THE FAILURE OF THE LAW TO IMPOSE ADEQUATE
DUTIES AND RESPONSIBILITIES UPON COMPANY MANAGEMENT
TO PROTECT THE INTERESTS OF EMPLOYEES.

James O'Donovan

Thesis submitted for the degree of
Doctor of Philosophy
in the
Australian National University
Canberra
July, 1975
This thesis is my own original work.

[Signature]

[Name]
ACKNOWLEDGEMENTS

I am very greatly indebted to Mr D. Smith and Mr C.J.H. Thomson for their support and advice in the supervision of this thesis.

I am also very grateful to Professor Geoffrey Sawer for his encouragement and suggestions. A special debt of gratitude is owed to Mrs Heather Maxwell for her unfailing patience, perseverance and efficiency in producing the typescript.

James O'Donovan
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This thesis has five parts: general introduction, current law, argument for reform, proposals, and constitutional avenues of reform.

PART 1

Chapter 1

This is the only chapter in this part. It explains the writer's general approach and describes the terms used in the thesis topic. In particular, it states that only employees' interests in recognition of their services, job security, responsibility, advancement and 'reasonable' supervision will be considered. These interests were selected basically because job satisfaction surveys suggest that they are important to employees.

PART II

This part examines how the law recognises and protects the interests selected.

Chapter 2

Here the writer traces the development of the director's duty to act bona fide in the interests of the company with particular reference to cases involving employees' interests. Most of these cases involve payments or proposed payments from company funds to employees in recognition of services. It appears that the extent of corporate philanthropy permitted by the law depends upon the predicament of the company and the generosity of the shareholders.
Chapter 3

This chapter also deals with recognition of service. It points out the deficiencies of the law governing the rights of an employed inventor to the benefits of his inventions.

Chapter 4

Long service leave is discussed in this chapter. Here again, recognition of service is involved. Defects appear in the long service leave provisions themselves and also in the approach of the tribunals charged with their interpretation. The factors which may disqualify an employee from becoming entitled to long service leave are discussed in some detail.

Chapter 5

This is the first of four chapters dealing with the current law of job security. It examines the law governing dismissal with notice, summary dismissal, and unlawful dismissal. The informality of dismissal procedures and the grounds on which a dismissal can be justified are criticised.

Chapter 6

The peculiar rules relating to the effect of liquidation, receivership and take-overs on the contract of employment are analysed. The writer points out that employees not conversant with these technical rules may forfeit their job without knowing that they have been dismissed.

Chapter 7

Here the writer examines the remedies available to employees unjustly, wrongfully or unlawfully dismissed. It is pointed out that the common law remedies of an action for damages, quantum meruit,
a declaration or an injunction promise little reward for an employee wrongfully dismissed and none whatsoever for an employee who has been lawfully, although unjustly, discharged. In some jurisdictions, reinstatement is now available. Indeed, in New South Wales and South Australia this remedy is well established. On the other hand, it appears that federal tribunals may not order reinstatement of a dismissed employee.

Where the employee is dismissed in breach of the 'victimisation provisions', he is entitled to reinstatement but this may not be an adequate remedy in all cases.

Chapter 8

This chapter deals with the topical and developing area of redundancy law. The writer examines the role industrial tribunals have played in resolving redundancy disputes and traces the timorous approach of many tribunals to doubts about jurisdiction.

Chapter 9

This examines the law relevant to employees' interests in promotion, advancement and 'reasonable supervision'. In general, the law has not begun to recognise these interests. In fact, industrial tribunals have expressly refused to interfere with management's right to deal with these issues as it thinks fit.

Chapter 10

Here the writer discusses the legal machinery available for the settlement of plant-level disputes. This issue is important as most of the interests studied in this thesis arise at the work place. The writer concludes that, while the available machinery might be adequate, there is a need for local bodies better-equipped to handle problems arising at plant level.
PART III

Chapter 11

Chapter 11 looks at the history and theory behind the law. By examining this issue at this point, the writer is able to place the current law in its historical perspective. Three main themes emerge from this analysis: paramountcy of shareholder interests, freedom of contract and respect for property rights. The modern significance of each of these is considered in the light of the changes in the scope of economic organization and company management.

Chapter 12

The main purpose of this chapter is to indicate that reform is necessary. Thus, the writer looks at the dimensions and causes of plant-level problems.

Chapter 13

Here the prospects for reform are examined. In particular, the critical issue of whether reform would disturb the market mechanism is discussed. The writer concedes that many of the necessary reforms would place a substantial restraint on managerial freedom and would possibly be more than some companies could afford. On the other hand, this traditional argument against reform is questioned and suggestions are made for reducing the impact of the reform measures.

Chapter 14

Here the writer explains why the law should implement reform. The practical answer is that unless the law plays a role, the measures needed will not be introduced. The theoretical justification for advocating a more active role for the law in industrial relations lies in the writings of Roscoe Pound.
PART IV

In this division the writer outlines proposals for reform.

Chapter 15

This recommends a redefinition of the director's duty to act *bona fide* in the interests of the company so that directors would be allowed, but not obliged, to take employees' interests into account in running the company, whatever its predicament.

Chapter 16

This suggests measures which would give the employed inventor recognition and reward for his creative efforts.

Chapter 17

This chapter considers certain amendments to Australian long service leave provisions. In particular, it proposes measures to overcome problems caused by transmission of a business and interstate service.

Chapter 18

Reforms relating to dismissal procedure, the type of dismissals the law will sustain, onus of proof and remedies are suggested in this chapter. The writer draws upon a great deal of overseas material to support his recommendations.

Chapter 19

This chapter examines reform of redundancy law under three major headings: criteria for selection, redundancy procedures, and the assistance and compensation provided for retrenched workers. Here again, overseas experience with these issues is discussed in detail.
Chapter 20

Here the writer discusses ways of enhancing employees' responsibility in and over their work through workers' participation in management. The West German scheme of co-determination is considered at length and the lessons to be learned from this model are analysed. Finally, the writer discusses the local obstacles to a co-determination scheme and suggests what can be done to overcome these obstacles. The writer's overall conclusion is that co-determination could be a useful way of satisfying workers' interests in responsibility but he concedes that much remains to be done before this measure would be a viable proposition in the present industrial context.

Chapter 21

Proposals designed to protect employees' interests in advancement and reasonable supervision are discussed in this chapter.

PART V

This part deals with constitutional avenues for reform.

Chapter 22

The writer briefly describes the potential of the 'corporations power'.

Chapter 23

This contains a short analysis of the limits inherent in the industrial power. It also suggests a way in which reinstatement jurisdiction could be legitimately exercised in the federal sphere.

Chapter 24

Here the writer examines the scope of the external affairs power and the trade and commerce power and points out that these placita
could be used to implement many of the proposals outlined in Part IV. In addition, the writer briefly analyses the potential of the taxation power and the patents power.

In the Conclusion the writer submits that the thesis is established and attempts to explain briefly the reasons for the law's failure to impose adequate duties and responsibilities upon company management for the protection of employees' interests.

Volume 2 contains five appendices.

Appendix 1 is a brief survey of important job satisfaction studies. It supports the proposition that the interests selected in Chapter 1 are important to employees.

Appendix 2 contains a report of the writer's mail questionnaire which surveyed certain aspects of the employer-employee relationship in 350 large companies operating in Australia.

A copy of the writer's questionnaire appears in Appendix 3.

In Appendix 4, the writer examines certain aspects of superannuation law in great detail. Particular attention is directed to protecting the employees' rights to receive the benefits promised by their employers' superannuation scheme. The writer also considers the impact of the proposed national superannuation scheme upon occupation superannuation.

The primary purpose of Appendix 5 is to support the submissions advanced in Chapter 22 which deals with the potential of the 'corporations power'.
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Lloyd's Rep. Lloyd's List Law Reports.
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M.L.R. Modern Law Review.
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N.S.W. New South Wales.
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P.C. Privy Council.
Pet. Peters' United States Supreme Court Reports.
Q.B. Queen's Bench.
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St. R. Qd. State Reports, Queensland.
Syd. L.R. Sydney Law Review.
Tas. Tasmania.
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PART 1
CHAPTER 1  GENERAL INTRODUCTION

1. Introduction

In a period of sharp down-turn in the labour market, when local and international conditions make for uncertainty in future labour demand, when claims that workers be given a say in decisions that affect their working lives are becoming more widespread and insistent, when 6.3 million working days are lost in one year through strikes, when absenteeism costs Australian industry an estimated 1,000 million dollars a year in lost production, it is timely to consider the role the law has played, and could play, in the protection of employees' interests. Are the legal foundations on which our forefathers built still relevant to our modern industrial society? Do the changes in the composition of the work force, in the expectations and aspirations of employees, in the scope of industrial organization and in social norms demand revision of the law's approach to the employment relationship? These fundamental issues lie at the heart of this thesis.

Traditionally, protection of employees' interests is studied from the industrial law end of the legal spectrum. This thesis approaches the subject initially from a company law standpoint. With this perspective, the writer hopes to present a fresh insight into certain areas of law.

To keep this thesis within reasonable bounds, it was necessary to concentrate upon certain interests of company employees, namely: recognition, job security, responsibility, advancement and 'reasonable' supervision. This strategy will be explained below.

2. Why Company Employees?

The inevitable query is: why focus upon company employees?
interests? Is not this, after all, only part of the whole picture? Why should company employees be treated any differently from other workers?

It is true that a significant proportion of employees are engaged in the public sector. But there, some of the interests to be considered are already adequately protected. This will be seen, for example, in the statutory provisions which regulate dismissal, retrenchment and promotion in the public service. Further, the public superannuation schemes have avoided some of the defects which appear in the private schemes. Apart from this formal protection, there is the vague, but nevertheless significant, factor that the Australian Public Service has traditionally been a responsible employer.

It is more difficult to justify the exclusion of those who work for small firms or partnerships or a sole trader. The main reason is that, today, companies are the big employers. Reforms directed at companies, therefore, will affect the major proportion of the work force in the private sector. Moreover, in companies, the potential for reform is greater than in other business forms. Companies exist and enjoy limited liability by virtue of what is essentially a State privilege. This gives the State a powerful instrument for regulating the company's affairs which is simply not available for other forms of private enterprise. The State can, of course, regulate partnerships and sole traders but there its weapons are not as potent as the threat of withholding the twin privileges of incorporation and limited liability.

When the scope of industrial and economic organization was small there was less need to question the basic assumptions of the law regulating the employment relationship. With the emergence of the large corporation, the employment equation has changed. The size and growth of companies, more than anything else, have destroyed the presumed equality of bargaining power between an employer and his individual
Where the employer is a partnership or a sole trader, the owners are more often involved in the active management of the business; both the owners and the employees invest their labour in the enterprise. Shareholding, on the other hand, commonly gives rise to a form of passive ownership involving a minimal investment of labour in the enterprise and a minimal amount of personal responsibility towards the company's employees. In these circumstances, it is interesting to compare the legal protection afforded employees' interests with that provided for shareholders' interests, and to consider the relative merits of these two groups' claims to this protection. This is an important issue, but it is only relevant to company employees.

The Concrete Pipes Case has provoked much interest and a keen controversy about the scope of the 'corporations power'. As yet, few have considered whether this placitum would enable Federal Parliament to regulate conditions of employment in the corporations described. If it does have such a potential certain restrictions inherent in the 'industrial power' might be avoided. Industrial law (at least in relation to the corporations described) would no longer be hamstrung. But any legal reforms could only relate to companies of a certain description.

Further, in some Western European countries the distinction between company law and labour law has become slightly blurred by the emergence of 'enterprise law'. West Germany is probably the classic example. There, a system of worker participation in management is integrated with company structure to allow employees representation in vital organs of the company. Should this scheme be adopted in Great Britain it might become more palatable in Australia. Such a development would, of course, have a direct impact upon company law. In addition, it would make the position of company employees distinct

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from that of their colleagues in the private sector.

Finally, the exclusion of employees in the public sector and in small firms and partnerships can also be justified by restrictions of time and space. The decision to exclude these employees was deliberate and, indeed, necessary. It imposes a somewhat artificial fetter upon the scope of the inquiry but without this limit the task would be unwieldy. In any event, the writer's approach does have some attractions which are not apparent at first glance. It allows sufficient latitude to consider a broad range of legal issues pertinent to a substantial section of the work force. Only when these issues are integrated is it possible to assess whether the law adequately protects these employees' interests.

This thesis examines shortcomings and defects in the law, the latitude given to unscrupulous employers, what happens and what might happen to employees whose interests are not safeguarded. In essence, it looks at the negative side of the law. This approach produces a minor distortion of the overall effect of the law but it can be justified by the nature of the topic.

3. General Comments

Two further comments are necessary. This thesis is written from a background of law, not industrial relations. These disciplines are by no means co-terminous or co-extensive. Indeed, some would argue that they are, at time, incompatible! By concentrating on legal solutions, this thesis neglects social, economic or political solutions which may be equally, if not more, appropriate. On the other hand, the law may not always be able to stand on the sideline of industrial relations. When it is called into the fray, it must be equal to the task. Moreover, in the writer's view the non-legal forces will only achieve their potential for reform within a legal framework providing certain, reliable and comprehensive protection for employees' interests.
As will soon be apparent, it was necessary to step across the boundary between law and the social sciences to ascertain what interests are important to employees. Here again the writer was forced to tread warily. Nevertheless, this thesis attempts to present a balanced view of the relevant research material and to be conservative in its deductions therefrom.

4. A Note on Terms

At this point it will be convenient to describe the principal terms in the thesis topic.

Firstly, 'the law' shall be taken to include case law, legislation and award provisions. There are sanctions for breaches of awards, and awards do make rules which regulate conduct. Therefore it seems legitimate, for present purposes, to regard award provisions as 'law'.

The phrase 'to impose' will be used primarily in the sense of placing an obligation upon company management.

'Duties and responsibilities' in this paper shall simply mean 'legal duties and responsibilities'.

The term 'company management' presents a greater difficulty. Management involves two primary functions: policy formulation and administration. In this thesis, it will be assumed that the board of directors and controlling shareholders play a role in policy formulation. Thus, these persons fall within the category 'company management'.

A different group may carry out the administration of company policy. It would probably not be going too far to describe this group as all those who have executive authority in the organization. Persons of foreman rank and above would on this basis form part of management.

These two units then, comprise company management.

The expression 'employee' when used herein shall bear the
meaning ascribed to this term by the common law. In effect, this means that workers of all ranks are employees provided they are engaged under a contract of service. To some extent this description begs the question. But the problems associated with identifying the employer-employee relationship are well-known; they need not detain us here. Several industrial statutes have wrestled with these problems but as yet they have not evolved a comprehensive definition of 'employee'. In some cases they are merely crude attempts to restate the common law. Even when the statutory definitions go further, the context limits their general relevance.

There is one small problem with the definition of 'employee' adopted above: persons may fall within the category 'company management' and still be 'employees'. In other words, the groups overlap. This is, to some extent, inevitable. If the categories were defined in mutually exclusive terms many managerial employees would be excluded from the scope of the thesis. This is a high price to pay for simplicity. It would seem preferable to persist with the descriptions mentioned earlier despite the minor conceptual difficulty.

The term 'interests' requires a more detailed analysis. It could refer to those matters which are not yet legally secured but which are the subject of negotiation between employees and management. But this is not the meaning used herein. In this thesis, 'interests' will be used to describe matters of concern to employees. This is clearly a broad compass and some limitation is necessary, but where should the line be drawn? Perhaps the most rational course to adopt is to examine those 'interests' which employees themselves consider important.

Job satisfaction surveys suggest that recognition, job security, responsibility, 'reasonable and decent' supervision, and advancement are prominent features of a job. There is no definitive catalogue of factors which affect job satisfaction. Nevertheless, the
'interests' selected keep recurring in discussions of this issue.

This is not to say that all employees seek all these factors at any one time. On the contrary, it seems that different employees are satisfied by different factors. Thus, on the slender evidence available, women may be primarily interested in job security and supervision while men may tend to focus more upon responsibility and opportunities for advancement. Another variable is the age and status of the employee. One survey suggested that younger, better-educated employees aspire to promotion and interesting work whereas older tradesmen are more interested in job security. Again, the personal characteristics of the employee and even the state of the labour market might influence job satisfaction. One cannot generalise on this topic. Perhaps the most that can be inferred from the available evidence is that all employees are interested in one or more of the factors listed.

Statistics showing the causes of industrial disputes provide another clue to the scope of employees' interests. These figures suggest that at least some of the selected factors are important to employees. Let us now consider how the law fosters and protects employees' interests. Only the law up to 1 October 1974 will be examined.
PART 11

CURRENT LAW
1. Introduction

Recognition ranks highly among employees' interests. In one sense, this desire for approval relates to the actual work performed by the employee. On a broader view, it concerns the employee's overall contribution to the enterprise.

The following chapters in this Section explore ways of recognising employees' efforts through law. Chapter 2 discusses the very basic issue of recognising an employee's existence in the company. True, this is not recognition of employees' services. It is much more fundamental: how can the law purport to foster or protect employees' interests in recognition of their services if it ignores their existence?

In any event, the company law cases which raise this basic issue have almost invariably involved gratuitous payments or benefits to employees as a reward for their services. Chapter 3 analyses the law governing an employee's rights in inventions made during the course of his employment. Here, direct recognition of the employee's output is at stake. The fourth chapter examines the law regulating the provision of long service leave. This benefit rewards an employee for long service in an enterprise. It involves, therefore, some recognition (albeit general and remote) of an employee's contribution.

2. Is Company Management Obliged to Recognise Employees' Interests?

The speculation which occurred in commercial investment from the enactment of the Bubble Act until long after its repeal in 1825
impressed parliament and the courts with the need to protect investors from unscrupulous promotions and hazardous business ventures.

The following extract from the judgment of Lord Langdale M.R. in *Colman v. Eastern Counties Rly. Co.* reflects this protective policy:

A railway investment should not be considered a wild speculation, exposing those engaged in it to all sorts of risks, whether they intended it or not. Considering the vast property which is now invested in railways, and how easily it is transferable, perhaps one of the best things that could happen to them would be, that the investment should be of such a safe nature, that prudent persons might, without improper hazard, invest their monies in it.

Against this background it is perhaps not surprising that, when the director's duty to act *bona fide* in the interests of the company became established, company law was preoccupied with the interests of shareholders. While the duty to act *bona fide* is owed to the company, the law, in searching for natural persons who may be the beneficiaries, looks no further than the present and future shareholders of the company. Thus management is not legally obliged to recognise employees' interests. But does it have the power to take these interests into account?

3. **The Power to Recognise Employees' Interests**

   *(i) Section 19 (a), U.C.A.*

   Section 19 (a) of the Uniform Companies Act empowers a company to 'make donations for ... charitable purposes'. This power may not be excluded or modified by the memorandum or articles of association. The phrase 'charitable purposes' has acquired a definite legal meaning. It includes the relief of poverty and the advancement of education. Further, to be charitable, a purpose must have an element of public benefit. Clearly this technical legal meaning of 'charitable purposes' does not coincide with its popular connotation. Nevertheless, it appears that the phrase 'charitable purposes' in section 19 (a) would take on its special legal meaning.
Thus, a company has power to make donations towards employees' interests provided the purpose of the gift is charitable in the technical sense and the requisite public benefit element is established. This appears true whether the company's contribution is granted directly or through a trust.

The public benefit requirement presents a major obstacle to corporate generosity. Oppenheim v. Tobacco Securities Trust Co. Ltd is an example of the problems involved. There the House of Lords decided that an educational trust for the children of employees and ex-employees of the British Tobacco Company Ltd was not charitable because the class of beneficiaries could not be considered a section of the public: the connecting link between the members of the class was purely personal. The trust was, therefore, a private trust and, since it offended the rule against perpetuities, it was void.

Lord Simonds succinctly expressed the reasoning of the majority:

These words 'section of the community' have no special sanctity, but they conveniently indicate first, that the possible (I emphasize the word "possible") beneficiaries must not be numerically negligible, and secondly, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual.

As the number of employees involved in the class of beneficiaries exceeded 110,000, it was the relationship of the beneficiaries to the particular company which proved decisive.

Lord MacDermott dissented. He suggested a more flexible approach which took into account all the surrounding circumstances. On this basis His Lordship concluded that the public benefit requirement was satisfied.

After Oppenheim it appeared that trusts for the benefit of employees of a particular company would not be entitled to the advantages of a charitable trust. Dingle v. Turner demands a revision of this assessment. There, the House of Lords unanimously held that a trust to
apply the income from the investment of £10,000 'in paying pensions to poor employees' of a particular firm was a valid charitable trust. In so doing, Their Lordships granted trusts for the relief of poverty among employees of a particular company an exemption from the requirement of public benefit.

Oppenheim involved an educational trust, not a trust for the relief of poverty. Thus it might be argued that the Oppenheim principle has survived Dingle v. Turner. It is true that Dingle v. Turner did not overrule Oppenheim, but it did question its rationale. Lord Cross of Chelsea, with the concurrence of the other Lordships, expressed dissatisfaction with the distinction between a personal and an impersonal relationship with a particular entity. His Lordship thought that this was not a valid basis for defining a charitable trust.

Dingle v. Turner is not the first example of a trust upheld as a valid charitable gift despite the absence of a public benefit element. In Re Gosling a testamentary gift to establish a pension fund for 'old and worn-out clerks' of a banking firm was upheld as a valid charitable trust. Dingle v. Turner says nothing inconsistent with this.

Further, in some cases the public benefit requirement has been relaxed. Thus in Hall v. Derby Sanitary Authority a trust for persons following a particular trade or profession qualified as a charitable trust since it was for the benefit of a section of the community. Again, where the trust defines the class of beneficiaries by reference to a geographical area, the public benefit element is satisfied.

From the authorities, it appears that certain company donations towards employees' interests will be valid. Trusts or direct dispositions for the relief of poverty among the company's employees will be upheld. With trusts or direct contributions for other charitable purposes it may
be necessary to define the class of beneficiaries by reference to a geographical area or require that all the beneficiaries be members of a particular trade or industry. If either of these conditions is satisfied, it does not appear to matter that company employees are given preference over other members of the particular trade or profession or other residents of the particular district.  

(ii) **Section 19 (c) U.C.A. and the Third Schedule Powers**

In addition to the power conferred by section 19 (a), U.C.A., a company may have power to recognise employees' services through section 19 (c), U.C.A. or by virtue of an express clause in the company's constitution.

By section 19 (c) the powers set forth in the Third Schedule to the Uniform Companies Act are automatically incorporated unless these powers are expressly excluded or modified by the memorandum or articles of association of the company. This holds true whether the company was incorporated before or after the Uniform Companies Act came into force.

The Third Schedule powers are very broad. For example, clause 7 includes power to establish or support benefit schemes for employees and their dependants, to grant pensions and allowances and to subsidise insurance. Where the company establishes any of these schemes through trust machinery the question arises: is the trust charitable or non-charitable. If it is for a charitable purpose, and if it has the requisite public character, it will qualify for the privileges of a charitable trust. On the other hand, if it fails to satisfy either of these two requirements it may be void. Its chances of survival depend on two factors: certainty of objects and beneficiaries and compliance with the rule against perpetuities.

In some states non-charitable trusts for the benefit of employees are granted a statutory exemption from the rule against perpetuities.
perpetuities. When he introduced the New South Wales provision, the Honourable Mr L.O. Martin, Minister for Justice, explained:

Some years ago in England it was held that moneys in the hands of a company which had been transferred to a superannuation account to provide benefits for its employees on retirement became available for the benefit of the general creditors of the company on its liquidation owing to [the rule against perpetuities]. The Superannuation and Trust Funds (Validation) Act 1927, 17 & 18 Geo. V, c.41 was passed to remedy this position.

Section 382, U.C.A. provides the local remedy. The apparent purpose of this section is to ensure that certain trusts for the benefit of employees are independent of the company's life and beyond the reach of the company's creditors.

Section 382 defines 'fund or scheme' as including 'any provident, superannuation, sick, accident, assurance, unemployment, pension, co-operative benefit or other like fund, scheme, arrangement or provision'. The Full Court of the High Court considered this definition in Oesterlin v. Sands. A testator provided that, subject to the cessation of three life interests, the trustees of his will were empowered to apply any or all the income from a parcel of shares in a family company 'in the interests of the whole staff'. The trustees were also authorised to award the income to individuals from time to time. Unfortunately, the will provided only vague guidelines for the trustees to follow in applying the proceeds of the trust fund: the proportions for distribution were not specified; nor were the trustees directed as to what purposes were to benefit from the fund. As the power infringed the rule against perpetuities it could only be saved from extinction by the statutory exemption.

Notwithstanding the 'extensive' import of the word 'includes' in the definition clause, Mr Justice Kitto ruled that the words 'or other like fund, scheme, arrangement or provision' exclude by necessity any fund, scheme, arrangement or provision which is not 'like' those that are specifically described'. His Honour continued:
A fund or scheme, it seems to me, could not properly be described as "like" those to which the titles apply unless it be governed by rules or prescriptions which limit its purposes to benefiting or assisting an employee of the company in defined circumstances.

The High Court unanimously decided that the section did not save the trust because the trustee's powers to benefit the company employees were not limited to the type of fund or scheme protected by the section. Oesterlin v. Sands was an exceptional case. Most superannuation, profit-sharing or other benefit schemes for company employees define the duties of the trustees quite extensively. Thus these schemes would easily qualify for the statutory exemption.

South Australia and the Australian Capital Territory have a provision equivalent to section 382 of the Companies Act, 1971, as amended (N.S.W.). But in Queensland, Victoria, Western Australia and Tasmania some non-charitable trusts for the benefit of employees must comply with the rule against perpetuities. If the rule is infringed, the trust will be invalid and no benefits would be conferred upon employees. It is true that the duration of the trust can be confined to the perpetuity period but it is surely preferable for the trust to be independent of the company's life.

Leaving aside the difficulties encountered by non-charitable trusts created under the Third Schedule powers, it is interesting to speculate upon the general effect of these powers.

(iii) Nature and Effect of the Third Schedule Powers

Walsh expressed the view that the Third Schedule powers are incidental to the business of the company and are "not to be taken as an extension of the objects clause". He argued that the Third Schedule "merely prevents the possibility of it being argued that the powers mentioned cannot be incidental to the pursuit of the company's objects". He conceded that clause 1 in the Third Schedule clashes with this interpretation.
Clause 1 empowers a company to carry on any other business which may seem to the company capable of being conveniently carried on in connection with its business or calculated directly or indirectly to enhance the value of or render profitable any of the company's property or rights. It is difficult to see how a power couched in such broad language can be merely incidental to the company's principal objects. Much turns on the word 'conveniently' in clause 1. To Walsh, it seems to imply that the power to expand and diversify the company's business is confined to fields which are related to the company's principal business. But perhaps Walsh underestimates the import of the adverb.

H.A. Stephenson & Son Ltd v. Gillanders Arbuthnot & Co. suggests alternative constructions. There the High Court considered the effect of the following clause in the company's memorandum: 'To carry on any other business whether manufacturing or otherwise as the company may deem expedient'. This object is broadly similar to the first limb of clause 1 in the Third Schedule.

Mr Justice Starke decided that the correct way to interpret the clause was 'to confine the object to businesses allied to or connected with the particular businesses specified in the memorandum'. Mr Justice Dixon took a slightly different view. His Honour commented:

The true meaning of the object would appear to be to authorize the Company to carry on any business found to be connected or associated with any existing business of the Company. When it speaks of such business as the Company may deem expedient, it fails to supply in terms any criterion of expediency. The rest of the memorandum suggests that it does not simply mean such business as the Company may choose to carry on, but such business as it may consider convenient to carry on because they are connected with or arise out of the course of business adopted by the Company.

It appears that Walsh's interpretation of Clause 1 of the Third Schedule is somewhat narrower than that which Starke and Dixon JJ. would favour. While Walsh's construction apparently depends on the company's 'principal business', Mr Justice Starke construed a similar
clause by reference to the 'particular businesses specified in the memorandum', and Mr Justice Dixon referred to 'any existing business of the company'.

Thus, the word 'conveniently' does admit a wider meaning than Walsh would attribute to it. For example, it may be convenient for a company to diversify its business because a particular commercial opportunity is available at the time or because the financial resources of the company at a particular time warrant expansion into another business.

Mr Justice Menhennitt recently remarked that the power contained in clause 1 of the Third Schedule is 'not confined to matters that are incidental or conducive to other powers'. His Honour thought that if this was not the proper construction of clause 1, clause 26 of the Third Schedule would be redundant.

It is not entirely clear whether Menhennitt J., when he used the words 'incidental or conducive to other powers', was referring to other powers in the Third Schedule, or other powers, whether in the Third Schedule, the memorandum or the articles of association. The fact that the learned judge did not use the words 'the other powers' suggests that he was referring to powers wherever contained. On this construction, clause 1 has, indeed, acquired an independent status.

And so, it seems, have other powers in the Third Schedule. In Hawkesbury Development Corp. Ltd v. Landmark Finance Pty Ltd, Mr Justice Street concluded that the defendant company had power to issue a joint debenture over its assets and undertaking by virtue of clauses 12, 13, 25 and 26 of the Third Schedule even though this power was not contained in the company's objects clause.

Perhaps the true interpretation of the nature and effect of the Schedule powers is as follows: a company which has not excluded or modified the Third Schedule shall have all the powers listed therein.
whether or not they are incidental to the pursuit of the company's objects, unless, of course, the Schedule powers themselves are expressly limited by reference to these objects.

Only four of the Third Schedule powers are of direct relevance to employees' interests: clauses 7, 12, 22 and 10. The first three in this group are not limited by reference to the company's objects; they are, therefore, 'independent' powers. Clause 10 empowers a company to undertake certain building and construction ventures but only if these 'seem calculated directly or indirectly to advance the company's interests'. Yet this proviso does not rob clause 10 of an independent status for a transaction may advance the company's interests without necessarily being merely incidental to the pursuit of its objects.

Turning from the nature of the Third Schedule powers, let us consider for a moment the limits placed upon their exercise.

Professor Parsons suggests that 'an independent object' to make gifts" taken by way of an express provision in the memorandum must be exercised in the interests of the company as determined by reference to all its objects'. Similar reasoning could be applied to the Third Schedule powers. The logic of this theory seems to be quite sound but, as a guiding principle, it provides little assistance. If a company's objects clause includes power 'to carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or ancillary to any of the above businesses or the general business of the company', it is pointless to insist that the powers granted in the memorandum, as well as those inserted by section 19, be interpreted by reference to all the objects of the company. The objects of a company may be so widely phrased that it may not be clear whether or not the interests of the company will be served by actions in purported exercise of the powers in the Third Schedule. While the validity of Professor Parsons' theory...
is not questioned, its utility has been diminished by draftsmen conscious of the spectre of ultra vires.

