reach in their agreement. On the other hand, it seems very likely that the level of wages which the unions genuinely hope to achieve in such negotiations will have been set by their assessment of the economic capacity of the particular employers with whom they are negotiating, and that the limits of what those employers are prepared to concede are likewise set by their own assessment of their capacity.

On both sides these economic factors have probably been more significant than work-value factors, if we take work-value factors as meaning only considerations arising from the content of the job. To this extent, the Arbitration Commission is right in saying that such agreed wage settlements are already taking up some of the capacity which it had hoped it would distribute to employees through its general wage cases: to apply the outcome of these general arbitration cases to employees who have already had their slice of the economic cake will give them two slices of cake, although other employees will only get one slice. On the other hand, direct negotiation will bring into the consideration of the parties, even if only tacitly, the particular economic capacity of the enterprises with which the negotiations are concerned. Both sides will find this a more satisfying way of reaching a settlement, but it is a way which is not ordinarily open to them in proceedings before the Arbitration Commission. It is therefore not very likely that, in areas where direct negotiation has become an accepted practice, there will be any strong wish to return to arbitration.

[172] The principles of wage fixation. From what has been said in the preceding notes it will be seen that the principles on which the Arbitration Commission conducts its wage-fixation inquiries are in a state of flux. The going rates are being largely determined by market forces and are in turn having a substantial influence on the minimum rates being determined by the Commission. In so far as these circumstances permit, the Commission is applying the principles which have been worked out in earlier cases. There is an element of precedent applied here, although there is also a large degree of flexibility in its application, and there is always the need to give due consideration to the almost infinite variety of circumstances which bear on a proper determination of wage rates. It follows that the Commission will heed the expectations and standards which are being accepted in the community at large, but in these circumstances, it is almost inevitable that there will be a time lag between the development of social standards and their recognition by the Commission. This can be best illustrated by stating principles which have been recognized in the arbitration decisions at different stages.

The principles which had been developed by the Arbitration Court in its first 10 years were given as a series of propositions by its president (see, HB Higgins, *A New Province for Law and Order*, Lond 1968 rep pp 6-14) thus:

1 The secondary wage is remuneration for any exceptional gifts or qualifications necessary for the performance of the functions, eg skill, strength or responsibility.

2 It preserves "the old margin" between the unskilled labourer and the skilled or "exceptional" class.

3 The Court will consider any evidence that the employer ought not to be asked to pay such wages, eg on grounds of finance, competition with imports, unfairness to other workers, undue increase of price, injury to the public.

4 Wages cannot be allowed to depend on the profits made by the employer, but the profits of which the industry is capable may be taken into account. Above the basic wage, bargaining of the skilled employee may with caution be allowed to operate.

5 That a mine is being exhausted or is poor in ores is not a ground for awarding lower wages. Shareholders may stake their own money on a speculation, but they should not stake part of the employee's proper wages also.

6 The Court does not increase the minimum because of the affluence of the employer.

7 The minimum must be based on the highest function that the employee may be called on to exercise.

8 In finding the proper minimum rate, the Court tries to find what would be proper for an employee of average capacity called on to do work of the class required. Higher wages for an exceptional workman is left to the play of bargaining.

9 The Court does not attempt to discriminate on the ground of comparative laboriousness.

10 It will not discriminate in wages between the several States so as to interfere with the freedom of trade between the States provided by the Constitution.

11 The Court will not keep down wages so as to help one competitor against another.

12 It follows the usual practice of making rates for casual employment higher than those for continuous employment.

13 As required by the Act, it provides exceptions to the minimum for aged, slow or infirm workers, but discloses these to the union.

14 It will not provide exceptions for "improvers", men who are used to beat down the

Mills, C. P., & Sorell, G. H., Federal Industrial Law, 3rd Ed, Butterworths, Sydney, 1975

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15 The Court regards
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claims of competent journeymen and who are "a perpetual menace to the peace of the community".

15 The Court regards the old system of apprenticeship as unsuitable for factories under modern conditions. It objects to fixing a rigid proportion of apprentices to journeymen without regard to the circumstances. But if apprenticeship conditions are in dispute, and especially if both sides wish it, it will, for the sake of peace and efficiency, make regulations on the subject.

