THE HIGH COURT AND THE PREFERENCE POWER: *WALLIS* AND *FINDLAY* IN THE CONTEXT OF THE 1947 AMENDMENTS

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Introduction

The purpose of this article is to examine the effect of two High Court decisions, *R.* v. *Wallis; Ex parte Employer's Association of Wool Selling Brokers*[1] and *R.* v. *Findlay; Ex parte Victorian Chamber of Manufactures,*[2] upon the Federal industrial Tribunal's power to award preference to unionists under the Commonwealth Conciliation and Arbitration Act. In the course of this examination, the article critically assesses in some detail the approach by the High Court towards compulsory unionism and the closed shop as industrial relations issues. In order to demonstrate more fully the relevance of the decisions in *Wallis* and *Findlay* to industrial relations, and in particular to the practice of the Federal Tribunal, the decisions were placed in the contect of the Tribunal's approach to the preference power, and of the prospects for re-appraisal of that approach following the 1947 amendments to the *Conciliation and Arbitration Act.* The conclusions suggest that the decisions were, in point of time, and in import, (at least) partially responsible for obstructing the Tribunal from a more effective use of the preference powers.

The Federal Industrial Tribunal's Practice in Preference Cases.

Since 1904 the Commonwealth *Conciliation and Arbitration Act* has empowered the Federal Industrial Tribunal[3] to direct that preference in employment be given to members of organisations (in effect to members of unions of employees). The original provision allowing for preference[4]

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1 (1949) 78 C L R 529

2 (1950) 81 C.L R. 537

3 The Commonwealth Court of Conciliation and Arbitration 1904-1956, the Commonwealth Conciliation and Arbitration Commission 1956-, the Australian Conciliation and Arbitration Commission 197-

4 Section 40(b) of the Act See now s 47

was hedged with substantial qualifications. Preference could be granted only in circumstances where notification had been given to all interested persons and organisations and an opportunity afforded to such parties to be heard.[5] Further, preference could not be granted unless the application was "in the opinion of the Court of Conciliation and Arbitration" approved of by a majority of those affected by the award,[6] nor could it be granted in situations where the rules of the applicant union were unfair, or placed unreasonable restrictions upon admission to or continuance in membership.[7] Finally, no union was entitled to a declaration of preference when its rules permitted the application of funds for political purposes.[8]

It is obvious that these qualifications presented an insurmountable barrier to unions seeking preference under the Federal Act. In only one instance were the provisions in their original form tested and predictably the union case failed.[9] However, the Fisher Labor administration substantially amended the preference power in 1910, and as a consequence of these amendments, most of the qualifications upon the Tribunal's exercise of its power to award preference were removed.[10] Nevertheless two major limitations remained after 1910. First, an award of preference could only direct an employer to prefer unionists who were otherwise equal with non-unionists. Second, preference could be granted to unionists only at the point of entry to employment. These were, however, limitations upon *what* the Tribunal could award. Otherwise the amendments had largely unshackled the *occasions* upon which the power might be exercised. After 1910 the Tribunal was invested with a basically unfettered discretion to award preference in the course of settling disputes,[11] and was charged with a statutory duty to award preference when it was necessary for the prevention or settlement of the industrial dispute, or for the maintenance of industrial peace, or for the welfare of society.[12]

5 s 40(b)
6 s 40(b)
7 s 40(b)
8 s 55(1)
9 See A W U v Pastoralists' Federal Council of Australia (1905) 1 C A R. 62
10 Following the 1910 amendments to the Act the preference provisions read as follows. "S. 40(1). The Court, by its award, or by order made on the application of any organization or person bound by the award may -
(a) direct that, as between members of organizations of employers or employees and other persons (not being sons or daughters of employers offering or desiring service or employment at the same time, preference shall, in such manner as is specified in the award or order, be given to such members, other things being equal, .
(2)Whenever, in the opinion of the Court, it is necessary, for the prevention or settlement of the industrial dispute, or for the maintenance of industrial peace, or for the welfare of society, to direct that preference shall be given to members of organizations as in paragraph (a) of subsection (1) of this section provided, the Court shall so direct "
11 s 40(1)(a)
12 s 40(2)

What happened in the Tribunal's exercise of its discretion thereafter is something of a puzzle. The preference provision in the Federal Act was based upon the pre-existing powers being exercised in both the New Zealand and New South Wales jurisdictions. The Courts and Tribunals in these jurisdictions had been very liberal in their interpretation of the power to award preference to unionists.[13] This was not however the approach subsequently taken in the Australian federal jurisdiction. Although s.40 in its recast form remained unchanged from 1910 until 1947, the powers expressly given in that provision were rarely exploited. In the period 1904-1947 there were in excess of 85 applications for preference by organisations of employees which were contested before the Tribunal. No more that 6 of these applications appear to have been successful.[14]

Pinpointing the precise reasons for this peculiar treatment of legislative power by the Federal Tribunal, even if it were possible, would require detailed consideration which is not possible in this article. Briefly however, there appears to have been a combination of factors which induced the Tribunal to eschew the granting of preference.

First, the tribunal's elder statesman, H.B. Higgins, contrary to his expansive attitude to many arbitral matters,[15] took an extremely negative approach to the granting of preference. In his formative decision in *Federated Engine-Drivers and Firemen's Association of Australasia v. B.H.P. Co. Ltd.*[16] Higgins J. stated:

> On what principle is preference to be granted or refused? The Act gives me no direct guidance, but the main considerations in that appeal to my mind would be (1) is the order necessary or conducive to industrial peace; and (2) will it aid the Court by encouraging unionism, or by preventing injustice to unionists?... there is much force .... in the position taken .... by Cohen J. in his judgment in the Trolly and Draymen's Case.... that the union men have to fight for non-unionists, as well as for themselves, in the efforts to obtain better terms from the employers; that the unionists have to pay subscriptions and levies, sacrifice time and energy and ... their employment; and that the non-unionists often assist the employer against the unionists in the struggle, and yet come in and enjoy

13 For a brief account of the early years in the New South Wales jurisdiction see R. Mitchell, *The Development of Labour Law Under the Coalition Government Some Comments on the 1982 Bill* (1983) 17-24. On New Zealand see H. Broadhead, *State Regulation of Labour and Labour Disputes in New Zealand* (1908) chap.X.