4. Does the Board of Directors Have Power to Recognise Employees' Interests?

A company's power to recognise employees' services may spring from section 19 (a) U.C.A., the Third Schedule or a clause in the memorandum or articles of association. The company may then delegate this power to the board of directors through Article 73, Table A, U.C.A. or a similar provision. Article 73 allows the board to exercise all such powers of the company as are not, by the Act or by these regulations required to be exercised by the company in general meeting. Thus, company powers which are not reserved for the members in general meeting may be vested in and exercised by the directors. This is simply a recognition of the fact that a company can only act through directors. 57

The next section involves an analysis of cases in which management has either allocated company funds in recognition of employees' services or acted, in some other way, in response to employees' interests.

In some instances the directors acted on their own initiative; in others they sought the approval of the company in general meeting. For the present, this factual difference matters little. The key issue is: to what extent is corporate generosity towards employees permitted by law?

Corporate altruism is a fairly elastic concept. Its legal boundaries are, to a large extent, determined by the company's predicament.
5. Exercise of the Power to Recognise Employees' Interests

(i) Where the Company is a Going Concern

A viable company has a great deal of latitude in recognising employees' services and interests.

(a) Gratuities for Current Employees

One of the earliest decisions in this area was Hampson v. Price's Patent Candle Co. From the undivided profits of the company (some £1,500) the directors paid a gratuity to each worker in the company's factory who had served faithfully throughout the year. The bonus represented one week's wages for each factory worker.

The Master of the Rolls considered the payment a reasonable exercise of the powers of 'management and superintendence' conferred on the directors by section 90 of The Companies Clauses Consolidation Act 1845. The Court of Appeal regarded the bonus as an inducement to better efforts. It stressed that the amount allocated was intended to be shared only among those workmen who were currently employed by the company and concluded: 'It is quite plain that [the gratuity] was a bona fide payment, and a question of factory management'.

Hardy v. Wilson is the first reported decision in Australia dealing with the powers of directors to reward company officers. In a brief judgment, Mr Justice Molesworth ruled that directors may pay a deserving officer more than he is legally entitled provided the directors do not desire unduly to benefit the officer at the expense of the company. It seems a fair inference from this case that the law frowns upon excessive payments to company employees.

Re William Brooks & Co. Ltd and Companies Act confirms this suspicion. The case involved an application for compulsory winding up on the ground that the managing director of the company, with the concurrence or acquiescence of the board of directors, was deliberately limiting the dividends payable to shareholders without their approval.
so that large amounts of the company's profits and liquid funds could be allocated to an annual bonus scheme for the company's employees. Despite this excessive altruism, the company was an expanding, efficient and prosperous business.

Mr Justice Hardie had no hesitation in deciding that the managing director had breached his fiduciary duty to the company. On the facts this conclusion was perhaps inevitable as, at one stage, the annual bonus paid to each employee reached £700. The learned judge found that 'this particular bonus scheme, with the extravagant amounts paid away out of profits year by year, was in no sense essential for the success and prosperity of the business'. This reasoning appears to follow a stricter line than other decisions in this field. Yet later in his judgment, Hardie J. stated that the board of directors were entitled to meet all proper and reasonable expenses of the business before giving the shareholders the benefit of any increase in efficiency or profit-earning capacity of the company. Here, Mr Justice Hardie seems to be more consistent with the other authorities. Apparently Mr Justice Hardie did not regard the bonuses as essential to the prosperity of the business nor as a proper and reasonable commercial expense. In the result, he ordered that the company be compulsorily wound up on the grounds specified in sections 208 (2) and 208 (1)(f) of the Companies Act.

(b) Gratuities for Retired Employees

It will be recalled that the gratuitous payments upheld in Hampson and Hardy were made to current employees. Indeed, in Hampson, the Court of Appeal emphasised this point in their judgments. But corporate generosity towards retired servants was approved in a series of cases beginning with Henderson v. Bank of Australasia. There Mr Justice North considered a company resolution to pay a retired official in a banking company a substantial pension.
After hearing evidence of the practice of granting pensions among other companies of similar character, His Honour concluded: *what has been done has been done for the purpose of giving effect to the objects of the company, and promoting the prosperity of the company*. 71

No doubt the company's resolution approving the pension influenced his decision. Yet when he came to consider the amount of the benefit he decided that this was entirely a matter of internal management. 72

The next year, a more formal staff superannuation scheme established by a mutual life assurance society with the approval of the society's members was sanctioned in McElhone v. Australian Mutual Provident Society. 73 The Chief Justice in Equity held that the creation of the fund was a valid exercise of the general powers of management conferred on the board of directors by the Act which incorporated the society. In itself, this finding is not surprising. What is startling is the fact that the Chief Justice reached this conclusion in the face of a by-law of the society which declared that *the granting of pensions and gratuities to retiring officers is inconsistent with the principles and objects of the society, and shall in no case be allowed without the consent of a special general meeting*. Although the scheme was approved by the members in a ballot, there was no evidence that a special general meeting had been called.

Much of the argument centred on the excessiveness of the amount allocated. In fact, it was proposed to pay £25,000 into the fund. His Honour found that the society's contribution was not excessive in the circumstances. The small liability of each member of the society, the necessity of ensuring that the society retained its officers, and, in particular, the scope of a scheme of assisted assurance and superannuation available to the society's officers formerly, proved the decisive factors.

The final case in the trilogy, Cyclists' Touring Club v. Hopkinson, 74 approved the provision of a gratuitous annuity for a retired
servant of the club. Swinfen Eady J. upheld the annuity because he thought it furthered the best interests of the club by encouraging faithful service amongst the officers and servants. It made no difference that the employer was a club and not a trading company; the same principles were applied.

(c) Internal Management Rule

In matters of internal management the courts are reluctant to interfere. This judicial policy of non-intervention was seen in Hampson and Henderson. It reappeared in Miles v. Sydney Meat-Preserving Company (Ltd) where the High Court declined to restrain the management of a company which declared and pursued a policy of operating for the benefit of the pastoral industry generally.

There are two reasons why this case cannot be regarded as a relaxation of directors' fiduciary duties. The first is that the declared policy was approved by the majority of the shareholders, most of whom were engaged in the pastoral industry. In addition, the High Court found that without such a policy the company would not have been economically viable.

What is significant for present purposes is the following extract from the judgment of Griffith C.J.:

If the contention of the appellant is sound ... a trading company which thought fit to expend part of its income upon providing good and wholesome residences for its employés instead of distributing it in dividends could be enjoined from doing so. In my judgment, such matters are entirely matters of internal management with which the Court has no authority to interfere.

And again:

The law does not require the members of the company ... to maintain the character of the company as a soulless and bowellless thing, ... or forbid them to carry on its operations in a way which they think conducive to the best interests of the community as a whole, or a substantial part of it ... These passages, albeit obiter dicta, suggest that the interests of the company may encompass employés' interests and that management should
be given some latitude in recognising employees' services.

(ii) Where the Company is being Wound Up

Where the company is in the course of a winding up do the courts take a more restrictive view of corporate generosity towards employees? *Hutton v. West Cork Railway Company*[^80] raised this issue directly. The railway company sold its undertaking to another company for a price to be determined by arbitration. The Act authorising the transfer provided that, when the transfer was complete, the railway company was to be dissolved except for certain internal matters, in particular, the winding up of the business and the division of the purchase money among the debenture holders and shareholders.

Soon after the transaction was finalised, the general meeting resolved to approve payment of a £1,050 gratuity as terminal compensation to certain officials of the company, and a further £1,500 to the directors for past services. No remuneration had been paid to the directors since the inception of the company and there was no provision in the articles authorising such a payment.

The majority[^81] in the Court of Appeal promptly distinguished *Hampson*[^82] on the ground that there the company was a going concern. The West Cork Railway Company, on the other hand, had a 'special and limited business, and that business was to preside at its own funeral, to wind itself up and carry on its own internal affairs until it had distributed the purchase-money in the way the Act of Parliament prescribed'.[^83]

In the majority's view, the proposed payment was not reasonably incidental to the pursuit of the business of the company in its qualified form. Thus the resolution authorising the gratuities was invalid. Lord Justice Bowen stated in a colourful and much-quoted dictum: 'The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the
Like Hutton v. West Cork Railway Company, Re Lee, Behrens & Co. Ltd involved a winding up, albeit through a different procedure. There, a private company granted a pension to the widow of a former managing director five years after his death. The annuity was established in purported exercise of an express power which authorised directors to provide for the welfare of employees and their widows. Three years later, the company went into liquidation and the widow lodged a claim for the capitalised value of the pension. The liquidator rejected her claim.

Confirming the decision of the liquidator, Eve J. found, on the evidence, that the directors were preoccupied with providing for the applicant, and that they neglected to consider what, if any, benefit would accrue to the company. In a seminal statement, Eve J. observed:

But whether they be made under express or implied power, all such [welfare] grants involve an expenditure of the company's money, and that money can only be spent for purposes reasonably incidental to the carrying on of the company's business, and the validity of such grants is to be tested, as is shown in all the authorities, by the answers to three pertinent questions: (i.) Is the transaction reasonably incidental to the carrying on of the company’s business? (ii.) Is it a bona fide transaction? and (iii.) Is it done for the benefit and to promote the prosperity of the company?

This statement of general principles was applied in Ridge Securities Ltd v. Inland Revenue Commissioners and Re W. & M. Roith Ltd, and was expressly endorsed in Parke v. Daily News Ltd.

Notwithstanding this judicial approval, several learned writers believe that the 'pertinent questions' should only be applied in cases involving implied powers. This is the 'orthodox view' and it has some merit. In only one of the cases which have applied the tests did the company have express power to make the payment challenged. And none of the cases cited in support of his formulation were concerned with express powers. In fact, in Re Lee, Behrens & Co. Ltd...
itself, the express power in the company's articles related to the welfare of employees and their dependants; it did not cover managing directors. The issue could have been resolved on this ground alone. Thus Mr Justice Eve's dictum, so far as it relates to express powers, may be regarded as obiter dicta.  

(b) Rationale of Mr Justice Eve's Tests  
Bastin recently suggested that the tests still represent a general rule which is applicable to all gratuitous payments made by companies whether they be made under an express or implied power. He contends that the 'orthodox view' is the result of a failure to comprehend the true juridical basis of the statement. In his view, the theoretical foundation of Mr Justice Eve's dictum lies in the following passage from Lord Justice Bowen's judgment in Hutton v. West Cork Railway Company:

The money which is going to be spent is not the money of the majority. That is clear. It is the money of the company, and the majority want to spend it. What would be the natural limit of their power to do so? They can only spend money which is not theirs but the company's, if they are spending it for purposes reasonably incidental to the carrying on of the business of the company. That is the general doctrine. Bona fides cannot be the sole test ... The test must be what is reasonably incidental to, and within the reasonable scope of the carrying on, the business of the company.

Certainly dicta in Re Clifford Deceased lend support to Bastin's theory. Further, the majority judgment in Miles v. Sydney Meat-Preserving Company (Ltd) turned on the powers of the majority to bind the minority to a scheme designed to benefit the pastoral industry generally. And Vaughan Williams L.J. in Kaye's Case thought that a payment could be challenged on the ground that it was ultra vires the majority of shareholders. Indeed, His Lordship believed that Lord Justice Bowen's statement in Hutton's Case embodied this principle. Parke v. Daily News Ltd may also be cited as inferential support for Bastin's thesis.
In essence, Bastin argues that the tests relate to 'the making of the payment' rather than 'the power to make the payment'. In other words, Mr Justice Eve's requirements are conditions imposed upon the exercise of the power. He submits the invalidity of the payments in *Hutton v. West Cork Railway Company* and *Parke v. Daily News Ltd* is attributable to the inability of the majority of the shareholders to authorise the payments. In Bastin's view, the 'pertinent questions' are of general application to gratuitous payments whether authorised by the general meeting or the directors.

While Bastin's analysis is useful in that it questions the foundation of Mr Justice Eve's tests, it has one fundamental flaw. This appears in *Re Lee, Behrens & Co. Ltd* itself. There, it will be recalled, no general meeting had been called to ratify the pension. Thus the issue of majority power had not arisen on the facts. Further, if the correct interpretation of the tests is that they relate to limitations on the power of the majority to bind the minority, one question remains unanswered: why did Eve J. suggest that a general meeting could have ratified the annuity even though it offended his three requirements? This aspect of *Re Lee, Behrens & Co. Ltd* is difficult to square with Bastin's theory. One is left with the impression that Eve J. himself would not have agreed with Bastin's explanation of the three 'pertinent questions'!

In *Charterbridge Corporation Ltd v. Lloyds Bank Ltd*, Pennyruick J. poured a broadside into Mr Justice Eve's statement of general principles, and there remains some doubt about the present scope of the tests. Nevertheless, it is conceded that Mr Justice Eve's dictum embodies the general rules on which all gratuitous payments will be judged. But the mystery of its rationale persists. It is submitted, somewhat tentatively, that the 'pertinent questions' involve a confusion of the issues of *ultra vires* and directors' duties. This is perhaps understandable in this area of law where these issues...
often become entangled and little attempt is made by the authorities to differentiate them. 17

(c) Are the Rules Different for Non-gratuitous Payments? Hutton's Case 18 and Re Lee, Behrens & Co. Ltd 19 involved gratuitous payments or benefits. The final case in this series, Re W. & M. Roith Ltd 20 departs from this pattern.

Roith controlled two companies, W. & M. Roith Ltd, which manufactured ladies' clothing, and Michael Wayne Ltd, which marketed these products through mail orders. He held more than two-thirds of the issued capital of the manufacturing company, while the balance was held by three shareholders: his wife, Miss Leah Roith and a Mrs Lawrence. Since 1934, the date of incorporation, Roith had been a director of Roith Ltd and received remuneration from the company. He was also general manager of Roith Ltd but he had no service agreement with either company.

In August 1957 Roith, realising he was in poor health, consulted his solicitor about provision for his wife and family, and arrangements for continuity of the business after his death. He was at that time fifty-seven years old. His solicitor advised him to make a service agreement 'with one or other of the companies'.

Some fifteen months later Roith acted on this advice. He agreed to devote the whole of his time and abilities to the business of Roith Ltd. There was no specific provision for remuneration, this being left to the parties to agree upon from time to time. In return, the company covenanted to provide an annuity for Mrs Roith in the event of Roith's death. 21

Before the agreement was settled, a precaution was taken. The company inserted a new clause in its memorandum of association. This clause empowered the company to grant pensions to the wife, children and dependants of any person who had 'served the company in business'.

The service agreement was indeed timely: it was dated 3 December 1958 and Roith died of cancer less than a month later. Roith's widow received the pension for nearly four years before Roith Ltd went into a creditor's voluntary winding up. Roith's executors lodged a proof for the capitalised value of the pension but the liquidator rejected the claim. The executors then challenged this ruling by an originating summons which came before Plowman J.

Mr Justice Plowman applied the tests in Re Lee, Behrens & Co. Ltd without exploring their rationale or questioning their utility. He inferred from the evidence that the real purpose of the service agreement was to benefit, not the company, but Mrs Roith. He reasoned that the agreement gave the company no benefit which it did not already enjoy; the service contract was a sham. Thus, although it was alleged that here the pension was part of a transaction for value rather than a gratuitous payment, this appeared to make no difference to the result.

It appears that Roith wished to avoid dividing his shareholding among his dependants since they might not be interested in the continuity of the business. The service agreement was designed to allow Roith to provide for his widow without dividing up his shareholding. It was at least arguable, therefore, that the contract was for the benefit of the company as its underlying purpose was to preserve the continuity of the business. Unfortunately, no evidence was adduced to support this contention.

Further, Mr Justice Plowman's finding that the company gained no real benefit from the pension agreement is open to question. Before the contract, Roith was clearly entitled to relinquish control of the company and resign as general manager; after the agreement, Roith was tied to the position of general manager and director for life and was legally bound to 'devote the whole of his time and abilities to the business of the company', to serve the company faithfully and to use his best
endeavours to promote the company's interests. This is an essential change in Roith's legal relationship with the company. Roith's pledge to the company could, it is submitted, constitute adequate consideration for the provision of the pension. 25

But, accepting the result in Re W. & M. Roith Ltd, 26 how may the decision be classified? 27 Is it an ultra vires case or a directors' duties case? Clearly the company and the directors had power to grant the pension. Express clauses in the memorandum and articles of association put that beyond dispute. Thus the key issue was not ultra vires.

The tenor of the judgment suggests that the case was more in the realm of directors' duties. But it was not that the power to grant pensions was exercised from an improper purpose. Rather the directors had simply failed to consider the interests of Roith Ltd.

In both Re Lee, Behrens & Co. Ltd 28 and Re W. & M. Roith Ltd 29 the validity of the pensions was determined by reference to the company's position at the time of the original grant. In principle, the fact that in each case the company was being wound up was of no consequence; it simply provided the opportunity for challenging the payments. But it is difficult to ignore the innuendo that courts are likely to adopt a fairly circumscribed view of corporate philanthropy when creditors' claims clash with employees' interests. 30

(iii) Where the Company Disposes of a Substantial Part of Its Business

If a company disposes of the major part of its business, it may wish to compensate employees retrenched by the transfer. Can it recognise the services of the employees dismissed? The answer lies in two cases: Re Clifford Deceased 31 and Parke v. Daily News Ltd. 32

(a) Re Clifford Deceased 33

In the first case, the major asset of the testator's estate was a parcel of shares in a limited company which owned and operated a
circuit of cinemas. The trustees of the estate carried on the business of the company with the help of its officers and staff for four years after the testator’s death. During this period, the company’s shares steadily appreciated so that when the cinema circuit was sold it realised a handsome profit far in excess of its estimated value at the time of the demise.

After the transaction, the company continued as an investment company with the trustees holding the majority of the shares. Yet, as a result of the sale a number of the company’s employees were retrenched. The trustees proposed to submit to an extraordinary general meeting of the company a resolution for payment of certain gratuities to the retrenched employees in recognition of their services since the testator’s death. They sought directions from the court.

The summons came before Chief Justice Napier. His Honour noted that the proposed payments would require only £3,000 out of the sale price of £282,314. High ranking officers were to share £2,150 of the grant with the balance to be divided among seventeen employees.

The Chief Justice wasted no time in distinguishing *Hutton v. West Cork Railway Company* and *Re Lee, Behrens & Co. Ltd* on the ground that, here, the company was not being wound up. He also pointed out that in the present case it would be the shareholders, not the directors, who would be acting generously towards the officers and servants if the resolution were carried.

On the amount of the proposed gratuities, Chief Justice Napier commented: ‘I cannot assent to the view that equity countenances a breach of trust so long as it is only a little one. I think that there must be some principle upon which cases like this can be reconciled with the duty of a trustee’. The Chief Justice found this ‘principle’ in the ‘social and moral obligations’ which require that trustees act as ‘ordinary decent people’. 
But how would the beneficiaries of the trust benefit from the proposed grants? Napier C.J. believed that this generosity would enhance their reputation and standing in the community. On the other hand, he thought "it would be niggardly and churlish, upon the part of those who take this windfall, to refuse some substantial recognition of the services without which it would never have been realised." Accordingly, he sanctioned the severance payment scheme.

The company had an express power to remunerate employees for services rendered in the conduct of the business, but Napier C.J. founded his conclusion more on general principle and the particular circumstances of the case than the express power.

It appeared to be crucial that the suit did not involve a dissentient shareholder. Indeed, the Chief Justice proceeded on the assumption that the shareholders would unanimously approve the proposed gratuities.

Although the 'salvage' effect of the employees' services after the testator's death makes the fact situation distinctive, it should not be allowed to detract from Mr Justice Napier's general proposition: with the approval of the shareholders, company management of a going concern may recognise the services of the firm's employees through gratuitous severance payments.

The second case, Parke v. Daily News Ltd, took a narrower view of a company's obligations to employees dismissed when the company sold its major assets. This landmark decision warrants a detailed analysis.

(b) Parke v. Daily News Ltd

Associated Newspapers Ltd opened negotiations with Daily News Ltd with a view to purchasing the major part of its business, namely, the premises, plant and goodwill of two newspapers, The News Chronicle and The Star. These negotiations were of an 'exploratory' nature as
Daily News Ltd hoped that its business would improve so that it would be once again economically viable. Unfortunately these hopes were not well founded and Daily News Ltd was compelled to proceed with the sale. The terms of the take-over offer provided, inter alia, for a cash payment of approximately £2 million to the offeree company. It was agreed that the offeror company would attempt to retain as many of the Daily News staff as possible but it was expressly provided that the purchaser was not liable for pension and/or compensation to employees displaced by the take-over.

It appeared in the course of negotiations that Daily News Ltd intended to distribute the bulk of the proceeds of the sale among its employees. The company planned to provide gratuitous compensation for the loss of employment to each employee at the rate of one week's basic pay for each year of service with the company over the age of 21.

This proposed payment was to be in addition to payments in lieu of notice and holidays and provision of a half a million pounds in respect of accrued pension entitlements. The amount of the gratuitous compensation exceeded £1 million. This was to be paid to the 2,700 workers dismissed. The scheme was designed, at least in part, to placate the employees' trade unions, and the terms of the proposed payments were revealed to these unions before the take-over was completed.

The directors disclosed the nature of the deal to the shareholders in a circular issued on the day the take-over was finalised. Certain shareholders disapproved of the proposed payment of terminal compensation and the directors, on legal advice, called a general meeting to ratify their proposal.

Parke, a minority shareholder of Daily News Ltd, sued on behalf of himself and all other shareholders of the company, except the directors, seeking a declaration that the proposed payment of compensation was ultra vires the company and illegal, and an injunction to restrain the
company distributing the balance of purchase monies (after deducting the costs of the sale) in the suggested manner. He challenged the scheme on the basis that it was designed to compensate the company’s employees whether or not they were retained by Associated Newspapers Ltd. He imputed ‘bad faith’ to the directors by suggesting that they were concerned with salvaging their reputation and standing in the community from a deal which would provoke a public controversy.

(c) Parke v. Daily News Ltd: 43

Plowman J. promptly disposed of the argument that Daily News Ltd was contractually bound to pay the proposed compensation. 44

Having rejected this contention, he got down to the main issue of whether the payments were intra vires. The plaintiff relied on Hutton v. West Cork Railway Company 45 (particularly the judgment of Bowen L.J.) and Re Lee, Behrens & Co. Ltd. 46 His Lordship endorsed the principles embodied in these cases but added a fourth requirement to Mr Justice Eve’s ‘three pertinent questions’ namely, ‘the onus of upholding the validity of such payments lies on those who assert it’. 47

The defendants maintained that here there was an arrangement to dispose of part of the defendant company’s assets. They relied on Kaye v. Croydon Tramways Co. 48 Plowman J. had little difficulty distinguishing the latter case from the facts before him: in the present case there was no contract between Daily News Ltd and Associated Newspapers Ltd for the payment of compensation by Associated Newspapers Ltd. If this reasoning is followed to its logical conclusion, it would appear that His Lordship would have no objection if Associated Newspapers Ltd had agreed to pay the bulk of the purchase price direct to the Daily News employees. In this event, would not the financial detriment suffered by the shareholders be as great?

Paragraph 19 of the defence alleged that it ‘is and will be’ in the interests of the company to make the proposed payments on the
grounds, *inter alia,* that failure to do so would be a breach of good faith with the employees and the employees’ trade unions, that the company’s reputation as a fair employer would be lost or damaged, that the hostility of the employees’ trade unions would be incurred and, finally, that the company’s reputation and future activities would suffer.

Unfortunately, the defendant company’s efforts to support this defence were half-hearted. The only director called to give evidence was Mr Crosfield. Representatives of the employees or the trade unions involved were not called. These witnesses could have given some indication of the likely repercussions for the defendant company if the gratuitous compensation were not paid. It was not pressed that Daily News Ltd intended to continue with the television and publishing sector of its business; no evidence was adduced concerning the morale of the employees retained by the defendant company; nor was it argued that Daily News Ltd was having, or would have, difficulties securing staff for its continuing business.

Thus, it comes as no surprise that Plowman J. ruled: ‘the defendants have failed to satisfy me that there is any substance in this defence.’ His Lordship regarded paragraph 19 of the defence as a retrospective attempt to justify an arrangement actuated by a ‘desire to treat the employees generously, beyond all entitlement, and to appear to have done so.’ Clearly, Plowman J. would not have been persuaded by the considerations which influenced Napier C.J. in Re Clifford Deceased. Mr Justice Plowman would be reluctant to allow directors ‘to act as ordinary decent people are in the habit of acting’. Apparently His Lordship would not be impressed by the argument, accepted by Napier C.J., that a gratuitous payment may be for the benefit of a beneficiary (in this case the defendant company) ‘in so far as it is for the protection of his reputation or standing in the community’.
Plowman J. expressly rejected the view that directors, in having regard to what is in the best interests of their company, are entitled to consider employees' interests irrespective of any consequential benefit to the company. To interpret the phrase 'benefit of the company', His Lordship relied upon the statement of Sir Raymond Evershed M.R. in Greenhalgh v. Arderne Cinemas Ltd\textsuperscript{56} that this term meant the benefit of the shareholders as a general body. Plowman J. conceded that Greenhalgh's Case\textsuperscript{57} concerned a different situation; and indeed the case was related to the duty of shareholders in general meeting, not the duty of directors.

The total amount of the compensation was estimated at £1,500,000.\textsuperscript{58} This factor alone would have made Plowman J. confident in his conclusion that the 'defendants were prompted by motives which, however laudable, and however enlightened from the point of view of industrial relations, were such as the law does not recognise as a sufficient justification'.\textsuperscript{59} The unfortunate implication in the judgment is that no gratuity, however small, would be permissible where the company has curtailed its operations to a substantial extent.

Although Parke v. Daily News Ltd\textsuperscript{60} has clarified the legal position of companies making gratuitous payments to its employees in the absence of an express power to do so, the case itself is a very shaky foundation for any general principle prohibiting attention to the interests of employees.

(d) Parke v. Daily News Ltd:\textsuperscript{61} Its Effect and Aftermath

In essence, the decision in Parke v. Daily News Ltd\textsuperscript{62} allowed a dissentient shareholder holding less than 3% of the issued ordinary shares and less than 1% of the total issued share capital, to abort a transaction 'approved' by the overwhelming majority of shareholders for the benefit of some 2,700 employees whose jobs were in jeopardy. Parke, in this respect, is reminiscent of the statement of Blackburn J. ninety-
five years earlier:

Any shareholder has a right to object to any act being done which is in contravention of the rights [created by the 'trust' which arises when the management of a trading concern is committed to the body corporate]... Though the majority of the shareholders, or even all but himself approve, yet he has a right to object to the making or the enforcing of any contract to do any unauthorized act which would affect his individual interest.64

In fact, the majority of the shareholders in Daily News Ltd avoided the obstacle presented by Mr Justice Plowman's decision. The ordinary shareholders were invited to transfer to a compensation fund their share of the £1,141,650 which was distributed to shareholders by way of reduction of capital.65 In response to this request many shareholders waived their claims to a repayment of capital. Ultimately, on 5 April 1963 (nearly two-and-a-half years after the retrenchments), £984,753 was shared among the employees dismissed.66 This figure represented 86% of the total capital distributed - a generous effort, but unfortunately much too late to cushion the immediate hardship of retrenchment.

As a result of Parke v. Daily News Ltd 67 an employee’s entitlement to terminal compensation is made to depend, not on the law, but on the philanthropy of shareholders and the predicament of the company.

(iv) Where the Company is Under Threat of Take-over

When a company becomes the target of a take-over bid, the board of directors often resorts to defensive tactics to discourage the raider. May the board justify this action by asserting that a take-over would displace or unsettle the staff? Here a recurring and fundamental issue is involved: can directors take employees' interests into account and still comply with their fiduciary duty.
(a) Savoy Hotel Case

The celebrated Savoy Hotel inquiry sheds some light upon the boundaries of directors' duties in a take-over situation.

The directors of the company which owned the hotel successfully thwarted a take-over raid by a somewhat devious strategy which became known as the 'Worcester scheme'. The details of the scheme and the take-over battle need not detain us here. The upshot of it all was that the Board of Trade appointed an inspector, Mr Holland Q.C., to report, in particular:

... whether or not in his opinion, the persons concerned with the management of the hotel companies in entering into or promoting [the Worcester Scheme] ... committed any breach of their duty to the hotel companies or the members thereof.

After a thorough inquiry in which the legal issues were fully argued by counsel, Mr Holland found that the directors had acted bona fide. He, nevertheless, found that the directors had exercised their powers for an improper purpose, namely to entrench their position and frustrate the take-over bid. In his view, the directors' action went beyond matters of internal management. They tried to place a substantial fetter upon the discretion of a future board and, in these cases, the courts will intervene.

Mr Holland noted in passing that the directors also considered that the discontinuance of the Berkeley as an hotel and restaurant would be injurious to the interests of employees since it would involve a reduction of staff, although this was not the ground on which the directors sought to justify their actions. On this clearly peripheral issue Mr Holland concluded that the interests of employees were considerations which, however meritorious, would not seem to me to form part of a true legal definition of the interests of the companies, except that indirectly a substantial reduction of staff might have unsettled the staff remaining at the other hotels and restaurants. It appears
that Mr Holland would equate the interests of the company with the interests of shareholders, present and future, balancing a long term view against the short term interests of present members. True, he does not state this expressly but it seems a fair inference from his report.

The Savoy Hotel inquiry did not, and could not, decide authoritatively that the phrase 'interests of the company' excludes employees' interests. It simply raised the issue and suggested that these interests may only be considered by directors in performing their duties where the long term interests of shareholders will be served.

(b) Hogg v. Cramphorn Ltd

Like the Savoy Hotel case, Hogg v. Cramphorn Ltd touched on the issue of directors' duties toward employees during a take-over struggle. Once again, the incumbent management devised a defensive scheme which frustrated the efforts of the raider.

The scheme was ingenious. A trust for company employees was created and this trust was allotted a substantial parcel of unissued preference shares each of which was weighted with ten votes. The board financed the transaction by an interest-free loan to the trust out of the company's reserve fund. And, as if this was not enough, the directors decided to lend the balance of the reserve fund to the trust to enable the trustees to bid in competition with the raider for the preference shares already issued.

In the face of this opposition, the raider's bid lapsed. Subsequently, a minority shareholder brought a representative action seeking to have the directors' scheme declared void. The case came before Buckley J.

The learned judge conceded that the directors had acted bona fide throughout. He accepted the directors' evidence that the staff
would be unsettled by the raider's bid, that the board genuinely desired to give the staff a voice in the company's affairs, and that the board thought it would be advantageous to the customers, the staff and the shareholders to retain the existing management. Thus, Buckley J. was apparently persuaded that some employees' interests may be included in the phrase 'interests of the company'. The directors' strategy was impugned not because it was contrary to the interests of the company, but rather because the directors exercised their power for the improper purpose of preserving their control.

This may seem to be a victory for the shareholder. In the long run, it was not. Curiously, Buckley J. suggested that the general meeting could ratify the special issue of the preference shares to the trust. Indeed, he gave the company the chance to do just that by granting an adjournment. One month after the judgment the general meeting approved the directors' scheme in toto.