16. It will not prescribe extra wages as compensation for unnecessary risks to life or health or for unnecessary dirt. "No employer is entitled to purchase by wages the right to endanger life or to treat men as pigs."

17. It gives weight to existing conventions, usages, prejudices, exceptional obligations and expenses of employees.

18 Where it is established that there is a marked difference in the cost of living between one locality and another, the difference will as far as possible be reflected in the minimum wage.

19 Where the employees and employers generally desire that there should be no differentiation, the minimum wage is based on the mean Australian cost of living.

20 Where tipping by customers is usual, the tips will be taken into account in finding whether the employee receives a living wage.

21 Where the employer provides food and shelter, the value is allowed in reduction of wages awarded.

These principles had been derived from cases decided 60 years ago or more, and naturally they cannot be applied today without some modification. Since then, the categories of industry encompassed by the arbitration system have been broadened, so that what had then been stated as general principles are not always appropriate for the areas of employment which have since been brought within the regulation of Federal awards. Thus, in the *Professional Engineers Case* (1961) 97 CAR 223; 1961 OILR Rep 175, which for some time was regarded as the classic work-value case, these have been given as the relevant considerations for wage fixation in that case: professional qualifications; experience; responsibility; management, supervision and co-ordination of effort; nature of work undertaken; conditions in remote and rugged areas; question of safety of persons, plant and structures; financial implications; lack of opportunity for private practice; promotional changes; mathematical capacity; technological change, and the need for continuing study: RE McGarvie, "Principle and Practice in Commonwealth Arbitration after Sixty Years" (1964) 1 *Federal Law Revue* 47 at 75.

In more recent years, and especially for manual workers, the *Metal Trades Work-Value Case* 121 CAR 587; 1967 AILR Rep 319; 23 IIB 6 has become the model for work value reviews of wages, despite the exorbitant length of the case and the futility of its results so far as they affected work value principles. The importance of the case, as it is reported, lies in the evidence and other material contained in the reasons of the several members of the Commission and bearing on work value considerations. The reasons of Gallagher J and Commissioner Winter include extensive summaries of the evidence and the inspections on particular jobs which can be useful guides for any investigation of work values, whether on a general basis or on the basis of a particular classification, although it is also fair to comment that the conclusions of these members give no guide as to the weight which they gave to what they had heard or seen. The wide ranging nature of the case makes it less than typical, and little by way of principle emerged from it, but it remains useful as illustrating what aspects of work are considered relevant in wage arbitrations. Moreover, each member of the Commission discussed the use of job evaluation approaches in wage proceedings.

Soon after the *Metal Trades Work-Value Case*, Senior Commissioner Taylor in *Re Vehicle Industry Award* (1968) 124 CAR 295 at 308 gave these as the relevant factors for those employees:

1 The qualifications necessary for the job.
2 The training period required.
3 Attributes required for the performance of the work.
4 Responsibility for the work, material and equipment, and for the safety of the plant and other employees.
5 Conditions under which the work is performed, such as heat, cold, dirt, wetness, noise, necessity to wear protective equipment, etc.
6 Quality of work attributable to and required of the employee.
7 Versatility and adaptability, eg to perform a multiplicity of functions.
8 Skill exercised.
9 Acquired knowledge of plant and processes.
10 Supervision over others or necessity to work without supervision.
11 Importance of the work to the overall operations of the plant.

Matters such as these will generally be the relevant considerations, but it would be misleading to suggest that what is relevant can ever be exhaustively stated in detail. The

question of relevance is to be determined in the light of the Commission's wage-fixing function; that function was stated by the senior commissioner in the last-mentioned case as being "to determine just and fair wage rates having regard to the work being performed and the general level of wage rates at the time of the fixation".

[173] **The valuing of work as the basis for wage fixation.** It has been consistently stated that the process of wage fixation in arbitration proceedings is essentially one of placing a value on the work in question, but that value is to be a "fair value", not necessarily the "value to the employer". The process of arbitration is one of deciding between the competing claims of employers and employees, but the decision will be influenced by the fact that rates decided upon will be prescribed only as the minimum rates (although in *Re Electrical Contractors' Federation Vic and Electrical Trades Union of Aust* 94 CAR 450; 1960 OILR Rep 100; 15 IIB 243 it was assumed that there was jurisdiction to deal with a claim that rates in an agreement should be also the maximum rates).