14 These figures have been compiled from the cases reported in the Commonwealth Arbitration Reports The Reports are generally poorly indexed and unreliable The figures must therefore be treated with considerable caution

15 For example, his establishment of the basic wage principle in Ex Parte H V McKay (1907) 2 C A R 1 (the famous "Harvester Case")

16 (1911) 5 C A R 9

> the fruits of the unionists' exertions and sacrifices ... But I am very loth to interfere with the employer's absolute discretion in choosing his employees without the employer's consent, or some very strong necessity ... Moreover, I find, in this case, at present, no disposition or wish on the part of these employers to discriminate as against unionists ... The burden of proof lies on the claimant to show that preference ought to be granted, and that burden has not been satisfied.[17]

There are a number of interesting points to be made about this passage. For our purposes however, it is necessary only to dwell upon the discussion of the grounds upon which preference might be awarded. These grounds are set out not as principles but as relevant "considerations", and as the remainder of the passage demonstrates, Higgins J. was not prepared to implement them in the *F.E.D.F.A. Case,*[18] nor to raise them to the status of principle. On the contrary, Higgins J. introduced further factors which had an overriding tendency to place restrictive and limiting conditions upon the exercise of the preference power. There was stated to be, for example, a requirement that there be "some very strong necessity" for interfering with the "employers absolute discretion in choosing his own employees". Further, Higgins J. stated that it was incumbent upon the applicant union to satisfy the burden of proof with respect to the existence of a "strong necessity" for awarding preference. The example furnished by Higgins J. in the *F.E.D.F.A. Case* is found in his reference to a "disposition or wish" by employers to discriminate against unionists. The union failed to satisfy any such case.

Whilst it is not possible to explain why Higgins J. adopted this approach, it is clear that his views on preference continued largely if not completely to dominate the thinking of members of the Federal Tribunal well into the 1950's.[19] Further, although some commentators have attempted to construct from Higgins J.'s decisions a set of "principles" governing the grant of preference,[20] a study of the cases establishes this construction as being completely unwarranted. There was in fact only one operating principle employed in preference cases; that was the principle that preference would not be granted in the absence of proof of discrimina-

17 Id at 24-26

18 Cf the approach in the New South Wales Tribunals, see for example Laundry Employees' Union v Wilson (1905) A R (N S W) 16, Book-binders and Paper Rulers' Union v Master Printers and Connected Trades' Association (1905) A R (N S W) 209, Firemen and Deck-hands' Association v Sydney Ferries (1907) A R (N S W) 111, United Labourers' Protective Society v Commonwealth Portland Cement Co (1907) A R (N S W) 177

19 Higgins retired from the Court in 1921

20 See Latimer, 'Principles Underlying the Preference-to- Unionists Awards in Industrial Law' (1981) 23 *J I R* , see also Drake-Brockman J. in Amalgamated Clothing and Allied Trades Union of Australia v D E Arnall and Sons (1932) 31 C A R 435

tion against union members. This principle was unambiguously expounded by Higgins J. in 1913,[21] endorsed by other members of the Tribunal,[22] and with the exception of very few cases was a position not deviated from until well into the 1960's.

A second factor influencing the negative approach of the Tribunal to the granting of preference may be found in the form of preference which it was possible for the Tribunal to award. It became increasingly apparent, both to the Tribunal and to unions, that a grant of preference "other things being equal" was of very little value to the applicant union. Employers could easily evade the intent of the award by selecting non-union labour ahead of union labour on grounds of competence and qualification.[23]

Thirdly, there was from the outset, considerable uncertainty among the members of the Tribunal as to the extent of the Tribunal's jurisdiction in matters of preference and union security generally. There was confusion, for example, both as to the circumstances in which jurisdiction might be exercised, and as to the extent of the power; whether or not a dispute over preference was required, whether or not preference might be awarded to selected groups of unionists rather than unionists generally, and whether or not awards of compulsory unionism could be made. Further, it was unclear whether awards prohibiting discrimination against unions, frequently granted in lieu of preference, were valid.[24] These problems of jurisdiction, if not decisive, were clearly influential in the manner in which the Tribunal members approached their powers under the Act.[25]

Preference, the Closed Shop and the 1947 Amendments.

In practice many Australian unions and employers worked within an agreed framework of union security devices which went well beyond what the Federal Tribunal could order, or was prepared to order, under the preference power or any other power in the Act.[26] These practices, which included the devices of union labour-supply and the post-entry closed shop, were generally acknowledged by the Tribunal to be beneficial or practical in the industrial relations of those industries in which the

21 Australian Builders' Labourers Federation v Archer (1913) 7 C A R 210

22 See, e g , Powers J in Australian Theatrical and Amusement Employees' Association v J C Williamson (1917) 11 C A R 133 and Starke J in Musicians Union of Australia v J C Williamson Ltd (1920) 14 C A R 438

23 See, e g the remarks of Higgins J in Federated Seamen's Union of Australia v. Commonwealth Steamship Owners' Association (1911) 5 C A R. 147 and of Dethridge C J in Federated Carters and Drivers Industrial Union of Australia v J H Abbott & Co (1935) 34 C A R 841 at 842

24 For examples of these types of awards see (1918) 12 C A R 277; (1920) 14 C A R 438, (1925) 22 C A R 106

25 See for example Powers J. in (1914) 8 C A R 145 and (1917) 11 C A R 51

26 For a general discussion of preference and closed shop practices in Australia see Wright, 'Union Preference and Closed Shop' in B Ford and D Plowman (ed), *Australian Unions* (1983) 241

devices were employed. Martin's study of the forms of certified agreements and consent awards brought under the Tribunal's authority demonstrates quite clearly that the Tribunal was prepared to endorse these consensual practices despite the perceived inadequacies of the Tribunal's jurisdiction to award compulsory unionism.[27] This duality of union security coverage, identified by Martin's research in the 1950's, had in fact been an established pattern much earlier.[28]

Nevertheless the fact remained that where employers were not agreeable, unions were unable to have the same closed shop practices authorised by the Federal Tribunal in the form of preference clauses. The alternative approach for unions to take was to move beyond the bounds of the preference provisions and to seek to utilise the general dispute settling provisions of the Act. The definitions of industrial dispute and industrial matter, *prima facie* at least, supported the notion that compulsory unionism and the closed shop could be the subject of award coverage.[29] However, the attempt to use these general provisions had proved unsuccessful.[30]

In 1947 the preference provisions in the Act were substantially amended by the Chifley Labor government.[31] The requirement that preference be restricted by the "other things being equal" clause was removed, thus leaving the way open for awards of absolute preference. It was also made possible for preference to be granted at any point in the employment relationship.

For a number of reasons it appeared a probable consequence of the 1947 amendments that the Tribunal's approach to the exercise of its power to grant preference would undergo some revision. It was clear that in practice a grant of absolute preference would, in due course, result in

27 Martin, 'Legal Enforcement of Union Security in Australia' in J Isaac and B Ford (ed.), *Australian Labour Relations Readings* 2nd ed (1971) 166.

