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TOTAL WAGE — AN ANALYSIS*

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If it is in any sense true that the establishment of the federal arbitration system created "a new province for law and order" as Higgins asserted,[1] then it is certainly true that the concept of the basic wage as a foundational element in all awards of that system made in settlement of interstate industrial disputes became the single most important factor in the development of that law and of that order.[2] From the *Harvester* judgment of 1907[3] emerged the structure of:

(i) a basic wage common to all workers irrespective of the work upon which, or the industry in which, they were employed and

(ii) a secondary wage or margin for the skill, responsibility, or particular circumstances of the work, or industry, in question

which was the distinguishing feature of wage determination in Australia for the next sixty years. All federal and State industrial tribunals operated within this structural framework, either by legislative direction, or as a result of their own deliberate decisions based upon a common acceptance of this structure by the parties coming before these tribunals.

Clearly then, the Commonwealth Conciliation and Arbitration Commission handed down an historic decision on 5 June 1967. This decision abolished the basic wage and margins as separate elements, and determined

* Two general comments seem appropriate in regard to this article. First, the use of terms *e.g.* "judgments" for reasons for decisions given by the Commonwealth Conciliation and Arbitration Commission is based upon an assumption that readers will know, and assume that the writer knows the implications of the *Boilermakers'* decision (*The Queen v. Kirby*; *Ex parte Boilermakers' Society of Australia* (1955-1956) 94 C.L.R. 254).

Second, an attempt has been made as far as possible to refrain from a partisan analysis that would reflect the fact of personal commitment in the cases under consideration. This has been possible, at least to my satisfaction, in the first two sections. Assessment of the implications of the total wage decision for the future operation of the federal arbitration system must inevitably reflect the writer's own involvements. This no doubt explains my emphasis in the third section—which makes such an assessment—upon possible trade union reactions. That analysis is not meant to suggest that the attitude of the trade union movement is the sole consideration in determining the implications for the federal arbitration system of any particular course of action adopted by that system.

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[1] The phrase provided the title for the book, published in 1922, by the creator of the basic wage system, H. B. Higgins, the second President of the then Commonwealth Court of Conciliation and Arbitration.

[2] For a detailed analysis up to 1953 of this development with particular reference to the basic wage concept, see Hawke, "The Commonwealth Arbitration Court—Legal Tribunal or Economic Legislature?" (1956) 3 *Annual Law Review*: *University of Western Australia* 422; reprinted in Isaac and Ford (ed.), *Australian Labour Economics: Readings* (1967) 33.

[3] *Ex parte H. V. McKay* (1906) 2 C.A.R. 1.

that, in future, wages for all classifications in awards of the Commission should appear as total rates. This article goes first to a factual consideration of the cases from 1964 in which applications for the total wage system were before the Commission, second to a speculation upon the reasons for the 1967 decision, and third to an assessment of the implications of this decision for the future operation of the federal arbitration system.

THE 1964-1967 CASES

1964[4]

The organized employers of Australia made their first application to the Commission for the implementation of the total wage concept in Matter C No. 834 of 1964 which came on for hearing on 21 April 1964, before a bench consisting of Kirby C.J., Gallagher, Moore, Nimmo JJ. and Commissioner Winter. Following an eleven-day hearing, Kirby C.J. on 9 June, announced this decision:

> The members of the bench are unanimous in the opinion that the application of the employers for the deletion from the Commission's awards generally of the basic wage provisions and for the insertion in those awards of a wage expressed as a total wage should be rejected.[5]

Reasons for the decision were handed down jointly by Kirby C.J., Moore J. and Commissioner Winter, and separately by Gallagher J. and Nimmo J.

The joint judgment made it clear that the employers had considerably inhibited their chance of success by the conditional nature of the submissions in support of the application. Counsel had acknowledged in reply to questions from the bench during the proceedings that the employers did not wish the application to be granted unless the Commission accepted the total wage as part of the implementation of the employers' productivity theory of wages.[6] While neither accepting nor rejecting the theory as a theory, the three members of the Commission advanced six reasons why they were not in fact prepared to accept it as a basis for implementing the employers' propositions.

The rejection of the application by the three members was not dependent solely upon this refusal to embrace the productivity theory of wages. The employers, they observed, were asking the Commission "to abandon a concept which had been an integral part of Australian wage fixation for over fifty years"[7] and, because of the freedom of parties to make claims

[4] *Employers' Total Wage Case 1964* (1964) 106 C.A.R. 683.

[5] *Ibid.* 689.

[6] Briefly this theory can be expressed by the proposition that wage increases should not exceed the estimated increase in national productivity for the ensuing year, such estimate to be based on a consideration of current economic factors assessed in the light of past productivity movements.

in forms of their own choosing to be dealt with by the Commission "in its various manifestations" it was being asked to substitute a concept which:

> would be difficult to implement if the Commission as now constituted were persuaded to accept it for general application. It would be impossible for the Commission as now constituted to create permanently for the future a universal pattern both acceptable to the parties and inflexibly binding on the Commission however constituted.[8]

But, as with the employers' emphasis on the productivity theory, this procedural uncertainty was not put as a fatal bar to the success of the application, the opinion being expressed that if the claim should succeed on its intrinsic merits "we feel that, as has been shown by the history of basic wage fixation, ways and means could be found to give general effect to the employers' case".[9] The three members summed up the issue before them in this way :

> But it is history that a basic wage became and remained a national phenomenon and the real problem is whether that phenomenon still remains of value in the field of national wage fixation.[10]

Without finding positively on this issue, the joint judgment concluded in effect that the employers had failed to dislodge the *prima facie* assumption in favour of the continuing value in this field of the basic wage concept. The similarity of the economic grounds put in support of previous union applications for general increases in the basic wage and margins had been a fundamental part of the employers' case before the Commission. It had been argued, as the judgment indicated, "that it would be more logical and tidier to require these arguments to be applied at the same time to a total wage rather than to different elements at different times".[11] Although some merit was seen in this argument, it was put aside in this significant section of the judgment:

> We are attracted by the suggestion of greater tidiness, though we doubt whether there is any greater logic in the employers' proposal. However, this and similar arguments overlook both the function and the duty of the Commission to prevent and settle industrial disputes, in which tidiness may have to give way to more important considerations. The parties are in fundamental disagreement on the issue of a total wage and we think that there would have to be more cogent reasons than tidiness before we should approve the drastic change sought by the employers.[12]

This passage contains perhaps the clearest indication to the reasoning underlying the joint judgment.

[8] *Loc. cit.* (Both quotations).
[9] *Loc. cit.*
[10] *Ibid.* 694.
[11] *Ibid.* 694-695.
[12] *Ibid.* 695.

The commitment of the two presidential members (Kirby C.J. and Moore J.) in the conflict of view as to whether the Commission should place primary emphasis on its constitutional role as a dispute-settler or upon the economic consequences of its decisions had been made clear in earlier judgments. In the *1961 Basic Wage Case*,[13] in a joint judgment with Ashburner J., Kirby C.J. and Moore J. reaffirmed their assertion in the *1959 Metal Trades Margins* decision[14] that "The true function of the Commission is to settle industrial disputes",[15] and went on to declare: "We are not national economic policy makers or planners".[16] The adoption of this position, they observed, did not mean "that we have not to consider seriously the probable effects of our decision on the economy".[17] The validity of this approach had been strenuously questioned in the 1964 proceedings, of which the total wage case was merely a part.[18]

In their joint judgment in the *Basic Wage Case*[19] handed down at the same time as the total wage decision, the two judges indicated quite firmly however, their intention of adhering to their 1961 approach. In particular, the judges observed in accepting the unions' submissions, that the 1961 intimation of an intention to adjust the basic wage annually in the light of changes in both prices and productivity had been the premise upon which they had conducted their affairs, and should not therefore be departed from:

> We consider this submission to be one of importance, because the probity of the Commission must not be in doubt, particularly in