(c) Ampol v. Miller

Ampol Petroleum Ltd v. R.W. Miller (Holdings) Ltd is the final chapter in this analysis of the director's duty to act bona fide in the interests of the company. It is just one of the many recent Australian cases on the director's fiduciary duty but it does have several interesting features.

Like Hogg v. Cramphorn Ltd, Ampol v. Miller involved a take-over battle. Ampol and Bulkships, an associated company, held between them a majority (nearly 55%) of the issued shares in Miller. Ampol made a bid for all issued shares in Miller. Eight days later, Miller's board met and considered the offer but much happened in the interim.

For some time Howard Smith had been interested in purchasing two tankers which were under construction for Miller. Negotiations fell through but an alternative plan evolved: that Howard Smith make an offer
to take over Miller in toto. In fact, Howard Smith made a formal offer on the day before Miller's board considered Ampol's bid. The offer was more generous than that proposed by Ampol, and the board of Miller unanimously decided to recommend rejection of Ampol's bid as too low.

Ampol and Bulkships closed ranks. They publicly announced that they would decline any offer for their shares "whether from Howard Smith Ltd or from any other source". Faced with this strategem, Howard Smith's bid was doomed.

Once again Howard Smith and Miller's management team conferred. They devised a plan to convert the majority shareholding of Ampol and Bulkships into a minority holding. This would then allow the Howard Smith offer to proceed unhindered. Thus, just over 33% of Miller's issued shares were allotted to Howard Smith.

The purchase price and the number of the shares issued were determined by Miller's capital need. Miller solved its liquidity problem and Howard Smith obtained a substantial shareholding. Ampol and Bulkships, on the other hand, were incensed. They challenged the allotment.

After an exhaustive review of the evidence in the twenty-eight day trial, Street J. concluded that Miller's management team acted in response to the take-over struggle. He was not prepared to accept that their dominant purpose was to obtain capital. This was a smoke-screen. Rather it appeared that the directors' strategy was to facilitate the take-over bid made by Howard Smith Ltd and to destroy the majority holding of Ampol and Bulkships.

In the result, Street J. held that the allotment was an abuse of the directors' power to issue shares. Further, since Howard Smith knew the true purpose of the transaction, the allotment was void. Howard Smith appealed direct to the Privy Council but Mr Justice
Street's decision and reasoning were affirmed.

Lord Wilberforce, delivering the advice of Their Lordships, agreed that the purpose of the disputed allotment was to dilute Ampol and Bulkships' majority block and to induce Howard Smith to proceed with its take-over offer. In reaching this conclusion, Their Lordships applied the following approach:

it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls.

In consequence of Ampol v. Miller, Australian courts may be more prepared to review directors' actions even if the directors act bona fide and in pursuance of an express power. This is certainly true where the court is put on inquiry by unusual or extreme managerial decisions. But it may also occur where there is a suggestion that directors have exercised their powers for an improper purpose. And this issue will be determined by the court's objective assessment of the whole situation not simply the directors' testimony in the witness box.

This development is important in the present study because it now appears that dispositions by directors in favour of employees may be challenged on two grounds apart from ultra vires: first, that the directors did not act bona fide in the interests of the company; and second, that the directors have not exercised their powers for a proper purpose. In other words, the 'proper purpose' limb of directors' duties has now been formally recognised by Australian law.

Before leaving Ampol v. Miller, it is interesting to note
Mr Justice Street's reply to the suggestion that he should take the interests of the Australian economy into account when considering the take-over struggle:

The important economic or national consequences of takeovers are matters for the legislature or the Government to consider. The court cannot, as the law stands, take regard of these considerations in a context such as the present. Thus, like Plowman J. in Parke, Street J. eschewed any consideration of the community's interests. Presumably, he would rule out employees' interests on similar reasoning.

6. The Cases in Retrospect

(i) Does an Express Power Make any Difference?

Of the cases discussed in the foregoing analysis, Cyclists' Touring Club v. Hopkinson, Re Lee, Behrens & Co. Ltd, Re Clifford Deceased and Re W. & M. Roith Ltd involved a consideration of an express power relating to employees. None of these cases can be regarded as firm authority for the view that the mere existence of an express power precludes an inquiry into the validity of its exercise.

In Cyclists' Touring Club v. Hopkinson, Swinfen Eady J. saw the main issue as whether the club had the power on a true construction of its memorandum to make provision for an annuity for a retired servant. In deciding that the club had this power, His Lordship pointed out that the gratuity would be conducive to the best objects of the club as it would encourage the officers and servants to serve faithfully. Thus, Swinfen Eady J. did not rely on the express power in the memorandum to reward employees for services rendered to the club. In Re Lee, Behrens & Co. Ltd, the managing director did not fall within the scope of the express power. Strictly speaking, Mr Justice Eve's tests, so far as they relate to express powers, may be classified as obiter dicta.
Moreover, Re W. & M. Roith Ltd assumed, rather than decided, that Mr Justice Eve's tests applied where an express power existed. Further, in Re Clifford Deceased, Napier C.J. was at pains to confine his decision to the particular facts of the case.

In these circumstances it is difficult to define the precise limits which may be placed upon the exercise of express powers relating to the interests of employees. The Jenkins Committee, on a cognate issue, thought that "the directors, at least, might be in breach of their duties, and liable to account for donations that were "unreasonable" in amount notwithstanding the existence of an express power".

In Harlowes Nominees Pty Ltd v. Woodside (Lakes Entrance) Oil Co. N./L., the High Court was more definitive. It referred to the 'undoubted general proposition that a power vested in directors to issue new shares is a fiduciary power which the directors are not entitled to exercise otherwise than bona fide for the benefit of the company as a whole'.

More recently, in Ashburton Oil N./L. v. Alpha Minerals N./L., Windeyer J. endorsed the following statement of Dixon J. in Mills v. Mills:

Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to that power.

This passage was again expressly approved in Ampol Petroleum Ltd v. R.W. Miller (Holdings) Ltd.

On this basis it is submitted that the dispositions of corporate assets by directors in favour of company employees in the exercise of an express power are still subject to the restriction that directors must exercise the power bona fide in the interests of the company and for a proper purpose.
(ii) The Effect of Referring the Matter to the Members in General Meeting

An interesting feature of many of the cases in the above study was that the directors sought the approval of the general meeting before appropriating funds towards employees’ interests. What are the implications of this?

For one thing, the duty of members in general meeting is much less stringent than the directors’ duty to act bona fide in the interests of the company. Shareholders are not obliged to disregard their own interests when exercising their votes. Generally the mood at a general meeting of the members is likely to be much less altruistic than the atmosphere at a board meeting. At board level, the issue may be simply whether the directors can reconcile the proposed payments with their rather vague fiduciary duty. Further, directors are, to some extent, disinterested parties: they often have no direct financial stake in the decision. And even where their investment is substantial, they may be more prepared to disregard their own interests.

On the other hand, shareholders in general meeting are being asked to sacrifice their own short term interests. Put simply, if they authorise dispositions in favour of employees, there will be less money available for dividends.

There is nothing wrong with allowing shareholders to consider their own interests when voting in a general meeting. The error lies in the law’s failure to redefine directors’ duties to include employees’ interests. It is this failure which forces directors to seek the approval of the general meeting – a forum which, by its very nature, may not be disposed towards employees’ interests.

Shareholders are not, however, permitted to allow their ‘selfish’ interests to dominate their vote. While they are not...
fiduciaries, they must nevertheless vote "bona fide for the benefit of the company as a whole". In a recent explanation of this misleading phrase Lord Evershed M.R. stated:

In the first place I think it is now plain that "bona fide for the benefit of the company as a whole" means not two things but one thing. It means that the shareholder must proceed upon what, in his honest opinion, is for the benefit of the company as a whole. The second thing is that the phrase "the company as a whole" does not mean the company as a commercial entity distinct from the corporators; it means the corporators as a general body.

In other words, the shareholders' duty is not to be dissected into two limbs: one subjective, the other objective.

The search for a single comprehensive principle defining the parameters of the members' duty in general meetings seems a futile exercise. However, Dixon J. suggested a positive criterion in Peters v. American Delicacy Co. Ltd v. Heath:

But, whatever may constitute bad faith, it is evident that, if a resolution is regularly passed with the single aim of advancing the interests of a company considered as a corporate whole, it must fall within the scope of the statutory power to alter the articles and could never be condemned as malice.

Lord Evershed also attempted to formulate some guidelines in Greenhalgh v. Arderne Cinemas Ltd. He proposed two basic tests: the "individual hypothetical shareholder test" and the "discrimination test".

None of these tests is satisfactory. Mr Justice Dixon's formula seems to be nothing more than a restatement of the phrase "bona fide for the benefit of the company as a whole". And the Master of the Rolls' hypothetical shareholder test raises more problems than it solves: who is an individual hypothetical member?; how does one determine what is for this member's benefit? Further, the difficulty with Lord Evershed's discrimination test were highlighted by Greenhalgh v. Arderne Cinemas Ltd itself. There, the majority shareholders amended the articles. The amendment prevented the minority selling its shares to a non-member without approval of the majority. The majority was not so restrained. Yet the Court of Appeal upheld the majority's resolution since it was non-discriminatory.
It would seem preferable to identify the grounds on which a resolution will offend the shareholders' duty. The authorities suggest several criteria: fraud or trickery, oppression, 'extravagance', deliberate injury to the minority, discrimination, male fides, reprehensible appropriation of property beyond the company's powers.\textsuperscript{14} These essentially negative tests, then, sketch the ambit of the members' duty in a general meeting.

Given that shareholders in general meeting have a certain duty, how may this duty affect corporate dispositions in recognition of employees' services? The issue arises in two ways: expropriation of company funds by the general meeting and ratification of a breach of directors' duties.

(a) Expropriation of Company Funds

Where the company is in the course of a winding up\textsuperscript{15} or where it has disposed of the major part of its business,\textsuperscript{16} the general meeting may not prospectively approve an appropriation of company funds for employees. A single dissentient member may challenge such an expropriation.\textsuperscript{17}

By contrast, if the company is a viable, prosperous business the general meeting may approve the allocation of company funds in recognition of employees' interests.\textsuperscript{18} The resolution will virtually be unimpeachable because, in these circumstances, it would be open to the members to conclude that the payments would benefit the company as a whole.

(b) Ratification by the Members in General Meeting

The directors may not bother to consult the general meeting before allocating funds for employees' interests. If they go ahead without the members' approval they may nevertheless seek to have their
actions retrospectively ratified by the general meeting.

It seems that ratification will be invalid where the directors have breached their fiduciary duty to act bona fide in the interests of the company. This may be inferred from Parke v. Daily News Ltd and, arguably, Re W. & M. Roith Ltd. In contrast, when the directors exercise their powers for an improper purpose their actions may be sanctioned ex post facto by the general meeting.

7. Members' Duty Outside General Meeting

Shareholders' duties outside the general meeting are obscure and, possibly, non-existent. The issue usually arises when controlling shareholders are offered a price for their shares. If they sell there will be a change in the control of the company. Should they be obliged to consider the offer bona fide in the interests of the company as a whole?

Gower believes they should. He contends that control is an asset of the company and that it should not be transferred to the detriment of the company as a whole. But he cites no direct authority for his view.

Indeed, what little authority there is points to the opposite conclusion. In United Trust Ltd v. South African Milling Co., Kuper J. stated unequivocally that there is no authority which suggests that "a decision of majority shareholders, taken outside a meeting of the company, can be impeached on the ground of the duty of the majority to vote for the benefit of the company as a whole." Further, Gower's view that control is a corporate asset seems open to question. It is perhaps more accurately described as an 'attribute of corporateness'. And Gower's conclusion seems to be inconsistent with shareholders' proprietary rights in their shares.
8. Conclusion

To sum up, neither a company nor its directors are obliged to recognise employees' interests. On the other hand, the company may have power to pay tribute to employees' services either through the powers incorporated by section 19 or through an express power inserted in the memorandum or articles of association. Such a power might also be inserted in the articles or be implied from the directors' general power to manage the company.

Both the directors and the general meeting are subject to certain duties in exercising these powers. A number of propositions emerge from the above analysis and it may be convenient at this point to draw them together.

(i) Where the company is a going concern, directors have an implied power to grant gratuitous bonuses to employees in recognition of their services provided the payments are not excessive. It would appear that the members in general meeting also have this power.

(ii) As an incident of their general power to manage, directors of a viable business may pay a pension to the family of a former employee in recognition of his services. And certainly the members in general meeting have power to reward retired workers for their efforts.

(iii) If a company disposes of the major part of its business, or substantially curtails its operations, for example, in the course of a winding up or in a take-over, the directors may not make gratuitous payments to employees as compensation for their loss of employment. Such a transaction will be invalid even if it is confirmed by a majority of the shareholders in general meeting. In these situations it is difficult to identify a consequential benefit for the company, and the transaction may be impeached at the suit of a single dissentient shareholder.
(iv) On the other hand, where the employees' services greatly enhance the value of the company and provide a handsome profit for shareholders, the directors, with the concurrence of the general meeting, may be allowed to pay terminal compensation to employees retrenched by a sale of a substantial portion of the company's business.  

(v) The director's duty to act *bona fide* in the interests of the company requires that directors act *bona fide* in the interests of the shareholders as a general body.  

(vi) Directors must also not exercise their powers for an improper purpose, although actions in breach of this duty may be ratified by the general meeting.  

(vii) As the law stands, company funds can only be expended for purposes reasonably incidental to the carrying on of the company's business, and the validity of such grants is to be tested by the answers to three 'pertinent questions' posed by Eve J. in *Re Lee, Behrens & Co. Ltd.*  

(viii) The onus of upholding the validity of such payments lies on those who assert it.
The legal rights of the employed inventor to the benefits of his invention further illustrate how the law has responded to employees' interests in achievement and recognition of their services.

1. Absence of Australian Authority

In Australia, there have been no reported decisions on the law governing the rights of an employed inventor. This absence of local authority is puzzling. Perhaps Australian research and inventive activity in the private sector does not have the scope and sophistication of the projects undertaken in the major industrialised countries.\(^1\) This suggestion gains support from the relatively small percentage of patents obtained each year for local inventions in Australia.\(^2\) On the other hand, it may well be that competing claims to the benefit of an invention made in the course of an employment are resolved by the contract of service or informally settled without litigation. Whatever the explanation, the absence of local authority allows one to seek guidance from English decisions.

2. Two Extremes

Where the employee is hired to invent, or to engage in research, patent rights in any invention he makes in the course of his employment will belong to his employer.\(^3\) There can be little quarrel with this.

In modern inventive activity the employer is often a large company, in some cases a multi-national corporation.\(^4\) It will provide
both the opportunity for its employees to engage in research and the expensive equipment required for this purpose. It will usually bear the considerable expense involved in discovering, developing and patenting an invention.

Moreover, often the invention is not the product of one employee's inventive activity. Research teams financed by the company may undertake protracted investigations and experiments prior to the ultimate discovery. Indeed, it may be difficult to identify an individual employee's contribution.

Finally, the invention may simply be a modification of the employer's existing equipment or formulae rather than an independent creation in its own right. All these considerations militate against an employee's claim to beneficial ownership of the invention.

At the other extreme, an employee will be entitled to the patent rights where, on his own initiative, he makes an invention which is not derived from his employer's business. It is mainly in cases falling between these two extremes that courts have failed to provide adequate protection for the interests of the employed inventor.

3. Where There is an Express Clause

If, by an express term in the contract of service, the employer is given the right to the employee's inventions, then this clause will normally govern the issue. This will be so even where the contract deprives the employee of rights he would otherwise obtain at common law.

On the other hand, an employer may not claim all inventions made by his employee. Courts are inclined to curtail the application of restraint of trade clauses or to treat them as unenforceable. Thus, in Electric Transmission Ltd v. Dannenberg, a contract which required an employee to disclose and assign future inventions in return for
remuneration to be agreed upon was held to be in restraint of trade and void.

Yet the failure of a restraint of trade clause does not leave a vacuum. The employee is not thereby absolved from his common law duty of good faith towards his employer. Even if the restrictive covenant is unenforceable, the employee might be obliged by an implied term in the contract of service to hold the benefits of his invention in trust for his employer. This is a curious result, seemingly inconsistent with ordinary contractual principles.

4. Where There is No Express Clause

In the absence of an express clause determining rights to an invention, some of the early decisions turned on an independent equitable obligation derived from the employee's duty of good faith.

Later authorities establish that the employee's obligation is contractual, not equitable. In other words, it depends upon an implied term in the contract of employment that the employee is trustee for his employer of any invention made in the course of his duty as an employee.

In most cases, either test would produce the same result. Both rely on inferences drawn from the circumstances in each particular case. Many factors must be considered but two are of cardinal importance: the nature of the employment and the circumstances in which the invention was made.

5. Nature of the Employment

The nature and quality of the employment is determined not only by the contract of service but also by the relative positions and responsibilities the parties assume thereunder.

To a large extent, the particular terms of the employment contract define the employee's duties.
is an illustration. Charles Selz Ltd, lampshade manufacturers, advertised for a manager ‘conversant with design’ and business routine. Warren-Smith applied, and was appointed as a factory manager. In the course of his work, he attended a packaging exhibition. One particular display of spray-plastic packaging inspired him. He conceived the idea that a similar process might be used to produce advertising signs. It could also be used in the manufacture of lampshades. He applied for a patent and his employer contested the application.

Mr Justice Lloyd Jacob noted the word ‘design’ in the original advertisement. He felt that this word implied ‘artistic designs’, not designs in the nature of inventions. This was an important factor in his decision that the factory manager could retain his beneficial interest in the invention.

The degree of responsibility assumed by an employee under the contract of service is often crucial. The authorities provide several guidelines.

In Worthington Pumping Engine Co. v. Moore, the defendant was employed by the plaintiff company as its agent and manager in England. His relationship with his employer was of an extremely confidential nature. Indeed, the presiding judge described the defendant as ‘in effect the alter ego of the plaintiff corporation outside the United States’. The degree of good faith owed by the defendant to his employer was akin to that owed by a partner to his firm. During his employment the defendant took out three patents and used them in the business of his employer. When he was dismissed from his employment, he sought to restrain the company using the patents in its business. Predictably, his attempt failed.

The defendant in Edisonia Ltd v. Forse was engaged initially as a workman, and later as the manager of the department in charge of moulding cylinders for the company’s phonograph records. He regularly
attended conferences of the department managers at which suggestions for improving the quality of the cylinders were discussed. The defendant and the general manager of the plaintiff company obtained patents for cylinder mouldings devised wholly or partly by the defendant. The general manager later assigned his interest to the company but the defendant was not so compliant. He disputed the company’s claim that he held his interests in the patents in trust for his employer.

Warrington J. concluded on the evidence that the defendant had been expressly or impliedly directed to use his best endeavours to improve the mode of sale and manufacture of the moulding cylinders. The learned judge inferred this from the nature of the defendant’s position and responsibilities. Since the defendant had been admitted to confidential conferences about the cylinders, the product of his ingenuity belonged to his employer.

In British Syphon Co. Ltd v. Homewood, 19 the quality of the defendant-inventor’s employment again tilted the balance in favour of the employer. There, the inventor was employed as a technical adviser in relation to the design and development of anything connected with any part of the plaintiff’s business. The employer’s business could be described as the distribution of soda water in containers. On his own initiative, the defendant invented a device for dispensing soda water.

Roxburgh J. decided that the defendant’s duty of good faith required him to avoid putting himself in a position where his personal interests would conflict with his advisory role. Thus, the employer was entitled to the patent.

Contrast these cases with Mellor v. William Beardmore & Co. Ltd. 20 There, the pursuer invented and patented a process and apparatus for extracting sulphate of ammonia from producer gas. He allowed the defendant to install and use the process and apparatus in
its gas plant but later alleged that there was an implied contract to remunerate him for this 'licence*. The defendant argued that the pursuer made the invention during the course of his employment, and, therefore, held the patent as trustee for the company.

Giving judgment for the pursuer, Lord Constable stressed that the pursuer was merely the superintendent of the defendant's plant, a relatively subordinate position. It appears, therefore, that the nature and quality of the inventor's position again proved to be a decisive factor.

Compared with the responsibilities of the managerial employee in *Mellor v. William Beardmore & Co. Ltd.*, the duties of the defendant in *Barnet Instruments Ltd v. Overton* were menial. Yet, in the latter case, the employer was declared sole owner of his employee's invention. The defendant was a tool room foreman at the plaintiff's factory. His duties included tool designing but it appeared that this obligation was limited. In the course of his employment, the defendant invented a new machine of general application.

Romer J. relied upon *Adamson v. Kenworthy* and *British Reinforced Concrete Engineering Coy Ltd v. Lind* to reach his conclusion that the invention was made in the discharge of the employee's duties, and, hence, belonged to the employer. Now, both *Adamson's Case* and *Lind's Case* involved employees who were specifically instructed by their employers to design a solution to a particular problem. With respect, neither of these decisions should have determined Overton's claim.

The authorities show that occupations are not automatically classified into two categories: those in which employees are entitled to their inventions, and those in which employees hold their inventions in trust for their employer. On the other hand, where the employee is a subordinate with limited responsibilities and humble duties, it will
be difficult to persuade a court to deprive him of an invention even if it was made in the course of his employment. Conversely, the invention of an employee with confidential or advisory duties will normally belong to his employer. But in Vokes Ltd v. Heather, the appellant's employment in a drawing office was not fatal to his claim. Moreover, the factory manager-designer in Re Selz's Limited's Application was allowed to retain his interest in his invention. The nature and quality of the employment is a material factor, but it is not the sole consideration. To quote Eve J. in Lind's Case:

it is necessary to regard not only the contract of service and the relative positions which the servant and the employer occupy under, but the circumstances in which the particular invention was made.

6. Circumstances Surrounding the Creation of the Invention

(i) Genesis of the Idea

Where the employer conceives the original idea, and the employee is simply engaged in developing or perfecting the details of its implementation, the invention will belong to the employer. In fact, the employee's ancillary suggestions and modifications may be included in the employer's patent. On the other hand, if the employee's contribution amounts to a distinct invention he will be entitled to a patent in his own right. A few examples of this principle will suffice.

In Re Marshall and Naylor's Patent, the patentees requested one of their workmen to invent a tap which would, through a certain process, provide hot, warm, or cold water as required. After the invention was perfected, the workman was paid for his overtime work on the project. Nevertheless, he petitioned for revocation of his employer's patent.

Farwell J. held that the workman was the proper patentee since he was the first and true inventor. Accordingly, the employer's patent was revoked.
In *Lind's Case*, the plaintiff company assigned the defendant the task of drafting designs for suitable lining headings in a client's colliery. Without any personal experience of similar underground work and reliable data on the character and effects of earth pressure experienced at the particular colliery, the defendant found it impossible to prepare a satisfactory design. At his own suggestion he was allowed to visit the colliery to overcome this problem. On his return, he submitted a report outlining the essential features for the design. He also prepared several designs but none satisfied all the essential conditions. However, the chief engineer considered that one of these designs was practicable. The defendant then advised the chief engineer that he had invented a model which embodied all the essential features. He applied for, and was granted, a patent. His employer sought a declaration that he held the patent in trust for the company.

The defendant argued that he had not been hired to invent; he claimed he was simply engaged to perform duties ordinarily carried out by a draftsman or an assistant engineer. Eve J. did not agree. His Honour stated:

> In my opinion the terms of his particular employment imposed upon him a duty and obligation, and it is inconsistent with that duty and obligation that he should be allowed to retain for his benefit the results of the skill and inventive activity which, in the discharge of his duty to his employers, he applied to this particular matter.

How does one reconcile *Re Marshall and Naylor's Patent* and *Lind's Case*?

In the former, the idea for the invention originated with the employer; in the latter, the idea germinated from a problem posed by a client of the employer. Yet can this be a basis for distinguishing the two authorities? One would have thought that if the employer conceives the original concept his claim to the patent would be reasonably secure.
Yet, in Re Marshall and Naylor's Patent, beneficial ownership of the invention was awarded to the employee.

It might also be argued that Lind was hired to invent whereas the workman in Re Marshall and Naylor's Patent was engaged for more modest duties. Unfortunately this does not appear to be the basis on which Lind's Case was decided. Rather, the decision seems to turn upon the nature and quality of Lind's employment, not at the time of engagement, but after the visit to the colliery.

(ii) Use of the Employer's Time, Equipment and Materials

The fact that an employee uses his employer's time, materials and equipment in creating or developing an invention will not necessarily defeat his claim to the patent. This principle follows from Re Marshall and Naylor's Patent where the workman invented a tap in the employer's time and with the use of the employer's materials, yet retained the right to patent the invention.

7. The Utility of the Invention

One further factor may be important: the relevance of the invention in the employer's business. The cases show that this is indicative, but not decisive. Thus, in some cases, employees have been held to be entitled to inventions germane to the employer's business while, in others, employers have been declared beneficial owners of patents which have uses beyond the scope of their business. Nor is it conclusive that the employee has allowed his employer to use the invention in the business.

In general, the courts determine the beneficial ownership of an invention made in the course of employment by the circumstances of each particular case. This is a familiar, but elusive, criterion. While it allows the court to take a global view of the situation, it
also leaves a great deal of latitude for what is essentially a value judgment. To quote Vaisey J. in *Riber v. Marsden-Smith*: "Of course, it is, I suppose, in every case, a matter of degree." In theory, this may not be a bad thing; in practice, the employed inventor will consistently find himself on the wrong side of the line drawn by the courts.

8. Consequences of Granting Beneficial Ownership to the Employer

Assuming the employer is declared to be beneficial owner of the invention, what are the consequences for the employed inventor?

Firstly, the employee will be entitled to recoup any out-of-pocket expenses properly incurred in developing the invention and obtaining the patent. Secondly, the employee will be liable to disgorge any amounts or advantages he has obtained through legal ownership of the patent. Thirdly, a judgment for the employer might extend to rights in respect of the employee’s improvements to the invention unless, of course, the refinements amount to a distinct invention.

In some cases, these last two consequences can be quite harsh upon the employee. An employer is under no obligation to develop and exploit an invention. He may allow his rights to lie dormant for several years and then assert his entitlement just when the invention is perfected and popular. It matters not that, by this time, the employee may have undertaken personal financial commitments for the manufacture or distribution of the invention.

If the employer does decide to dispute the employee’s claim to a patent, he may obtain an order that the employee assign the foreign patent rights to him, or an order that the employee sign all the forms necessary to enable him to obtain those rights.
In addition, beneficial ownership of the patent entitles the employer to exploit all the possible applications of the inventions, not simply those which are relevant to his business. This is of vital importance when the invention has a general application as in *Barnet Instruments Ltd v. Overton.* There seems to be little justice in this principle. True, the employer may legitimately claim that he bought the use of the products of his employee's labour. But where is the equity in allowing him the exclusive right to exploit these products?

The final, and perhaps most significant, consequence of giving the patent rights to the employer is that the employed inventor is entitled to no reward for his creative efforts. In general, courts will not entertain a claim for apportionment of the benefits of an invention. In *Barnet Instruments Ltd v. Overton,* Romer J. considered that such a calculation would involve an 'impossible task.' This is a curious feature of the law in this field: courts almost invariably decide that the beneficial ownership of the invention resides in either the employer or the employee. The legislature, on the other hand, has taken a few hesitant steps towards recognising that more than one party may be entitled to the patent rights.

9. The Co-ownership Provisions of the Patents Act

The Patents Act 1952-1969 (Cth) provides for co-ownership of patents. It permits a joint application for a patent and allows a patent to be granted to two or more persons. 'Persons', in this context, may include a 'body corporate'. The Commissioner is empowered to give co-owners such directions upon certain matters as he thinks fit.

Section 153 (1) of the Act provides: 'Where a patent is granted to two or more persons, each of those persons is, unless an agreement to the contrary is in force, entitled to an equal undivided share in the
patent*. The section reflects the attitude of the Australian Patent Law Committee whose report in April 1952 preceded the present legislation. The Committee, under the chairmanship of Mr Justice Dean, felt that disputes between employers and employees as to ownership of inventions should be settled in the courts as the Commissioner was not thought to be an appropriate authority to deal with this type of dispute. Hence the Act presumes an equal division of benefits between co-owners. There is no need for an adjudicated apportionment.

It may be noted that section 153 (1) only applies where a patent is granted to two or more persons. An employer may be content to allow the employee who is the actual inventor to apply for a patent, and then contest the beneficial ownership of the patent in subsequent proceedings. If the employer adopts this course of action, section 153 (1) will not apply.

Even if the employer company and the employee held the patent jointly, an agreement giving beneficial ownership of the invention to the employer would exclude the section. It is not entirely clear what type of 'agreement' is contemplated. An 'agreement' could possibly be inferred from the express or implied terms of the employee's contract of service. On the other hand, 'agreement' in section 153 (1) might denote a contract relating to the respective shares of the patentees - an agreement reached after the invention was discovered. On either interpretation, the section is founded on a myth of equal bargaining power between employer and employee.

Let us now turn to the duties and responsibilities imposed upon company management in the provision of long service leave. This is at once more general and less direct than the type of recognition discussed in this chapter.
1. Purpose of Long Service Leave

In Kennedy v. Board of Fire Commissioners,\(^1\) the New South Wales Industrial Commission in Court Session described the basic social purpose of the long service leave legislation in that state as "reward for long service".\(^2\) More recently,\(^3\) the Commonwealth Conciliation and Arbitration Commission expressed the view that long service leave should be treated as a respite from work and not as a "reward for loyal service given over an extended period".\(^4\) Certain provisions\(^5\) in long service leave statutes and awards emphasise this recreational aspect of long service leave.\(^6\) But long service leave has a character distinct from that of annual leave. In the words of the Privy Council, "it is a separate item in industrial relations".\(^7\)

Whatever may be the fundamental purpose of long service leave, both employers and employees would agree that it is a means of recognising and rewarding employees' long term contribution to an enterprise. It is for this reason that long service leave provisions are pertinent to the present study.

The terms of long service leave entitlement are prescribed by statutes\(^8\) and awards\(^9\) in each state and the federal long service leave 'code'.\(^10\) Entitlement is based upon a certain qualifying period of service under an 'unbroken contract of employment'\(^11\) or in a 'continuous employment'.\(^12\) A variety of factors and events could sever a contract of employment or interrupt a continuous employment. Unless the law excuses these interruptions, employees would, in many cases, be deprived of an opportunity to qualify for long service leave.
2. Interruptions Excused by the State Statutes and the Federal Code

(i) Absence on Annual Leave or Long Service Leave

In Victoria, Tasmania and Western Australia, it is expressly provided that the taking of annual leave or long service leave shall not interrupt the continuity of employment.\(^{13}\)

The Queensland provision excuses 'absence from work on leave granted by the employer',\(^{14}\) while in South Australia an 'absence of the worker from work in accordance with the contract of service' and an absence by leave of the employer do not break the continuity of service.\(^{15}\)

In both these states the provisions are broad enough to cover absence on annual leave or long service leave.

