COLLECTIVE BARGAINING AND COMPULSORY ARBITRATION - THE AMERICAN AND AUSTRALIAN EXPERIENCE AND THEIR IMPACT ON MANAGEMENT RIGHTS — I

A Thesis presented in connection with an application for a Masters of Law degree

by

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May 1969
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PREFACE

The opportunity for the present study was afforded when the writer was fortunate enough to be the recipient of an Australian-American Educational Foundation Grant to study the industrial arbitration system of Australia for a period of one year, commencing in August 1966.

Attempts at comparative investigations and analyses of the American and Australian industrial relations systems have been successfully undertaken over recent years. Academics and practitioners from both countries have sought to study problems both of a general survey nature and of particular institutions and practices within each system. Having the benefit of their past studies and findings the present writer became aware of the scope of the problems yet to be explored. Starting from the assumption that one of the criteria for the successful functioning of any industrial relations system is the creation of delegation to and acceptance by the parties of functional responsibilities within the system, it was decided to study thoroughly one meaningful segment in the totality; namely, the impact of our respective systems on the concept of "management rights". In so doing, a careful examination of the legal, political and socio-economic institutions could be undertaken, thereby making possible an analysis of not only the general over-all structure of a system, but also the day-to-day operations which form the integral components.

Having thus decided on the nature and scope of the research project, it was necessary to decide on the mode of presentation. It seemed that the detailed organization and structuring required by a university for the submission of a thesis would be the most systematic and academic way of regimenting this study.

The carrying out of the field work in Australia provided both advantages and difficulties. Operating from the Sydney University Law School, full entrée was given to libraries, both public and private.

Extensive interviews, both formal and informal, with representatives from trade unions, employer organizations and Government departments, and with members of the industrial tribunals, provided the writer with innumerable opportunities to clarify thinking and to gain valuable material for this study. On numerous occasions it was possible to sit in or and observe, first-hand, industrial conferences and dispute settlements. All of this practical experience, along with extensive readings of cases, agreements and awards, afforded substantial addition to the otherwise available source materials.

Two problems which the writer encountered presented themselves regularly. First was the ever-present time factor. With the industrial climate being in a constant state of agitation and problems suddenly arising, one had to be aware of geographic restrictions and the accessibility of the relevant parties, and therefore the question of how much time and depth to devote to the various situations was constantly present. Secondly, having been schooled in the American collective bargaining system, it was necessary to adopt an objective attitude to many factors and situations, and detach subjective values when looking at the Australian system. I am indeed grateful to the numerous people who constantly served to remind me of this, and trust that this detachment, where appropriate, is duly reflected.

The writer has elected to impose the cutoff date of August 1967, the date of the expiration of his grant, for the materials used in the development of this project. Finally, as this study is directed to both an American and an Australian audience, the writer, assuming that each audience may be relatively unfamiliar with the other's industrial relations system, has goen into greater detail in the introductory background and institutional framework chapters than would ordinarily have been warranted. It is in the hope of engendering better understanding and ease of comparison that this approach has been used.

Space prohibits my thanking individually all of those who provided the necessary guidance and information that aided me in structuring the body of this project. I would extend special thanks to Professor D. C. Thomson of the Sydney University Law School who so kindly served as my supervisor during my stay in Australia, and to Dr. R. A. Bauman of the University of Sydney who provided the initial inspiration which resulted in this thesis being undertaken. However, any failing, explicit or implicit, in the pages that follow lie solely with the writer.

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April 1969.

* The views expressed in this thesis are the personal views of the writer and in no way are meant to represent those of the National Labor Relations Board except where expressly stated.

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CHAPTER 1

INTRODUCTION

The complexities and significance of industrial relations systems are mirrored in the extensive legislative, legal and economic procedures and regulations applicable thereto, which have been developed in the United States and Australia. Under common law, owners of business establishments possess certain freedom of action, incidental to their legal status, which are commonly called "management rights" or "management prerogatives". Management spokesman would define the term to refer to "those rights or that authority which management must have in order successfully to carry out its function of managing the enterprise". This study will attempt to present a comparative investigation and analysis of how two differing industrial relations systems -- the "collective bargaining" system of the United States and the "conciliation and arbitration" system of Australia -- have, through their legal institutions and industrial participants, acted upon this concept.

In effect, the essential power in an industrial relations system is that of decision-making. As affects the concept under analysis in this study -- "management rights" -- this is reflected in a two-fold manner: the job-related rights of management (e.g., flexibility in operations) and the worker-related rights of management (e.g., discipline). Decisions must be made concerning who is hired, promoted, transferred, laid-off; wage scales must be set, as is also often the case with production standards; equipment must be selected and, as technological developments take place, it must be replaced; production schedules must be set; discipline must be maintained and grievances settled; and work must sometimes be transferred from one plant to another.

Who is to make these decisions and how are they to be made? By and large industry protests against any attempts by labor to interfere with its plans for greater efficiency or to impose on it any

financial or social responsibilities for the employees whose jobs disappear. The significant point is that management considers such matters to be entirely outside the pale of unions, insisting that the traditional pattern continue. Yet, legislation and industrial practices in both countries have had an impact on management's common-law rights to a greater or lesser degree.

In the light of these factors, it will be the purpose of this study to attempt to pose and answer three fundamental questions:

1. What has been the influence of unionism, within the context of the collective bargaining and arbitration systems, on management?

2. Why has the influence in each case been what it is?

3. What trends are likely and/or possible in the future?

Very briefly, the plan and organization of the body of this study is as follows:

In order to better understand and consider the problems raised by and the accommodations made to the issues under analysis in this study, it will first be necessary to present the historical and structural framework within which the systems developed and function today.

Chapter 2 will briefly survey the growth and characteristic features of the respective systems, pointing out the factors which hav influenced and are influencing their development. In particular, initial references to economic and political factors, past and present, will be made, with greater discussion to follow, where relevant, in subsequent chapters.

Chapter 3 attempts to outline the relevant legal framework which creates both the permissive and restrictive boundaries within which the participants may operate. The aims and objectives of pertinent legislation will be referred to, with brief mention of significant changes over the years. Finally, this chapter looks at the composition, role and powers of the industrial tribunals and administrative agencies created by the two systems.

In Chapter 4, the structures, characteristics and policies of the participants in the systems -- employees and their trade unions and employers and their organizations -- will be presented. This chapter will attempt to examine the interaction of the historical development and legal framework on the attitudes towards and divergences from the operational systems, with emphasis on examples of cooperation and private modifications.

In both countries, orderly rule-making -- whether by "legislatve" arbitration on interests (as in Australia), by "judicial" arbitration on rights (as in America), or by privately legislated collective bargaining on interests (as in America and to a small degree in Australia) -- may be supplanted by disorderly strikes or other direct action.

Chapter 5 will examine the degree and nature of strike activity in both systems, from both a long term and recent view, with emphasis given to current trends. The pressures upon and the weapons available to the participants will be discussed, with special emphasis on the roles of private and public containment and settlement.

Chapter 6 focuses on the effect of government regulation and industrial practices on the way an employer may manipulate his plant and his work force; the extent to which the areas of plant administration and job security are affected by law and the industrial participants. Where relevant, statutory provisions, contractual or award provisions, private agreements, and cases decisions will be referred to. In particular, special attention will be paid to the level of institutional involvement on these various issues, noting the role of union-management cooperation to settle outstanding problems.

Having presented, in Chapters 2-6, a structural and institutional panorama of these two industrial relations systems, with their practical operational effects, Chapter 7 will highlight, by way

of evaluations and conclusions, the emerging characteristics and potential compatibility of the two systems. In addition, suggestions as to future lines of research will be made.

CHAPTER 2

HISTORICAL BACKGROUND AND TRANSITION

Over the years academics and practitioners who have presented both comparative and inter se studies of the arbitration system of Australia and the collective bargaining system of the United States attempted to purpoint the key distinguishing characteristic -- the one factor that explains why the two systems developed in the ways they did.

Mark Perlman, in his foundational study of the Australian systems in the early 1950's,[1] emphasized Australia's social climate as being determinative: "The Australian culture with its characteristic state paternalism and economic egalitarianism has little, if any, of the rugged individualsim of the American social tradition."[2]

Another writer in the same period, M. J. C. Vile, felt that in the field of labor regulation the significant difference between the American and Australian systems was not the difference of constitutional form or interpretation, but the fact that in the United States, labor is a series of pressure groups, while in Australia labor is a political party.[3] While recognizing that this was an oversimplification, Vile held that political forces are the real determinants of patterns of regulation and the constitutional structure is an important though secondary factor in the situation.

While it can be contended that both of these statements are generalizations and, though partially valid, do not fully explain why the systems are what they are today, they do provide a starting point from which to trace the beginnings and developments of the respective industrial relations scheme.

The origins of colonial Australia have greatly influenced the economic and industrial development. The failure of the attempted land reforms in the 1860's meant that from then on the great majority of Australians would be required to work for wages. By 1870 the

"increasing prices of exports had stimulated the flow of British capital again" and Australia entered on twenty years of economic prosperity. It was in this favorable economy of full employment and high wages for most workers that the trade union movement of Australia became firmly established.[4]

By 1890 the employers were no longer prepared to grant any concessions to the workers and began to organize so as to contest the determination of wages and conditions.[5] The struggle culminated in a series of strikes from 1890 to 1894: The Maritime Strike of 1890, the Shearers' Strike of 1891 in Queensland, the Miners' Strike of 1892 at Broken Hill, and the Shearers' Strike of 1894 in Queensland. "Each lasted a few months, but they were part of the general struggle between capital and labor as to who was to carry the main burden of the economic depression."

The union post-mortem on the strikes of 1890-1894 led to the following conclusions: (a) Union organization had to be broadened; (b) Unions needed some form of federation if they were to resist the attacks of the employer class; (c) the direct intervention of the state and the use of the police and law courts against the unionists led to the conclusion that the workers had to organize as a separate political party; that if control of the state could be gained by a means of a majority in Parliament it could then be operated in the interests of the workers against the employers by passing "good" laws. The creation of the Australian Labor Party in 1891 and the Australian Council of Trade Unions in 1928 saw the enactment of these conclusions.

The unions also formed a positive outlook on compulsory arbitration, viewing it as a means of reconciling the interests of workers and capitalists, rendering strikes obsolete and unnecessary, and strengthening unionism. In 1889, an Inter-Colonial Trades Union

Congress carried a resolution: "That in the opinion of this Congress the time has arrived for the establishment of Boards of Conciliation and Arbitration for the settlement of all disputes between capital and labor, and so prevent strikes and lockouts".[6/]

At the same time, Australian capitalism as it developed into the pre-First World War period also had certain specific characteristics which stemmed from its colonial origins. There was an early development of monopolistic control in certain key non-manufacturing industries such as wool, cattle, mining and shipping. The manufacturing industry, on the other hand, was characterized by small units of production, with a high percentage of Australian factory workers engaged in light consumer goods industries which flourished behind State and Federal tariff walls. Finally, the direct responsibility of Australian Government for many economic activities, such as railways, post offices and telegraphs, roads, etc., produced early acceptance on the part of the Australian Labor Party (and therefore the majority of trade economists) of state enterprise as a reasonalble alternative to private capitalist enterprise in many fields.[7/]

Thus the development of industrial arbitration in Australia can be seen as a product of the ideas and policies generated in the labor movement and the needs of developing capitalism. Thinking was also influenced by the traditions in Australia of leaning on the Government to solve social and economic problems which were "inherited from the early difficult pioneering days". The years between 1880 and 1910 were the formative ones for industrial arbitration, with the decade of 1890 to 1900 being the period when the basic principles on which the Commonwealth system was to be based were charged.

The NSW-Royal Commission on the 1890 strike recommended the establishment of a Board of Conciliation and Arbitration as a means of avoiding strikes, and in 1892 the Trades Disputes Conciliation and Arbitration Act was passed with the support of the Labor Party. The

Board which was established by this Act only lasted for three years because there was no compulsion of the parties involved and the employers refused to use it on several occasions, but it did introduce the principle for the first time that awards could be enforced legally if made with the agreement of both parties. In 1899 a Conciliation and Arbitration Act was passed in New South Wales (NSW) which introduced the new idea of the prevention as well as the settlement of disputes.[8] The first Industrial Arbitration Act, as we currently know it, went into effect in 1901 and has undergone numerous amendments until it has reached its current form.

Australia, as a nation, came into existence on January 1, 1901. Previously the present Australian States -- NSW, Victoria, South Australia, Western Australia, Queensland and Tasmania -- had existed as separate British colonies completely independent one of the other, and when they decided to combine as a single nation, each State was reluctant to surrender too many of its powers to an untried central government. Thus Australia emerged as a federation, not a unitary State, and the Constitution of the new nation provided for a strict division of powers between the Commonwealth and State Governments. This division of authority has greatly influenced the system of industrial regulation in Australia and has at least in part, determined the lines along which it has developed.

The main source of the Commonwealth Government's industrial power is Section 51, placitum XXX of the Constitution which states that Parliament "shall have power to make laws for the peace, order and good government of the Commonwealth with respect to . . . conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" /emphasis added/.[9] One result of this limitation, which the individual States are not subjected to, is that the Federal Parliament does not in peacetime have a general power to prescribe wages and

working condtions either by direct legislation or by delegating authority to an administrative department of the government. This is notably contrasted by the power of Congress in the United States, whereby, for instance, in 1938, it enacted the Fair Labor Standards Act, which, with its subsequent amendments, establishes the minimum wage and maximum hours applicable on a Federal basis.

Section 51 confirms other powers on Parliament, but they all have narrower applications as far as industrial regulation is concerned. For instance, the trade and commerce power (placitum i), to make laws with regard to "trade and commerce with other countries, and among the States". (Section 98 of the Constitution) enables valid federal legislation to be passed with respect to employment in the maritime industry and on the waterfront. But the High Court will not read this power in the same light as the United States Supreme Court. While on this comparative constitutional point, it is relevant to point out that there is no provision in the United States Constitution which is the counterpart of, or corresponding with, the Australian Constitution's industrial power.

Other constitutional powers sometimes called into play include the defense power, placitum VI, which is useful in connection with Federal control of labor relations by reason of the prosecution of a constantly expanding, large-scale defense program and the fact that the industrial and exclusive powers (Section 52, as to public service) can have no application to some of the employments. Finally, under the incidental power (placitum XXXIX) Parliament can legislate with regard to "matters incidental to the execution" of these powers assigned to it, but the High Court has held that the "incidental power" is essentially an implied and complimentary, as distinct from a supplementary, force, and it is not to be read so as to justify the acquisition of any new power.

This constituional power was first reflected in the Commonwealth Conciliation and Arbitration Act of 1904. There have been numerous amendments, some more significant than others, which will be discussed in the following chapter. Although there is scope for "collective bargaining" within all of the systems, Federal and State, set up, each government has chosen in one form or another to establish a tribunal of some kind with power to make binding awards.

All systems, federal and state, rest upon a concept of the coverage of the term "industrial" which is much wider than the same word in the context of American industrial relations. The reach of the Australian tribunals extends much more widely into the professional and the lower and intermediate managerial sections. Government employees, also, seem to be brought more within the reach of the Australian arbitration system than they are in the United States.

Not all the State systems have reflected the Commonwealth system. Two States, Victoria and Tasmania, have chosen to rely on wages boards to regulate conditions in industry.[10/] They are so called because their "industrial tribunals" are their hundreds of tripartite "wages boards" set up industry by industry. "In these two states labor disputes are settled, not by juridical 'law making' but by a process of dispute determination more like the multipartite parliamentary process characteristic of legislatures."[11/] Each industry will have a wages board comprised of both employer and employee representatives with an independent chairman. On minor issues, both employer and employee representatives might be able to agree about the issue. On major issues very rarely could they agree, the result being a tendency for decisions to be given by the independent chairman. To avoid differing results among the industries, the trend has been to a minimum number of chairmen in order to secure uniformity. The next step seemed to be to provide a tribunal to which there could be some appeal to keep the various chairmen within

reasonable bounds. In Victoria, you now have an Industrial Appeals Court comprised of a County Court judge and two representative members sitting with him. Tasmania still has no appellate tribunal.

The other four States have adopted arbitration systems which while differing to varied degrees, most notably in the absence of Constitutional restrictions as to separation of powers, have certain features in common with the Commonwealth system. Federal and State systems are both based on the principle of (1) joint participation by employers and employees, operating through registered unions or organizations as the recognized bargaining units; (2) the systems encourage bargaining between these groups representing employees and employers and they provide that the terms of an industrial agreement shall be legally enforceable; (3) they aim to settle industrial disputes characterized by strikes and industrial warfare, by conciliation, if possible, but in default of any agreement, they issue awards binding on the parties to a dispute; (4) the tribunals under each system are directed to proceed according "equity and good conscience" and are not bound to observe the rules of law governing the admission of evidence; (5) they make it possible for the terms of collective agreements and awards to be a common rule binding on all employers and employees in the industry concerned; however, the jurisdiction given to the Commonwealth Commission has been held to be ultra vires the Constitution.

"What has given the Arbitration system its distinctive feature is the way in which it has grown into a system of industrial regulation, in the way in which the dispute concept has been used not to obtain ad hoc decisions on contentions matters . . . but to obtain general 'legislative' determinations of future rights and relationships . . . ."[12/] The tribunals very early came to be concerned much more with the determination of work rules for the future than with alleviation of grievances arising out of those rules in operation.

But "with the passage of time /and/ with the multiplication of awards and consequent multiplication of award-interpretation cases, major tribunals found themselves, perforce, dealing with such rights cases."[13] In the Federal system this gave vent to a series of amendments to the Act and a string of cases trying to define and confine the arbitral and judicatory powers, culminating in the now famous Boilermakers' Case,[14] which confined the judicial questions of enforcement and interpretation of awards to a newly created Industrial Court and left the Conciliation and Arbitration Commission with the arbitral powers similar to those formerly exercised by both the Commission and the Commonwealth Court of Conciliation and Arbitration.

Thus, Australia has experienced more than sixty years of an arbitration system. While the system is held to be "an integral part of the social and economic structure of the country,"[15] there have been disenchanted voices over the years. In fact, in 1934 the ACTU resolved-to "call on trade unions to withdraw from the Arbitration Courts" and to adopt a policy of direct negotiations with the employers. But no such action resulted. In recent years academics and participants, most notably the unions, have agains raised their voices against the operations of the arbitration system. Such criticisms as those that the system is too legalistic, burdened by excessive delays in administering claims, and too dependent on the tribunals have become common-place. With the advent of a full-employment economy, increasing production of secondary industry, and burgeoning industrial prosperity, the unions have taken the tribunals at their word and regard awards as "bare" minimums and seek to gain more through private negotiations, almost solely on a single company or industry basis. This perhaps most forcefully represented by the growth in "over-award" payments which the tribunals claim no jurisdiction to regulate.

The years 1965 and 1966 have seen dissatisfaction grow and gave vent to new shows of discontent. The advent of increasing technological changes impose important questions to industries and unions as to job content, machinery and job security. The year 1966 saw the latest display of union discontent in the way the tribunals have handled the question of prosperity in a full-employment economy, as exemplified by the General Motors-Holden decision which refused to grant a monetary increase on the basis of a particular company's profitability. Since no privately negotiated agreement can give less than the registered award, there is a general reluctance among the employers to bargain with the unions. While not many people seriously advocate the total abandonment of the present system, calls for changes and accommodations are becoming more frequent. They have prompted Sir Richard Kirby, President of the Conciliation and Arbitration Commission to comment: "If we started afresh in the industrial sphere no doubt we could devise a more effective division of industrial powers between the States on the one hand and the Commonwealth on the other. Like it or not, however, we had inherited our present from our history."[16/] What the future holds in store for the Australian arbitration system might become open to serious conjecture after the subsequent treatment of the issues under analysis in this study.

The development of trade unionism and the system of collective bargaining in the United States is exemplified by adaptation to the prevailing economic, social and political conditions. Organization by workers took place in one form or another almost since the inception of the United States Government. During the nineteenth century, "we find a diversity of movements that ranged along the ideological spectrum from broad reformism to narrow and relatively conservative economic unionism".[17/] We saw the short-lived producers' and consumers' cooperatives, and attempts at agrarianism; the

beginnings of the national trade union in the form of the National Labor Union (1866) and the Greenback Movement (1867-1878). Following the depression and riots of 1877, the Knights of Labor rose quickly from 9000 in 1879 to 700,000 in 1886, and then fell just as quickly so that by 1893 it had only 75,000.[18/] Structured along the lines of "one big union" to oppose the "capitalist class," the strike proved to be both its success and failure. It was left for the American Federation of Labor (AFL) to take over, in 1886, where the Knights had failed. Composed of craft unions, its early policy was that the gradual improvement of the economic condition of the worker was the only useful course of action to follow, and that collective bargaining was the chief tool to use. Indeed, until relatively recent times, few American employers conceded that unions had a legitimate role to perform. The long history of determined union opposition plus the high mortality rate suffered by labor organizations impressed many labor leaders with the need for contractual arrangements to enhance the survival possibilities of their unions.

After this brief survey of the beginnings of a national labor movement, it is worthwhile to ask why an economic rather than a political form of unionism emerged. There were workingmen's parties during the nineteenth century, though in their activities they tended to emphasize citizenship rights rather than economic matters such as wages and hours. The labor historian, John R. Commons, believed that the legislatures and the courts frustrated labor to the degree that workers in this country had to achieve, through collective bargaining, what had been granted by law in other countries. As has been recently stated:

> "Whether the nature of this unionism with its emphasis upon collective bargaining grew out of a worker consciousness of scarcity of opportunity and a concommitant desire to 'own' and extend the area of opportunity as Perlman averred or whether it reflected a unique combination of [19/]

opportunity, insecurity, and a high standard of living as Ulman has contended,20/ economic unionism had a sufficient appeal to workers and a sufficient effectiveness as a method to endure in an environment that was still hostile to trade unionism in many ways."21/

The collective bargaining law developed during the post-Civil War industrial revolution. The economy of the country changed from one dominated by agricultural and commercial enterprise to one dominated by industrial activities. In the late nineteenth and early twentieth century, insofar as the law was concerned, the tactical position of management was superior to that of labor because the management philosophy was more readily transformed into legal power in a particular labor dispute. The dominating property ideology and the ability to call the power of government into play in a favorable way afforded the forces of management an advantage over those of labor

Because the United States developed its great strength through private enterprise, the belief developed that freedom of enterprise should be untrammelled. In so far as it meant no government intervention it was a belief not only of the employers but also of the unions. They were not interested in state minimum wages; they thought it was best to leave this to negotiations. One sees this general distrust of government activity today in the fact that broadcasting, telegraph and telephone services, railways, electricity and gas, all remain in private hands.22/

The nineteenth century saw the unions confronted with hostile public opinion which was early reflected in the labor conspiracy cases.23/ Even with the decision in Commonwealth v. Hunt,23a/ in 1842, which rejected the doctrine that actions of labor combinations were illegal per se, the unions were still faced with the "property" concept which was given force in the judicial application of the injunction. With the passage of the Sherman Antitrust Act in 1890, to combat trusts and conspiracies that restrain interstate commerce

and forbid persons to monopolize trade or commerce among the states, the courts again went after labor organizations, condemning certain restrictive activities of labor unions.[24] It was argued before 1914 that some of these decisions raised doubts concerning the right of such bodies to exist. There was hope that legislative approval of their existence might be interpreted as endorsing their activities. So, in response to the demands of labor, Congressional relief was secured in Sections 6 and 20 of the Clayton Act,[25] which withdrew legitimate union activities from the purview of the Sherman Act and prohibited issuance of injunctions against them. But the exemptions were not interpreted to grant complete immunity; the exemption was expressly limited to the "legitimate objects" of such groups. The content of legitimacy was a problem left for the courts. But, as Prof. Ralph Winter, points out, "Experience under the Sherman Act has demonstrated that the fundamental question of labor policy must be left to the political process".[26]

With the 1930's came the effects of the depression, and most of the gains won by unions were virtually wiped clean. It was time for rethinking public policy toward labor relations. The enactment of the Norris-LaGuardia Act[27] in 1932 was prompted by the belief that by restricting the judiciary of its most effective weapon -- the injunction -- for the enforcement of court-made labor policy, the substantive law restricting union activities would be effectively nullified, thereby establishing a government policy of neutrality.[28] But, moreover, Congress believed that formulation of labor policy was not a proper judicial function.[29]

On June 16, 1933, the National Industrial Recovery Act was passed,[30] authorizing, in Title I, the enactment of codes of "fair competition" within industries, an easing of competitive rigors in the hope of creating a favorable climate for expansion of business. The Collective

bargaining section of Title I, the famous Section 7(a), provided for employees to have the right to organize and bargain collectively through representatives of their own choosing. But, the NIRA structure, and with it Section 7(a), was declared by the United States Supreme Court to be an unconstitutional delegation of legislative power to the President and that it regulated business transactions that were not part of interstate commerce.[31/]

Building around "Section 7(a)" Congress, six weeks after the demise of the NIRA, passed the Wagner Act (NLRA)[32/] which gave affirmative protection and encouragement to union organization and collective bargaining and further reflected Congress' desire to narrow the judiciary's role in the formulation of labor policy by entrusting principal enforcement responsibilities to an administrative agency -- the National Labor Relations Board (NLRB). The Constitutional grounding for the Act is found in Section 8 of Article 1 of the Constitution, which enumerates positive powers of Congress and includes, without elaboration, the statement that Congress shall have power "To regulate Commerce with foreign nations and among the several States . . . ." In 1937, in the case of N.L.R.B. v. Jones & Laughlin Steel Corp.,[33/] the United States Supreme Court upheld the constitutionality of this Act.

The labor legislation since the 1930's has reflected a change in public attitude toward labor policy and trade union power. The NLRA represented a determination that individual bargaining was not an adequate way for individual employees to protect their terms and conditions of employment. With this public policy enacted, union membership grew from 3.6 million in 1935 to 14 million in 1947. It was inevitable that growth of this kind would turn a certain amount of public sentiment away from organized labor. The frequency of jurisdictional disputes, the occasional examples of coercive picketing, the well-publicized work stoppages

during the war, irregularities in the internal affairs of some unions, and the failure of the AFL and CIO (which grew up in the 1930's on an industry basis) to accomodate their differences are examples of factors that destroyed some part of the general sympathy for unionism. As a result, from 1935 to 1947, 169 bills concerned with national labor policy were introduced in Congress.[34/] Subsequent enactment of the Taft-Hartley Act[35/] in 1947 and its amendments in 1959,[36/] have been a response to these problems, and have provided for Congressional regulation of certain union activities. Finally, in 1959, with passage of the Landrum-Griffin Act,[37/] Congress sought to regulate the internal operations of trade unions.

If the NLRA represented a policy to keep extensive government control out of the field of labor relations, the question can properly be raised as to the justification of the passage of the Landrum-Griffin Act which regulates the private bodies relied on to avoid government regulation. A possible answer to this query can be suggested if you look on the NLRA as a system of government regulations seeking to avoid government regulations, a piece of "procedural" legislation establishing a process for dealings between unions and employers so as to avoid "substantive" regulations. Landrum-Griffin can then be explained as a "shoring up" process through which the decisions (and the decision-making process of the NLRA) are made, imposing a democratic process as an alternative to regulating the decisions made.

Just as the legislation has been in transition, so too has the concept of collective bargaining. Toward the end of the 1950's the economic base upon which post-war collective bargaining had largely rested was shaken by several interrelated forces of steadily mounting effects: accelerated technological change; increase in foreign

competition; changes in the work force, in particular the decline in organized manual worker occupations and a rise of unorganized white-collar worker occupations, which weakened the trade union structure; high rates of unemployment; and scarcity of jobs for which displaced workers and workers in vulnerable occupations and ages were fitted.

New techniques for collective bargaining were devised. "Human relations" committees and other types of joint study or continuous bargaining committees were established -- e.g., in steel, automobiles, meatpacking, rubber, electrical equipment. Neutral advisers were used with the result that such plans as the Kaiser Steel "long-range sharing" plan and the steel industry's extended vacation plan were instituted. These and other examples of arrangements negotiated to meet the changing industrial environment will be examined more fully in subsequent chapters.

Work Force and Technological Change:

As has been alluded to in discussing both systems, the problems that technological changes present are coming to the foreground, more rapidly, perhaps, in the United States. Before briefly discussing the nature of the changes and the attitudes of those affected by them, a look at the numbers and composition of the work force might prove helpful.

For Australia, the estimated 1966 figures show that there were 4.7 million in the total work force out of a population of 11.7, thereby placing 40.5 percent of the population in the work force. 38/ Of this figure, some 2.1 million were members of trade unions, which, when taken as a percentage of all wage and salary earners in civilian employment, estimated to be 3.7 million as of September, 1966, means that just under 60 percent are organized. A look at the position of industry in Australia in 1965 shows that the number of factory workers

in the manufacturing industry averaged 1.26 million employed in some 61,000 factories.[39/] On the basis of 1965 over-all figures, manufacturing employed about 35 percent of the work force as compared with primary industry's 13 percent.

When looking at the concentration of wealth, one finds, according to Hutson's figures, that 80 percent of the working population were wage and salary earners, and 1 percent of the 54,000 taxable companies earned between them 53 percent of all company profits, produced more than 50 percent of the national production, and employed over 50 percent of the private work force.

In the United States, since so few agricultural workers are effectively organized, it is perhaps more useful to talk of the nonagricultural work force. In 1966, the nonagricultural work force numbered some 64-65 million, approximately one-third of the total population. With 18-19 million workers represented by union, approximately 30 percent of the work force was organized. Since union and collective agreement coverage virtually coincide, it is estimated that approximately 30 percent of the work force is, therefore, covered by collective agreements, though in manufacturing it is estimated that coverage extends to two-thirds of the work force. /Contrast this with Australia where close to 90 percent of the work force is covered by awards or agreements./

Having briefly developed the historical and statistical background, a cursory examination of the degree, nature and effects technological change has had on industry, public policy and trade unions can be undertaken.

Since the 1950's the American collective bargaining system has been confronted with the realization of technological developments. A major challenge to the parties has been to develop a system of cooperation that will preserve the element of choice without

undermining the effectiveness of the overall program to deal with job insecurity in a context of technological change. In this endeavor, the American system of collective bargaining has proven flexible. It has sought some acceptable basis for distributing the costs and benefits of the new technology among those who are directly affected. Also, it has attempted to deal with the difficult questions of equity that frequently have been ignored in previous periods of change.

Unions early sought new arrangements, with a view to both achieving job security and cushioning the impact of dislocation. It has been put forth that four principal contitions determine policies adopted by unions toward technological change: (1) the nature of the union; (2) the condition of the industry or enterprise; (3) the nature of the technological change itself; e.g., effect of the change on the number of jobs on the process or in the bargaining unit, effect on degree of skill and responsibility of employees, and effect on kind of skill or other qualifications required to do the work; (4) the stage of development of technological change and of union policy toward it.[40/]

As an illustration, the United Automobile Workers has had a long-established policy. In a publication issued in 1954, this union stressed its prime goal as security in employment without severe economic bosses to workers in following the job wherever it may be.[41/] A couple of years later, Walter Reuther stated: "If the result of automation is that large numbers of workers in a plant have to learn new skills, it is just as reasonable to expect the employer to pay the cost of retraining, including wages, as it is that he should pay the cost of building the new plant or installing the new equipment."[42/] Adding to this, the AFL-CIO looked upon security as the key to meeting the problems imposed by technological change.[43/]

Representative of some of the new negotiated arrangements have been: attrition plans to protect employed workers, special mechanization and automation funds (severance payments) to which employers contribute (e.g., the West Coast Longshore plan and the Armour plan. , Plans for sharing benefits (e.g., American Motors - UAW), methods of removing restrictive work practices while protecting equities of workers involved, and special early retriement provisions in pension plans.

But what has been the actual impact of technological change? Participants in the collective bargaining arena can easily be justified in concluding that technological change has taken its toll on job security and job displacement. Unemployment reached high proportions, though the 1960's have seen these figures reduced from a high of 7 percent to less than 4 percent of the work force, while automation has made rapid gains. Major disputes in railroads, meatpacking, airlines, longshore, maintenance and newspapers have all revolved around technological change. Its role has been widely assumed in steel, textiles, automobiles and mining. Yet various economists have played down both the severity and actual causal relationship: "How much is technological, how much economic, and how much simply the fact that we are more sensitive to human distress than we once were?"[44/]

Mr. Charles E. Silberman, an economist, writer and editor of Fortune Magazine, feels "it has been established that the big rise in unemployment in America in the '50's was caused by the restrictive financial and fiscal policies of the Eisenhower Administration and not by automation."[45/] In a recent article, after presenting statistical periodic comparisons of displacement rates, he concludes that "the real culprit was slowness of economic growth

which accentuated displacement by restraining product demand in some industries while preventing the creation of employment opportunities at a rate adequate to absorb the displaced and new entrants to the labor force."[46/]

Nonetheless, the effects have caused problems for the collective bargaining process. The same article goes on to look at the changes involved in some of the more notable disputes.[47/] For example, the railroad work rules dispute was clearly technological but resulted from the accumulated failures to adjust as changes occurred. In meat packing the changes were in market structure and transportation which allowed for location of plants nearer the source of raw material which in turn encouraged abandonment of obsolete plants. These and other technological disputes and their "settlements" will be examined further in the context of the theme of this study -- impact on management rights.

The government has not turned a deaf ear to this complex situation, and indeed some commentators have placed the matter solely in its hands: "The state of economic knowledge is such that a satisfactory rate of job creation is a matter of public policy choice."[48/] In August 1964, Congress, at President Johnson's request, established a National Committee on Technology, Automation and Economic Progress and charged it with preparation of a report on (1) past effects and current and prospective role and pace of technological change; (2) the impact of technological and economic change on production, employment and social institutions; (3) the areas of community and human needs towards which new technologies might be directed; (4) the most effective means for utilizing new technology in new endeavors; and (5) the action which should be taken by governmental bodies to promote technological change and to meet the problems arising from such change.