[13] (1961) 97 C.A.R. 376.
[14] (1959) 92 C.A.R. 793.
[15] *Ibid.* 801.
[16] (1961) 97 C.A.R. 376, 380.
[17] *Ibid.* 381.
[18] Kirby C.J., Gallagher, Moore and Nimmo JJ. constituted a bench hearing the unions' applications for an increase in the basic wage lodged with the Commission in early 1964; by the provisions of section 33 of the Conciliation and Arbitration Act 1904-1966 (Cth) such applications can only be heard by the "Commission in Presidential Session". The composition of the bench consisting of these same presidential members together with Commissioner Winter to deal with the employers' total wage application followed a finding by the President, Sir Richard Kirby, that the matter was of sufficient importance in the public interest to be dealt with by a reference bench of this type according to the provisions of section 34 of the Act. Much of the evidence and argument of the parties was common to the basic wage and total wage applications, but the Commission held, rightly, in the preliminary proceedings that it was precluded, under section 44 of the Act, from hearing the matters together. The section detailed the circumstances where there could be joint sessions of the Commission if differently composed benches were dealing with matters in which a question common to both was considered to be involved. As it then stood, the section did not include specific reference to section 33 matters. In the event the *Basic Wage Case* was heard first with Commissioner Winter physically present on the bench, but taking no part in the proceedings. The Commission, constituted as the reference bench, then proceeded almost immediately to hear the total wage case. The clumsiness of these procedures was obviated by amending legislation in 1965 which enables the President to provide for joint sessions without inhibition as to the type of proceedings in which the common question arises.
[19] (1964) 106 C.A.R. 629.

view of its statutory role of preventing and settling industrial disputes.[20]

Given this position in regard to the basic wage applications, the decision of these two judges on the simultaneous total wage application almost inevitably had to be in the negative. In the absence of any applications in 1962 or 1963, the 1964 basic wage application represented the first test of their determination to give effect to their 1961 decision which they specifically described in the *1964 Basic Wage* judgment as "a deliberate and unanimous departure from the practice of annual reviews since 1956".[21]

That "departure" had been made by the two judges in the context of a firm commitment to the "dispute-settling" conception of the Commission's role.

Having made a radical departure as to the principles to be adopted in the fixation of the basic wage, it is inconceivable that the two judges would have abolished that wage at the first point when it next arose for consideration, particularly when the argument for its abolition was couched in terms which involved a rejection of their conception of the fundamental role of the Commission.[22]

The joint judgment, finally, referred to three other matters. First, comment was made upon the employers' "legacy claims" argument, *i.e.* an increase by the Commission in the basic wage of itself created claims on the same economic grounds for increases in margins to restore previous relativities. This argument was found to be not convincing:

> We think the real truth of the matter is that unions base their claims for both basic wage and such marginal increases on the same economic grounds and therefore inevitably there must be a similarity between such margins cases and basic wage cases. We think it at least as likely as not that increases in the basic wage have an effect of delaying and moderating marginal claims and not in increasing and accentuating them.[23]

[20] *Ibid.* 641.

[21] *Ibid.* 642. Following the abolition in 1953 of automatic quarterly adjustments to the basic wage for changes in the cost-of-living, the tribunal in annual hearings from 1956 had conducted general economic reviews using for this purpose a number of "indicators". No particular significance was attached to movements in prices. The essential significance of the 1961 decision was the indication by the Commission that in future annual hearings a *prima facie* assumption would operate in favour of translating into basic wage rates, price movements shown by the consumer price index since the last hearing; movements in productivity would be considered at longer intervals. *Infra*, 105-112.

[22] The employers' productivity theory of wages (*supra* n. 6) was advanced in these proceedings, as it has been consistently in all national wage cases, as part of the submission that while, formally, the Commission's function is the prevention and settlement of industrial disputes, the Commission "should act as if its primary function were to attempt to create or sustain a favourable economic climate"—the words used by Moore J. in *National Wage Cases of 1965* (1965) 110 C.A.R. 189, 267, when discussing the opposing propositions under the heading "Rôle of Commission".

[23] *Employers' Total Wage Case 1964* (1964) 106 C.A.R. 683, 695.

Second, the judgment expressed agreement with the employers' submission that section 33 of the Conciliation and Arbitration Act 1904-1961 (Cth) did not create jurisdiction and conceded "that the Commission could, if it so desired, in each industrial dispute which came before it create a wage which had no basic wage element".[24] Observing however that the legislation was enacted in an atmosphere in which wages prescribed by the Commission contained two elements, including a basic wage element, the joint judgment considered significant the fact that Parliament had (by section 33) created a special kind of bench to deal with some very limited subject matters, including alterations to the basic wage, and concluded on this point: "We consider that at the very least the question of the abolition of the basic wage must be seen against a background of Parliamentary recognition and perhaps even approval of its continued existence".[25]

Third, in summarizing their approach, the three members of the Commission to some extent kept their options open for the future by emphasizing that the employers' argument as to greater tidiness was not sufficient "to displace a concept which has for so long been an essential element in wage fixation"; they added significantly however that "it might be different if our task were to bring into operation a national wage code for the first time".[26]

In a brief judgment Gallagher J. stressed the importance of the basic wage for "many thousands" whose marginal element was insignificant. Irrespective of the nature and conditions of his work, an employee was entitled to have included in his wage a sum aimed at the provision of the highest living standard for the wage-earner which the community could afford. Gallagher J. observed: "The basic wage ensures that this fundamental requirement is observed"; then after conceding that grounds may exist for further consideration of current methods of marginal fixation he nevertheless asserted in conclusion, "but the case for the retention of the basic wage is beyond argument".[27]

Nimmo J. enumerated[28] six reasons why he considered the granting of the application was not justified:

[24] *Loc. cit.*

[25] *Ibid.* 695-696. This passage of the judgment seems to reflect, with approval, a section from an article tendered in the proceedings by the unions, Dunphy and Wright "The Jubilee of Industrial Arbitration in the Federal Sphere" (1951) 25 *Australian Law Journal* 360, 366: "Subsequent statutory references to the basic wage can only be interpreted as approving the 1928 amendment which provided "that this section shall not affect the practice of the Court in fixing the basic wage", the 1930 amendment, which gave exclusive jurisdiction over the basic wage to the Full Arbitration Court as distinct from a single Judge, the 1947 amendment, which perpetuated this exclusive control as against Conciliation Commissioners, and the 1949 amendment, which introduced for the first time a definition of the term basic wage, all amount to unequivocal Parliamentary sanction".

[26] *Ibid.* 696. (Both quotations).

[27] *Ibid.* 698. (Both quotations).

[28] *Ibid.* 701-702. (Quotations are taken from these pages).

(a) The established nature of the basic wage. "The concept of the basic wage has been with us for more than fifty years and is now a well accepted and fundamental feature of our nation's industrial, social and economic life which, in my opinion, it has served well."

(b) Because of this general acceptance and effective service, the current system should not be changed on the application of the employers against the strong opposition of the combined trade union movement "and the wish of the Commonwealth [whose] submissions leave no doubt whatever in my mind that the Commonwealth, in the public interest, considers the change sought to be undesirable".

(c) Because of what he had expressed in his second reason he believed "that the change sought would be more likely to increase than reduce the number of industrial disputes in this community".

(d) The burden of the employers' criticism of the current system of wages fixation, while providing valid grounds for changing the method of marginal fixation to prevent an automatic spread to other awards, did not however "justify so drastic a remedy as the abolition of the basic wage".

(e) Parliament had intended that a dispute of the importance of a basic wage dispute should be determined by the Commission in presidential session and not otherwise. "A total wage dispute would at least be as important as a basic wage dispute yet it would not as the Act now stands be heard by the Commission in Presidential Session. It is my view that the Commission should hesitate before introducing new procedures which would produce this result."

(f) The judge acknowledged disadvantages in the existing system and then pointed out: "there are advantages as well, not the least of them being its flexibility, a feature emphasized by [the Commonwealth]. I am not at all convinced that the disadvantages of the present system outweigh its advantages or that the suggested new system would not have just as many disadvantages of the same magnitude."

1965[29]

On this occasion the same bench comprising Kirby C.J., Gallagher, Moore, Sweeney and Nimmo JJ. was constituted to hear the unions' basic wage claims and the employers' applications. These latter applications were in two parts. Part A repeated the 1964 claim for the replacement of the separate elements of basic wage and margins by a single total wage. Part B, while allowing the retention of the separate elements, was essentially concerned to achieve a consideration of the

[29] *National Wage Cases of 1965* (1965) 110 C.A.R. 180.

appropriate level of both elements at the same time by the Commission on general economic grounds; this claim specifically sought a reduction in the basic wage, compensated by a corresponding increase in margins to which should be added a one *per cent* increase of the wage payable, but in the course of proceedings the employers submitted that provided the Commission accepted the point of simultaneous determination, it could satisfy this application by increasing either the basic wage or margins alone, or by increasing basic wage and margins together. The President constituted the one bench of presidential members because those portions of the employers' claim seeking an alteration of the basic wage (and thus requiring, under section 33 of the Conciliation and Arbitration Act 1904-1964 (Cth), this type of bench) and those portions not seeking such alteration were, he considered, "so inextricably interwoven that they cannot as a matter of practicability be dealt with separately".[30]

The Commission unanimously rejected Part A seeking implementation of the total wage which the employers on this occasion did not make dependent upon the acceptance by the Commission of their productivity theory of wages.