Entitlement under the New South Wales statute and the federal code depends upon an 'unbroken contract' of employment. Since normal absences from employment such as the taking of annual leave or long service leave do not sever this contract it has not been necessary to exempt these absences in those jurisdictions.

(ii) Absence on Account of Illness or Injury

Short absences on account of illness or injury are expressly or impliedly excused by the statutes in each state and the federal code.\(^{16}\)

In Tasmania, the illness or injury must be certified by a qualified medical practitioner.\(^{17}\) In Queensland, the absence is excused only if the employer grants leave.\(^{18}\) Where the absence is caused by an injury arising out of or in the course of his employment, it appears that the Victorian and Tasmanian statutes grant an unlimited exemption.\(^{19}\)

In Victoria, a woman's absence from work for a period not exceeding twelve months through pregnancy does not interrupt her period of 'continuous employment'.\(^{20}\) In the other jurisdictions, however, there is no express provision of this nature, and it would seem that pregnancy cannot be classified as an 'illness'.\(^{21}\) It appears, therefore,
that in most jurisdictions a lengthy absence through pregnancy will rob an employee of the chance to qualify for long service leave unless the employer grants the employee leave during such absence.

(iii) Attempted Evasion of Award or Statutory Obligations

The relevant statute in each state and the standard federal long service leave award expressly provide that any interruption or termination of an employee's employment engineered by an employer for the purpose of avoiding his award or statutory obligations will not deprive the employee of his accruing entitlement; the employee's contract of service remains unbroken, and the employment continuous, notwithstanding the employer's action.

_Australian Society of Engineers v. Rogers Meat Co. Pty Ltd_ illustrates the evidentiary problem raised by this type of provision. Wharton was employed by the company as a fitter and turner at the time of his dismissal less than a fortnight before the completion of a ten year period of qualifying service with the company. It appeared that Wharton had been dilatory in carrying out work assigned to him over a week-end. Because of his lack of progress he used the services of an assistant on the Sunday without justification or authorisation. The company thereby incurred expensive penalty rates which could have been avoided. When questioned about the incident by the company's engineer, Wharton replied in improper and abusive language. The Industrial Commission of New South Wales found that the applicant union had not discharged the onus of proving that the dismissal was unjustified. Accordingly the application for reinstatement was rejected.

It is possible to argue from this case that, provided the dismissal can be justified on technical legal grounds, continuity of employment and the contract of service will be broken. Where there is a clear proximity between the interruption or termination of the
employment and the time at which the employee becomes entitled to long
service leave it may be easier to prove the illegitimate motive of the
employer. It would appear much more difficult to impugn a dismissal
with notice, say, one or two years before entitlement accrues.

In those jurisdictions where reinstatement is available on
the ground that the dismissal was harsh, unjust or unconscionable, the
employee in such a case may still forfeit his opportunity to qualify for
long service leave because the contract of service has been lawfully
terminated.

(iv) Interruptions Arising Directly or Indirectly from an Industrial
Dispute

The federal 'code' and the relevant statutes in Western
Australia, South Australia and Tasmania provide that this type of
interruption does not break the continuity of employment or a contract
of service provided the employee returns to work in accordance with the
terms of settlement of the dispute. Unfortunately it is often difficult
to discern the terms of settlement of an industrial dispute; in many cases
the employees simply return to work without negotiation. The Queensland
and South Australian provisions have overcome this difficulty to some
extent by providing that such an interruption is not taken into account
where the striking employees are re-employed by their employer. The
New South Wales and Victorian Acts also avoid this problem.

It may be noted that only interruptions arising directly or
indirectly from an industrial dispute are excused by the state statutes
and the federal 'code'. Since in most jurisdictions the concept of an
industrial dispute is linked with the term 'industrial matter',
interruptions caused by disputes over non-industrial matters may not
be excused. Further, it is often extremely difficult to determine in
advance whether a dispute relates to an industrial matter or not.
Matters regarded by a union as legitimate issues for negotiation with
an employer may fall outside the scope of ‘industrial matters’. Strikes over ecological or political issues or managerial matters may well interrupt the continuity of an employee’s service or the contract of employment.\textsuperscript{28}

In New South Wales, Queensland and South Australia and in the federal ‘code’, \underline{any determination} arising directly or indirectly from an industrial dispute does not interrupt continuity of service or terminate the contract of employment.\textsuperscript{29} The Victorian and Tasmanian provisions do not excuse such determinations.\textsuperscript{30} The term ‘interruption’ in these states’ long service leave legislation seems to contemplate a temporary suspension, rather than a termination, of the contract of employment. At common law an employer is legally entitled to treat a striker’s withdrawal of labour as conduct justifying summary dismissal.\textsuperscript{31} If this course is open to employers, employees who participate in strikes could prejudice their chances of qualifying for long service leave, at least in Victoria and Tasmania.

The relevant provisions in New South Wales, Queensland and South Australian statutes and the standard federal award would seem to be broad enough to cover this situation. The provisions relate to determinations arising \underline{indirectly} from an industrial dispute. This could cover summary dismissals in response to strike action. But once again the salutary effect of these provisions is confined to disputes over industrial matters.

(v) \underline{Dismissal followed by Re-employment}

In most jurisdictions the dismissal of an employee followed by a \underline{re-employment} of the employee within two months of the dismissal will not disrupt the continuity of service or the contract of employment for the purposes of long service leave.\textsuperscript{32} The term ‘re-employment’ means a re-engagement by the former employer; it does not cover the ‘fortuitous
(vi) **Stand-down or Dismissal on account of Slackness of Trade**

Most of the state statutes and the federal code provide that the standing-down of employees on account of slackness of trade will not interfere with the continuity of employment or the contract of service. The Western Australian provision is slightly broader in scope since it excuses stand-downs in accordance with a federal award or an award of that state. In some jurisdictions the exemption is only available if the employee is re-employed by the employer within a certain period.

Only the federal, New South Wales, Queensland and Western Australian provisions expressly cover **dismissals** on account of slackness of trade. In Victoria, it has been held that continuity of employment is interrupted by a dismissal for slackness of trade followed by a re-employment three months later. Under the federal code and the New South Wales and Queensland statutes such an absence would not have disentitled an employee.

The termination of a worker's employment in a particular capacity because of slackness of trade does not necessarily mean that the continuity of his employment will be broken. In Crennan v. Oliver Furniture Pty Ltd a foreman was advised that the economic situation of the company made it necessary to dispense with his position. He forthwith accepted the company's offer of a re-classification as a pattern maker on a lower rate of pay. The Industrial Appeals Court held that the worker's continuity of employment was maintained notwithstanding the re-classification.

The phrase 'slackness of trade' admits several interpretations. It could refer to a general economic recession. Again, the overall
economic position of the employer might reflect a 'slackness of trade'. Alternatively the phrase might relate to a down-turn in one aspect of the particular employer's operations. In Amalgamated Engineering Union of Employees, Queensland v. Evans Deakin & Co. Ltd, the Industrial Conciliation and Arbitration Commission of Queensland chose the latter interpretation. Thus, if one sphere of the employer's business is experiencing a down-turn, it matters not that the other sectors of the business compensate for this depression.

(vii) Absence through Service in the Armed Forces

In all jurisdictions absence through service in the naval, military or air forces does not interrupt continuity of employment or sever the contract of employment.

(viii) Absence on Union and Related Business

Any reasonable absence on union business is excused in Western Australia if the employer refuses leave. In Tasmania, absences through attendance at meetings of the Apprenticeship Commission or a wages board are exempted. In the other states which rely on the concept of continuous employment or continuous service as a basis for long service leave entitlement, there are no express provisions dealing with this type of situation. In these jurisdictions an employee who plays an active role in legitimate union or industrial activities will, in certain circumstances, jeopardise his accruing entitlement.

(ix) Absence by Leave of the Employer

Many of the oversights or omissions of the long service leave provisions can be corrected by the sections which excuse any absence by leave of the employer. Provisions of this nature are not necessary in the New South Wales Act or the standard federal award because such
absences would not sever the contract of employment. In the other states, employers are, of course, free to grant leave for reasons other than those specified in the relevant statute and for periods in excess of those stipulated. In either case continuity of service will be preserved. However, it does seem that in many cases the legislature has left the employee's accruing entitlement to the mercy of the employer's discretion and disposition.

3. Do the Excused Absences Count as Qualifying Service?

Although the interruptions excused by the state statutes and the federal code do not break the continuity of a worker's employment or his contract of employment, such absences are not always taken into account in calculating the employee's long service leave entitlement. In other words, the length of qualifying service in some cases is the sum of the period of service before the interruption and the period of service after the interruption.

4. Service with Related Companies

The interruptions or determinations discussed above are not the only factors which could interfere with an employee's 'continuous employment' or an 'unbroken contract of employment'. A simple transfer of an employee from one company to another company in the same group could defeat an employee's chance of qualifying for long service leave. To safeguard an employee's interests in this situation, the state statutes deem any period of employment with a company related to the 'initial employer' to be a period of service with the 'initial employer'. The periods of service with the 'initial employer' and subsequent periods with related companies are, therefore, aggregated to calculate the period of qualifying service.
5. **Interstate Service**

(i) **Jurisdiction**

A more complex problem arises from interstate service with the one employer or with companies related to the employer. It is sufficient for present purposes to refer to some of the anomalies.

In Queensland long service leave entitlement is based upon a certain period of "continuous service with one and the same employer (whether wholly within or partly within and partly without Queensland)". This provision was applied in *Re Federal Hotels Ltd.* There, the claimant was engaged by the company in Melbourne around August 1954. He then worked for the company in Victoria and New South Wales before being transferred to Queensland as the company's state general manager. In September 1964, after four years' Queensland service, he resigned. On these facts the Industrial Court of Queensland upheld the employee's claim for a payment in lieu of proportionate long service leave ruling that his service fell literally within the terms of the local Act.

The *Federal Hotels Case* did not consider whether the Queensland Parliament was competent to enact such a provision but it would appear that it can be justified on private international law principles.

In New South Wales, jurisdiction in these cases may be invoked where the service on which the claim is based has a substantial connection with that state. *Australian Timken Pty Ltd v. Stone (No. 2)* established that proposition. There the New South Wales Industrial Commission in Court Session stressed that it is not necessary for the terminating event to occur within the state. Rather, at the time of the employee's resignation, dismissal or death, the Commission will look at the service as a whole and ascertain whether it may fairly be said to be substantially New South Wales service. Since the Act was designed to provide a 'reward for long service' the Commission felt
that the locality of the service was irrelevant. It decided that entitlement to leave or a payment in lieu thereof accrued as an incident of employment in New South Wales.

If the locality of the service is to be disregarded in applying the 'substantial connection' test, what factors may be taken into account? In the Commission's view, the fact that the terminating event occurred within the state is significant, but not conclusive, evidence that the service had a substantial connection with the state. Yet in *Australian Timken Pty Ltd v. Stone (No. 2)* there were few other factors linking the service with New South Wales.

The Commission concluded, nevertheless, that the service had a substantial connection with New South Wales. Notwithstanding their comment early in their judgment that 'locality of service appears irrelevant', Their Honours seemed to rely heavily upon the fact that the employee served for eight years in New South Wales prior to his resignation. Indeed, in their view, the employee's period of service in New South Wales was 'far longer than would have been sufficient to meet the test which we have formulated'.

The Commission provided no further guidelines for the application of its test. And their 'pragmatic' analysis may raise difficulties in marginal cases.

In the other states the principles on which the tribunals will assume jurisdiction in these cases await definition. It has been suggested that jurisdiction could be invoked in the state where the employment is located even though during some periods the employee was engaged in service outside that state. The suggestion probably derives from the judgments of Rich and Dixon JJ. in *Mynott v. Barnard*, a case involving the construction of the *Workers' Compensation Act 1928* (Vic.). However, the basic nature of long service leave legislation differs substantially from workers' compensation legislation. Under
the former, benefits are conferred not by reason of an isolated event or incident but because of a prolonged period of service. In many cases the situs of employment approach would produce a result similar to the ‘substantial connection test’ but this may not always be the case especially if locality of service is regarded as a significant factor in determining the nexus.

(ii) Can Periods of Interstate Service be Aggregated?

Assuming the employee can overcome the first obstacle of persuading a state tribunal to entertain his claim, an even more difficult issue arises: what periods of interstate service can be aggregated for the purpose of calculating long service leave entitlement? The answer depends, to some extent, upon the effect of the full faith and credit provisions.

The diversity of opinion on the effect of these provisions falls outside the scope of this paper. On one view the provisions have a substantive effect and require a state tribunal to recognise ‘rights’ conferred by the statutes of sister states. Even if this view is correct the state tribunal is only obliged to recognise ‘rights’. Under long service leave legislation, an absolute right to long service leave normally accrues after, say, fifteen years’ service, while a contingent right to pro rata long service leave is usually earned after a shorter period of service of five or ten years.

Thus a company employee who completes twenty years’ continuous service consisting of nine years’ service in the company’s Western Australian branch, nine years’ service in the Tasmanian branch and finally two years’ service at the Head Office in Victoria, may not qualify for long service leave. This anomaly results from the fact that he has not become entitled to any rights under the long service leave legislation in Western Australia, Tasmania or Victoria. Although
the employments in Tasmania and Victoria might be viewed as being undertaken by leave of the employer, the term of those employments may not be taken into account in calculating the period of 'continuous employment' under the Western Australian statute. Similar reasoning would defeat any attempt to combine the periods of service in Tasmania and Victoria.

If the situs of the employment is the proper test of jurisdiction it would appear that the employee would be unable to establish that his employment was 'Victorian'. If the 'substantial connection test' established in *Australian Timken Pty Ltd v. Stone (No. 2)* were applied, the employee would probably be no better off. Could it be said that the service as a whole had a substantial connection with Victoria? The answer would probably be 'no'. After all, the contract of service was made in Western Australia, and eighteen years' service was performed outside Victoria.

Where the period of service includes a term of service in New South Wales, further anomalies appear. Consider the following example:

An employee was engaged in New South Wales by a national company. He worked with the company's New South Wales office for nine years, and was then sent to the Tasmanian branch for a period of eight years. After completing that period of service he was transferred back to the New South Wales office where he worked until his resignation some four years later.

When the employee was transferred to Tasmania it would appear that his New South Wales contract of employment was broken for the purposes of the long service leave legislation. The New South Wales Act does not excuse absences by leave of the employer. Moreover, a lengthy absence interstate could not be regarded as one of the normal breaks in the continuity of employment.
Assuming the New South Wales contract of employment is severed, the right to pro rata long service leave accrues as the employee has served for more than five years and he has not been dismissed for 'serious and wilful misconduct'. But there is no obligation placed upon the employer to grant long service leave as soon as it accrues. It may be taken 'as soon as is practicable' after accrual 'having regard to the needs of the employer's establishment'. In the example, the employee would forfeit his civil remedy against his employer for failure to grant long service leave after he had served in the Tasmanian office for over two years. His civil remedy in New South Wales would be statute-barred by the expiry of the two year limitation period prescribed by the New South Wales Act.

When the employee returns to New South Wales and eventually resigns he will clearly be able to satisfy the 'substantial connection test', but with what period of service will he be credited? As noted above, the initial period of New South Wales service may well be excluded because the employee's civil remedy in respect of that service has lapsed. No 'rights' are conferred by the Tasmanian statute in respect of the service in Tasmania so there is no room for the operation of the full faith and credit provisions. Moreover, his final term of four years' service in New South Wales, taken by itself, is not sufficient to qualify for pro rata long service leave under the state Act. In the result, after twenty-one years' service for one employer, the employee has failed to qualify for long service leave?

Some lack of uniformity in the state statutes is perhaps inevitable but disparities causing injustices of this nature are inexcusable. The limitation periods prescribed by the state statutes are simply inadequate to cope with the problem of multi-state service.
(iii) Interstate Service in Related Companies

The examples considered above involved service for national companies with branches in each state. Under these circumstances it may be easier to conclude that the period of service is continuous employment with one and the same employer. What is the position if the periods of interstate service are undertaken for companies 'related' to the original employer?

In the Federal Hotels Case, the Industrial Court of Queensland took into account a period of some five years' service in a wholly-owned subsidiary of the appellant company. Again, in Australian Timken Pty Ltd v. Stone (No. 2), service with the appellant company's parent company in the United States was added to a period of New South Wales service to calculate long service leave entitlement. It thus appears that state tribunals may be prepared to give extra-territorial effect to the provisions of the state statutes deeming service with a related company to form part of the continuous service with the initial corporate employer.

To this point, the rights of an employee transferred within one company or to a related company have been discussed. When the business itself is transferred, a different set of problems arise.

6. Effect of Transmission on Continuity of Employment

If an employer acquires the business of another employer, and the employees remain in the service of the business as employees of the new employer, there is a technical break in the continuity of the employees' service. In theory, the former employer has terminated the services of his employees who are then engaged by the new employer. To safeguard the interests of employees in this situation, the state statutes and the standard federal long service leave award contain provisions preserving an employee's continuity of employment if the
employer transmits his business to another employer and the employee is engaged by the purchaser. There are slight differences in the wording of the relevant provisions in the state statutes and the federal 'code'.

Where a person who was an employee at the time of the transmission becomes an employee of the transmittee his continuity of employment is deemed not to have been broken by the transmission. In addition, any period of service by the employee with the transmittor or any prior transmittor is deemed to be service with the transmittee.

In New South Wales the provision relates to the transmission of a 'business, undertaking or establishment or any part thereof'. These words were considered by the Full Bench of the New South Wales Industrial Commission in Hayman v. Neill. It was held that the terms 'business, undertaking or establishment' should be construed as *eiusdem generis*; each term is intended to refer to the whole of the enterprise carried on by the transmittor. Further, the Full Bench placed a restrictive interpretation on the words 'or any part thereof'. In their view, 'to be a part of a business the part must itself constitute a business'. Both these points were recently affirmed in Manley v. Gazal Clothing Co. Pty Ltd.

(i) What is a Transmission?

In most jurisdictions 'transmission' is defined as including a 'transfer, conveyance, assignment or succession, whether by agreement or operation of law'. This technical definition provides little assistance for determining whether a transmission has occurred. Guidance must be sought in the authorities. It appears that a transmission within the meaning of the sections comprises two essential elements: transmission of a business and transmission of the employees.
(ii) First requirement: Transmission of the Business

The ultimate test of a transmission of a business appears to be: has the transferee been put in possession of a going concern? Usually this test will be satisfied by evidence that there has been a transfer of the goodwill associated with the business. Clearly if there is no business and no goodwill there can be no transmission.

It may often be difficult to ascertain whether the business had any goodwill and, if so, whether the parties intended it to be assigned. But if the vendor covenants not to compete with the purchaser, this will be cogent evidence of a transmission of the business. Again, the tribunal may find that a transmission has taken place if the transferee agrees to perform all the outstanding contractual obligations of the transferor.

(a) There must be a Transaction

There must be a transaction involving some legal nexus or privity between the transferor and the transferee. This transaction must concern the acquisition of the business, not just shares in the business or the assets of the business. Hayman v. Neill clearly illustrates this point. There, Styl-Master, a partnership, acquired all the issued shares in a company and later purchased some of the company's plant. In the meantime, the firm moved some 150 employees and 100 machines into factory premises leased and occupied by the company. Styl-Master's partners operated the company until December 1954 when it was decided that the company would cease manufacturing. The company's employees were advised by a notice posted on a notice board that their services would no longer be required after 22 December 1954. On the same day and on the same board Styl-Master published a notice stating that all employees dismissed from the company could apply for employment with the firm. In fact, all but seven of the
employees applied and were accepted. These employees ceased working for the company on 22 December 1954 and started work for Styl-Master about three weeks later.

On these facts the Full Bench of the New South Wales Industrial Commission concluded that a transmission had not occurred. Their Honours stated:

It is plain, in our view, that there was no transfer, conveyance or assignment from the Company to Styl-Master of the Company's business or any part thereof. There was no transaction at all between the Company and Styl-Master. In particular there was no transfer of goodwill, no transfer of assets (except an isolated sale of machinery for a particular purpose), no transfer of liabilities.96

Hayman v. Neill 97 demonstrates that the technical requirements of a transmission must be satisfied before an employee's continuity of employment will be preserved. Employees not familiar with these requirements may forfeit their accruing entitlement to long service leave. To allow a break of three weeks, especially in the dubious circumstances in Hayman v. Neil, 98 to erase this accruing benefit is a travesty of justice.

(b) Can a Transmission Occur in a Liquidation?

In certain circumstances a transmission may occur in the course of a company liquidation. In Rayner v. Joseph Haskin & Co. 99 two former directors of a company in liquidation purchased a substantial part of the company's business and set up an enterprise in separate premises. An employee of the company was instructed to report to the new premises for work. Under the new arrangement, the nature of the employee's work was the same and she worked under the same supervisor. It was held that in these circumstances continuity of employment had been maintained.

On the other hand, a liquidator incurs no personal obligations in respect of the long service leave entitlement of employees whose
services he has continued in the course of a voluntary winding up.\textsuperscript{1} This follows from the fact that a liquidator is not deemed to be a transmittee of the business of the company.\textsuperscript{2}

If an employee qualifies for a long service leave entitlement during or at the completion of his service with the liquidator, his entitlement is given priority as one of the costs and expenses of the winding up.\textsuperscript{3}

(iii) Second Requirement: Transmission of Employees

The acquisition of a business without a transfer of staff cannot amount to a transmission. The transaction must involve the transmission of the employees as well as the business.\textsuperscript{4} Thus, where the engagement of the employee by the purchaser of a business amounts to an independent employment, the transaction will not be a transmission.\textsuperscript{5}

In most states and under the standard federal award, the re-engagement of the employees by the purchaser of the business must take place at the time of transmission.\textsuperscript{6} If the employee decides to take a holiday,\textsuperscript{7} or is directed to take a holiday, before taking up employment with the transmittee,\textsuperscript{8} his continuity of employment will be broken. The only break in the continuity of employment which is excused by the transmission provisions in most jurisdictions is the gap caused by the very fact of transmission.\textsuperscript{9}

In Tasmania and Queensland an employee's continuity of employment is maintained if he is engaged by the transmittee up to two and three months after the transmission.\textsuperscript{10} This type of provision would curtail some abuse of the transmission sections but it does not protect an employee's continuity of employment from transmitters and transmittees who act in collusion to minimise long service leave liabilities.\textsuperscript{11}
The transmission provisions appear to have been interpreted in a legalistic manner. As a result, the technical requirements of a transmission are difficult to establish. In many cases the employee's continuity of employment will be severed even though the employee himself believes on reasonable grounds that his employment is continuous. The requirement that there be a transmission of employees has been so strictly interpreted that it is relatively easy for employers acting in concert to defeat the purpose of the transmission provisions.

The factors and events which affect the employee's continuity of service for the purpose of long service leave entitlement have been considered. Prior to the completion of a basic period of qualifying service the employee acquires, after a certain period of continuous employment, a contingent right to pro rata long service leave. This contingent right may be forfeited where the employee is dismissed by his employer for 'serious and wilful misconduct'. It remains to consider this topic. It should be emphasised at the outset that a dismissal for 'serious and wilful misconduct' can only affect a pro rata entitlement; it has no effect upon the absolute entitlement earned by the basic periods of qualifying service.

7. Effect of Dismissal for 'Serious and Wilful Misconduct' upon Pro Rata Long Service Leave Entitlement

(i) Meaning of the Term

The term 'serious and wilful misconduct' was considered by the Industrial Appeals Court of Victoria in Knott v. Carlton & United Breweries Ltd. Gamble J. found that the word 'misconduct' in this context referred to a particular type of breach of the contract of service. His Honour suggested that the breach must be one which 'according to the current and generally accepted moral standards of the community would be regarded as reprehensible and deserving of censure in
In his view, the word 'serious' was intended to be a gauge of the gravity of the employee's offence. To determine whether the misconduct is 'serious' all the elements of the impugned conduct must be taken into account. The likely effect of the conduct upon the safety and well-being of the employer's business, his property, and other employees will be considered. For example, in Tucker v. Benoit the court concluded that the employee's actions in borrowing his employer's tools without permission for intended use in a competitor's business did not constitute 'serious misconduct' since the employer's business was not prejudiced by the conduct and the tools were returned unused and undamaged. In a recent South Australian case, the probable effect of the employee's conduct upon other employees was treated as a vital factor.

The term 'wilful' denotes that the employee's conduct must amount to a deliberate repudiation of the contract of service. It allows the appropriate authority to consider subjective factors such as the motivation and general attitude of the worker at the time. Thus, a spontaneous reaction to an increased workload will rarely amount to wilful misconduct. On the other hand, if an offender adopts a defiant attitude this will aggravate the seriousness of his conduct.

When deciding whether the employee's actions justified dismissal for 'serious and wilful misconduct', the appropriate authority will, it seems, disregard the employee's length of service and the grave consequences for an employee who forfeits his pro rata entitlement. The fact that the employee provided good service over a lengthy period prior to his dismissal is immaterial; the sole issue is: has the employee been dismissed for serious and wilful misconduct?
(ii) Some Examples

The authorities shed some light upon the nature and degree of misconduct which may defeat an employee's pro rata entitlement. Dishonesty may amount to 'serious and wilful misconduct'.\(^{29}\) Similarly, an unauthorised use of the employer's property may constitute 'serious misconduct'.\(^{30}\)

Moreover, refusal to obey a lawful instruction may, in certain circumstances, substantiate a dismissal for 'serious and wilful misconduct'. In Gvozdenovic v. Mallabones Pty Ltd\(^ {31} \) the claimant was summarily dismissed for his failure to comply with a lawful order to do spray painting. When a management representative questioned the claimant over his refusal of duty, he produced a medical certificate which stated that he was unfit for spray painting. Later the same day the foreman was instructed to insist that the claimant perform the work. The employee again refused and was dismissed.

The Western Australian Industrial Commission in Court Session found that the employee was an unsatisfactory worker and it doubted the bona fides of the medical certificate obtained by the employee. It concluded that the employee was not entitled to a pro rata long service leave payment.

A refusal to load and shift bricks without the assistance of another worker was held to constitute 'serious misconduct' in Ford v. C.S.P.P. & Farmers Ltd.\(^ {32} \) It appeared that the particular task had been performed without assistance in the past and that, though an assistant would expedite the completion of the work, he would not lessen the effort required by the claimant. On the other hand, an employee who declined to perform work declared 'black' by his union did not lose his pro rata entitlement.\(^ {33} \)

Closely related to the disobedience cases are those involving a neglect of duty by the employee. For example, where an employee
deliberately absented herself from her employment for two days in the face of two definite refusals of permission for leave, her action constituted 'serious misconduct' and also probably amounted to 'serious and wilful misconduct'.

Conduct prejudicial to the employer's business or inconsistent with the employee's duty of good faith will normally be classified as 'serious misconduct'. Forwood Down W.A. Pty Ltd v. Brandis provides an interesting illustration. A mass meeting of the workers decided to press for a wage increase by restricting factory output in accordance with a 'working to regulation plan'. Brandis participated in this 'go-slow' campaign along with the bulk of the company's workers. As a result the level of production had fallen drastically by 18 June 1964, the date of the dismissal, and it appeared that the company might be compelled to retrench certain employees in sectors not involved in the 'go-slow' policy.

The foreman advised Brandis prior to 18 June that other workers were dependent upon his output for their work. Moreover, it was not disputed that he had exceeded a reasonable time for the completion of the job on which he was engaged. On 17 June the foreman advised Brandis that he 'would have to get on with the job' and another worker was assigned to help him. The next day Brandis was some ten or fifteen minutes late in starting his work. The foreman dismissed him but made no mention of the fact that the dismissal was for misconduct.

The Western Australian Industrial Commission in Court Session was convinced that Brandis' actions amounted to 'serious misconduct' within the meaning of the relevant long service leave award. The fact that Brandis was not proved to be an instigator or a 'ring-leader' of the 'go-slow' campaign was irrelevant. Along with the mass of the workers, Brandis had, in the Commission's opinion, taken a direct part in the demands on the employer. Mr Commissioner Schnaars dismissed the contention that Brandis was no more implicated in the campaign
than any of the bulk of the company's employees: "This case concerns one particular worker and it is his conduct which is under consideration and not the conduct of the other workers." 37

Once the employee establishes that he has served his employer for a period sufficient to qualify for pro rata long service leave, it is incumbent upon the employer to prove that the dismissal was for 'serious misconduct' or 'serious and wilful misconduct', as the case may be. 38 Whether the employee has been guilty of this type of misconduct is a question of fact which will turn on the particular circumstances of each case. 39

(iii) Conclusion

The range of factors which the appropriate authorities are allowed to take into account in determining whether the employee's actions amount to 'serious and wilful misconduct' appears to be too restricted. Where an important issue like long service leave entitlement is at stake, the authorities should be permitted to consider the employee's previous record and length of service. Perhaps the proper inquiry should be: is the employee's 'serious and wilful misconduct' grave enough to deprive him of his pro rata entitlement, rather than simply, is the employee's action 'serious and wilful misconduct'?

While the authorities state that 'serious and wilful misconduct' involves actions of much greater gravity than mere misconduct, it appears that some cases have set a low standard for the former concept. It is submitted that Myer Emporium (S.A.) Ltd v. Clemens, 40 Forwood Down W.A. Pty Ltd v. Brandis, 41 Singer Aust. Ltd v. Cardigan 42 and Gvozdenovic v. Mallabones Pty Ltd 43 fall in this category. Indeed, in Forwood Down W.A. Pty Ltd v. Brandis 44 the employer's action in dismissing the claimant had undertones of discrimination against a
particular employee. Yet the employee forfeited his pro rata entitlement. There can be little doubt that the employers in each of the above cases were justified in dismissing the employees for misconduct. What is disputed is the finding in each case that the misconduct was 'serious misconduct'.

8. Effect of Death and Resignation on account of Illness or Domestic or Other Pressing Necessity upon Pro Rata Long Service Leave Entitlement

Entitlement to a payment in respect of pro rata long service leave accrues upon the death of the worker. In addition, provided an employee resigns 'on account of illness' or 'domestic or other pressing necessity' he will not be denied his proportionate entitlement. The interpretation of the terms 'illness' and 'domestic or other pressing necessity' will now be examined.

(i) Has the Employee Resigned 'on account of illness'?

The tribunals have adopted a subjective test in determining this issue. This is so even in those jurisdictions where the illness must be 'of such a nature as to justify termination of employment'. But, although an objective test has been rejected as too restrictive, it appears that the resignation must be reasonable in all the circumstances. The motive of the employee in terminating his employment is considered from the point of view of such an employee in his particular circumstances.

The 'illness' must be actually relevant to the employee's resignation but it need not necessitate the termination of the employment. It must, however, be shown that the 'illness' caused the termination. Thus, evidence of the 'illness' should permit the tribunal to draw a reasonable inference that the sickness caused the termination of employment. Medical advice that the employee should
change jobs because of his health will, of course, place the employee in a strong position. On the other hand, the employer may be able to discredit the medical evidence submitted on behalf of the employee by proving that the doctor made an incorrect diagnosis. Furthermore, the medical evidence adduced by the employee may be unacceptable for some other reason.

