a new and pioneering community with the advent of a working class party as such, there was not the reluctance of the older established countries to legislate in unknown fields. Then we have the added ingredient of judicial interpretation by literally scores of High Court decisions delivered from time to time over the sixty years since the first legislation. It would appear that if the national power had not been interpreted as it has been, the States would have had various systems of arbitration, probably widely differing in character and effectiveness, and the national system would have been merely ancillary for the purpose of dealing with the "bush fire" and "wild rabbit" type of dispute which could not be dealt with effectually by a single State. In the result the emphasis is the other way round, with the national system by and large predominant, with the States looking after what is left over and, in the main, following the federal lead. Now it happens that, in some opinions, the growth of industrialisation and of competition in primary and secondary trade between nations, and the existence of situations described as "cold wars" would make it a very handy thing for any nation to have a national wages policy. A national system of minimum wage prescription can take account of the economic needs, powers and restrictions of the nation viewed as a whole rather than concentrate on particular industries and groups of industries. But under present conditions it is doubtful if a national wages policy in the real sense could be institutionally implemented.

In this context it is important that in the way our national system of arbitration has progressed it has been concerned in its prescription of wages with the minimum and not the maximum legally payable. Under a system of collective bargaining an employer or group of employers could (unless there were a contrary agreement with fellow employers) pay an employee or class of employees more than the amount specified in the agreement which was the outcome of the bargaining. No doubt this is done quite frequently. But I think on the whole the true contrast is that arbitration is concerned with minimum wages and collective bargaining with actual wages. I mention this contrast at this stage because so long as an arbitration system is concerned, as ours is, with minimum payments to the exclusion of maximum payments, there is of necessity scope in theory and practice for bargaining in particular or even in general cases for payments above the minimum payments. Once there is this area of permitted bargaining and the tendency today towards unions and groups of unions on the one hand, and organised employers and groups of employers on the other hand, concerning themselves with industrial relationships, it is obvious that individual bargainings easily lead to general or collective

bargainings. So that in Australia once the arbitration system has fulfilled its particular function of prescribing minimum wages there is room for collective bargaining. It is well known that a great deal of bargaining, for example about over-award margins, is done in particular industries such as those in the metal group. The totality of these payments represents, it is claimed, a significant portion of the increase in the "average weekly earnings" figure over recent years. But our system encourages the play of bargaining between employers and employees in another important way. I refer to the emphasis the system puts on conciliation not just as a part of the process of arbitration but as a means of avoiding the very necessity to arbitrate. It is significant in the Constitution and in the legislation the emphasis is on conciliation over arbitration. Placitum 35 gives the National Parliament power to legislate with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". The Statute under which the system works is called the Conciliation and Arbitration Act, not the Arbitration and Conciliation Act. The chief objects of the Act so far as are presently relevant are, and I take them in order, to promote goodwill in industry; to encourage conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes; and to provide means for preventing and settling industrial disputes not resolved by amicable agreement. I omit that object dealing with enforcement of awards and agreements because since 1956 that area is not within the control of those who conciliate and arbitrate. It may be noted that since 1956 the Act has provided for the separate office of Conciliator. The three Conciliators are confined to conciliation and have no power of arbitration unless the parties consent and agree to abide by the decision. The tremendous emphasis placed on conciliation before arbitration commences is not in my view sufficiently appreciated. This is important in our discussion because conciliation amounts to free bargaining between parties to a dispute or a possible dispute. In practice in every dispute which comes before a Commissioner he puts the parties into conference with each other before he starts the processes of arbitrating. He might do this by sending them before one of the Conciliators, or he may preside himself. As often as not he puts the disputing parties into conference on their own. So that in practice the Australian arbitration system encourages collective bargaining before arbitration becomes necessary. I have already mentioned the fact that once arbitration has laid down minimum wages, bargaining can take place in different areas for actual payments above the minimum prescribed. No doubt this is a feature which has always existed to some extent. However, in my time bargaining in respect of over-award payments has progressively

increased. As the development of our society and our system of arbitration has progressed, the significant growth of over-award payments has become a worrying feature to those whose duty it is to arbitrate in cases of nation-wide economic importance of which the basic wage is an example.