Kirby C.J., expressing the view that unless however the Commission decided to accept the employers' theory "there would be no substantial reason for granting their application",[31] then referred to evidence and submissions in the proceedings which made him "even more confirmed than I was last year in my view that it would not be practicable or proper for this Commission in present circumstances to attempt to put into operation in its limited field the proposal of the employers based on their economic theory".[32] He concluded: "I would reject Part A of the employers' claim on economic as well as on last year's non-economic grounds".[33]

Gallagher, Sweeney and Nimmo JJ. in a joint judgment, very briefly dismissed Part A for the reasons given by the two of their number who had participated in the 1964 case;[34] and Moore J. in dismissing Part A simply adopted "the non-economic reasons given in the majority judgment of 1964".[35]

Despite the unanimous and fairly summary dismissal of Part A in 1965, the turning point in the attitude of the Commission to the adoption of the total wage can be identified in the acceptance in that year by the

[30] *Ibid.* 193.
[31] *Ibid.* 206.
[32] *Ibid.* 211.
[33] *Loc. cit.*
[34] *Ibid.* 232.
[35] *Ibid.* 267.

majority judgment of, and the *prima facie* support by Moore J. for, the employers' Part B application. The majority said:

> the case for the simultaneous determination by one bench of the Commission of the basic wage and of a test case seeking a variation of margins on general economic grounds is overwhelming. We have no hesitation in accepting Part B of the employers' application which makes this possible.[36]

Such simultaneous hearings according to the majority would be "more likely than separate hearings to produce coherence and consistency in decisions on national wage cases".[37]

The majority accepted the employers' indication that similar claims would be brought in succeeding years to enable simultaneous determination of the two elements on economic grounds to become the established practice of the Commission. Further, to avoid the procedural uncertainty associated with the composition of the bench, the majority suggested that consideration should be given by the Parliament to an amendment of the legislation which would add the alteration of margins in a test case on general economic grounds to those matters required by section 33 to be dealt with by the Commission in presidential session.

Moore J. saw merit in the proposal for a simultaneous hearing in the fact that both parties had come to the position of being in favour of test cases for margins on general economic grounds. Whatever the previous attitude of the Commission, the employers and the Commonwealth as to the desirability of an industry by industry approach, "the accord of the parties on this question seems to me to make its implementation inevitable . . . . [I]f margins cases are to be test cases and if they are to be argued on general economic lines, it seems reasonable to have them considered at the same time as the basic wage."[38] Although applications in respect of the two elements had been brought before the Commission at different intervals, the Commission itself had come since 1961 "to apply similar principles when fixing both aspects of the wage".[39] While regarding an amalgamation of similar hearings into the one case therefore as a logical consequence, Moore J. preferred to leave a decision upon this matter until further opportunity was available for submissions to the tribunal, particularly if the levels of margins and the principles of their fixation were to be in issue, until a Commissioner could participate in the hearing. Kirby C.J. rejected Part B both on the ground of the impropriety of applying the small increase (eighty cents) on economic grounds which he assessed to be available, to anything other than the

[36] *Ibid.* 241.
[37] *Ibid.* 242.
[38] *Ibid.* 268.
[39] *Ibid.* 269.

basic wage (which Moore J. also considered a relevant consideration), and also because he considered it to be "in direct conflict with the principles and approach of the 1961 Basic Wage decision endorsed in 1964".[40]

1966[41]

At the beginning of 1966 the Commission was confronted by separate applications from the unions for increases in the levels of basic wage and margins, and by an application, again in two parts, from the employers. Part A sought the elimination of the separate elements and an increase of one and a half *per cent* in the aggregated total rates. Part B in the alternative sought simultaneous consideration of the two elements with an increase of thirty cents in the basic wage, one *per cent* in margins, and a further increase of one half *per cent* in the total of the two. The President, on 21 February, announced the appointment of two benches: Wright J. (presiding) Gallagher and Moore JJ. to deal with the unions' basic wage applications and those portions of the employers' total wage case seeking alteration of the basic wage, and Wright J. (presiding) Gallagher and Moore JJ. and Commissioner Winter to deal with the unions' margins applications, and those portions of the employers' total wage case not seeking alteration of the basic wage. The President indicated in his announcement that the procedure to be adopted in the hearing of the cases would be a matter for decision by the benches "but I shall make a direction pursuant to section 44A of the Act which will allow the various members of the Commission nominated to the different benches, should they desire to do so, to sit together in joint session to take evidence and hear argument".[42]

Hearings were set down to commence on 1 March but on the previous day the Commission was served with a rule *nisi* issued out of the High Court on the application of the employers returnable before the Full Court of the High Court on the morning of 1 March. The employers sought to test the validity of the President's action in nominating Commissioner Winter to be a member of the bench dealing with part of their application.

The matter was heard by a Full Court comprising Barwick C.J., McTiernan, Taylor, Menzies, Windeyer and Owen JJ. In the words of the Court the prosecutor's principal submissions in support of the application for prohibition were:

> that, because its log of claims required that the Commission should first consider what total sum ought to be paid in each classification of the award by way of a weekly wage, it is impossible to "sever" its

[40] *Ibid.* 214.
[41] *Basic Wage, Margins and Total Wage Cases of 1966*, Serial No. B1365.
[42] *Ibid.* 7. *Supra* n. 18.

> claim; that therefore the whole of its log must be heard by the same bench of the Commission; and that as its claims if successful, on either alternative, would involve an alteration of the basic wage, that bench must necessarily be composed of presidential members only.[43]

After a brief hearing and without calling on counsel for the respondent unions, the Court unanimously on that day gave judgment discharging the rule *nisi*.

Later on the same day the unions' and employers' applications were called on for hearing before the Commission. The President having made the direction foreshadowed on 21 February, Wright J. announced that it had been decided "that it is fitting that we should avail ourselves of the procedures available to us under section 44A of the Act".[44] The two benches of the Commission then sat in joint session until the conclusion of the hearing.

Although Wright J. expressed substantial doubt on the point, he was prepared to concur in the view first adopted by the President in the 1964 proceedings that the Commission constituted by a Commissioner was entitled to deal with an application to abolish the basic wage and therefore that the Commission in presidential session was not empowered to deal with Part A of the employers' log. The decision of the Commission in respect of this aspect of the employers' application was therefore given by the bench consisting of Wright, Gallagher, Moore JJ. and Commissioner Winter constituted by the President under the reference provisions of section 34 of the Conciliation and Arbitration Act 1904-1964 (Cth).

In separate judgments delivered on 8 July the reference bench came down in favour of the total wage concept embodied in Part A of the employers' application. The bench declined however to implement the single wage proposal at that point of time because of its apprehension that the existing structure of marginal classifications in the *Metal Trades Award* (the vehicle common to the unions' and employers' test case applications) did not reflect current industrial requirements.

In his announcement on behalf of the reference bench Wright J. said that it had "reached the conclusion that it would be unwise to award any general increases until an investigation has been made on a work value basis of the relativities of the 330 classifications listed in the award and the necessity for as many as 53 separate wage rates with refinements as low as a cent per day between classifications".[45] The announcement indicated the intention of the reference bench to use the provisions

[43] *The Queen v. Commonwealth Conciliation and Arbitration Commission; Ex parte Metal Trades Employers' Association and Others* (1966) 114 C.L.R. 648, 654.

[44] *Basic Wage, Margins and Total Wage Cases of 1966*, Serial No. B1365, 9.

available under the Act to obtain from Commissioner Winter after such investigation as be considered necessary a report covering the changes required in the classification structure to bring it "into accord with present-day requirements" and the alterations of marginal rates or additional marginal rates "justified upon the grounds of work value, the economic considerations which have been presented to this bench, or for any other reason".[46] Wright J. then related the issue of implementation of total wage to this investigation in two sections of his announcement. On behalf of the reference bench he said:

> We have indicated in our reasons the extent to which we favour the employers' proposal for conversion of the wage structure to the basis of a single wage but have decided to defer the question of implementation pending further consideration of the present structure of marginal rates and further argument.