The illness relied on as justification for the resignation need not be a drastic complaint. In one case the Victorian Industrial Appeals Court held that a state of mild nervous tension was sufficient to justify an employee resigning on account of illness. Further, it is not necessary for a claimant to establish that the illness alleged prevented him from performing his work; it is sufficient if the illness hinders the employee carrying out his normal duties.

(ii) Has the Employee Resigned *on account of ... domestic or other pressing necessity*?

In resolving this issue the tribunals again resort to a subjective test. Nevertheless, a tribunal is entitled to consider whether a reasonable man would feel that the situation warranted resignation. The phrase "domestic necessity" imports a serious problem, not necessarily a crisis. While specious or trifling matters will not normally constitute domestic necessities, the tribunal should be careful not to apply a too restrictive interpretation of the term. The adjective "pressing" does not qualify the phrase "domestic necessity". Thus, the legislature has apparently indicated that a "domestic necessity" is automatically to be regarded as a pressing matter.

Where an employee faced with heavy financial commitments resigns in order to secure a position on higher pay involving less travelling, he will not be denied his pro rata entitlement. Indeed, in one case, a saving in travelling expenses and car maintenance was sufficient
justification for an employee who resigned because of his economic worries.

A normal healthy pregnancy does not of itself amount to a 'domestic or other pressing necessity' in its early stages. Thus, if an employee resigns at this stage of a pregnancy, medical evidence will probably be required to establish that the pregnancy amounted to a 'domestic or other pressing necessity'. During the later stages of a pregnancy it appears that the tribunal will allow the employee to decide in her own discretion whether her condition justifies resignation.

Some cases appear to have adopted a stricter attitude to employees' claims for pro rata long service payments. In Hill and Dalgety and N.Z. Loan Ltd, an employee resigned because of his apprehension that a proposed interstate transfer would disrupt his domestic situation. It appeared that the employee and his wife intended to adopt a child and the employee's wife was firmly opposed to the transfer. Indeed, the employee alleged that his marriage would be jeopardised by the transfer. The chairman of the board of reference which heard the claim concluded that the employee had over-estimated the threat to his marriage. He considered that the degree of inconvenience caused by the proposed transfer fell considerably short of a domestic necessity which would justify the employee terminating his employment. It would seem that the Chairman strayed from the subjective test of 'domestic necessity'.

Again, in Brindley v. Melesco Manufacturing Company Pty Ltd, a restrictive interpretation of the term 'necessity' was employed. The tribunal decided that 'necessity' denotes something unavoidable or an unavoidable compulsion. Accordingly, an employee who resigned from his job because it involved excessive travelling, loss of overtime and site allowances, and disruption of his domestic life forfeited his pro rata
entitlement. These causes of distress did not fall within the relevant provision because the employee need not have purchased a house so far from his workplace, or having bought it, he could have sold it!  

If the term 'necessity' is to denote 'an unavoidable compulsion' what interpretation should be attached to the word 'pressing'? On the tribunal's view the term 'pressing' would seem to be tautological. It is submitted, with respect, that the adjective 'pressing' indicates that Parliament did not intend a literal interpretation of the word 'necessity' to be applied.

More recently in Zussa v. Bent; Re Industrial Concrete and Terrazzo Pty Ltd (in liq.) the Victorian Supreme Court ruled against an employee who had resigned from a company some three weeks before its compulsory winding up. The employee's doubts about the solvency of the company and the security of his position in those circumstances precipitated the resignation. The Supreme Court rejected the employee's claim since he had not established that the termination of employment was caused by a 'domestic or other pressing necessity'. This decision appears to be particularly harsh in view of the fact that, in a compulsory winding up, an employee's entitlement to a pro rata long service payment accrues at the date of publication of the winding up order. It thus appears that to qualify for a pro rata payment an employee must remain with the company until the winding up order is published. He will then have to compete with his fellow employees for a position elsewhere and he will not be receiving an adequate regular income to sustain himself and his family during his search for alternative employment. In view of Australia's increasing unemployment, this could present a problem for the individual worker.

Although there is no authority on the point, it has been
to get married would be denied pro rata long service leave entitlement since the resignation would not be caused by a "domestic or other pressing necessity". 74

(iii) **Effect of Delay, Failure to State Reason at Time of Resignation and Mixed Motives**

Apart from the isolated cases mentioned above the tribunals have consistently adopted a liberal attitude to employees' claims for pro rata entitlement after a resignation on account of illness or domestic or other pressing necessity. The mere fact that an employee delays his decision to resign because of one of those reasons for a considerable period of time does not defeat his entitlement. 75 Again there appears to be no necessity for an employee to advise the employer of the reason for his resignation. 76 His failure to do so will not defeat his claim for a pro rata payment although it will be a factor which the tribunal can take into account. Moreover, if the employee's resignation is caused by "illness" or "domestic or other pressing necessity", it matters not that some other factor contributed to his decision. 77 But the termination of the employment by the employee must be attributable to "illness" or "domestic or other pressing necessity" and not some ulterior motive such as better pay or conditions in another position.

9. **Prohibition of Contracting Out**

Having imposed obligations upon employers in respect of long service leave, the legislature and the tribunals would be neglecting the interests of employees if they allowed employers to contract out of the provisions of the relevant statute or award. In some states, contracting out is expressly prohibited. 79
In Queensland, state long service leave awards will prevail over provisions in contracts of service unless the contracts provide more favourable conditions of employment. Employees who are not covered by state long service leave awards in that state must fall back on section 19 (1) of the Industrial Conciliation and Arbitration Act, 1961-1974 (Qld). That section governs the entitlement of "any and every employee" in respect of whose employment there is no current federal or state long service leave award or industrial agreement.

In a similar vein, section 4 (1) of the Long Service Leave Act, 1967-1972 (S.A.) provides: "Subject to this Act, every worker shall be entitled to long service leave or payment in lieu thereof, in respect of service with an employer." It remains to be seen whether the words "any and every employee" in the Queensland provision, and "every worker" in the South Australian section, will be sufficient to preclude contracting out. If they cannot be so interpreted an interesting question arises: can an employer stipulate in a contract of service that, say, South Australian law shall be the proper law of the contract and then provide that the provisions of the South Australian long service leave legislation shall not apply to the contract? Chief Justice Latham's judgment in Mynott v. Barnard would probably demand a negative answer to this question.

(i) Exemptions

While in most jurisdictions an employer will be prevented from contracting out of the provisions of the long service leave legislation, he may apply for an exemption from the obligations imposed by that legislation. The grounds on which such an exemption will be granted are carefully scrutinised. In most states, to qualify for an exemption an employer must establish that a scheme conducted by him or on his
'not less favourable' than those specified in the relevant Act. Provided the employer meets this condition, and the appropriate tribunal is satisfied that it is in the best interests of the workers, an exemption will be granted. In most states, there are provisions for review of exemptions.

(ii) New South Wales Approach

In New South Wales, it appears that the appropriate tribunal will determine the employer's application by comparing the provisions of the employer's scheme as a whole with the provisions of the statutory scheme as a whole. It will attempt to decide upon a final balance on an overall basis. Thus in Kennedy v. Board of Fire Commissioners the fact that the employer's scheme gave no rights on termination of employment to those employees with less than ten years' service and that between ten and fifteen years' service the employer's scheme gave no rights upon dismissal for misconduct did not persuade the Industrial Commission that the scheme was less favourable than the statutory requirements. The Commission in Court Session was clearly swayed by a provision in the scheme which gave employees with fifteen years' service an entitlement more generous than that prescribed by the statute. Its reference to the relatively permanent features of the particular employment involved does not dispel doubts that it failed to protect an employee's entitlement to long service leave prior to the completion of fifteen years' service. It appears then, that the Commission neglected the rights of the individual employee in favour of a scheme which would provide a more generous entitlement for the bulk of the workers taken, as the Commission indicated, on overall basis.
(iii) Victorian Approach

In Victoria, the appropriate tribunals have evinced a somewhat stricter attitude to exemption applications. It is not sufficient simply to compare the benefits provided by the employer's scheme with those required by the relevant statute. The appropriate tribunal is obliged to examine the basis on which the scheme's benefits are provided including the length of service necessary to qualify, the duration of the leave, the terms upon which it is granted and the conditions under which it may be forfeited.\(^8\) The tribunal should also consider any benefits which the employees may lose if the exemption is withheld and the employer abandons the scheme as a result.\(^9\) It is entitled to take into account the position of an individual worker or group of workers whose entitlement under the employer's scheme is substantially less than the corresponding statutory benefits.\(^1\)

(iv) Election

The prejudicial effect of a "global" approach to exemption applications so far as the individual employee is concerned is off-set in two states by allowing employees to elect to be covered by the statutory or award scheme rather than their employer's scheme.\(^2\) The position in the other states is far from clear. The Tasmanian\(^3\) and South Australian\(^4\) provisions allow exemptions to be granted to employers in respect of their employees or "any of them".\(^5\) The Victorian statute\(^6\) contains a similar provision. Presumably these sections would enable the appropriate tribunals in those states to make allowances for the position of an individual employee who may not benefit as much from the employer's scheme as he would under the statutory provisions.
10. Conclusion

Certain aspects of an employee's long service leave entitlement under the state statutes and the standard federal award have been analysed. Defects both in the legislation and the tribunal's approach have appeared under almost every heading discussed. It is difficult to share Mr Justice Sheldon's confidence that, by virtue of the long service leave legislation, 'a social policy without loopholes has been made operative'.

Before leaving aside the issue of recognition of employees' services it is convenient, at this point, to note some of the principal conclusions which Appendix 4 draws from the law regulating private superannuation schemes.

At the outset, the law does not oblige company management to provide superannuation for their employees. Further, by questionable reasoning the High Court has decided that superannuation is not an arbitrable matter. However, the Income Tax Assessment Act 1936-1974 (Cth) offers powerful inducements to employers to grant this form of fringe benefit.

Unfortunately, the taxation concessions in respect of superannuation schemes may be obtained even though the members' rights under the schemes are far from secure. Thus, there is no guarantee that employees will receive a 'vested' superannuation benefit upon resignation, dismissal or retrenchment. Indeed, an employee's rights may be 'fully secured' within the meaning of the income tax provisions even if he will forfeit his own contributions to his employer's scheme in the event of dismissal. It is also possible for a company to provide in its superannuation scheme that a member will forfeit his own contributions if he participates in a strike. Such a clause will not disqualify the company from taxation concessions in respect of the scheme.
Moreover, the Income Tax Assessment Act 1936-1974 (Cth) provides a positive incentive to employers to disregard the position of an employee who resigns or withdraws from the employer's scheme, or who is dismissed. The 'benefits foregone' by the former member may be applied in such a way as to reduce some of the employer's costs of running the scheme.

An employer may be granted a greater taxation deduction than that specified in section 82 AAE of the Income Tax Assessment Act 1936-1974 (Cth) if the Commissioner is satisfied that 'special circumstances' warrant more generous treatment of the employer's contributions. But an employer is given no incentive to reward an industrious employee or to recognise an employee's past pioneering services by increasing his contribution beyond the statutory formula. To this extent, the law actually discourages recognition of employees' efforts through generous superannuation benefits.

Taxation concessions are more generous for funded superannuation schemes but the complexity and administrative discretion inherent in the relevant legislation may, in fact, persuade employers to provide superannuation on an informal, ad hoc, unfunded, and, therefore, insecure basis.

In the field of superannuation, as in the field of long service leave, the central issue is whether the law secures the employee's rights to receive the benefits promised by his employer. In both areas the law can do much more to safeguard these rights.
INTRODUCTION

A man's job, to a great extent, determines his income and his standard of living, his social status and self-respect. In our industrialised society a worker without a job is a 'misfit' with a low morale and an inadequate income. Job security, then, is fundamentally important. In overseas countries it is coming to be regarded as a right rather than a privilege. On a related point, Lord Denning declared in Nagle v. Fielden:¹

A man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights to property. Just as the courts will intervene to protect his rights of property, they will also intervene to protect his right to work.²

The following chapters in this Section show that Australian courts and tribunals are a long way from recognising proprietary rights in employment.

CHAPTER 5 DISMISSAL

1. Background

At the root of the individual employee's relationship with his employer lies the contract of employment. This contract may be in writing³ or oral and may be amplified by custom, statute, collective agreement or award.⁴

Often the parties simply enter into the relationship of employer and employee leaving some of the essential terms of the employment obscure and uncertain.
In industrial employment the provisions of awards, collective agreements and wages board determinations incorporated into the contract of service are negotiated by third parties and may be unknown to the individual employee. Indeed, the foundation of the employment relationship often appears to be conduct rather than contract. Yet contractual principles determine the formation of the employment relationship.

Common law also directly governs the dismissal of employees whose working conditions are not regulated by industrial agreements or awards. Approximately 12% of Australian employees are in this category.

The overwhelming majority of workers in Australia are engaged in 'award employment'. Yet the standard award clause dealing with the duration and termination of the contract of service preserves the employer's common law right of summary dismissal for 'malingering, inefficiency, neglect of duty or misconduct'. These terms are interpreted in the light of common law principles.

In addition, where the award is silent, the common law applies. Thus, an employer retains his right of instant dismissal where the employee breaks one of his common law duties, for example, the duty to obey lawful and reasonable commands. Take a recent example.

On 19 November 1973, Mace Denheld, a Fokker Friendship Captain employed by T.A.A. was dismissed over an incident which occurred during a flight from Melbourne to Wynyard, Tasmania on 27 October 1973. The airline alleged that Denheld breached Department of Civil Aviation navigational regulations by descending below the minimum altitude (366 m. or 1,200 ft) prescribed for limited visibility flying. In view of Denheld's thirteen years' service (the last three as a Captain), T.A.A. offered him a ground job but it rejected his claim to reinstatement.
The sacked pilot complained to his union, the powerful and strategic Australian Federation of Air Pilots. The Federation stressed that the dismissal was unduly severe. It argued that a demotion to First Officer for a period would be more appropriate punishment for the admitted breach of safety regulations. The union also pointed out that Denheld became accustomed to this method of flying during his recent New Guinea service for the airline. Denheld himself asserted: "During my period in New Guinea it was company policy to practise limited visibility approaches into coastal airports. It was encouraged by the check and training section of T.A.A. in New Guinea and to my knowledge was condoned by the Department of Civil Aviation".11

The union backed up its stand with strike action beginning on 15 November 1973. Nearly a week later, faced with threats of further lightning strikes, T.A.A. shut down its services indefinitely.

At this point, the Minister for Civil Aviation (Mr Jones) and the Minister for Labour (Mr Cameron) became embroiled in the dispute. Mr Jones accused the Federation of trying to substitute 'muscle for safety'.12 Mr Cameron also came down firmly in support of the airline. He stated: "It will always put the safety of its passengers above the private motive or above monetary considerations".13

Other unions entered the fray. The A.C.T.U. and the Transport Workers' Union supported the Government's stand. The Assistant Secretary of the Australian Federation of Air Pilots explained the T.W.U.'s position thus: "They work beside us in the same industry, and they are in awe of our industrial power".14 On the other hand, the Amalgamated Engineering Union and the Amalgamated Postal Workers' Union aligned themselves with the Air Pilots' Federation.

Meanwhile, the Federation applied to the Flight Crew Officers' Tribunal for an order compelling T.A.A. to employ the airline's pilots who continued to report for work. Mr Justice Coldham refused to make
this order. Upholding the airline's stand on the discharge, His Honour stated: 'The recent history indicates that T.A.A. dismissed a pilot who breached D.C.A. regulations. The right of the airline to take this action cannot be disputed'. He also pointed out that the severity of the dismissal was in issue but declined to consider this point.

At this stage one may wonder what was happening about Denheld's dismissal. As one union official put it: 'Denheld became buried in the broader issue of Government versus union'.

The Department of Civil Aviation reviewed the alleged breach of safety regulations and ordered the suspension of his first class licence. Under pressure, the Government agreed to appoint a board of review to hear Denheld's appeal against the cancellation. The board comprised Mr R.E. McGarvie Q.C., Captain R.J. Smithwell, a Qantas pilot and former president of the Australian Federation of Air Pilots, and Mr R.M. Seymour, the Queensland regional director of the Transport Department's air transport group. Mr McGarvie was the chairman. The board unanimously decided that Denheld's first class licence should be suspended for two years. It also recommended that T.A.A. re-employ him as a First Officer. On 17 May 1974, it was reported that T.A.A. had agreed to comply with the recommendation.

What are the results of this saga? The dispute cost T.A.A. nearly $1.8 million in lost revenue, and long after it resumed normal services it was struggling to regain its share of the domestic air travel market. The proceedings before the Transport Department's Board of Review cost the Federation $25,000. And the litigation did not end there. The Federation later sued the airline for back-pay during the period 23 November to 29 November 1973 alleging that in this period the airline locked-out its pilots. Before he was dismissed Denheld was earning $17,255 per annum; in August 1974, his
salary was $14,650 per annum. All the parties seem to bear some scars of the battle.

In some respects, Denheld's dismissal case may be regarded as atypical. The Federal Secretary of the Federation gives one reason for this view. 'This would never have happened with Ansett. T.A.A. would rather lose a quid than lose face. They are more concerned with firm administration than making money.' Nevertheless, the case does illustrate a few general points. Firstly, a dismissal of one employee can spark off a dispute of national proportions. Secondly, even with the support of a powerful union, an employee will not always be able to secure reinstatement. Thirdly, this was a case where the 'award', actually the Airline Pilots' (Domestic Operators) Agreement 1972, did not cover the dispute. In effect, the dismissal was caused by the pilot's breach of the airline's orders to obey D.C.A. navigational regulations. In other words, the sacked Captain had breached his duty to obey his employer's lawful commands - a common law duty. The Airline Pilots' Agreement did not affect the employer's right of summary dismissal on this ground.

Fourthly, Denheld's contract of service was made up of several components: an industrial agreement, common law and statutory regulations. Low-level flying was not consistent with the duties under this contract; it was at most a practice, not a custom.

Finally, the case demonstrates that the employee's interest in job security may become obscured when powerful forces such as the Government, a large corporation and a union become involved in a dispute. In the Australian context, job security is not a simple issue between an employer and an employee.
2. Duration of the Contract of Service

Before turning to dismissals with notice, it will be convenient to describe the duration of the different forms of hiring: in many cases, the period of hiring gives some indication of the length of notice required by law to terminate the contract.

(i) Yearly Hiring

It was once widely recognised that an employment for an indefinite period was a yearly hiring in the absence of evidence to the contrary. Moreover, if employment was initially for a year certain, and the employment continued over that period, the presumption of yearly hiring was again raised. The genesis of the rule can probably be seen in section 3 of the Statutes of Labourers which commenced in 1562.

While it was frequently stated that the presumption was not an inflexible rule of law and was capable of being rebutted by evidence inconsistent with a yearly hiring, the presumption has shown surprising tenacity. Despite the efforts of the English Court of Appeal to limit the application of the presumption in De Stempel v. Dunkels, Jackson v. Hayes Candy & Co. Ltd and Vernon v. Findlay reaffirmed that the presumption could be applied to modern employment contracts. As late as 1950, English judges paid lip service to the presumption. But Richardson v. Koefod, a recent decision of the English Court of Appeal rejected the presumption of yearly hiring in unequivocal language. Lord Denning M.R. stated firmly:

The time has now come to state explicitly that there is no presumption of a yearly hiring. In the absence of express stipulation, the rule is that every contract of service is determinable by reasonable notice.

The presumption was not applied because 'it has ceased to be valid in our modern industrial society'.


While the presumption has been swept away entirely in England, the position in Australia is not yet clear. Early Australian authorities such as Mackenzie v. Union Fire & Marine Insurance Co. of New Zealand and Manners v. Denny Bros clearly recognised and applied the presumption. In Healy v. Law Book Company of Australasia Pty Ltd Latham C.J. regarded the presumption as well-established but he declined to apply it because of the express notice provision in the plaintiff's contract of employment. However, since Arlesheim Ltd v. Werner, it appears reasonably clear that the presumption will not apply to the type of employment regulated by wages boards and industrial courts. As the law stands at present, the rule may still be relevant in other sectors of employment. It remains to be seen whether Australian courts will follow the Court of Appeal in Richardson v. Koefod and abandon the presumption.

(ii) Hiring at Will

The contract of general hiring must be distinguished from a hiring at will. A hiring for 'so long as the master wants a servant', though indefinite as to time, is not a general hiring, but a hiring at will. This type of tenure may take the form of an employment for a period subject to satisfactory service or subject to the performance of duties to the satisfaction of the employer or the board of directors. Courts construe these provisions literally and grant no redress to employees dismissed in accordance with the clause. Further, courts will not inquire into the reasonableness of the employer's dissatisfaction provided the employer is honestly and genuinely dissatisfied with the employee's service. However, the terms of a hiring at will must appear clearly from the contract. Thus, employment on an annual salary for 'at least three years' at the option of the employer was held not to be a hiring at will.
(iii) Hiring for a Fixed Term

Hiring may be for a fixed term. This form of hiring is common among managerial employees. Contracts providing employment \(\text{for 2 yrs at a salary at } \text{or over the rate of } £250 \text{ a year}\), \(\text{for a period of not less than 3 years}\), \(\text{for one year only}\) have been held to be hirings for a fixed term. In one case the fact that salary was to be £500 per annum persuaded the court that the agreement was for a year certain.

In Salt v. Power Plant Co. Ltd the appellant's employment was expressed to be 'permanent' after four years, subject to an express provision that the performance of the employee's duties should be to the satisfaction of the directors. Some eleven years after the employee was engaged, the employer purported to terminate the contract by notice. It was held that, provided the employee performed his duties to the satisfaction of the directors, his contract was for life. That this may be regarded as a rare and exceptional case appears from McClelland v. Northern Ireland General Health Services Board. There the House of Lords decided by a narrow margin that there was no magic in the word 'permanent' in the appellant's contract: it did not preclude the right to issue notice of dismissal.

Contracts of service which are stated to expire at retiring age are almost as rare as contracts for life. In Orr v. University of Tasmania the University statute provided that the appointment of any person would determine on the last day of the year in which the appointee attained the age of sixty-five. The High Court unanimously ruled this clause did not prevent the University terminating an appointment prior to this retiring age. Rather, it simply provided that the appointment was not to continue beyond that time.
(iv) Periodic Hirings

The majority of employees in Australia are covered by periodic hirings. In blue collar employment, hiring is normally by the week, but periodic hiring in other sectors may be for weekly, monthly or yearly intervals. The reservation of a weekly salary may raise a presumption of a weekly hiring but this presumption can be rebutted by the particular nature and incidents of the service arrangement. If an employee is entitled to his wage or salary weekly, the fact that he receives his pay monthly or at irregular intervals will not be sufficient to rebut a presumption of weekly hiring. Again, mere reference in a contract of service to a period of anticipated service longer than that by which the remuneration is to be calculated or paid does not necessarily mean that the hiring is for a fixed term rather than a periodic hiring.

These then are the different types of hiring. What periods of notice are required by law to terminate these forms of tenure?

3. Notice Required to Terminate the Contract of Service

(i) Yearly Hiring

Contrary to the view in some authorities, there is no necessary link between the period of the hiring and the length of notice appropriate to terminate it. Where the presumption of yearly hiring still applies, it is established that the hiring must continue for the entire year and that notice purporting to terminate the agreement earlier will be ineffective. This rule, however, admits an exception: where the contract is subject to a stipulation either express or implied by custom, enabling either party to determine the agreement by notice, then this clause applies.

When the yearly hiring runs on over the first year, what notice is required to terminate the arrangement? The authorities are
singly obscure on this point. In most cases the issue did not arise because the employer’s notice was defective in any event since it was not timed to expire on the last day of the relevant year. However, the better view appears to be that a yearly engagement may be terminated by reasonable notice due to expire on the final day of the relevant year.

(ii) Other Forms of Hiring

Fortunately, there is little controversy about the length of notice required to terminate the other forms of hiring. A hiring at will may be terminated at any time by either party; no notice is required. In the absence of an express provision as to notice, a hiring for a fixed term does not require any notice of termination; the hiring terminates automatically when the term expires.

The general rule applicable to periodic hirings and hirings for an indefinite period (other than those subject to the presumption of yearly hiring) is as follows: in the absence of a custom or an express stipulation as to notice, the contract may be terminated by reasonable notice.

(iii) Customary Notice

A practice hardens into a custom when it is general, of reasonable antiquity and standing, uniform and so notorious and well-understood that people make their contracts on the assumption that it exists. In other words the alleged custom must be well recognised, certain and consistent.

When reliance is placed upon custom to determine the notice required, it must be expressly alleged and clearly made out. If there is an express or implied term of the employment contract dealing with notice of dismissal, the alleged custom will be displaced for a
custom will only be imported into a contract when it accords with the tenor of the agreement as a whole.  

An ancient and well-established custom in England requires that menial servants be given one month's notice of dismissal. The rationale of this custom is that, since menial servants are brought into such frequent and close proximity with their employers, it is desirable, in their own interests, that the intimate employment relationship be speedily terminable. Such considerations do not apply to the typical industrial worker. Yet, ironically, his contract may be discharged by a much shorter period of notice.

(iv) Express Provision as to Notice

Where the contract of service makes express provision as to notice that clause will govern the amount of notice required. And an express notice clause will not be overridden by an industrial award providing a shorter period of notice.

The vast majority of workers in award employment are entitled to one week's notice or one week's wages in lieu thereof by virtue of the standard 'contract of employment' clause in awards. However, in some awards the prescribed notice increases with seniority.

(v) Reasonable Notice

If the contract of employment is silent as to notice and a custom cannot be implied, reasonable notice is required. Contrary to the assumption made in some cases, there is no essential link between the periodic hiring interval and the period of notice which will be deemed reasonable. In resolving the issue of what amounts to reasonable notice, the jury is entitled to consider the duration of the hiring together with many other factors such as the rate of pay and mode of payment, the length of service and seniority, the character of
the service, the actual responsibilities of the job, the period which the parties themselves regarded as reasonable notice, the convenience of the employer and the difficulty the dismissed employee would have in procuring other employment.

The jury may also seek guidance in the findings of other juries in similar cases. But these will usually be of little assistance. A few examples illustrate this point. A journalist who contributed weekly notes to a newspaper was entitled to one month's notice, whereas a photographer-journalist was found to be entitled to six months' notice. Six months' notice was deemed to be reasonable for a foreign correspondent to The Times and also a sub-editor of a newspaper. In Fox-Bourne v. Vernon & Co. Ltd a newspaper editor was held to be entitled to six months' notice, while twelve months' notice was sufficient for another newspaper editor. The variety of factors which may be considered by a jury in reaching a finding on what is reasonable notice makes it virtually impossible to predict with certainty the period of notice to which a particular employee is entitled. But for the typical industrial employee it appears that one week's notice will be deemed reasonable.

(vi) Validity of Notice

Notice must be clear and definite. A vague warning that the employee may be dismissed in the near future is not a valid notice of dismissal. On the other hand, a discharge is effective even if it is communicated to the employee in polite, rather than peremptory language. And once given, notice may not be withdrawn without the consent of the other party.
(vii) No Reason Necessary

An employer is not obliged to furnish a good reason for dismissing an employee with notice or with wages in lieu of notice. Provided the notice is lawful the courts will not inquire into the employer's grounds for terminating the employment contract. The rationale of this principle is that the right to hire and fire is "as fundamental in the relationship of an employer and employee as is the right of an employee to leave the employment".

(viii) Restrictions upon Dismissal with Notice

An employer may restrict his right to determine the contract of service by notice. McClelland v. Northern Ireland General Health Services Board provides an illustration. The appellant applied for a position advertised as a "permanent and pensionable" post and was selected. Clause 12 of the formal employment contract which followed the appellant's appointment provided that the Board could dismiss any officer for gross misconduct, unfitness or inefficiency. Save in the case of gross misconduct, the Board was obliged to give at least one month's notice of its intention to dismiss an officer. Faced with a redundancy of staff, the Board purported to retrench the appellant with six months' notice.

The House of Lords declared that the contract had not been validly terminated as the Board had limited its right to discharge the contract to the circumstances specified in clause 12 of the agreement. Thus, Their Lordships resolved the issue by a construction of the contract.

Again, the contract of employment may require that a certain procedure be followed before dismissal. If the contract does so provide, the prescribed procedure must run its course. Otherwise the dismissal will be a breach of contract.
By contrast, the common law does not, in general, prescribe a dismissal procedure. Principles of natural justice are more easily imported into an employment relationship regulated by statute. Yet, even in that case, natural justice will not be required where the relationship is essentially one of an ordinary master and servant. An employer must comply with the principles of natural justice when dismissing an office holder but company employees do not fall within that category.

Australian Trading Co. Pty Ltd v. Jones causes a slight ripple in this relatively clear picture. The plaintiff's contract of employment provided that he could be dismissed by written notice, if, in the opinion of the chairman of the company, the plaintiff's actions rendered his continued employment prejudicial to the interests of the company. McArthur J. relied heavily upon Fisher v. Jackson in reaching his conclusion that the chairman was given a quasi-judicial function which required him to give the plaintiff a hearing before dismissal.

This case runs counter to a host of distinguished authorities. The general rule is that natural justice principles will be confined to employment with a statutory status or, at least, a statutory flavour. Moreover, Mr Justice McArthur predicated his conclusion upon the chairman's quasi-judicial or judicial function. Such a function will be rare in the ordinary master and servant relationship. Some employers have established internal dismissal procedures providing for review of a dismissal at various levels in the enterprise. But generally it will not be necessary to observe the principles of natural justice in this type of procedure.
(ix) Conclusion

The employment relationship is often founded upon an informal arrangement which the law is at pains to classify as a contract. This contract contains certain essential terms but unfortunately the individual employee may be left completely in the dark about his particular duties.

The duration and termination of the employment of the typical industrial worker are normally covered by awards or wages board determinations. These provisions commonly entitle an employee to no more than one week's notice or wages in lieu of notice. Employees outside the category of 'award employment' must fall back on custom or express provisions in their contracts, an obsolete presumption of yearly hiring or the vagaries of reasonable notice.

In general, an employer is under no obligation to give an employee a reason for his dismissal or to allow the employee a hearing before he is discharged. Perhaps more importantly, the employee does not require a legitimate reason for the dismissal. Subject to the 'victimisation provisions' of the industrial arbitration and wages board statutes, a dismissal with the proper period of notice or with wages in lieu of notice is lawful. It matters not that management has exercised its right of dismissal capriciously or arbitrarily; the dismissal is effective nevertheless. Thus, an employee dismissed with notice because of his race, creed, colour, marital status, political views or even the colour or length of his hair may not complain that the dismissal is wrongful. This is a disgrace to the law. When freedom of contract carries the freedom to discriminate, it is time to modify the law regulating this aspect of the employment relationship.
4. **Summary Dismissal**

(i) **Definition**

Summary dismissal may be defined as a discharge without notice or wages in lieu of notice. This is its normal form. It may, however, involve a dismissal with notice or wages less than that prescribed by the contract of service.\(^{23}\) In either form, the dismissal is wrongful if it is unjustified.