The Committee, composed of fourteen persons selected from the highest ranks of industry, labor and education, met in monthly two-day sessions from January 1965. Its completed report was submitted in January 1966.[49] Among its proposals was the call for a Congressional study of the possibility of providing every American family with a guaranteed annual income. The report reflected union goals for protecting benefits lost by workers who are displaced or whose jobs are shifted. It proposed an insurance system to secure pension rights and advocated portability of employee credits and benefits. The Committee also called on unions and employers to "begin to discuss" what it termed a "single standard of pay" for all employees. "As an objective," the report said, "it could be a stated matter of social policy that each industry seek, as well as it can, to put all employees on a salaried basis," a goal, incidentally, that the Auto Workers has advocated since 1955.[50]

The interaction of the collective bargaining system and public policy as to technological changes will come in for more detailed treatment in Part III's focus on that phase of the impact on "management rights."

When considering the impact of technology on the Australian industrial scene the question arises as to why these developments like seniority, severance pay and other special arrangements for redundancy, along with serious disputes based on technological problems, have not taken place on such a grand scale. Having observed the transition in American in the 1950's, the unions began making dire predictions: "It is estimated that in office work 80 percent of all secretaries, clerks and typists will have been displaced by mahinces in ten years."[51] The ACTU began proposing the establishment of a national tripartite committee for the purpose of ensuring adequate consultation and cooperation on this important subject.

In October 1958, under the provisions of the NSW Industrial Arbitration Act (IAA), reference was made to the Industrial Commission for an inquiry and report on (1) the incidence in industry in NSW of any recent mechanization or other technological changes in industrial processes; (2) the effect of these changes with respect to employment; (3) practical measures deemed necessary to protect the legitimate interests of employees engaged in any industry affected. In particular as to the introduction of safeguards such as (a) adequate notice to employees and unions concerned, (b) terms and conditions of transfers, and (c) training of displaced employees. In 1963 the report was published of the inquiry by Mr. Justice Richards. It was found that changes had happened slowly without problems of unemployment; redundancy problems were at a minimum. Part of the answer may be in the fact that the wealth of natural resources plus a relatively small population allow the rapid introduction of automated processes in Australia much more easily than had been the case in the United States.[52/] Also, the smallness of pupulation and limited funds account for a lower demand for products, which leads to the introduction of less-specialized technology.[53/]

Despite the recent Postal Workers Union stoppage over the introduction of an electronic mail sorting machine with its resultant lower rate of pay for femal operators[54/] and the trouble on the waterfront as to demarcation and redundancy over the increasing use of containerization,[55/] the introduction of major technological change has proceded to date with little industrial unrest. By June 1965, with 9000 less staff, freight volume had increased in NSW by about 60 percent. This had been accomplished

by the replacing of steam locomotives with diesel electric and electric locomotives and other technological innovations. Some officials of the Australian Railways Union expect that containerization would bring about a reduction of at least 50 percent of staff employed in railway depots.[56/] The greatest impact will most probably be felt by the white-collar section, as the employers look to automation as a way of reducing the overhead cost of their salaries. As an illustration, the volume of installation of digital computers is increasing rapidly. A recent report by the Queensland branches of the ACTU and the Australian Council of Salaried and Professional Associations (ACSPA) points out that "in 1960 there were 36 operating in Australia; by 1962 that number had almost trebled to 99; by 1964 the number had grown to 238; at the end of 1965 to 293; by June 30, 1966, 410; and today close to 600."[57/] Two notable examples of the problems raised and accommodations made are presented in the cases of Mobil Oil Company and Caltex Oil Co. decisions to centralize their accounting procedures.[58/] While in both instances settlements have been made without calling on the industrial tribunals for a ruling, a test case on redundancy seems inevitable.

With these circumstances in mind, what is being done? As a result of the 1963 report in NSW, the IAA was amended in 1964 by the inclusion of Section 88G which requires the Industrial Commission, when it is approached, to make provisions as to what the obligations, duties and responsibilities of an employer are to be on the occasion of the introduction or proposed introduction of mechanization or technological changes in the industry in which he is engaged. The following is an example of the type of provision inserted in awards and agreements as a result of Section 88G:

"Where, on account of the introduction or proposed introduction by an employer of mechanization or technological changes in the industry in which he is engaged, the employer terminates the employment of an employee who has been employed by him for the preceding 12 months, he shall give the employee 3 months notice of termination of his employment."

In a recently held Automation Seminar in Sydney in October 1966, the ACTU called on unions from metal, service, transport, manufacturing, food and building groups, along with the ACSPA and the High Council of Commonwealth Public Service Organizations (HCCPSO), to report on technological effects in their industries, as well as suggestions as to union, employer and government responsibility.[59/] In seeking more than just notice, the unions seemed to be unanimous in reaffirming their support for the creation of a tripartite committee, and many called for (1) no introduction of automation without previous consultation; (2) no redundancy arising from introduction of automation, labor so displaced to be retained on the payroll pending alternative work without loss of earnings; (3) increased productivity resulting from these processes to be reflected in increased earnings and reduced hours. In this vein, the Queensland report, supra, points out that until now automation problems have been resolved at the industrial level, but that "the unions should look to the establishment of minimum standards adopted on a national basis."[60/]

This growing concern and unity of the union movement and the reluctant willingness on the part of employers to negotiate settlements in advance, can make for increasing industrial unrest in the future.[61/] The recently concluded Waterfront Industry Conference, with representatives from unions, employers and Government, and chaired by an independent chairmen, breaks new ground. While the final agreement is limited expressly to this particular industry, there is room for it becoming a pace-setter.

The problems that technological changes impose on management vis-a-vis the trade unions will be further explored in Part III, with some conjecture in the final chapter being made on the likely future course of events. But, before that, a look at the legal setting within which the parties must operate, and a look at the parties themselves, are in order.

CHAPTER 3

LEGAL FRAMEWORK: LEGISLATIVE, JUDICIAL AND ADMINISTRATIVE

Once it was decided that the common-law approach to industrial relations was no longer in the public interest it became necessary to substitute some form of legal institutions to create and regulate the participants and the "contractual" arrangements representative of the respective systems. It will be the purpose of this chapter to outline the nature and scope of the legislative, judicial and administrative machinery which have evolved to meet the needs of these policy determinations. In the next chapter, the structure and policies of the participants -- unions and employer organizations, will be explored, along with their attitudes toward and divergencies from the systems within which they operate.

AUSTRALIA

Keeping in mind the Constitutional difficulties confronting the Federal system and the varied State approaches, perhaps the view of a trade unionist, somewhat disenchanted with the present system, most colorfully captures the ingredients of the Australian arbitration system:

> "Mix together two State arbitration systems which have some similarity, two similar State wages boards systems which are different in some respects, two State systems which are crossbred between arbitration and wages boards systems, and a Commonwealth arbitration system which has some similarity to two of the State systems. Drop in an assortment of associated tribunals, both State and Commonwealth, such as Coal Industry Boards, a Stevedoring Industry Authority, Public Service Boards, and various other subsidiary tribunals. Season with Departments of Labor, both State and Commonwealth, a Tariff Board, State Trade Union Acts, and special State legislation, to cover such things as compensation, apprenticeship, equal pay, hours, long service leave and adjustments to basic wage. Throw in some common law, sprinkle with the legal fraternity, flavour with a suggestion of lunacy, and simmer the mixture well on the hotplate of employer-employees relations." 1/

I. Commomwealth

One of the major factors necessitating organized arbitation in Australia was the limitation of power of the Commonwealth Parliament to legislate directly on conditions of employment and hence the necessity not only to delegate this power but also to delegate it to a body which could only act through conciliation and arbitration and then in respect only of disputes extending beyond one State.

The first Court of Conciliation and Arbitration was set up by an Act of Parliament in 1904. Since then, the Act has been amended some 30 times, and, in addition, six referenda have been held to amend the Constitution to extend the powers and functions of the Court, all such referenda having been defeated. After a series of amendments directly resulting from High Court cases, the present federal industrial machinery, through which the awards governing the terms and conditions of employment are determined, was established. The Boilermaker's Case found that a combination of judicial and arbitral functions in one body, the Court of Conciliation and Arbitration, was outside the powers conferred upon the Commonwealth Parliament by the Constitution. The new system creates two quite separate bodies, the Commonwealth Industrial Court and the Commonwealth Conciliation and Arbitration Commission. These two bodies have the main task of carrying out the objects of the Conciliation and Arbitration 1904-1966:

1. To promote good will in industry;

2. To encourage conciliation with a view to amicable agreements thereby preventing and settling industrial disputes;

3. To provide means for preventing and settling industrial disputes . . . with the maximum of expediency and minimum of legal form and technicality.

4. To provide for observation and enforcement of awards and agreements made in the settlement of industrial disputes;

5. To encourage organization of representative bodies of employers and employees and their registration under the Act.

A. Commonwealth Industrial Court

The functions of this Court (which at present consists of a Chief Justice and four other Judges) are judicial in nature. This tribunal is the principal tribunal appointed for the interpretation and enforcement of orders and awards made by the Commission. It has the power, in addition to deciding all questions of law referred to it by the Commission, to hear appeals from the Registar and from inferior courts in various matters arising under the Act, to answer any question under the rules of an organization and to look into disputed ballots, and rights of individuals to be, or to remain a member of an organization.

Considerable public attention has been focused on the Court's penal powers, e.g., ss. 109, 111, 119 and 122. Power conferred by sec. 109 for the making of mandatory orders for compliance with the Act or with an Award of the Commission and the issuance of injunctive orders against breach of an order or award, breach of which orders lead to contempt proceedings and imposition of fines, is vested in the Industrial Court alone. The scope and affects of this power will be more fully explored in Chapter 5.

On the question of appeals, since the Industrial Court is a federal court an appeal lies to the High Court unless expressly excluded by the Act. However, sec. 114 places express limitations on such appeals. It purports to provide appeals to the Industrial Court alone and to eliminate any appeal either to the High Court or other tribunal. But this provision merely confers this exclusive appeallate jurisdiction on the Industrial Court in connection with matters arising under the Arbitration Act which is clearly a matter of Federal jurisdiction. Such provisions was held valid by the High Court, the exclusion being justified as an "exception" within the meaning of s. 73 of the Constitution to the right of appeal to

the High Court. Hence it appears valid and applicable to proceedings for breach of award under s. 119 as well as proceedings for breach of Act. However, under s. 75(v) of the Constitution, prerogative writs, both of prohibition and mandamus, are available where the Court either acts without jurisdiction[2/] or conversely, where it refuses to exercise a jurisdiction which in fact it has.[3/]

The Court of Conciliation and Arbitration still exists and those who were appointed to it pre-1956 are still members of it. Its retention was to enable an appeal against the decision in the Boilermaker's case to be prosecuted and to deal with matters of a nature.

B. Commonwealth Conciliation and Arbitration Commission:

The concept of the Conciliation Commissioners, which was introduced in 1947 amendments to aid the Court and encourage greater emphasis on conciliation, has been carried forward into the present machinery by the division of the Commission into Lay and Presidental members. The Commission has sixteen members and is aided by three Conciliators. The sixteen 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 number of industries or groups of industries within the Commission's jurisdiction are just under eighty. To give effect to the requirements of the Act, the President assigns to each commissioner a group or a number of industries that are covered by Federal awards, and, subject to practical limitations, each Commissioner deals with the disputes within his assignment. In addition to dealing with industrial disputes the Senior Commissioner allocates and organizes the work of commissioners and conciliators. It is the responsibility of Commissioners not only to produce awards prescribing a code of

industrial conditions for their various industries and to vary them from time to time so as to keep them up-to-date in a changing economy, but also to be ready to settle expeditiously and on the spot those sudden flare-ups and stoppages which inevitably occur.

The Commission now sits in quite a number of forms. Some fundamental industrial issues are reserved for hearing by a Bench of not less than three Presidential members nominated by the President. That form of the Commission has exclusive power over alternation of the male basic wage, determination or alternation of the female basic wage, alteration of the standards hours in any industry and provisions relating to long service leave in any industry. It has exclusive power over these matters, no single Deputy-President and no Commissioner being able to deal with them. The presidential members have the same qualifications and status as Judges.

The Commissioners, ten in number, do not require any formal qualifications to be appointed, but come from men of proven status, ability and experience in the industrial field irrespective of whether before appointment they were employer advocates, trade union officials or Government officials. The purpose of the Lay Commissioners on hearing of an industrial dispute or its likely occurrence (through a section 28 notification) is to help in the process of conciliation (section 29 compulsory conference) and to arbitration where they are unable to bring parties into agreement. They conduct hearings at which the parties to an industrial dispute are represented and arrange private conferences and informal discussion where deemed helpful.

Under section 30, provision is made for conciliators, presently three in number, to aid the Commissioners in the work. They are made

available whenever a member of the Commission, dealing with the particular section of industry in which the dispute arises, feels that a Conciliator might help. To avoid prejudice resulting from any discussion that took place at the conference, before the Conciliator, the Act provides that the Conciliator cannot furnish a report unless the parties to the dispute consent and agree on its terms. If parties find there are few outstanding matters after conciliation, they may be willing in these circumstances to have the Conciliator settle any remaining points rather than involve themselves in another and more formal arbitration before the Commission. However, any agreement arrived at out of this conciliatory process will, if it is to have effect of an award, still need to be certified by the Commission.

Section 44 allows the Commission to refer an industrial dispute which is before it to a Local Industrial Board for investigation and report, delegating to that Board such powers of the Commission as are deemed necessary, and on the basis of said report, make its award.

To appreciate the extent of the use made of ss. 30 and 44 and the nature of the subject matter dealt with, see Table I , in Appendix A .

On the question of appeals from the Commission, no appeal lies to High Court from any award or order ot the Commission (either full bench or single member) firstly because the Commission is not a "federal court" within the meaning of s. 73 of the Commonwealth Constitution and secondly, s. 60(1) of the Act makes decisions of the Commission final and conclusive. However, as in the case of the Industrial Court, control via s. 75(v) of the Constitution cannot be excluded by the Act.

In addition to the above mentioned tribunals the Commonwealth Parliament has established two special tribunals. These are the Coal Industry Tribunal and the Public Service Arbitrator. The former was established under joint legislation by Commonwealth and NSW Parliaments to consider and determine disputes in coal mining region. The tribunal, through conciliation and arbitration, regulates the industrial conditions of employees in the coal-mining industry in all states (except West Australia) even though a dispute is not interstate in character. The Public Service Arbitrator is concerned with employees of the Commonwealth Government and its instrumentalities, and under the Public Service Arbitration Act 1920-1956, has power to determine matters submitted to him relating to their rates of pay and conditions of employment. 4/

II. New South Wales

A. Industrial Commission:

An award-making and award-interpreting tribunal consisting entirely of Judges, it has judicial as well as conciliatory and arbitral powers. An appeal lies to the Industrial Commission against any order or award made by a conciliation commissioner or by a conciliation committee.

Section 30A sets out the general powers and functions of the Commission to "(a) endeavor . . . to settle 'industrial matters' by means of conciliation; (b) take all reasonable steps to effect an amicable settlement of industrial matters." Certain of the powers, authorities and functions of the Commission are exercisable by the Commission in Court Session (such members of the Commission being not less than three in number as may from time to time be chosen by the President) and not otherwise, though S. 30B(2) allows the commission in court session to delegate any of its powers, functions or authorities, in any matter, to any one member sitting alone.

State industrial authorities are not technically bound by decisions of Federal industrial authorities. The Industrial Commission has never considered itself bound in all circumstances to follow or apply any principle that has been announced, nor has any such principle been regarded as immutable:[5] "While bound to pay great respect to the decisions of their predecessors, Judges of this Court as now constituted are not controlled by precedent."[6]

While a decision of the Industrial Commission cannot be regarded as a precedent which becomes an authority in the Commonwealth Industrial Court, that Court has held that having regard to the undesirability of industrial authorities putting into effect different conclusions on the same questions of law, the Court should be reluctant to disagree on a point of law with a decision of a tribunal such as the Industrial Commission.[7]

B. Conciliation Commissioners:

A conciliation commissioner is a statutory tribunal constituted under S. 15 of the Industrial Arbitration Act, the limits of whose authority are imposed by the Act. Accordingly, the orders which a conciliation commissioner may make are only those which the Act as a whole authorizes him to make. At present there are six, with one being designated senior conciliation commissioner. It is his duty to determine the committees of which each conciliation commissioner is to be chairman either generally or for the purpose of hearing of a particular application. He allocates the industries to the particular commissioners, and it is through the committees that the bulk of the award-making work occurs.

Under S. 25, the commissioners have particular duty to investigate disputes as soon as they are notified of them. A dispute must be notified to the Registrar whenever a union or employer becomes aware of it within the meaning paragraphs a, b, c of S. 25(1), and it is normally referred to a Commissioner

(unless the Industrial Commission feels it is of vital public interest for it to handle it) who will call a compulsory conference, a procedure whereby the disputants and other interested parties are summoned together, the object being to bring parties face-to-face at an early stage of the dispute and to ascertain as far as possible the issues involved.[8] He has very wide powers to deal with a dispute there and then after such investigation as subsection 3(a) of the 1964 amendments requires. He can refer the problem to the Industrial Commission and does not have to wait for any of the parties to take action. Under S. 25(5) he can, in the public interest, make an interim order, preserving the status quo -- where something has happened to produce a very live industrial dispute which is causing a dislocation.

C. Conciliation Committees:

Under S. 18, such committees, composed of representative members with an equal number on each side representing employers in the industry and employees in the industry with one of the conciliation commissioners as chairman, can be established "for any industry or calling or for any combination, arrangement or grouping or industry or callings." It has been declared that:

> "Committees should be established in such a way that industries will fall into national compartments to the intent that public interest and convenience and that of parties concerned will be served with efficiency, alacrity, and an absence of undue expense, and without injustice to any interest, and so that employers and employees therein will be represented by persons having a proper contact with and knowledge of the particular problems of the industry."[9]

Committees may be established on either an industry or craft basis, i.e., they may cover all employees in a particular industry regardless of their craft or occupation, or they may cover all employees in a particular craft or calling regardless of the industry in which they are employed. In fact the practice has been

to use either the industry or the craft basis as appears most convenient in each particular case. This has necessary exceptions from the industry committees of callings which have been allocated to craft committees and vice-versa to avoid overlapping of areas of jurisdiction. The third type of committee -- the establishment committee -- is really only a special type of industry committee. It covers all employees of a particular employer or any particular plant.

Section 20, confirming original jurisdiction, says that a "committee shall have power to inquire into any industrial matter in the industry or calling for which it is established and in respect of such industry or calling may on any reference or application to it make an order or award, fixing the prices for work done, the rates of wages payable, the number of hours, the times to be worked, the rates for overtime and holidays" and so on. The members are required to consider the general conditions of the industry and terms of an award in a judicial spirit.[10/]

Section 23, dealing with jurisdiction of committees, says that "a committee shall, as far as is consistent with maintenance of industrial peace, deal only with the wages and hours of employment, leaving all other matters to shop committees, industrial councils, or voluntary committees formed for the purpose of adjusting the industrial relationship of employer and employee . . . ." But, since a committee has no jurisdiction to delegate its authority to bodies established by the award of that committee, it does not derive any power in this regard from S. 23, since the word "formed" in that context does not confer any power on the committee to form the bodies specified. Though the Commission has power under S. 35 to set up certain bodies, that section confers no power on the committee, and the Commission cannot on appeal insert a provision that the committee has no power

to make.[11] All of this argument may merely be academic, as Mr. Justice Moore in referring to S. 23 has reported that, "I know of only one case of an industrial council being established and for all practical purposes the section can . . . be ignored."[12]

There was an attempt in 1930 to use conciliation committees under S. 34 of the C & A Act as it then stood. Those committees were somewhat after the pattern of wages' board. However, that failed when the High Court held that the section was ultra vires; it was not a law with respect to conciliation and arbitration for the settlement of disputes. Its "main vice" was that under the Act it was capable of making an award without any hearing or determination between parties -- thus not meeting the requirements of Commonwealth jurisdiction.

In addition to the above mentioned tribunals, the Act provides for a Registrar who along with his notification functions, serves as the main supervisor of apprenticeship regulations and such various other powers dealing with registration of unions and employers as are specified.[13]

Under S. 126, industrial magistrates are empowered to recover penalties, and S. 127 authorizes inspectors to make specified examination and inspection of industries and awards and agreements in force. They can institute proceedings for a penalty under S. 93 for breach of award.

The Department of Labour and National Service also maintains Arbitration Inspectors on its staff, who act on complaints about breach of awards or those found by spot checks in the field. They aim to obtain observance of the award by persuasion, but failing this they can initiate prosecution through the Grown Solicitor.

D. Public Service Act (NSW):

This Act, which save as otherwise expressly provided does not amend or effect the provisions of the IAA, established the Public

Service Board to carry out the provisions. Among its powers are the determination of the grades and the salaries, fees or allowances payable to the officers and all other persons employed under the provisions of the Act. The Board can enter into an agreement with any association or organization representing any group or class of officer or employee /Sec. 14A & B/.

Under S. 20, the Board may, in addition, make regulations governing conditions of employment. Since access to the Industrial Commission is available unless exceptionally provided for, it is important to note that as to "conditions of employment" there is no access. Hence, if no agreement is reached, the Public Service Board can make a unilateral determination and it has force of law. This does not go for employees employed by NSW instrumentalities or for Commonwealth employees.[14/]

III. Operation of Arbitration Machinery

The Commonwealth tribunals cannot make an award on their own motion; there must be an industrail dispute in existence before the tribunal can deal with the matter. Section 4 defines an industrial dispute to mean (a) a dispute (threatening, impending or probable) as to industrial matters which extends beyond the limits of any one State; and (b) a situation which is so likely to arise. "Industrial matters" are defined to mean "all matters pertaining to the realtions of employers and employees and goes on to list some examples, e.g., (a) all matters or things affecting or related to work done or to be done; (b) privileges, rights and duties of employer and employees; (c) wages; etc.

In looking at the question whether or not there is a dispute one comes across a number of problems. The fact that there is a strike is not always sufficient; the strike itself is not a dispute. The High Court has made it clear in quite a number of cases that the strike is only some outward sign of the discontent, the difference,

that is, between the contending parties. The Department of Labor and National Service has defined an industrial dispute to be a claim by one of the disputants that existing relations should be altered, and by the other that claims should not be conceded. It is therefore a claim for new rights and duty of arbitration is to determine whether the new rights ought be conceded in whole or in part. A court of law has no power to give effect to any but rights recognized at law.

The dispute has to be about industrial matters. Furthermore, the dispute has to "extend beyond the limits of any one State." Cases have held that it is not necessary that employers concerned should themselves carry on business in more than one State; or that the products of an industry should have interstate markets; or that employees concerned should be in the habit or moving from one State to others; or that operations and conditions of industry in one State should have any direct action or reaction with respect to operation or conditions in any other State. "It is sufficient if the dispute exists, in fact, in more than one State; the industry itself creates a sufficient nexus between employers to link up into one single dispute disagreements which otherwise might be regarded as a series of identical local disputes."[15/]

The dispute also has to be between parties in an industrial relationship. Accordingly, the High Court has said, when interpreting the Constitution, that the expression "industrial dispute" includes a disagreement between employees and employers over the terms upon which work will be performed and does not by any means necessarily mean that an actual strike must be in progress or even contemplated. An industrial dispute may, therefore, grow out of a demand made on employers by an employee organization that, in relation to persons in their employment who are not members of claimant organization,

they shall pay wages at the same rate and observe the same conditions of employment as awarded with respect to their employees who are members of the organization.[16/] But this does not operate vice-versa.[17/] This elasticity of definition has allowed for a standard way of bringing a matter before the tribunal and so securing an award -- a log of claims.

The industrial tribunals in the States are not bound by the Constitutional limitation of having to deal only with actual disputes. Unions and employers can apply directly to the relevant tribunal for an award instead of first having to serve a log of claims on the other party, and the award can be made a common rule, hence binding on all persons engaged in the occupation whether or not they were direct parties to the dispute.

In NSW, S. 5 of the IAA defines "industrial matters" to mean "matters or things affecting or relating to work done or to be done, or the privileges, rights, or duties of employer or employees in any industry. . ." and then proceeds to list a non-exclusive illustration of matters, including "(e) the interpretation of an industrial agreement or award," hence allowing a non-judicial tribunal to perform this function.

A. General Principles of Award-Making

In its most typical operation, a trade union registered under the provisions of the Commonwealth C & A Act compiles and serves a "log of claims" on the employer and says, "We demand that you agree to give the benefits, terms and conditions, and so on, in the attached log, to our members. If you do not agree within, i.e., 14 days, then we will regard you as having disagreed with us and we will proceed in the Commission." For partical purposes that suffices as evidence of the existence of a dispute. Yet that log, service and rejection is not the dispute. The dispute is the difference between the parties -- the requirement by one of the co-operaters in the

industry that as a condition of continuing cooperation, the following points should be conceded. The log creates the proverbal "paper dispute" and forms the "ambit" within which the Commission has jurisdiction. There is a very real reason why claims are often put at their extremes in the Commonwealth Commission: the Commission has, under the Constitution, jurisdiction only to determine the dispute before it and is bound by the top and bottom limits of a claim. This applies not only to the original award made, but also to any variations which the Commission might be asked and refused, the original amount claimed would remain the ceiling beyond which the Commission could not go.

Federal awards, however, only bind the parties to a dispute and it must be emphasized that a Federal tribunal cannot make a "common rule," that is, order that the terms and condition of an award shall be binding on all persons engaged in the occupation to which the award relates, whether or not they are parties to the dispute. The High Court has declared as ultra vires provisions bestowing on the tribunal power to declare an inter partes award to be binding on all employers and employees in the industry.[18/] Hence, even if a union serves a log on an employers' organization, he had best serve it also on each employer individually, since some employers may not be members and if any member employer leaves, he would no longer be bound.

Where it is desired to extend the scope of an existing Federal award to new respondents, it is necessary to first create a fresh dispute with such employers on the subject matters involved in the existing award. Such a dispute is known as a "roping-in dispute" and the award made in settlement thereof, as a "roping-in award." To avoid leaving a possible group of employers award free, the practice has further been for the union which has obtained a Federal award to seek a "counterpart" State award, substantially in terms of the Federal award.

The NSW jurisdiction is not bound by the above-mentioned constitutional limitation of having to deal only with actual disputes. Unions and employers can apply directly to the relevant tribunal for an award instead of first having to serve logs of claims on the other party, and the award can be made a common rule, hence binding on all persons engaged in the occupration whether or not they were direct parties to the dispute.

Public Interest

It has been said that the raison d'etre of the arbitration power in the Constitution is not the mere decision between two contesting parties as to disputed industrial conditions, though that in itself is undoubtedly important, but the desirability, sometimes amounting to a public necessity, that the community may be served uninterrupted and not be compelled, when threatened with deprivation of perhaps the essentials of existence to look on helplessly, while those whose function it is to supply them stop their work to quarrel.[19/]

"The interests of the public generally, 'the silent party in every dispute,' have always been considered by all industrial tribunals, both Federal and State, to be a matter which cannot be disregarded on the making of an award. . . ."[20/] Indeed, under S. 4 of the C & A Act, the definition of "industrial matter" includes "all questions of what is right and fair in relation to an industrial matter having regard to the interests of the persons immediately involved and of society as a whole." Similarly, the Industrial Commission has said that with any award, it is bound to consider "the interests of the public as well as those of the employer and employees whom the award is to govern," and further, that in framing the award the Commission must make sure that "nothing is done that will prejudicially affect either the employer or employees to be governed by it, the industry and those engaged in it, directly or

indirectly dependent upon the undertaking, or the public interest." 21/

The NSW legislation also provides that the Crown has a right to intervene in the public interest in any matter before the commission, conciliation commissioner or a committee. /Sections 78 and 79/

Even where an award is agreed to by the parties or some of them, the tribunals in both the State and Federal system will not necessarily grant it in terms of, and by reason by, such assent, but must consider the public interest. 22/

There are two principal ways in which Australian Governments try to influence, as distinct from directing or controlling, particular decisions of statutory industrial tribunals in line with a public interest concept:

> "First, directly informing arbitrators of Government views on issues before them; secondly, by adopting policies which arbitrators may feel they should take into account in reaching a decision." 23/

As intervenors, governments may express an opinion for or against claims before the tribunal, with or without providing supporting evidence, or they may adopt an attitude of what might be described as neutrality. The former position has been most recently evidenced in the succession of National Wages Cases.

The necessity for interference with existing contracts was one of the principal reasons for the introduction of the arbitration system. 24/ The effect of the award is not to become a term of the contract but to create a distinct substantive right. But, the parties may by agreement incorporate the provisions of an award so as to create between them contract rights in the same terms as the award. A Federal award overrides an existing contract between parties to the award if, on its true construction, it provides for the particular subject matter contained in such contract. 25/ It it is intended to cancel or vary an existing contract, this should be done in clear and precise lanugage, and not by implication founded on exceptions to the award. 26/

The provisions of awards are in the nature of implied conditions of a contract covering employment that is made the subject of the award. The creation of the relation of employer and employee depends on an agreement between them and not upon an award. As the Industrial Commission in NSW has put it, "The rights and obligations of employers and employees inter se depend, in first instance, on the initial fact of a contract between the parties . . . . Whether the terms of an award constitute the whole of the terms of a contract of employment which be obeyed by the parties to the contract or whether there are additional terms, is a question of fact to be determined in each particular case." 27/

An industrial award is the instrument by which an industrial tribunal prescribes the conditions regulating the work of employees in the particular craft, industry or occupation to which the award relates. An award binds the parties to which it applies quite independently of any agreement by them to be bound by it, and any contract inconsistent with the award is invalid. If the contract confers higher rates or better conditions than the award, they are enforceable in the ordinary courts. The tribunals are given wide scope in granting the remedy or relief deemed necessary to settle a proper dispute:

> "Though it was the law that an award cannot give a form of relief that is not 'relevant to the matter in dispute, that is not reasonbaly incidental or appropriate to the settlement of that part of the dispute, and that has no natural or rational tendency to settle the particular question in dispute,' yet the award need not adhere to the remedy or relief proposed or claimed in the course of the dispute or in a demand forming a source of the dispute, so long as the provision in the award is related to the dispute or its settlement in the manner stated." 28/

Awards may be made to cover employees in particular crafts or to cover all those in a particular industry or section of industry,

irrespective of their craft or occupation. Sometimes awards are made to cover employees within a particular establishment, e.g., the workers of BHP Co. Ltd., but committees of this type are comparatively rare. From all indications, there appears to be a trend toward Federal awards.[29] But unions usually register within the jurisdiction where they can secure greatest advantage, and once selected, tribunals in other jurisdictions are reluctant to act on claims.[30]

Australian awards bear much less intimately on the everyday relationships of employer and employee. There are usually no provisions for job security, an absence partly due to a difference in the unemployment situation and partly to a different approach to the matter of the hiring contract. The awards themselves usually cover such topics as basic wage, marginal rates for each classification affected, conditions of employment for juniors and females, conditions of apprenticeship, special disability allowances, mixed functions, allowances for travel and board when on distant work, hours, shift work conditions, engagement (weekly, hourly or casual hiring), sick leave, annual leave; aged, infirm or slow workers, right of entry for union officials, recognition of shop stewards, union notice boards, keeping of time and wages records, and provision of ammenities and safety devices.

The awards seek to establish terms and conditions for a period beyond the dispute which gave the tribunals jurisdiction. Section 87 of the IAA provides that an award shall be binding for the period not exceeding three years specified therein and after such period until varied or rescinded. Section 58(1) & (2) of the C & A Act provides that "an award determining an industrial dispute shall . . . continue in force for a period . . . not exceeding five years. . . ." After the expiration of that period, "the award

shall . . . continue in force until a new award has been made." This fixed limitation and the fact that the tribunals only have jurisdiction over an employer-employee relationship will be explored in relation to the problem of unions seeking to cushion the impact of job dislocation.

While the tribunals have power to set aside or vary awards, this is a step that they are reluctant to take, especially if the terms had been voluntarily accepted by both parties and the alternative is not acceptable to both of them.[31] Award variation is used as a method of affecting changes in work rules -- in settlement of interim disputes on interests -- where such changes are desired before the terms of an award have lapsed. It is an expedient comparable to American contract reopenings.

IV. Application and Interpretation of Awards

The tribunals very early came to be concerned much more with the determination of work rules for the future than with alleviation of grievances arising out of those rules in operation. With the passage of time, the latter problem came to the fore as awards increased, and as early as 1915 Boards of Reference were established to meet the need of dealing with disputes "arising under" awards.[32]

Today's C & A Act provides under S. 50 for the power of the Commission to appoint a Board of Reference, under the award, and assign to it the function of "allowing, approving, fixing, determining or dealing with, in the manner and subject to the conditions specified in the award or award, a matter or thing which, under the award, may from time to time require to be allowed, /etc./ . . . by the Board." /Emphasis added./ There is no power under the NSW IAA to establish Boards of Reference, nor has the Industrial Commission jurisdiction

to invest a Conciliation Committee with power to determine a dispute in the manner in which Federal awards often delegate matters to Boards of Reference. In fact, however, the functions exercised by Boards of Reference in the federal sphere are carried out in effect by the various State tribunals, e.g., Conciliation Commissioners, Conciliation Committees, Apprenticeships Councils.

Narrowly construed, the powers of the boards of reference are very limited: they may not interpret; they may not modify; they may not enforce; they may only "apply." The awards describe the duties of boards. Their functions usually comprise dealing with matters specifically mentioned in the award for board action. By the terms of many awards they must make administrative decisions on matters ranging from apprenticeship problems to granting of permits for workers to work in their own homes. The specific matters are often listed in detail. The Commission, in effect, delegates some of its legislative power to them. For instance, under the Metal Trades Award, the Board of Reference ultimately determines questions, concerning "dirty work" (Cl. 8, Part. 1) and "hours of work" (Cl. 11). Clause 23(g)(2) gives the Board power to consider any proposals made by any of the parties concerned for the regulation of overtime and the distribution of work. Clause 16 of the Textile Award (1955, S. 38(c)) gave the Board power to settle disputes over "payment by result" systems.

There is no right of appeal from a decision of a Board of Reference unless the right is reserved in the award[33/] and it is usual to so provide in the award. As an example, Clause 23(h) of the Metal Trades Award -- "Decisions of the Board of Reference may be reviewed and altered by the Commission on the application of any party to this award . . . ." Also, Clause 37 of the Clothing Trades Award, 1964:

"(i) Nothing in this clause shall take away from any party the right to apply to the Commission or to the Court given by the Commonwealth Conciliation and Arbitration Act whether for a variation or an interpretation of this Award."