On behalf of the President, he announced in relation to a number of employer applications in other awards currently before the President seeking reference under section 34 to a full bench of claims similar to that made by the employers in the *Metal Trades Award* that:

> the President will in the light of the foregoing announcements and decisions defer his decision until the results of Mr Commissioner Winter's investigation are known, with liberty to parties to raise any question with the President earlier should they so desire.[47]

Before considering the individual reasons given by members of the reference bench for now favouring the total wage concept it is necessary to appreciate the significance of a new provision introduced at this stage by the Commission into the award (and subsequently into other awards). In addition to the decision of the presidential bench to increase the basic wage on the unions' application by $2 *per* week the reference bench as an interim order in the unions' margins application inserted a "minimum wage" provision in the award. As a result of this order no adult male employee could be paid as a weekly wage for working the standard hours an amount less than $3.75 above the relevant basic wage rate (for Victoria this meant a minimum wage of $36.45). The provision was designed, as the Commission put it, to meet the circumstances of the low wage earners in the bottom classifications who were in receipt of award rates only. An employer who already paid an employee in the lower classifications an overaward payment which took the employee's total remuneration for the standard hours beyond the prescribed minimum wage had no additional obligation imposed upon him by the order.

Wright J. expressed the belief that the circumstances in which the 1966 decision had to be taken on the application for a total wage system

[46] *Loc. cit.*

differed "in essential respects from those in which the earlier decisions were made", and, in particular, that two basic considerations led him to the conclusion that the time was "opportune for the adoption of the concept".[48]

The presiding judge explained the two considerations in these terms:

> One of the basic considerations affecting my decision is that, over the years, the Court and the Commission have come to regard the same general economic considerations—such as purchasing power of money and national productivity—as relevant to the level of marginal rates in the fashion that they have for a very long time been relevant to the basic wage level.
>
> The other basic consideration which has influenced me is that, for the first time so far as I can see, the parties have seen fit, for reasons which to them doubtless appear sufficient, to seek simultaneous consideration of basic wage and marginal levels—a course which for some time has obviously commended itself to individual members of the Commission.[49]

Wright J. concluded this section of his judgment by observing:

> On merit I would favour an immediate change to the format of a total wage in the Metal Trades award, but as a matter of practical convenience I can see some advantage in deferring it pending developments on the marginal aspect following the report which we intend obtaining from Mr Commissioner Winter, which will also give State authorities longer notice of this Commission's intentions.[50]

The decision of Gallagher J. assumed more than usual interest because of his assertion in 1964 that "the case for the retention of the basic wage is beyond argument".[51] His Honour quoted this passage and then set out his position in these terms:

> Notwithstanding the unequivocal statements above . . . I have come round to thinking in 1966 that the time is now approaching for the introduction of a total wage system. The reasons for my change of attitude are these :—
>
> (1) My participation in the decision reached in 1965 that there should be annual reviews of the economy at which one bench of the Commission should make a simultaneous determination for the following twelve months of the basic wage and the level of margins so far as the latter is fixed on general economic grounds.
>
> (2) The circumstance that basic wage and margins claims have this year been in fact heard together.
>
> (3) The likelihood that the procedure followed this year would be continued.
>
> (4) The circumstance that a simultaneous hearing conveniently enables consideration of wage rates as a whole and obviates the necessity for separate assessments.

[48] *Ibid.* 15. (Both quotations).
[49] *Loc. cit.*
[50] *Ibid.* 16.
[51] *Supra* n. 27.

> (5) The circumstance that under the system now being followed an employee would be expected to think in terms of his wage rate as a whole and not in terms of so much for the basic wage and so much for margin.
>
> (6) The circumstance—and I regard this as a ground of paramount importance—that special provision is about to be made for employees on lower margins.[52]

In view of his observations in 1965 the transition for Moore J. to an acceptance of the total wage system was relatively straightforward. While holding to the view that the non-economic arguments set out in the 1964 decision were still valid, Moore J. noted the existence before the Commission for the first time of applications from both unions and employers for simultaneous consideration of the basic wage and margins on economic grounds. The 1965 majority decision, said the judge, although being one with which he disagreed, was nevertheless "a fact of industrial life to which some weight must be given".[53] Moore J. indicated that these facts taken in conjunction with the employers' arguments in favour of the desirability of the total wage concept inclined him "to the view that the Commission should probably ultimately accept the concept". Acknowledging the change of views involved in this statement the judge said that consistent with his attitudes to notice and gradualism he was "not prepared to do more than state that, subject to further argument, I am inclined now to the view that when we finally deal with secondary wages in this award, the wages should be expressed as total wages". He concluded:

> An agreement in principle to the ultimate implementation of this part of the employers' claim does not involve ultimate agreement to the application of the economic theorem which the employers have pressed upon us. If proper principles of wage fixation are applied to a total wage, both in economic and work value reviews, there is no reason why wage and salary earners should suffer from what, in some ways, is no more than a procedural change.[54]

Commissioner Winter also attached considerable significance to the fact that the Commission had been dealing simultaneously with union and employer applications relating to both elements of the award wage, a fact which led him to believe "that there has been established notionally a total wage". The Commissioner however was quite unequivocal on the point of actual implementation by the Commission:

[52] *Basic Wage, Margins and Total Wage Cases of 1966*, Serial No. B1365, 37.
[53] *Ibid.* 96. The 1965 majority decision rejected the 1961 approach of making a *prima facie* assumption in favour of adjusting the award wage for preceding price changes, *supra* n. 21. An assessment by the three judges that the economic capacity of the country in the ensuing twelve months would allow an increase of one and a half *per cent* in the level of award wages was applied by them to the marginal element alone, *i.e.* each margin was increased by an amount equal to one and a half *per cent* of the sum of six capital cities basic wage and that margin.
[54] *Loc. cit.* (All quotations).

For my part, I would not implement a total wage now. However, I would by proclamation in these decisions of the Commission serve notice upon all concerned that at the conclusion of the work-value case in the metal trades industries which is envisaged elsewhere herein, the Commission would be prepared again to consider the question of prescribing a total wage.

I consider, however, even if a total wage were accepted, that there should always be within the wage a readily recognizable basic wage component which had been determined upon an easily identifiable date.[55]

1967[56]

The national wage cases of 1967 which finally saw the adoption of the total wage by the Commission again consisted of a joint session of two benches following a direction by the President under section 44A of the Act. In the absence through ill-health of Wright J., a bench comprising Gallagher and Moore JJ. and Commissioner Winter was constituted on an application by the employers to deal with the re-listed unions' margins application and employers' total wage application which had been before the Commission in 1966. The President, replacing Wright J., sat with Gallagher and Moore JJ. to consider the unions' application for an increase in the basic wage.

On 5 June the President published a document entitled "Pronouncement By President On Behalf Of All" in which it was said at the outset:

> We have agreed that in the way the proceedings have developed each bench is called upon to consider and decide two questions only. Firstly, whether there should be an increase in award rates of pay and, secondly, whether any increase should be added to the basic wage on the one hand or expressed in a total wage on the other.
>
> Because the issues argued before us are inextricably mixed and because we are unanimous on how they should be decided we have concluded that it would be best if I made on behalf of us all a pronouncement which is the result of our combined efforts and which takes the place of such traditional reasons for judgment as might otherwise have been given.[57]

In four pages, incomparably the shortest document ever to emerge in the history of federal arbitration at the end of a major national case, the four members of the Commission then announced two decisions which clearly must be regarded as among the most remarkable in that history. One decision was to abolish the basic wage and implement the total wage concept; the other was to award a $1 increase to *all adult employees*.

[55] *Ibid.* 137-138. (Both quotations).
[56] *National Wage Cases 1967*, Serial No. B2200.
[57] *Ibid.* 2.