(ii) **The Basic Test of a Justified Dismissal**

What conduct on the part of an employee will warrant summary dismissal? An ancient authority\(^{24}\) suggested that 'moral misconduct, either pecuniary or otherwise, wilful disobedience, or habitual neglect'\(^{25}\) would be adequate grounds. Rather than elaborate upon these grounds by piecemeal additions, the common law evolved a contractual test: does the employee's conduct show a 'complete disregard' of a 'condition essential to the contract of service'?\(^{26}\) In other words, does the employee's behaviour amount to an express or implied repudiation of the fundamental terms of the contract?\(^{27}\)

What constitutes a fundamental breach varies with the nature of the business and the position occupied by the employee.\(^{28}\) Thus, when the alleged misconduct involves a senior employee in a responsible or confidential position, courts will inquire whether the employee's conduct is inconsistent with the faithful discharge of his duties\(^{29}\) or incompatible with the continuance of the confidence or trust inherent in the relationship.\(^{30}\)

Clearly, the second limb of this inquiry is virtually useless where more menial workers are involved. It seems unrealistic to speak of an industrial worker on the shop floor breaking the confidence or trust in his relationship with his employer. At this level, a more functional test is often applied: does the employee's conduct hamper
or prejudice the safe and proper conduct of the employer's business? Beneath this verbiage, the basic test remains: is the employee's behaviour repudiatary?

(iii) General Considerations

(a) Question of Fact or Law

There is no fixed rule of law, nor even a rule of thumb, which defines precisely what degree of misconduct warrants summary dismissal. Whether there is sufficient justification is generally a question of fact for the jury. Yet in some cases the employee's conduct will, as a matter of law, justify his summary dismissal. Bowen L.J. provides the explanation in *Boston Deep Sea Fishing and Ice Company v. Ansell*:

in cases where the character of the isolated act is such as of itself to be beyond all dispute a violation of the confidential relation, and a breach of faith towards the master, the rights of the master do not depend on the caprice of the jury, or of the tribunal which tries the question. Once the tribunal has found the fact - has found that there is a fraud and breach of faith - then the rights of the master to determine the contract follow as a matter of law.

Where the employee's conduct is such that his summary dismissal is justified as a matter of law the trial judge must direct the jury to enter a verdict for the employer. Offences of this nature are not uncommon. For example, a flagrant breach of trust, the receipt of a secret commission or a distinct refusal to be bound by the terms of the contract of service would almost certainly, as a matter of law, warrant summary dismissal.

(b) Suspicion and Inquiry

If an employer suspects that one of his employees is guilty of misconduct he is allowed to investigate the facts. Indeed, the employer should review the position carefully before taking action;
mere apprehension of a breach of duty is not enough to justify a summary dismissal. As mentioned earlier, natural justice principles will only apply to the ordinary master and servant relationship where the person authorised to inquire into the employee's conduct is vested with a judicial or quasi-judicial function. The situation may be entirely different where an inquiry is prescribed in an award or industrial agreement. There, if a certain procedure is prescribed it must be followed.

Similarly, an industrial agreement may provide that disputes over dismissals must be referred to an independent arbitrator. But an adverse finding at that level does not preclude the employee bringing an action for wrongful dismissal at common law.

(c) Waiver and Warning

After investigating a complaint against an employee, an employer may forfeit the right of summary dismissal if he elects to continue the employment relationship in spite of the employee's misconduct. Waiver does not, however, prevent an action for damages against the employee. Where the condoned misconduct consists of repeated offences, each new act of misconduct revives the earlier infractions. But it appears that an employer who discovers misconduct warranting dismissal should exercise his right to discharge within a reasonable time. A delay of three hours or until the evening of the day on which the offence occurred may amount to condonation.

Once the employer reaches his decision to dismiss he may exercise his right without prior warning or admonition. The common law does not inquire into the justice of the dismissal; it simply requires proof of actual misconduct. One can appreciate the vulnerability of the employee's position: he may be instantly dismissed...
even though the offence was committed innocently and was done without knowledge that it was wrong. In fact, an employee cannot rely upon an honest and reasonable belief in the correctness of his conduct to excuse a breach of an essential term of his contract of service.

(d) Employee is not Entitled to Reason for Dismissal

The law does not oblige an employer to give a reason for a dismissal. It is true that if an employee brings an action for wrongful dismissal, the employer may put forward evidence justifying the dismissal or in mitigation of damages. Yet, at the time of discharge, the employee may be left completely in the dark.

Further, the reason submitted by the employer at the hearing need not be the original reason for the dismissal. A discharge can be justified on grounds discovered after the dismissal or on grounds different from those declared at the time of the discharge. Thus, if an employee hears that his employer intends to dismiss him without notice, and if he reacts in an insulting or abusive manner towards the employer, there is ground for summary dismissal. This is so even if the employer had no justification for the discharge before the employee's outburst. That an employee can be dismissed without notice under these circumstances is patently unjust. But in law the key issue is whether the employee is guilty of misconduct justifying instant dismissal; the motive behind the discharge seems immaterial.

(e) Effect of Summary Dismissal upon the Contract of Service

The effect of summary dismissal upon the employment contract is far from clear. The better view appears to be that a summary dismissal, even if wrongful, terminates the employment relationship but leaves the contract of service intact. The general contractual
principle that recission requires repudiation by one party and acceptance of the breach by the other is, however, modified by the particular incidents of the employment relationship. Though the contract of service survives, courts will not grant specific performance of the contract; the contract subsists mainly for the purpose of measuring the claims arising out of the breach.

Whatever the theoretical effect of summary dismissal, its practical impact is clear: the employee is banished from the work place. In clerical, and particularly confidential, employment, the employee may not even be allowed to return to his desk immediately after the dismissal. A recent case, Sharston Engineering Co. Ltd v. Evans, highlights the finality of dismissal. An employer sought an order excluding dismissed employees from the work place. In granting an order for possession, the Lancaster Chancery Court ruled that a dismissed employee is not entitled to remain on his employer’s premises as his discharge terminates his licence to go upon or remain on the premises.

(f) **Wages for the Broken Period**

The general rule is that if a weekly servant is lawfully discharged before the end of the week he cannot recover payment for that fraction of the week he has worked. A similar rule is applied to employees engaged by the month. Much, however, depends upon the particular terms of the contract of service. If payment of wages is by the day, an employee dismissed in the middle of the week is entitled to wages for the expired portion of the week. Similarly, the standard award clause provides that in the case of a dismissal without notice for certain offences *‘wages shall be paid up to the time of dismissal only’.*
Where the employee engaged to complete a certain task is summarily dismissed he may not sue on the contract for the work performed prior to the dismissal. He may, of course, claim a quantum meruit but his chances of success are remote.

(g) Loss of Accruing Benefits

Summary dismissal for misconduct may defeat an employee's claim to payment of pro rata annual leave and, in some cases, long service leave. Further, an employee justifiably dismissed for misconduct may forfeit valuable fringe benefits such as superannuation or low interest housing finance. In addition, immediate dismissal may cancel the employee's seniority rights under the relevant award. These are just some of the important consequences of summary dismissal for the employee. In some instances, they flow from the dismissal itself; in others, from the fact that the dismissal was for misconduct.

To quote Wright J. in Savage v. British India Steam Navigation Company Limited: "If the dismissal was justifiable in law it was immaterial that it might be a decision of great severity."

(iv) Grounds for Summary Dismissal

Having sketched the general principles relating to summary dismissal it will be convenient to consider some of the recognised grounds for this form of discharge. This section will not attempt a comprehensive catalogue of these grounds. Rather, it describes how the general principles are applied. The authorities reflect the social attitudes of judges as much as a rigid application of contractual rules. For this reason, one must approach the early cases with caution.

Courts have described summary dismissal as "a strong measure" and "altogether a severe penalty." One industrial tribunal called it
an 'extreme step'. The implication is that summary dismissal should not be taken lightly, that it should be used as a last resort. It will be interesting to test this theory against the decided cases.

Another theme which may be explored in the following analysis is the conviction that the general concepts relating to the right to hire and fire have materially changed under modern industrial relationships ...

(a) Insolence

Insolence and impertinence have long been recognised as sufficient justification for summary termination of the contract of service. Moreover, the use of insulting and objectionable language towards the employer or the employer's representative is gross misconduct providing a good reason for dismissal without notice. The words used by the employee must not be considered in isolation. The circumstances surrounding the confrontation, in particular the persons present and the manner and tone of the exchange, are vitally important. If man-to-man discussions were encouraged by the employer this may be a mitigating factor. Again, where the employer provokes the outburst, he may not be justified in dismissing the insolent employee without notice. In a recent dictum, Lord Justice Edmund Davies boldly asserted: 'We have by now come to realise that a contract of service imposes upon the parties a duty of mutual respect'.

In general, the decided cases have adhered to the guideline laid down in Jupiter General Insurance Co. Ltd v. Shroff: their Lordships would be very loath to assent to the view that a single outbreak of bad temper, accompanied, it may be, with regrettable language, is a sufficient ground for dismissal. Sir John Beaumont, C.J., was stating a proposition of mere good sense when he observed that in such cases one must apply the standards of men, and not those of angels, and remember that men are apt to show temper when reprimanded.
Unfortunately courts and tribunals in dismissal cases have, at times, tended to forget that employees are mere mortals. In one case, a hotel employee criticised the manager of the hotel in the presence of the licensee. During this confrontation the employee said to the manager: "Who do you think you are, God Almighty?". As a result of this incident, the employee was dismissed without notice. An industrial tribunal sustained the dismissal ruling that the employee's conduct was insubordination.

Again, the Commonwealth Conciliation and Arbitration Commission thought that the dismissal of a waterside worker was justified when he replied to his foreman's order with the plea: "Hang on a bit, Gunga, give us a go". Do these cases apply the standards of men or of angels?

(b) Disobedience

Disobedience and insolence often go hand-in-hand. The general rule is that an employer is entitled to dismiss an employee summarily for wilful refusal to obey any lawful and reasonable order which falls within the terms and scope of the contract of service. In fact, mere delay in complying with an order may justify immediate dismissal.

Where the employee refuses to do work outside the express terms of his contract, the employer must establish a custom or implied term obliging the employee to do the work, before an instant dismissal is warranted.

In Allen v. Commissioner of Railways, a coaching porter was instructed to do work normally done by lumpers who were on strike. The employee refused and was dismissed. Upholding the dismissal, Parker C.J. (with whom Rooth J. concurred) found that the employee had done this work before at Yalgoo without objection, and that apparently
it was not unusual for a coaching porter to be asked to assist in unloading trucks. The Chief Justice also pointed out that a document purporting to outline Allen’s duties was conspicuously displayed at the workplace and that it concluded with the words ‘any other duties as instructed’.

With respect, the fact that an employee has done the same work before at another location does not import a term into his contract of employment. And the observation that it was not unusual for a coaching porter to do this type of work falls far short of establishing a custom which would require the employee to comply with the employer’s order. Further, the concluding words of the document defining the appellant’s duties could be interpreted as relating only to the incidental duties of a coaching porter. On the authority of Allen v. Commissioner of Railways an employee who refuses to do strikers’ work through fear of the ‘scab’ label and union reprisals is liable to be dismissed without notice thereby forfeiting valuable accruing rights.

An employee is justified in refusing to obey an unlawful or unreasonable order. An instruction to work in a subordinate position at a lower rate of pay is unreasonable. But an employee who refuses a transfer which is consistent with the express or implied terms in his contract of service may be instantly dismissed. On the other hand, if the contract contains no transfer clause, and the surrounding circumstances suggest that such a provision is not to be implied, the employee will be entitled to disregard a direction to transfer.

An employee may also disobey an order where compliance would jeopardise his own safety. Such disobedience will not warrant summary dismissal. Yet, in a recent case it was held that an employee’s refusal to perform a certain task was unreasonable even
though he had not been shown the safe way to do the job. It was enough that he would have seen the task performed and known that the work could be done safely. With respect, there is a considerable difference between knowing the task can be executed safely and knowing the safe way to execute the task. The decision appears even more unjust when it is realised that the plaintiff's ignorance was partly caused by a language difficulty.

Where an employee refuses to obey because illness prevents him from complying, his employer is not entitled to dismiss him instantly. But the onus is on the employee to notify the employer that his sickness is the reason for his refusal.

Subject to the foregoing, a distinct refusal to obey a lawful instruction will be a valid ground for dismissal. Such a refusal does not of itself terminate the contract of service; it merely gives the employer the option of continuing the employment or accepting the employee's repudiation and terminating the contract. The refusal must strike at the foundation of the employment relationship. In other words, the disobedience must be wilful in the sense that it must be a 'radical breach of the relation, and inconsistent with its continuance'.

Take a modern example. In Laws v. London Chronicle (Indicator Newspapers) Ltd, an advertising representative was summarily dismissed following an incident in an editorial conference. The conference erupted when Delderfield (the appellant's immediate superior) and the company chairman became involved in an altercation. Delderfield left the room inviting the employee to accompany him. The company chairman directed her to stay. Embarrassed and confused, she disregarded this direction and left the room. Did her conduct justify summary dismissal?

The English Court of Appeal answered in the negative. Here there was no deliberate flouting of the essential conditions of her
contract of service. She was simply a victim of divided loyalties. Thus, not every act of disobedience will justify instant dismissal. Thus, not every act of disobedience will justify instant dismissal.\footnote{18}

Examples of disobedience which warrant immediate dismissal include: a wilful refusal to do any further work for the employer;\footnote{19} a gardener's refusal to plant certain plants;\footnote{20} and a crane driver's repeated refusal to obey a lawful instruction.\footnote{21}

In some cases there are extenuating circumstances. Does the law take these into account? In Federated Storemen and Packers' Union, on Behalf of Bell v. Swift Australian Co. Pty Ltd,\footnote{22} an employee was dismissed for breach of a company rule which prohibited employees' clocking out for workmates. It seems that one of Bell's fellow workers wanted to leave thirty minutes early to go home to his pregnant wife who was sick. He approached Bell and asked if he would clock out for him. Although Bell was aware that the penalty for this infraction was instant dismissal, he agreed.

The Industrial Magistrate who first heard the matter described Bell's action as 'an unprecedented act of compassion for a fellow employee'. Nevertheless, he found that the dismissal was justified. On appeal, the Industrial Court of Queensland sustained this decision. Bell's thirteen years' continuous service counted for nothing against the thirty minutes' working time lost by the employer.

Again, in Federated Miscellaneous Workers' Union v. Tip Top Laundries and Dry Cleaners Pty Ltd\footnote{23} the tribunal seemed to overlook the extenuating circumstances. A mother and her daughter both worked for the company. One pay-day, the daughter was absent, and the mother collected the daughter's pay packet on her behalf. At this time no objection was raised. Later, the employer demanded the daughter's pay packet back, but the mother refused to hand it over. The mother considered she was entitled to do what she did. Nevertheless, she
was dismissed and her dismissal was upheld.

If an employer devises rules of conduct for his employees, these must be obeyed to the letter provided, of course, the general orders contained therein are lawful and reasonable. In one case, the company rule directed employees to observe the speed limits strictly. A truck driver employed by the company drove at 32 m.p.h. in a 30 m.p.h. zone and had an accident. He was dismissed and his discharge was sustained. Further, an employer was held to be entitled to dismiss an employee who failed to observe a company rule that all items found in the rubbish were to be handed over to the supervisor. The tribunal accepted that the employee intended to return the items to his employer, although not by the correct channel. In spite of this finding, the dismissal was not held to be harsh, unjust or unreasonable.

These cases make one wonder whether the law has come very far since Turner v. Mason.

(c) Absence without Leave

Absence from employment without leave is almost invariably sufficient justification for instant dismissal. Persistent absenteeism is really just one form of unauthorised absence. It is clearly a valid reason for dismissal without notice.

In one early case, a domestic servant absented herself from her employment overnight even though her request for leave was denied. The employee went to visit her mother who, allegedly, was in imminent danger of death. The pleading did not disclose whether the servant had notified the master of the reason for the proposed visit. It was held that, even if the servant had so advised her master, she would not be justified in absenting herself when the leave was refused. Alderson B. stated:
the replication is informal, because it does not show that the mother was likely to die that night, or that it was necessary to go that night to see her, or to stay all night. But if this were otherwise these circumstances would amount only to a mere moral duty, and do not shew any legal right.\footnote{Laws v. London Chronicle (Indicator Newspapers) Ltd\textsuperscript{31} mitigated the harshness of this precedent but it still survives as an authority.}

It appears that an employee is obliged to obtain positive permission before absenting himself from his employment; notifying an employer through a fellow employee will not suffice.\footnote{Even where an employee leaves his employment through illness he is expected to report his reason to his employer. Failure to do so will afford grounds for summary dismissal.\textsuperscript{32} The employee's supervisor need not inquire the reason for the absence; he may dismiss on the spot.\textsuperscript{33}}

(d) \textit{Punctuality}

Habitual lateness will also justify instant dismissal.\footnote{But even an isolated instance of lateness may warrant summary dismissal, for employers are entitled to demand an exacting standard of punctuality.\textsuperscript{34} In a Queensland case,\textsuperscript{35} an employee who was unable to provide a satisfactory explanation when he returned fifteen minutes late from his half-hour lunch break was held to be guilty of misconduct justifying instant dismissal. The Industrial Court of Queensland considered it important that the dismissed employee was engaged on penalty rates on that particular occasion, and that his absence would have disrupted his employer's business since only forty workers were employed at the foundry. The employee dismissed had served his employer for twenty-nine years in broken periods and forfeited his long service leave entitlement because of the dismissal.\textsuperscript{36} Moreover, there was no evidence that the dismissed employee had an unsatisfactory service record. The adoption of a legalistic approach by the courts,\textsuperscript{37} in such cases, upholding the managerial prerogative to hire and fire.}
causes grave hardship to individual employees.

(e) Negligence

An employee who holds himself out as possessing a skill will be liable to summary dismissal if he fails to demonstrate the degree of skill professed. But where the employee does not expressly or impliedly promise that he has the skill to perform the task assigned to him he may not lawfully be dismissed without notice for incompetence in the execution of the task. As Avins puts it: "an employee who claims little need exhibit little to keep his job..." Thus an unskilled worker will be almost immune from dismissal on grounds of incompetence provided of course he displays an ordinary standard of care. For other employees, the standard varies with the nature of the job and the degree of responsibility vested in the employee.

Whether negligence by an employee is a valid reason for instant dismissal is a question of degree. In Savage v. British India Steam Navigation Company Limited it was suggested that the gravity of the negligence should be weighed by considering the nature of the act rather than its consequences. Where an isolated act of negligence is involved, however, it appears that the consequences of the act are vitally important. Thus, in Baster v. London & County Printing Works, Darling J. upheld the immediate dismissal of a servant whose forgetfulness caused damage to an expensive machine. The servant's absent-mindedness was so fundamental as to amount to neglect. It is difficult to avoid the implication that the resulting damage influenced Darling J., for His Lordship stated: "I do not say that [forgetfulness] would be a good ground for dismissal in every case." It appears, then, that an isolated act of negligence by a skilled worker may warrant summary dismissal.
Dishonesty during service also warrants summary dismissal. Thus, the receipt of a secret commission was held to justify instant dismissal even though the dishonesty was not discovered by the employer until some months after it occurred, and in spite of the fact that the culprit had served faithfully in the meantime.

An isolated act of dishonesty may justify immediate dismissal. In Re Brown and Australian Iron and Steel Limited, an employee was summarily dismissed for filing a false claim for sick leave. The employee planned to spend the leave period holidaying at an island resort. Unfortunately for him, his deception was discovered and he was thereupon dismissed. The Industrial Commission of New South Wales sustained the dismissal on the ground that the dishonest claim was filed with intent to defraud the employer. There can be little quarrel with this finding. Here was a clear case of premeditated misconduct. But consider for a moment the position of the employee. As a result of the dismissal he forfeited his entitlement to long service leave in respect of nearly twenty years' service. He lost all this because of a single indiscretion.

It is not always necessary to establish an intent to defraud in order to justify a summary dismissal for lack of probity. In Sinclair v. Neighbour, the plaintiff was manager of a betting shop owned by the defendant. He borrowed £15 from the till, putting an I.O.U. in its place. He used the money to place a private bet with another betting shop. He did not ask his employer's permission because he knew that his employer would not approve borrowing from the till for gambling. When the employer learnt what had transpired he sacked the plaintiff without notice. The trial judge took the view that the plaintiff's conduct was not dishonest, and awarded damages for wrongful dismissal.
The Court of Appeal reversed this ruling. Whether or not the conduct was dishonest, it was inconsistent with the plaintiff's duty as manager of the business. It was incumbent upon him to keep the till inviolate. By abusing the till the plaintiff set a bad example for his subordinates, one of whom was the defendant's grandson. Only Sachs L.J. expressly found that the plaintiff was dishonest; the other members of the Court of Appeal were content to base their judgments on the ground that the defendant's behaviour was of such a grave and weighty character as to breach his duty to his employer.

Some relatively trivial acts of dishonesty may justify summary dismissal. In Re Avon Products Pty Ltd v. Reilly the New South Wales Industrial Commission sanctioned the dismissal of an employee who was detected removing company property with a retail price of $1.50 from the company premises. Again, an employee may be instantly dismissed if he borrows his employer's property without permission even if he returns the property unused the next day. Further, an employee who uses the firm's equipment without permission to spray his private car with his own paint is guilty of misconduct even though the exercise is done during his lunch-break and near the plant. Charging private long distance telephone calls to one's employer is clearly misconduct. But is an employee liable to instant dismissal for charging private local calls to his employer? Where will the courts and tribunals draw the line? If all employees who made away with items of their employer's stationery were dismissed, the labour market would be flooded! Yet technically this is an offence punishable by dismissal.

(g) Drunkenness

Drunkenness will be a valid reason for dismissing an employee summarily where the inebriety directly interferes with the employer's
business or impairs the employee's ability to provide due service. An employee who claimed that the use of drugs prescribed for her use intensified the effect of the alcohol she consumed was, nevertheless, held to be justifiably dismissed as the standard of her work had deteriorated. Accordingly, her claim for payment in lieu of long service leave in respect of fourteen years nine months' service was defeated.

(h) Dismissal for Illness

Whether an employee's absence from work because of illness warrants termination of the contract of service without notice depends upon two factors: the nature of the illness and the terms of the contract.

Permanent incapacity attributable to an illness justifies an employer in discharging the employee. In one case the Industrial Court of Queensland held that an incapacitating injury which forced an employee to be absent from his work for five years frustrated the contract of service at the time the employee sustained the injury. The rationale of this approach is that the incapacitating injury seriously interferes with or frustrates the business purposes of the contract.

In cases of temporary infirmity much turns on the duration of the hiring. Where a servant was engaged for a month and was unable to attend his employment shortly thereafter it was held that the employer was entitled to regard the agreement as cancelled after a reasonable time had elapsed. In the circumstances one week was deemed reasonable. On the other hand, it appears that an absence of two days through illness after five months' service is not sufficient justification for discharging an employee. Further, in Leake v. Holdsworth, the dismissal of an employee because of a temporary infirmity at the end
of the first year of a five year term was held to be wrongful.

The continuance of the employment relationship during absence through illness depends, in some cases, on whether the employee is ready and willing to perform the contract, while, in other cases, actual performance of the terms of the contract is required. Confusion arises where cases fail to differentiate between the continuance of the relationship and the right of the employee to wages during his absence.\textsuperscript{66}

In award employment the emphasis is usually upon actual performance of work.\textsuperscript{67} This is particularly true where the employee is paid for piece work. Thus, in the absence of an appropriate provision in an award, an employer would probably be entitled to regard the contract of service as terminated after one week's absence through illness.\textsuperscript{68} Sick leave clauses in awards do not grant the absent employee immunity from dismissal; they merely determine the wages to be paid to the employee during the leave period if the employer chooses to continue the employment relationship. Thus, an employer may dismiss with notice before the expiration of the leave period contemplated by the award.\textsuperscript{69}

(i) \textbf{Conduct Incompatible with the Employment Relationship}

Conduct inconsistent with the continuance of the employment relationship warrants summary dismissal. This broad residual category of misconduct includes: conduct which places the employee in a position where his duty to his employer conflicts with his own interests,\textsuperscript{70} conduct which destroys the confidence between the parties,\textsuperscript{71} conduct which would be detrimental to the employer’s business,\textsuperscript{72} and violations of the employee’s duty to work in an orderly and proper manner.\textsuperscript{73}
(j) Conduct outside Working Hours

Improper conduct outside the employment will not always justify summary dismissal. But where there is a sufficient nexus between the alleged misconduct and the employee's ability to perform his work in a proper manner, the discharge will be valid. Thus, the summary dismissal of a confidential clerk for vast speculative dealings on the stock exchange was justified because the employer, a firm of merchants, frequently consulted the clerk about proposed investments in securities.\(^74\)

If the employee's moral conduct off-duty is of such a nature as to render him unfit for his position, his employer is entitled to dismiss him instantly. \textit{Orr v. University of Tasmania}\(^75\) provides an illustration. Orr, a university professor, became involved in an intimate relationship with a teenage student enrolled in his philosophy class. Although the High Court considered that the student was 'passing through a period of turbulent eroticism',\(^76\) and was eager for an assignation with the appellant, it unanimously held that the professor's conduct provided ample ground for summary dismissal: the appellant was unfit to perform his duties to the university.\(^77\)

Where an employee intimidates or assaults his workmates or his superiors outside working hours, this is clear justification for immediate dismissal. Thus, a worker who disrupted a canteen committee which the company management had established for the benefit of its employees was held to have no ground for complaint against his summary dismissal even though the misconduct occurred outside his normal hours of duty.\(^78\)

(v) Conclusion

Even this cursory analysis of the law on summary dismissal reveals major obstacles to job security.
An employer may dismiss an employee without notice where the employee's conduct is calculated to repudiate the essential conditions of the contract of service. But the employee may not be aware of these essential terms. And even if he knows that he is liable to dismissal for misconduct he may have no idea what his employer regards as misconduct. This is important because the courts do not inquire whether a reasonable employer would have exercised his right of summary discharge; they merely ask: is the employer legally entitled to dismiss the employee instantly.

Moreover, an employer may discharge a worker suspected of misconduct without warning and without giving the employee an opportunity to state his case. Further, the employee is not entitled to a reason for his dismissal. And the employer may justify a dismissal on grounds discovered since the discharge after a petty witch-hunt through the employee's record.

Summary dismissal banishes an employee from the workplace even if there is no justification for the discharge. It will deprive the worker of valuable accruing benefits and make it difficult for him to obtain fresh work. He may challenge the dismissal in the courts or urge his union to press his claim before an industrial tribunal. In either forum, common law principles may defeat his claim. An isolated or trivial act of misconduct, a first offence, an oversight, a past indiscretion or an innocent act honestly and reasonably believed to be correct, might all justify summary dismissal. Even the employee's private life is not beyond scrutiny. And here Victorian standards of morality may govern the employer's right of discharge. Further, an absence caused by a temporary infirmity of, say, two weeks, may put an end to the contract of service.

In practice, industrial tribunals have, of course, mitigated the harshness of some common law principles but it is perhaps fair to
say that these bodies have not realised their potential as a buffer against the unbridled use of dismissal as a disciplinary measure.

Although some ancient authorities are buried, they continue to rule from their graves. Revision of obsolete common law principles evolved in the nineteenth century has scarcely begun. And the persistence of a contractual approach to matters of discipline stifles reform. It hides the fundamental element of subordination inherent in the employment relationship and entrenches management’s right to hire and fire. Thus a technical breach of the contract of service may justify summary dismissal. The employer is free to exercise his disciplinary power of dismissal inconsistently and indiscriminately. In short, the employer may make an example of an employee who steps just outside his contract of service. The foregoing analysis suggests that the law has not entirely abandoned the ‘attitude of Czar-serf’ found in some of the dismissal cases decided in the last century.

5. Unlawful Dismissal

Another form of dismissal is penalised by the various industrial arbitration and wages board statutes throughout Australia. The relevant legislation prohibits victimisation on grounds of legitimate trade union or industrial activity. In most jurisdictions, it covers not only dismissals but also lesser forms of discrimination such as injuring a person in his employment. These lesser forms of victimisation may stop short of discharge but they nevertheless threaten an employee’s job security.

(i) The ‘Victimisation Provisions’

Section 5 of the Conciliation and Arbitration Act 1904-1973 (Cth) may be regarded as typical of these ‘victimisation provisions’. It will be convenient to set out the relevant provisions of the section...
in full. It provides as follows:

(1) An employer shall not dismiss an employee, 81 or injure him in his employment, or alter his position to his prejudice, 82 by reason of the circumstances 83 that the employee -

(a) is or has been, or proposes, or has at any time proposed, to become, an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization; 84 or

(b) is entitled to the benefit of an industrial agreement or an award; 85 or

(c) has appeared, or proposes to appear, as a witness, or has given, or proposes to give, evidence, in a proceeding under this Act; 86 or

(d) being a member of an organization which is seeking better industrial conditions, is dissatisfied with his conditions; 87 or

(e) has absented himself from work without leave if -

(i) his absence was for the purpose of carrying out his duties or exercising his rights as an officer or delegate of an organization; and

(ii) he applied for leave before he absented himself and leave was unreasonably refused or withheld; 88 or

(f) being an officer, delegate or member of an organization, has done, or proposes to do, an act or thing which is lawful for the purpose of furthering or protecting the industrial interests of the organization or its members, being an act or thing done within the limits of authority expressly conferred on him by the organization in accordance with the rules of the organization. 89

Penalty: Four hundred dollars. 90

(1A) An employer shall not threaten to dismiss an employee, or injure him in his employment, or to alter his position to his prejudice -

(a) by reason of the circumstance that the employee is, or proposes to become, an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization, or that the employee proposes to appear as a witness or to give evidence in a proceeding under this Act; or

(b) with the intent to dissuade or prevent the employee from becoming such officer, delegate or member or from so appearing or giving evidence; 91 or

(c) with intent to dissuade the employee, being an officer, delegate or member of an organization, from doing an act or thing of the kind in relation to which paragraph (f) of sub-section (1) applies. 92

Penalty: Four hundred dollars.
(3) A reference in this section to an organization shall be read as including a reference to a branch of an organization.

(4.) In any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved it shall lie upon the defendant to prove that he was not actuated by the reason alleged in the charge. \(^9^3\)

(5.) Where an employer has been convicted of an offence against this section the court by which the employer is convicted may order that the employee be reimbursed any wages lost by him and may also direct that the employee be reinstated in his old position or in a similar position. \(^9^4\)

(ii) Lack of Uniformity

The victimisation provisions of the various industrial arbitration and wages board statutes provide a mosaic of distinguishing features. In some cases the differences in the sections relate to substantive, rather than procedural, issues. It will be sufficient to highlight just a few of the gaps in these provisions.