Awards of course are legal documents, made in settlement of industrial disputes and industrial issues. Moreover, they are made to regulate industrial relations of persons who are not versed in legal terminology. It is not necessary therefore that the award be a simple clear statement of the respective rights and duties of the parties. This policy is recognized by the legislation, as for example S. 56 of the C & A Act which provides that the award shall be framed in such manner as best to express the decision of the Commission, and to avoid unnecessary technicality. Nonetheless, the need for interpretation arises.

The principles applied by the Commonwealth and NSW tribunals in the interpretation of awards and industrial agreements are those applicable to all written instruments, with the qualification that they are dealing with a special type of instrument regulating the employment relationship of the parties. For example, ". . . Awards are to be interpreted first, from a consideration of the circumstances to which the awards are to be applied -- that is, the conditions of the industry."[34/]

The judicial interpretation of awards and industrial agreements, that is the making of a binding declaration of existing legal rights and duties of the parties, involves an exercise of the judicial power.[35/] As to the Commonwealth, judicial interpretation of an award cannot be validly exercised by the Commission, conciliators or Boards of Reference.[36/] Not every investigation of the meaning of an award necessarily involves the exercise of the judicial function of interpretation. So, where a tribunal has power

to settle, views and opinions may be formed on the meaning of documents and on matters which are not necessarily foreign to the judicial power.[37/]

A. Federal v. State Question

Under S. 109 of the Constitution, a decision given in the exercise of Federal industrial power, whether it allows or refuses a claim wholly or in part, is conclusive and debars, by transcendency of Federal power, a State authority from making any effective decision that is inconsistent or at variance with the Federal order or award. S. 65 of the C & A Act establishes that awards are to prevail over State laws and awards.

When a particular claim is refused by the Commission such a claim cannot be granted by a State tribunal as a subject matter left at large by the Federal tribunal.[38/] The High Court had stated that the test of inconsistency between a federal award and state law was not whether compliance with State law was consistent with obedience to the federal award, but whether there was an intent by both state and federal law to deal with the same subject matter.[39/] Hence the importance of a Federal tribunal using clear and explicit language.[40/] Of greater significance, the continuing existence of federal awards, once made, makes it impossible for any State tribunal to make any effective determination or award on the same subject matter unless the Commonwealth tribunal cancels the award.

B. Uniformity and Pattern-Setters

The similarity between Federal and State provisions governing the same or like employment is, by and large, closer in Australia (by award, order, determination or statute) than in the United States (by legislation or authorized decision). The industrial tribunals early expounded the goal of uniformity:

> "There are national and constitutional reasons why the United States of Australia should maintain uniformity in industrial conditions. One of the most important conditions of the federal compact is that trade between the States is to be free, but there can be no freedom of trade between States where there is any wide divergence in industrial conditions, and it is obvious that, in order that the federal compact should function fairly, it is necessary that industrial conditions throughout the Commonwealth should be coordinated. I think that this Court should endeavor to make its awards as to wages and conditions as uniformly in all States as is consistent with the needs of justice."41/

NSW, as a State Government, unlike the Federal, has power to prescribe terms of employment by parliamentary legislation and administrative acts of Government departments. As has been pointed out, however, State legislation cannot overrule an award or decision of a federal tribunal, so that in the event of a clash between the two jurisdictions, the federal prevails. Where the State legislation makes provision for some aspect of employment not covered in a federal award, then the two co-exist and both, in combination, regulate the conditions under which the employees concerned work.

While the Federal tribunals are not required to adopt this supplementary State legislation in their awards, nevertheless, sometimes such legislation can be important. For instance, the Government of NSW introduced the 40-hour week in that State by direct legislation in 1947, and this was later taken up by the other States and by the Federal tribunal so that it has become the general standard throughout Australia 42/ As a further example, with respect to long service leave:

> "In the 1960 Annual Leave case the /Commonwealth/ Commission indicated that the existence of State legislation did not require that its prescription should be made in identical form,43/ but at the same time the Commission acknowledged that it was a matter of significance for it that employees under this legislation enjoyed a higher standard of annual leave

by virtue of that legislation than did employees under the Commission's award. . . . It seems only consistent with those decisions, and indeed proper for us, to take into account the existence of standards set by the various legislation. . . ."44/

There are fundamental differences between principles applied between the different tribunals throughout Australia as concerns the fixation of wages. While acknowledging the need to determine for itself the appropriate principles, each tribunal should consider as relevant the rates which have been established in related areas.45/ But, "it is imperative that /unions/ and their members fully understand . . . that if adoption of Federal decisions be their chosen method of wage fixation for their industry they cannot expect to also have independent assessment of wages made by the /State/ Commission."46/

V. Wage Determination

While the focus of this dialogue is directed to the emphasizing of non-wage aspects of the issues under examination, the very nature and application of national wage fixation has repercussions on the day-to-day functioning of industrial relations in Australia both in terms of fostering negotiations outside the arbitration system and in pointing up some of the inherent weaknesses of the system's structure as regards increasing technological change and prosperity. Therefore, this section attempts to briefly outline the machinery of wage determination and just raise, expressly and impliedly, the complexities.

The tribunals in both systems are authorized to determine wages and allowances. The basic wage, as defined in federal legislation, is "that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstances pertaining to the work upon which, or the industry in which, he is employed." S. 33(1)(b). The criterion for this determination has shifted from a "needs" (cost-of-living) concept to an ability to pay. This "ability to pay" does

not mean the ability of a particular firm, nor of a particular industry; the Commission is interested in the ability of the Australian economy to absorb any required increase without upsetting the national economy.[47] The formulas used to determine this capacity have varied from "prices plus productivity" which the unions advocate and "capacity of the economy in terms of prospective productivity gains" which the employers and the Government usually advocate. Basic wage rates generally resting on the federal determinations, are regularly fixed in all of the States. In NSW, S. 23A defines the committees' powers "to fix rates of wages as the committee deems just and reasonable to meet the circumstances of the case, "but subsequent amendments have since dropped the system of quarterly adjustments to basic wage based on the Consumer Price Index, movement and brought it in line with the Federal Basic Wage for Sydney -- "whenever the Commonwealth Commission varies the Federal Basic Wage for Sydney, that variation will take effect as from the same date, in State awards and agreements."

The basic determination of the basic wage has usually been brought by unions and employer organizations involved in the Metal Trades industry and the decision reached by the Commission has been subsequently adopted by unions and employers in all other industries concerned as the "minimum," basic wage and have had their awards amended accordingly, the Commissioners involved usually doing so as a matter of fact.

"Margins" have been defined officially as "minimum amounts awarded above the basic wage to particular classifications of employees for the features attaching to their work which justify payments above the basic wage, whether those features are skill or experience required for the performance of that work, its particular laborious nature, or

the liabilities attached to its performance."[48] Margins traditionally have been keyed to the marginal rate determined for the classification of "fitter" in the Metal Trades Award, which in turn, is fixed in terms of the value of work done by him. The work values and corresponding marginal rates for other classifications, in that award and other federal awards as well, are fixed in relation to the fitter's rate prevailing at any given time. All this involves the very formidable business of fixing a valuation for the work of the metal trades fitter, and the no less formidable enterprise of determining the "relativities" of the work values of the myriad other skilled jobs to the work value of the fitter's job.[49]

The 1966 National Wages Case judgment composed new changes for both parts of the wage determination. In addition to heralding the probable implementation of a "total wage" concept, thereby no longer necessitating two separate benches for the determination of a basic wage and then a margin, first moves were taken to write new minimum wage provisions into awards other than the Metal Trades. The Full Bench ruled that no adult employee should be paid less than a certain minimum figure, amounting to the basic wage in each State plus $3.75. This was intended to give relief to the low wage earner and those who only work for a basic wage, It is to be expressed as an overall minimum wage and not to be separated into a minimum margin of $3.75. This step clears the way for minimum rates to be provided in other Federal awards.

At the same time, Commissioner Winter was authorized to implement a work value study in the Metal Trades industry to reevaluate the numerous classifications and margins differentials now in existence, and hopefully to seek a closer value for work performed.[50]

In the most recent National Wage Case, 1967, the Arbitration Commission adopted the total wage concept which, in effect, does away with future reference to a separate basic wage. National wage increases will be awarded in one of three wags in the future: as a flat amount -- as in the case of the $1 given in the 1967 case; as a percentage -- this was done in 1965, when the Commission awarded a 1½ percent increase; or in varying percentages, as in December 1966 when the Commission awarded interim margins increases ranging from 1 percent to 2½ percent of a total wage. The emphasis will be removed from the metal trades fitter's pay as the yardstick of wage fixation. Another significant development was the probable foundation for the ultimate acceptance of equal pay for men and women for work of equal value and for a possible upsurge in the number of protracted and complicated work value cases. As Sir Richard Kirby said, in speaking for the Full Bench,

> "Our adoption of a total wage concept has allowed us to take an important step forward in regard to female wages. We have on this occasion deliberately awarded the same increase to adult females and adult males.
>
> The recent Clothing Trades decision affirmed the concept of equal margins for adult males and females doing equal work."51/

After having read about and observed the wages machinery in operation in Australia, it is easy to agree with Ron Fry, the Director of the Metal Trades Employers' Association, when he says that "an overseas visitor might well be astonished at the complexity and uncertainty generated by Australia's wage-fixing procedures. He would not be impressed by the subtle distinctions between basic wage and margins or between work value and economic value."52/ The industrial tribunals' role as guardians of the nation's economic welfare, and their prerogative to identify public interest with what the economy can afford are not duties directly imposed by the C & A Act. Some critics suggest industrial tribunals should abandon their interest in the general

economy and make their decisions solely on industrial relations grounds, as indeed their primary function is to prevent and settle industrial disputes.[53]

An American observer of the Australian scheme, Frank deVyver, has criticized the Australian system of arbitration as being used to determine wage policy, the making of which is ordinarily one of the major decisions of responsible Government. He questions whether this "power of the economic life of the nation should be entrusted to an agency independent of Government, an agency whose major task is settlement of disputes and whose judges are trained in legal rather than economic matters."[54] But, in the 1967 judgment, Sir Richard Kirby pronounced: "we agree that when settleing interstate industrial disputes involving general economic reviews we must consider the economic state of Australia and have regard to the economic consequences of our decisions."[55]

The literature and debate on the role of wage fixing is ever increasing and would easily provide the subject for an independent study; therefore this brief discussion will have to serve for the purposes of the present study, though further references to the implications of this machinery on union and management policy will be necessary in undertaking the exploration of the issues under examination.

An important point to keep in mind, in view of the above discussion, is that awards in most cases are meant to prescribe the minimum below which wages and conditions may not fall. It is at this juncture that, in this writer's opinion, the system begins to break down, and, as will be subsequently argued, the fault lies equally with the formal system and the participants.

The tribunals encourage the parties to reach settlements on their own not only as regards an initial award but also as to subsequent additions thereto. There is nothing to prevent an employer from paying

more than the award obliges him to pay, and in recent years "over-award" payments have been on the increase. But they have seemingly created more problems than they have settled. At the present time basic wages and margins comprise about 80 percent of average earnings, with the remaining 20 percent divided roughly into equal portions by overtime and over-award payments. There are significant areas of employment where at present skill is at a premium and labor scarce, where the over-award segment of total wage is far higher than the average 10 percent. The unions have attempted, at various times, to get tribunals to award "over-award" payments and to get the tribunals to recognize the capacity of an industry to pay higher rates when fixing wages. On both counts the tribunals have refused to act. In NSW, the Industrial Commission has ruled that S. 25 gives no jurisdiction.[56/] The Commonwealth tribunals have refused to arbitrate on claims for over-award payments stating that they fix minimum rates and it is for the parties to negotiate further. Moreover, Kirby, in his Tenth Annual Report, referred to the jurisdictional drawbacks, i.e., that these over-award claims often arise in single establishments, not extending beyond the limits of one State. Yet, in 1965, there were 145 notifications to the single members of the Commission concerning "over-awards" out of 862 concerning all subject matters -- nearly 17 percent.[57/]

In the highly emotive case put by the Vehicle Builders' Union against GM-H in 1966, the Commission was asked to break new ground by making a one-company award on the basis that movements in and levels of production, productivity and profits of the company had created not only a capacity but an obligation to pay higher rates to employees whose efforts had, in large measure, been responsible for these achievements. The Commission refused, stating that:

> ". . . the present claim for a 'prosperity loading' is sponsored by only 9 of the 150 odd organizations of employees registered under the Act and . . . the claim

> is against only one of several 100's of employers under this award. . . . The time may possibly come when the whole body of trade unions may see fit to put forward a comprehensive plan based on profitability through increased productivity, when its implicat ons for all classes of employers and a wide range of employees may be open for examination, but that is not the case at present, and we are not prepared to make an exception to the general rule of uniformity upon the case put to us in the present proceedings."58/

Unions often use the argument of concession by some employers to justify capacity to pay on the part of the whole industry. The NSW Commission has stated that privileges (wage and non-wage) conceded by the employer should not, as a matter of course, be converted into award obligations.59/ Moreover, in the 1965 National Wage Case, the majority concluded that the Commission should not place any reliance on over-award payments as evidence of capacity to pay award increases which are designed to be added to them, not absorbed into them.

VI. Industrial Agreements

Since the Acts consider conciliation to have precedence before arbitration on a dispute, both Acts provide for the registration and enforcement of industrial agreements. An agreement for these purposes means an agreement reached between the parties to an industrial dispute at some stage during the hearing of the dispute and before an award is made.60/ S. 31 of the C & A Act provides that such "an agreement, if certified by the Commission shall have the same effect as, and be deemed to be, an award for all the purposes of this Act." But under subsection 3, the Commission may refuse to certify such agreements on grounds of public interest and lack of jurisdiction of the Commission to assert such provisions in awards. S. 11 of the IAA provides power to make industrial agreements for a period not exceeding five years and to be enforceable under the Act, to continue in force after expiry until varied or rescinded by the parties or by the commission or until notice of termination is given by either party.

With this encouragement, industrial agreements have been on the increase. In NSW, for instance, in 1955 there were 180 registered agreements and 670 awards. In 1966 there were 800 industrial agreements and 758 awards.[61] However, before one jumps to the conclusion that this is all the result of increasing "collective bargaining," one must look behind the nature of these agreements and awards:

> ". . . at least one-half the awards currently registered under the Conciliation and Arbitration Act are awards by consent. This is largely due not to sophistication in negotiation, but to the fact that precedents in arbitration and/or negotiation, elsewhere have guided the results; and the Unions concerned have not been equipped to devise agreements to justify a departure from precedent." [62]

The negotiations are usually based upon standard clauses rather than upon departures from those clauses: "It is easy to agree upon a clause if both sides know that is what the Commissioner will ulitmately award anyway. . . ."[63] It seems to be only rarely that collective bargaining takes place before even the filing of claims. Once within the system by virtue of claims filed, the bargaining is largely of a "conciliatory supervision" under the guidance of a third party. Perhaps Paul Brissenden puts it best: "there evidently is very little independent prearbitration bargaining done in Australia, and the likely explanation is that both unions and employers are conditioned to 'approach' tribunals instead of each other with their problems."[64]

Once the awards are determined by the tribunals, it is often found that award classifications and conditions do not fit the particular operational set up of a plant or segment thereof -- hence industrial agreements are used to get around this. Also, there is a tendency for there to be more liberal sick leave, annual leave and long service leave provisions in industrial agreements, which tend to become trend setters. One result of this is to find many unwritten agreements and many unilateral determinations by employer organizations. As to "bargaining"

about over-award payments, this post-arbitration bargaining can scarcely be called "collective bargaining." What happens, according to Prof. Kingsley Laffer, is that a market rate for a particular type of work gets established, sometimes through industrial pressure, and then tends to be paid to individuals without much bargaining.[65/]

Though this process of industrial agreements does result in terms and conditions of employment being regulated by agreement, similarity to the American collective bargaining agreement is but superficial. Apart from the fact that the agreement can be the product only of the conciliatory process, it is not enforced by action for damages or injunction on the contractual basis but by the same methods as an award, that is by procedure for a penalty in specially designated courts.

Specific instances of agreements to meet a particular industry problem or plant problem, as well as those agreements providing for "settlement of disputes" clauses will be explored in subsequent sections of this study. The next chapter will explore the attitudes of unions and employers to arbitration, collective bargaining and the awards.

UNITED STATES

A study of the United States collective bargaining system is an examination of the role which different institutions in government perform in the process of the regulating of the labor market. Once the law, and not economic force, is to be the regulating force, who shall institute this law? We are thus concerned with legal institutions in their role of performing in this area of labor law. Which institution performs is often more important than the rule laid down? The crucial question is to what extent, if at all, is it possible for the law to intervene to the extent of regulating and establishing the process of collective bargaining and enforcing the agreement, without significantly impinging on the freedom of the parties to make their own agreement and make for themselves their terms and conditions of employment?

Title I of the LMRA, 1947, as amended by Public Law 86-257, 1959, declares the policy of the United States to be to

> "eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

Section 1(b) of the LMRA, 1947, declared the purpose of the Act to be to:

> "prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical tc the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."

In order to carry out this policy, an independent administrative agency, the National Labor Relations Board, was created. The functions of the Board are divided into a trial section and an investigation section headed respectively by a Board with five members (on 5-year appointments) and a General Counsel (on a 4-year appointment), all appointed by the President by and with the advice and consent of the Senate. The NLRB is concerned only peripherally with labor-management disputes. The Board's chief concern is the encouragement of self-organization, protection of mutual bargaining rights of parties and regulation of the bargaining process on the theory that, given this encouragement and protection, most disputes will be settled by negotiation, or, failing that, through the conciliatory good offices of the Federal Mediation and Conciliation Service, or, even that failing, that the parties will consent to arbitration by a private arbitrator. The Board is empowered to investigate, hold hearings, and to issue decisions and orders, though

it is dependent on court review for their final enforcement. In its proceedings the Board is not bound by technical rules of evidence, and its findings of fact, if supported by evidence, are to be controlling in court.

The NLRB is empowered, under S. 9, to provide machinery to determine apporpriate bargaining units and conduct representation elections, and endow such "representatives designated . . . for purposes of collective bargaining by a majority of employees in a unit appropriate for such purposes /to/ be the exclusive bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

Section 8(a) and (b) /reproduced in Appendix B / list a series of activities on the part of employers and unions which are declared to be unfair labor practices and under Section 10 the Board is given power to prevent these practices. The Act does not make unfair labor practices a crime, hence the Board could impose no penalties or fines for any violation found, but it was empowered to issue cease-and-desist orders and to require affirmative action to effectuate the Act.

The Board makes decisions on cases which the General Counsel who is not responsible to the Board, investigates and prepares for hearing. This separates executive and judicial functions in enforcing national labor relations policy. The General Counsel shall exercise supervision over all attorneys employed by the Board (with several listed exceptions) and over the officers and employees in the regional offices (of which there are thirty-eight), where complaints of alleged violations of the LMRA originates.

Title II of the LMRA is concerned with the "Conciliation of Labor Disputes in Industries Affecting Commerce." Section 201 sets out the policy of the U. S. emphasizing settlement of issues between employers and employees through the processes of conferences and

collective bargaining between employers and representatives of their employees. It encourages "full and adequate governmental facilities for conciliation, mediation and voluntary arbitration," in the hope that the parties can formulate for inclusion within their agreements "provisions for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such controversies."

Unlike the Federal legislation in Australia, whereby the Commission has power to allocate powers of conciliation to recognized conciliators or Local Industry Boards, the NLRB is expressly forbidden to "appoint individuals for the purpose of conciliation or mediation, or for economic analysis." /Section 4(a)./ But Section 202(a) creates an independent agency, the Federal Mediation and Conciliation Service, which is allocated the responsibility to provide full and adequate governmental facilities for conciliation, mediation and voluntary arbitration. Whenever in its judgment any dispute threatens to cause a substantial interruption of commerce, either on its own motion or on request of one of the disputants it can seek to act as a conciliatory body. /Section 203b./ The Director can try to induce voluntary settlement without resort to direct action, including submission to employees in the bargaining unit of employer's last offer of settlement for approval or rejection in a secret ballot. But, since its role is one of "friendly persuasion," the parties are free to reject any procedure suggested by the Director and this will not be deemed a violation of any statutorily imposed duty or obligation /Section 203(c)/. As to disputes arising over interpretation or application of an existing collective bargaining agreement, "the Service is directed to make its conciliatory and mediation services available in settlement of such grievance disputes only as a last resort and in exceptional cases." /Section 203(d)/.

This provision for a "conciliation and mediation" agency can be fitted into the statutory pattern of limiting the "freedom" of collective bargaining. While the operation of this machinery is of a voluntary type, it does represent a form of "official persuasion" directing the parties toward a conciliatory avenue for the settlement and submission of issues.

I. Collective Bargaining - Components

There are two main aspects of collective bargaining. First, on particular items, shall the employer retain his freedom of action or be bound to certain standard and fixed terms? What areas of operation of the enterprise will he have freedom to determine day-by-day and to what extent is he bound to follow pre-determined rules? Secondly, in so far as parties agree to joint control - a rule of bargaining - what shall be the substance of the rule? And how shall it be administered?

The Taft-Hartley Act defines collective bargaining to be "the performance of the mutual obligation of employer and representative of employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract. . . ." Neither the committee reports nor the congressional debates concerning the Act indicated any clear awareness of the far-reaching implications of this legally imposed duty to bargain exclusively with the majority representatives. Some consequences were fairly obvious and had been foreshadowed by decisions under preceding statutes.[66/]

The Union need not depend on economic strength to bring the employer to the bargaining table; no matter how weak the union might be, the employer was compelled by law to meet and negotiate with it.[67/] Nor could the employer use his economic force to limit the application of the

application of the agreement to union members; the union was entitled by law, not bargaining power, to recognition as the sole agent for all members.[68] The employer was not compelled to agree to any particular substantive term or condition of employment, for the very heart of the statute was that these should be regulated by free bargaining based on the relative economic strength of the collective parties. However, once an agreement on substantive terms was reached, the employer was required to sign a written agreement containing those terms. Whether this agreement should be written was not a matter for bargaining; it was removed from the area of economic contest and compelled by law.[69] What the U.S. system is seeking to do then is to give unions a share in management to the extent this affects employees' terms and conditions of employment. To this degree, then, "free collective bargaining" is circumscribed by the imposed boundaries of "statutory collective bargaining".[70]

But a further claim of impingement on "free collective bargaining" has been raised by academics and employers in that the concepts of the "duty to bargain" and "mandatory subjects of bargaining" have caused, increasingly in recent years, the NLRB and the Courts to concern themselves with the questions of the substance of agreements. Questions as to mandatory and non-mandatory subjects of bargaining subjects of bargaining are meaningless unless we understand the nature of the collective bargaining process. If union and employer are agreeable, they can bargain about anything they want (except what is expressly forbidden by legislation). The legal problem revolves around mandatory subjects of bargaining. This can mean two things: (1) the employer must discuss with the union the matter concerned before he takes unilateral action; (2) more important, the employer is compelled to arrive at some settlement; he must be willing to bind himself to established standards of contractual obligation.

Increasingly in recent years Congress, the Courts and NLRB have felt a necessity to consider the appropriateness of some collective bargaining subjects. Their action has almost always been a pragmatic response to public pressures and needs rather than the implementation of what collective bargaining should be. Having given not only legal sanction but also a measure of encouragement to collective bargaining, the federal government is expected by the public to assume some direct responsibility for matters handled through bargaining.

The NLRB and the Courts have ruled over various times that management must bargain with union representatives over such topics as Christmas bonuses, stock sharing plans, and the relocation of the plant; safety rules, work clothing, retirement and pension plans, profit sharing, merit rating systems, and subcontracting of specialized operations previously performed by the company's own employees. Yet, the NLRB has not set forth particularly clear principles or standards to guide either union or management negotiators. Its reluctance to do so is not surprising when one considers that the parties involved in negotiations are not often able to agree on any line dividing appropriate and inappropriate subject matters, though they have tried.

Section 8(d) of Taft-Hartley, while providing for "good faith" bargaining, forbids the Board from applying pressure on either side to make concessions. The employer and union are entitled to bargain to impasse, and then resort to appropriate direct action, subject to restrictions imposed by the statutes. But, the Board does have the authority to determine whether the bargaining has been in "good faith". It generally looks at the totality of the employer's conduct to determine the bad faith of the duty to bargain.[71/] Over the years, the Board has found in many cases that a unilateral grant of wage increases or other benefits at a time when a union was seeking

to negotiate was evidence of bad faith bargaining.[72] Indeed, the Courts have often lent their support.[73] But on notable occasions the Court have been forced to "pull the reins" on the NLRB.

In American National Insurance Co. v. N.L.R.B.,[74] the Board found the employer guilty because of its insistence on a strong prerogatives clause not providing for arbitration, and apted for a per se violation. The Supreme Court ruled that an employer is free to use his economic force to insist that certain terms and conditions of employment will not be bound by contractual obligation. So long as the employer has discussed these bargainable terms and conditions, he is left free to use his economic muscle to keep these from becoming contractually binding rules. But more important, in discussing the Board's role in this question, the Court went on, to say that:

> ". . . whether a contract should contain a clause fixing standards for such matters or should provide for more flexible treatment . . . is an issue for determination across a bargaining table, not by the Board. If the latter approach were adopted, the extent of union and management participation in the administration of such matters would itself be a condition of employment to be settled by bargaining." [75]

A. Implications of Duty to Bargain on Collective Bargaining

The often-discussed bargaining practices of General Electric (G.E.) offer an interesting illustration of the question of legislative and administrative regulation of the "duty to bargain." General Electric has had the reputation for adopting a "take-it-or-leave-it" bargaining attitude.[76] Reluctant to recognize unions to the extent required by the labor legislation, it has been said that G.E. has sought to "unilaterally" look after its employees. In 1964, the NLRB took a close look at the company's general approach to collective bargaining in light of the union's allegations of a refusal to bargain in "good faith." It was found that the company's negotiating practice involved presenting the union with a set of counterproposals, somewhat modified by what

management considered valid union demands or other information, and adherence to them firmly throughout contract negotiations. The company's offer was based on extensive year-round research by it into all pertinent factors, including the study of economic and business conditions and gathering of information on employees' needs and desires, in order to determine what was "right" for them. The Company claimed that continuing consideration was to be given to meritorious suggestions from the union during negotiations. The final step was for the company to "market" its position directly to its employees through an elaborate communications system.

The majority of the Board found this practice to be a violation of Section 8(a)(5) and in so doing cited four basic elements that went into their finding: (1) failure timely to furnish certain information; (2) attempts, while engaged with the International union in national negotiations, to deal separately with locals thereof; (3) presentation of the company's personal accident insurance proposals on a take-it-or-leave it basis; and (4) the company's over-all approach to and conduct of bargaining. 77/

As one commentator put it, the "Board's decision seems to invalidate an advance decision by employer as to his position before beginning bargaining." 78/ Another writer, in concluding an article on the history of the employer's duty to bargain, hypothesizes that:

> "For the purposes of issues raised in this page, it will be crucial to see if the courts agree that G.E.'s policy of remaining adamant on a carefully researched proposal, when the union cannot prove, the company has erred, is evidence of bad faith. From the above precedents, it appears this type of bargaining satisfies the duty-to-bargain provision. If not, courts will be saying that G.E. must alter some of its "fairly" maintained proposals. This would require the making of concessions, which cannot be compelled under Section 8(d)." 79/

If we look at the actualities of the bargaining relationship, we can see the effects of what G.E. is doing. The company attempted

to negotiate with someone other than the recognized bargaining representative. Instead of bargaining with the union for the employees, it was bargaining through the employees for the union. What impact does this have on the union involved? G.E. has to negotiate with a whole range of unions. But one aspect of collective bargaining that is frequently ignored is that a union often ends up representing a diverse collective of employees; it is bargaining for and representing people young and old, married and unmarried, skilled and unskilled. In attempting to negotiate a seniority clause - relating priority of job access within the bargaining unit - the union faces conflicting demands and interests of employees. The same is true for a pension plan, i.e., as to retroactive credit for years of work prior to the establishment of the plan.[80/] Thus it is important to apprectiate the problem of the bargaining inside the union - the parcelling of the advantages and disadvantages of the terms of the agreement within the conflicting demands and interests of the employees represented. To put it in the proper perspective, it is a question of political survival of the union leadership. Now think of G.E.'s "take-it-or-leave-it" package. The total value of the offer may be appropriate, but the mixture of the terms may be inappropriate since it would not represent the competing demands of the members. In terms of U.S. labor policy, it frustrates the bargaining function of the union doing a democratic job.

There has also been academic comment on the deleterious effects of NLRB imposition on collective bargaining:

> "in an enterprise in which collective bargaining is just making its appearance, if the law in its administration surveys the course of the apparent bargaining and determines that is is more apparent than real, because of the scope of demands for unilateral discretion, the law may well be merely enforcing the duty to bargain rather than shaping the content of the bargaining. But in an enterprise in which collective bargaining is an accepted and going institution, if the law commands that some particular item must be made the subject of bargaining and may not be the object of a firm demand for

> unilateral control then to that extent the law interferes with the parties' autonomy and shapes the content of their bargaining. . . ." 81/

More recently, George Taylor has put the matter on more natural terms:

> "Thought should be given to the process of problem selecting and definition and not merely the process of decision-making. . . . When parties lose their liberty to select their problems and decide what is important to their interests, then the collective bargaining process as we know it will be in real danger. It is a mistake, under Taft-Hartley, for a government agency to be charged with responsibility for defining subject matter of compulsory collective bargaining as a matter of national labor policy - it is at cross purposes with the concept of collective bargaining as a liberty rather than an institution." 82/

But the Taft-Hartley Act, and its interpretation by the NLRB, has also changed the Act's definition of lawful subject matter of collective bargaining. Neither employer nor union can use economic force to compel the other to agree to things that are not terms and conditions of employment. Most of those issues excluded are of a nonpecuniary nature. The new Section 8(a)(3) prohibits management and unions from incorporating a closed-shop in their contracts and also narrowly circumscribes all other union security agreements. Section 14(B) also permits states to ban all union security agreements and has given vent to the concept of "Right-to-Work" laws which unions oppose. In addition, checkoff (of dues) procedures are made a crime in the absence of compliance with the specific terms of the proviso to Section 302. The legal rights of unions and management to agree on health and welfare plans is also made conditional upon compliance with Section 302, which spells out, subject to criminal enforcement, the objectives of all such plans along with certain administrative requirements, the most important of which is dual administration of the funds. Moreover, neither union nor management can legally insist that the other negotiate an extension of the agreement beyond the designated bargaining unit, 83/ nor may either require the other to forego any of the rights it is entitled to under Taft-Hartley.

As the collective bargaining system began to mature, the concept of long-term collective agreements became more viable, so that today contract terms of from three to five years is becoming commonplace. But this seeming stability has also brought with it problems of bargaining during the life of agreements.

Since this chapter is dealing with the legal institutions, it will be left to the next chapter to discuss the private cooperative approaches that the parties have established to deal with these problems. The traditional view of labor contracts has been that once the contract is signed, no new issues may be brought up and discussed until the contract is up for renegotiation. Moreover, Section 8(d) provides that there is no requirement for either party to discuss or modify terms or conditions contained in a contract for a fixed period. But the NLRB has determined that this is only applicable to those subjects covered by contract and as to matters not so covered, in the absence of an effective waiver, the continuing duty to bargain is unaffected. 84/

As the exclusive representative of employees in the bargaining unit, the union has an administrative right to protest and appeal every action that management's representative initiate, which the union claims violates the contract. But a union does not have a right to protest and appeal management's right to act unless management's negotiators have given up that right by "prior contract," "mutual restrictions" or "joint consultation" restrictions in the contract. Where there is an arbitration clause in the contract, the union may force management to arbitrate a dispute arising over the exercise of some management action which the union failed to win inclusion of as a provision. The Board has carried this a step further and ruled that a company commits an unfair labor practice of it takes action based on economic grounds, e.g., subcontracting, without first bargaining with the union even though subcontracting is not mentioned in the agreement and no attempt is being made to discriminate against the union or union members. The

Board has also ruled that where a matter was not discussed in bargaining, it can be brought up during the life of the agreement, and again the employer must bargain.[85/]

Such rulings have disturbed employers. Rather than trying to rely on basic statement of principle to define the appropriate subject matter of collective bargaining, many employers insist on so-called "management rights clauses" stating that "all functions, rights, powers and authority which the company has not specifically abridged, delegated or modified by this agreement are recognized by the union as being retained by the company." But a management's rights clause can scarcely be considered to resolve the question of what issues are bargainable,[86/] even at a given point in time and certainly over time. Chamberlain and Kulin set out factors which lead to this conclusion:

> ". . . (1) contents of agreement may expand from one negotiation to the next, regardless of the wording of a management's rights clause in the previous agreement; (2) intent of the clause depends on the intent of the entire agreement; /moreover/ as long as there is a 'no-strike' pledge in the agreement, it is hard to prevent any worker complaint from being processed through the grievance procedure, right up to arbitration."[87/]

Many employers often demand that unions waive the right to bargain over or to arbitrate issues which management feels it must control to protect the profitability of the business. To preclude bargaining throughout the life of the agreement, contracts may provide for "waiving" bargaining, even on subjects never considered in negotiations. It must appear clear and unmistakable that the parties "waived" their right to bargain.[88/] Upon such showing of definite waiver, courts may sustain the actions of employers unilaterally affecting bargaining rights, that is, i.e., subcontracting bargaining unit work to another company without notice to the union, approval if the labor contract specifically grants employers the right to subcontract without notice.[89/]

Once the contract is given life, Section 8(d) requires that any party intending to terminate or modify a collective agreement must serve written notice of such intention on the other party to the agreement sixty (60) days before the agreement expires or, if the contract has no termination date, sixty days before the desired charge. Thirty (30) days after the serving of the termination notice, the Federal Mediation and Conciliation Service and state mediation agency must be notified of the existence of a dispute. A strike or lockout before the expiration of this sixty days period or termination of the date of the agreement, whichever occurs later, is an unfair labor practice.

II. Public Employees and Collective Bargaining

Public employees and workers in publicly owned established establishments are excluded from Taft-Hartley and are subject to separate legal representation depending on whether they are employed by the Federal government or by State, county or municipal authorities. It is estimated that one in six employees is in the public sector of employment; by 1975 the projected employment will increase by 69 per cent. 90// Prior to 1960, only in a few cases had Federal agencies signed collective agreements with unions representing their employees, examples being the Tennessee Valley Authority, Alaska Railroad, Inland Waterways Corp. and Bonneville Power Administration. The majority of local governments were silent on the rights of their employees.