Such historic decisions should of course be allowed to speak in full for themselves. On total wage the Commission said:

> The basic wage has become a tradition in Australian wage fixation, though it may mean different things to different people. For example, to some it means the wage of the unskilled employee; to many more it means the lowest wage paid in their industry. Some regard it as an assessment by the Commission of a family wage but such an assessment has not for many years been undertaken or sought. For the Commission not one of these meanings is apt, because the basic wage is in substance defined by the Act to mean that wage or part of a wage fixed without regard to the work upon or the industry in which a man is employed. It is with this statutory basic wage that the Commission has been dealing over the years.
>
> The Commission's basic wage has become important in three specific ways. It has guaranteed a minimum wage to workers under its awards, its variation has been the means of giving general wage increases on economic grounds, and the secondary wage structure has been built on it. It has played a significant part in improving wage standards. Since the famous Harvester decision of Higgins J. some 60 years ago the basic wage has served the workers of Australia well. It has been the keystone of our wages system and has had a special quality. But in our view the time has come to overhaul our time-honoured system because a course is now open which is more consonant with modern requirements and which at the same time will give better protection to employees. We should now express wages as total wages and retain the minimum concept introduced by the Commission in July 1966.
>
> This new approach will ensure that under our awards wage and salary earners will annually have applied to them the increases for economic reasons which it is common ground they may normally expect and the increases will be applied to the whole wage instead of only to part of the wage as at present. We are sure that in work-value cases the fixation of total wages will bring to award-making both greater flexibility and greater reality. The minimum wage will give better protection to those whose needs are greatest, namely those whose take-home pay would otherwise be below the standard assessed by the Commission and will give the Commission more flexibility in assisting them because we will have more scope to give them special consideration.
>
> We have not taken this step lightly. In four consecutive years the Commission has been called upon to consider applications of one sort or another for the abolition of the basic wage and the adoption of a total wage. The applications of 1964 and 1965 were rejected but there was an acceptance in principle of the application of 1966. Notwithstanding that acceptance in principle if upon further reflection a reasonable doubt had remained as to the wisdom of changing a long-established system those involved last year would have been prepared to revert to earlier views. However, no member of either bench entertains such a doubt.
>
> We have given serious consideration to the powerful arguments which [the unions have] advanced for the retention of the two elements of the wage and in particular to what [was] said about the

Commission's indication of July last that it would delay its decision on total wage until the ultimate hearing of the margins claim under this award. A year has passed since then; a year during which margins were significantly increased. Appropriate notice has been given to everyone concerned that the employers would press for a total wage now. All this has been considered, as have all the other submissions put. Our decision has been reached after consideration and discussion of all matters. [The unions] tendered certain exhibits to show some practical difficulties which might flow from the introduction of the total wage. We have given the most serious consideration to these exhibits but we feel that the genuine fears expressed by the trade union movement will be proved to be groundless. We are sure that with continued common sense and continued practical approaches to award-making this Commission will produce better results for those concerned than at present. We emphasise the fact that this Commission retains control over the fixation of its award rates and that it will continue to apply proper principles of wage fixation. The new procedures will ensure greater industrial justice to all concerned with our wage fixation. We are creating new up-to-date fixation procedures and not changing principles of wage assessment.

The Commission will be able to handle the annual review of the total wage flexibly. An increase could be awarded as a flat amount, as now; as a flat percentage, as in 1965; or in varying percentages, as in December 1966; or in other ways. We will not attempt to tie the hands of future benches in this regard.

We have given consideration to the position of State industrial laws. We can see no serious problems under State laws and in any case we must first aim at what we consider the best results under our own awards. If we attempted to retain any basic wages in the Federal system for any purpose whatsoever the decision which we make would inevitably be complicated and weakened. There will therefore be no reference to basic wages in our awards. Although opposition to the total wage was expressed by unions representing Commonwealth public servants, the Commonwealth expressed no difficulties about the introduction of the total wage. No serious problems should arise in applying total wages in the Commonwealth Public Service.

In summary the adoption of the new procedures will enable the Commission to act flexibly, to ensure that economic gains are reflected in the whole wage each year, to give more reality to its award-making both in economic and work-value cases, and to give proper attention to the low wage earner. It will simplify the procedural difficulties in economic cases, which would not be entirely overcome by the unions' agreement to simultaneous hearings of basic wage and margins cases. It will eliminate the present awkward necessity for different benches contemporaneously dealing with different parts of the wage; it should simplify the rapid and proper spread of economic decisions throughout awards and determinations under this Act and the *Public Service Arbitration Act*; and it should put those who give and receive over-award payments in a better position to deal with their problems.[58]

[58] *Ibid.* 4-5.

On the increase being awarded to all adult employees the Commission said:

> Although we refer to the total wage, there will for the present be a different total wage for males and females and a number of total wages for many classifications. These result from existing basic wage differentials and from the quite complex history of basic wages particularly those for females, starting many years ago from a concept of differing needs and responsibilities of men and women. Both basic wages have over the years been adjusted in a variety of ways. We are conscious of these apparent anomalies, but consider it is not practicable to attempt to deal with either at this time.
>
> The community is faced with economic industrial and social challenges arising from the history of female wage fixation. Our adoption of the concept of a total wage 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. The extension of that concept to the total wage would involve economic and industrial sequels and calls for thorough investigation and debate in which a policy of gradual implementation could be considered. To a lesser extent the same may be said about the abolition of locality differentials. We invite the unions, the employers and the Commonwealth to give careful study to these questions with the knowledge that the Commission is available to assist by conciliation or arbitration in the resolution of the problems.[59]

WHY DID THE COMMISSION ADOPT THE TOTAL WAGE SYSTEM ?

The question may appear redundant—to some disrespectful—after the preceding analysis culminating in a detailed exposition of the 1967 pronouncement. I believe it is not, for two reasons. First, only the most naive would subscribe to the proposition that arbitration tribunals have always revealed exactly to the world in the document delivered at the end of a case all the reasons which have moved the members of the tribunal to come to the decision contained in that document. The classic example is provided by the judgment in the *1952-1953 Basic Wage and Standard Hours Inquiry*[60] which abolished the system of automatic quarterly adjustments to the basic wage for changes in the cost of living indicated by movements in the price index published by the Commonwealth Statistician. The judges who made the decision indicated at two points in the judgment that their conviction of the significant inflationary impetus of the automatic adjustment system was only an incidental consideration in their thinking and would not, of itself, have been a sufficient reason for making the decision to abolish the system.

[59] *Ibid.* 6.

[60] (1953) 77 C.A.R. 477.

No commentator, rightly in my opinion, has accepted the judgment as a complete reflection of the reasoning which led the tribunal to that decision; whatever their attitudes to the "correctness" of the decision these commentators, again rightly in my opinion, basically attribute the decision to suddenly end an adjustment system which had operated for more than thirty years to a belief on the part of the judges that such a decision would assist in the creation of a less inflationary economic climate. Second, as already noted, the document is incomparably short and "takes the place of such traditional reasons for judgment as might otherwise have been given".[61] If we are going to be confronted with mini-judgments it is inevitable that contemplation will shift from the document itself to what it leaves uncovered.

This is not to imply in any way that the reasons in fact given by members of the tribunal in 1966 and 1967 were not fundamentally important in the processes of reasoning through which those members (other than Wright J.) came to reverse their decisions on this question within the space of three years. Following the 1965 majority decision to apply a general increase assessed on economic grounds to the marginal element of award wages and, in so doing, to alter intra-marginal relativities, the unions considered they had no alternative than to ensure that when the Commission assembled in 1966 the applications embodying their policy as to margins as well as the basic wage were before the Commission. The separate judgments of 1966 and the joint pronouncement of 1967 reveal the common element of a belief by all members of the tribunal dealing with the matter that this existence before the tribunal of test claims covering both elements of the wage, the likelihood of this practice continuing in the future and the recognition by the parties and the tribunal of the relevance of general economic arguments to those claims created a new situation warranting a change of procedure. If not actually embarrassed by the apparently cumbersome and unduly technical necessity for constituting separate benches while the two elements remained in the award, the relative elegance of having one bench to consider the whole wage on the same grounds was clearly a powerful factor in the minds of members of the tribunal and was so acknowledged.

The 1966 and 1967 documents handed down by the tribunal do not indicate any other factors, common to the reasoning of members, which would appear to have been compelling in leading them to the decision to establish the total wage system. The above factors, alone, may well have been sufficient to induce the 1967 decision. To put the matter no higher however, it seems to me possible that other considerations played some part in bringing the Commission to that decision. While it would be idle to attempt to weight them it is certainly legitimate and probably helpful to speculate upon these possible considerations.

[61] Serial No. B2200, 2.