28 See, e g , Waterside Workers' Federation of Australia v Commonwealth Steamship Owners' Association (1918) 12 C A R. 277 at 280-281, Australian Tramway Employees' Association v Railway Commissioners for N S.W (1927) 25 C A R 597 at 608

29 See ss 4, 16, 19, 23 and 24(2) of the 1904 Act

30 In Amalgamated Clothing and Allied Trades Union v D E Arnall (1932) 31 C A R 435 Drake-Brockman J had awarded "absolute preference" to the applicant union, relying on general powers under the Act The decision was quashed by the High Court in Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 C L R 1

31 Following the 1947 amendments to the Act the preference provision (s 56 from 1947-1956) took the following form "S 56(1) A Conciliation Commissioner may, by an award, or by an order made on the application of any organization or person bound by an award, direct that preference shall, in relation to such matters, in such manner and subject to such conditions as are specified in the order or award, be given to such organizations or members thereof as are specified in the order or award (2) Whenever, in the opinion of a Conciliation Commissioner, it is necessary, for the prevention or settlement of an industrial dispute, or for the maintenance of industrial peace, or for the welfare of society, to direct that preference shall be given to members of organizations as provided by the last proceeding sub-section, the Commissioner shall so direct 1

The current provision (now s 47) is substantially unaltered from the form it took in 1947

a union monopoly of employment opportunity. Nevertheless the amendment was not opposed by the Federal Opposition.[32] Further, there had been a tendency, though perhaps only a slight tendency, in the pre-war years to question the Higgins approach to the power.[33] Those members of the Tribunal who were minded to re-think their approach to the preference issue must have had their views reinforced by the continued political support for the principle of preference and for its exercise in dispute settlement. Provisions re-structuring the Court of Conciliation and Arbitration in 1947 may also have been expected to have had some impact.[34] Pursuant to these provisions, non-judicial "commissioners" were given the responsibility for settling disputes, including disputes over union security matters, in the first instance. These commissioners, less imbued with the legal approach, perhaps less under the influence of the common principles and procedures adopted by judicial members of the Tribunal, were expected to be more flexible in their approach to the preference power.[35]

Unions clearly expected that there would be a revised approach to the preference power as a result of the 1947 amendments. This expectation is demonstrated by the marked increase in the numbers of contested preference applications coming before the Tribunal after 1947, and in the types of orders being sought in those applications. In the three years 1948-1950 there were 22 contested applications considered by the Tribunal. This figure amounts to more than a third of the total number of contested cases dealt with in the period 1948-1970 inclusive, and to a third of the number of contested applications dealt with in the years 1923-1945. We can surmise therefore, upon the assumption that employer attitudes remained fairly stable, that the number of applications for preference, in the years immediately following the 1947 amendments, increased significantly relative to the general experience in the Tribunal's history. Furthermore, significant numbers of these applications were solely for compulsory unionism, or for compulsory unionism and preference.[36]

However, whatever might have been the expectation of unions in respect of the Tribunal's discretion to grant preference there still remained

32. Australia, House of Representatives, *Debates,* 1947, 1309 (16 April, 1947).

33 See Beeby J. in Waterside Workers Federation v. Commonwealth Steamship Owners' Association (1928) 26 C A R. 866.

34 For a general account of these changes see O de R. Foenander, *Studies in Australian Labour Law and Relations* (1952) Chap III

35 See the views of the Leader of the Opposition in Australia, House of Representatives, *Debates*, 1947, 1309 (16 April, 1947). The experience in New South Wales is comparable. The numbers of awards of preference increased dramatically in the years when the jurisdiction was exercised by non-judicial Boards in the first instance: see Mitchell, supra n.13, at 20.

36 See, e g , (1948) 61 C A R 170, (1948) 61 C A R 237; (1948) 61 C A R. 483, (1949) 63 C A R 274, (1950) 66 C A.R 481

for determination a number of important questions concerning the extent of the Federal Tribunal's jurisdiction so to do. Two major questions had yet to be authoritatively determined. These questions were:-

(i) whether an order or award for preference could be made in the absence of a dispute over preference; and

(ii) whether the section of the Act specifically authorising the Tribunal to direct that preference be given (s. 40 prior to, and s. 56 following, the 1947 amendments) was the limit to the Tribunal's powers to award preference.

Waiting in the wings was a sub-question. If the answer to question (ii) was affirmative, was a claim for something different from preference (e.g. compulsory unionism) within the general jurisdictional powers of the Tribunal?

The form of words adopted in the preference section seemed clearly enough to impose no requirement that there be an existing dispute over preference for the Tribunal's powers under that section to be exercised. The provision empowered the Tribunal to make an order or award of preference "on the application of any organisation or person bound by the award".[37] Presumably that application could be made at any time in the course of a dispute over other matters. The weight of judicial opinion was overwhelmingly in support of this view.[38]

The position on question (ii) seemed much less clear. In *Waterside Workers Federation* v. *Gilchrist, Watt and Sanderson,*[39] Knox C.J. and Gavan Duffy J. had expressed the view that the power to award preference was limited by the bounds of s. 40.[40] Starke J. however had expressed the opposite view, that there were general powers under the Act to award preference.[41] Isaacs and Rich JJ. did not consider the question. Drake-Brockman J.'s decision in *Arnall's Case*[42] clearly went beyond the bounds of s. 40 in awarding unqualified preference. However, that decision was reversed by a majority in *Anthony Hordern and Sons Ltd. v. Amalagamated Clothing and Allied Trades Union of Australia.*[43] In the latter case Gavan

37 s 49(1) (1910-1947), s 56 (1947-1956), s 47 (1956-)

38 See, e g , Higgins J in Australian Workers Union v Pastoralists' Federal Council of Australia (1911) 5 C A R 48 at 98, Dethridge C J in H V McKay v Court of Arbitration of Western Australia (1929) 28 C A R 333, Griffith C J in the Tramways Case (No 2) (1914) 19 C L R 43 at 81 (though the Chief Justice thought that the proviso might therefore be constitutionally invalid), and the majority view in Waterside Workers Federation v Gilchrist, Watt and Sanderson (1924) 34 C L R. 482 (Isaacs, Rich and Starke J J , Knox C J and Gavan Duffy J. expressing no opinion) In Anthony Hordern and Sons Ltd v Amalgamated Clothing and Applied Trades Union of Australia (1932) 47 C L R 1, a majority again supported this view (Starke, Evatt and McTiernan J J) and it appears not to have been strenuously resisted by the dissenting members of the Court (Gavan Duffy C J. and Dixon J)