The unions of civil servants and public employees seem to have two principal aims. First, to attract the biggest possible membership through an intensive recruiting campaign, so as to increase their powers of persuasion and ability to bring pressure. Secondly, to increase the number of collective agreements in public employment and to try out certain formulas as a first step to the general

introduction of new methods of collective bargaining and labor relations between the public authorities and their employees.

In the Federal system, the right to join unions has existed since the Lloyd-LaFollette Act of 1912, but by 1961, excluding the Post Office, only 16 percent of Federal officers were unionized.[91/] It was not until Executive Order 10988 of President Kennedy in 1960 that the basis of formal Federal collective bargaining was established. It provides that management and employee organizations designated as exclusive representatives shall meet at reasonable times and confer with respect to personnel policy and practices and matters affecting working conditions. The basic issues of public policy confronting collective bargaining in the public employment arena are exemplified by such matters as, e.g., agreement on what is negotiable in public service; exclusive recognition and its impact on unorganized employees as well as employees in organizations not accorded exclusive recognition; strikes in the public service; third party arbitration of disputes and the circumstances of its use; determination of bargaining units; employee exclusions from unions and associations; and assignment of responsibility for conduct of bargaining activities.

Under Kennedy's Executive Order, each agency is required to promulgate its own regulations for the conduct of its labor relations pursuant to the Order. Typically, these regulations reproduce in substance, Articles 1 and 2 of Section 7 of the Order.[92/] These Articles, which may be characterized as management rights clauses, provide that:

> "(1) In the administration of all matters covered by the agreement officials and employees are governed by the provisions of any existing or future laws and regulations, including policies set forth in the Federal Personnel Manual and agency regulations, which may be applicable, and the agreement shall at all times be applied to such laws, regulations and policies;

(2) Management officials of the agency retain the right, in accordance with applicable laws and regulations (a) to direct employees of the agency, (b) to hire, promote, transfer assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees, (c) to relieve employees from duties because of lack of work or for other legitimate reasons, (d) to maintain the efficiency of the government operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted, and (f) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency."

In a study undertaken by the Bureau of Labor Statistics in 1964, 209 collective bargaining agreements under E.O. 10988 were examined. They covered nearly 600,000 workers in 21 departments and agencies.[93/] About 90 per cent were negotiated by unions affiliated with the AFL-CIO, representing about 87 per cent of all covered workers. Amongst the devices in operation were cooperative committees, negotiation committees, fact-finding committees, mediation, grievance procedures and advisory arbitration.[94/]

When we get to the States, in most respects labor relations practice in public employment is still in an early stage of development. With the upswing in threatened and actual direct action by public service employees, of important concern is the designation of impartial agencies to regulate collective bargaining practices and to aid in the adjustment of labor disputes. In some states and municipalities jurisdiction on public employment relations has been conferred on already existing or new agencies.[95/] In other cities and states proposals are being considered.[96/]

III. Unfair Labor Practices and Board Machinery

Reference has been made throughout the U.S. section of this Chapter to this term. Section 8(a) - as to employers - and (b) - as to labor organizations and their agents - set out activities and conduct

which are held to be unfair labor practices. All of these which have not already been mentioned will be discussed, where relevant, in sections dissecting the effect of law and unions on management functions.

An unfair labor practice is not a crime; "although properly speaking it can only be regarded as sui generis, a useful analogy is that of a public tort."[97] The NLRB is empowered, by Section 10, "to prevent any person from any /listed/ unfair labor practice affecting commerce." Whenever it is charged that such a labor practice has occurred the Board[98] or any of its agents may issue a complaint and subsequently begain an inquiry. An official of the Board investigates and tries to settle the issue informally. If it can be neither settled nor dismissed as unfounded, a formal hearing will be held by a trial examiner, testimony reduced to writing and filed with the NLRB. After reviewing the testimony, the trial examiner either dismisses the case or issues a cease-and-desist order. The five-member Board then sits, as a three-man bench, as a type of court that hears appeals on decisions made on unfair labor practices and representation cases.

Under Section 10(j) the Board has power to petition a District Court (within the district wherein the practice in question is alleged to have occurred) for appropriate temporary relief or restraining order, which is subject to a final decision by the Board as to the substance of the case.[99] If the Board decides against the charged person, it can issue an order requiring such person to cease and put up notices within the plant or union office giving details of steps the Board has ordered him to take /Section 10(c)/. If the employer or union refuses to comply with the Board order, the Board may petition a U.S. Court of Appeals for an enforcement order /Section 10(e)/. Upon the filing of such petition, the Court can grant such temporary relief or restraining order as it deems just and proper, and make and enter a decree enforcing, modifying or

setting aside in whole or in part the Board order. Refusal to comply with such an order would subject the non-complying party to contempt of court action with possible penalty of fine and imprisonment. Only in a limited number of cases can an employer incur financial penalty, e.g., when he is ordered to reinstate an employee who has been unfairly dismissed and to make up his back pay /Section 10(c)/, or when he breaks a collective agreement, Section 301 provides for suits for violations of contracts between employer and labor organizations. Hence, a court order would be necessary.[100]

A look at statistics over past years shows that such unfair labor practices rarely go beyond the initial stages in the machinery. For the period 1937-1947, only 5.4 percent of all charges filed with the Board required a formal order for enforcement.[101] In fiscal year 1961, a total of 12,116 unfair labor practice charges were closed. Of this number, only 4.6 per cent reached the Board in Washington, D.C., for decision.[102] Adding to this number the 1.1 per cent of cases which were closed after compliance with an intermediate report, we have a total of 94.3 per cent of all cases closed before a formal decision by either a trial examiner or a board order and/or court decree.[103] The number of cases going to the courts for enforcement constitutes about 1.5 per cent of the total cases filed. Recent years have shown similar patterns. It will be this 5 or 6 per cent which forms the difficult labor relations questions that the final part of this study will focus upon.

IV. Interpretation and Application of the Collective Agreement

It has already been established that the NLRB has power to remedy and prevent unfair labor practices, a power "not /to/ be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . . ." /Section 10(a)/. Yet, a series of Court cases have reinforced the position of Federal Courts and arbitrators to play a role in interpretation and enforcement.

What is management free to do? This is the key question on the bargaining and interpretation of collective agreements. Parties mean by the "management prerogatives" clause that if the matter falls outside the boundary of matters subject to regulation by the agreement, then no arbitration can put limits on the employer's freedom of action. But the question of which side of the line it falls on is a question for arbitration. The U.S. contemporary system of "private arbitration" is embedded in the collective bargaining agreements between managements and unions, but even without such agreements, employees and employers would still have to find a mutually satisfactory way for setting the multitude of conflicts that inevitably arise in any large organization where management's primary concern is with efficiency and the employee is jealous of protecting his rights and freedom. American labor contracts contain many clauses which invite outside interference. "Just cause" must be interpreted by someone after management and labor agree that there shall be no discipline without just cause. And when the parties agree that seniority shall prevail in job assignments, promotion, and lay-offs, provided the senior man is qualified, someone has to pass on qualifications unless there are some objective tests for the purpose.

In the period from 1900 to 1935 important beginnings were made in the development of technizues for arbitration of labor disputes over the meaning and application of contract terms. /Neither the NLRA of 1935 nor the LMRA of 1947 was designed, or is directly used, for settlement of labor-management disputes, except that Taft-Hartley has such provisions for "national emergencies," to be discussed in Chapter 5/. The pioneer experiment along this latter line centered on the impartial chairmanship or umpire system marked by provision, in collective bargaining agreements, for a person, agreed on by the parties to it, to serve for the term of the agreement, and during that time to hear and determine all disputes over the meaning and application of terms

of the contract, such arbitration being a final step in those procedures. This was used widely in situations where there is either a large union and many small firms in the same market, or where there exists both a powerful union and powerful employer.

With the increasing acceptance and cooperation between the parties, and increasing maturity of contract administration has witnessed a "judicial" approach to grievance arbitration, asserting the primacy of the contract as the governing instrument of Union-management relationships, thus imposing on the parties a greater degree of responsibility for effective contract administration. Harry Schulman saw the collective labor agreement as establishing an "automomous rule of law and reason." 104/ Of arbitration under such an agreement he says:

> "The arbitrator is an integral part of the system of self-government. And the system is designed to aid management in its quest for efficiency, to assist union leadership in its participation in the enterprise, and to secure justice for employees. It is a means of making collective bargaining work and thus preserving private enterprise in a free government." 105/

Thus, management, in agreeing, e.g., to discipline only for cause, or to promote by seniority if qualifications are equal, has, through arbitration, turned over to someone else decisions previously made by management. Collective bargaining agreements may provide that the road to arbitration shall be (1) directly from the parties to an agreed upon arbitrator; (2) by way of the American Arbitration Association, with selection from its roster of arbitrators; (3) by way of the Federal Mediation and Conciliation Service, with a mediated settlement and an end of the matter, or selection from that agency's panel of private arbitrators, and proceeding to arbitration; or (4) by way of a State mediation agency and continuing to arbitration. 106/

An agreement to arbitrate rights is specifically enforceable. 107/ This was not the case in the absence of a statute. At common law, though an arbitrated award was enforceable, an agreement was enforceable only

as other ordinary contracts, by an action for damages. Since it was virtually impossible to establish that damage had been suffered by reason of a refusal to arbitrate, there was in practice no enforceable contract. Section 301 of Taft-Hartley has opened the doors to court review of the contents of collective bargaining by allowing either party to bring suit for violation of an agreement in federal courts. While originally meant to be a method of holding unions accountable for any breach of a "no strike" commitment, it has proved more useful to unions then to management. Unions have sued to require managers to abide by arbitration decisions under the grievance procedure established by the agreement.

In Lincoln Mills,[108/] the Supreme Court held that agreements to arbitrate in collective bargaining contracts are specifically enforceable under Section 301(a) of the LMRA. Section 301 "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective agreements and includes within federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."[109/] Since federal law is supreme under the Constitution, the new federal law of collective agreements to be fashioned by federal courts has wholly displaced state law in the field.[110/] And while State courts have concurrent jurisdiction with federal courts to entertain suits under Section 301,[111/] the state courts must apply federal law.

Historically, agreements to arbitrate grievance disputes carefully restrict the arbitrator's jurisdiction. Some contracts state that the arbitrator cannot rule on certain subjects, or cannot add or subtract from the agreement. Until recently, it was also assumed by most practitioners in collective bargaining that rights not specifically dealt with by the contract were, in effect, reserved to management. This view was buttressed in many contracts by a general

"management rights" clause, which reserved to management all rights that were not limited by the agreement with the union. Then, in 1960, the U.S. Supreme Court in the now famous Steelworkers Trilogy,[112] ruled that unless there is a specific exclusion in a written agreement, "or the most forceful evidence" indicating that the parties intended the arbitration clause not to be applicable, issues arising between parties to a contract were arbitrable. Such matters as plant movements or the contracting out of work, over which the union had failed to gain a voice in contract negotiation, were thus nevertheless made arbitrable by these Supreme Court rulings.

Though it is the courts which are charged in Lincoln Mills with the task of fashioning the common law of labor contracts, it would seem that, since it is the arbitrators who have the responsibilities (in almost all such contracts) for the determination of disputed issues involving the interpretation and application of their terms, the first assault amy well be mounted by them, as advance agents for the courts. But recently an emergent role of district courts in national labor policy has been seen.

Since 1963, the collective bargaining agreement has been a "federal contract"[113] to which federal question jurisdiction attaches automatically. Such agreements are federal contracts not merely because national labor policy approves and encourages them, but because they are the product of a process of compulsory bargaining devised and imposed by federal law for that very purpose.[114] Even though the courts have opted for reference of the arbitrability question to arbitrators in the first instance, unless parties have unequivocally excluded arbitration, nevertheless, the volume of cases which district courts will be called upon to adjudicate on the merits will substantially increase, largely for two reasons: (1) a substantial number of employers will insist on the right to litigate their claims for damages for strikes

in breach of contract in courts rather than before an arbitrator; and (2) some employers will insist on explicitly excluding important areas of contract interpretation, like the management prerogative clause, and some questions of law, entirely from arbitration.

There are instances where collective bargaining agreements contain no arbitration clause or where arbitration is not resorted to, and the courts are called upon to decide the dispute. Among the issues decided recently by courts as matters of federal law are severance pay,[115] the right unilaterally to change hours of work,[116] discharge,[117] transfers,[118] compulsory overtime,[119] travel pay,[120] vacation pay,[121] seniority,[122] going out of business and leasing the enterprise to employees,[123] contracting out,[124] effect of decertification on recognition clauses,[125] and retroactivity of wage adjustment.[126]

On the question of the process of interpreting the collective agreement and the roles of Courts and arbitrators, the Supreme Court has ruled that "so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."[127] The 1960 Trilogy also hold that ". . . the federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards . . . /for/ the arbitrators under these collective agreements are indispensable agencies in a continuing collective bargaining process." The Court has also stated that "under decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties."[128] Courts must now also look to National labor laws as interpreted by the NLRB and review courts in resolving such questions as whether an agreement to refrain from filing

charges with the NLRB in exchange for arbitration is unenforceable because public policy forbids waiver of the righ to seek redress from the Board, or whether waiver of strikers' rights to reinstatement is enforceable.[129]

There are those commentators who feel that the courts should not get involved in this complex area:

> "I believe that the courts should not lend themselves at all to the arbitration process. Labor arbitration is a private system of justice not based on . . . /or/ observant of law . . . . /It should not/ be able to call on the legal system to enforce its decrees . . . .
> Section 203(d) of LMRA, 1947, so often quoted as indicating a national policy in favor of arbitration, says nothing of court enforcement."[130]

There are additional conflicts of jurisdiction when the NLRB is brought into the picture. It will often happen that the same conduct which the Federal Act condemns as an unfair labor practice will also be a breach of Section 301. Often where the ultimate issues are different, the court must determine unfair labor practice issues as the threshhold matter in order to reach the ultimate issue of the breach of contract question, just as the Board must often determine whether a contract has been breached in order to reach the ultimate question whether an unfair labor practice has been committed.[131]

Finally, the conflict that has so far produced the most literature has been that between the arbitrator and the NLRB. The origins of this dilemma stem from two separate policies expressed in the statute. Section 203(d) states that "final adjustment by a method agreed on by the parties is hereby declared to be the desirable method of the settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." However, Section 10(a) includes a proviso that, "this power (of the NLRB to prevent an unfair labor practice) shall not be affected by any other means of adjustment or prevention that has been

or may be established by agreement, law or otherwise." Thus the Board is, on the one hand, directed to faster use of voluntary dispute settlement procedures and, on another, to protect statutory rights under the Act.

In theory, the two powers are mutually exclusive, but employer, employee or union conduct may be both a breach of contract and a violation of the statute. While the courts have not held that NLRB jurisdiction preempts the collective contract area as they have federal-state jurisdiction, the decision of an arbitrator does not necessarily preclude an independent Board determination of a grievance filed under the NLRA.[132/] In a later case,[133/] the Board refused to uphold an arbitrator's decision for his failure to consider any unfair labor practice questions where they may exist.

This current policy of favoring the sharing of jurisdiction is best expressed by Douglas, J. in Carey v. Westinghouse:[134/] "By allowing the dispute to go to arbitration . . . those conciliatory measures which Congress deemed vital to 'industrial peace' . . . and which may be dispositive of the entire dispute, are encouraged. . . ."

But problems lie ahead in the area of private vis-a-vis public interests and policies. With the Board's tendency to increase the number of issues considered to be mandatory subjects for bargaining under the NLRA, the scope of concurrent jurisdiction between arbitrators and the NLRB has been broadening. Whereas the settlement of disputes over many of these issues was formerly the responsibility of the arbitrator according to management's rights and arbitration clauses of collective agreements, the Board can now exert jurisdiction under Section 8(a)(5) of the Act in "refusal to bargain" cases. In two recent decisions dealing with employer's duty to bargain during the term of an agreement, the Supreme Court (1) upheld a Board order requiring the employer to furnish information on the transfer of machinery from the plant so that

the union might be able to proceed with pending grievances,[135] and (2) upheld the Board when it interpreted contract clauses to find out whether unfair labor practices had been committed.[136]

How can these conflicts evolving around arbitration (the "private judicial system") and the Courts and the NLRB (the "public judicial system") be resolved? Hays suggests that as a substitute for Court enforcement of arbitration is concerned, if we are concerned about a special expertise in problems for those passing on violations of collective agreements, we set up systems of labor courts.[137] In light of the Board's present policy of deference to private arbitration with the right to review, commentators have sought to evolve criteria to endeavor to reduce and eliminate conflict between arbitrators and the NLRB.[138]

Finally, not by way of a definitive answer, but in an attempt to present the problem as one both of a need for Congressional redefinition of public labor policy vis-a-vis the role and jurisdiction of the agencies created, and a re-evaluation of the role of arbitration within our collective bargaining system, the following comment on the operation of arbitration perhaps best sums up the problem as it now exists:

> "If arbitration begins to do the business of the NLRB and courts, interpreting legislation, effecting national rather than private goals as a kind of subordinate tribunal of the Board, that voluntarism which is the base of its broad acceptance could be eroded and its essential objectives changed. Arbitration can be weakened by freighting it with public law questions which in our system should be decided by courts and administrative agencies. Arbitration should not be an initial alternative to Board adjudication. It has been (and should be) a separate system of judication respecting private rights and duties resulting in final decisions - not decisions on public matters reviewable by the NLRB and deferred to if not repugnant to the Labor Act." [139]

CHAPTER 4

THE PARTIES: EMPLOYERS AND UNIONS

AUSTRALIA

Unions

The arbitration system depends on the organization of employees (and to a lesser extent of employers).[1/] Part VIII of the C & A Act sets out the provisions of the statute applicable to registered organizations. Sections 6-10 of the IAA cover registration of trade unions, and Part XI, Sections 107-117 deal with rules and provisions applicable to trade unions.

A trade union in Australia, where registered as an organization, industrial union or association under the relevant arbitration legislation, has, except in the isolated case where there is more than one registered employee organization in the same field, what amounts to a sole right of representation before such a tribunal of the workers in the industry to which it is functionally related, and in the obtaining of awards in their interests fixing the terms and conditions of employment in that industry.[2/] Industrial disputes between employers and members of unregistered unions can be settled under the C & A Act but the unregistered union is not a party to the dispute. The dispute is between employers and individual employees.[3/]

But unions obtain many powers by registering under the respective Acts. Unions registered under the Commonwealth Act acquire (1) legal entity; without registration an award could not be made covering new members of the union who came into the industry post-dispute; (2) right to sue its members for subscriptions, fines, and levies; (3) right to expend funds in support of political parties; (4) protection against employers' attempts to weaken the union by discriminating against unionists in promoting or discussing employees; (5) privilege to obtain award provision requiring preference to be

given to union members over non-members in obtaining employment or in relation to promotion or dismissal; (6) if there are rival unions, the registered union has greater bargaining advantage; it can initiate an award covering employment not only of its own members but also members of an unregistered union.

The fact that in the Federal sphere and in all the "court" States unions have to register with the appropriate tribunal in order to participate in conciliation and arbitration processes and appear before tribunals, and also may have their registration cancelled, gives such tribunals powers of scrutiny over union activities which is not possible in most collective bargaining countries. The industrial arbitration statutes have introduced control over internal affairs of "industrial unions" very much more authoritarian in type than anything known to the common law. E.g., (a) provision as to what must be included in union rules as a pre-requisite to registration; (b) provision for Industrial Court to order enforcement of rules; (c) provision calling for union rules to conform to the Act's provisions, and power of Industrial Court to declare an offending rule void;[4/] (d) power to order cancelation of registration of a union; (f) power to inquire into alleged irregularities relating to conduct of union elections and to make an order declaring the election void; (g) provision enabling union elections to be conducted under authority of the court on request from the union or branch or specified proportion of members; (h) to insure democratic government of trade unions, a requirement that union rules provide for control of committees of association and its branches by members of the union and members of the branches.

In NSW, the point in becoming an industrial union is that only industrial unions have access to the State's arbitration system on the employee side. Section 74 of the IAA makes it necessary for proceedings for an award to be initiated on the employees side by an industrial union.

In the Federal sphere the Commonwealth Industrial Court has adopted the approach that there is no obstacle so far as Federal law is concerned to the registration of a Federal organization under the IAA of NSW. But there is reluctance on the part of the NSW Industrial Commission to accept the position that one can have a trade union registered under the Trade Union Act and the IAA which is really nothing more than part of the membership of the Federal organization subject in all respects to the direction and control of the Federal organization and having no measure of independence.

With the advent of the C & A Act, unions of a like nature acting independently in each State began to meet and to amalgamate into the one organization for the purpose of obtaining federal awards. In spite of the growth of the membership of unions, and a more general amalgamation of State unions (covering the same type of worker) into Federal unions (the main purpose being to obtain Federal awards), it was not until 1927 that the ACTU was formed.

The growth in membership and the number of trade unions since 1959 is set out in the following table:[5/]

YEAR	NO. OF UNIONS	NO. OF MEMBERS
1959	369	1,850,700
1960	363	1,912,400
1961	355	1,894,600
1962	347	1,950,500
1963	347	2,003,000
1964	340	2,054,800
1965	334	2,116,200

One thing noticeable about the trade union movement is that the national links are not strong, most national unions being loose federations, with the big majority of unions being active mainly on a State basis. It is difficult to quote exact figures when dealing with Australian unions, since several recent articles have had the number of trade unions vary from 370 to 334. As of 1967, 101 unions were affiliated with ACTU, as compared with about 85 per cent with the AFL-CIO.

The size of the unions range from 5 members (Industrial Arbitration Registrars' Assn.) to 200,000 (Australian Workers Union). Most unions in Australia are small, but as the following figures for 1963 show, the bulk of membership is concentrated in a few unions: 6/

SIZE OF UNIONS	NO. OF UNIONS	% OF TOTAL UNIONS	NO. OF MEMBERS (000's)	% OF TOTAL MEMBERS
Less than 2000	238	69.0	122.7	6.1
40,000 & over	16	4.6	964.0	48.1

The sixteen unions comprising 48 per cent of total membership are small by international standards, having an average 60,000 members. 7/ The figures presented in a recent book written by a trade unionist will give, in the extreme, a rough idea of the makeup and problems confronting the unions:

> ". . . 370 unions, 260 of which, or 70 percent, have less than 2,000 members, but more significant still, 4.6 out of the 98 unions affiliated to the ACTU have less than 3000 members and only 21 have more than 20,000. At the State level, where the ACTU policy is implemented, the fragmentation is even worse. E.g., in NSW, of the 194 unions registered under State legislation 26 have less than 100 members, 44 less than 500, 113 less than 3000 and only 11 have more than 20,000." 8/

There are now three central organizations covering wage and salary earners: The ACTU with 101 affiliates covering about 1.5 million; the Australian Council of Salaried and Professional Associations (ACSAA) with 39 affiliates covering about 330,000; and the High Council of Commonwealth Public Service Organizations (HCCPSO) with 29 affiliates covering about 100,000. One trade unionist points out that the percentage of trade unionists in the total work force is falling: 9/

> ". . . In 1954 /61 per cent; in 1964, 56 per cent/. In this same period the work force increased by approximately 830,000, but the affiliated membership of the ACTU went up only 343,000. At the present time there are about 1,480,000 in the work force yet to be enrolled in the trade union movement. Of the

1,224,700 workers in the manufacturing industry only 741,300 are unionists. In three years, 1962-1964, membership of white-collar organizations went up by 10 per cent as against an increase of 2.6 per cent in the trade union movement generally. In NSW, the work force increased by 5 per cent in 1964, but trade union membership went up by only 1.6 per cent." 10/

A. The ACTU

The objectives of the ACTU were based on the socialization platform adopted by the Australian Labor Party in 1921: socialization of industry and utilization of resources of Australia for the benefit of the people. The methods it has chosen to implement this policy include the closer organization of workers by --

(a) transformation of Australian trade union movement from a craft to an industrial basis;

(b) grouping of unions in their respective industries;

(c) amalgamation of unions with a view to the establishment of one union in each industry;

(d) the consolidation of the Australian labor movement with the object of unified control, administration and action;

(e) centralized control of industrial disputes;

(f) educational propaganda;

(g) political action to secure satisfactory working class legislation.

Its executive is composed of one delegate from each State Trades and Labor Council and six representatives from the major industrial groups of unions affiliated, with two Vice-Presidents, a President and Secretary. It convenes a supreme Congress biennially. Under its Constitution, the executive has power, inter alia, to deal with business submitted to it by any Branch or affiliated organization, intervene in every dispute likely to extend beyond the province of any one state, and to deal with all industrial matters of an interstate character. Decisions of the executive tending to make or alter policy

as to interests of the trade union movement as a whole are subject to endorsement by the Branches and shall apply when endorsed by a majority of them.

The almost universal coverage of compulsory arbitration procedures in Australia has given the ACTU an assured role in the process of industrial regulation, owing to the pivotal position of the Commonwealth Arbitration Commission. The ACTU often coordinates union claims and takes part in negotiation of composite agreements with a single industry or concerns whose employees are covered by a multiplicity of unions. The more strategic the position occupied by a union, theoretically the greater is the need for ACTU support, and hence the latter is in a position to act effectively against any union acting in ways considered detrimental to the interests of the movement as a whole. One of its methods is centralized control of industrial disputes, and its constitution provides accordingly. The procedure and effect of this power will be discussed in Chapter 5.

The ACTU has steadily gained initiative in presenting moves for revisions in wages and hours in cases presented to federal arbitration authorities. In the post-war era, the ACTU has been successful in an application to the Arbitration Court in having the work week reduced to 40 hours,[11/] and it has taken over the responsibility of presenting all national wage claims relating to the Basic Wage and Margins before the Conciliation and Arbitration Commission even though it is not a registered organization within the meaning of the C & A Act. The ACTU overcomes this by appearing for unions that are registered and this is accepted by the Commission.

B. Labor Council of NSW

The Branches of the ACTU are the various State Trades and Labor Councils which were formed prior to the ACTU. In NSW, there are affiliated District or Provincial Councils. There are at present

some 106 unions affiliated, with a membership of 750,000 members. In addition to the objects of improving conditions, securing representation in Parliament and establishing educational facilities and programs, the Council is empowered to prevent disputes between their member unions and employers, the implementation of which will be further discussed in Chapter 5.

The administration of a typical federal union is on a two-tiered basis. The lower level consists of the various branches, usually one in each capital city but sometimes more than one in each State depending upon the size and locational features of the union. The branch office is the active operational level of the union. The upper tier is the federal conference which consists of the branch secretaries and the delegates elected by the branches. It is the supreme policy-making body of the union with over-riding authority over the branches. The task of the federal committee (or federal executive), which is elected by the conference or referendum of members in all the branches, is to coordinate the activities of the branches and to keep them in line with the conference's policy.

C. Shop Stewards and Shop Committees

Australian unions are noted for their apparent lack of strong and effective communications at the plant or shop level. Yet such machinery as shop stewards and shop committees are not held in the best favor by many union leaders. In the Commonwealth, ordinarily the Commission is prepared to accord a union delegate or shop steward a very limited role as representative of the union in dealing with an employer.[12/] In NSW, an award may make provision for recognition by an employer of the representative of the union on the job, for the right of the representative to interview management in the event of a dispute arising,[13/] and to communicate with permanent officials of the union in case of urgent grievances arising.[14/]

As Commissioner Kelly of the Western Australian Commission recently explained the industrial situation:

> "It is the duty, responsibility and right of management at its various levels to manage. It is the duty of those employees, including shop stewards, to carry out lawful directions of management and to comply with obligations voluntarily entered into by them in entering into contracts of employment with the /employer/. . . . Under those contracts, employees have many rights and, just as management is entitled to efficient and diligent service from its employees, so too are employees entitled to an efficient means of protecting those rights and remedying any grievance arising out of their employment. The appointment and recognition of shop stewards can make an important contribution to the achievement of this end if their role is properly defined and if they do not seek to go beyond that role and attempt to usurp either the functions of the union or the rights of management . . . ." 15/

Employers regard shop stewards as helpful in industry as a point of speedy and easy contact with workers, realizing that it is impractical for union officials to be constantly "on the spot" to represent and speak for employees in matters requiring immediate attention, and as useful because of the sound advice that, in ordinary circumstances, he can usually be relied on to impart to fellow workers in any discussion of employment grievances.

But part of the trouble revolving around the role of the shop steward is the question of clarification of his functions. It has been the case that a number of unnecessary stoppages have occurred simply because the job representative has not been properly instructed and/or he has arrogated to himself powers which are outside his authority. 16/ Commissioner Kelly, in his pronouncement, went on to state that:

> ". . . fundamentally, in his relationship with management, the role of the shop steward is to make management aware of the existence of grievances amongst workers whom he has been elected to represent and to put to management the views of those workers on the subject matter of grievances; and it must be stressed that his /authority/ is restricted to represent the group of workers who have elected him and does not extend beyond that he has the responsibility to advise his union of the existence of any unresolved grievance." 17/

But beyond just serving as the contact between union and management, the Australian shop steward also functions, in the ordinary case, as the chief representative of his union in negotiations with management covering matters of local shop importance, such as special rates and special conditions of employment. The distance to which he is entitled to proceed in the execution of this task is carefully observed and severely circumscribed. Australian shop stewards do not, to any extent, negotiate with employers on matters covered by, or connected with, the principal award or central agreement governing affairs in the industry,[18/] areas in which shop stewards in the U.S. figure strongly (e.g., job evaluation, work loadings and plant rules).

Shop committees are found mostly in the larger industrial establishments. They usually comprise representatives of all unions in the establishment concerned, and are established principally to coordinate union policy therein and to "streamline" the machinery for negotiation with management, but they have not generally gained recognition by award.[19/] There is total absence in the awards of any regulatory prescription in regard to these committees. The committees, as such, are unknown to the law and are without status under it, and they enjoy no recognition in the eyes of the industrial tribunals.

Shop committees exist in a number of forms in the trade union movement. The simplest form is the one confined to the members of one union, which usually takes the form of two members to assist and advise the shop steward or job delegate. Another form consists of a shop committee consiting of stewards of one union in a particular establishment with a convenor as chairman. Thirdly, there is a set-up consisting of representatives of a number of unions, who are usually stewards, and is known as an inter-union committee. The rarest form consists of representatives from the various shop committees in a

number of separate establishments of the same employer and is referred to as an area committee. In the latter two set-ups, they are not within the jurisdiction or subject to the control of any individual union, because the powers of a union have no attachment to shop committees not consisting solely of its own members.

Under most awards, shop stewards in a particular shop or department are allowed time off during work hours to interview the employer on matters affecting employees whom they represent. Members of shop committees, as such, have no such privileges and are not entitled to payment for time lost in connection with matters affecting employees indepartments other than their own.[20/] But since shop stewards or committees are employees first and foremost, there is limited protection accorded them in the usual managerial functions concerning the work force. For example, an employer, when retrenching employees, is under no obligation to give preferential treatment to shop stewards or union delegates, nor will such a provision be inserted in an award.[21/] This is in direct contrast to the set-up under the U. S. collective bargaining system.

D. Political Affiliation and Influence

The relationship between the ACTU and the Australian Labor Party (ALP) has already been mentioned. Today, many trade unionists and their sympathizers sit in both State and Federal Parliament. The socialization of industry is a well-advertised feature of the ALP's program, and of the advocacy of Australian trade unions. The ultimate objective of the trade unions and their political party is the socialization of the means of production, distribution and exchange. Indeed, this is one of the moving forces behind the unions' view that labor, being responsible for production, should share an increasing productivity. One of the officials of the NSW Labor Council expressed his belief "that industry should be socialized, and administered on a tripartite basis, with representatives of consumers, management and

workers. Workers should have a direct voice within their place of work in regard to wages, hours, work rules, and Works Councils should be elected from the ranks of the workers."[22/]

But the political action has had its detrimental affects on the Australian labor movement. The local, on-job activities gradually deteriorated among Australian unions that began to rely on political action after the start of the Labor Party in 1891. The focus of union work became the centralized, political-directed activity of full time union officers. It has been pointed out that there have been three significant developments, resulting from unions' political action, which in time impaired their ability to maintain or re-establish local job organization. First, rewards of political service to officers, second, continuous public prominence given to political aims and gains created the presumption that the political goal of securing distributive justice is the whole of the unions' concern, and third, the injection of possible political consequences into any bargaining with union representatives induced rigidity into bargaining relationships that almost preclude union-management negotiations at lower levels.

Statutorily, there is no provision in Australian Federal law, such as in Taft-Hartley, against the making on the part of labor organizations of contributions in, or in connection with, a political election campaign. An organization registered under the C & A Act may have rules authorizing expenditure of an organization's funds by payment to a political party where such a payment can fairly and reasonably be regarded as likely to further the industrial objects of the organization, and those objects are not such as to frustrate the policy and main purpose of the Commonwealth Act. Any State law purporting to restrict payments by a union to a political party that way cannot operate so to restrict a union registered as an organization under the Commonwealth C & A Act. While the Osborne,[23/] doctrine (a rule of a union in restraint of trade is not enforceable and is not legitimated

by the State Trade Union Act) does not apply to bodies registered under Federal law, it is unresolved whether it applies in the situation where a State branch is registered under State law, but is part of a Federal organization registered under Federal law.[24/]

At a recent meeting of the NSW Industrial Relations Society, Dr. D. W. Rawson, in speaking of the political influence within Australian trade unions, felt that the rapid growth of so-called tertiary or service industries which do not bring people together on the job in such large numbers, the general improvement of living standards and diminution of unemployment have all worked a lessening of class-consciousness of employees. Yet, unions have not moved away from their traditional affiliation to the ALP unless it is to accept the leadership of members of the Communist Party, despite the fact that a very large minority of trade unionists, roughly one-third, are reported to vote for non-labor parties.[25/]

Communists Influence:

There is no provision on Australian law similar to that previously found in Taft-Hartley that denied certification as a bargaining unit by the NLRB, and access to the peaceful machinery of this Act, to unions whose principal officers had failed to sign an "anti-Communist" affidavit. In 1950, Federal legislation was passed - the Communist Party Dissolution Act - declaring the Australian Communist Party an unlawful association, and by force of this Act, dissolved and its property forfeited. The High Court subsequently declared this to be ultra vires.