Nevertheless, although the problems caused by the existence of this bargaining and its manifestation in over-award payments are complex, this does not demonstrate that such bargaining should not take place or that such payments should not be agreed upon and made. It follows from what I have said that arbitration and collective bargaining do go hand in hand in this country. When noting that this is partly due to the fact that our arbitration system does not prescribe maximum as well as minimum wages, we should also note that the only call for such an autocratic adjunct of arbitration was during Australia's participation in war when it was justified under the Defence power.

When Australians think of countries who use collective bargaining they are inclined to imagine Nirvana-like places where governmental interference between employers and employees does not exist. This, of course, is far from the case. The growth of population and the growth of industry with the huge concentration of both, the acknowledgement of full employment as a governmental aim in the developed countries, the gradual emancipation of the population in undeveloped countries with the necessity for the progressive development of industry, and the expansion of education not only in the cultural but also in the technological field, have increasingly made it well-nigh impossible to keep governments out of any phase of modern industrial life including industrial relationships.

In the collective bargaining countries all sorts of governmental agencies exist to help employers and employees in their attempts successfully to bargain with each other. Further, once governments start to help it is inevitable that they restrict to some extent the freedom of those engaged in the bargaining. Thus these collective bargaining countries, and I speak very generally of course, not only have governmentally provided aids to help them, but also have very real restrictions on the freedom to bargain or use industrial strength. In America, the home of the free as well as of the rugged individualist, we find "Taft-Hartley" Acts, and in that country and in the United Kingdom we notice more and more the growth of ad hoc arbitration and ad hoc arbitrators. I mention this to show that in both types of countries to some extent collective bargaining and arbitration go hand in hand. The difference is that in some the emphasis is put on arbitration and in others on bargaining.

He who would investigate the merits of one system as against the other must of course investigate in detail and it is not my object here to do this. However, I think it is important to discuss one aspect that those who support collective bargaining as against arbitration stress in favour of the former. They assert that collective bargaining encourages a sense of responsibility in the persons who do the bargaining on behalf of employers on the one hand and employees on the other. Because failure to bargain successfully will result in the use of industrial might either in the form of lock-outs or strikes, it is imperative, the argument runs, in their own and the community interest that they should successfully compose their differences. The converse is argued in the case of a compulsory arbitration system where it is claimed this sense of responsibility is discouraged because the arbitrator is present to take the load of responsibility off their shoulders and impose his will on both parties. Responsibility is also discouraged, it is said, by the fact that once the arbitrator's will is imposed, both sides are by human nature itself inclined in their reports back to their principals to blame the arbitrator for the faults of the award, and are relieved of the necessity to explain and justify its terms as they would be in the case of an agreement for which they themselves were responsible. I incline to the view that this argument overlooks many human aspects. True, the arbitrator is nearly always wrong in the view of the parties, but I am sure the advocate, and those who instructed him to put his case in a particular way, get their share of censure on both the employers' and trade union sides. Professor Hancock and the other critics I have mentioned all discuss the question of responsibility and I am going to say no more than that I am not persuaded that it is discouraged by our system more than by the other. Arbitration cases, particularly the national ones, have become such a public feature of Australian life that the main arguments are described in the daily press comprehensively, and generally speaking, lucidly. Both the trade union spokesmen and those of the employers have to stand up and be counted in public forum in respect of these arguments. Also, as I have implied earlier, the question of how a case should be argued and conducted must be the subject of live debate, before and after and no doubt during hearings, and I should imagine there would be a lot of "I told you so's" after cases have been won and lost. But an important feature of our own system must not be lost sight of. In the years in which I have been associated with arbitration I have become deeply impressed with the emphasis given to economics in national cases by the advocates of both sides. This, together with the intelligent publicity given to those cases in learned journals and in sections of the press, has progressively over the years led to a realisation of the importance from the employers, the trade