39 (1924) 34 C L R 482

40 Id at 496

41 Id at 549

42 (1932) 31 C A R 435, see supra n 26

43 (1932) 47 C L R 1

Duffy C.J., Dixon and McTiernan JJ. took the view that the existence in the Act of a special power to award preference subject to certain limitations, must be taken to indicate that the Court had no unqualified power to do the same thing through another provision in the same Act.[44] Gavan Duffy C.J. and Dixon J. argued that even if s. 40 was intended to apply in situations where no dispute (in the technical sense) as to preference existed, it was still intended by Parliament to apply to *every case* where preference was sought. Unfortunately this majority opinion, in what was a forerunner to the decision in *Wallis,*[45] relied somewhat inadequately upon the wording of s. 40(2)[46] read in isolation from s. 40(1). There are strong grounds for suggesting that the wording of s. 40(2) could not be use to govern the approach towards the section as a whole. Indeed the wording of s. 40(2) (now s. 47(2)) suggested that it was intended to apply on different occasions from the exercise of power under s. 40(1). Section 40(2), it is submitted, was intended to give the Tribunal *no discretion* other than to direct that preference be given when it was necessary for the prevention or settlement of an industrial dispute, or for the maintenance of industrial peace or for the welfare of society, even though the subject of preference be not in dispute, or even sought by one of the parties. Section 40(1) appeared to envisage a situation where preference could be sought and directed at the Tribunal's discretion even though not *originally* demanded by the union. This construction would leave the remaining possibility that when preference was sought *as part of the original claim by the union,* it could be processed as any other industrial matter and become part of an award. It was this construction of the preference power which was favoured by the dissentients Evatt and Starke JJ in *Anthony Hordern.*[47] Their judgments favoured the view that s. 40 was an *expansion* of the authority of the Tribunal in preference cases, a view earlier expressed by Starke J. in *Gilchrist, Watt and Sanderson.* Collectively their judgments made much of the policy implications inherent in reducing the Tribunal's dispute settling powers.[48]

Much of this argument, concerning the limits of the Tribunal's power to award preference, appeared to have been made redundant by the 1947 amendments. Removal of the "other things being equal" limitation gave rise to the possibilty, if not to say expectation, that forms of unqualified preference tantamount to compulsory unionism might be awarded by the Tribunal. For this to occur however, it was necessary that compulsory

44 Id at 7 per Gavan Duffy C J , at 7 per Dixon J, and at 20 per McTiernan J

45 See supra n 21

46 (1932) 47 C L R 1 at 7-8

47 Id at 10-11 (Starke J), at 14-18 (Evatt J)

48 Particularly Evatt J who pointed out (at 16) that the majority view would remove from the Tribunal the power to settle preference disputes involving unregistered organisations

unionism should be regarded as an industrial matter.[49] Preference of course was clearly recognised as an industrial matter, and there was nothing in the Act clearly separating preference and compulsory unionism, and necessarily suggesting that "preference" excluded the latter. In fact, in some isolated cases, the Tribunal had gone so far as to sanction compulsory unionism in the form of consent awards.[50]

Notwithstanding all of this, in due course the decisions in *Wallis* and *Findlay* completely defeated the immediate aspirations of the unions, and ruled out prospects for awards of compulsory unionism in the future.

The Decisions in *Wallis* and *Findlay*.

In *R.* v. *Wallis; Ex parte Employers Association of Wool Selling Brokers*[51] the Federal Clerks Union had sought variation of two awards to which it was a party. In both instances the demand was in effect a demand for union monopoly of employment. That is, the demands required not only that from the date of the award's operation only unionists should be engaged when the employer was taking on labour, but also that all current employees should become, if they were not already, members of the union. Further, the claim was for a monopoly not by unions generally, but by a specific union, the F.C.U. The major distinction between the two claims was that the variation in the Clerks (Wool Stores) Award sought to effectuate a post-entry closed shop situation, whilst that in the Shipping Clerks Award sought the introduction of a pre-entry system which required the employer to accept union supply of labour. The employers sought prohibition in the High Court to prevent the variations taking place.

It was the decision of the whole Court[52] that the Act did not empower the Tribunal to make the variations. The leading judgements in the case were delivered by Latham C.J. and Dixon J.

Both Latham C.J. and Dixon J. were of the view that the preference provision (then s. 56) did not authorise a grant of monopoly of employment to an organisation of empoyeees. Monopoly of employment, it was held, was something different from preference and went therefore beyond the bounds of s. 56. Further, s. 56 was the limit of what could be ordered in respect of preference to unionists because it conferred a "specific power" in respect of a limited subject and "...upon ordinary principles of interpretation the provision in which that is done should be treated as the source or .... authority over the matter notwithstanding that otherwise

49 That compulsory unionism was an "industrial matter" within the meaning given to that term in the Act does not seem to have been seriously contested in the pre-1947 cases

50 See, e g ,(1918) 12 C A R 277, (1943) 50 C A R 5

51 (1949) 78 C L R 529

52 Latham C J , Rich, Dixon, McTiernan and Webb JJ

the same or a wider power might have been ... covered by general authority (given in other sections in the Act)"[53]

To this point the Court had merely adopted the view of the majority in *Anthony Hordern,* and the acceptance of that view alone was sufficient to dispense with the union's case. However the Court went further and considered whether a claim for union monopoly of employment could amount to an "industrial matter" within the meaning of the Act.[54] It was held that it could not. Union monopoly of employment neither fell within the initial words of the definition of industrial matter "all matters pertaining to the relations of employers and employees"[55] nor within any of the specific paragraphs enumerated in the definition.[56]

The views expressed by Latham C.J. on the statutory concept of "industrial matter" contained an additional and important element. It seems that in Latham C.J.'s view the fact that the Federal arbitral Tribunal had no power to grant compulsory unionism logically impelled the conclusion that compulsory unionism was not an industrial matter.[57] However it will be argued in this paper that there is nothing that compels such a conclusion and submitted further, that there is nothing in the other judgments delivered in the case to suggest that this was the view of the High Court generally.[58]

In *R.* v. *Findlay; Ex parte Victorian Chamber of Manufacturers*[59] the Clothing and Allied Trades Union of Australia had filed a log of claims upon employers one part of which included a demand for compulsory union membership for those employed in the trade. Commissioner Findlay made an award which attempted to meet the demands of the union whilst avoiding the effects of the decision in *Wallis.* Among other things the award provided that an employer should not employ non-union members where union members were available and willing to accept employment; that an employer should notify the union when no union member was available and willing to accept employment, and allow the union 48 hours

53 (1940) 78 C L R 529 at 550 per Dixon J (bracketed words added) See also Latham C J. at 542 Latham C J pointed out that para (j) of the definition of "industrial matters" refers to preferential employment of persons *not being* members of an organisation He took the view that unless this expression was read down in light of s 56 it would sit somewhat inconsistently with the express power given to the Tribunal to award preference to members Whilst there is some force in this argument it may be overcome by adopting the argument that the express power given in s 56 is intended to give rise to a privilege to unions when no dispute has taken place over the subject of union membership

54 The term "industrial matters" is defined in s 4 of the Act

55 (1949) 78 C L R 529 at 545 (Latham C J), at 547 (Rich J), at 554-5 (McTiernan J)

56 Id at 540-541 (Latham C J), at 547 (Rich J), at 553-4 (Dixon J), at 555 (McTiernan J), at 555-6 (Webb J)

57 A view that he repeated in R v Findlay (1950) 81 C L R 537

58 cf Hall, 'Compulsory Unionism Returns' (1971) 45 *A L J* 415 at 420

59 (1950) 81 C L R 537 The members of the Court in this case were Latham C J , Dixon, McTiernan, Webb and Kitto JJ

to provide a suitable person; that an employer should not continue to employ a non-unionist if the union had notified the employer of the employee's non-membership, if such person refused to become a union member within 14 days and there were union members available to accept such employment. It is apparent from this brief outline of the award's provisions that it did not provide for compulsory unionism in the sense that employers bound by the award could employ only union labour. However in the course of his judgment Latham C.J. noted that the award had been worked "so as to bring about in *actual practice* the result that employers should be at liberty to employ only unionists nominated by union officers".[60]

On application by the employers for prohibition the High Court held that the preference clause contained in the award was invalid. The decision was based principally on three separate grounds.