Since the arbitrator's concern is limited to the work falling within the scope of the classification in question and his award will apply to all persons doing such work, he will not be influenced by matters which are peculiar to particular employees: *Vehicle Builders Employees' Federation of Aust v General Motors-Holden Pty Ltd* (1942) 47 CAR 41 by statistics as to the quantity or value of the output of machines: *Amalgamated Engineering Union v Adams* (1924) 20 CAR 1134 or by the nature of the object or material being worked on: *Amalgamated Engineering Union v Broken Hill Pty Co Ltd* (4 September 1968) 1968 AILR Rep 373; 23 IIB 1505 although it will be otherwise where special skills are required for work being done by an identifiable group within the general award classification: *Re Carpenters and Joiners (ACT) Award* 107 CAR 633; 1964 AILR Rep 392; 19 IIB 944 or these factors place abnormal physical demands on the employees concerned.

Traditionally the arbitration tribunals have sought to maintain the principle that it will not be influenced by strikes in support of wage claims, but that has not always been practicable: often the outward expression of discontent has a justifiable cause: cf *Re Metal Trades Award; Re State Electricity Commission of Vic* (1964) 106 CAR 535 at 562-4; 1963 AILR Rep 343; *Re Theatrical Employees (Drive-in Theatres) Award* (24 January 1967) 1967 AILR Rep 39; *Metal Trades Work-Value Case* 121 CAR 587; 1967 AILR Rep 517; 23 IIB 6. It has also been the general view of the tribunals that award rates will not be determined with the deliberate intention of attracting labour to the particular industry or reducing labour turnover: *Re Railways Professional Officers Award* (1958) 89 CAR 40; *Re Metal Trades Award; Re State Electricity Commission of Vic* 106 CAR 535 at 564-6; 1963 AILR Rep 343 but this factor, like that of industrial discontent, is usually only an aspect of the larger question of wage relativities, which is discussed in the succeeding note.

The process of valuing the work also involves questions as to the relevance of the rates actually being paid by employers, of the rates previously awarded by the Arbitration Commission itself, and of the financial position of the employers concerned. These also are discussed below.

[174] **Wage relativities.** The relationship of the work in question to other kinds of work is at the heart of the process of valuing work in arbitration proceedings. The value should be fixed for the work "either on the basis of detailed comparison with other work or on the basis of the arbitrator's yardstick of work in industry generally . . . Though the desirability of increasing social standards is an underlying consideration . . . the paramount consideration in fixing [wages] in particular industries by individual members of the Commission is that of fair relativity, and . . . increased [wages] in a particular industry made with the object of improving social standards of employees are not justified unless they are in accordance with fair relativity": *Re Transport Workers (General) Award* 111 CAR 553 at 573; 1965 AILR Rep 394; 20 IIB 1082. This overriding principle has become known as the principle of "comparative wage justice", and it has been at least implicit in wage determinations from the earliest arbitration decisions; see, for examples, *Meat Industry Case* (1925) 22 CAR 794 at 800-4; *Meat Industry Case* (1911) 46 CAR 260.

Where there is no award rate for a comparable calling, the Commission will accept as a starting point the existing rates paid by the employer if it appears that those rates were fair at the time they were established: *Commonwealth Public Service Case* (1955) 83 CAR 64; 11 IIB 1. In that case, see the discussion of the comparability of airline pilots, professional and administrative public servants, and craftsmen.

Account must be taken of the broad relationships of one class to another, and of community standards: *Professional Engineers Case No 2* (1962) 100 CAR 158 at 219 but the tribunals are concerned with the standards of the Australian community, and will

not concern themselves with international comparison of wages: *Re Airline Pilots Agreement* (1957) 88 CAR 410; 12 IIB 789; *Re Airline Pilots Agreement* (1959) 91 CAR 590. The claim is sometimes made that the Commission should take account of the repercussive effects of its awards on the wages of other groups; while this may be an aspect of the public interest to which regard should be had, the Commission's main function is the fixation of fair and just wage levels for the group of employees before it: *Professional Engineers Case No 2* (1962) 100 CAR 158 at 226.

Rates in one award may be fixed by reference to those in another award, so that the two may properly be regarded as "counterpart" awards, but it is not the practice to prescribe in one award that wage rates are to be ascertained by reference to another: *Gas Industry Case* (1942) 48 CAR 139 at 167.