unions and the community viewpoint of the value of research into industrial relations. This particularly applies to the economic aspects both from a national and group point of view. It is significant that in the forum over which I preside, both sides and the Commonwealth Government intervening have for a number of years deliberately based their arguments almost entirely and scientifically on economics. In the organised trades union and employer world a very high value has therefore been given to research into the lore of economics. This I am sure would not have occurred to the same extent in the absence of these national cases which are a feature of our system. I think the country owes and will continue to owe a tremendous debt to this research. Also it should encourage into the faculties of economics, commerce and political science young men who wish to play their part in public life well-equipped by tertiary education to do so. Equally it should lead graduates in those Faculties into the industrial relations field. A dramatic instance of the effect of research in the Commission's cases comes quickly to my mind. A few years back the Commonwealth Statistician decided that the old "C" Series Index had gradually become unrepresentative and wished to abandon it in favour of the new Consumer Price Index. The acceptance of the new Index in place of the old meant that current and future union claims were and would be reduced significantly in money amounts. Yet the unions agreed that the new Index should be used once they were satisfied by research that it was more appropriate than the old. Such a result and such responsibility on the part of a combatant in this disputatious field would have been virtually impossible when I first came onto this bench a little less than two decades ago. Yet I am sure it is one only of many examples of greater acceptance of responsibility on both sides of the industrial fence. These have occurred because of the recognition of the value of research, because cases are argued before a national audience on a national basis, and because these cases are the subject of informed and analytical criticism particularly in the learned journals. These are features which I would think would not be likely to be present in the same degree in a collective bargaining country.

Of course not all the cases before the Commission are national cases. Cases which concern the basic wage and such nation-wide subjects as standard hours of work and the general code of long service leave are, by their very nature, national cases. They come fairly regularly before Presidential Sessions of the Commission, that is, sessions of three or more Judges, and they tend to attract the publicity and glamour if the latter be a word in any way appropriate to the disputatious industrial scene. Important cases concerning Commonwealth Public

Servants may come to Presidential Sessions or full benches of the Commission by way of appeal or reference. But it would be most unfortunate if arbitration and the work of the Commission were considered and discussed as if these much publicised cases constituted the only or the essential work of the Commission. The bread and butter and basically important day to day work of the Commission is performed by its single members, and paradoxically the more successfully they perform their functions the less publicity they get and the less is their work discussed. The Commission has 16 members and is aided by three Conciliators. The 16 members comprise a President and five Deputy Presidents who are Judges and a Senior Commissioner and nine other Commissioners who do not need judicial qualifications. The Commission's awards cover directly the working conditions of about half the Australian work-force or something over 2¼ million workers spread over all six States and the two Territories. Two important industries with a nation-wide spread of work, namely, the Stevedoring (wharf labourers) and Maritime (seamen) industries, are by the legislation required to be dealt with by a Judge. The remaining industries or groups of industries within the Commissions' jurisdiction are just under 80 in number. They are divided amongst the ten Commissioners in appropriately related groups so that the work and responsibility is shared on as even a basis as possible, taking into account their geographical spread and their tendency to require attention. It is the responsibility of the Commissioners, not only to produce awards prescribing the code of industrial conditions for their various industries and to vary these awards from time to time so as to keep them up-to-date in a changing world, but to be ever at the ready for another function. This is to settle expeditiously, and generally speaking on the spot, those sudden flare-ups and stoppages which inevitably occur in the stress and strain of modern industry and industrial relationships. For instance, if a stoppage occurs or is likely to occur at a particular factory or undertaking, the Registrar or Deputy Registrar in the city concerned may be notified at once by either party or both by telephone or wire. He then passes the information on to the appropriate Commissioner who, generally speaking, gets to the trouble spot as soon as possible and endeavours to get the stoppage averted or, if it has already occurred, to get work resumed on the basis that an immediate inquiry will be made and his views of the rights and wrongs given to the parties at once. Often the Commissioner has to act with the knowledge that his right to decide the dispute may be open to serious jurisdictional challenge. Sometimes after he has settled the dispute the challenge comes and one party drags the other to the High Court. Fortunately, however, common sense and a sense of community responsibility on

both sides often prevail, and in the overwhelming majority of cases the Commissioner is enabled to perform this unostentatious but extremely valuable public service without interference from on high. But nevertheless the worry over jurisdiction is constant and wearing for each Commissioner. As I said earlier, the paradox is that the better he performs his task the less praise he gets, because nobody ever hears about the matter other than the parties immediately concerned. They, naturally and correctly, are more concerned with keeping the wheels of industry going once a particular stoppage has been avoided or ended.