First, the introduction of the minimum wage in 1966 would appear to have a significance even beyond that ascribed to it in the judgments;[62] it can be seen as an attempt to meet, in some measure, three related problems which had come to confront the tribunal in the period since the 1953 decision to abolish the adjustment system. Commencing in 1956 the tribunal considered the level of the basic wage in five annual hearings before the 1961 case. In that period while the tribunal followed the principle of examining economic capacity in terms of several indicators, giving stress to particular indicators at different hearings, the real value of the basic wage declined by four and one half *per cent*. In this period economic capacity was in fact increasing and this was reflected in the labour market, with actual wages paid in industry in many instances coming to move further ahead of the award wages fixed by the tribunal. What was happening in the market however was little consolation to those wage-earners on the basic wage alone or with low margins whose income depended predominantly on the level of award wages. The genesis of the 1966 minimum wage concept can be seen in a statement made by the President during the course of the 1961 proceedings, indicating his awareness of this problem:

> I would like to hear any submissions which any party, intervener or the Commonwealth might wish to make on something which might be considered to have arisen from Sir Douglas Copland's evidence—that is, whether by prescription of the basic wage special consideration or treatment should or could as a matter of power be given to those employees who receive the basic wage without addition or the basic wage with a marginal addition of, say £1 per week or less.[63]

In the event the Commission abandoned the approach to wage fixation which had been adopted since the 1953 decision and adopted the principles of *prima facie* annual adjustment for prices and periodic reviews at longer intervals for productivity movements. In the knowledge that this new approach would increase the real value of the basic wage through time and having assessed that a general increase in the basic wage of twelve shillings was possible at that time, the Commission declined to take any specific action along the lines implied by the President's observations.

Because of the stability of the price index no basic wage cases were initiated in 1962 or 1963. By a majority judgment in 1964 Kirby C.J. and Moore J., who with Ashburner J. had delivered the unanimous 1961 decision, effected a five and a half *per cent* real increase on the 1961 basic wage by adding twenty shillings to that wage. The 1965 majority judgment delivered by Gallagher, Sweeney and Nimmo JJ. rejected the 1961 approach, refused any increase in the basic wage and applied a

[62] Gallagher J. in 1966 described the introduction of the minimum wage as "a ground of paramount importance" for the change from his 1964 and 1965 opposition to the total wage. *Supra* n. 52.

[63] (1961) 97 C.A.R. 376, 415.

one and a half *per cent* increase of the total award rate to the marginal element.[64]

It was obvious to any observer therefore that the 1966 proceedings would assume a particular significance in relation to the fundamental questions of the function of the Commission and the principles of wage fixation to be applied in the discharge of that function. The principles of fixation applied by Kirby C.J. and Moore J. in 1961 and 1964 reflected a firm commitment on their part to the view that the Commission should place primary emphasis on its constitutional role of dispute-settlement.[65] The 1965 majority on the other hand founded their judgment on the proposition that, basically, the Commission should be concerned to make decisions according to an assessment of their probable economic consequences;[66] under this approach to award wage fixation no particular significance was attached to movements in prices and productivity.

Before the commencement of actual proceedings in 1966 intense interest naturally centred on the nomination of the presidential members to deal with the applications constituting the national wage cases of that year. Under the Act this is a matter solely within the discretion of the President.[67] Without question this interest was more than sustained by the announcement by the President on 21 February indicating the way in which he had chosen to exercise this discretion. Observing that his participation in every major case since the formation of the Commission in 1956 had limited the opportunities of discharging other important functions of his office the President said:

> I have therefore decided not to nominate myself for this year's National cases. In my absence I have thought it proper to nominate for each case the three Deputy Presidents required in order of seniority and each bench shall therefore comprise Mr Justice Wright, Mr Justice Gallagher and Mr Justice Moore. I am conscious of the fact that a review of competing past decisions is sought this year but in letting the Judges in effect select themselves by seniority I have been helped by the happy circumstance that Mr Justice Wright the Senior Deputy President who has not been able to sit on these cases since 1958 is available to join Mr Justice Gallagher and Mr Justice Moore who sat on the benches of 1964 and 1965 and were divided in opinion.[68]

[64] *Supra* n. 53.

[65] *Supra* n. 15.

[66] Fear of inflation, in particular, predominated in the majority judgment: "We have decided to grant wage increases which we consider will not be incompatible with price stability because, in our view, any wage increase granted at the present time without regard to this question would not confer a real or lasting benefit upon wage and salary earners. The Commission cannot, of course, guarantee price stability, but it should in present economic circumstances take care not to make decisions which it recognizes as a threat to it." (1965) 110 C.A.R. 189, 257.

[67] Section 4 (1.) of the Conciliation and Arbitration Act 1904-1966 (Cth) provides: "The Commission in Presidential Session", in relation to a matter, means the Commission constituted by such presidential members of the Commission to the number of at least three as are nominated by the President for the purposes of that matter.

[68] *Basic Wage, Margins and Total Wage Cases of 1966*, Serial No. B1365, 6. *Supra* [illegible] for further details as to the constitution of the two benches.

The stage was thus clearly set for a hearing in which the Commission would have to face up to the three related problems—first, the existence of conflicting viewpoints among presidential members as to the function of the Commission and, as part of that conflict, dispute as to the appropriate principles to be adopted for the adjustment of award wages in national cases; this in turn involving the two problems of the significance to be attached by the Commission to the gap between award rates and higher actual paid rates in sections of industry and the attitude to be adopted towards those predominantly dependent on award rates particularly workers on low margins. These three issues were further highlighted, as was the hearing itself, by the calling of three members of the Vernon Committee whose Report dealt with these and other related matters in the chapter "Costs, Prices and Wages".[69]

The position of the presiding judge, Wright J., whose attitude to these issues was obviously crucial, was made clear in his judgment and, in this context, warrants some detailed consideration. We have already seen that the judge acknowledged, as a basic consideration affecting his decision on the total wage, the relevance which general economic considerations "such as purchasing power of money and national productivity" had come to have for the tribunal in regard to marginal rates "in the fashion that they have for a very long time been relevant to the basic wage level".[70] On the question of adjustment for price movements Wright J. went beyond the 1961 concept of an annual review. Indicating his acceptance of "the doctrine that award rates of pay should be kept in reasonable accord with the movement of retail prices" the judge favoured "half-yearly or nine-monthly consideration of price movements".[71]

[69] The Prime Minister announced on 13 February 1963 the appointment and terms of reference of a Committee of Economic Enquiry consisting of Sir James Vernon, chairman, Sir John Crawford, Professor P. H. Karmel, Mr D. G. Molesworth and Mr K. B. Myer. The Committee's basic report was submitted to the Prime Minister on 6 May 1965 and tabled by him in the Commonwealth Parliament on 21 September 1965. The remarkable similarities between the majority judgment delivered on 29 June 1965 and chapter 7 of the Report ("Costs, Prices and Wages") led counsel for the employers in the 1966 proceedings to submit "that the principal issues of substance involved in the 1965 judgment are endorsed issue by issue in the Committee's report" (Transcript of Proceedings, 1187).

In these circumstances the unions sought to have members of the Committee available for questioning before the Commission. The Commission itself declined to call members, but by a majority (the question was decided by the presidential members, Moore J. dissenting) allowed the unions to issue *subpoenas* compelling attendance, a right which was exercised in respect of Sir James Vernon, Professor Karmel and Mr Myer.

[70] *Basic Wage, Margins and Total Wage Cases of 1966*, Serial No. B1365, 15. *Supra* n. 49.

[71] *Ibid.* 18. Wright J. advocated price reviews at these intervals on the assumption "that in future the Commission will possibly declare new wage rates, after triennial or quadrennial investigations. . .". The judge contemplated hearings at which a *prima facie* assumption would be made in favour of reflecting price movements in the award wage but at which it would be open to argue that exceptional circumstances rendered this course undesirable.