First, the whole Court (following *Wallis*) considered that the original demand, being explicitly a demand for compulsory unionism, did not give rise to an industrial dispute. Nor was the Court prepared to read the demand as covering, or including, the lesser demand for preference, or to allow that a new dispute over preference had occurred in the course of proceedings before the commissioner. There was therefor nothing upon which the powers given in s. 56 could be exercised as they were neither relevant nor incidental to the settlement of the dispute.[61] Since there was clearly an industrial dispute over other matters, it must follow from this that the Court took the view that s. 56 had no independent operation in the context of a dispute, though only Latham C.J. expressly addressed this question.[62] Earlier dicta favouring a different approach must therefore be taken no longer to apply.

Secondly, the preference clause did not in any event comply with s. 56 as the Court interpreted the requirements of that section. The clause failed to specify in an appropriate fashion the manner in which preference was to be given, the persons to whom it was to be given and the conditions under which it should be given.[63]

60 Id at 548 (emphasis added)

61 Id at 543-4 (Latham C J), at 549-551 (Dixon J), at 551-2 (McTiernan J), at 553 (Webb J), at 554 (Kitto J)

62 Id at 543-4

63 Id at 545-6 (Latham C J), at 550 (Dixon J) Dixon J was correct to suggest that the award is invalid if it goes beyond or is substantially different from that which the demand contemplates, because it is then clear that there has been no dispute over what has been awarded However Dixon J 's argument (at 550) seems, oddly, to suggest that the fact that the commissioner was exceeding his jurisdiction was a further reason for finding that the original claim did not give *rise* to an industrial dispute It was quite clear in this case that a dispute existed When the commissioner framed a clause falling outside the ambit of the log, the resulting invalidity was surely a *consequence* of the fact that no dispute over a particular matter arose, not a *reason why* the log did not give rise to the necessary dispute.

Thirdly, the award as framed produced a result which was quite different from what was contemplated by the demand (i.e. the award granted a complex form of unqualified preference whereas the original demand was for compulsory unionism). Thus for Latham C.J. a person served with the original log of demands, but not taking part in the arbitral processes, could not have expected from the form of those demands to have found himself bound by a clause such as that awarded by Commissioner Findlay.[64]

A Critical Assessment of the Major Premises Forming the Basis of the Decisions in Wallis and Findlay.

Two major propositions emerged from the High Court's deliberations in *Wallis* and *Findlay:* (1) that the specific grant of preference excludes the power (in the preference section or elsewhere in the Act) to grant compulsory unionism and (2) that compulsory unionism is not otherwise an industrial matter within the meaning of the Act. Adoption of these propositions has had significant repercussions upon the *legal* settlement of union security disputes in the Australian federal jurisdiction. It also is certain that the decisions in *Wallis* and *Findlay* will contine to affect practical undustrial relations unless substantial revision of the two propositions is undertaken. Attempts to evade the effects of *Wallis* and *Findlay* in the 1970's proved unsatisfactory, and it seems tolerably clear that from an industrial relations perspective the Federal Tribunal requires the power to order compulsory unionism in appropriate circumstances.[65] The next part of this paper examines the arguments upon which a revision of *Wallis* and *Findlay* might rest.

(1) *The specific grant of preference excludes power to grant compulsory unionism*

(a) It has been urged that compulsory unionism is a form, albeit an extreme or highly effective form, of preference to unionists[66] and therefore sanctioned by the Act after the 1947 amendments had removed the requirement that a grant of preference be qualified. There are however two basic and apparently overwhelming difficulties with this argument. The first is that the High Court reads the preference section not as empowering the Tribunal to grant preference to unionists, but as empowering it to *direct* that preference be *given* (presumably by the employer though the section does not strictly require this).[67] Therefore the fact that an award might, or does, cause

65 Even if it was conceded that compulsory unionism could be granted under the Act, the further question of the constitutional validity of such an order remains largely unexamined

66 See, e g , E I Sykes and H J Glasbeek, *Labour Law in Australia* (1972) 741

67. See R v Findlay (1950) 81 C L.R 537 at 554 (Kitto J)

the stream of employment to run in favour of the union (as an order for compulsory unionism must do) does not mean by reason of that fact alone that the award is a valid exercise of the preference power as spelled out in the section.

Secondly, it was decided in *Findlay* that where an employer is directed to give preference, it is implied that this necessitates that there be a choice exercisable by the employer.[68] This view seems to have arisen by inference from the ordinary meaning of the word "preference".[69] None of the judgments in *Wallis* expressly uses the term "choice"[70] or appears explicitly to have considered whether or not preference does require an "exercisable choice". Nevertheless the conclusion seems inescapable upon a literal reading of the provision.

(b) It may be argued that the preference provision is not a grant of power *per se* but a direction as to the manner in which the Tribunal's general power in relaton to preference is to be exercised.[71] On this view the Tribunal's general powers to deal with compulsory unionism would be unaffected by the preference section which serves merely as a guide to the form of the order if preference is granted.

(c) It was argued earlier that the wording of the original s. 40, which remains largely unaltered, is consistent with an intention of the legislature to extend the powers of the Tribunal to provide for a grant of preference when preference is outside the ambit of the dispute. This argument was advanced both in respect of the power inherent in s. 40(1) and s. 40(2). It has been suggested that in either case there is no necessity for the dispute, expressly or impliedly, to have included a demand for preference. If this construction is correct, the preference provision should not fall victim to the maxim *expressio unius est exclusio alterius* since the general powers to settle disputes by awarding preference, and the specific power to direct that preference be given, are intended to be exercised at different times.[72]

(d) finally, one might argue that the existence of a power to award preference does not, by necessary implication, remove from the Tribunal the power to award compulsory unionism.