The mention of stoppages brings me back to Mr. Justice Higgins' words: "The process of conciliation, with arbitration in the background, is substituted for the rude and barbarous processes of strike and lock-out. Reason is to displace force; the might of the State is to enforce peace between industrial combatants as well as between other combatants; and all the interest of the public".[4] Both the interested and the merely cynical will ask: "Has the system of conciliation and arbitration brought about this millennium?" The answer must be: "Of course it has not; strikes and stoppages still occur unfortunately to quite a significant extent". But the incidence and extent of strikes is a world-wide problem. The International Labour Office figures show that in one recent year (1959) over 110 million days were lost throughout the world by this cause.[5] As Professor Hancock points out, strikes occur to a greater degree in Australia than in some countries and to a lesser degree than in other countries. I don't think the answer will come from such a comparison. The real question, as far as this particular aspect is concerned, is whether we now have more or less strikes than we would have had if we had not had a system of conciliation and arbitration. I think that we have fewer strikes and stoppages than we would have had without the system. I must admit, however, that the opinion is intuitive rather than calculated. I think it is common ground among all critics that the Australian public supports the system and, although it is claimed that this has become merely a matter of habit, I myself feel that there is more to it than this. Although it does not prove anything statistically, I feel pretty confident that one of the reasons for the public support of the system is a belief that there are fewer strikes and lock-outs because of it. Indeed, Professor Isaac considers the Australian public prefers the arbitration system to collective bargaining, partly because it is "unduly morbid about strikes and untutored in the less tangible and more subtle aspects of industrial relations".[6] The more youthful among you might think that there is no ground for my belief and Professor Isaac's fear that the Australian public approves, and is determined to retain, its national arbitration system. I would,

therefore, remind you of a dynamic bit of political history. Mr. S. M. Bruce, Prime Minister of Australia in a seat regarded as impregnable as the seat of Kooyong now held by the present Prime Minister, not only managed to lead his government, also regarded as impregnable, to defeat in 1929, but lost his own seat. This, it is generally regarded, was because he proposed that the Commonwealth should vacate the arbitration field. Although this was a radical change in arbitration it would not have left a vacuum but would have left the States with full rights to maintain within their respective borders either their existing systems or any modification or enlargement of them. In recent years, too, the Australian Council of Trade Unions has publicly endorsed the arbitration system, although it stated there should be radical changes in its machinery,[7] and likewise the organised employers have stated officially that "industrial arbitration *must* be retained even though more and more industrial matters may be resolved in future by the process of conciliation".[8] I personally regard the fact that the public, the major political parties, the organised trade unions and the organised employers wish to retain the system as some evidence of its success. But if the cynical do not agree it is pretty obvious that here in Australia because of that fact we are going to retain the system, successful or not.

This benevolent approval of arbitration does not obtain in the United States. Indeed, Professor de Vyver, the distinguished visiting Professor from that country, says that the mere word "arbitration" has been described by one American arbitrator as "a glandular word"[9] meaning that "the mere articulation of the word causes thyroid and adrenal glands to secrete" and that at mention of the term "calm men get blood-shot eyes, pulses throb and temperatures rise".[10] I hope, as President of the Australian conciliation and arbitration system, that this is not so in our country, although I confess to being aware that immediately after some decisions there has been a tendency for "pulses to throb and temperatures to rise" but, on the whole, I think this is a temporary phenomenon on the part of those who consider they are losers. I gather also from the Professor that Australia has a greater incidence than the United States of the sudden and short flare-up type of strike occasioned by such things as the dismissal of a worker who is a shop steward or union official which underlines our important need of the service rendered by individual Commissioners which I have referred to earlier. However, referring to the refusal in the United States to arbitrate disputes concerning wages and other claims of an economic nature the Professor says that this means that "trial by economic combat is the method for settlement".[11] He then goes on to say: "When collective bargaining breaks down a long drawn-out strike may be the result. Thus in 1959 steel negotiations ended without a contract and

the ensuing strike lasted nearly four months. More recently New York newspaper publishers failed to agree with a large group of their workers and no daily papers were published in New York City for 114 days. Some indication of the importance of these strikes in the United States may be seen from the fact that for the year 1959 most of the time lost was accounted for by the prolonged steel strike".[12]