Only the Queensland section penalises a refusal to employ any person on the prohibited grounds of victimisation. \(^9^5\) Thus, in most jurisdictions, an employer recruiting labour after a temporary lay-off may refuse to re-engage employees who have been active in legitimate trade union affairs. \(^9^6\)

No state prohibits discrimination against candidates for union office or for the position of job delegate. Further, no state penalises discrimination against former officers, delegates or members of a trade union. And in those jurisdictions where boards of reference operate, the trade union representatives on these bodies are given no protection against victimisation. These are serious defects. Only in New South Wales are employees who complain to their union officials about their working conditions shielded from discrimination. \(^9^7\) Again, employees who are simply dissatisfied with their working conditions are exposed to victimisation without redress in most jurisdictions. \(^9^8\)
Only the Queensland and federal statutes have made any attempt to prohibit intimidation which falls short of discharge. And the Queensland provision itself is defective.

No state protects shop stewards from discrimination even where the steward's actions are lawful, legitimate and authorised by the union.

Taken overall, the sections most urgently in need of amendment are the Victorian and Western Australian provisions. Perhaps the law's failure to re-model the Victorian provision can be attributed to the small percentage of employees in that state who fall within the jurisdiction of the local statute. The same excuse cannot be pleaded for Western Australia: in that state the overwhelming majority of employees fall within the local jurisdiction.

This lack of uniformity is appalling. In many cases employees are deprived of protection which the law could quite easily provide. If the industrial arbitration systems are to function effectively a total prohibition against all forms of victimisation on grounds of legitimate trade union or industrial activity is vital. In reference to a fore-runner of the present section 5 of the Conciliation and Arbitration Act 1904-1973 (Cth), Evatt J. pointed out:

If an employee can be dismissed or prejudiced because, by joining a union, he becomes entitled to better conditions contained in an award of the Federal court, the whole system of industrial arbitration would be threatened with destruction.

In theory the unlawful dismissal provisions are a bulwark against victimisation; in reality many procedural and substantive pitfalls lie in the path of justice. It remains to consider these defects in greater detail.

(iii) Who May Institute Proceedings?

In federal jurisdiction, any person may institute proceedings in the Australian Industrial Court challenging an unlawful dismissal.
The aggrieved party has an individual right of complaint, and an application for leave to prosecute is not necessary.

(iv) Onus of Proof: The Prosecutor's Onus

In the Commonwealth jurisdiction the complainant must prove the facts and circumstances constituting the alleged offence beyond reasonable doubt. For example, a party who complains that he was discharged because of his trade union membership must establish, firstly, the fact of dismissal, and, secondly, that he was a trade unionist. The Registrar's certificate confirming that the aggrieved party was a member of a trade union at a certain date is prima facie evidence of such membership at the date of dismissal but the issue of membership will be resolved upon the whole of the relevant evidence.

Again, where the complainant alleges that he was discharged because of his award entitlement, he must prove convincingly that the award was operative at the material time and that he was entitled to the benefits of the award. This will present no problem for employees who are members of a union which is a party to the award. But a non-unionist may not be 'entitled to the benefit' of the award which governs his employment. Certainly he enjoys the benefit of the award but he has no right to enforce the award.

(v) Onus of Proof: The Defendant's Burden

A defendant charged with an offence under section 5 of the Commonwealth Act must prove on the balance of probabilities that he was not actuated by the reason alleged in the charge. Thus, his onus is negative, not positive: he need not prove why he dismissed his employee. Nor is it necessary to show reasonable grounds for the dismissal.
On the other hand, if the defendant chooses to submit evidence of the actual reason for the discharge, he will not be constrained in any way by the section. Where the reason advanced by the employer is petty or trivial, the tribunal will be all the more careful in scrutinising his motives. Nevertheless, the defendant is entitled to the benefit of any doubt that remains in the mind of the court after reviewing the whole of the evidence.

This brief account of the defendant's onus hints at the evidentiary obstacle faced by the complainant. Pearce v. W.D. Peacock & Co. Ltd is a classic example of this problem. The case arose out of the dismissal of a unionist who, the employer alleged, was 'dissatisfied'. It appeared that when the employer received a log of claims from the appropriate union a director of the company asked the unionist to sign a paper stating that he was satisfied with his working conditions. The unionist refused and was dismissed.

The magistrate who first heard the matter accepted evidence from a director of the employer company to the effect that the employee had previously been content with his working conditions. Accordingly, the magistrate found that the employer was not motivated by the reason alleged in the charge. The employer was acquitted.

On appeal, the High Court sustained the magistrate's finding. Isaacs J., however, dissented. To Isaacs J. the facts were clear: the employer tried to coerce his employee into 'doing what might have been thought a disloyal act to the union, and might have caused him to leave it - a step injurious both to the man and the union, ...'. In fact, in His Honour's view, the employer's demand meant simply 'give up your claim or your billet'. With respect, this conclusion seems to be a realistic appraisal of the evidence.

Normally an appellate court will be reluctant to interfere with the trial judge's findings of fact. But in this case the evidence
on which the magistrate relied appears to be rather tenuous to say the least. The result is unsatisfactory: an employer escaped penalty for a blatant act of victimisation against an employee. More disturbing is the implication of the decision. It seems that an employer may simply assert that a dismissal was caused by the employee's general attitude, and the employer's subjective assessment of this attitude will determine the matter. While the specific problem raised by Pearce v. W.D. Peacock & Co. Ltd\textsuperscript{24} has been removed by amendments in the federal\textsuperscript{25} and Queensland\textsuperscript{26} spheres, this more general, evidentiary problem remains in all jurisdictions.

(vi) **Defences**

The tribunals have recognised that certain dismissals are justified even if the employee makes out a prima facie case of victimisation. Thus, where a dismissal can be attributed to misconduct,\textsuperscript{27} incompetence,\textsuperscript{28} persistent absenteeism\textsuperscript{29} or even a general unco-operative attitude\textsuperscript{30} the employer will not be penalised. Further, the tribunals have repeatedly affirmed that management has the right to reorganise and reduce staff when an award increases operating expenses.\textsuperscript{31} The unlawful dismissal provisions are not intended to encroach upon this right. Nor are they designed to prevent an employer dismissing staff because his operations have become unprofitable\textsuperscript{32} or because there is no suitable work available for his employees.\textsuperscript{33}

In one case,\textsuperscript{34} a company successfully pleaded the ignorance of one of its officers as a defence. The officer dismissed a union delegate on the ground that the delegate's involvement in certain union activities seemed to be inconsistent with the delegate's duties as the company's industrial officer. The company was able to establish that the officer was not aware the employee was a union delegate. Accordingly the charge was dismissed.
On the other hand, the circumstances of the case may raise an inference that the employer has infringed the victimisation provisions. Thus, where an employer peremptorily dismissed two experienced, efficient and satisfactory employees with long service records for refusing to carry out certain duties which the employer did not, in fact, desire them to perform, the employer was penalised. Furthermore, evidence of the employer's opposition to the spread of unionism in his factory may tilt the scales in favour of a dismissed employee who was believed to be promoting union membership.

If an employer alleges that the dismissal is caused by a need to reduce staff, the fact that the aggrieved party is replaced immediately after his discharge may tell against the employer. And it is not sufficient to claim blandly that the dismissal was motivated by economic reasons: the tribunal will normally expect the employer to provide some evidence of the need for the cut-back.

In some cases the inference from the facts is clear. Thus in O'Gradey v. Cunliffe an employer was successfully prosecuted for discharging an employee at 5.00 p.m. on the last day of the employee's testimony in proceedings against the employer for recovery of wages due under an award. The close contemporaneous connection between the employee's action in testifying and the employer's action of dismissal made this conclusion inevitable. But where there is a long time lapse of, say, three months, between the testimony and the dismissal it may be more difficult to draw an inference against the employer.

(vii) Penalties

A dismissal which defies the victimisation provisions is a matter of grave concern to the legislatures. In a recent decision Smithers J. described it as 'quite a serious offence'. Yet the penalties imposed upon offenders do not reflect this concern. A
monetary penalty of $100, $200 or even $400 can hardly be expected to deter an unscrupulous employer from discrimination against employees on grounds of legitimate industrial activities.

And even where victimisation is established some tribunals seem to be reluctant to impose the maximum penalty. In King v. Hickson's Timber Impregnation Co. (Aust.) Pty Ltd the Commonwealth Industrial Court levied only half the maximum penalty against an employer who dismissed six employees because they proposed to join a trade union. Spicer C.J. seemed to be impressed by the fact that the employer became tractable in the later stages of the proceedings. This persuaded him to impose a moderate penalty. Dunphy J. agreed with his decision. Smithers J., on the other hand, took a firmer stand.

I think that the company went through this with a great deal of determination and has only repented at the end because of the inevitability of the position in which it found itself, faced with the prospect of incurring a serious penalty unless it changed its attitude.

Although Smithers J. was inclined towards a harsher penalty, he ultimately agreed with the figure proposed by Spicer C.J.

The gravity of an offence against the victimisation provisions cannot be overstressed. The penalty should fit the 'crime'.

(viii) Conclusion

The unlawful dismissal provisions are not intended to confer upon employees who engage in legitimate trade union and industrial activity an immunity from dismissal. Rather they are designed to penalise employers who offend the provisions. These sections are hesitating steps towards ensuring that those who choose to play a role in the arbitration systems or who enjoy the benefits of those systems are not prejudiced in their employment. However a close scrutiny of the various victimisation provisions reveals alarming gaps and a distressing lack of uniformity in the protection afforded. In general,
the tribunals have interpreted these provisions in favour of the employer. The onus of proof sections make this inevitable. Further, the penalties imposed by the relevant legislation are grossly inadequate.
Misconduct, inefficiency and disobedience are not the only causes of summary dismissal. Under certain circumstances, if a corporate employer goes into liquidation or receivership its employees' contracts of service will be instantly discharged. Again, the sale of a company's business in a take-over may involve the summary dismissal of company employees.

1. Liquidation

The effect of company liquidation upon the contract of service depends upon the type of winding up involved.

(i) Compulsory Winding Up

In a compulsory winding up, the liquidation order serves as a notice of dismissal to all the company's servants as from the date of publication of the order. This rule originated in Re General Rolling Stock Co.(Ltd), Chapman's Case where Lord Romilly M.R. took cognizance of the chamber's practice which treated the winding up order as equivalent to notice. Although Chitty J. in Re Oriental Bank Corpn; MacDowall's Case conceded that the rule was 'founded upon good sense', the judiciary has never offered an explanation of the principle.

The automatic dismissal effected by a compulsory winding up order may expose the company to a claim for damages for breach of contract if the employee is entitled to a period of notice or was guaranteed a fixed period of employment in his contract.
A liquidator may waive the automatic notice of dismissal and require certain employees to continue in employment. If he does so, the employee's contract of service may be revived. But waiver is difficult to establish. The evidence of waiver must be unequivocal. To quote Chitty J. in *MacDowall's Case:* 'Something must be done in a clear and unmistakeable way'. There the liquidator simply allowed MacDowall to continue rendering to the corporation services analogous to those he provided before the liquidation order. This was not sufficient to establish a waiver.

The duration, character and incidents of an employee's employment after the winding up order may indicate that he was engaged by the liquidator under a fresh contract. But, once again, clear evidence is required.

These rules are technical. The ordinary employee could be excused if he were ignorant of the significance of a compulsory winding up order.

(ii) Voluntary Winding Up

A resolution to wind up a company does not, *ipso facto,* operate as a notice of dismissal to the company's employees. Warrington J. established this principle in *Midland Counties District Bank Ltd v. Attwood.* He sought to distinguish the effect of compulsory and voluntary liquidation upon contracts of service on the basis that, in the former there is an essential change in the personality of the company since the business is carried on by the court, not the company.

In *Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd* Scrutton L.J. exposed the weakness in this reasoning: in neither form of liquidation is there any change in the personality of the employer company until it is finally dissolved; in both forms, the company, not the liquidator, employs the company's servants before and after the winding up.
It appears, then, that the explanation for the distinctive rule as to the effect of a compulsory winding up must lie elsewhere. Graham sees the rationale in the fact that:

the effect of an order for winding up is to take the power of dealing with the assets of the company and carrying out any obligation of the company out of the hands of the company and to put them into the hands of an officer of the court.^{14}

A voluntary winding up resolution, on the other hand, does not transfer this power to the court, it merely vests the power in the hands of a liquidator. Thus, Graham's thesis revolves around the ability of the company to perform its contractual obligations: in a voluntary winding up this ability survives the resolution; in a compulsory winding up it ceases with the issue of the liquidation order.

This theory ignores the fact that, in a voluntary winding up, the liquidator's power to honour the company's obligations under a contract of service is severely limited because the company's property is clearly trust property.^{15} With the passing of the resolution, the company ceases to be beneficial owner of its assets.^{16}

But this change in beneficial ownership may not deprive the liquidator of the power to carry out the obligations of the company in a contract of employment. The liquidator may, after all, carry on the business of the company so far as is necessary for its beneficial winding up.^{17} And to quote Simonds J. in Re Great Eastern Electric Company Limited:^{18}

If in the proper exercise of this statutory power he incurs obligations, those to whom he incurs them are entitled to be paid out of the assets of the company in priority to its creditors at the commencement of the winding up.^{19}

Graham's theory meets a more formidable obstacle in U.C.A., section 227.^{20} This section provides that, in a compulsory winding up, the company is divested of the power of dealing with its assets from the date of presentation of the petition. Thus, the company may be unable to perform its contractual obligations after that date. But the
automatic discharge of company servants dates from the publication
of the compulsory winding up order.

Perhaps this discrepancy can be explained on the ground
that the company's inability to perform its contracts becomes public
and official when the winding up order issues. At this point the
employees are deemed to know that the company has repudiated or will
repudiate its contracts. Before the order is published the
company's repudiation has not, in theory, been communicated to the
company servants.

Furthermore, although the company's powers to perform its
contracts are generally in abeyance after the presentation of the
petition, some activities may be approved by the court both before
and after the winding up order issues. Thus the company is not
completely crippled by the presentation of a winding up petition.
With the approval of the court, the company may still have the ability
to perform its contractual obligations. It is the winding up order,
not the petition, which ultimately paralyses the company.

With the above qualifications, Graham's theory has some merit.
It goes a long way towards explaining the reason for the peculiar rule
applicable to a compulsory winding up.

Given that there is a different rule for the effect of a
resolution for voluntary liquidation, how may that rule be stated?
Perhaps the best formulation is as follows: where it is clear to the
employee in the light of all the surrounding circumstances that the
resolution repudiates the company's obligations under the contract
of service, then the resolution operates as a notice of discharge.
If the company is unable to perform its contractual obligations this
will be cogent evidence of repudiation. But the insolvency of the
company is indicative, not decisive.
2. Receivership

The impact of the appointment of a receiver or a receiver and manager upon contracts of service depends largely upon the mode of appointment. A receiver may be appointed by a court or by the company’s debenture holders.

Where a court appoints a receiver and manager at the instance of the debenture holders in an action by these creditors to enforce their security, the appointment itself automatically dismisses the company’s employees. Similarly, if a receiver and manager is appointed by, and acts on behalf of, the debenture holders, the appointment operates as an automatic notice of discharge to the company’s employees.

By contrast, the appointment by debenture holders of a receiver and manager as agent of a company does not automatically terminate a subsisting contract between the company and an employee. However, this contract will be automatically discharged in at least three cases. First, where the appointment was accompanied by the sale of the company’s business. Second, where the appointee negotiates a fresh contract with the employee soon after his appointment provided the new agreement is inconsistent with the continuance of the employee’s original contract with the company. Finally, where the receiver and manager’s role is inconsistent with the continuance of the employee’s contract.

3. Take-Overs

When the business of a company is taken over the assets of the company are normally transferred to the purchaser. But, apart from statute, a contract of employment cannot be assigned to the transferee without the consent of the employee. Nokes v. Doncaster Amalgamated Collieries Ltd makes this clear. There Lord Atkin stated firmly:
I confess it appears to me astonishing that apart from overriding questions of public welfare power should be given to a court or anyone else to transfer a man without his knowledge and possibly against his will from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve: and that this right of choice constituted the main difference between a servant and a serf.34

It follows that a transfer of the business of a company as the result of a take-over terminates the contracts of service of the company’s employees. If this technical break in the employees’ service is effected without the appropriate notice or wages in lieu thereof it will amount to a wrongful dismissal of the company’s payroll.

On the other hand, a transfer of the control of the company does not itself discharge the employees’ contracts of service.35 In effect, the identity of the employer has changed. Yet, in this case, the courts do not inquire whether the company employees have agreed to work under the new arrangement.

4. Conclusion

The rationale of the peculiar rule that a compulsory winding up order operates as a notice of dismissal to the company’s servants is obscure. If the employee was entitled to a period of notice or employment for a fixed period his right to claim damages against the company is preserved.36 The adequacy of this remedy will be considered elsewhere.37 Where an employee’s contract of employment is discharged by a compulsory winding up order but the employee agrees with the liquidator to continue in his employment, it may not be clear whether the employee is working under a revival of his former contract or a new contract with the liquidator. If an employee is confused as to the effect of the new arrangement he could suffer the fate of Mr MacDowall and lose both his right to notice and the right to claim damages in lieu thereof.38 The effect of a voluntary winding up upon contracts of
service appears to depend on an arbitrary standard - the particular circumstances of the case. In either type of winding up, an employee may have his contract terminated with little or no forewarning.

Contracts of service may be discharged perfunctorily in consequence of a take-over or by the appointment of a receiver or a receiver and manager. Finally, a change in control may have a material effect upon an employee's future with a company but he has no right to be consulted about this development.
1. Action for Damages

An action for damages for breach of contract is the ordinary common law remedy of an employee wrongfully dismissed. Where the contract of service is due to commence at some future date and the employer indicates that he does not intend to honour his contractual obligations, the employee may accept this repudiation and sue for damages immediately: the employer's conduct is an anticipatory breach of contract.\(^1\) In fact, the employee must sue promptly; he may not delay his action until the end of his term of hiring in order to claim the balance of the wages promised.\(^2\)

(i) The Measure of Damages

In the absence of an express provision stipulating an amount of liquidated damages,\(^3\) the measure of damages for wrongful dismissal is the pecuniary loss which flows naturally from the employer's breach of contract.\(^4\) To be included in the measure of damages an item must be of such a nature that it would have been contemplated by the parties as a possible result of the breach.\(^5\)

(ii) The Scope of Damages

Damages are intended to compensate the employee for loss of his wages or salary,\(^6\) not to punish the employer for breach of contract.\(^7\) Thus, the fact that the employer does not have a good reason for the discharge is immaterial.\(^8\) It will not warrant an increase in damages. Wages or salary will often be the sole factor for consideration in computing the damages.\(^9\) This loss will be measured at the rate the
plaintiff was receiving at the time of his discharge. Wages earned but not paid may also be taken into account.

(a) No Damages for Personal and Financial Hardship

Only in exceptional cases will an employee be entitled to damages in respect of the loss of reputation occasioned by the dismissal. Nor will the manner of the dismissal or the injured feelings of the employee enter into the assessment. This remains true even where the manner of the employee's dismissal carries an imputation of dishonesty or incompetence. Further, damages will not be granted to compensate for the difficulty of obtaining fresh employment nor the loss of prospects for advancement in the former position.

(b) Fringe Benefits

Benefits such as tips, commission, board and lodging, travelling expenses, the chance of winning a bonus and the loss of an opportunity to make a profit on company shares may be considered in assessing the damages provided they were promised in the contract of service or were reasonably contemplated by the parties at the time of entry into the contract as part of the possible loss resulting from a wrongful dismissal. Where the benefit is made contingent upon the employee serving the full term of his engagement he will not be entitled to damages in respect of the benefit even though the wrongful dismissal prevented him from qualifying.

(c) Superannuation

Whether damages may be awarded for loss of superannuation benefits is a vexed question. Clearly, where the superannuation scheme
is founded on a discretionary basis and the employee has no contractual right to the benefits, he will not be entitled to damages for the loss of these benefits. If, on the other hand, the contract of employment provides for superannuation benefits, it seems that the employee may recover damages for the benefits foregone. The actual amount of damages attributable to loss of superannuation benefits will depend upon the particular terms of the employer's scheme. The courts will examine these terms to ascertain what benefit the employee would receive if he were lawfully dismissed. An amount equivalent to that benefit is then included in the award of damages. This approach is consistent with the general rule that the plaintiff is entitled to an assessment of damages which represents the difference between his financial state at the time of the breach and what it would have been if the contract had been performed.

Where the employee's entitlement under his employer's scheme is 'vested' the award of damages will include the employer's contributions on behalf of the employee up to the time of dismissal. But the vast majority of schemes do not provide vested benefits. In such cases damages for wrongful dismissal will merely reflect the employee's own contributions with or without interest. In fact, the employee may be obliged, in some schemes, to prove that the dismissal was unjustified in order to obtain a refund of his own contributions.

It may be difficult for the dismissed employee to establish his entitlement to damages for these fringe benefits. Normally damages will be restricted to the amount of wages or salary the employee would have earned during the notice period. Even this meagre sum may be reduced in certain circumstances.
(iii) Mitigation of Damages

In estimating the damages the jury may consider all that has happened, or all that is likely to happen, to increase or mitigate the plaintiff's losses down to the day of trial.\(^{38}\)

If the employee could have obtained almost immediately after his discharge alternative employment which a reasonable man would have accepted, only nominal damages will be awarded.\(^ {39}\) However, an employee is entitled to decline an offer of employment in a different capacity and at a lower salary without reducing the amount of damages.\(^ {40}\) Further, an employee may, in certain circumstances, reject an offer of re-employment with his former employer on the same terms and still obtain more than nominal damages.\(^ {41}\) In Yetton v. Eastwoods Froy Ltd\(^ {42}\) a managing director who, after his dismissal, turned down his employer's offer of another position as an assistant managing director with his former emoluments was held to have acted reasonably in refusing the offer. The history of the relationship and the lower status of the position justified his refusal.

On the other hand, the employee has a positive duty to mitigate the loss he sustains from the wrongful dismissal.\(^ {43}\) He must seek other suitable employment with reasonable diligence.\(^ {44}\)

Any wages or salary earned by the dismissed employee after the dismissal and before the expiry of the notice period will be taken into account in calculating damages.\(^ {45}\) Moreover, if the wrongful dismissal gives the employee the time and opportunity to profit from a transaction, the profit will be deducted from the damages due to the employee. This is so even if the transaction involved an investment of capital and the grant of a security by the employee.\(^ {46}\) The onus of establishing factors in mitigation of damages lies upon the employer.\(^ {47}\)

An employee who complies with his duty to minimise his damages and obtains other employment may ruin his chances of reinstatement.
Thus the law places the employee in a dilemma: if he finds another job he may be denied reinstatement; if he does not seek other employment his damages may be reduced.

(iv) Damages: a Matter for the Jury

Normally, assessment of damages is the province of the jury, but their award may be set aside if it appears that they have taken improper factors into account.\(^\text{48}\)

(v) Should Tax be Deducted from the Award of Damages?

In Australia, damages for loss of wages or salary as a result of wrongful dismissal retain the character of income under section 25 (1)\(^\text{49}\) or, arguably, section 26 (j)\(^\text{50}\) of the Income Tax Assessment Act 1936-1974 (Cth). Thus the employee will be entitled to recover the actual loss of wages or salary from his employer\(^\text{51}\) without any deduction of income tax.\(^\text{52}\) These damages are then taxable in the hands of the employee.

2. Recovery of Wages due under the Award

In Australia, an award employee who has been wrongfully dismissed will rarely seek a common law remedy of damages for breach of contract. He is more likely to urge his union or the industrial authorities to prosecute his employer for breach of the award governing his employment. The industrial tribunal in all Australian jurisdictions may impose a penalty\(^\text{53}\) for such a breach and require the employer to pay the employee any arrears of wages to which he is entitled.\(^\text{54}\) Normally the employee is also able to recover amounts due in lieu of annual leave and long service leave. But generally industrial tribunals have no jurisdiction to award damages for wrongful dismissal; this is reserved for the common law courts. On the other hand, if an employee
claims wages in lieu of notice under an award he is under no obligation to mitigate his damages. 55

3. Quantum Meruit

In lieu of an action for damages, an employee who has been wrongfully dismissed may choose to sue his employer on a quantum meruit. This option is only available when the contract of service has been rescinded or determined. 56 Starke J. expressed this principle neatly in Automatic Fire Sprinklers Pty Ltd v. Watson. 57 His Honour stated that the dismissed employee may elect to treat the agreement as rescinded and sue immediately on a quantum meruit for services actually rendered or he may sue immediately on the agreement for breach thereof in wrongly dismissing him from his employment. "But he cannot do both". 58

A claim for a quantum meruit is founded upon the defendant's voluntary acceptance of the benefit of the plaintiff's work. 59 This presents no real obstacle in wrongful dismissal cases.

A quantum meruit is calculated on the basis of the value of the work done and services rendered by the employee up to the time of the dismissal. 60 Thus, an employee will rarely resort to an action for a quantum meruit because he cannot thereby recover wages or salary for the period from the dismissal until the end of the proper period of notice; nor can he recover compensation for the wrongful dismissal. 61

This last point is largely academic because when an employee sues for wrongful dismissal an allowance may be included in the damages which might, if the employee had so elected, have been recovered upon a quantum meruit. 62
4. Declaration

The traditional view that wrongful dismissal terminates the employment relationship irrespective of the employee’s acceptance or rejection of this breach of contract militates against the grant of declaratory relief. If the employer wrongfully discharges his employee, service is terminated, albeit in breach of contract. By his action the employer clearly indicates that he will no longer assign work to the employee. This prevents the employee performing his normal obligations under the contract of service. In these circumstances courts will not ordinarily declare that the employment relationship survives.

The grant of declarations as a remedy for wrongful dismissal is usually restricted to employees who enjoy a statutory status. McClelland v. Northern Ireland General Health Services Board may be a notable exception. McClelland’s employment did not carry a statutory status. Why, then, was the declaratory relief granted? Her employment was subject to the approval of the Northern Ireland Minister of Health and Local Government. This might suggest that McClelland held a public post and enjoyed a permanent status. But none of the majority referred to this fact in their judgments. Their Lordships thought that the issue turned on a construction of the contract.

Lord Goddard and Lord Evershed pointed out that the appellant’s post resembled that of a civil servant whose tenure was, in practice, quite secure. In this sense the appellant’s employment had a statutory flavour.

Whatever may be the correct description of her position, one thing seems clear: the appellant’s post did not involve an ordinary master-servant relationship. Moreover, the trend of subsequent decisions implies that McClelland’s Case may be regarded as an
exception rather than the rule.

On the other hand, in Hill v. C.A. Parsons & Co. Ltd., the English Court of Appeal suggested that a declaration may be available to an ordinary employee in ill-defined 'special circumstances'. The majority relied upon Francis v. Kuala Lumpur Councillors as authority for this proposition. However the view of the Court of Appeal on the availability of declaratory relief is not consonant with established authorities and should be treated with caution.

To sum up, an ordinary employee has only a remote prospect of obtaining a declaration challenging his dismissal.

5. Injunction

The courts have also steadfastly refused to grant injunctions which would, in effect, amount to an order of specific performance of the contract of service. There are several reasons for this approach.

In De Francesco v. Barnum, Fry L.J. asserted that to grant specific performance would 'turn contracts of service into contracts of slavery ...'. Although this statement implies that the employee's interests are being safeguarded, it merely entrenches management's right to hire and fire its employees. In general, no matter how eager a dismissed employee is to continue in his employment, neither common law nor equity will compel the employer to reinstate him.

In addition, the employment relationship is regarded as an essentially personal arrangement dependent upon mutual confidence; once lost, this confidence cannot be restored by a court order. Yet injunctions are used to enforce the creation or continuance of other personal relationships. And courts have been prepared to enforce a negative covenant in a contract of service even though the court's order would effectively compel the employee to perform his contractual obligations.
Courts are also reluctant to grant specific performance of a contract if such an order would require the continued superintendence of the court. Too much can be made of this difficulty. Courts could compel compliance with their order through contempt proceedings. Alternatively they could appoint an officer of the court to ensure that their order is observed.

Again, courts are chary of interfering with the parties' freedom of contract. One may doubt whether employees enjoyed equal bargaining power with their employers in the nineteenth century. Certainly in modern employment, this presumed equality of bargaining power is becoming increasingly attenuated.

Further, specific performance is denied because damages are regarded as an adequate remedy. In many cases, this argument is now untenable. Damages are not sufficient compensation for the loss of a job and all its valuable incidental benefits.

There is, however, some hint of a more relaxed attitude to injunctive relief in wrongful dismissal cases. In Hill v. C.A. Parsons & Co. Ltd the appellant sought interlocutory relief to restrain the respondent company dismissing him. Hill was an engineer who had been employed by the company for thirty-five years. He was only two years off retirement. A union exerted pressure upon the company to ensure that all professional and technical company employees joined the union. The company purported to vary Hill's contract so as to require him to join the union. When the appellant refused, the company purported to terminate his contract by one month's notice.

The majority of the Court of Appeal treated the company's action as a wrongful repudiation of the contract of employment. The remarkable feature of the case for present purposes was that both Lord Denning M.R. and Sachs L.J. granted an interim injunction even though they were, in effect, ordering specific performance of the contract of
Lord Denning M.R. found support for his conclusion in form of the order made by Lord St Leonards in *Lumley v. Wagner*. In fact, the order in that case did not operate in the employee's favour; it merely enforced a negative covenant which required the defendant not to sing for any other theatre or for any other concert manager or proprietor other than the plaintiff. And traditionally courts have been more prepared to enforce negative covenants on behalf of employers than to oblige employers to re-employ or reinstate dismissed employees.

Sachs L.J. pointed out that the main grounds on which specific performance of a contract of service had been refused in the past did not exist in the present case. Above all, the mutual confidence which existed between the parties had not been impaired by the purported dismissal.

The majority thought that damages were an inadequate remedy for the plaintiff since he would not be compensated for lost pension benefits or the difficulty he would have in securing alternative employment. Further, they refused to be restricted by what Lord Denning M.R. called 'the trip-wires of previous cases'. In their view, there was a need to modify the law to suit the realities of modern employment.

Denning M.R. and Sachs L.J. were anxious to preserve the appellant's position until he could invoke the protection of the Industrial Relations Act 1971 which was not yet operative. With respect, this would seem to be an illegitimate judicial exercise. In effect, they anticipated the Act and attempted to confer upon the appellant rights which had not yet been created by the legislature. Moreover, they over-estimated the protection which that Act would provide.
In his dissenting judgment, Stamp L.J. took an orthodox line. His Lordship conceded that damages may not have been an adequate remedy but he was not persuaded that an injunction should issue.

Though the reasoning of the majority is suspect, the decision on the particular facts appears just. Whether Hill's Case is the vanguard of a new judicial trend towards recognition of an employee's 'property' in his job or merely an exceptional case restricted to its facts, remains to be seen. One writer suggests that the decision may portend a changing attitude by the courts in considering equitable remedies available to employees and could be a major development. But the fact that Hill's Case concerned an application for interlocutory relief prompts a more conservative assessment. As Stamp L.J. pointed out in his dissenting judgment, the proper role of an interlocutory injunction is to preserve the status quo until the matter is heard.