The behaviour of the employer himself may provide evidence that existing rates are less than fair wages for the work: if he agrees to increase the rates for one group of his employees, by reason of their relativity with employees of another employer, that may provide strong ground for extending the recognition of relativity to other groups: *Re Railways Metal Trades Grades Award* 101 CAR 208; 1962 AILR Reps 207, 274; *Re Metal Trades Award; Re Hydro-Electric Commission of Tas* 101 CAR 646 at 652; 1962 AILR Rep 289. Similarly promotion of employees to a higher paid classification, although there is no change of work may show that award rates are inadequate: *Re Metal Trades Award; Re State Electricity Commission of Vic* 106 CAR 535, at p 590; 1964 AILR Rep 161.

Sometimes cross-comparison will have to be made: an award being made for one group of employees in the service of one employer will have to be fitted in with the existing award structure for other employees of the same employer, but regard must be had also to corresponding salaries paid by other employers. In the case of the professional employee, earnings by persons of the same profession in private practice are scarcely relevant: *Re Repatriation Department Medical Officers Determination* (1956) 84 CAR 57; *Re Repatriation Department Medical Officers Determination* (1960) 96 CAR 673; 15 IIB 1092.

[175] **Relevance of rates conceded by employers.** What weight should a tribunal give to a wage rate conceded by an employer to his employees outside the sanction of an award? The tribunals are not consistent in their answers to this question.

The matter may arise in several ways: it may be that an award is being made for the first time in an industry, and the current rates are offered as being proper for incorporation in the award; an earlier award, in which rates have been incorporated with the employer's consent, may be put forward as establishing proper rates; or, rates which are being paid by an employer, over and above existing award rates, either as a voluntary concession or as a result of some threat of economic force by the union, may be claimed as being proper rates to be awarded.

In the *Commonwealth Public Service Case* (1955) 83 CAR 64 the Commonwealth Arbitration Court said that, where there was no prior award, the rates currently being paid by the employer would be accepted as the basis for the rates to be awarded if it appeared that the existing rates were at the time fair. In so far as this requires a prior determination of what are fair rates, this statement of principle seems to beg the issue. In other cases it has been said that the apparent value of the work may be determined by looking at what "reputable" employers are prepared to pay: *Harvester Case* (1907) 2 CAR 1; *Printing Industry (Commercial) Case* (1947) 59 CAR 278 or what is being paid by "responsible" employers: *Re Gas Industry Award* 107 CAR 344 at 349; 1964 AILR Rep 284, but the cases do not show what criteria are used to single out "reputable" or "responsible" employers from the others; the *Harvester Case* and the *Gas Industry Case* suggest that government authorities are *ipso facto* in that category, but as will appear later the Commission, in other cases, has come to recognize that governments, as employers, may sometimes need the sanction of an award to bring the rates they are paying into line with what have come to be accepted as fair, prevailing rates. In *Re Professional Scientists Award* 1964 AILR Rep 210; 19 IIB 834 Commissioner Portus was prepared to accept as the basis of the award then being made, without further inquiry as to work value, the rates which had been fixed by agreement for the vast majority of the employees within the scope of the new award. This suggests that the test should be the extent to which the union in the circumstances of the particular case accepts current rates as being proper minimum rates.

The same sort of problem, but in an aggravated form, appears when the Commission is faced with payment of wages in excess of the award rates. The tribunals have never denied that employees are free to bargain for more than the minimum rate: *Merchant Service Guild Case* (1928) 27 CAR 482 at 494-5 per Dethridge CJ and they have acknowledged that general movements in wages, even in non-related industries, are a relevant consideration: *Federated Engine Drivers and Firemen's Association of A'asia v Adelaide Brick Co Ltd* (1942) 46 CAR 560; *Aust Builders Labourers Federation v*

Cockram (1942) 47 CAR 567 but individual cases of payment of more than the rate awarded create a dilemma for the tribunal. The rates having been awarded by an industrial tribunal must be taken to have been just and reasonable at the time they were awarded and, to a degree, the principle is that they will not be varied unless there is shown to have been a change which makes it proper for the tribunal to do so, but the amount which is being paid over and above the award rate may be paid in consideration of some factor which a tribunal would not take into account. Hence, rates which have been reached by agreement or have otherwise been conceded by employers are not conclusive on the question of what are proper rates to be awarded as minimum rates, for it is not generally known what factors have influenced the determination of the agreed or conceded rates: *Re Engine Drivers and Firemen (SA) Award* 101 CAR 739; 1963 AILR Rep 2 although such rates may be used as indicators. And yet it must be recognized that the payment of different rates to different employees doing the same work in the same plant, or in different but competing plants, is neither fair nor conducive to good industrial relations: *Re Engine Drivers and Firemen (General) Award* (1965) 112 CAR 59, at 61; 20 IIB 1474.