In another part of his paper the Professor reflects on the likelihood of Australia doing away with arbitration of economics disputes with its reasonable amount of uniformity throughout the Commonwealth and reverting to collective bargaining on a plant or perhaps an industry basis. His answer after his investigation over a period in this country is given in these words: "My guess is that most Australians would question the sense of plant or company bargaining with the possibility of a 116-day steel strike or a 114-day newspaper strike. Yet the afternative to Australian-type arbitration could well be the American style long strike that is always possible when bargaining breaks down".[13] The Professor concludes his paper with two paragraphs which I quote with the warning that they must not be taken out of the context of his whole paper and to indicate an unqualified benevolent approval of arbitration over collective bargaining. A fair reading of the whole of his paper would not show this. Nevertheless the concluding paragraphs of his paper are in these words:

> "American business and labour can see in Australia what might happen if they found the drawbacks to rights arbitration overwhelming and took the clauses out of their contracts. They could see strikes taking place over any number of management actions which under grievance arbitration with a no-strike clause would have been referred to arbitration. Both labour and management might decide that despite its drawbacks arbitration is better. Strike losses could easily exceed losses which either side might suffer at the hands of an arbitrator.
>
> "Finally, arbitration as part of an industrial relations system was never intended to cure all industrial ills. Years ago Justice Higgins called the Australian procedures 'A New Province for Law and Order'. He did not maintain that the peace described in the Book of Isaiah would follow compulsory arbitration. He suggested that a type of law similar to the criminal and civil codes might be applied to labour-management relations. Despite the drawbacks of our criminal and civil legal systems, and despite the fact that people still steal, still cheat in business transactions, and still break the laws in many ways, we take pride in ourselves as countries where law and order prevail. In the same way, despite drawbacks and despite strikes and other 'law-breaking' in the industrial relations system, we have and are developing industrial relations law. Arbitration, therefore, in different ways in different countries has fulfilled Justice Higgins' vision of a New Province for Law and Order".[14]

Some people claim that an arbitration system leads to claims for wages and conditions which are fantastically exaggerated and that this

would not apply to a system of collective bargaining. They claim that this is inherently evil because it tends to bring the parties into greater and more emphatic dispute. If it were not for one factor I will mention in a minute, I can see no reason to suppose that claims made before an arbitrator are any more exaggerated than the claims that would be put before the other side when argument was starting round the collective bargaining table. But the critics, and even the learned critics I have already mentioned tonight, forget that there is a very real reason why claims are often put at their extreme highest in the federal Commission. This is because the Commission has, under the Constitution, jurisdiction only to determine the dispute before it and is bound by the top and bottom limits of any claim. This applies not only to the original award made, but also to any variation which the Commission might be asked to make over the years. Until another demand were made and refused, the original amount claimed would remain the ceiling beyond which the Commission could not go. Thus, for those who know the realities of the situation, claims which are featured in the press and ridiculed in conversation as being fantastically high are often made in such a manner for the convenience not only of the party making the claim but also of the other party, and in order to avoid the creation of unnecessary fresh disputes. It has also been claimed that the arbitration system is unduly costly to the parties appearing before it. Whatever may have been the position in the past, I am sure there is no substance in this claim now. The national cases, in which the costs would be higher than in the usual run of cases do not last these days more than a matter of weeks. In any case, they concern such vast sums of money that you could multiply the present costs many times over without the relationship between the amounts at stake and the amounts expended in costs being in any way significant. It has been asserted that "over-legalism" is a feature of our arbitration system and that there is little or no legalism in collective bargaining. My own view, fortified by the observations of outside observers from other countries and at home, is that there is now little or no substance in the charge against the system. The Act directs that technicalities and formalities be kept at a minimum and my colleagues and myself, since the inception of the Commission in 1956, have paid a great deal of attention to this requirement of the legislation. It must be indicated, however, that when any tribunal works under a power contained in a written Constitution the question of jurisdiction is ever present and no amount of wishing will make such problems other than legal ones. However, legalism, and I use the term for want of a better shorthand term, rears its head everywhere even in collective bargaining countries. For instance, in the United States, speaking very generally, once an