One reason for the previous refusals of the Australian Workers Union to affiliate with the ACTU was the allegation that Communists played too strong a part on the framing and control of the ACTU's policies. But recent years have seen some of the Communist strongholds lost with some resultant moderation of labor's voice.[26/] For this, and

other reasons, the AUW now seeks affiliation with the ACTU and will most probably be voted in at the 1967 ACTU convention.

With the adherence of organized labor to organized politics, there has come to be the reported lack of organization at the job-level, and this in turn is often cited as the cause for Communist success in capturing control of shops, forming unofficial inter-union shop-steward committees, and a heavy incidence of stop-work meetings and one-day strikes. 27/ One reputed result of this success of the Communists at the job-level has been that few unions have pressed ahead with shop policies and procedures as far as the arbitration system would permit. Foenauder is quick to point out that this has become a bit of a "bogey-man" with Australian unions:

> ". . . /By/ no means are all of these committees in Australia given to Communist inclination or tendency, and . . . even those that are Communist-dominated are sometimes at pains not to follow plans or make decisions calculated to antagonize unions whose stewards participate in their membership." 28/

In subsequent discussions in both this and succeeding chapters, further reference will be made to the political implications visible in day-to-day union transactions.

E. Union Policies

One of the frequent criticisms leveled at Australian trade unions is that the emphasis of policy determinations and administration is focused to too great a degree on the ACTU and industry - wide level. 29/ Though union leadership in Australia is reputedly weak at the plant level, 30/ the growth in influence and authority of the shop-steward is an unwelcomed development to many Australian unions and the threat of incurring penalties may serve union officials as a means of controlling this movement. 31/

In recent years the ACTU has been embarrassed by tactics by multi-union shop committees and area committees in industry stoppages in workshops where a dispute has arisen in regard to an

industrial matter, before control of the dispute can be, or has been, assumed by the relevant union and union machinery is set in motion to deal with the situation. The ACTU has established a policy in regard to shop committees[32] - the Charter for Shop Committees, Constitution and Rules, 1961. The Charter reminds affiliates that anything affecting wage rates and conditions of employment covered by an industrial award or industrial agreement is - by constitutional necessity - a matter for decision by the union or unions concerned, and is no affair of the shop committee. All shop committees should be subject, as to their decisions and actions, to rules and conditions of the respective unions concerned, there would be no power vested in the shop committee to determine matters, or abrogate decisions, contrary to rules and conditions of the respective interested unions, and the authority of a union over its shop stewards and other representatives would remain unimpaired. They are under an obligation to comply with procedures determined by the ACTU branch in the State which the shop committee in question is located.[33]

To reduce fragmentary industrial action by individual unions and shop committees, the ACTU instituted machinery to secure more central control. When the Australian Paper Mills (APM) warned the ACTU that the company might be forced to seek an arbitration award after twenty years of successful collective bargaining agreements in the paper industry because of unauthorized industrial action by a small group of employees, the ACTU executive moved to pull into line unions who threatened the successful operation of a "collective bargaining" system by unauthorized stoppages and urged the unions involved in the APM dispute to contact their members and instruct them to end these disputes.[34] When a dispute is threatened or has developed to the point where a stoppage is likely, the union or unions concerned should refer it to the State branch of the ACTU which shall control the dispute.

Where a stoppage occurs and Section 109 proceedings are likely, the State branch is supposed to call a conference of Federal unions involved, and arrange for them to confer with the disputes committee previously handling the dispute. If agreement cannot be reached, control of the dispute should pass to the Federal unions concerned under the auspices ot the ACTU. Further discussion of NSW Labor Council and ACTU disputes machinery will be presented in Chapter 5.

Since there is always the danger of irresponsible action on the part of a junior trade-union official or job delegate making a decision which could precipitate a strike, it is all the more noticeable how lacking the union movement is in education of industrial affairs. In most industrialized countries trade unions have long recognized the value of special education and training programs, either financed and run by themselves, or in cooperation with universities workers' educational associations and other outside organizations.[35/] It has been asserted that, "appointment of education officers by the ACTU at national headquarters and the State Branch level and by the bigger individual unions and white-collar organizations is the key to the developing of union education in Australia."[36/] In 1964, the ACTU made a decision to introduce extensive union education but very little has been done about it. The ACSPA representing 330,000 white-collar employees has formed a committee and with the aid of university lectures, organized a 7-day residential school for labor and industrial relations at the Australian National University for union people, but the ACTU declined to participate.[37/] Some individual unions, notably the NSW branch of the Vehicle Builders' Employees' Federation, have been active. The Institute ot Administration at NSW University has run four shcools for shop stewards of this union, the union meeting costs of fees, residence, and loss of wages.

The writer, during his stay in Sydney, witnessed two other outside attempts at "education". The Law School offers an extension course of lectures on Industrial Law at which members of employers' organizations and trade unions attend. Also, the various States have Industrial Relations Societies, which hold periodic meetings and annual conventions at which representatives of unions, employers and Government exchange ideas. Unfortunately, from this writer's experience, the trade union participation seems limited to a few unions, most of which have some sort of educational or research program of their own.

Employer Organizations

Often faced with as many problems as union members, the employer turns toward his association with the same logic as the worker turns toward the union. Both are seeking greater security against the fluctuations and uncertainties of their lot. Both have learned that they must stand or fall together, not only within their respective groups, but between the group as well.

The importance of employer associations in the framework of the arbitration system and award-making has already been discussed. It should be emphasized that award amendments are not merely a matter for decision between an employer and his employees, or between union and employer. For the reason that awards govern employers of employees on an industry-wide basis, along with the smallness in size of most individual employer units, preliminary negotiations with unions and submissions to arbitration are made by employer associations on behalf of all employers covered by the award rather than by individual employers on their own. This also assures employers that they are not confronted with wide variations in wages and/or working conditions amongst competing companies in as much as all are governed by the same award to which their association is a party.

All of the almost seventy employers' organizations registered under the C & A Act cover a particular industry or occupation. Apart from these, there are linked organizations not registered, the function of which is to coordinate the policies of an industry or an occupation on a national basis. Only in the 1960's has there emerged the National Employers' Policy Committee (NEPC), which presents a united employer front so as to promulgate and pursue a "total wage" policy. The policy committee consists of four major employer organizations: The Australian Council of Employers Federation, the Associated Chambers of Manufacturers of Australia; Australian Meat Industry Association; and the Australian Woolgrowers and Graziers' Council. Below the Committee is a national employers industry committee, consisting of experienced industrial officers from the above four organizations, whose function it is to conduct national arbitration proceedings and general industrial, economic and statistical research in relation to pending and future national arbitration proceedings.

Recently, two major employer organizations in NSW - the Metal Trades Employers' Association (MTEA) and the NSW Chamber of Manufacturers - have taken steps toward the formation of an Australian council of employer groups, to match the power and influence of the ACTU in the area of non-national wage issues.[38/] What is happening at the State level in NSW is occurring also in other States and at the Federal level, with major employers' associations seeking to enlist support under "a common banner." Some recent examples highlight this "cooperative" spirit amongst employers.

The NSW Government amended the IAA in 1959 by adding Section 88E providing for certain persons to be "deemed" to be employees. Since then there has been a struggle by five employer organizations against the Transport Workers Union (TWU) attempts to recruit to its membership some 1000's of small businessmen - employers, the owner-drivers of the transport industry. In October 1966 all major employer

organizations in NSW were invited to join in a combined effort to frustrate attempts of the TWU from becoming a joint union of employers and employees, thereby stripping some transportation employer groups of their membership.[39]

Another example of a major employer organization trying to rally all employers under a common banner presents itself in the recent attempts by the Printing and Allied Trades Employers Association (PATEA) to deal with the "O.K. Card" requirement of the printing unions to impose job and wage pressures on the individual employers. PATEA urged all the non-member companies to join PATEA and from a uniform hiring policy and industry-wide agreement among employers in the industry to pay a specified over-award rate.[40] Since most of the companies are confronted with a tight labor market, each company has the tendency to look after its own interests, and this cuts against the possibility of a united front to any one particular problem.

More and more the employer organizations are aware of the need for a well-informed and educated managerial staff. In talking about the structure of management, Warren McDonald, the then Chairman of the Commonwealth Banking Corporation, stressed effective communication within a company as perhaps the most urgent need in industrial relations. He emphasized the need to have internal directors on the Boards of Directors, so that there would be knowledgable people to make the decisions. "There is constant pressure on executives responsible for making decisions affecting employer-employee relationships. The wrong decision involving unwise determinations is often impossible to rectify and an unwise stand on an improperly prepared case can result in strikes. . . ." These words form part of the message introducing the MTEA brochure announcing seminars for Supervisors. In order to assist works managers and supervisors to

handle day-to-day problems in industrial relations, MTEA has set up a regular course whereby the "students" are presented with sessions dealing with employer-employee relationships, awards and legislation, trade unions and union officials, and labor disputes.

In forming a policy toward dealing with unions, the employers have sought a united front to as great a degree as possible. Employer groups have presented the problem as being one where managements will have to determine, in the face of union pressures, on a collective basis, whether or not they will allow unions to single them out individually with a view to enforcing upon them by direct action their demands. But at the same time employer associations seem reluctant to engage in joint consultation with unions: "Whilst unions persist with their attitude that the destruction of profitable business enterprises and services is legitimate in seeking their ultimate aim of socialization. I do not concede that management should be prepared to consult on a joint basis on matters of business administration. 41/ More recently, in an interview with staff members of the NSW Chambers of Manufacturers, the writer was presented with the view that management has of unions today -- unions trying to pick off the employers one at a time, and often not wanting to approach the employer associations so as not to have face a united front; unions assuming a negative attitude, saying that the employer "cannot do this or that" instead of discussing positively with the employer the proposed action to be taken, with those employees who gain extra benefits fighting the union policy of equalization of wages. 42/

I. "Collective Bargaining" Within the Arbitration System

The compatibility of "collective bargaining" within the Australian arbitration system has come in for a lot of discussion both by academics and participants, and will be the subject of examination in the last chapter of this study.

The present section will seek to examine the extent of bargaining and joint consultation that takes place, along with the attitudes of the parties. As has been mentioned, [43] a considerable amount of "supervised" restricted collective bargaining is carried out by the parties during award making. There evidently is very little entirely independent pre-arbitration bargaining done in Australia, and the likely explanation is that both the unions and employers are conditioned to "approach" tribunals instead of each other with their problems, especially as to negotiation of awards and with regard to grievances "arising thereunder."

But what does "collective bargaining" mean in the Australian context? According to one employer spokesman,

> "/C/ollective bargaining means, if we use it in the American sense, that the trade unions are on their own, no holds barred. It means long strikes; no Labor Department Inspectors coming out to aid the provisions. It means that every bargain when made has to be followed up, supervised, enforced by unions themselves, not by aid of outside inspectors. The bargain when made is not an enforceable, legal contract. In these terms we have no collective bargaining in Australia." [44]

/For the purposes of this discussion the writer will not attempt to point out the misconceptions that Australian participants have of the American collective bargaining system, but will wait until the Evaluation section of the final chapter/.

The unions think of arbitration awards as establishing the minimum terms and conditions, and continue seeking to reassert the right of unions to bargain outside these minimum standards set up by the Commission. This attitude has been most pronounced in the area of over-award payments. The ACTU has stated that the trade union movement accepts the Commission's rates as minimums which are to be built up by additional payments determined by negotiation. Moreover, the unions have come to the opinion that the tribunals, reluctant to break new ground, will be more ready to act if they are presented with established facts:

". . . It is clear. . . that the key guiding principles are that arbitration only grants that which has already been won or about which great determination has been shown. It is therefore necessary for the trade unions to either establish a higher wage or a certain working condition in industry to a substantial degree before going to arbitration; or to mount a strong enough campaign of action to indicate great determination to have the higher standard. To go to arbitration first without having previously paved the way for the application of these principles is to seriously jeopardize the success of the claim. . . ." 45/

The employers' associations have sought to counter the unions' claims for collective bargaining by arguing that the acknowledgment of the rights of unions to prey upon individual employers must also connote rights of employers to compel groups of workers wihin the factory to accept their demands under collective bargaining -- unfettered by union interference or by intrusion of arbitration procedures.

The spread of collective bargaining since the 1950's has not ranged wider than a single industry basis (e.g., the oil agreement in 1958 between oil companies and the main metal trades unions, exchanging over award payments for union submission to a grievance procedure). A notable attempt at nation-wide agreement was made in connection with long service leave. Employers and unions represented by the ACTU agreed on a draft code for thirteen weeks leave twenty years of continuous service. The unions wanted the code to form a minimum provision and that more favorable terms under State legislation should be available to workers under State awards. The negotiations broke down and there was no signing of a uniform national agreement. 46/ On the American pattern, that is, a private negotiation of all terms and conditions of employment, "collective bargaining" is still comparatively rare. 47/ Collective bargaining on this scale occurs most frequently in what are called "island" industries, that is, where there is one or at most a few employers covering the whole industry, such as at Broken Hills or the airlines.

Before examining individual instances of bargaining in Australia, one may ask why, what with the system encouraging conciliation (hence negotiated agreements) and the unions and employers seemingly critical of the present operation of the arbitration scheme, more collective bargaining has not developed. Perhaps the key is found in a statement by Professor Isaac: "Whereas as co-existence is all that is necessary under compulsory arbitration, an essential feature of collective bargaining is some measure of cooperation." [48] While the extent of industrial agreements and consent awards has been referred to (see supra p.), this phenomenon has been largely due not to sophistication in negotiation, but to the fact that precedents in arbitration and/or negotiation elsewhere have guided the result; and the unions concerned have not been equipped to devise arguments to justify a departure from precedent. As O'Dea points out, ". . . little attempt is made to advance arguments in negotiation, other than those arising from the brute strength of labor shortage coupled with strike action." [49] For over sixty years now union officials and employers' representatives have been busy developing skills of advocacy rather than those of negotiation. One of the draw backs to fundamental bargaining in Australia is the employers' seeming lack of appreciation of the value of an increasing in monetary benefits in return for productivity improvements. They are, in other words, too content to allow the industrial commission to impose an increase in wages, etc., without requiring anything extra in performance from the employees.

In an attempt to sort out the criteria for labor-management cooperation, the then Regional Director (NSW) of the Department of Labor and National Service stated that cooperation can begin only after the respective parties have agreed on a goal or goals for joint achievement, which must include consideration of means of achieving it and the motives of the proponent. Given acceptable goals, he went on to emphasize, cooperation is facilitated by good personnel relations, by

willingness to supply information, by the understanding of issues involved, and by continuous attempts to understand the other's point of view.[50] Yet, very few industries find the industrial officers of the company meeting with the union officials involved on any regular basis.[51]

An important step in the direction of joint consultation on a tripartite level, between the Federal Government and top-level representatives of unions and employers was taken in 1954 with the formation of the Ministry of Labour Advisory Council. The main purpose of the Council was to provide a channel for regular study by and exchange of views between the three parties on broad but important matters of common interest. However, the Council came to an abrupt end in 1958 when the ACTU withdrew its representatives.[52] In his 10th Annual Report, Sir Richard Kirby, trying to encourage a re-establishment of joint consultation on a national level, stated that "a joint committee of the organized unions and employers meeting fairly regularly for discussion of industrial relations on a national level might well be aimed at and if, on occasion or more often, the President of the Commission could assist by being an independent chairman, I can give assurance that he would be delighted to do so.[53]

In one of the few studies undertaken on this subject in Australia, a 1962 survey of aspects adopted by major secondary industries in Newcastle, NSW /an important center for heavy industry, marketing of primary products, and shipping, with a population of 210,000 +/ was carried out[54] Managements of individual companies were asked to provide an outline of their standard techniques adopted to deal with, among other things, determination of issues considered to be of major significance and facilitation of joint union-management consultation. The writer concluded that:

> ". . . /a/nything approaching joint consultation or collective bargaining is in most cases strongly opposed by company policies in the steel groups. In the non-steel group there is considerable willingness to seek solutions . . . outside of the framework of arbitration. . . . Whenever possible, management in the Newcastle area prefers to maintain a paternalistic rather than a consultative approach to rank-and-file employees. When this paternalism meets with a negative response from

rank-and-file, the most common reaction is to have recourse to the legal santions provided by the arbitration system." 55/

In referring to one giant of Australian secondary industry, BHP, Professor Kingsley Laffer considers it "rather exceptional and extreme in its resistance to the development of informal relations with unions. 56/

But the fault does not lie solely with management. Australian unions are opposed to any scheme according to which employees are represented directly on company boards of directors, instead of through delegates nominated by their trade unions. They are also opposed to joint consultative committees or councils in industry, even where constituted in such a manner so that the trade union is a member, and in direct association and cooperation with management. 57/

A look at several notable (and most talked about) examples of collective bargaining in Australia may give an idea of the problems and criteria surrounding its workings. One of the earliest examples of an industry attempt at cooperation was the Melbourne Building Industry Agreement in the lat 1950's. 58/ This was an uncertified agreement between a group of master builders and a group of unions, providing for contract over-award rates (not attempting to improve on any other State or Federal determinations) and a method for settling disputes other than by direct action. 59/ Frank deVyver explored the reasons behind this display of cooperative spirit and found that economic necessity forced the Melbourne building trades unions and their employers to embark on collective bargaining: "With craftsmen in short supply and their business booming, builders readily agreed to pay over-award rates and received in return some assurance that workers would remain on their jobs while disputes were investigated." 60/ Hence this was really an example of "collective bargaining under the impetus of compulsory arbitration," in that the parties bargained on these issues after the determinations of the Wages Board had been made and met.

Broken Hill presents an interesting, but exceptional, situation. Predominantly a mining area, the Broken Hill arrangement is not a registered industrial agreement and has none of the features that distinguish industrial agreements under the Arbitration Acts. It is an agreement entered into after earnest consultation by a body of men representing the mining companies of Broken Hill, the associated unions and the Barrier Industrial Council (a group of delegates from all unions, who are the ultimate authority in industrial relations in Broken Hill). Each of the companies' officials signs the agreement and each union does the same. The document sets out the work arrangement for the ensuing three year period. If a stoppage occurs, then a member of the Industrial Commission or a Conciliation Commissioner examines the situation and makes an appropriate finding (which is almost invariably accepted by the parties).

The airline industry offers an illustration differing in several respects from the others cited. Though, as Hutson points out, changes were made in the legislation governing the statutory airline corporations (e.g., Qantas, TAA), so as to exclude the Public Service Arbitrator from the fixation of their wages and conditions, it was provided that their agreements must be submitted to the Department of Labor to check if they conformed with official policy.[61] Adding to the special circumstances surrounding the airline industry, the pilots, in 1957, voted to leave the arbitration system, and formed the Australian Federation of Airline Pilots, which is not a registered body under the C & A Act. Though it is able to call a strike, it has no legal power to make agreements on behalf of pilots without the consent of individual pilots. The normal processes of conciliation and arbitration cannot be applied in disputes involving the AFAP, as Chapter 5 will seek to demonstrate, using the recent Qantas dispute as an illustration. But the major advantage of the pilots' being outside the Arbitration Commission is their ability to bargain separately with the domestic and

overseas airlines. In July 1966, the AFAP won increases of 27.5 per cent over the next two years for domestic pilots. The economics of the industry are important to keep in mind. This is an industry where complex, highly capitalized new equipment, worked by relatively few highly stalled operatives, is currently being installed at great capital cost. The relationship of these factors to the action of the union will be discussed further in Chapter 5.

The situation at APM, involving the Pulp and Paper Industry Agreement presents yet another approach. An ACTU steering committee does the negotiating. Comprised of representatives of the unions involved with the company, the committee reports to the ACTU. This committee system functions for both the major agreement and the subsidiary company agreements. For example, let us say 14 unions and 14 companies were involved in the pulp and paper industry; then these groups elect a committee to negotiate on behalf of the group, e.g., a committee of four on each side. At APM, the building trades unions do not operate under the agreement because they seek to retain a special loadings provision instead of double pay for public holidays. Bargaining with the building trades unions takes place through an exchange of letters with the individual unions, to get a consensus of terms and conditions. They usually accept the terms and conditions of the Pulp and Paper Industry Agreement, but enter into no formal, registered written agreement. If a dispute should arise, APM could go to the State system since the unions concerned are registered.[62]

This brief examination of some instances of collective bargaining in Australia points up the difficulties, the special circumstances, and the necessary mature thinking and re-evaluation of a cooperative relationship between union and management. Further references to examples of negotiations outside the "court" machinery will be made in Part III, in particular, in light of the "hands-off"

attitude of the arbitration system. As to the future of collective-bargaining within the Australian arbitration system, the final chapter will seek to offer some evaluations and predictions.

UNITED STATES

Unions

Roughly 18 million workers belong to trade unions,[63] organized in nearly 80,000 locals, most of which belong to national unions covering a particular occupation or, in certain cases, covering all workers in an industry. There are nearly 200 of these nation-wide organizations, the great majority (85 per cent) of which are affiliated to a single trade union federation - The AFL-CIO.[64] International unions vary in size from less than 100 members, like the International Association of Siderographers, to well over a million like the United Auto Workers, United Steelworks, and the Teamsters, who account for approximately one-fifth of total union membership. By contrast, the 100 smallest probably account for about one-twentieth of total union-membership.

The trade union movement in the U. S. saw, in the 1930's, a split in organizational strategy. The well-established American Federation of Labor (AFL) was "craft-oriented". A craft union strategy looks to the demand for and supply of labor in each of the various skill categories. It aims at regulating supply to meet, but not to exceed, the demand. It does this by (1) controlling entrance to the trade, through apprenticeship and a work permit system, (2) maintaining union hiring halls so that available work may be rotated among members when there is not enough for all, and (3) insisting on "closed-shop" conditions so that outsiders may not disturb the equilibrium. The Congress of Industrial Organization (CIO), which originated in the mid-1930's, is "industry-oriented." Industrial union strategy has to be based on the work place. When first hired, the industrial worker has only general aptitude to offer, not a developed skill which is a finite

quantity in the labor market. Key focus is on the work-place, with the industrial union seeking to fix him there, to give him a vested right to stay there, tying his claim to the work available in the enterprise to length of service in the enterprise relative to the length of service of the other workers (a seniority principle).

Employers often refused to recognize unions as bargaining representatives and were often found guilty of an unfair labor practice, since the union was entitled to petition for an election if a majority of employees wanted it as the "exclusive bargaining representative." But certification is by no means required by law and for recognition purposes there are other alternatives which are just as valid and legitimate as the electoral process. The alternatives include a recognition strike, card checks and voluntary balloting, including a show of hands. The advantages of Board-conducted elections mainly accrue to an employer in certain statutory protection in the event a union loses. This protection includes a 12-month ban on another election and a prohibition against recognition picketing by any union, and is considerably broader than in the absence of the election. As far as the union is concerned, the advantages of certification, over recognition based on other means, are minimal, and basically consist of the one-year period during which absent exceptional circumstances, the employer may not in good faith challenge the union's majority status.

A. Structure and Government of Unions

The AFL-CIO, representing some 14.3 million workers,[65/] depends on the affiliated unions for its existence. It is a federation in the true sense of the word, with limited powers delegated to it by the autonomous internationals. The internationals are self-governing bodies, financed independently of the Federation, and free to disaffiliate - leave the Federation - at their own discretion. If an international does disaffiliate it loses the aid and services of the Federation, but many of them are sufficiently powerful to operate efficiently as independent organizations, notable examples being the

United Mine Workers and several of the Railroad Brotherhoods. /The Teamsters were voted out of the AFL-CIO/. In addition to the internationals, the Federation is comprised of a number of locals that have not been incorporated into any of the nationals, city and state groupings of local unions, and six trade and industrial departments. In short, the powers of the AFL-CIO are no greater than those the internationals are willing to grant.

1. Government of the Federation

The supreme governing body of the AFL-CIO is the biennial convention. Each national or international union and each organizing committee is entitled to send delegates in accordance with the size of its membership. Between conventions the government rests with Executive Council which is to meet at least three times a year. It consists of the president, secretary-treasurer, and twenty-seven vice-presidents, all of whom are elected at the biennial convention. The Executive Council is an extremely powerful body, with authority to put into effect the decisions of the conventions and to enforce the provisions of the AFL-CIO constitution.

The Executive Council may investigate any affiliate accused of infiltration by communism, facism, or corruption, and, on a two-thirds vote, suspend such an affiliate from the Federation. Such action may be appealed to the convention. The most publicized and repercussive of such suspensions for corruption was that of the Teamsters Union.

The membership of the Executive Council is made up largely of top officers from the large internationals, another avenue through which the large internationals dominate the Federation. Two other bodies complete the top governmental structure of the AFL-CIO. The Executive Committee creates its own "inside ruling group" by electing an Executive Committee consisting of six of its members and the president and secretary-treasurer of the Federation. It meets every two

months. Since the AFL-CIO conventions are biennial, some mechanism had to be created to reflect the views of the total membership during the two-year interval. Hence, the General Board was established consisting of the Executive Council and the president of each affiliated international. It is to meet at least once a year and to decide all policy matters referred to it by the executive officers or the Executive Council.

2. Governments of the Internationals

The formal government of the internationals has a number of parallels with that of the Federation. The international's chief source of authority is the convention; between conventions, it is executive boards, and between meetings of the boards, the president and other elected officers. In the actual operation of the governmental structures, there are fundamental differences between the Federation and internationals. The officers of the latter have much more power over their constitutional bodies; they need not tolerate as much dissension among their bodies; they can remove officers of a local union and directly take over its administrations (trusteeships). The Federal has no parallel power over the internationals.

3. Government of the Locals

For the locals, the basic policy-making unit is the local meeting, once a month. Union organizers or business agents are important in those locals which have members in several different companies and where jobs are of relatively short duration (e.g., garment industry, construction industry).

The basic functions of these three groups of government are briefly as follows:

1. The AFL-CIO: to promote interests of unions and workers by encouraging organization among the unorganized, engaging in political activity through the Committee On Political Education, and maintain a labor lobby to testify on matters before Congressional committees.

2. Internationals: to promote organization within the industry, bargaining directly with employers in some cases and supervising and assisting local union bargaining in others, lending assistance to strike-bound locals, and maintaining a close watch on legislative and legal developments.

3. Locals: to regulate the business of day-to-day unionism such as contract administration, grievance processing, and looking after the welfare of the employees.

People have questioned whether labor's political strength would be more effectively deployed by a charge in its basic strategy, which is to operate as a pressure group within the political system. Labor leaders such as Walter Reuther have talked about possible formation of a labor party, and his union, the UAW, has engaged in a considerable amount of political action in Michigan without any apparent neglect of their internal procedures or members' job problems. Still another pattern is provided in New York by the Liberal Party, strengthened by such unions as the ILGWU and the Hatters, Cap and Millinery Union, whose 250,000 to 400,000 votes often play a balance-of-power role. In assessing the relative effectiveness of these forms of political action, one must remember that unions represent a minority group whose percentage has shrunk in recent years,[66/] and whose members, while predominantly Democrats, represent other political views as well.[67/]

Employer Organizations

While the majority of agreements are single employer agreements, negotiated with a local of a national union, covering a single establishment or plant, the post-war era has seen an increase in the number of workers covered by collective agreements under multi-employer contract bargaining.

Employers' associations conduct most of the multi-employer bargaining. There are two major employers' associations covering the whole of the U. S. and all sections of the economy: The Chamber of Commerce and the National Association of Manufacturers. There seems to be a trend towards multi-employer bargaining on an industry-wide scale with "industrial" unions - e.g., garment unions, teamsters, lumber industry, shipping industry. Employer association bargaining usually takes place in two situations. First, when a number of employers hire workers who are members of the same Local, or groups of Locals organized in a Joint Board, or District Council, of the same International. The effect of this industrial union type of multi-employer (association) bargaining is to cut down competition between companies based on wage differences. Second, when a number of employers each hire workers who are members of different Locals of as many different Internationals (e.g., the construction industry). The Association negotiates and signs agreements with each of the Locals. This relieves the need of separate negotiations with many unions and promotes uniformity. 68/

In some instances the associations may have no clearly defined authorization or membership, but the employers as a matter of practice accept whatever the association negotiates. Employers also engage in more flexible, informal arrangements. In the steel industry during the past decade, bargaining has moved from simultaneous negotiations by the major companies to bargaining through an elected negotiating team, at least for economic terms and general contract provisions. The auto industry has thus far reached only the stage of collaboration in parallel negotiations. However, with the increasing use of "pattern-bargaining" - using an agreement with one company as a basis for bargaining with the next - more than collaboration in some industries will be imminent.

Despite the increasing use of multi-employer bargaining, the Acts ignore it. Employers who bargain jointly must do so by agreement among themselves on a voluntary basis, with the bargain agreed on by them in no way binding on other employers who are not members of the association. Section 9(b) of LMRA states that the unit appropriate "shall be the employer unit, craft unit, plant unit or subdivision thereof." No mention is made of multiple employer units, and the subsequent certification by the NLRB of such units makes it arguable that this was an oversight in the 1935 statute. Since then, several attempts have been made to outlaw "industry-wide bargaining," both politically and academically.[69/] Also, while the Board has certified multiple employer units, no employer can be compelled to be a part of such a unit against his will, for the act provides no procedure for establishing "majority rule" on the employer side.[70/]

Not to be confused with true Association bargaining is employer cooperation. The airline and newspaper industries provide the best examples. Traditionally, airline unions bargain on a single carrier basis. However, to counter-balance union "whip-saw" strike tactics, six major carriers created, in 1959, a Mutual Aid Pact. The Pact is designed to reimburse the strike-grounded airlines for a part of its strike losses by payments from other pact members whose routes duplicate those of the struck carrier and who acquired the additional revenue as a result of the strike. Another form of employer cooperation is exemplified by the agreement between New York City newspaper publishers that if anyone of their papers is hit by a strike, all the others will suspend publication. This is a strong pledge of support for an enterprise to get from its competitors, but the bargaining and the agreements signed are separate.[71/] The legal standing of these cooperative agreements in relation to the law of lockouts will be discussed in Chapter 5.

> "Collective bargaining can be looked upon as a three-step process: (1) bargaining within the union to accommodate the needs and goals of the various groups within the work force; (2) the same kind of "internal bargaining" within management, especially when multi-plant or industry-wide bargaining structures are involved. Then the parties can sit down together and attempt to resolve their dis-agreements; and (3) if, after bargaining on substantive terms, the parties are unable to reach agreement, agree on procedures to break the impassee. . . ." 72/

In the period 1935-1945 many managements, confronted with unions for the first time, centralized all authority for labor relations matters at a high level. Once collective bargaining became established and management became competent in its practices, many managements began training foremen in contract administration and restoring their authority in labor relations. Today, progressive management policy tends to give foremen increasing discretion in industrial matters. Yet, it remains likely that consultation with top-level management on many issues, notably, grievance settlements, will remain a necessity because of their potential precedent - making nature.

A. Union Policies

Because the union is essentially an opposition group, responding on behalf of its members to actions initiated for the most part by management, it can never be secure. Union strength depends on the support of the membership, whose attitudes toward the union fluctuate, depending largely on meaningful attitudes. The union must therefore carry on a campaign on two fronts: for power in relation to management and for allegiance of its membership.

The 1950's saw an increasing centralization of power in the national unions at the expense of their affiliated locals. A number of factors account for this. The spread of industry-wide and regional bargaining gives prominence to the negotiating functions of the national union and reduces that of the local. The effects of

automation and greater capital investment per worker in such areas as national health and welfare funds, and the need for mobility of employees and portability of benefits increases the necessity of national control of collective bargaining. In addition, union leaders have learned that low wage standards in any geographic area cause competitive disadvantages to employers in that region and constitute a threat to union standards achieved elsewhere, and hence seek supervision and policing of local union contracts with employers. Moreover, the legal requirements imposed by labor laws place further burdens on the locals. The requirement of filing financial reports, adhering to certain standards in election procedures, and limitations on contract terms and bargaining tactics all require legal advice, and it is likely that in most cases it is the national which can afford to hire a staff of lawyers to cope with these problems.

The techniques by which the national exerts control over its locals consist of formal constitutional limitations on the local union, intervention by national officers in local bargaining, and the informal exercise of power that is coordinate with the process by which an ambitious national leader solidifies his position.[73/] As control affairs has become centralized in the hands of the national office, the degree of discretion which local unions and even joint and district councils may exercise in drafting some bargaining proposals has been limited: "National and local union representatives appear together in virtually all bargaining conferences, from those in the individual plant (where national representatives supplement the local committee) to those blanketing a large part of the industry (where local representatives supplement the national officers)".[74/] As an example, the Teamsters recently instituted constitutional changes to strengthen international control in the negotiations of industry, area and nationwide contracts. Local unions that are parties to area, conference, industry or national bargaining must accept terms of the ensuing contract even if its members vote against it.

Some unions which formerly bargained on a plant-by-plant basis or a regional basis have, in recent years, found it necessary to resort to the concept of national or "master" agreements.[75] The Teamsters, in 1964, negotiated their first national labor contract in the trucking industry, which at least one commentator predicted would eventuate into such a situation as the April 1967 three-day lockout.[76] The growth of the "giant" firms in the garment industry has caused the International Ladies' Garment Workers' Union (ILGWU) to reevaluate its bargaining policy and produced a new approach to "large firm" bargaining. The basic technique for dealing with the complex problems has become the Master Agreement, of which there are now more than a dozen. The primary function of the master pact is to provide a centralized vantage point for bargaining with the firm so that a single standard may be effective. For each shop a supplementary agreement is negotiated to deal with local problems in the light of local conditions. This master contract bargaining continues the ILGWU principle of requiring the expanded production of a unionized firm to be conducted under union terms.[77]

Where unions cannot gain company-wide bargaining, to gain self-protection against company efforts to take advantage of the weakest or most poorly informed locals, unions have devised what substitutes they could. They have established councils of all the locals whose members include employees from the specific firm. They have developed exchange of information among these locals and have assigned specific international representatives to handle negotiations with a single company.

While the emphasis in many unions has been on achieving and maintaining company-wide negotiations, this does not mean that there is no room in such bargaining for local initiative or direction; for differential terms or conditions between firms of plants.[78] The industrial agreement determines certain major conditions of work in

the bargaining unit and prescribes the standards which must be observed by all component units, but considerable supplementary agreements at the level of the individual plant cover other matters of local interest not in conflict with the general terms - e.g., wage differentials among job classifications, seniority arrangements, work sharing, administration of layoffs, scheduling of hours and vacations.