The more widespread the incidence of over-award payments, the more weight such payments attract in arbitration proceedings: *Re Railways Metal Trades Grades Award* 101 CAR 208; 1962 AILR Rep 207; 17 IIB 852; *Re Metal Trades Award; Re Hydro-Electric Commission of Tas* 101 CAR 646 at 652; 1962 AILR Rep 289; *Re Gas Industry Award* 107 CAR 345 at 349-351; 1964 AILR Rep 284. The fact that such rates have been reached by agreement rather than by arbitration, does not destroy the fact that they exist: *Re Metal Trades Award; Re State Electricity Commission, Vic* 106 CAR 535 at 571; 1963 AILR Rep 343, and that they may have been achieved by a certain amount of duress does not affect their relevance for this purpose: *Re Aircraft Industry Award; Re Commonwealth Aircraft Corporation Pty Ltd* 105 CAR 6 at 13; 1963 AILR Rep 333.

On several occasions, the Commission has had to deal with a claim for higher margins in an industry where there has been a standard rate of over-award payments virtually throughout the whole of that industry, and it has awarded increased margins with the express intention that they should, *pro tanto,* absorb the over-award payments. In other words, the conceded rates were accepted as the basis for the award rates, but the payment in excess of the award was to be reduced by the amount of the increase in the award rate: *Re Storemen and Packers (Wool Stores) Award* (1960) 95 CAR 19 at 20-5; *Re Storemen and Packers (Wool Stores) Award* (1961) 97 CAR 770; 1961 OILR Rep 199; 16 IIB 681, affd (1961) 98 CAR 159; 1961 AILR Rep 242; 16 IIB 863; *Re Wool and Basil Workers Award* (1962) 101 CAR 42 at 90-1; 1961 AILR Rep 319; 1962 AILR Rep 262; 17 IIB 1235; *Re Storemen and Packers (Wool Stores) Award* 104 CAR 557; AILR Rep 324. Such attempts to enforce absorption of award increases in existing over-award payments have not always succeeded: cf *Metal Trades Work-Value Case* 1968 discussed in note [169], and for a much earlier example, see *Meat Industry Case* (1925) 22 CAR 794 at 802-3.

[176] Weight to be given to previous fixations by the Commission. As a matter of principle, a wage rate, once determined by the Commission, should be regarded as being just and reasonable at the time it was made, and as continuing to be just and reasonable, at least for the period for which the award was made, unless there is shown to be some change making the rate no longer just and reasonable; similarly, on a new dispute arising, the tribunal should approach the question *de novo,* and should determine the question of what are just and reasonable rates in the circumstances as they then exist. However, the distinction between the making of a new award, and the variation of an old award, has become much blurred, and moreover it is, more often than not, convenient for the parties as well as the Commission to argue and decide the question of what are now just and reasonable rates on the basis that the old rates were just and reasonable when they were fixed, and that they should be continued subject only to such adjustments as are called for by changes in the relevant factors. Even if the arbitrator is prepared to adopt the approach of making a completely new assessment, on a thorough review of the industry concerned, it will be difficult for him to dismiss from his mind altogether the consideration of existing award rates, for they will be part of the circumstances in which he has to make his assessment.