agreement has been arrived at as a result of the bargaining it is reduced into writing of course and when disputes from time to time occur, as they do, arbitrators are called in who, on the surface at any rate, are required to give a legal interpretation of the agreement and not to settle the dispute on its merits. Thus arbitration in America is concerned with the rights flowing from agreements and not the economic issues we deal with in Australia. It is not the object of this paper to discuss the significance of this inherent difference.

Arbitration and collective bargaining are not mutually exclusive. In my view they go hand in hand to some extent in collective bargaining countries and to a greater extent in this country. Here the partnership may exist before arbitration becomes necessary and sometimes may avoid the need for any arbitration at all.

It is true that, in these cases if there is a federal award in existence or a federal award has been sought by one of the parties, the bargaining has some of the imprint of the seal of arbitration about it. This is not only because the bargaining is carried out within the arbitration system but also because, even if it leads to complete agreement on all subjects, the result almost certainly will be manifested either in a consent award or in an agreement which becomes certified under the Act. In either case the document recording the agreement becomes an award of the Commission in all senses, including that of enforcement. Nevertheless, I think it would be unreal not to recognise that within the compulsory arbitration system itself there is a deliberate encouragement and, indeed, emphasis on conciliation which after all is bargaining. It is frequently the case that the conference into which a Commissioner puts the parties in a case where an award is sought results in agreement in all but three or four aspects of the dispute. When this occurs it means that the parties have successfully bargained in relation to perhaps 90 per cent of the claims. I think the instinctive objection among those who do object to the existence of our arbitration system is based on a repugnance against the word compulsory. It is because I must admit to the element of compulsion in our system that I stress, perhaps unduly to your minds, the emphasis the system itself puts on conciliation. It is also necessary, however, to remember that our arbitration is compulsory in the sense that an award, if made, binds the parties and also in the sense that once brought within the system you are almost certainly compelled to remain there. The national system, however, is not compulsory in every sense. Otherwise of course the whole of the work-force and not merely half of it would now be subject to the awards of the Commission.

I would like to make a few observations on the other area where the play of bargaining occurs within our system. I have said this area

exists in part at any rate because the Commission prescribes minimum payments and not maximum. Those who receive award wages receive the basic wage plus a margin for skill, responsibility and the like. These wages will from time to time be added to by a prescribed basic wage increase or a prescribed increase in margins. However, on past patterns workers will still receive in addition the over-award payments which have been the result of past bargaining, and at some time in the future negotiations may commence for further over-award additions. It is known that a considerable pocket of over-award payments exists and is reflected in the table of "Average Weekly Earnings" and that this has often been the result of negotiations outside the system. But this sort of bargaining does not appear to be organised in such a way that it takes place at regular intervals, as over recent years have the Commission's basic wage and marginal prescriptions. The demands upon, and their treatment by, individual employers and groups of employers by various unions on behalf of various types of worker may depend upon a number of factors. Among these would be the shortage or otherwise of the sort of labour concerned and the prosperity of the employer concerned or even of the particular industry. Another factor could be the extent to which employers seeking or retaining the same type of labour in short supply would agree not to compete with each other. These factors are of course by no means exhaustive. There is a distinction between this over-award bargaining and that which takes place before an award is made. The over-award payment is made by agreement which, in the great majority of cases, is not recorded with the Commission and may not even be written. Indeed, investigations both in hearings before the Commission and otherwise, have not presented a clear picture of the circumstances, amount, class of worker, reason for payment and the like.