Bargaining within the framework of the collective agreement goes on at levels other than the local union leader and plant officials. Thus, increasing use is made of educational and training programs whereby shop stewards and supervisory personnel in order to improve the overall bargaining relationship and day-to-day operations within the plant, are regularly "schooled" in the problems of contracts and their administration. A shop foreman may then be enabled to collaborate informally with a union steward by working out private understandings as to how they will handle, i.e., recommendations for promotions, within the terms set forth in the collective agreement. Sometimes the local union leader may join with lower-level management to establish and carry out policies on which a master agreement is silent. Union officials are also alert to the possibility of obtaining additional benefits for their membership after a contract is signed as well as before. For example, if a union can induce management to make an exception can be made the basis of demand for the liberalization of vacations in the next contract negotiations, either with this company or with others.

Various groups within the shop may try to gain by direct action or pressure what they failed to gain in bargaining over the new contract. The term "factional bargaining" has been used to describe the action of these groups.

Some unions have sought to take into effect these conflicts of pressures between local and national interests in their internal structure. A good example of union establishment of effective internal procedures is found in both the men's and women's clothing industry. They have special structures to recognize the different interests in the work force. There are special locals established to take into account the varied differences in the composition of the union membership. For example, on the men's side, there is a pants-makers' local, coat-makers' local, etc.; on the women's side, a dress pressers' local, a cutters' local, etc. Each local then selects a representative to serve on the joint board, where the problems and interests of all the groups are accommodated. This enables the union to present a common front in dealing with the employer.

George Taylor cites the interesting example of a union that has tried to balance local autonomy and centralization.[79/] In bargaining on national agreements the Glass Workers Union sets up a negotiating committee that consists of about sixty members elected by members of the different locals. A unanimous vote of this committee is required to consummate an agreement. The delegates to the committee are sometimes instructed by their locals not to sign the national agreement unless certain issues, which are important to the particular locals, are resolved during the course of negotiations. Once an agreement is reached between management and the committee, there is no referendum vote by the members. Instead the elected delegate is responsible for going back to his membership and explain why he agreed to certain provisions in the contract or why he receded from some of the demands proposed by his local.

Recent changes in the formal bargaining procedures and machinery of two of the biggest unions have given positive proof of attempts to "de-centralize" control of bargaining to a degree sufficient to take account of local interests. In 1966, the 3500 delegates to the United Steelworkers convention approved a resolution to give rank-and-file members a greater say in contract negotiation while preserving industry-wide bargaining. The resolution takes the right to ratify or reject contracts from the wage policy committee and gives it to four industrial conferences - basic steel, nonferrous metals, aluminum, and can making. Also, the industry conferences, rather than the wage policy committee, will determine whether or not to strike, subject to approval of members in the industry. 80/

After the UAW's 20th Constitutional Convention in 1966, the delegates adopted a proposal to amend the contract ratification procedure of the Constitution to permit skilled trades workers, engineers, technicians, and office workers to "vote separately on contractual matters common to all and, in the same vote, in those matters which relate exclusively to their group." The effect of this amendment has drawn comment from the General Counsel for the International Brotherhood of Electrical Workers:

> ". . . /the/ challenge /to collective bargaining/ presented by the veto the UAW has given to its . . . skilled tradesmen in the Big Three Contract talks. If they do not feel they get enough out of the proposed national agreements, the whole thing goes down the drain. . . ." 81/

The trend toward larger bargaining units has also been coupled with an increasing tendency by local unions to spurn industry-wide agreements because they fail to deal adequately with plant problems. 82/ As an outgrowth of the 1959 legislation seeking to secure rights of members, locals in such diverse unions as those of machinists, auto workers, musicians and teamsters began to act on their own, rejecting

national agreements and continuing strikes for local demands long after the officers of international unions and chief company officials had reached their understanding.[83] Agreements are usually not completed until the members approve them, and approval is by no means automatic: "The Federal Mediation and Conciliation Service estimated that in over 750 situations in 1962, rank-and-file union members rejected settlements negotiated and approved by their leaders."[84] In 1966, the rejection figure was put at 12 per cent,[85] with several commentators suggesting that this has perhaps been influenced by Landrum-Griffin's emphasis on democracy and member rights.[86] Examples are not hard to find. In 1961 the big Kenosha local of the UAW rejected a profit-sharing agreement worked out by managers of American Motors and UAW leaders. The vote caused the national offices to demand a revote. Approval was won the second time, but only after a concerted effort by union officers to "persuade" the members to reconsider. In the same year, the musicians of the New York Philharmonic walked out on strike when presented by their local officers with a signed agreement. They protested that they had not participated in the negotiations. 1963 saw the New York Typographers reject an intricately negotiated agreement and continue their long 100-day strike another two weeks.

With the increasing complexities of collective bargaining issues and the transitions of the economy, unions and management face the problem of avoiding crisis bargaining which might lead to increasing government intervention: "We want free enterprise and free collective bargaining to support each other. They stand as the cornerstones of the labor policy of this Administration. All our experience teaches us that free collective bargaining must be responsible. So long as it remains responsible, it will remain free." 87/ Over recent years various representative groups appointed by the President have reaffirmed this view along with suggestions as to how to encourage more responsible bargaining. 88/

Before exploring the devices that have been incorporated to induce cooperation and provide mechanisms for resolving competitive differences, it might prove worthwhile to pause and look once again at the practices of General Electric, this time in its approach to multiunion bargaining. For years, G.E. had negotiated with more than 80 labor unions representing its employees, the IUE being the largest and one of three that had national agreements with the company. In 1965, in order to "evolve a set of national goals and to adopt a coordinated approach to 1966 collective bargaining negotiations," the AFL-CIO formed a committee on collective bargaining, consisting of representatives of the several unions /Auto Workers, Machinists, IBEW, Technical Engineers, Sheet Metal Workers, Allied Industrial Workers, and Flint Glass Workers/ that bargained with G.E., including representatives of the IUE. However, the company refused to discuss contract issues with that group's steering committee.

In April 1966 the IUE informed G.E. that it had abandoned the group effort and arranged for further negotiations, but when G.E. found that seven members of the IUE's negotiating committee were affiliated with other unions represented on the steering committee, negotiations

ended. The IUE charged that G.E.'s refusal to meet and bargain with the eight-union committee violated Sections 8(a)(5) and 8(a)(1) of Taft-Hartley. G.E., saying that the IUE was the only union certified to bargain with G.E. nationally and that the other unions are not part of the bargaining team, filed charges that the "coordinated bargaining" coalition was unlawful. The NLRB held that G.E. must show cause why it should not bargain with the coalition on a national contract, and ordered G.E. to bargain. 89/

On August 18, 1966, the Federal District Court in New York issued a temporary order under Section 10(j) of LMRA directing G.E. to bargain with the IUE in the presence of the representatives of the seven other unions. On September 8, the Court of Appeals, without determining the merits of the unfair labor practices involved, vacated the injunction as not being necessary to restore a status quo in the present dispute before its final resolution by the NLRB. 90/ The questions were IUE's right to designate such additional, nonvoting members of its negotiating committee and G.E.'s right to hold such designees unacceptable or unpermissible. Then, on September 20, Justice Harlan of the Supreme Court issued a stay of the appellate court's decision. 91/

After three weeks of contract talks with the IUE and ten other unions, G.E. offered a 3-year package on September 14, which the unions rejected. At President Johnson's request, contract negotiations were extended for two weeks past the October 1 strike deadline, while three top-level Cabinet officials joined Federal mediators in assisting the parties seeking a settlement. On October 16, the G.E. Conference Board of the IUE ratified a national contract agreed upon by G.E. and an eleven union bargaining committee headed by the IUE. After the agreement was signed, a series of local strikes occurred at G.E. plants concerning local issues. On October 18, workers represented by the

Machinists and the UAW at a local plant where military jet engines are constructed were ordered back to work under a Taft-Hartley injunction. 92/

The final chapter on this question has not yet been written, for on January 16, 1967, the Supreme Court declined to hear the IUE and G.E. coalition case and remanded it for a decision as to whether it was moot because the parties were able to reach a contract. The ultimate decision in this "test case" can have for reaching repercussions on collective bargaining.

Changing economic and industrial conditions, as they have developed in the post-war era, call for a form of continuous bargaining before, during and after the life of a contract so as to engender a closer relationship of union and employer. Since in the U.S. federal and state legislation have in the past been reluctant or unable to act forcefully in establishing labor standards, developing social welfare, and helping industry and labor adjust the technological change, many difficult issues, only initially touched on in the political process, have been thrust upon collective bargaining. 93/ Moreover, technological developments are such in some industries that strikes are made almost obsolete. 94/ Late in 1966 the American Assembly Conference on Collective Bargaining /71 leaders in economics, labor, business and education/ recommended year-round joint discussion on all issues of mutual concern to unions and management "to reduce to a minimum the count-down element in the negotiations of new contracts." 95/

If negotiations are to be conducted on the basis of factual study and discussion of the various proposals, time should be given each side to study and reply to proposals of the other. Most agreements specify a date when they will expire and when the relationship expressed by the agreement will come to an end. A few agreements provide for indefinite renewal of the old provisions until new provisions are approved. The "open-end" agreement (no fixed termination date) continues in effect until termination or sixty days' notice by either party. 96/

In a few cases arrangements have been made for formal exchange of propositions. This has been the case for years in the industry-wide collective bargaining in the flint glass industry. The written agreement covering bargaining between the Simmons Co. and the Upholsters' Int'l. Union provides for such an exchange. Article IV stipulates that "all proposals regarding either the Master Multi-Plant Working Agreement or Local Plant Supplements shall be consolidated and presented in writing by the respective negotiating chairmen to the other party within 30 days from the first notice by either party of a desire to negotiate."

The strength of American unions in the shop and the prevalence of the grievance process have already helped to produce a good deal of lower-level cooperative bargaining. Grievance bargaining is not always cooperative, but the common practice of discussing work rules and writing them down makes them explicit and easier to deal with than if they were merely tacit arrangements protected by tradition. 97/ "If managers are willing to offer value for value and not merely insist upon a sacrifice of valuable rules by workers, changes can be secured without stubborn resistance." 98/

Many commentators have suggested the use of bilateral or tripartite bodies to deal with such problems as revision of incentive systems and obsolete or inefficient work rules, planning adjustment to technological change, reduction of high grievance rates, and increasing efficiency of high-cost plants or firms. 99/ Recent years have seen examples of union and employer bilateral and tripartite committees to carry out continous bargaining and administration of programs:

1. The General Motors - UAW formula to guarantee employees a "real wage"; that is, one not subject to the fluctuations of the Comsumer Price Index, and assurred, as a quid pro quo for not resisting

the introduction of labor-saving machinery, that they will share in the benefits of increased productivity, in the form of an "annual improvement factor."

2. The work of bipartite "human relations committees" in the basic steel industry, established as an outgrowth of the 1959 steel strike. In 1963, the contract contained an agreement on four job-security issues to be overseen by the Human Relations Committee, the implication being that further bargaining on these issues might be undertaken during the term of the contract.

3. Kaiser and the Steelworkers have instituted a tripartite committee to devise a long-run plan designed to share the fruits of increasing productivity among shareholders, workers and the general public, and a formula for settling disputes without the necessity of a strike. 100/

4. Armour and Co. and the Packinghouse Workers' Union initiated a "study committee," designed to anticipate and cushion the impact of plant closings or curtailment of the work force, as a result of automation.

These are probably the best known and most imitated forms of union-management cooperative bargaining. This concept of continuous bargaining has caught on in other union-management relationships as well. 101/ On the West Coast, the longshoremen and shipping companies reached a bilateral trade whereby certain obsolete and costly work rules were relaxed in exchange for a fund to stabilize earnings and to accelerate retirements. 102/ In 1963, the American Arbitration Assn. announced a program to encourage an even wider adoption of "continuing discussions" outside of the "crisis atmosphere that often accompanies negotiations of labor contracts," beginning with a 3-day conference of union-management officials in the newspaper industry. 103/

To avoid crisis bargaining to a further degree, several industries have established "pre-negotiation" committees. In 1963, the UAW and two large companies set up study groups to explore difficult issues a year before formal negotiations were to begin. The UAW has also directed its International Executive Board to devote intensive study, prior to a 1967 Special Collective Bargaining Convention to several of the problems now confronting their employees.

In sum, in the past decade, public impatience with crisis bargaining and the complexities of many issues raised by rapid technological change have convinced union leaders and managers of a number of industries that they might gain by the establishment and institutionalization of cooperative forms of bargaining. Just recently, I.W. Abel, president of the million-member Steelworkers Union, called for voluntary union-management action to insure industrial peace without Government intervention. He urged that employers and unions agree, before contract negotiations begin, on procedures for resolving any deadlocks that may develop at the bargaining table. He also recommended a Federal study of "the causes of industrial peace," in the hope that answers to the problems that erupt in strikes may emerge from a comprehensive analysis of the factors that produce constructive labor-management relations. 104/

CHAPTER 5

INDUSTRIAL DISPUTES: CAUSES, CONTAINMENT AND SETTLEMENT

In both countries orderly rule-making -- whether by "legislative" arbitration on interests (as in Australia), by "judicial" arbitration on rights (as in America), or by privately legislated collective bargaining on interests (as in America and to a small degree in Australia) -- may be supplanted by disorderly strike or other direct action.

The purpose of this chapter will be to examine, in the first instance, the degree and nature of strike activity in both systems, from both a long-term and recent view, with emphasis given to current trends. Subsequent sections will then seek to discuss the legal approaches to direct action, with special emphasis on the roles of private and public containment and intervention.

W. Sprague Holden, of Wayne State University, visited Australia and did a comparative study of two newspaper strikes. 1/ He concluded that,

> "The two disputes were different in no important detail as to origins. In Detroit and in Sydney, disagreement about wages was a primary factor. Both situations held overtones of automation fears. . . . Why then did one stoppage (in Detroit) last for more than four months and the other (in Sydney) only one long week-end? The answer is to be found in differences between the social-economic-historical-legal milieu of the two situations, as well as in the procedures involved in time of trouble." 2/

A. E. Evans, the executive officer of industrial relations for the Metal Trades Employers Assn., after a visit to the U.S., called Australia "strike-bound," and bemoaned the impression that has been created that "strike action can operate side by side with compulsory arbitration," so that strikes in breach of awards are too often accepted as normal. 3/ He concluded:

"In the U.S., the two parties face up squarely to the bargaining issue and they act responsible. Strikes are relatively rare: a deal is a deal. The Australian system, which revolves around a third party does not require the same degree of responsibility and this has been reflected in the attitude and conduct of the unions." 4/

These two brief observations, perhaps debatable, do serve to highlight the difference in outlook of the two systems. The Australian system appears to justify the reduction of strikes as an end in itself, without necessarily going to the root causes of unrest. In the U.S., it is recognized that since it is the parties who must live with the agreement and its terms, it is they who should determine them. Australian arbitration claims to place concilatory bargaining first, but in effect the parties to a great degree feel that the terms and conditions are being pre-determined or ultimately determined for them.

STRIKES-GENERAL STATISTICS

Much has been said about the "time-lost" or "man-days lost" due to strikes. It is true that in the U.S. we occasionally get the longdrawn-out strike when contract negotiations are engaged in, but the U.S. has taken an outlook on strikes vis-a'-vis responsible industrial relations that Australia has apparently failed to grasp: we differentiate between the strike which seriously threatens public interest and those which, while being a nuisance and inconvenience and even imposing economic hardship, are not of a kind which may be reasonably regarded as seriously threatening human life or the national economy. An ILO study of the number of man-days lost through industrial disputes per 1000 persons employed in mining, manufacturing, construction and transportation showed that from 1955-1964 time lost in Australia was less than in the U.S. for every year. 5/ As an average during the 10-year period, Australia lost 378 days/year/1000 employees, while the U.S. lost 1044, or more than one day/man/employee. 6/ For the years 1960-1964, in terms of duration, the U.S. average strike lasted about 14 days, while the average strike in Australia lasted less than 2 days. 7/

One must always be careful in dealing with reported figures, especially when they represent a comparative analysis, because of the different techniques and formulas employed in arriving at the final totals. However, one thing that can be fairly stated, without resorting to exact figures, is that America suffers more man-days lost, due to longer strikes. Yet it has been reported that during recent years a reasonable estimate would show that the time lost as a result of strikes in the U.S. approaches roughly only .3 of 1 percent. 8/ For a look at a comparison of the duration of work stoppages for year 1965 between the U.S. and New South Wales (as being representative of Australia) see Table II.

Before turning to a full discussion on how the systems treat with industrial disputes both on a legal and practical level, a look at the extent of the disputes and the types of issues out of which they erupt would help to shed some light on the directions the respective systems are going and at the same time, lay the foundation for Chapter 6's discussion of the inroads made on management rights by the systems and their participants.

United States. In 1966, all measures of strike activity reached their highest levels since 1959, but the percentage of total estimated worktime lost because of stoppages only increased to 0.19 from 0.18 percent in 1965; with 25 million man-days lost in 1966 compared with 23.3 million in 1965. 9/ There were 4,200 stoppages involving 1.8 million workers during 1966, compared with 3,963 stoppages, idling 1.5 million workers in 1965. 10/

A study made of 1965 work stoppages both independent of and in relation to past years presents a statistical summary of the U.S. disputes picture. 11/ Briefly stated, the number of stoppages beginning in 1965 (3,963) reached the highest annual level since 1955, but the number of workers involved (1.5 million) and idleness resulting from all strikes in effect during the year (23.3 million man-days) were below the

average for the previous decade. 12/ Strikes ending during the year averaged 25 days in duration (22.9 in 1964; 20 days averaged during 1948-1958). There were 21 major stoppages (strikes involving 10,000 employees or more) which began in 1965, and work stoppages among groups of 100 or more occurred in greater frequency in 1965--46 percent (41.4 percent average during 1960-1964). Of the larger strikes, 268 directly affected as many as 1000 workers -- the highest incidence in this size group since 1958.

Breaking the disputes down as to issues involved, of the 3,963 stoppages reported, 64 percent were renegotiation disputes, and 35 percent occurred during the term of the agreements. Of the renegotiation stoppages, 7 percent developed out of disputes over plant administration or job security matters but accounted for 20 percent of total idleness. On term of agreement strikes, plant administration and job security accounted for 40 percent. In sum, plant administration accounted for 36 percent of total idleness in 1965 (8 percent in 1964) and job security accounted for 16 percent in 1965 (6 percent in 1964). The basic bread and butter issue -- general wage increases and for supplementary benefits -- accounted for more than 40 percent of the 1965 stoppages, involving 46 percent of workers involved in all strikes, and yielding 54 percent of idleness. 13/

Australia. The Australian statistics are not uniform. For the purposes of this study the writer will rely on the statistics found in the Quarterly Summary of Australian Statistics, December 1966. 14/ For the year 1965, Australia experienced 1,346 industrial disputes (those disputes involving stoppage of work of 10 man-days or more), involving 460,234 workers directly (14,810 workers were involved indirectly -- persons thrown out of work at the establishments where the stoppages occurred but not themselves directly involved), and yielding 815,869 working-days lost. /Id at Table 14/. For NSW the comparable figures were 832 disputes involving 244,900 workers directly (plus 6,156 indirectly) totaling 367,942 working-days lost.

In a study made of the Australian experience for the years 1913-1963 15/ the statistics show that strikes over such issues as physical working conditions and questions of managerial policy accounted for more than one-half the strikes, more than one-third the strikers, and one-quarter of total man-days lost, with a sharp increase in recent years. 16/ In NSW, for 1965, of 621 disputes recorded in the NSW Industrial Gazette, 17/ 386 involved these issues, with disputes over matters of managerial control accounting for 272. 18/ Referring once more to the study covering a 50 year period, strikes over the fundamental economic issues of wages, hours and leave accounted for 20 percent of all strikes, between 25 and 33 percent of strikers, and about 50 percent of the total number of man-days lost. Over the whole period, the average length of strikes varied from 9.2 man-days/workers involved in strikes over basic economic issues to only 2.4 over miscellaneous issues. As an interesting statistic, workers in coal-mining and stevedoring industries accounted for the largest amount of time lost; excluding them, the average loss of working time through industrial disputes suffered by the Australian worker is extremely low.

The remainder of this chapter will focus on the legal and practical implications of industrial disputes, focusing on the roles of tribunals and private parties, and the weapons at their disposal.

AUSTRALIA

I.

A. The status of strikes under the Acts.

In the Commonwealth, until 1930 the Conciliation and Arbitration Act from its inception prohibited persons or organizations from doing "anything in the nature of strike or lockout." What was prohibited was striking, either in relation to an industrial dispute which a Federal arbitrator had jurisdiction to prevent or settle, or against an award in which some settlement was embodied. No strike was punished or prohibited unless the parties concerned in it could have, or at least

might have had, their grievances settled by court. From 1930-1947 the Act contained no provisions against strikes as such; provisions for enforcement of awards were retained, as were the Court's powers to order compliance with an award and to enjoin breaches of the Act. 1947-1956 saw the use of the Court's contempt jurisdiction founded on its exercise of its long standing power to order compliance and enjoin. Under the Act as it now stands a strike is not an offense; punishment is imposed for contempt of the Industrial Court for failing to obey orders of the Court not to act in breach of an award.

In New South Wales, Section 99 of the IAA expressly declares certain strikes, and only those strikes, to be illegal, and Section 99A then provides for the giving of notice of intention to strike so as to legalize other strikes. Section 99A does not of itself legalize strikes to which it applies. It operates as an exception to the categories of strikes mentioned in Section 99(b) -- strikes in an industry the conditions of which are wholly or partly regulated by an award or industrial agreement, such strikes being illegal, under 99(b), unless they fall within the provisions of 99A. Accordingly, Section 99A operates only in connection with strikes in an industry wholly or partly regulated by award or industrial agreement. It does not apply to strikes in industries where no award operates, nor does it apply to strikes by employees of the Crown or any other authority mentioned in 99(a); strikes in the first instance cannot be illegal under the IAA, and strikes in the second instance will always be illegal.

What 99A does then is to make strikes by employees in private industry "legal" if 14 days' notice of intention to strike is given the Minister and if the strike does not commence until the expiration of that period. This is intended as a "cooling-off" period during which time the dispute will be referred to one or more of the tribunals for settlement, hence making it, in effect, difficult for there to be a "legal" strike, once the industrial tribunals take jurisdiction of the dispute.

Lockouts. The Conciliation and Arbitration Act does not specifically refer to lockouts or strikes, but refers to "industrial disputes," a term previously dealt with in Chapter 3. The NSW Act expressly defines lockouts. Section 5 includes " a closing of a place of employment, or a suspension of work, or a refusal by an employer to continue to employ any of his employees with a view to compel his employees, or to aid another employer in compelling his employees, to accept terms of employment." Section 98 provides for civil penalties, a maximum fine of £ 1000, for anyone engaging in an "illegal" lockout. In proceedings under this section the onus of proof is upon the applicant but proceedings are civil in their nature, not criminal. It follows that facts may be proved by a preponderance of probability; if there is evidence from which the Commission can reasonably find for the applicant then a decision in his favor cannot be successfully challenged. 19/

The term "lockout" and its legality has been the subject of several cases and was given coverage in Sykes' study of strikes and law. 20/ "The dismissal of a substantial number of workers for reasons of enforcing compliance with industrial demands or resisting industrial demands, with or without other replacement by others, constitutes a lockout."21/ It is no defense that an employer honestly believes he is merely exercising the right of "hire and fire" given to him by the notion of freedom of contract nor does it confer the right to suspend employees or stand them down without pay. An employer can also be found guilty of a lockout even though employees affected were not working under an award. 22/ However, "an employer is free to close down his factory and dismiss his work force because he deems it economically unprofitable to carry on, 23/ or because of personal whims such as a desire to engage in another occupation. 24/

A lockout should not be confused with the standing down of a section of employees in a shop due to a stoppage of work in another section. The employer has the right to stand off without pay an employee, who, in a particular period, refused to perform the work for which he was engaged or misconducted himself in such a way as to interfere with the proper performance of his work. 25/ In the absence of express provision in an award permitting such action, the employer has no power to suspend an employee on weekly hire for any reason. Thus, it is becoming more common now for awards to provide that, where production becomes impossible for reasons beyond an employer's control, the employer is entitled to stand down employees without pay. 26/

The importance of this discussion is apparent when it is recognized that standing down of employees is perhaps one of the more effective ways the employer has to combat a union's strike action since all employees may be stood down, whether or not they are members of the striking union. That this is not an absolute right in all instances is evidenced by the recent Commission ruling arising out of the December 1966. Qantas dispute, discussed infra, Chapter 6, p. 208 . See further discussion of standing down in Chapter 6, pp.205-209.

The industrial tribunals have let their attitudes towards industrial disputes be known. On the Commonwealth level, the Commission in the National Wages Case of 1965 expressed its disapproval of strikes:

> ". . . /I/f the policy of welcoming in advance the use of the strike weapon wins adherents it will threaten industrial peace and the capacity of the economy to sustain wage increases. Instead of glorifying strikes, it would be more useful to examine the question why they should not generally be regarded as relics of past thinking, when the economic power of unenlightened employers was abused by them and workers had little hope of redressing grievances without resorting to strikes. The balance of economic power today is vastly different and the processes of conciliation and arbitration are available to all parties."

One member of the Commission, Gallagher, J., went even further when he stated, "I think there is no such right to strike and the sooner that belief is abandoned the better for this country and the better for every working man in this country. 27/

In NSW, the notion that there is no place for direct action in a system of compulsory arbitration of industrial disputes has been strongly held by members of the Industrial Commission. That proposition was put by Cantor J. in 1950 in Metal Manufacturers' Case (1950). AR 373, at 374, when his Honour said,

> "industrial registration of a union, either of employers or employees, carries with it the positive obligation not to resort to direct action to enforce industrial claims or demands, but (1) to submit them to conciliation and failing agreement by conciliation then to arbitration under the Act, and (2) having submitted them to the tribunal appointed by law for determination, not to resort to direct action to supplement or subtract from the decision that has been reached. Each party concerned must be prepared to accept the decision and loyally abide it, whether it is wholly in its favor or not. Any organization of employers or employees which fails in this duty commits a most serious industrial offense, and one which it is impossible for the tribunals to overlook."

Whether either quote is indeed a reasonable attitude to take in the light of jurisdictional difficulties and changing economic situations will be discussed in a section following examination of the penal provisions applicable against strikes and lockouts.

The dominant attitude of trade unions for the last 60 years has continued in favor of conciliation and arbitration, but there has been over the same period a strong body of opinion that the way to eventual complete fulfillment of working class objectives was by direct action. It can be accepted that union members engage in strike action because they are convinced that to depend on arbitration alone in the face of what they regard as unreasonable employer opposition is not enough. Indeed, when we look at the high level of wages that have been achieved above award standards, the unions seem justified in their belief that without the aid of industrial pressure their standards would not have reached their present level.

The fact that some industries have experienced more industrial conflict than others, aside from its political implications, suggests that the control of stoppages by compulsory arbitration is not one problem but several, and that to apply a single principle to the regulation of disputes in all industries may well be a mistake. With full employment and expanding industries, opportunities are presented for workers to ignore central trade union decisions, central agreements on wage policies, or compulsory arbitration decisions. In effect, as Ron Fry, then Assistant Secretary of the MTEA of NSW pointed out in a speech given on September 18, 1959, it is basically a question of power: "I think trade unions, under full employment know that in a situation of shortage of labor, they have the power behind them through their trade unions against single employers and it is the community stepping in to curtail that power at this point of time that irkes them. The community must all the time curb excesses of power of any constituent member of the community."

One of the leading voices for the employers, Mr. D.G. Fowler, secretary of the NEPC, has called for a declaration from within the arbitration system that all persons holding appointments under the various Arbitration Acts must at all times take steps to protect their awards, make them effective, and prevent their frustration: "There must be an all-out attack on the use of the strike weapon as a means of enforcing industrial demands." 28/

B. Definition of strikes and types of direct action.

The C & A Act does not define the term "strike" but rather defines "industrial disputes" concerning "industrial matters." NSW, in Section 5 of the IAA, defines "strike" to include cessation of work by any number of employees in combination, or a concerted refusal or a refusal under a common understanding by any number of employees to continue to work for an employer with a view to compel their employer, or to aid other employees in compelling their employer, to accept terms of employment, or with a view to enforcing compliance with demands made by them or other employees on employers.

The action of a number of employees in terminating their employment simultaneously in order to enforce demands made on their employer has been held on a number of occasions to constitute a strike. /But what if employees refuse in combination to enter into a new contract or to take work under it?/. In NSW the question of partial refusal to work is not covered by statutory definition, but the tribunals appear unequivocal in holding that a partial refusal to work constitutes a strike. 29/ Stop-work meetings, in spite of their general acceptance within the system, can constitute strikes if held without permission and when used as instruments of pressure. 30/ Yet, as Sykes queries, "it is difficult to see how a meeting held without permission merely to discuss a situation or to determine a future course of action can constitute a strike." 30/

Is a ban by a union on overtime a strike? The NSW Industrial Commission has held that it is, but there are doubts that it is so in every circumstance. However, if overtime is expressly provided by a Commonwealth Award as a term of employment, and is regularly worked in a particular establishment by employees who later impose a ban union it, there would clearly be a restriction upon work.

The boycott is not used in Australia. Section 30K of the Crimes Act deals with the imposition of boycotts or threats of, by violence or by spoken or written threat or intimidation in a number of given circumstances contained in the section, the penalty being imprisonment. Picketing is of limited usefulness; the tendency seems to be to use the "black" ban rather than to resort to the threat of a strike against the customer who deals with the primary employer. 32/ A recent example of the use of a "black ban" was that imposed in 1966 by the Melbourne Trades Hall Council in instructing its 82 affiliated unions that Tupperware of Aust. Pty Ltd., its products and its processes were declared black over the employment of non-union labor. 33/

As for picketing, there are possibilities of its being subjected to both criminal and civil penalties. The C & A Commission suggested that even if employees were covered by a Federal award, "the Commission as at present constituted is completely and utterly opposed to picketing. . . . It is possibly an offense against Section 545(b) of the Crimes Act of NSW." 34/ The possibility of civil consequences in the form of an action for conspiracy in respect of the actions of pickets remains: ". . . If the picketing is part of or incidental to a strike declared illegal by the relevant compulsory arbitration statute, then the principle of protection laid down by the Crofter case 35/ is excluded because of the choice of a specific illegal purpose or means. . . ." 36/

Go-slow. Does this amount to a strike? 37/ It has been established beyond doubt that "go-slow" tactics constitute serious misconduct warranting summary dismissal. 38/ Moreover, under Section 138 of the C & A Act it is an offense for an officer of a union to, inter alia, "advise, encourage or incite members to retard, obstruct or limit progress of work to which the award applies by "go-slow" methods". /The maximum fine equals L 100/.

Political strikes. There are many stoppages which are not directly related to the securing of better wages and conditions. They may take the form of protest strikes, a form of extra-industrial or expression of internal union politics. Commonly referred to as "political strikes," they are "concerted work stoppages which are not concerned with making ordinary demands on employers for the changing or sustaining of conditions of employment, but are essentially concerned with making demands on governmental authorities for altering or redirecting policy in the political or industrial sphere." 39/ On the whole, the attitude of the governemt as to the punishment of unions for engaging in political strikes which challenged specific policies of the Government depends on weighing the balance between the consequences of taking disciplinary action and the consequences of letting the success of this stoppage lead to further dislocation.

The most recent example of union action involving refusal to work over a political issue centered around the refusal of members of the Seamen's Union aboard Vietnam-bound freighters to man the ships. 40/ Those so refusing were dismissed and replaced by naval servicemen. The ACTU Executive directed that "Australian merchant ships should be manned by trade unionists rather than servicemen," 41/ and President Monk stated that any unionist was free on a voluntary basis to man vessels carrying war materials to Australian troops in Vietnam, even though the ACTU was opposed to the use of Australian troops in the war. 42/

The question of what types of penalties can be imposed to combat political strikes has arisen on occasion. In the federal sphere, if the strikes were solely related to claims that prices should be fixed or legislation amended, it has been suggested that this would not fit the statutory definition of "industrial matters." But it is hard to imagine these stoppages, though of a non-industrial nature, not interrupting an employer -- employee relationship and hence forming the subject matter of an industrial dispute. 43/ This jurisdictional question aside, as has been evidenced in the past, in particular with relation to the Coal Strike of 1949, emergency legislation can be passed, or the Crimes Act can be invoked. 44/ These latter procedures will be discussed subsequently under the topic of Emergency Strikes.

C. Grievance Machinery

Before turning to the statutory and civil penalties available to combat industrial strike action, a look at the machinery established under the Acts and created by the parties themselves is worthwhile.

There are few grievance procedures such as those found in American labor-management contracts, providing for a series of steps in the handling of a dispute. Despite claims by academics of increasing informal machinery, 45/ it seems that ". . . by contrast with the position in North America, there is, in /Australia/, no really developed system to deal with disputes arising out of the operation of

awards".46/ As Brissenden describes the difference between Australian and American arbitration,

> "In Australia, the "arbitral" process has emerged as a legislative one albert presided over by judges, whereas in /America/ the "arbitral" process gradually has assumed the form of a judicial procedure presided over by laymen. One result of this contrasting evolution is the semantic paradox that in Australia the word "arbitration" connotes, primarily, third-party determination of labor disputes over divergent interests, whereas in /America/ it connotes. . . determinations of controverted rights. . . ." /Emphasis added/. 47/

Some federal awards and industrial agreements do provide for a rudimentary system of consultation between the parties concerning disputes arising out of the operation of the award and in a few cases (e.g., Snowy Mountain Authority) use is made of private arbitration. 48/ In seeking to explain the reason for this lack of development of a grievance procedure the difference between the industrial climates has been pointed to. 49/ There are certain types of grievances regularly filed by American unions, asking for more heat or light, for instance, which would be unknown in most Australian situations since Factories and Shops Acts set out explicit requirements of shop and plant fixtures. Also, "rights" disputes arising out of questions of discipline or seniority do not exist to the same extent in Australia because of the different concept of the employment contract. This latter point will be further explored in Chapter 6.

With this brief introduction to the nature of the climate, attention is now turned to the Acts' provisions along the lines of encouraging private machinery. Part X, Section 172 of the C & A Act allows organizations of unions and employers to enter into and register agreements containing codes for preventing and settling future or existing disputes by conciliation and arbitration. Sir Richard Kirby, for one, is disappointed that such limited use has been made of this provision, citing that only 2 or 3 agreements per year have been registered since 1959 under this Part 50/ and particularly feels that they could play a useful part in the over-award payment area.