This acceptance of these principles of award wage fixation was contained in a judgment which at the same time set out an unequivocal conception of the function of the Commission. The judge said:

> Its one and only function under the law is the prevention and settlement of industrial disputes, with a statutory injunction to act according to equity, good conscience and the substantial merits of the case.[72]

This conception was developed further in the section of the judgment dealing with the Vernon Report:

> In paragraph 7.100 (which was written before July 1965, and consequently could have had no reference to the judgments in the 1965 National Wage Cases) the Committee expressed the belief "that the Arbitration Commission has become an incomes tribunal *de facto* even though its statutory duty is to settle industrial disputes". Having been concerned in, or closely studied, every general wages case that has come before the Court or the Commission in the last 36 years I disagree entirely with that proposition. According to my experience and reading no more can be said of the Court or the Commission than that it is in fact, as in law, a "wages tribunal". For my part I reiterate that it is no part of my philosophy to further any particular policy, economic or political.
>
> In paragraph 7.109 of the report the Committee said "We think that price stability should be central to the Commission's task". Mr Myer in the course of his evidence at our hearing made it clear that the Committee felt that the price stability element ought to be paramount—"ought to be of most importance". I am left unmoved by this exhortation, firstly because I think it inappropriate that this Commission should lend itself to the pursuit of any policy, but also by reason of the fact that none of the members of the Committee who gave evidence, nor Mr Robinson [counsel for the employers], offered a convincing explanation of what price stability connotes in concrete terms.
>
> In paragraph 7.111 the Committee expressed "sympathy with the view that regular. . . small increases in award wages are greatly to be preferred to irregular large ones." I feel obliged here to repeat the comment I have made concerning the Commonwealth's reference to "moderate" and "large" increases, and to add the comment that I find the reference to "regular" and "irregular" increases entirely unhelpful because those words could mean anything or nothing according to the whim of the reader. This passage is also unacceptable to me as implying that it puts the implementation of an economic policy before the settlement of an industrial dispute upon its substantial merits.[73]

[72] *Ibid.* 26.

[73] *Ibid.* 29-30. In the same section Wright J. endorsed what was written by Moore J. on the subject of the Vernon Report, except his attitude towards the summoning of members of the Committee. In his judgment Moore J. said: "In the present proceedings the Report should not be given the pre-eminence which the employers sought to give it. The Report contains helpful discussions of the Commission's work and problems but though the Committee included two distinguished economists it was not in my view as qualified as this Commission either to understand fully the problems of award wage fixation or to attempt to find solutions to them. The conclusions reached by the Vernon Committee closely resemble submissions made by the employers to the Commission since 1964 and I prefer to consider these submissions on their merits without the intermediation of the Report." (*Ibid.* 97).

Wright J. did not dismiss a consideration of possible economic consequences as irrelevant; he demoted it to one of a number of factors to be taken into account within the discharge of the fundamental dispute-settlement function. He said:

> I can say without equivocation that questions of political or economic policy have no place in my thinking, because I believe them to be extraneous to the Commission's function of determining industrial disputes. But I would not like to give the impression that my mind is closed to consideration of the expected consequences of the Commission's decisions.
>
> I believe that the Commission, as an instrument of public administration, must have due regard for the consequences of its decisions in the course of performing its transcending function of prescribing just terms for settlement of industrial disputes. To do otherwise would, in my view, be reckless and irresponsible. Such consequences are, to my mind, one of the multitude of considerations which we must bear in mind, and I have had regard to all those prognosticated on behalf of parties and interveners.[74]

The attitude of the judge to the gap between rates actually paid in industry and award rates was consistent with his stated conception of the function of the Commission. Wright J. dealt with this issue in two sections of his judgment. In the section on "Average Earnings"[75] he dismissed any suggestion that the Commission was relieved of some responsibility by the existence of the Commonwealth Statistician's regular figures showing average weekly earnings *per* male unit considerably in excess of award rates. The judge referred to certain problems of interpretation inherent in the statistics and added:

> So far as overtime and other forms of extra award pay are concerned I am firmly of opinion that they are irrelevant to the fixation of award rates; my view being that the function of the Commission is to fix fair and proper rates for work, having no specified disabilities, performed within the ordinary standard hours of work prescribed by the award.[76]

Referring particularly to a more detailed survey of earnings undertaken by the Statistician in October 1965 which had been produced before the Commission he said:

> I found much in this study to interest me as background material to the problems of the Commission in the numerous cases with which its several members must deal, but as I have said I do not feel that average rates in fact paid assist me in the task of fixing *minimum* rates, below which no employee may be paid.[77]

Another section of the judgment of Wright J. considered the body of evidence which had been presented in the proceedings by the unions on

[74] *Ibid.* 22-23.

[75] *Ibid.* 23.

[76] *Loc. cit.*

[77] *Loc. cit.* (The judge's emphasis).

overaward payments. This evidence, said the judge, did not establish a given "market value" for the various classifications because of the wide range of payments shown to exist (including a few instances where no overaward payments were made) and, while the evidence indicated capacity to pay the rates shown, it did not, of itself, indicate capacity to sustain higher rates. Wright J. then proceeded to perhaps the most significant section of his judgment, a section in which the three related issues are brought together:

> The state of affairs revealed by the union evidence and the Statistician's recent survey in my view confronts the Commission with a dilemma. As has been said by others, overaward payments are a fact of life and part of the economic structure in which the Commission has to function. It would be sheer naivete for the Commission to suppose that any substantial portion of present overaward payments will be absorbed into any increase which the Commission may be disposed to grant. Consequently any increase based on the evidence of overaward payments would simply start a roundabout.
>
> On the other hand to withhold an increase otherwise justified would do an injustice to those who have no overaward payment.
>
> In this condition of perplexity it seems to me that the Commission must content itself with a plain exposition of its position within the law. Its one and only function under the law is the prevention and settlement of industrial disputes, with a statutory injunction to act according to equity, good conscience and the substantial merits of the case. From the earliest days of the federal system of arbitration the tribunals have confined themselves to the prescription of minimum rates of remuneration with encouragement rather than discouragement of higher rates by individual or collective arrangement outside the tribunal. The only experience of maximum wage fixation emanated from Executive regulations during World War II.
>
> Payment of wages and salaries above award minimum rates is in my view a laudable practice and no reflection upon the tribunals which fix the minimum rates. It may contain an element of unfairness, however, because its incidence depends upon no overall plan but upon piecemeal or random arrangements, through expediency or even whimsical determination.
>
> The prescription of minimum rates of pay has had the double effect of ensuring fair wages to employees and fair competition in the matter of wage costs amongst competing employers.
>
> In my opinion the Commission would not be fulfilling its duty of equity, good conscience and the substantial merits in the settlement of the present disputes if it refrained from awarding proper increases simply because it believed, however firmly, that overaward payments will not be absorbed.
>
> It cannot be too strongly emphasized that it will be the responsibility of employers and the unions, and not of the Commission if the contemplated increases are not absorbed in overaward payments. The Commission is powerless in present circumstances to say whether they should be absorbed or not, its function being to lay down in its awards the minimum rates which shall be paid—not the maximum rates, nor average rates.[78]

Given the attitude adopted by Wright J. to these issues the balance on the benches therefore clearly came down now on the side of the 1961 and 1964 majority approach in which Moore J. had participated and to which he continued to adhere.[79] Commissioner Winter reaffirmed his 1964 association with the attitude of Kirby C.J. and Moore J. to the function and role of the Commission and, in particular, stressed the importance he attached to the principle of adjusting award wages for movements in prices and productivity.[80]

Given, further, the attitude of all members of the benches that the existing levels and relativities of marginal rates should be left over for investigation by Commissioner Winter, the impact of the implementation of this principle of adjustment, *in the absence of any immediate change in the award structure*, would have fallen entirely on the basic wage. Under the unions' claim which was based on the Commission's last basic wage fixation, in 1964, adjustment for movements in prices and productivity would have required an increase of $4.30 *per* week—more than double the highest increase ever awarded in the basic wage.[81]

The introduction of the minimum wage concept appeared to provide an answer to the Commission's problems. Two dollars could be awarded to the basic wage bringing it to $32.70 (Melbourne). Fixing a minimum wage of $36.45 meant for the man on the lowest margin, of 90 cents, an increase of $4.85—more than prices and productivity—by decision of the Commission but only if, or to the extent, that the amount of the

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[78] *Ibid.* 26. The judge went on to express the belief "that any fair-minded person should concede that overaward payments should bear objective reconsideration in the light of the new level of minimum wages created by the present decisions". (*Ibid.* 27).

[79] *Ibid.* 90-95. In this section of his judgment dealing with principles of wage fixation, Moore J. under the heading "Conclusions on Wage Fixation" said: "The Commission should not attempt at this time to implement through its awards the economic theorem that if increases in incomes are kept within increases in productivity prices will not rise. Action by the Commission alone could not achieve the desired result, and in fact the result has not been achieved anywhere in conditions of full employment.

Assuming that wages actually paid may have reflected increases in prices and productivity, the Commission is not relieved of its duty in the field of industrial relations to fix proper rates for its awards. It should take into account both price movements and productivity, but should not allow itself to be over-concerned with the elusive concept of price stability.

If it fixes proper rates the wages drift may diminish, in which event not only would all-round wage justice be ensured but also, for those who wish it, the possibility of an effective wages policy would become greater." (*Ibid.* 95). The term "wages drift" refers to the movement of actual paid rates above award rates.