It would not be proper for me in my position to say in a personal paper like this what I think should be done or not be done in the future in this free bargaining area tacked on to our compulsory arbitration system, but in any case I am not in a position to give clear-cut solutions of problems in this area. I do think, however, that many problems exist and will progressively crop up for solution. The organised trade unions and organised employers have a responsibility not only to their members who receive and make the payments, but to employees and employers at large as well as to the community generally. I think that experience not only in Australia but also, and perhaps even more so, in other countries demonstrates that in the modern world, wage rates for particular workers cannot be looked at in isolation. They cannot be looked at even in the more liberal isolation of industries and groups of industries. In my view they must be looked at, to some extent

at any rate, on a national basis. I do not mean to imply by this that the wages concerned (and I mean of course actual as opposed to minimum) should necessarily or desirably be controlled by an arbitration or other centralised authority. I do, however, consider that they should be looked at by the negotiators on each side from a national viewpoint and that this will become more and more so in the future. If I am correct in this, the responsibility on the organised trade unions and on the organised employers will become heavier and heavier. I feel confident that the responsibility will be accepted. I also feel confident that whatever part the conciliation or arbitration system may play in the future in this particular area, it has already helped considerably in the general national sphere in the manners I have described, namely, by having encouraged a sense of national responsibility on the part of disputants, by having fostered a reliance on research, and by having indirectly led to the public recognition of the value of the study of economics and the participation of economic students in industrial life. In short the attempt by the Commission, pursuant to the will of the legislation, to put the public interest to the forefront has been recognised as valid by employers and unions and will I trust continue to be so. Perhaps more should have been done in recent years to encourage agreements under Part X of the Act which allows organisations of unions and employers to enter into and register agreements containing codes for preventing and settling future or existing disputes by conciliation and arbitration. Only two or three agreements per year have been registered since 1959 under this Part. They could play a useful part in the over-award payment area.

Most people would, I believe, agree with Mr. Justice Higgins that the processes of strike and lock-out are "rude and barbarous" and that "reason" in the industrial world "should displace force". The tendency towards the over-valuation of industrial might and the taking advantage of industrial vulnerability in making and resisting claims in this over-award payment area is of sufficient growth to cause some apprehension. This is one of the reasons I have emphasised the national responsibility of the employers and trade unions concerned, and that the problems with which particular unions and particular employers are dealing go beyond their own narrow interests. It is possible that significant increases of particular groups of wages, if sought and paid in isolation from the interests of wage earners generally, could lead even in a prosperous community to the existence of pockets of comparative poverty. In communities which believe, as ours does, in full employment a great responsibility rests on all sections of the community.

Lastly, and not leastly, I think that recognition of the importance of the national interest in industrial relations generally has led to recognition of the need for understanding of the arbitration system and its mysteries. This has in its turn led to the establishment of more and more bodies such as your own. This explains how glad I was to receive your invitation and how eagerly I have availed myself of it. I thank you for this opportunity to have a talk with you and would conclude by emphasising that my aim has been to encourage your interest in many aspects of the Commission's works and its problems rather than to teach you or lay down solutions. A great deal depends on the understanding of your Society and others like it.

FOOTNOTES

1. An address given to the Industrial Relations Society of Queensland, Nov. 10th, 1964, and in an earlier form to the Industrial Relations Society of South Australia and to the Canberra Branch of the Royal Institute of Public administration.
2. 3, 4. Henry Bournes Higgins, *A New Province for Law and Order*, p. 2.
5. International Labour Office, *Report of the Director-General, Part I Labour Relations,* Geneva, 1961, p. 96 (quoted by Professor de Vyver).
6. Professor Isaac, *Economic Record,* December, 1958, Vol. XXXIV, p. 361 (quoted by Professor Hancock).
7. Executive Report, A.C.T.U., September 5, 1955, p. 25 (quoted by Professor Isaac).
8. The Editorial in the *Employers' Review,* October 7, 1957 (quoted by Professor Isaac).

9 and 10. Professor de Vyver, *Fourth Edward Shann Memorial Lecture,* 1964, p. 1. Published by University of Western Australia Press.

11 and 12. *Ibid,* p. 10.

13 and 14, *Ibid,* p. 23.