This argument might be supported on two grounds. First, a power

68 Id at 548 (Latham C J.); at 554-5 (Kitto J)

69 Id at 553 (Webb J)

70 cf Latham C J in R v Findlay (at 548)

71 See Latham C J in Metal Trades Employers Association v Amalgamated Engineering Union (1935) 54 C L R 387 at 405, see also Hall, supra n 58, at 419

72 It should be noted however, that insofar as the decisions in R v Wallis and in R v Findlay appeared to be ruling on the effectiveness of s 56(1), it may still be questionable whether s 56(2) (now s 47(2)) requires the existence of a dispute over preference before it can be exercised, see Australian Foreman Stevedores Association v E P and A Frazer (1961) 98 C.A R. 924 at 927-928 per Ashburner J

to award preference and a power to award exclusion from employment are quite distinct powers. Therefore a restriction or limitation upon one does not affect the other. Hall has pointed out that a clause granting preference does not legally *exclude* anyone though it might in practice have this effect.[73]

Secondly, by the Court's own admission in *Wallis,* compulsory unionism fell within the same *general subject matter* as preference (i.e. it was a matter *ejusdem generis* with preference).[74] One would think it at least arguable therefore that the Tribunal had power to deal with the dispute pursuant to the preference section. However this was not the approach of the High Court. It found that a claim for compulsory unionism, though *ejusdem generis* with preference, was nevertheless a subject *distinct* from preference. This distinction was necessary for the Court's two pronged approach to the argument. Since the subject of preference quite clearly *is* an industrial matter, the finding that the claim for preference was different from a claim for compulsory unionism was *not* an industrial matter.[75] On the other hand the Court was of the view that the dispute (had there been a dispute) should be limited by the terms of the preference section (s. 56 after 1947). That is to say that in the Court's view s. 56 was the sole source of power in respect of disputes concerning preference and matters *ejusdem generis.* Since compulsory unionism was a matter *ejusdem generis* with preference it was covered by s. 56, pursuant to which compulsory unionism could not (on the Court's interpretation) be granted. Strictly speaking therefore the finding in *Wallis* that compulsory unionism was not an industrial matter was unnecessary. Even had the Court concluded that compulsory unionism was an industrial matter, and that a claim for it gave rise to an industrial dispute, its subject matter was annexed to the matter of preference and therefore limited by the terms of s. 56.

The Court in *Findlay* tackled the problem somewhat differently, deciding that preference and compulsory unionism were completely different (as would preference be distinguishable from wages, or health and safety), and therefore that no dispute could arise which could be covered by the terms of s. 56. On this line of reasoning the argument based upon the implied limitations of s. 56 was largely irrelevant. The Court's conclusion that there was no dispute was all that was necessary.

73 Hall, supra n 58, at 419
74 See Dixon J at 553
75 This point is dealt with infra

(2) *A Claim for compulsory unionism does not give rise to a dispute over an industrial matter.*

It follows from the foregoing that this finding was not strictly necessary in *Wallis*. There are further substantive grounds for rejecting this proposition.

(a) To conclude that a demand for compulsory unionism is not a demand over an industrial matter *because* the Tribunal has no power to grant the demand[76] is not an inescapable conclusion. It might equally as well be argued that though such a demand gives rise to an industrial dispute with which the Tribunal is competent to deal, the Tribunal is limited to settling the dispute in a particular manner.[77]

(b) The finding in *Wallis* that "compulsory unionism" was not an industrial matter within the meaning of the Act was an unreasonable and artificial interpretation of the Act's provisions. The expression "industrial matters" is defined in s. 4 of the Act as meaning "all matters pertaining to the relations of employers and employees" and without limiting the generality of that clause a further number of industrial matters are separately listed. In *Wallis* it was argued that the claim for compulsory unionism was an industrial matter on the basis of the opening words of the definition, and four of the enumerated matters contained in the definition. These were:- "(h) the mode, terms and conditions of employment"; "(i) the employment of children or young persons, or of any persons or class of persons"; "(j) the preferential employment or the non-employment of any particular person or class of persons or of persons being or not being members of an organisation"; and "(k) the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons."

Three of the judges in *Wallis* considered that a demand for exclusion of non-unionists was not a matter pertaining to the relations of employers and employees.[78] Rich J. advanced no arguments in support of his contention, but the views of Latham C.J. and McTiernan J. were fairly similar. Their Honours held that not all demands between employer and employee create disputes over industrial matters. In the view of Latham C.J., the claim for monopoly of employment had consequences which took it, potentially, beyond employer-

76 Hall, supra n 58, at 420 assumes this to be the basis of the decision in Wallis In fact only Latham C J expressly makes the point, and it was not, strictly speaking, a conclusion that the Court necessarily had to reach

77 This seems to have been the view of Evatt and Rich JJ in the Metal Trades Case at 449

78. Latham C.J , McTiernan and Rich JJ. Two Justices, Dixon and Webb JJ. did not expressly deal with that part of the definition.

employee relations, and which could be compared with a claim "that employers should transfer their assets and business to their employees".[79] Further, the Chief Justice argued that a claim for the exclusion of non-unionists *prima facie* is not an industrial matter affecting the relations of employers and employees because those relations remain the same whatever the state of relations are between employers and non-employees.[80] McTiernan J. took the similar view that an employee's membership of a union has nothing to do with the specific relations arising from the creation of the employment relationship.[81]

There are obvious objections to these conclusions. It probably has to be accepted that not all claims by employees upon employers (or vice versa) give rise to disputes over industrial matters, though it has yet to be fully explained why demands of the nature cited by Latham C.J., which may even question the right of ownership of the enterprise, are not industrial in nature. However, whatever might be thought of that contention, it seems clear enough that the location of "compulsory unionism" as an industrial relations issue is many degrees removed from those claims with which Latham C.J. drew parallels.

Since there is no clear definition, testing which matters do and do not pertain to the relations of employers and employees can only be done by having reference to the relevant industrial relations norms. Whilst there has been some tension in the High Court as to whether this requires an assessment based upon prevailing norms at the time of Federation, or it allows for a changing assessment according to varying standards,[82] it seems incontestable that the practice of compulsory unionism and demands imposed upon employers for "closed shops" have been part of industrial relations in Australia since the late 1800's at least.[83]

Further, Latham C.J.'s view that "compulsory unionism" does not affect the relations between the employer and the employee persists with the antiquated notion that the relations of employers and employees (or at least in the sense that they are spoken about in the

79 (1950) 81 C.L R 537 at 546

80 Id This proposition by Latham C J. seems oddly misstated If the claim is for compulsory unionism, members of the category to be excluded from employment may well be currently *employed* non-unionists

81 Id at 554-555

82 See for example R v. Portus, Ex parte Australian and New Zealand Banking Group (1972) 127 C L R. 353 and see discussion in W Creighton, W Ford and R Mitchell, *Labour Law Materials and Commentary* (1983) 308-310