1. Boards of Reference. Most federal awards make provision for Boards of Reference and they perform useful work but the number of notifications to the Commission under Section 28 shows that the parties to disputes do not regard the types of dispute contained in the Table of Notifications of Disputes to be properly or appropriately the subject for treatment by such Boards.

The Australian Boards of Reference are a limited version of American arbitrators under collective bargaining, to the degree that both deal with minor disputes on interests arising during the terms of the agreement. But there the likeness ends, as will be discussed in subsequent pages. Brissenden feels that under the language of Section 50, and in view of "award phraseologies" such as clause 23(g)(1) of the Metal Trades Award: "Boards of Reference are empowered to deal with the following matters: (1) Settlement of disputes on any matters arising out of this award," there was a basis for contending that boards had authority to deal with "rights" disputes. 51/ Aside from the difficulty for some academics and practitioners to clearly differentiate between "rights" and "interests" disputes, 52/ the High Court has expressly ruled that despite Section 50, Boards of Reference have no power to interpret awards. 53/

The implications arising from this decision would appear to limit materially the existing practices of seeking board of reference intervention in certain types of disputes. As one trade unionist put it:

> "The worship of awards tends to bring on a relish for Boards of Reference for the solution of industrial problems, but it is not surprising that many are lost before they are even heard as the Board is often asked to do something that is outside its power, such as interpreting an award, or dealing with a breach of an award, or settling an issue that can only be won on the job." 54/

But the parties often want to make boards of reference work because they both have a simple way to get differences settled without using the involved processes of any court. This can be accomplished if the parties

are willing to waive the question of jurisdiction. In this sense, it can be likened to private arbitration under collective bargaining in the U.S.

2. Conciliation. The emphasis by the industrial tribunals on conciliation has met with varied success. The Federal Public Service Arbitrator, Mr. E.A. Chambers has urged white-collar unions to make greater use of industrial conciliation processes to settle disputes over salaries: "All avenues of negotiation should be explored before cases are submitted to him for arbitration; the conciliatory process should not be subordinated to arbitration; the arbitrator's jurisdiction is to be concerned only with matters which unions have been unable to settle by prior negotiations with the Public Service Board." 55/

But drawbacks to third-party conciliation have been pointed out. In an article in the Journal of Industrial Relations, Vernon Watson listed several reasons for the lack of success of conciliation, among them being the freedom of the parties to refuse reconciliation and the lack of frankness and willingness to make concessions as part of an offered compromise in the presence of a potential arbitrator. 56/ Representatives of the parties often are not prepared to take the responsibility for making decisions, when they know that the final step will be an arbitration decision. If a company is not prepared to give its industrial officer authority to come to a decision on a matter, then the manager or other top official who can do so should be present at the conferences.

3. Plant-level disputes settlements. What has been most harmful to the development of any regulated, responsibility for handling workers' job grievances in Australia has been the typical management stand that questions as to, e.g., transfers and promotion, hiring and firing, discipline and work scheduling are exclusively matters of management prerogative. As an example, Gordon's previously referred to study

[see pp.109-110] points out that among the steel companies in the region studied, relatively little attention was paid to intraplant grievances and virtually no formal grievance machinery was provided -- "great stress being laid on the foreman."

Disputes at the shop level, where grievances erupt, are usually handled, if at all, on an informal basis, with variations in procedures: "Strong evidence for the conclusion that most industrial grievances are given scant, if any, attention at the point of eruption is the extraordinary percentage of Australian strikes having a duration of one day or less." 57/ One of the forms of grievance procedure developed by unions and apparently acquiesced to by employers, is the stop-work meetings of union members during working hours to discuss any subject the leader may wish and to decide these issues by ballot. Such meetings are not viewed with the same type of management hostility as they would be in America, where "they would probably be reported to the Department of Labor as sit-down strikes." 58/ Australians are more tolerant, apparently feeling that without such meetings a union could not get its work done, even though they are probably illegal stoppages. While many Australian commentators regard the one-day stoppage as a sign not of poor grievance procedures but of the development of the practical use of the strike weapon for disputes over interests or rights rather than the strategic use, this writer feels that this is the expression of a lack of trust of management and a means of expiating the settlement of a grievance. As several union leaders expressed to the writer, "if we file a grievance via a log of claims with the industrial tribunals, we often have to wait for an opening in their crowded calendars; but if we go on strike or threaten to do so, then a compulsory conference is called and management must discuss the situation with us, right away."

4. "Settlement of Disputes" clauses. As noted, Kirby, in his 9th Annual Report (1965), expressed his concern over the lack of use being made of provisions of Part X of the C & A Act for industrial agreements containing grievance procedures being entered into and certified pursuant to the Act, particularly as pertains to the question of stoppages and over-award payment issues: 59/

> ". . . /P/rovisions of this Part give employers and employees even in an "off" period when they are not in dispute an opportunity of arranging amongst themselves a code to be followed for the prevention and settlement of disputes in an orderly and peaceful manner without loss of work and pay. /He then cites an example of an agreement filed under Part X in 1964/. This agreement provided that the principle of conciliation by direct negotiation should be adopted for the purpose of preventing and settling any industrial dispute that might arise between the parties, that the Federal and State officials of the unions would do all in their power to prevent precipitate action by employees and would take early and active part in discussion and negotiations aimed at preventing or settling disputes in accordance with the agreed procedure. . . ." /p. 13/.

One form of grievance procedures established between employer and union was typified by the 1956 Agreement between Ford Motor Co. and the VBEF: 60/

> 4. If any dispute arises in connection with any of the Company's operations the matter. . . shall. . . be brought to the attention of the immediate foreman. . . or if necessary to the Company's Industrial Officer. If not amicably settled the parties shall forthwith confer thereon with a view to its settlement.
>
> 5. In event of the parties being unable to settle. . . the party complaining shall, and the other party may, forthwith after the completion of such conference take proper legal action to refer such disputes for settlement by a Board of Reference. . . under the provision of the Conciliation and Arbitration Act.
>
> 6. (a) Pending settlement of any dispute. . . employees of the Company shall remain at work.
>
> * * * *
>
> 13. Disputes Regarding Agreement -- Any dispute or question concerning interpretation or application of this agreement shall be referred to the Industrial Registrar of the Commonwealth Court (now Commission) of Conciliation and Arbitration whose decision. . . shall be final.

Recently, in a few agreements filed under Part X, there have been included "settlement of disputes" clauses. As an alternative of the bans clause, instead of merely prohibiting strike action by employees or unions, it imposes on parties to any dispute an obligation to negotiate towards settlement of disputes by means of a series of conferences. On the union side, the conference will first be at the shop steward level. On the employer's side, the level of conference will likewise ascend, perhaps from the industrial officer to plant management and finally to the head office, though there are variations fron award to award. If there is still no settlement, then the matter is to be submitted to the Commission for determination, but work is to proceed normally in the meantime, except that sometimes this last provision does not apply to safety matters.

Some early examples of the clause appear in industrial agreements, either filed under Part X. 61/ or certified under Section 31, 62/ but later examples can be seen in awards. 63/ Typical of the clauses is the one found in the Aluminum Industrial Award, 1963: clause 6(e) established grievance procedure to handle "any dispute or claims arising out of the operation of this award:"

> "(i) The matter shall be submitted by the shop steward or union representative to the industrial officer or other appropriate officer of the employer concerned.
>
> (ii) If not settled the matter shall be formally submitted by the State secretary or other appropriate official of the union concerned to the employer.
>
> (iii) If agreement has not been reached, the matter is then discussed between the head office of employer concerned and federal body of union concerned.
>
> (iv) If matter still not settled it shall be submitted to the Conciliation and Arbitration Commission for decision.

(v) While the above procedure is being followed, work shall continue normally where it is agreed there is an existing custom, but in other cases the work shall continue at instruction of employer concerned unless danger is involved, in which case work shall not proceed until a decision is given on the matter. No party shall be prejudiced as to final settlement by continuation of work in accordance with this sub-clause."

A clause drafted in these terms is likely to be construed strickly as being confined to matters "arising out of" the award, and it does not extend to claims for higher wages. 64/ It may well be that the matters which do arise out of the award will be judicial in nature and therefore can properly be dealt with only by courts. 65/

C.P. Mills, in a recent supplement to his series of annotations on Federal Industrial Law, feels that it is difficult to regard these agreements as coming within the scope of Section 172. 66/ In so far as the clauses stand above they might be open to attack as an attempt to impose prior "collective bargaining" negotiation as condition precedent to the submission of disputes to the Commission and hence in excess of the constitutional power relating to conciliation and arbitration. Early in the history of the Australian arbitration system, the High Court declared that such a clause would be invalid as tending to exclude the jurisdiction of the now Commission. 67/

However, considered in its setting as part of an award regulating extensively the relations between the parties, such a provision might well be regarded as reasonably incidental to the main purpose of the Act and the award, provided it is limited, or read in such a manner that it is limited, to settlement of disputes arising out of the award. 68/ According to another early High Court decision this section was directed to grievances arising under the operation of an award, and not to enforce agreements fixing wages and conditions. 69/ Yet in spite of this decision, several agreements under Part X directly fixing wages and conditions are still filed. 70/

Despite the encouragement given to the establishment of these clauses, there are many commentators who are not in favor of these provisions on a wide scale. In addition to claims by unions that the steps are too involved and productive of delay, 71/ Foenander forsees limits to their effectiveness:

> ". . . there is much to be said against the writing of a settlement of disputes provision into awards regulating industries in which large numbers of employers and employees are engaged. Possibly a provision of this type is truly operable only where conditions are such that personal contact between employer and employees is usually reasonably close, and a measure of good feeling between labor and management normally prevails." 72/

D. Unions and Strikes

Various Trades Union Acts require certain things to be included in the rules of a registered trade union. Using the Vehicle Builders Employees' Federation as an example, among the objects of the union are, "To promote industrial peace by all amicable means such as conciliation and arbitration; to prevent strikes or lockouts between members of the Federation and the employers; and when differences occur, to assist in their settlement by just and equitable methods." 73/

As to the containment of disputes:

> Section 5. In the event of dispute taking place in any State, the officers of the Branch thereof shall try by conciliation to settle the dispute. In event of . . . /no/ satisfactory arrangement, the Secretary of said Branch shall at once report matter to Federal Secretary and Court Advocate, who shall notify the Executive Committee of the Federal Council, who shall take such action as the circumstances may require. . . .
>
> * * * *
>
> Section 46. In event of an industrial dispute occurring, no member must cease or leave his work without instruction from the State Executive, which must be called together as quickly as possible to consider the same. The Steward or a member of the shop must notify the Branch Secretary as soon as possible, and furnish particulars of the dispute.

The NSW Branch has provided against Infringement of Work:

> 38. Neither the union nor any of its members shall at any time take part in an illegal strike, nor refrain from handling or dealing with any article or commodity, nor do any act or thing to induce or compel any person to refrain from handling or dealing with any article or commodity during the currency of any strike.

While all of the above rules speak of containing a dispute, none of them go so far as to speak against striking as such, and this is in keeping with ACTU pronouncements:

> "This conference declares that the right to strike is fundamental, but it is recognized that individual affiliated unions have the responsibility of one to the other, and strike action taken affecting other organizations and their members without consulting with the ACTU or appropriate State Branch, cannot be accepted as a proper use of the strike action." 74/

Both the ACTU and State Branches have set up disputes committees to control strike activity. The Interstate Industrial Disputes Committee requires compulsory notification of any dispute likely to extend beyond the limits of any one State, and convenes a meeting of the Executive Sub-Committee and all unions likely to be involved. In the event of a strike taking place without ACTU consent, all affiliates are absolved from aiding the striking organizations.

The NSW Dispute Committee of the Labor Council provides for like notification and discussion. Among the factors to be taken into consideration in determining the ultimate action to be taken are: means available to effect a settlement; justification of industrial action; timing; financial support; general chances of success. Sub-section (g) provides an interesting regulatory sanction: "In the event of an affiliated union disobeying the direction of the Council by taking industrial action without giving the due notice and fully considered by the Council, shall do so at its risk and upon its own responsibility, and shall forfeit its right for financial assistance, and if they disobey the Council, they shall automatically cease to be a member."

A recent example of a clash between trades union policy and militant unions was highlighted in the Melbourne Trades Hall Council. The militant unions often weild considerable influence through the Trades Hall Council's industrial disputes committee and have been able to initiate strike action not having the full support of council or executive. 75/ In a show of annoyance at the length of the margins investigation by Commission Winter, several unions in Victoria decided to hold State-wide, 2-day 4-hour stoppages by metal trades workers, in spite of ACTU President Monk's protests that said proposed stoppages were in contravention of a decision by the ACTU interstate executive that lunch hour meetings of one hour's duration should be held under the auspices and control of State trades and labor councils to discuss the progress of the unions' margins claims. When the unions went ahead with their unauthorized stoppages, the Melbourne Trades Hall Council suspended them /AEU, Boilermakers and Blacksmith Society, Sheet Metal Workers and Moulders./ until January, 1968. The effect of this is to deprive these unions of their right to send delegates to council meetings, and when their suspension ends, they are required to give an undertaking that they will obey the rules of the council dealing with industrial disputes. 76/

II.

This next section will focus on the machinery available under the Arbitration Acts and related legislation to control and penalize industrial action.

A. Civil Law Liability

Preoccupation with the arbitration system and its penal sanctions has tended to obscure the fact that strikes and other forms of industrial action may frequently give rise to common law liability. A person who suffered loss as a result of industrial activities may be able to institute civil proceedings (tort action) to recover damages. He may sue on the tort conspiracy alleging that others combined for the

purpose of inflicting injury on him. 77/ As Sykes points out, ". . . The proposition that a combination involving a strike forbidden by Australian industrial arbitration statutes or involving the threat of such a strike is actionable as a conspiracy. . ., cannot be doubted, and it remains a matter for wonderment that employers have not resorted to the weapon of the tort action for damages or the equity injunction more frequently than they have done." 78/ There is also the possibility of a civil action showing that the other party was engaged in the inducing or procuring of a breach of the employment contract. 79/ Or, showing that another party has, by threats of an illegal act, compelled (intimidated) him to do something to his own injury. 80/

Sykes hinted at the possible use of equity injunctions, but proceeds, at a later point in his book, to explain that "they exist to protect property rights or to restrain commission of torts or certain types of breach of contract, generally as a prop to the enforcement of criminal law" /p. 184/. But Australian courts have not used the concept of protection of "property" to issue anti-strike injunctions on the basis that all strike activity is a threat to property rights, since the courts have not embraced the view that the expectation that a man would continue to work for another was a right of property. /See pp. 184-186/.

In connection with the use of injunctions, a case concerned with the pre-emption of injunction powers dealt with the question of power of civil courts to grant interlocutory injunctions in the course of industrial disputes. 81/ In a representative action against members of the union, in which the plaintiff claimed damages and an injunction in respect of picketing preventing the unloading of a ship, the Judge held there was no jurisdiction in the ordinary courts to grant an interlocutory injunction to restrain members of a union from engaging in such conduct until after the action had been tried. The court said that it was clear that the dispute between the parties was an industrial

dispute for the settlement of which elaborate machinery had been created by Federal statute. This legislation provided for punishment of persons refusing to abide by the established rules and seemed to have been intended to cover the whole field of industrial disputes in the industry in question. By implication it ousted jurisdiction of civil courts to interfere by way of injunction during the currency of any such dispute.82/

Finally, the power to fine strikers under the Master and Servants Law is not of much importance now, since penal provisions are available under Arbitration Acts or under laws especially passed to deal with strike situations. Moreover, the penal provisions of Master and Servants Acts are sometimes not available to deal with strikes since modern contracts of employment can usually be terminated by giving a short period of notice.

B. Emergency Strikes

If a strike occurs, the participating workmen, even though subject to a Federal award, remain prima facie subject to prosecution under the State law if it forbids the act of striking and is in its terms applicable. 83/ Should a strike threaten the community in such a way as to impose emergency conditions, if the situation is not covered by State law, it can be adequately handled by the Commonwealth under Section 30J of the Crimes Act and, if necessary, by special legislation to meet a particular emergency such as, e.g., the coal strike of 1949.

As was suggested in the recent Qantas air strike, the Federal Government can declare the strike a national emergency and invoke the Crimes Act against the striking pilots, thereby permitting the Government to jail pilots for "refusing duty on the ground the strike was causing a national calamity in the industry." 84/ Section 30J of the Crimes Act empowers the Governor-General to make a proclamation if there exists in Australia a serious industrial disturbance prejudicing or threatening trade or commerce with other countries or among the States.

Offenses are specified carrying the penalty of imprisonment if any person during the operation of such proclamation takes part in or incites a lockout or strike within the meaning of the section. Subsection 2 provides that any person who continues to take part in a lockout or strike in relation to employment in, or in connection with, the transport of goods or the conveyance of passengers in trade or commerce with other countries, shall be guilty of an offense and be liable to imprisonment for one year and, if he was not born in Australia, to deportation. 85/

During the Coal Miners Strike in 1949, the Federal Government brought into operation the National Emergency (Coal Strike) Act which was designed to prohibit during the period of national emergency caused by the strike, the contribution, receipt or use of funds by organizations, registered under the Commonwealth C & A Act, for the purpose of assisting or encouraging the continuation of the strike and for other purposes. In holding this Act valid, as falling within Section 51 (XXXV) of the Constitution and supported by Section 51 (XXXIX) -- the incidental power -- the High Court 86/ stated that it was a public fact of which they were entitled to take judicial notice that the general strike in the coal industry was prejudicing the community and had caused a grave national emergency.

Section 51(i), the trade and commerce power, gives Parliament authority to make laws with regard to "trade and commerce with other countries, and among the States" (Section 98 of the Constitution). This has enabled valid federal legislation to be passed with respect to employment in the waterfront. Under the Stevedoring Industry Act, 1956-1965, Section 17 empowers the Minister for Labor and National Service to declare an emergency, in which case the Australian Stevedoring Industry Association could become sole controller of stevedoring operations in port. Moreover, under this authority, the Waterfront Workers Federation has been threatened with deprivation of its rights and privileges under special legislation as to recruitment, suspension

and penalties. 87/ This legislation can be cited as one of the main factors for getting the parties together in all "all-in" waterfront conference recently concluded. (see p. 222).

C. Dispute Machinery Under the Arbitration Acts

In the U.S. there are legal minimums which the employer must pay; after that the unions and employers bargain and the strike is part of the bargaining process and a legitimate factor to force reaching an agreement. In Australia the legal question is whether the existence of a tribunal equipped with the power of compulsorily taking control of a dispute and dealing with it by the process of conciliation and arbitration, or the existence of an arbitration award, breach of which is penalized necessarily as a matter of law, imposes some restrictions on the use of strike or allied action so as to make such use an occasion for the invoking of sanctions.

Award breaches can only be of specific obligations stated in an award or necessarily implied from specific statements therein. Acts which are not breaches of the award may be strikes punishable separately by anti-strike legislation, though an award may specifically make a strike a breach of the award. Occasionally an employer will request, or a tribunal on its own motion will decide to include, a "bans clause" in an award. 88/ In its usualy form it prohibits any ban, limitation or restriction on performance of work in accordance with the award. 89/ Under the C & A Act, Section 55 gives the Commission broad relief powers and the cases have gone so far as to allow the Commission in a proper case to include in an award a general clause prohibiting all strikes and bans on work even where they have for their purposes matters with which the Commission is not competent to deal. 90/ A provision in an award that no organization party to such award shall be indirectly or directly concerned in a ban, limitation or restriction on the working of overtime permitted to be worked thereunder is a vaild exercise of jurisdiction as an industrial matter. 91/ The Constitutional validity of such clauses has been consistently upheld by the High Court. 91a/

The Commonwealth Commission seems reluctant to insert them in an award, because of their restrictive nature and generally weigh various factors, among them the threat which strikes present to the arbitration system and to tribunals themselves; threat to production, to employers' business, to workers' livelihood and to general public interest. Another device available to the Commission is the secret ballot. (Section 45). If the Commission feels that a strike may not reflect the opinion and wishes of a majority of workers employed in a certain industry, it can order that certain terms of settlement proposed by the court and/or offered by employers be submitted by secret ballot to a vote of members of the union concerned. 92/

In NSW there is also reluctance and a question of jurisdiction involved. McKeon, Jr. of the Industrial Commission has refused to insert in an award a clause which would have prohibited bans and limitations on work in accordance with an award, saying that such a clause should not be inserted in an award without good reason. 93/ He found it unnecessary to determine the question raised by the union as to jurisdiction of the Commission to insert such a clause on account of its possible inconsistency with Section 99 of the IAA. 94/ Sykes has discussed the inclusion of these types of clauses and concludes that they could be justified on the ground that prohibiting strike action is incidental to settling the subject matter of the dispute /p. 203/ and goes on to imply that,

> "/I/n many of the State jurisdictions it may be that no specific provision is needed to enable a court to make orders that men resume work or obey directions of their employer. It is true that there are difficulties in regarding such directions as mandatory orders to obey or comply with the directions of an award. However, they may well in some States be regarded as simply part and parcel of the Court's powers to deal with "industrial matters." Presumably then non-compliance with such orders would be in the nature of breach of an award in the wider sense." /p. 213/.

D. Controls and Penalties

1. Deregistration

Unions registered as organizations under the State and Commonwealth Acts are liable to suffer de-registration as a penalty for participation in aggravated and persistent forms of illegal action. Section 143 of the C & A Act; Sections 8(8) and 9 of the IAA. 95/ It is not a power that has often been invoked, and when the employers applied for a deregistration of a number of unions which were involved in stoppages and overtime bans at Port Kembla early in 1967, the Industrial Commission (Beattie, J., Pres., Cook & Kelleher, J.) stated that, "it is in best interests of the parties and . . . community for the Commission to devote its time for the present to the processes of conciliation rather than to de-registration proceedings. . . ." 96/

The effectiveness of deregistration as a sanction deterring strikes will depend on the value attached by the trade union concerned to registration, and on its chances of obtaining re-registration at a later date without a long period of waiting, and without a loss of union strength. Terry Ludeke, in a lecture in the Post-Graduate Series of Lectures at Sydney University Law School in 1966, uses the example of the FEDFA to show the significance of fate that can be suffered by a union which has been de-registered:

> ". . . the Association had had a great many members in the big steel plants at Newcastle and Pt. Kembla; while off the register it was practically powerless to look after the industrial interests of its members in the iron and steel industry, with the result that the FIA made very substantial inroads into the Association's membership. Not only did the FIA recruit the members of the Association because they could offer them industrial protection, but when the Association applied for re-registration, the FIA objected. The Association eventually recovered its registration, but there is no doubt that the experience suffered during the time it was off the register has been a substantial deterrent to direct action since then." 97/

Deregistration can also be a voluntary procedure under the Acts, 97a/ but this does not necessarily put members beyond the reach of penal powers. Perhaps the best example of this premise is the airline pilots. They left a registered organization, the Australian Association of Airline Pilots, and formed a non-registered organization, The Australian Federation of Air Pilots. Proceeding on the assumption that they were now free to act unhindered by the penal powers, they decided to engage in further industrial action against Qantas. But Qantas, and therefore the pilots' agreement with Qantas, is registered with the Arbitration Commission, and though the Agreement does not name the Pilots' Federation as the other party, it does name the pilots individually. Hence the Commission notified each pilot employed by Qantas that he was an individual party to the dispute with Qantas over rejected demands of the pilots and that the dispute would be arbitrated by the Commission. An individual pilot took a case to the High Court to prohibit the Commission from so proceeding, but he lost and an award was made for each individual pilot. When the members subsequently threatened to go on strike, the Commission inserted a temporary bans clause in each individual award. 98/

This question of subjection to penal powers arose again in the 1966 Qantas strike, and for the Arbitration Act to have been invoked, Qantas would have had to go to the Commission and get a bans clause inserted in the agreement. If the ban were inserted and the pilots ignored it, Qantas would then have had to seek an order from the Industrial Court saying there should not be a strike. In every instance, the pilots could have chosen to be heard individually and this would have only prolonged the dispute. 99/

2. New South Wales

Under Section 25, the Conciliation Commissioners have the duty of investigating disputes as soon as they are notified to them. After

the amendments to Section 25 in 1964, 25(3A) now requires an investigation of the merits of the dispute irrespective of whether or not the employees concerned in the dispute may be on strike. Previously the tribunal would not permit proceedings to be continued while the employees were still out on strike, stating that a party could not seek the aid of the system and flout it at the same time. After the amendments, 25(5A) still allows the making of an interim order or award, even to preserve the status quo, but only after the causes of and circumstances appertaining to the dispute have been investigated and the tribunal is satisfied that all reasonable steps have been taken to effect an amicable settlement.

On the first occasion on which the Commission was called on to determine the effect of the 1964 amendments, Cook, J. for the Commission held that nothing in subsection 3A of Section 25 required a Commissioner to arbitrate and adjudicate upon the disputed issues while a strike was in progress or was pending, it merely requires an investigation of the merits, even though the employees may be on strike. 100/

In the event of a breach of an award, the violating party is subject under Section 93I1) to a penalty not exceeding £ 100, and the action for recovery can be brought before an industrial magistrate. (In cases where industrial magistrates do not exist, penal jurisdiction is vested in courts of summary jurisdiction forming part of the ordinary court hierarchy.).Subsection 3 of Section 93 provides for injunctive power, but is confined to breaches of awards or of industrial agreements where the breach is wilful. The award itself must contain some anti-strike or anti-bans clause where it is desired to use breach of it as the basis of an injunction to restrain employee pressures.

Finally, Section 100 provides for direct penalties for illegal strikes (and is equally applicable to lockouts.). The section is directed at the union and not the members, 101/ the penalty provisions against members on illegal strike having been repealed, as they

were held with disfavor and were notoriously hard to enforce. The union is subject to a $1000 fine, but may be fined only once in respect of any one strike. The employers have claimed that when the NSW Labor Government amended the NSW IAA in 1964, adding Sections 101 and 101A, it generally eased sanctions against unions for strike action and made it more difficult to control industrial upheavals. Under Sections 100 and 101, before the 1964 amendments, the prima facie liability of the union needed no formal participation on its part, all that was required was that some recognized specific group of members takes uniform action in the nature of an illegal strike. 102/ In 1964, Section 101 was amended to give the union two additional defenses to proceedings for an illegal strike: provocation by an employer or a member of his staff (101A(a)), or that the executive of the union did not support, aid or abet the strike (101A(b)). Likewise, before 1964, a State industrial tribunal, whether a Judge of the Industrial Commission or a Conciliation Commissioner, would not hear the merits of a dispute while workers were on strike. If a work stoppage continued, any person -- usually the employer -- could summons the union concerned to show cause before the Industrial Commission why it should not be fined for taking part in an illegal strike. The 1964 amendments provide that before proceedings can be taken against a union under Section 100 for an illegal strike, leave to do so must be sought from the Industrial Commission. The Commission cannot grant leave unless the employer has made bona fide attempts to negotiate a settlement and the dispute has been investigated or adjudicated upon by an industrial tribunal. A compulsory conference called to settle the dispute while the strike is in progress must take in an investigation of the merits of the dispute; these actions can take up to two weeks. The employers say the present provisions place no incentive on union officials to end the strike quickly and they place an onerous task on an employer seeking redress against unions. Since the new provisions have been operating, very few actions have been started. 103/

In a table shown this writer dealing with penalties imposed by the Industrial Commission under Section 100 from January 1950 -- December 1966, out of 5377 disputes reported, 190 were involved in formal proceedings, giving way to 147 convictions, totaling $41,300 in funds. 104/ Among the factors that the Commission will look at in determining whether a union is guilty and, if so, what the penalty should be, include:

> "(a) earlier conduct of the union; (b) effect on supply of essential goods and services to the public; (c) if the strike is in defiance of the Commission's order or amounts to a protest against an award; (d) cost to employees indirectly affected by the strike; (e) fact that the union entered on strike as a result of a misunderstanding or wrong assessment of the situation; (f) importance of the issue; (g) significance of participation by one union in a strike involving several; (h) prompt action by the union to secure resumption of work immediately on the strike occurring." 105/

3. Commonwealth

Unlike NSW's imposing of a direct penalty for strikes, a strike is not a offense under the C & A Act. Punishment is meted out for contempt of the Industrial Court, in failing to obey orders of that Court not to act in breach of award. The steps involved are briefly as follows: there must be a bans clause in the award; if none exists, apply to the Industrial Court for an order that the organization comply with the award; finally, apply to the Court for punishing the union in contempt of the Court in disobeying its order (Section 122).

The starting point in the use of penal sanctions is the insertion in an award of a so-called bans and limitations clause. The Commission has the power to include a "bans clause" in an award, as has been previously noted. But it is the Industrial Court alone which has special jurisdiction under Section 109 to make mandatory orders, orders requiring an organization of employers or employees to comply with a provision of the Act or the award; this is not unlike a mandatory injunction. (Section 109(1)(b)). Sykes has queried whether, in the Federal sphere, an order requiring men to resume work could itself be an

order under Section 109(1)(a) unless the award sought to be enforced contained some such duty: "Such orders could possibly be argued to be exercises of the arbitral power which could in turn lead to an enforcement under s. 109 as the term "award" is defined by s. 4 to include "order." It is submitted that such an "order" would have to be made in the settlement of a dispute." 106/

Where an injunction has been granted at the instance of one employer, there is nothing in the Act to prevent the granting of another injunction at the instance of a second employer. To hold otherwise, according to the Industrial Court, 107/ would involve the proposition that any one breach of the award would involve the union in an injunction governing their relationships, not only with the employer in respect of whom the breach occurred, but with all employers who are parties to or bound by the award.

In 1965, Section 109A was added by amendment, with the object of providing a "cooling off" period similar to Section 99A of the NSW IAA, inserted in 1959, during which the Commission is given the opportunity to do something about the dispute, should it so desire. It provides for a 14-day cooling-off period before an order can be obtained from the Industrial Court requiring the union to refrain from committing a threatened breach of an award, when a claim is made within the terms of the award and carries with it a threat of strike action. Under the provisions the Industrial Court could not begin to hear an application for an injunction unless it was satisfied that three conditions had been fulfilled. First, the Commission must have been notified that breach or non-observance was likely to occur; second, there must have been no delay in notifying the Commission without a reasonable cause; and third, 14 days must have elapsed since notification was given to the Commission, thus allowing time for efforts by the Commission to settle the dispute. There is a proviso to the third condition stating that the 14 day period need not apply if the applicant is able to satisfy

the Industrial Court that breach or non-observance would occur within the next ten days or has already occurred. This protects the employer's rights in a case where the union had no intention of allowing any opportunity for conciliation inside or outside the Commission.

Once the conditions have been satisfied, the Court makes a rule nisi calling upon the union concerned to show cause why the order sought should not be made. 108/ Upon return of the rule and following a hearing, an order may be made restraining a breach of the award in question. The Court's usual order restrains the union from "committing or continuing" a breach of the relevant clause (the Industrial Court is reluctant to make an order of indefinite duration enjoining breaches of bans clauses, thereby turning the Commission's award prohibiting strikes into a perpetual injunction made by the Industrial Court), and it is not necessary for an applicant to show an actual breach -- "if a strike is in progress or appears likely, the order will be made." 109/

Section 109(1)(a) and (b) make deliberate disobedience of such punishable as contempt of court, the penalties for which are higher than the penalties for mere breaches of the Act or awards. 110/ For this reason some judges have considered that the use of such an "extraordinary" remedy should be restrained. 111/ The final step in the process is the imposition of penalties. The applicant, if a breach or non-observance of award is involved, has a choice of proceeding under Section 109, with the subsequent disobedience of a s. 109 order leading to a contempt of court penalty under Section 111, or going to an industrial magistrate or Industrial Court under Section 119 and getting a small fine for a proved infringement subject to the conditions of Section 41(c), which fixes maximum penalties for breach of an award -- $200 for an organization and $20 for a member.

In the Commonwealth sphere, penalties are most readily sought through Section 111 contempt of court proceedings. Contravention of a Section 109 court order prohibiting a union from being directly or

indirectly involved in a restriction or stoppage of work by employees could lead to a $1000 a day fine for the union (111(4)(a)) and the union's officers could be personally held responsible and fined up to $400 or given up to 12 months' imprisonment (111(4)(b)). As Foenander suggests,

> "In all probability, the principal reason why employers usually favor the procedure under s. 109 in preference to that under s. 119 in cases of alleged breach of award or non-observance, is that a more severe penalty is available for imposition by the Court under s. 111 for contempt of its authority in disregarding any order made under s. 109 than under s. 119 for a proved infringement or nonobservance of an award. Also, there is the hope that an order under s. 109 will be obeyed, making any step in pursuance of s.111, unnecessary, and opening up the way for restoration of good labor relations forthwith." 112/

The difference between NSW and Federal amendments is the specific defense open in NSW that the union did not aid, support or abet the strike. In the Federal sphere, the Court readily finds that the union was involved. 113/ The chief consideration is whether the evidence shows beyond reasonable doubt that the union has been guilty of wilful default of the Court's order. The gravity of the contempt itself may be affected by efforts made by the defendant union to remedy the situation out of which the proceedings arose -- passive inaction by a union when its members violate the award is just as incriminating.

The courts have followed a selective policy in imposing penalties -- they have exercised their discretion and have generally fined the union only where the breach is flagrant and/or the union has a "bad" industrial record. This had led some commentators to decry that this is, in effect, an admission of the right to strike in certain circumstances. 114/ As Mills highlights, "/The/ Federal system applies, as the principal test of guilt and of amount of penalty to be imposed, the extent of the union's submissiveness to the tribunal. All other issues are of secondary importance." 115/ As an example of this

proposition, in an application made by an employer for an order enjoining unions from committing breaches of a bans clause of an award, the union stated to the Court that it had placed the matter in the hands of the Trades Hall Council and would abide by whatever tactics the latter might choose to adopt. Following the making of an order under Section 109, 116/ the union again was involved in a strike in breach of award and at a hearing of a contempt charge told the Court it had been forced to choose between obeying orders of the Trades Hall Council and those of the Court, and in the interests of the union it had chosen the former. Spicer, C.J., in announcing the order of the Court that a $600 fine be imposed on the union, said that the union actions amounted to clear and deliberate contempt of the Court's order. 117/

Evaluation of the penalty provisions vis-a'-vis strike action, coupled with a discussion of the relationship this has with the jurisdictional drawbacks to the arbitration systems' intervention will be dealt with in Chapter 7.