The statements of the principles on which the tribunals purport to act reflect to some extent this ambivalence of approach. In the *Merchant Service Guild Case* (1928) 27 CAR 482 at 494 Dethridge CJ had said "The Court will bear in mind that in the past certain margins have been allowed, but those previous margins will not be accepted as presumptively proper standards in present or future circumstances." In a later *Merchant Service Guild Case* (1942) 48 CAR 577 at 586 Kelly J had adopted this statement of principle, but had added that this is not to say that the applicant for a different margin from that which up to the time of the application prevailed under some award of the

Court has not an onus resting on him to show that some change is called for. In this sense the prima facie sufficiency of a pre-existing margin must necessarily be a starting point for the approach of re-assessment". Five years later, in the *Printing Industry (Commercial Case* (1947) 59 CAR 278 at 287, his Honour expressed his views thus:

(a) It is on the applicant to satisfy the Court that a material change in circumstances occurring since the making of the award has rendered the rates prescribed as minima no longer just, as such.
(b) The standard of justice must be the true value today of the work for which the rates are to be paid as minima.
(c) The true value is not to be ascertained by reference to high wages being paid on account of accidental and temporary conditions connected with a shortage of labour.
(d) The true value is not to be ascertained by reference to variations in the purchasing price of money since the award was made.
(e) The assessment of the true value must have regard to comparisons of minimum rates payable for work in comparable industries or comparable occupations.

This statement was adopted by the Arbitration Court in the *Metal Trades Margins Case* (1954) 80 CAR 3 but a more flexible approach was given in the 1959 *Metal Trades Margins Case* 92 CAR 793; 14 IIB 982A: "We are of the view that the history of marginal fixation in a particular award or industry will almost certainly be of value when margins are under review in that award or industry. We do not think, however, that in this jurisdiction the past should always control the future and we believe that our function under the Act would be impeded if it were always allowed to do so". However, this statement must be seen in the light of its context: the Commission was dealing with a claim that margins should bear a fixed relationship to the basic wage; it was dealing with claims based on overall economic considerations and not with relative work values. The only course available was to take relativities as they existed and adjust them in the light of the relevant considerations.

Notwithstanding what was said in the passage just quoted, it was clear that the Commission expected the more usual approach to be that the prior fixation was just and reasonable at the time of making, and to make appropriate adjustments for intervening changes. In speaking of the proper treatment to be accorded price movements, the Commission said: "Whenever a margin is fixed, it is fixed in current money terms and if no account is taken of the decreased purchasing power of money since the margin was last assessed, then the fixation would not be a real one".

Several subsequent cases open up another way of lessening the weight to be attributed to an earlier fixation of wage rates. In *Re Seamen Award* (1960) 95 CAR 148 Foster J was dealing with an application for review of award provisions which had been made only a few months earlier: "The applicant who seeks the change must justify each and every part of it . . . . It, of course, must be shown that there are new facts not known to the award-maker and/or that new conditions and considerations not contemplated have arisen and that these call for a reconsideration of the dispute. There is a strong presumption that the award which in law settled the dispute is a considered final solution only to be overthrown if the evidence warrants it, and the presentation of that evidence must obviously rest on the applicant". While this was a strong statement, it also must be read in its context: as already mentioned, the award under attack had been made only a short time previously, and the attack had been supported only by submissions and argument, without any supporting evidence or verification; moreover, his Honour was careful to add that, if experience showed any injustice or anomaly he would hasten to correct it.

What is clear from this case is that, even during the period of the award, it is no more than a "strong presumption" that the award is a "final solution" of the dispute; the presumption will be less compelling when the award has expired and a new dispute has arisen requiring a fresh settlement. This indeed was the attitude expressed by a full bench of the Commission in *Re Ship Painters and Dockers Award* 94 CAR 579 at 611-2; 1960 OILR Reps 151, 154, in which it denied that "the onus lies 'as a matter of industrial jurisprudential principle' upon a party seeking an alteration of a pre-existing industrial prescription". A Commissioner may properly conclude that his predecessor has taken too humble or too exalted a view of the facts and circumstances; accordingly, he may, in equity and good conscience, prescribe departures from the work of any number of predecessors. However, it is to be noted that, in reaching their decision in that case, the members of the Commission paid due regard to existing relativities, the reasons for their fixation and the facts and circumstances of the case. For further discussion of the point, see *Re Ship Painters and Dockers Award* (1960) 95 CAR 896; *Re Builders Labourers (Construction on Site) Award* 105 CAR 794 at 801; 1964 AILR Rep 44; *Re CSR Co-Dow (Vic) Award* 106 CAR 346, at 353; 1964 AILR Rep 106. The view that each arbitrator is free to make his own assessment of the merits of the case before him leads