83 See Wright, 'Union Preference and the Closed Shop in Australia' in B Ford and D Plowman (ed) *Australian Unions* (1983) 241

definition of industrial matters) are essentially individual. In any dispute over compulsory unionism the individual contractual *rights* of the employer and employee might remain the same, but their respective collective *interests* clearly will be affected by the outcome of the dispute, and in particular by the extent of unionism at the place of work. This much was made clear in the celebrated *Badge Case*[84] where the High Court interpreted the expression "employers and employees" not as persons necessarily in contractual relationships, but as describing the two opposing classes engaged in industrial relations. Seen from this perspective, disputes over trade union strength would seem to pertain to the relations of employers and employees, unless the words "pertaining to" and "relations" are read, unduly narrowly, as necessarily referring only to the existing rights of the parties and not to their interests.[85]

Latham C.J. and Rich J. were the only members of the Court in *Wallis* who dealt specifically with sub-clause (h) of the enumerated "industrial matters" in s. 4. Latham C.J. held that "conditions of employment" referred to conditions under which persons are employed.[86] It was therefore not apt to treat this clause as including matters relating to the prohibition of the employment of other persons. The response to this is obvious. It is true that both claims in *Wallis* were couched in terms of non-employment for non-unionists. The corollary of this however, is that for a person to retain or hold employment, that person would, if the claim was granted, need to be a union member. It would seem therefore that the demand in substance (if not in form) was seeking to impose conditions of employment upon persons employed, or to be employed, similar to a requirement that an employee wear protective clothing or be a qualified tradesperson.

Latham C.J. took much the same approach in respect of para. (i) of the definition. The Chief Justice relied upon the use of the term "employment" in that paragraph as excluding from the Tribunal the power to deal with matters pertaining to the prohibition of employment of other persons. Some support for this argument may be found in the specific use of the term "non-employment" in para. (j). Read in isolation however, the construction of the paragraph is compati-

84 Australian Tramways Employees Association v Prahran and Malvern Tramways Trust (1913) 17 C L R 680 ("Union Badge Case")

85 Although the breadth of the interpretation of the term "industrial matters" has changed somewhat since the Union Badge Case (see, e g , Creighton, Ford and Mitchell, supra n 82, Chap 16), the approach by the High Court in that case was affirmed in R v Findlay, Ex parte Commonwealth Steamship Owners Association (1953) 90 C L R 621

86 (1950) 81 C.L R 537 at 540 Rich J. did not advance reasons for his view

ble with the view that the Tribunal is given the power to consider the *question* of employment of classes of persons rather than the mere detail of that employment. Webb J. was the only other member of the Court to consider specifically the application of para. (i). His Honour's view that para (i) gave no power to exclude non-unionists from employment, whilst giving power to exclude children,[87] is seemingly internally inconsistent, and contrary to the thrust of Latham C.J.'s position.

The applicant union in *Wallis* relied most heavily upon para. (j) of the definition. Latham C.J. drew attention to two possible interpretations of the term "non-employment" contained in the paragraph.[88] On one hand it could mean the immediate or existing failure of the employer to employ certain persons or classes of person (e.g. by deiscriminating against unionists). On the other it could be taken more widely to include a claim that the employer should be prevented from employing a particular person or class of persons. The Chief Justice opted for the narrower interpretation. If the wider interpretation was adopted, it was argued, the definition could be stretched to include a claim that employers falling within a certain description should not employ *any* persons and would thus be forced out of business. This, it was thought, was an unlikely power to have been intended by Parliament to be given to arbitration authorities. Both Rich and Dixon JJ. also appeared to opt for the narrower interpretation of the term "non-employment".[89] Dixon J. went further and contended that "non-employment" was not an expression to use if it was meant to refer to a demand that persons "employed" should be no longer "employed".[90] This argument is, however, rather unsatisfactory since it does not address the suitability of the term "non-employment" for encapsulating a demand that non-unionists not currently employed should be "not employed".

The basis of Latham C.J.'s argument on para (j) seems to make nonsense of the industrial relations context in which the Act operates. Elsewhere in its argument the Court had given quite a narrow interpretation of the words "pertaining to the relations of employers and employees". How then could it seriously be suggested that upon *any* reading of para. (j) a claim for excluding employers from business

87 Id at 555

88 Id at 541

89 Id at 547 (Rich J), at 553 (Dixon J) Webb J (at 555-56) found it unnecessary to decide on the precise meaning of "non-employment" because the breadth of "individual matters" was impliedly limited by s 56

90 Id. at 553

would get beyond first base? It is hardly controversial to assert that Parliament did not intend to give the arbitration authorities power to exclude employers from business. But this fact must by inference arise from what is understood of the conventions and practices of industrial relations and industrial tribunals. The argument is not a convincing one for concluding that Parliament similarly did not intend to give those tribunals the power to exclude certain class of employees. Again, whatever the legislative intention might be in respect of this latter question had to be considered in reference to the industrial relations context. It is clear that at the time the Act was introduced it was common for parties engaged in industrial relations, and for industrial tribunals in the exercise of their powers, to deal with the "non-employment" of non-unionists.

Finally Latham C.J. was the only member of the court to give separate attention to para (k) of the definition.[91] The application of this head of power was fairly easily refuted on the basis that what the union was seeking was a provision imposing a *duty* to refuse employment. On a literal reading of the paragraph, the Tribunal lacked that power.

Conclusion

Following a period of some doubt as to the extent of the Federal Tribunal's powers, the High Court in *Wallis* and *Findlay* established the upper limitations within which union security claims coming before the Tribunal must be dealt. Perhaps contrary to expectation, the effect of these decisions was to impose quite significant restrictions upon the power of the Federal Tribunal to settle disputes over the closed shop and union security generally.

The High Court has frequently been criticised for excessive legalism, particularly in industrial cases.[92] The analysis in this paper has attempted to demonstrate that the approach of the Court in these two cases was unduly narrow and literalist, and that upon any reasonable and liberal interpretation of the Act, the term "industrial matters" embraces the issues of compulsory unionism and the closed shop. Although none of the judgements in *Wallis* and *Findlay* are explicit on this point, it clearly was the view of both Courts that Parliament would not have intended to give the Federal Tribunal the power to order compulsory unionism.[93] This view is formally rooted in individualist philosophy (i.e. that it would be

91 Id at 540

92 See, e g , Maher and Sexton, 'The High Court and Industrial Relations' (1972) 46 *A L J* 109

93 There is an indication of this in the judgment of Latham C J in R v Wallis (at 546)

against public policy compulsorily to exclude non-unionist employees because to do so would constitute an unwarranted interference with their rights). Yet it is clear that the Federal Tribunal had long authorised such practices by *agreement* between the parties, and that there had been no attempt by Government's to move against these practices. Further, it was commonly acknowledged that the practice of unqualified preference produced in the long term a de-facto post-entry closed shop situation. Since the 1947 amendments had made it clear that it was intended that the Tribunal *should* award, in appropriate cases, unqualified preference, one may seriously question the reality of the view that the Act gave the Tribunal no powers over the closed shop issue per se.