UNITED STATES

Basically, five different forms of resort to force may be delineated: (1) strikes over non-arbitrable issues; (2) law suits by either management, workers or unions to recover damages suffered as a result of alleged agreement violations; (3) injunctions sought by either managements, workers or unions to prevent an anticipated breach of agreement; (4) voiding a contract which has been breached; and (5) disciplinary action against workers who have engaged in strikes, slowdowns, sabotage or other violations of a collective bargaining agreement. Sometimes, as in the case of strikes over non-arbitrable issues, the parties have agreed in advance to fight it out when disagreements arise. Other resorts to force such as injunctions, law suits, and disciplinary action against workers violating terms of the agreement, often result from inadequate advanced planning for handling certain particularly tough disagreements. 118/

A. Status of strikes and other direct action

Strikes, as such, are not illegal in the U.S. Section 13 of the Labor-Management Relations Act, as amended in 1959, expressly states that, "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." Perhaps the nearest the U.S. ever came to forbidding strikes by law was during the early 19th century when judges invoked the conspiracy doctrine against strikes and strike leaders, bringing strike action, by implication, under the general ban of the common law. It should be noted, though, that not all types of strikes are legal. For example, it is an unfair labor practice for a union to strike to secure an unlawful contract provision, to wit, a "hot-cargo" (black bans) clause, or a closed shop. 119/

Considering the number of cases in which disputes are not settled until after there has been resort to a strike, it may seem odd that confidence in the value of collective bargaining nevertheless persists. There are several reasons. First, a strike or threat of a strike is an essential part of negotiations; without it there could hardly be an approach to equality in bargaining power of the kind which our law seeks. Indeed, for purposes of union solidarity, the strike serves as a ritual for preserving the union's image in its members' eyes. Second, the denial of the right to strike would be incompatible with tradition and would strip the element of voluntarism from the labor agreement which is the objective of the process of collective bargaining as we understand it. As the NLRB early recognized,

> "Absent a contract waiver of the (right to strike), mutuality requires, and collective agreements are to be construed as contemplating, that if the employer is left free (after negotiations) to impose revisions in employment terms without regard to the desires of employees, the latter are entitled to a comparative degree of freedom of action, namely, the peaceable withholding of their service, in order to protest, or to secure the nullification of the employer's action." 120/

Third, we have not been able to devise a method of establishing the wage rates and other conditions of employment which is more efficient and at the same time consistent with our basic political thinking. 121/

It is as important to employers to resist union demands to the point of bringing on a strike as to unions to be able to exert strike pressures as a means of gaining concession. In order to protect themselves against illegal strikes and picketing, employers can have recourse to restraining orders but only on application to the NLRB. The Board decides at its discretion that appropriate grounds exist for it to petition courts for an order. From this standpoint, the Act narrows the safeguards regarding strikes introduced by the Norris-La Guardia Act.

In recent years the Board's attitudes regarding the employer's use of lockouts 122/has come under judicial scrutiny. In American Ship Building v. N.L.R.B., 123/ an employer who conducted a business which was largely seasonal, feared a strike and when an impasse in negotiations was reached in mid-summer, he decided to lockout the employees and hired temporary replacements. The Supreme Court found there was no violation since the lockout was not used in a way inimical to the employees' right to bargain collectively or to strike, there being no evidence of the employer's hostility to that process. Nor was there evidence that the lockout was designed to discipline employees for having bargained. The Court also chided the Board for "construing its functions too expansively" by attempting to restrict the employer's economic weapon under the Act in an effort to "balance" the bargaining power of labor and management, and for entering thereby into the substantive aspects of bargaining in derogation of Congressional intent. The union's right to strike is not absolute; "there is nothing in the statute which would imply that the right to strike carries with it the right exclusively to determine the timing and duration of all stoppages."

Subsequently, in N.L.R.B. v. Brown, 124/ the Supreme Court went further. The employers in this situation bargained as a group, and when the negotiations reached a dead-lock, the union authorized a strike. Declaring a "strike against one as a strike against all," when the union struck one the rest entered into a lockout. The NLRB regarded this as a sole purpose to inhibit a lawful strike, not for self-protection. In the past the Supreme Court had held that in the absence of specific proof of some unlawful motivation, a lockout by a multiemployer bargaining unit in responsive retort to whip-saw strike is not a violation. In this case, the Court ruled that when the resulting harm to employee rights is this comparatively slight and a substantial legitimate business end is served, the employer's conduct is prima facie lawful. As one commentator pointed out, 125/ the key thing to note is that the Supreme Court is limiting the all-encompassing power of the NLRB: "/t/he balance struck by the Board is (not) immune from judicial examination and reversal in proper cases. . . . Congress has not given the Board untrammeled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent. . . ." 126/

With regard to the status of strikers during a strike, a striker who is engaged in an economic strike for a lawful purpose and not in violation of an existing no-strike clause or of the procedural requirements of Section 8(d), and who has not engaged in tortious conduct or criminal conduct during the course of the strike, may not be discharged or otherwise discriminated against for his concerted activity, but he can be permanently replaced. An unfair labor practice striker is entirely different. If he has been replaced, he is entitled to reinstatement to his job, even if this requires displacement or discharge of the employee hired to replace him.

As to union responsibility for the actions of its members, a company cannot charge the union with breach of contract over a wildcat strike unless the union joins or supports the action, or, depending on

the agreement, fails to take vigorous measures to bring it to an end. In United Mine Workers v. Gibbs, 127/ the Supreme Court found that an international union which intervened in an unauthorized action by one of its locals prevented the spread of violence, and directed the dispute onto a lawful path was not guilty of a secondary boycott under the LMRA, nor was it responsible under State law for violence and alleged conspiracy to interfere with the company's contractual relationship, and therefore could not be held responsible under State law for damages resulting from such action. If the union were to be held responsible under State law for the unlawful and violent acts of its individual members, the union, its officers or its members must have authorized, participated in, or ratified the acts, and such conduct must be proved by clear, unequivocal and convincing evidence Section 6 of Norris-La Guardia Act.

At the other end of the spectrum, the Supreme Court has upheld the NLRB's decision that a union was within its Constitutional powers and did not unlawfully restrain or coerce its members when it fined them for crossing a membership authorized picket line and took court action to collect the fine. The Court said that the legislative history of Section 7 shows that "it was not intended to immunize union members from discipline for defiance of a majority decision to strike." 128/

B. Governmental anti-strike machinery

The size of bargaining units, the intractability of settlements, and the serious consequences of strikes in our interdependent economy have increased the tendency for governments to intervene in disputes to protect public welfare. There is growing awareness here that in some cases (e.g., the 1959 steel strike) our system can seriously jeopardize public interest which on the whole seems to be more quickly attended to in Australia than here. While the present labor laws have provided few controls over strikes, there are instances where the Government, both Federal and State, has seen fit to impose restrictions.

A tough law prohibits strikes by Federal Government employees. Passed in 1955 as a carryover from the Taft-Hartley Act of 1947, it makes it a felony to strike against the Government. Any employee who does is subject to a fine of $1000 plus a jail sentence of a year and a day. Every worker must sign an affidavit pledging himself not to strike, and the same law makes mandatory the removal from the Federal payroll of any worker who asserts the right to strike or belongs to an organization that asserts the right to strike. See Section 305, LMRA, as amended 1959. The only walkout in recent years was a wildcat strike of 85 sheet-metal workers at the Tennessee Valley Authority in 1962. All the strikers were fired, and their union helped the Authority recruit replacements.

However, similarly stringent penalties have proved scant deterrent to walkouts among state and local employees. On the contrary, New York State discovered that an excessively rigid law could prove unenforceable, partly because politicians were too fearful of union reprisals at the polls, but also because the penalties themselves made restoration of vital services impossible. Thus, in 1967, the 20-year old Condon-Wadlen Act was repealed. It had required the dismissal of all strikers and barred them from pay increases for 3 years if they were subsequently reinstated. However, recent events such as the 1965 New York City welfare strike and the 1966 transit strike showed that the Act was particularly ineffective as it was then being administered. The new Taylor Law provides a broad range of mechanisms for unionization and negotiation, including impartial fact-finding to break deadlocks over wages and all other issues. Its penalties are directed against union treasuries in the form of fines and withholding of rights to automatic checkoffs, rather than against individual strikers. It sets up a State Public Employment Relations Board to certify unions as bargaining agents for units of public employees and to mediate contract disputes. The Act received its first test during

the September 1967 New York City teacher walkout, with the effectiveness of the Act dependent on the ultimate outcome of likely lengthy litigation.

Emergency strikes. Both Federal and State governments have sought to impose restrictions on what are deemed to be "emergency disputes." Sections 206-210 of the LMRA set out the "national emergency dispute" procedures. Since 1947, 28 national emergency injunctions have issued under the Taft-Hartley Act. The only non-compliance came in two strikes by John L. Lewis' United Mine Workers -- in 1948 and 1950. Lyndon Johnson promised early in 1966 to propose legislation "to deal with strikes which threaten irreparable damage to the national interest," but as of yet, most likely in his fear of alienating labor's vote, he has hesitated. The lack of clear meaning of and criteria for the determination of an "emergency dispute" has prompted vast literature in this area. Discussion of alternatives to this procedure will be discussed infra in a following section of this Chapter.

On the basis of the definition in the Act, a national emergency dispute has 2 essential features: (1) it affects an entire industry or substantial part thereof and (2) it imperils national health and safety. The President is empowered to appoint a board of inquiry to ascertain causes and circumstances of the disputes. On receipt of the report, the President may direct the Attorney General to petition any district court for an 80-day injunction against strike or lockout. The district court will do so if the dispute has both required features. The board of inquiry is reconvened when the injunction is issued. If the dispute is not settled in the next 60 days, the board of inquiry reports the positions of the parties and the employer's last offer to the President who makes the report public. The NLRB within the next 15 days conducts a secret ballot of employees involved to see if they wish to accept the employer's last offer. If no settlement is reached by the 80th day, the injunction is discharged. The President reports to Congress and may recommend legislation to deal

with the dispute. At this point the union is free to strike and the employer to lockout.

Much criticism has been levelled at this procedure, and many of the drawbacks were seen early. For instance, in the 1st Annual Report of the Federal Mediation and Conciliation Service in 1948, in referring to Section 209(b): Last Offer Ballots, it was stated that:

> A vote turning down an employer's last offer places additional obstacles and difficulties in the way of a settlement. Union representatives must necessarily accept the vote as a mandate from the rank-and-file of workers that they may regard as practicable and possible bases of settlement only those offers of employers substantially more favorable than the one rejected. With foreknowledge of this consequence, employers tend to keep reserve, and not to represent as a last offer which may be submitted to ballot, concessions which might result in settlement. Union leadership and employees, aware that employees assess the situation in this manner act accordingly. Thus, the mandatory last offer ballot sets in actions a cycle of tactical operations by both parties which cancel each other out and delay serious efforts to arrive at a prompt resulution of their differences. 129/

Of the numerous examples of recent governmental intervention in industrial disputes, perhaps the most recently talked about instance was the railroad "arbitration award" of 1963. Before discussing the specifics of that situation, a look at the specific legislation directed to the regulation of railroads is in order. In 1926, Congress passed the Railway Labor Act, with provisions for dealing with railway labor disputes of all kinds. Among the "general purposes" of Section 2 are the provision for "(4). . . prompt and orderly settlement of all disputes concerning rates of pay, rules or work conditions; /and/ (5). . . for prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application covering rates of pay, rules or working conditions."

The Act used such devices as "cooling off" periods, mediation, voluntary arbitration, and fact-finding with recommendation as tools for averting railroad strikes and lockouts over terms of new agreements. It

created the National Board of Mediation to intervene as a mediator in event of a disagreement during the negotiation or amendment of a collective agreement. This intervention is voluntary; if the parties cannot reach agreement and reject the arbitration or award proposed by the Board they are at liberty (after a lapse of 30 days during which working conditions cannot be changed) to take such action as they consider necessary to defend their interests. Should the dispute threaten to interfere seriously with the flow of interstate commerce, the President is empowered to establish an Emergency Board. During the 30-day period provided for investigation and 30 days after it issues its recommendations, no strike or lockout is permitted. However, at the end of that period, either party is free to act as they think fit, since, as is also the case with the National Mediation Board, neither Board has power, except for public opinion, to enforce its award.

The Railway Labor Act of 1926 contained a directive to management and labor organizations to create a Board of Adjustment on national, regional, or systematic (company) basis for settling disputes over interpretation of labor agreements. The 1934 amendments created the Board. In the event of disagreement over interpretation of clauses of a collective agreement, the National Railroad Adjustment Board (NRAB) intervenes at the request of either or both of the parties. This board is made up of employer and trade union representatives. If a majority of members are not in favor of a particular settlement, an award is handed down by an independent arbitrator. 130/ Prescriptions of paragraph "5" of the Act made it the "affirmative duty" of "unions" to settle disputes as to interpretation of an existing collective bargaining not by collective union pressures on the railroad but by submitting them to the /NRAB/ as the exclusive means of final determination of such 'minor' disputes." 131/ In another case involving the Railway Labor Act, the Supreme Court concluded "that there was general understanding between both supporters and opponents of the 1934 /amendments to the Act/, that

the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field." 132/

When the Act was enacted in 1926, it was contemplated that special congressional action might be required "to protect the public interest in adequate and uninterrupted transportation. If /the bill/ does not work. . . so as to avoid any impairment of public interest. . . Congress will be unembarrassed in adopting any means it sees fit to protect the public interest." 133/ Then, in 1960, in case holding that job protection is a legistimate subject of bargaining, the Supreme Court stated that Congress is the appropriate forum for considering remedies against strikes designed to prevent the railroads from reducing employment for economic reasons 134/-- a "rights" dispute. But in 1963, in the face of a dispute (which threatened "essential transportation services of the Nation") about rules for use of firemen on certain engines and over the minimum safe crew consist (a dispute which had begun after a 1959 decision by the major interstate railroads to change work rules) -- clearly disputes over interests -- Congress enacted a joint resulution providing for the settlement of this particular dispute by compulsory arbitration. 135/ The tripartite Board created under its terms after hearings, filed its award on November 26, 1963.

The Railroad Arbitration Act, which superseded the exhausted procedures of the Railway Labor Act, was still intended to preserve collective bargaining: ....."it is desirable to achieve the objective (security and continuation of transportation services) in a manner which preserves and prefers solutions reached through collective bargaining. . ." While it was the closest thing to compulsory arbitration that Congress has yet legislated, it was not a federal statute of Congress establishing final and binding arbitration of railroad disputes:

> ". . . the public resolution and its mandate applied to a specific dispute and not to disputes in general. The proposal was in the form of a joint resolution of congressional intent and not a statute. . . It was. . . limited to 180 days,

> except for the arbitration award, which would set the efficient period of the decision, provided that it did not exceed 2 years. It has also been contended that the issues to be arbitrated had been more or less "in tentative agreement" by the parties in earlier discussions with government officials, and therefore the resolution merely supported earlier efforts at agreement." 136/

Under the award, 137/ the arbitration panel ruled that railroads could eliminate 90 percent of their freight and yard firemen, reportedly resulting in 20,000 firemen's jobs being eliminated. Since the Supreme Court ruled that neither the Congressional statute of 1963 nor the arbitration award issues as a consequence of the legislation superseded State "full crew" laws, 138/ unions and railroads have been negotiating for a solution. But when the award expired in March, 1966, a dispute arose over whether the jobs eliminated must be restored. In March 1966, a District Court ruled that railroad operating unions may not strike to compel carriers to rehire firemen and trainmen who lost their jobs under the Federal arbitration law. The judge said that the unions would have to negotiate on these matters under the procedures of the Railway Labor Act, and that union proposals to restore jobs existing before the arbitration award would be unreasonable. The unions ignored the Court's order and it was only after the judge threatened fines and was upheld by a Court of Appeals, and President Johnson called on the unions to end their illegal strike, that the unions agreed.

States have engaged in a wide variety of experiments designed to cope with strikes which are considered emergencies, or which cause serious inconvenience. As of 1965, 28 states provided for some sort of official investigation and/or fact-finding in such instances; 139/ 10 states enacted compulsory arbitration; 140/ 5 have provided for seizure of struck facilities; 141/ and one state -- Massachusetts -- adopted "choice of procedures" giving authorities a variety of methods to handle disputes. These state emergency dispute laws accumulated some

very interesting experience, but are now largely inoperative except where they apply to groups not covered by Taft-Hartley, because the courts have ruled that such state laws are in conflict with rights guaranteed under federal law. 142/ (The Kansas arbitration law will be discussed in a subsequent section of this Chapter dealing with compulsory arbitration).

A number of states also have laws which subject strikes to a series of prior conditions (such as the taking of a ballot), failing which they can be declared illegal. Strikes not covered by Taft-Hartley, such as sit-down and lightening strikes, can be prohibited by states, as can coercive practices and violence during a collective dispute. Naturally any state legislation submitting strikes to certain conditions, such as prior notice, a majority vote, compulsory mediation and arbitration, remain valid with respect to disputes which only affect intra-state commerce. In 1950, the Supreme Court declared that a Michigan statute, which required a period of notice and the approval of a majority of the workers involved before a strike could be called, was invalid when applied to disputes involving interstate commerce. 143/

Over the years many have raised their voice in claiming over-intervention on the part of the Government. It has been suggested that the national interest would be better served if the Government were to concentrate on improving the facilities that can assist the parties who earnestly desire to use collective bargaining as it was intended to be used. In particular, commentators have called for continuation and publicity of the Labor-Management Advisory Committee. Under Section 205, a National Labor-Management Panel of 12 members (6 labor and 6 management) appointed by the President was created, with the duty, at the request of the Director of the Federal Mediation and Conciliation Service to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjudication shall be administered, particularly with reference to controversies affecting the general welfare of the country.

There have been various proposals made over the years as to effective legislation to combat strike dislocations. When the threat of renewed strikes on the railroads was before the nation in 1966, one commentator saw the federal courts as the only significant protection of public interest against acts of organized labor, but even this was insufficient:

> ". . . as is inevitable in the case of outlaw strikes, these restraints of the law could not be imposed under due process until considerable damage had been inflected on the national economy." 144/

This has prompted some legislators to recommend more power for the courts. Thus Senators Javits and Kuchel proposed a bill that would allow the Government to seek through the courts authority to keep struck industries operating in order "to protect the public health and safety." 145/ Senator Smathers has gone even further, proposing the establishment of a court of industrial relations so that "the authority to require compulsory arbitration will remain a judicial function, but become much more quickly and widely available." 146/

The basic criticism of yet another proposal, seizure, as a method of dealing with labor disputes affecting the national interest is that, in forcing a settlement upon the disputants, it is really a form of compulsory arbitration. Moreover, seizure thrusts Government directly into the dispute, prevent the parties from negotiating in an atmosphere free from coercion and interference. Another proposal, statutory or nonstoppage strikes, presents an interesting attempt at non-disruption of industry. While all operations continue as usual, economic penalties are imposed which simulate the financial losses of a strike or lockout. Both wages and profits are withheld, thus providing powerful economic pressure for the efficient resolution of labor problems. Statutory strikes have the important advantages of serving the public interest in continuing production and of permitting free collective bargaining. 147/ But there are numerous problems and drawbacks

to this scheme, 148/ not the least of which is as to the determination of the penalty. Moreover, it may interfere with free collective bargaining for it deprives labor unions of the right to use an active strike as a means of settling their differences with management.

One writer has even gone so far as to recommend a ban on industry wide bargaining and national unions by suggesting that Congress seek legislation to dismantle existing bargaining structures along market-wide or industry-wide organization of employees by a single union. 149/ But this cuts against the grain of exclusive representation and is directed against those unions most in need of such organization, those markets and industries where the cost of organization is so high that a policing function is necessary.

C. Compulsory Arbitration -- No answer

During the 1967 auto strike between the United Automobile Workers and Ford Motor Co., the use of the strike as "economic warfare" and an outcry for public intervention filled the press. In a Letter to the Editor of the New York Times, Theodore Kheel, a leading mediator and spokesman of the American industrial relations system, emphasized the important role of the strike:

> ". . . I view the prospect of a strike or lockout as indispensable to collective bargaining, or collective bargaining as the best process any society has ever developed for voluntarily setting the relations of workers and their employers. Indeed, the 'prospect' of a cessation of work is the most effective strike deterrent ever devised even though it does not work 100 per cent. . . . there is no workable alternative to collective bargaining, and, therefore, the prospect of a strike or lockout." 150/

Kheel's remarks prompted a reply from a fellow practitioner, who advocated compulsory arbitration as a final solution:

> ". . . the greatest inducement to fruitful collective bargaining is the knowledge that if the parties do not make their own settlement a third party will make the final determination. . . . Nothing is more compelling toward a voluntary settlement than the prospect of third-party disposition." 151/

Public sentiment in the U.S., generally speaking is hostile to the use of compulsion in the settlement of labor disputes. It has been stated that "issues big enough to raise the prospect of a strike are too important to both sides to be submitted to an outsider for decision." 152/ Senator Robert Taft, Chairman of the Senate Labor Committee, in 1947 explained why there was no inclusion in federal legislation of compulsory arbitration or seizure:

> "We recognize the freedom to strike when the question involved is improvement of wages, hours and work conditions, when a contract has expired and neither side is bound by a contract. . . . /I/n spite of inconvenience, and in some cases perhaps danger, to the people of the U.S. which may result from the exercise of such a right. ... I think /that the right to strike/ can be modified in cases not involving the basic question of wages, prices and work conditions. But if we impose compulsory arbitration or give the Government power to fix wages at which men must work. . . I do not see how we can take from Government the power to fix prices; and if Government fixes prices and wages, we soon reach the point where all industry is under Government control, and finally there is a complete socialization of our economy." 153/

While unions and management, in general, strenuously oppose any compulsory arbitration in this country, seeing it as a threat to voluntary collective bargaining, their opposition to it enhances its values as a possible means of settling disputes or stopping strikes. If the government were empowered to intervene in true "emergency disputes" with compulsory arbitration, even though it seldom chose to exercise that power, the parties might be encouraged to submit their differences to voluntary arbitration. This aspect of compulsory arbitration has been referred to "the persuasion of power rather than the power of persuasion." 154/

There have been several instances of "compulsory arbitration" on the federal and state level (not counting the previously discussed 1963 railroad arbitration award). During WWII, the War Labor Board as an agency approximated compulsory arbitration in that its decisions were

final and binding and not subject to review by the courts. However, it must be remembered that leaders of labor and management had voluntarily agreed to give up their right to strike and lockout for the duration of the war provided an agency was established to make final decisions in the handling of labor-management relations.

Perhaps the most publicized attempt at the state level occurred in Kansas. In 1920, the legislative of Kansas created a court of industrial relations, clothed with powers of compulsory adjudication or arbitration of unresolved labor disputes (over interests) in food, clothing, mining and public utility industries. In a case involving a meat-packing plant, the U.S. Supreme Court, overruling the Kansas Supreme Court, held in 1923 that the enabling legislation was unconstitutional as applied by the court of industrial relations to fix wages in meat packing. 155/ Two years later the Court reached the same conclusion regarding the fixing of hours and overtime in the Wolff plant. 156/ The reason given was that fixation of higher wages in the Wolff Packing Co.'s plant deprived that company of property and deprived both it and its employees of liberty, without due process of law in contravention of the due process of law clause of the 14th Amendment of the U.S. Constitution, which stipulates that "no state shall deprive any person of life, liberty or property, without due process of law. . ." The court of industrial relations no longer exists, but the statute is still on the books, providing for compulsory arbitration of disputes in industries (deemed by courts to be) affected with a public interest. Apparently, the act continues to apply to railroads (intrastate) and to public utilities.

The right of states to legislate for compulsory arbitration in certain public utility disputes has been questioned in a series of court decisions. Nine states provide for compulsory arbitration as to labor disputes in public utilities -- Florida, Indiana, Kansas, Michigan, Minnesota, Nebraska, New Jersey, Pennsylvania, and Wisconsin.

In New Jersey the statute has been amended, in compliance with judicial objections, to provide standards for the guidance of boards of arbitration. In Michigan the statutory provision prescribing compulsory arbitration, incorporated in Section 13 of the State Labor Relations Act, has been held unconstitutional for lack of standards. 157/ The U.S. Supreme Court declared the Wisconsin statute unconstitutional as applied to business affecting interstate commerce. 158/

D. Parties' approach to disputes settlements

Voluntary arbitration of terms of new or renewing agreements is not common. Whereas most agreements provide for arbitration of grievance disputes -- that is, disputes over contract interpretation -- only about 2 per cent provide for arbitration of disputes over new or reopened agreements. 159/ This appears to be sensible because it has come to be accepted that no one is as qualified to write a contract as the parties who have to live with it. Indeed commentators have been quick to point out drawbacks to arbitration of disputes over new agreements. Because arbitrators tend to "split the difference" between the parties, the expectation that there will be arbitration encourages the parties to take and maintain extreme positions, and sharply reduces chances of a voluntary settlement. 160/ Both unions and employers have charged that arbitrators lack generally accepted standards of an equitable nature; that arbitrators are seldom versed in economic and technical aspects of a company or an industry, so that their decisions are necessarily ill-advised. Companies sometimes oppose arbitration on the grounds it grants control of company policy to an outside agency, thus representing improper delegation by management of its responsibilities. Frequent criticism by union representatives is that the delay involved sometimes postpones settlement for such a length of time that the morale of union membership may be broken.

In one sense the function of "interests" arbitration is to supplement the collective bargaining process by doing the bargaining

for both parties after they have failed to reach agreement through their own bargaining efforts. Arbitrators often recognize this to be their prime function:

> ". . . In submitting this case to arbitration, the parties have merely extended their negotiations -- they have left it to this board to determine what they should, by negotiation, have agreed upon. We take it that the fundamental inquiry, as to each issue, is: what should the parties themselves, as reasonable men, have voluntary? . . . . We do not conceive it to be our function to impose on the parties contract terms merely because they embody our own individual economic or social theories. . ." Arbitrator Whitley P. McCoy in Twin City Rapid Transit Co., 7 LA 845, 858 (1947).

There are instances where voluntary arbitration of key issues has settled contract disputes. E.G., in 1959 and 1960, a board of the three neutrals arbitrated a dispute over security, incentive plans, operational speeds and grievance procedures to be included in a new agreement between Pittsburgh Plate Glass Co. and United Glass & Ceramic Workers of North America. 161/ On June 9, 1963, the New York Times editorially hailed the decision of Pan American and two of its unions to include in their contracts promises for voluntary arbitration of further disputes over the terms of a new contract as "a sounder answer than compelling Congress to adopt a law under the pressure of panic."

A study made by Richard Miller 162/ analyzed wage arbitration cases over the period 1953-1965 and is a continuation of the study made for the period 1945-1950 by Irving Bernstein. It reveals that limited use has been made of arbitration in the resolution of wage disputes (probably fewer than 300 instances in 13 years) and that the situations in which arbitration of contract terms is resorted to involve principally small, low-profit firms faced with sever competition. The article suggests that arbitration of wages can contribute to collective bargaining only under crisis conditions; that resort to third party occurs only when neither union nor company can accept outcome of either negotiating

a settlement or a test of endurance. 163/ For the future, there is likely to be an interest in the possibility of developing the practice of voluntary arbitration in "new contract disputes," particularly in those industries or companies where unions are unable to rely on their right to strike or the employer on their right to lockout, or resort to other economic pressure; where the alternative is greater government intervention through the injunction process, or the alternative of seizure or compulsory arbitration.

Use is occasionally made of the Federal Mediation & Conciliation Service or of State Mediation agencies, but usually only after an impasse is reached. Conciliators agree that the earlier they participate in negotiations, the more likely they are to succeed in helping the parties reach agreement. Some international unions require their chartered locals to use the FMCS before dissolving the bargaining conference, and some collective agreements provide for the calling in of a mediator should a deadlock be reached in negotiations for subsequent agreements. If mediation fails or if resort to it would be useless, the parties, as noted, may sometimes agree to arbitrate their differences, but this is not too common. A few unions maintain a staff of experts whose chief function is to assist local unions in preparing and presenting their cases before arbitration boards, and some industries have established their own arbitration councils.

As previously indicated, once an agreement is concluded, dispute settlement by negotiation is institutionalized by contract. The grievance procedure is a standard part of almost every collective bargaining agreement. The need for some grievance adjustment machinery between the parties was noted before Taft-Hartley:

> "Collective bargaining agreements should contain provisions that grievances and disputes involving the interpretation or application of terms of the agreement are to be settled without resort to strikes, lockouts, or other interruptions to normal operations by an effective grievance procedure with

> arbitration as its final step." /Rep. of Cmtee VI, adopted by National Labor-Management Conference, Nov. 20, 1945 (U.S. Dept. of Labor, Bull. No. 77, pp. 44, 47)/

The agreement by unions and employers to use arbitration was almost the sin qua non of their acceptance of a formal, explicit grievance system and the spread of such system can almost be measured by the use of grievance arbitration. The courts have come to recognize the significance of arbitration and have seemingly gone out of their way, in the opinion of some commentators, to uphold arbitration clauses. Much has already been said of the use of arbitration in a preceding chapter /See pp. 79-86 /, but perhaps a few examples of the forms the provisions relating to disputes settlements take will present an idea of the acceptance of the procedure by the parties.

Brissenden 164/ gives the example of the Continuing Agreement between Phelps-Dodge Corporation, Douglas Reduction Works and the Int'l. Union of Mine, Mill and Smelter Workers (1956-1959) which devotes 10 of its 63 printed pages to grievance procedures (including arbitration). A grievance is defined as "any controversy, complaint, misunderstanding or dispute arising as to meaning, application or observation of any provisions of this Agreement. . . (except about strikes or lockouts)." A series of procedural steps, typical to many agreements, were then outlined to be followed:

> 1. Verbal presentation of grievance to foremen (informal procedure); 2. Written presentation of grievance to foreman (formal procedure); 165/ 3. Appeal to department head; 4. Appeal to superintendent by grievance committee; 5. Hearing and decision of superintendent; 6. Terminal arbitration.

As has been indicated, not all grievance procedures allow for final arbitration of every issue. Matters involving substantial changes in, or additions to, the contract are generally excluded from grievance procedure, either by implication or by explicit provisions.

The garment industry has maintained relative peace within its domain through the accepted grievance machinery provided in their contracts, making good use of permanent Impartial Chairmen. Using the agreement between Affiliated Dress Manufacturers, Inc. and the Int'l. Ladies' Garment Workers' Union (ILGWU) and Dressmakers' Joint Council (1964-1967) as an example, paragraph 64 declares that ". . . there shall be no general lockout, general strike, individual shop lockout or individual shop strike or shop stoppage for any reason, but work shall proceed. . . subject to the determination of the dispute. . . . /several exceptions are listed/. Provision is then made in paragraph 66 for grievances to be submitted first for joint investigation by the manager or deputies of the Employers' Assn. and the Dress Joint Council, their decisions to be final and binding. In the event of no agreement, the dispute is submitted to a permanent referee, the Impartial Chariman, whose decision is final and binding.

The two abovementioned provisions are representative of the more typical grievance machinery arrangements, but other industries and unions have developed other techniques. In the electrical contracting industry, for example, a Voluntary Council on Industrial Relations, a kind of private labor court set up by agreement and jointly maintained by the Electrical Contractors Assn. and the Int'l. Brotherhood of Electrical Workers, has been operating for more than 40 years. 90 per cent of the union's 500 + construction locals incorporate clauses into their agreements with employers, renouncing strikes and providing that disputes which cannot be resolved locally must be submitted to the Council, which has decided more than 800 cases since it began. It handles disputes both "over the terms of new contracts and over the meaning of contract language. 166/

In 1948 the employers and unions in the building and construction industry signed agreements establishing a voluntary National Joint Board to handle jurisdictional disputes. 167/ Recently, the procedures

were revised and adopted by the Building & Construction Trades Department of the AFL-CIO. 168/ A NLRB decision in 1965 decided to give the new AFL-CIO Joint Board for Settlement of Jurisdictional Disputes an opportunity to settle a long-standing dispute between Iron Workers and Carpenters locals.169/ While the Taft-Hartley Act, as amended, provides for the Board's determination of jurisdictional disputes, there has been so much confusion in the area that the Board is more than glad to try and let the parties settle it.

There are instances where the contract does not provide for arbitration after all grievance provisions have been exhausted. As an example, in September, 1965, American Motors and the Auto Workers endured a 17-day strike over issues of work standards and the company's right to discipline workers, the contract not providing for binding arbitration after all grievance procedures have been exhausted. In a recent article in an American journal the experience of companies and unions using "open-end" grievance procedures was examined. 170/ Citing the locals of Region 7 of Allied Industrial Workers Union and the Teamsters, the article noted that this "grievance procedure without arbitration" does not necessarily result in frequent work stoppages. The last step in these agreements is usually either referral to the international representative of the union and the plant manager, with final reference to the union as a whole, or the entrance of a federal or state mediator. The writer of the article suggests that this procedure may be helpful to small local unions not able to afford the heavy cost of arbitration, but doubts a union's ability to negotiate an open-end grievance procedure in larger bargaining units which are part of multiplant companies unless the idea fits the current philosophy of management.

A novel "no-strike, no-lockout" clause was included in recently concluded agreements for waitresses and kitchen employees of two of the largest New York City area restaurant chains. Both contracts were

formally signed for 4500 members represented by the Hotel and Restaurant Employees Union. They included a stipulation that the union "voluntarily declares its opposition to the use of the strike, under any circumstances, either as an instrument in settlement of disputes arising out of opposing interpretations of the existing contract, or after termination of this agreement, as an instrument to promote its program." In return, the companies agreed not to lockout employees or engage in anti-union activities. Bargaining is to begin 3 months before the contract expires, with automatic extension and binding arbitration if agreement is not reached by the expiration date. 171/

It seems a fair assessment that the advent of formal grievance adjustment arrangements along with official encouragement and support by the Federal courts and agencies has greatly cut-back the degree of industrial disruptions. The effectiveness of this machinery has been summarized as follows:

> "(1) The worker has at his disposal arrangements by which he can assert the rights given him under the agreement; (2) the fact that representatives of unions can argue with management over specific management decisions in a wide variety of cases makes for more carefully considered decisions and, in general, for better management; (3) it amplifies and develops meaning of the contract and reflects the degree of adjustment between the parties." 172/