[80] As to the former the Commissioner said: "So that, as I see it, the paramount and indeed the only real function and duty of the Commission is to prevent and settle industrial disputes". (*Ibid.* 117). As to the latter: "I firmly entertain the conviction that all parts of a wage should be susceptible to adjustment for productivity and price movements with certain qualifications that go to questions of economic unsteadiness". (*Ibid.* 132).

[81] Two dollars was awarded by the tribunal in 1950 and again in 1964

minimum wage was not being satisfied by overaward payments. That fact of industrial life was recognized. The more widespread the fact, the less the economic impact of the decision but the guarantee still being provided that the lower paid workers substantially dependent on award wages would not be neglected by the Commission declining to adjust the basic wage in the manner warranted by movements in prices and productivity. Importantly, also, this approach enabled a unanimous decision to be given as Gallagher J., while not retracting from his 1965 majority judgment, assessed the capacity of the economy as being able to sustain an increase of two dollars in the basic wage.

If the minimum wage appeared to be the panacea it was also an anomaly for the Commission while the basic wage remained in the awards since both wages purported to satisfy the concept of being that wage below which no person should be employed. It seems a completely reasonable interpretation to suggest that, to an important extent, total wage was entertained in 1966 and implemented in 1967 because, of the two wages, the Commission considered the minimum wage to be infinitely more useful in resolving these dilemmas with which it considered itself to be confronted. On this view the basic wage was an incidental but necessary casualty and the total wage more a by-product of this process of resolution than a concept deliberately introduced by the Commission to meet the circumstances encompassed by the employers' application.

The second consideration not detailed in the judgments that may well have influenced the thinking of the Commission was the change in attitude of the Commonwealth Government. In 1966 as distinct from its previously stated opposition to the claim for total wage, the Commonwealth took no firm attitude of opposition or support; in fact counsel for the Commonwealth made submissions from which Wright J. was able to conclude in respect of the Commonwealth Public Service that with the introduction of total wage "administrative difficulties will be few, and relatively easy to handle".[82] This is not to imply that the Commission's decision is to be interpreted merely as a reflection of its assessment of the Commonwealth's preference on this question; rather the neutrality, at least, of the Commonwealth removed the obstacle to implementation of the total wage implicit in the 1964 observations of Kirby C.J., Moore J. and Commissioner Winter that "at the very least the question of the abolition of the basic wage must be seen against a background of Parliamentary recognition and perhaps even approval of its continued existence".[83]

In this section it remains, very briefly, to consider the question why the Commission introduced total wage in 1967 before the end of the

[82] *Basic Wage, Margins and Total Wage Cases of 1966*, Serial No. B1365, 16.

[83] *Employers' Total Wage Case 1964*, (1964) 106 C.A.R. 683, 695-696.

Winter enquiry despite the clear indications to the contrary in the 1966 judgments.[84]

Apart from the observations made on this point in the 1967 judgment the reasoning of the Commission could have been influenced by two related factors. First it is unlikely that the Commission expected the Winter enquiry to be so protracted. Interim increases in margins on general economic grounds had been awarded in December 1966 after proceedings in which the Commission declined to accept the employers' submission that any increases granted should only be on the condition of implementation at that point of total wage.[85] Second, and particularly in the circumstances of the grant of this interim increase on general economic grounds and the uncertainty of when the enquiry would be brought to finality the Commission may have been disinclined to continue for more than one year what it regarded as the anomaly of having both a basic wage and a minimum wage in the one award.

IMPLICATIONS OF TOTAL WAGE FOR THE OPERATION OF THE FEDERAL ARBITRATION SYSTEM[86]

Broadly, the implications of the introduction of total wage can be put into two categories—those of which it is already possible to speak with some certainty and those which to a large extent will depend on future decisions taken by the Commission, particularly the decision in the 1968 *National Wage Case* scheduled to commence in August.

Going to the first category, the obvious effect of the decision has been to increase significantly the importance of cases seeking changes in wages to be taken before individual members of the Commission. Until total wage, individual commissioners or presidential members operated only on the non-basic wage element of the award. In the overwhelming proportion of cases therefore where changes were sought in wages on work-value or other grounds relating to the marginal element individual

[84] Commissioner Winter was joined by Gallagher and Moore JJ. in the latter stages of the enquiry in 1967 and judgment was not brought down until 11 December 1967.

[85] *Basic Wage, Margins and Total Wage Cases of 1966*, Serial No. B1748. Increases were granted on the majority judgment of Moore J. and Commissioner Winter with Gallagher J. holding that no increase should then be granted.

[86] This section is written without taking into account the possibility that the Commission could move to restore the basic wage-margins award structure. This is a matter entirely within the discretion of the Commission, the High Court on 13 December 1967 having unanimously (Barwick C.J., McTiernan, Kitto, Taylor, Menzies and Windeyer JJ.) rejected the unions' applications for prerogative writs directed to the Commission to prohibit it from proceeding further in total wage orders on the ground that the Conciliation and Arbitration Act 1904-1966 (Cth) imposed a duty on the Commission in presidential session to fix a basic wage. See *R. v. Commonwealth Conciliation and Arbitration Commission and Metal Trades Employers' Association* [1968] Argus L.R. 215.

members of the Commission were dealing with the relatively minor portion of the award wage.[87]

This change to a situation where the individual member of the Commission will be making decisions as to how the whole wage should be adjusted because of considerations applying to the work or circumstances of employment of the classifications before him has coincided with the attempt to confine the December 1967 work-value decision in the *Metal Trades Award* substantially to that award. While it is too early to say exactly how far this will be successful it is certainly true that while the present total wage system operates the only automatic flow to other awards of decisions made under the *Metal Trades Award* will be in respect of decisions in annual national wage cases. Both the opportunity and the necessity for individual members of the Commission to undertake major reviews of the award wage must increase under the new approach. This will affect the system in two ways. Congestion and frustration will increase if the same number of Commission members is going to be available to deal with an increased number of cases in respect of which detailed work-value investigations are required to be undertaken; nor will an increase in the number of Commission members necessarily avoid this problem. A second and indirect result should emerge. With an increased responsibility devolving upon individual unions in respect of cases taken by them before the Commission impetus should be given to the existing recognition of the need for unions to equip themselves with adequate research facilities. If this does happen the quality of cases presented to the Commission will improve and the opportunities for more significant increases in award wages will be increased.

In a more fundamental sense it is too early to say definitively what the effect of the total wage decision will be upon the federal arbitration system. The answer will depend largely upon the extent to which the Commission adheres to the most crucial sentence in the 1967 pronouncement: "We are creating new up-to-date fixation procedures and not changing principles of wage assessment".[88] If the Commission is prepared in fact to apply the principles of adjustment for prices and productivity regularly each year to the whole of the operative award wage it will become a more significant contributor to the movement of real earnings over time than had been likely under a system of annual review of the basic wage and reviews of margins on general economic grounds at intervals of three or four years. If such a new approach is accompanied by an attempt on the part of the Commission to give a meaningful

[87] As at June 1967 when total wage was implemented the basic wage (six capital cities) was 75.2% of the weighted average minimum weekly rate for adult males under Commonwealth awards.

[88] *National Wage Cases 1967*, Serial No. B2200, 5.

content to the concept of the minimum wage as being that wage which will enable a worker and his family to live "in conformity with the reasonable needs of this civilized community"[89] it will certainly assume a more significant position in the determination of wage and living standards in the Australian community than it has in the past. In these circumstances the immediate adverse reaction of the trade union movement to the abolition of a well-established and accepted award structure would be replaced by a recognition of the importance of the Commission's role.

Conceivably, however, the Commission could depart from the intentions expressed in that crucial sentence. In this case if what has been done turns out to be more than a "procedural change" and is seen to emerge as part of a preparedness by the Commission to let the market take over the determination of standards with the minimum wage being used to give the Commission cover at those points where the play of market forces has not produced an acceptable wage then the reaction of course will be quite different. Should this occur there would be a substantial decline in the respect of the trade union movement for the relevance of the arbitration system and a strengthening of that point of view which urges a greater reliance upon collective bargaining outside the system; according to this point of view if standards are basically to be determined in the market then that is the logical point for the concentration of energy.

[89] The words used by Commissioner Winter when referring to the minimum wage, *Basic Wage, Margins and Total Wage Cases of 1966*, Serial No. B1365, 134.