For the High Court to find that compulsory unionism was not an industrial matter, and therefore that it could not give rise to an industrial dispute invoking the powers of the Tribunal was, in practical terms, more far-reaching than the conclusion that the Tribunal had no power to grant the demand because of the limitations of s. 56. If a demand for compulsory unionism did give rise to an industrial dispute, the Tribunal would be able to exercise other powers even if it could not grant the claim. For example, the Tribunal could use its powers of conciliation, or it could make an order to award granting one or more forms of preference since this would be meeting part, though not all, of a legitimate claim. As the position now stands, the Tribunal lacks the power to deal with disputes on the closed shop, though informal proceedings no doubt take place where the parties are willing to allow this to occur. The consequences of this lack of power were to become particularly noticeable in the 1970's when the Arbitration Commission sought to extend its jurisdiction by adopting a more liberal interpretation of the preference power.[94]

The particular limitations upon the Tribunal in seeking to exercise its jurisdiction over matters of preference may be summarised as follows:-

(i) there must be a claim for preference (i.e. the Tribunal's power must be invoked by the demands of one of the parties to the dispute and cannot be invoked by the Tribunal itself);[95]

(ii) the claim must be for preference as distinct from compulsory unionism;[96]

(iii) the Tribunal in making its award, if it decides so to do, cannot award preference so as to eliminate all choice in the employer;[97]

(iv) the Tribunal, in directing that preference be given, must specify the

94 See eg , Federated Clerks Union of Australia v Altona Petrochemical Co Pty. Ltd (1971) 138 C A R 967, (1973) 150 C A R 387, Plastics, Resins, Synthetic Rubbers and Rubbers (Uniroyal) Award 1975 (1977) 188 C A R 943, (1979) 225 C A R 728

95 This arises by implication from the decision in R v Findlay

96 See both R v Wallis and R v Findlay

97 Id

persons to whom, the manner in which, and the conditions upon which such preference is to be given. Failure to do this with sufficient clarity will invalidate the award;[98]

(v) preference may be given at any point in the employment relationship, including upon engagement, promotion, transfer, the granting of leave and upon termination;[99]

(iv) preference may be granted to a class of unionists (e.g. members of one union over members of another, or some members of a union over other members of the same union) rather than unionists generally.[100]

Virtually all of the discussion in *Wallis* and *Findlay* was concerned with the ambit of s. 56(1) (now s. 47(1)). This has tended to obscure the significance of s. 56(2) (now s. 47(2)). It may have appeared from the lack of attention given to the latter sub-section that the High Court did not favour the view, contended for earlier in this paper, that s. 47(2) has independent operation. If this view is correct then s. 47(2) would appear to amount to no more than a direction to the Tribunal as to when it is to exercise its powers pursuant to s. 47(1). On the other hand later cases in the Arbitration Commission have revived the suggestion that s. 47(2) authorises an award of preference in circumstances different from those covered by s. 47(i).[101] However it must be assumed that whatever the veracity of these views, that sub-section (s. 47(2)) could only be given effectivitly when there is an existing dispute over preference.[102]

It is not possible fully to comprehend the effects of *Willis* and *Findlay* upon the practices of the Federal Tribunal without a close examination of the role of the Arbitration Commission in the preference cases of the 1970's. In this period the Commission was faced with the difficulty of tailoring awards of preference to concede, in effect, the post-entry closed

98 See R v Findlay

99 This was made possible by the 1947 amendments to the Act However cases granting preference other than upon engagement did not regularly occur until the 1970's

100 There was originally considerable doubt as to whether the preference section allowed selective preference between unionists, see, e g , Powers J in Amalgamated Society of Carpenters and Joiners v Vestey Brothers (1917) 11 C A R 51 There was no discussion of this point by the majority in the Anthony Hordern Case, but the minority - Evatt J (at 18) and Starke J (at 10) - followed the views expressed by the majority in the earlier case of Gilchrist, Watt and Sanderson In that case Isaacs, Rich and Starke JJ interpreted the use of the term "members" rather than "the members" in s 40(1)(a) as indicating that the Tribunal could select between members of the organisation when granting preference (see Isaacs and Rich JJ at 536-7 and Starke J at 549-550) Knox C J and Gavan Duffy J (at 496) dissented from this view After 1947 the position was clarified by the amendments to the preference provision which now specified that preference be given "to such organisations or members of organisations as are specified in the award or order "

101 See, e g , the remarks of Ashburner J in Australian Foremen Stevedores Association v E P and A Frazer (1961) 98 C A R 924, at 927-928 and the decision of Commissioner Gough in Pulp and Paper Workers' Federation of Australia v Associated Pulp and Paper Mills Ltd (1975) 169 C A R 753

102 This would seem a minimum requirement as a result of the decision in R v Findlay

shop, whilst not going so far as to violate the principles laid down in the two High Court decisions. Although it is beyond the parameters of this paper to comment further upon these developments, the short term effects of the 1947 amendments and of the decisions of *Wallis* and *Findlay* upon them were also interesting and two brief points will be made about these.

First, the very clear effect of *Wallis* and *Findlay* was to rule out any prospect of de jure compulsory unionism, by award, in the Federal industrial jurisdiction. The legislation amending the Conciliation and Arbitration Act was not enacted until December 1947. *Wallis* was decided in mid-1949. That being the case there was, to all intents and purposes, no opportunity for the newly appointed commissioners to demonstrate what their attitude would be to the expanded powers to award preference. Commissioner Findlay's deliberate attempt to evade the implications of *Wallis* failed when the High Court refused to read a claim for compulsory unionism as encompassing a claim for the lesser award of preference.

Secondly, the decisions in *Wallis* and *Findlay* appear to have induced a response among members of the Federal Tribunal which was not intended or suggested in those decisions. It seems that in a number of cases in the post-1950 period, some commissioners were in doubt of their powers to award *absolute preference* because that might amount to an award of, or induce the development of, compulsory unionism.[103] Despite the fact that the "all things being equal" requirement was removed from the Act in 1947, there was no award for unqualified preference until 1958.[104] It is necessary, perhaps, not to read too much into this fact. There was, overall, little significant change in the manner in which the Tribunal members exercised their powers to award preference in the post-1947 period, as compared with the approach taken before that time. Not only were awards of *absolute* preference rare until the 1970's, but awards of preference *of any type* numbered only 12 of 61 contested applications in the period 1947-1970. Nevertheless it is difficult to resist the conclusion that, at least in part, the rulings in *Wallis* and *Findlay* had the direct consequence of stifling the expansion of preference in awards, and thereby of negating legislative intention in that matter.

103 See (1952) 73 C A R 703 at 708 (Commissioner Blackburn), (1956) 86 C A R 354 at 360 (Commissioner Donovan), (1957) 87 C A R 327 at 343 (Commissioner Chambers)

104 Municipal Officers Association of Australia v Lord Mayor, Aldermen and Citizens of the City of Adelaide (1958) 89 C A.R 174