Further, both members of the majority conceded that the case involved 'special circumstances'. These 'special circumstances' may not exist in an ordinary wrongful dismissal. It may well be that Hill's Case will be confined to its particular facts. However if it does herald a new trend then the principles established by Australian industrial arbitration tribunals in reinstatement cases may provide useful guidelines for future development of injunctive relief in Australia.

6. Reinstatement

(i) Federal Jurisdiction

The employee who seeks a reinstatement order from the Australian Conciliation and Arbitration Commission has a hard row to hoe and little chance of success. The Commission's jurisdiction depends
upon the existence of an industrial dispute, a dispute as to industrial matters which extends beyond the limits of any one State ...'.  The term 'industrial matters' is defined as 'all matters pertaining to the relations of employers and employees ...'. Further, it includes 'the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons ...'. Does a claim for reinstatement of a dismissed employee fall within this description?

(a) The Industrial Matter Hurdle

In Australian Iron and Steel Ltd v. Dobb, the High Court considered a claim for reinstatement under the Coal Industry Act, 1946-1951 (N.S.W.). The definition of 'industrial matters' in that Act opened with the words 'matters relating to the relations of employers and employees'. Thus, the description was almost identical to the introductory words of the definition of 'industrial matters' in the Conciliation and Arbitration Act 1904-1973 (Cth). Dixon C.J., McTiernan, Webb and Fullagar JJ., Taylor J. dissenting, decided that these general opening words were sufficient to cover a dispute over the reinstatement of a dismissed employee.

The Chief Justice, with whom McTiernan and Webb JJ. concurred, also decided that a reinstatement claim fell within paragraph (k) of the statutory definition. In his view, the 'duty to reinstate' was not confined to an 'antecedent legal duty'; this would be an 'absurd interpretation'. Rather, the expression refers to 'a question whether it is not obligatory or incumbent industrially upon the party to reinstate a particular person or class of persons in employment'.

Thus, Dobb's Case suggested that the Commission may have jurisdiction to award an arbitral form of reinstatement. This suggestion was partially eclipsed by Re Association of Professional
Re Association of Professional Engineers: the facts

Among the claims in letters of demand which the Association served upon local authorities in two states was the following clause:

(a) That officers, in the event that their employment is terminated or who are dismissed, shall have the right to appeal against such purported termination or dismissal to the Commonwealth Conciliation and Arbitration Commission provided any such appeal is made within fourteen days of the purported termination or dismissal;

(b) The Commonwealth Conciliation and Arbitration Commission shall determine whether or not the purported termination or dismissal was harsh, unjust or unreasonable and may make such settlement as it deems just in the circumstances.

When a dispute over non-compliance with the letters of demand came before the Commission, Commissioner Portus commented that an award in the terms of the demand might involve an improper exercise of judicial power. Nevertheless, the Commissioner recorded a finding that an industrial dispute existed as to 'the matter claimed in the letters of demand'. He also suggested that an award in somewhat different terms might not involve an exercise of judicial power, and he adjourned the hearing to allow the parties to consider an appropriate form for the award. When the hearing resumed, the Association tendered a draft award and the Commissioner expressed the view that an award could be made which would state (a) that except as provided in section 5 of the Conciliation and Arbitration Act 1904-1972 (Cth) and by variations to the award a dismissed officer or one whose employment had been terminated should have no right to reinstatement or to monetary compensation except in accordance with his employment contract, and (b) that an officer, within fourteen days of termination of employment or dismissal, might apply for variation of the award to provide that the particular employer might be ordered to reinstate the officer or might be ordered to pay monetary compensation.
The local authorities applied to the High Court for a writ of prohibition.

Barwick C.J., Menzies and Stephen JJ, decided that the Association’s claim could not be classified as an ‘industrial matter’. It did not fall within the opening words of the statutory definition for it did not pertain to an existing employer-employee relationship. Rather, it involved the relations of a former employer and an ex-employee.

This reasoning is inconsistent with Dobb’s Case. In fact, Dobb’s Case was not mentioned in the majority’s judgments in Re Association of Professional Engineers. Further, the majority’s reasoning relies heavily upon R. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners’ Association, which itself was an unsatisfactory decision. Moreover, it may be argued that the principal issue between the Association and the local authorities was job security. Surely this issue directly relates to a current employer-employee relationship.

The majority also found that the rejection of the Association’s demand did not create a dispute as to the authorities’ ‘right to dismiss’. In the majority’s view, the demand did not challenge this right. Rather, it sought to regulate the consequences of certain dismissals. Indeed, Stephen J., with whom Barwick C.J. and Menzies J. concurred, went so far as to suggest that dismissal or other termination by the employer was made ‘a condition precedent to the operation of the proposed right of appeal to the Commission’. But is this so? The Association’s demand referred to the ‘purported termination or dismissal’. Is it valid then, to assert that the Association did not dispute the authorities’ ‘right to dismiss’?

Stephen J. conceded that the demand involved the employer’s ‘duty to reinstate’ in employment since reinstatement was a possible
outcome of an appeal to the Commission in pursuance of the proposed award. Nevertheless, he led the majority who characterised the dispute as one relating to the powers of the Commission. Thus, although the Association's claim fell squarely within paragraph (k) of the definition of 'industrial matters', the majority deftly avoided the conclusion that the dispute was as to an industrial matter by what appears to be a subtle sophism. Once again, it is important to note that Dobb's Case was not even mentioned in the judgments.

To attract federal jurisdiction it is not enough that a dispute relates to an industrial matter; it must also extend beyond the limits of any one state.

(b) Interstateness Requirement

Failure to satisfy this requirement proved fatal in R. v. Gough; Ex parte Cairns Meat Export Co. Pty Ltd. There the relevant award preserved the company's right of summary dismissal on grounds of inefficiency, neglect of duty or misconduct. The company purported to exercise this right by dismissing four employees from the 'boning room' because it was not satisfied with their rate of work. The company then notified the Registrar of a threatened industrial dispute over the dismissals. The question of the company's right or power to discharge the workers eventually came before Commissioner Gough. The Commissioner found on the evidence that the dismissals were not justified. He ordered re-engagement of the workers with arrears of wages and without break in the continuity of their service. The company then applied to the High Court for a writ of prohibition.

Dixon C.J. held that the dismissals did not create a new industrial dispute extending beyond the limits of one state. McTiernan and Taylor JJ. concurred.
Thus, the orders could only survive if they were award variations within the ambit of the original interstate dispute on which the basic award was founded. The Chief Justice doubted whether a power of variation of the award had been exercised. He nevertheless concluded:

But if there were any attempt to vary the award, I cannot see that it would have been within the original dispute. It would have required great foresight to make a dispute about these events, events which occurred three years later or at least two and one half year later.29

It appears then, that the dismissal of an individual employee or a small group of employees will rarely involve an interstate industrial dispute. Re Association of Professional Engineers30 confirms this assessment. There the majority31 found that the Association’s demand was designed to provide machinery for the settlement of essentially local disputes between an ex-employee and his former employer.32 Such a demand was not arbitrable.

(c) *Judicial Power* Hurdle

The final ground on which an application for reinstatement may flounder in federal jurisdiction appears in section 71 of the Constitution. If the determination of the application would involve an improper exercise of the judicial power of the Commonwealth it is not within the jurisdiction of the federal arbitral tribunal. Further, it is established that this judicial power may not be conferred upon a tribunal whose primary function is arbitral.33 But would the Commission’s decision upon a reinstatement application necessarily involve an exercise of judicial power?

In R. v. Gough; Ex parte Meat and Allied Trades Federation of Australia34 a clause proposed for an award provided, in effect, that an employer should not harshly or unreasonably give notice of termination to a weekly employee or refuse to re-engage a regular daily employee
or refuse to re-employ any person employed by him in the preceding
twelve months or dismiss an employee without notice. The second
paragraph of the proposed clause stated: "If any dispute arises
under this Clause the Commission may on the Application of the Union
order the reinstatement in employment or re-engagement or re-employment
of any such employee*. This last phrase, "any such employee*, was
taken to mean any employee "whose rights created by the first
paragraph of the clause have been violated*.35

The High Court unanimously held that the second paragraph
of the clause could not validly be inserted in a federal award.
Barwick C.J., Windeyer and Walsh JJ. found that the clause purported
to confer judicial power upon the Commission. It involved the
determination of legal rights and provided a remedy for their infringe-
ment. In the opinion of the Chief Justice, the clause called for "the
ascertaining and enforcement of existing rights, classically at the
very heart of the exercise of judicial power*.36 Owen and Menzies JJ.
felt it was sufficient to decide that the proposed clause did not
involve an exercise of arbitral power: this, in itself, spelt
invalidity.

The message was clear: the power to decide upon legal rights
and their enforcement by reference to any objective criteria or
standards is a judicial function. The union in Re Association of
Professional Engineers37 overlooked this message. There the claims
in the Association's letters of demand attempted to confer two judicial
functions upon the Commission. The first was the determination of the
issue whether an appellant was an officer whose services had been
terminated or who had been dismissed. The second was the decision
whether the appellant's termination or dismissal was "harsh, unjust
or unreasonable*. Clearly both these functions would require the
Commission to exercise judicial power. Thus, on the authority of
this clause could not validly be inserted in the award.

Does this mean that no reinstatement application can evade the 'judicial power' obstacle? If instead of providing objective standards by which a dismissed employee's rights could be determined, the award gave the Commission an arbitrary, unfettered discretion to entertain a reinstatement claim, then perhaps this would not offend the 'judicial power' injunction. Gibbs J. concedes this in Re Association of Professional Engineers. But the question then arises: can the award give the Commission power to back up the exercise of its unbridled discretion by a reinstatement order? Gibbs J. believed that it could. Yet this would come dangerously close to enforcing an award, a matter reserved for the Australian Industrial Court.

(d) Conclusion

While a dispute over a wrongful dismissal may concern the 'right to dismiss', it may not involve the 'duty to reinstate' for there is no legal duty to reinstate a wrongfully dismissed employee. But a duty to reinstate may possibly be created 'in the future'. Yet, even if this argument is accepted, a claim for reinstatement is not, on the current law, an 'industrial matter': it does not pertain to an existing employer-employee relationship.

In addition, a dispute over reinstatement of an employee wrongfully dismissed would rarely satisfy the 'interstateness' requirement. Even if it did, the Commission would be precluded from ordering the relief sought since this would involve a judicial function.

Similarly, the Commission could not order reinstatement of an employee whose dismissal, although lawful, was harsh, unjust or unreasonable. Once again the dispute would not involve a current employer-employee relationship. Nor would it normally have the
necessary interstate character. And to decide the threshold question whether a dismissal was harsh, unjust or unreasonable would involve a judicial function. Further, to order reinstatement in such cases might amount to enforcement of the award, another judicial exercise.

(e) Reinstatement in Practice

Notwithstanding these jurisdictional fetters, the Commission entertains applications for reinstatement of employees wrongfully dismissed and employees whose dismissal was harsh, unjust or unreasonable. It does not, and cannot, order reinstatement but it does often recommend or direct reinstatement in these cases. This reinstatement jurisdiction appears to be based upon the parties' consent to be bound by the Commission's decision. Since the direction of reinstatement is not enforceable one may doubt its utility. On the other hand, the practical realities of the industrial arbitration system ensure that the Commission's recommendations will not be taken lightly. It will be sufficient to give a brief sketch of the Commission's practice.

(f) Wrongful Dismissal Cases

The Commission has evolved several principles in exercising its de facto jurisdiction to direct reinstatement in wrongful dismissal cases. It scrutinises the circumstances surrounding the dismissal carefully. If it appears that the discharge was justified, the Commission will rarely interfere with the employer's decision. Further, reinstatement will not normally be recommended where the employee resigned from his position. Thus an employee who is forced to resign because of his employer's oppressive conduct towards him may be denied protection. In addition, the remedy of reinstatement is easily lost by delay. Even if reinstatement is directed, the
Commission may stipulate that the arrangement is to lapse if it appears that there is insufficient work available for the employee. 47

(g) Lawful Dismissal Cases

Subject to the "victimisation provisions" of the industrial arbitration and wages boards statutes, 48 an employee dismissed with the requisite period of notice may not complain that his dismissal was wrongful. 49 The remedy of reinstatement is thus vitally important to an employee who has been lawfully, though harshly, unjustly or unreasonably, dismissed.

Where it appears that a summary dismissal, although technically justified, may have harsh, unjust or unreasonable consequences for the employee, the Australian Conciliation and Arbitration Commission may recommend reinstatement. 50

On the other hand, the Commission has no power to order reinstatement of an employee dismissed in accordance with an award. 51 Thus, an employee discharged with the one week's notice prescribed in the award is not entitled to reinstatement if the dismissal is harsh, unjust or unreasonable. 52 In Wilson and Gorman Pty Ltd v. Australian Timber Workers' Union, 53 J.M. Galvin, Chief Conciliation Commissioner, upheld management's right to dismiss an employee with the appropriate notice, but he urged management to give the employee another chance. Although management decided to re-employ the worker in that case the fact remains that the Commissioner did not purport to order reinstatement.

After hearing evidence of the circumstances surrounding the dismissal, the Commission may conclude that reinstatement is not warranted. Thus, in Association of Architects v. Olympic Cables Ltd, the Commission refused to recommend reinstatement of an employee dismissed with wages in lieu of notice because of his membership of...
the Communist Party. It decided that the employer could not be obliged to employ a person whom the employer found unacceptable for any reason. This decision has far-reaching implications. By parity of reasoning, the Commission might not be willing to recommend reinstatement of an employee dismissed on the ground that he had red hair or a beard.

The power to direct reinstatement is discretionary and the applicant must establish that the Commission's intervention is justified. It is not enough that the dismissed employee will suffer financial detriment or be disturbed in the normal pattern of his life; special circumstances are normally required to establish that the dismissal is harsh and unreasonable. Further, the Commission will exercise its power to direct reinstatement in cases of lawful dismissal with the greatest caution. It occasionally seeks guidance in the principles established by New South Wales tribunals exercising their reinstatement jurisdiction.

(ii) New South Wales

(a) Wrongful Dismissal Cases

None of the jurisdictional limitations which circumscribe reinstatement in the federal sphere apply in New South Wales. There Conciliation Committees and the Industrial Commission are empowered to determine "industrial matters". The statutory definition of this term in the Industrial Arbitration Act, 1940, as amended (N.S.W.) differs significantly from its federal counterpart. It includes "the right to dismiss or refuse to employ or reinstate in employment any particular person or class of persons therein ...".

Armed with this jurisdiction, the industrial tribunals order reinstatement if the employer abuses his right of dismissal. An application for reinstatement may only be made by an industrial union
of which the dismissed employee is legally entitled to be, and is in fact, a member. 65

A reinstatement order or award may not take effect from a date earlier than the day on which the application was lodged with the Registrar. 66 This principle may deprive an employee of wages to which he should be entitled. This will certainly be true where the employee’s union engages in protracted negotiations with the employer over the dismissal before resorting to an industrial tribunal for reinstatement.

Reinstatement will not normally be ordered where it appears that the summary dismissal was justified. Thus, an employee who is dismissed for speaking to management’s representatives in a threatening or abusive manner 67 or for an unco-operative attitude in his work will be refused reinstatement. 68 An unreasonable refusal 69 or neglect of duty 70 will also disentitle an employee. In one case, 71 an employee was dismissed for his refusal to perform a certain task even though he did not know the safe way of doing the job. The tribunal rejected his claim for reinstatement: it was enough that he would have seen the job done and known that it could be done safely. Mere unfitness 72 or inefficiency 73 may disqualify an employee from obtaining an order. Further, an employee dismissed for dishonesty has little chance of obtaining a reinstatement order. 74

It appears then, that reinstatement has been refused in some cases where the employee’s misconduct was somewhat trivial. Moreover, reinstatement is a discretionary remedy. 75 It may not be available where it appears that the employer does not have enough work for the employee. 76 Yet compensation will not, it seems, be available in lieu of reinstatement in these cases. 77

Subject to these minor criticisms, industrial tribunals in New South Wales have, through their reinstatement jurisdiction,
substantially curtailed abuse of management's right of summary dismissal.

(b) Lawful Dismissal Cases

The term 'right' in paragraph (c) of the statutory definition of 'industrial matters' has been interpreted as 'not referring solely to a legal right, but as referring to the propriety, as a matter of fairness and justice, of doing in particular circumstances that which admittedly an employer has a legal right to do'.

Thus, the New South Wales Industrial Commission and other tribunals empowered to determine industrial matters have jurisdiction to order reinstatement where a dismissal, although lawful, was harsh, unjust or unreasonable. This jurisdiction is now firmly established.

In Western Suburbs District Ambulance v. Tipping, J. collected the main principles which may be extracted from the early decisions upon the reinstatement jurisdiction. It is sufficient for present purposes to examine some of these guidelines.

Firstly, the Commission has repeatedly affirmed management's right over the selection and retention of its employees. Only where the employer abuses his right of dismissal by acting harshly, unfairly, unjustly or oppressively will the Commission interfere with management's decision. Further, an order for reinstatement will only be made in exceptional circumstances where a strong case for intervention is established. And it is incumbent upon the applicant to call sufficient evidence to justify the Commission overruling the employer's right of dismissal. The Commission will inquire into the circumstances of the dismissal and each case must turn on its own particular facts. Finally, there is some doubt whether the Commission should take into account the likely practical outcome of a reinstatement order in exercising its discretion. The authorities
indicate how these basic principles have been applied in practice.

Where Dismissal was Excessive Punishment

The Commission has shown an alacrity to intervene where the dismissal was a severe penalty for the employee's conduct. Thus, where the employee's conduct amounted to a trivial breach of a company rule, the employee was reinstated. Again, an employee dismissed for his refusal to obey a lawful instruction was granted reinstatement because his refusal was attributable to a conscientious religious belief. Similarly, disobedience which the employee genuinely and reasonably believed was justified in the circumstances will not preclude the employee obtaining a reinstatement order. In addition, if it is unreasonable to hold the employee responsible for damage to company property, the Commission will order reinstatement.

Manner of Dismissal

The manner of dismissal may also persuade the Commission to order reinstatement. Accordingly where a company gives no reason for the dismissal of a long serving employee, the Commission will not hesitate to direct reinstatement. Again, the fact that the dismissed employee was given no caution or warning prior to his discharge may be good grounds for reinstatement.

Discretionary Remedy

As reinstatement is a discretionary remedy, the employee may disqualify himself by his past conduct. An unsatisfactory work performance may tilt the balance against an employee. Where an employee in a responsible position maintained a pattern of lying and deceit for his own purposes, he was denied reinstatement. In one case, the Commission accepted the evidence of management representatives...
that they did not have a high opinion of the employee's work as sufficient justification for dismissal of the employee.\(^2\)

The Commission's exercise of discretion has, in some cases, been quite favourable to the employer. Thus, if the employer has no work available for the employee, reinstatement may be refused even though the employee has made out a case for the Commission's intervention.\(^3\) Further the fact that the dismissal may cause an employee hardship is not sufficient to justify reinstatement.\(^4\) In one case,\(^5\) five employees with 'long or considerable' service were dismissed from their positions with a municipal council because of their association with a different political organization from that to which the members of the employer body belonged. On the authorities, the Commission declined to interfere with the dismissals.

The New South Wales decisions on this exercise of 'arbitral' jurisdiction to order reinstatement are particularly important because they influence industrial tribunals in other jurisdictions.\(^6\)

(iii) Queensland

(a) Wrongful Dismissal Cases

In Queensland, jurisdiction to determine 'industrial matters' is vested in the Industrial Conciliation and Arbitration Commission.\(^7\) The definition of 'industrial matters' in the relevant Act\(^8\) includes a sub-paragraph which corresponds with section 5, paragraph (c) of the Industrial Arbitration Act 1940, as amended (N.S.W.).\(^9\) It would appear then, that the Queensland Commission has power to order reinstatement in cases of wrongful dismissal.

*Australian Workers' Union of Employees, Qld v. M.R. Hornibrook (Pty) Ltd*\(^10\) is an example of the exercise of this jurisdiction. The company asserted that the employee concerned was sacked because he abused a foreman and refused to work on after normal finishing time on
a Saturday. Commissioner Pont who heard the matter found that the foreman had acted unreasonably and ordered the reinstatement of the dismissed worker with back-pay from the date of the dismissal.

(b) Lawful Dismissal Cases

Paragraph (c) of the statutory definition of 'industrial matters' in the Queensland statute is distinctive. It reads as follows:

any question whether any particular person or persons or class of persons ought (having regard to public interests, and notwithstanding the common law rights of employers or employees) to be continued or reinstated in the employment of any particular employer; ... 12

In R. v. The Industrial Court and the Honourable Mostyn Hanger, President of the Industrial Court, and Mount Isa Mines Ltd, 13 the Queensland Supreme Court stressed that the power to order reinstatement under this paragraph must only be exercised after 'considering and giving weight to all relevant circumstances'. 14 Mere discrimination against the applicants is not enough to warrant interference with the employer's right to dismiss without stating a reason. 15 Nor will actual or anticipated industrial unrest in the circumstances of a case be, in itself, a sufficient basis for directing reinstatement. 16

The criterion of 'public interest' is nebulous. 17 Until authorities establish its ingredients the protection afforded by the paragraph appears inadequate. Jurisdiction to order reinstatement in these cases turns on matters extraneous to the employment and upon factors over which the particular employee may have no control. Yet the essential issue in these cases should be whether the employer has abused his right of dismissal in such a way as to warrant intervention by the Commission.

In spite of these limitations, it appears that the Industrial Conciliation and Arbitration Commission has jurisdiction to order
reinstatement where the employer has acted unfairly, harshly or unjustly in exercising his right of dismissal. It is not yet clear whether this jurisdiction is founded upon paragraph (c) or paragraph (d) or, in fact, both these paragraphs of the statutory definition of 'industrial matters'. But it seems certain that the principles evolved by the New South Wales Industrial Commission exercising its 'arbitral' jurisdiction to order reinstatement in lawful dismissal cases will be applied by the Queensland tribunal.

(iv) South Australia

(a) Jurisdictional Basis

Section 15 (1)(e) of the Industrial Conciliation and Arbitration Act, 1972 (S.A.) confers upon the Industrial Court of South Australia jurisdiction to hear and determine any question as to whether a dismissal was 'harsh, unjust or unreasonable'. Paragraph (e) echoes much of the language of the former section 26 (2) of the Industrial Code, 1967-1972 (S.A.), but there is one essential difference: the new provision covers dismissals which are harsh, unjust or unreasonable; the old sub-section referred to dismissals which were harsh, unjust and unreasonable. Since the present prescription is expressed disjunctively it is now only necessary to prove that one of the adjectives applies to the dismissal. This difference is substantive and substantial.

Referring to the tests applied under the pre-existing legislation, Olsson J., Deputy President of the Industrial Court, stated:

I am by no means convinced that they necessarily fully cover the whole field contemplated by the present legislation. In particular questions of unreasonableness appear to me to involve concepts which are rather different from the more extreme connotations of harshness and injustice.
The Industrial Court is empowered to direct the employer to re-employ the dismissed employee in his former position on terms that are not less favourable than those enjoyed by the employee prior to his dismissal. An employer may also be ordered to pay to the employee an amount equivalent to the wages he would have earned had he been employed in his position between the dismissal and the date of re-employment. A successful applicant will not, however, be awarded costs.

Applications for re-employment must be made within twenty-one days from the date of the dismissal. While a prompt re-employment is desirable in most cases, this limitation period does seem to be unnecessarily short. If the employee's union becomes involved in lengthy negotiations over the voluntary reinstatement of the employee, this interval could easily be exceeded.

The sub-section does not make it clear who shall be allowed to make an application for re-employment but normally the applicant will be the dismissed employee.

(b) Wrongful Dismissal Cases

Geracitano v. Grote Street Service Station involved an application for re-employment under the former section 26 (2). The applicant was summarily dismissed when he refused to obey his employer's direction to take his annual leave during a period of slackness, such direction being contrary to the relevant award. The Industrial Commission had no hesitation in ordering the re-employment of the applicant. It rejected the respondent's submission that the personal ill-feeling generated by the dismissal would make the work situation intolerable in the small scale business. Clearly a similar decision could be reached under the present legislation.
(c) Lawful Dismissal Cases

An early decision suggested that section 26 (2) did not extend to the situation where the employer terminated his employee's contract of service by giving the appropriate period of notice or wages in lieu thereof. This suggestion was refuted by subsequent decisions, and it seems clear that section 15 (1)(e) of the Industrial Conciliation and Arbitration Act, 1972 (S.A.) applies to dismissals with the proper notice.

Manner of the Dismissal

The manner in which management handles a dismissal may justify a re-employment order. Thus, in Minchin and Gorman v. St Judes Child Care Centre, the fact that no warning preceded, and no reason accompanied, the dismissals clearly influenced the Industrial Court to grant the relief sought under the present section 15 (1)(e).

Consequences for Dismissed Employee

Under the former legislation the consequences of the dismissal upon the individual employee were not regarded as significant factors. Blacker v. Ashford Community Hospital Incorporated indicates that the impact of the dismissal upon the applicant may be decisive under the new Act.

Harsh Decisions

The Industrial Court's exercise of the new jurisdiction is not without blemish. In one case, an employee was dismissed for an alleged failure to follow instructions formulated by the company's house manager requiring that all items found in the rubbish were to be handed over to the supervisor. Bleby J. absolved the applicant from any intention other than to return both the items in question to the
employer's custody, although through a means other than the correct channel. Yet His Honour ruled that the dismissal was not harsh, unjust or unreasonable and refused to order re-employment.

Further, in Merrett and Davis v. Ralph McKay Ltd, the Industrial Court suggested that a dismissal for refusal to join a trade union might not be harsh, unjust or unreasonable. In that case, the applicants were in fact dismissed with notice when their refusal to join a trade union seemed certain to cause strike action by the other employees of the company. Bleby J. found that all the circumstances surrounding the dismissal had to be considered. Among these circumstances, of course, was the position of the employer. On this basis, the dismissals were not harsh, unjust or unreasonable. While this decision may have been politic because of the industrial relations problem faced by the company, it does ignore the effect of the dismissal upon the individual employees concerned.

In general, however, section 15 (1)(e) ensures that the employer's right to hire and fire will be exercised responsibly or, at least, that unreasonable dismissals will not be sustained. But it does not completely override the employer's right of dismissal. To quote Olsson J. in Kilworth v. Zweck:

> there must be a fair and reasonable explanation for the dismissal which could extend, of course, to aspects such as a down-turn in the employer's business, a bona fide restructuring of the business or of staff, or some other aspect of the employer's operations which, when viewed in its true perspective, could be considered by fair-minded persons as being a totally legitimate reason for action actually taken.

(v) Western Australia

(a) Jurisdictional Basis

Under section 61 (2)(d) of the Industrial Arbitration Act, 1912-1971 (W.A.), the Industrial Commission of Western Australia was denied the power to order an employer to re-employ any worker unless,
in the opinion of the Commission, the employer was participating in a lock-out or the employer had victimised the worker because of his industrial activities. The implication was that section 61 (2)(d) specified the only grounds on which reinstatement could be ordered by the Commission. Indeed, in Building Trades Association of Unions of Western Australia, Australian Builders Labourers Federated Union, Western Australian Branch v. N.J. Hurll & Co. (Vic.) Pty Ltd the Commission decided that it had no jurisdiction to award reinstatement in cases other than those covered by the sub-section.

A recent amendment repealed section 61 (2)(d). But it is, at present, not entirely clear whether this amendment removes a restriction upon the Commission's jurisdiction to order reinstatement or simply abrogates the Commission's former power to direct reinstatement in victimisation cases.

(b) Wrongful Dismissal Cases

Whatever may be the theoretical foundation of the jurisdiction in these cases, reinstatement applications are frequently heard and determined by industrial tribunals in Western Australia.

Compulsory conferences often result in a recommendation that the dismissed employee be reinstated but these recommendations are apparently not binding upon the employer: in some cases the parties agree to accept any recommendation which the Commissioner may suggest; in others the employer has simply refused to abide by the Commissioner's recommendation. Even if it appears in the course of the conference that the employer has abused his right of summary dismissal, a direction for reinstatement will not automatically ensue. In some instances, the Commissioner has merely suggested that the employment be terminated in accordance with the award provision.

Employees who have been wrongfully dismissed have fared...
little better when the parties agree at a compulsory conference to have the matter determined by the presiding Commissioner. In *Federated Engine Drivers and Firemen's Union of Workers of Western Australia v. Hamersley Iron Pty Ltd*[^46^] Commissioner Kelly found that the employee's summary dismissal was unjustified yet he directed merely that the employee be paid one week's pay in lieu of notice. In another case[^47^] where a worker was wrongfully dismissed, the Commissioner declined to order reinstatement. On the other hand, the Commissioner determining the dispute will occasionally award reinstatement[^48^].

### (c) Lawful Dismissal Cases

Conciliation Commissioners at compulsory conferences commonly recommend reinstatement of employees lawfully dismissed if the dismissals were harsh, unjust or unreasonable[^49^]. The efficacy of these recommendations depends largely upon the agreement of the employers to comply with the Commissioner's proposal[^50^]. Moreover, the Commissioners appear reluctant to recommend reinstatement when the employer has acted in observance of award provisions[^51^].

Where the parties formally agree to have the dispute determined by the presiding Commissioner, he will examine the circumstances surrounding the dismissal to ascertain whether the employer has been unfair. But the fact that the dismissal may be harsh or that the employer should have taken other factors into account before discharging the employee is immaterial[^52^].

*Trades and Labour Council Disputes Committee v. Midland Junction Abattoir Board*[^53^] provides an illustration of the Commissioner's jurisdiction to determine a reinstatement claim. There, the employer dismissed certain employees striking in protest over the discharge of another worker. The employer was directed to re-employ the striking employees without loss of accrued or accruing entitlements.
In a recent decision, Commissioner Kelly summarised the reinstatement jurisdiction in the following statement:

To justify making an order for reinstatement it is necessary for me to find that the Company had no right to terminate [the worker's] contract of employment, or, if it had that right, that it exercised it in a harsh, unreasonable or unjust way.

So formulated, the Western Australian jurisdiction corresponds closely with its South Australian and New South Wales counterparts.

(vi) Tasmania

In Tasmania, section 23 (2)(d) of the Wages Boards Act 1920 (Tas.) precludes a board determining any matter relating to the 'dismissal, or reinstatement of any particular employee or particular class of employees'. But a compulsory conference convened by the Minister may hear such a claim, and the person presiding may order reinstatement of the employee dismissed. If the employer disregards this order he is liable to a penalty. It would seem that reinstatement would be available both in cases of wrongful and lawful, but harsh, dismissal.

(vii) Victoria

The powers of wages boards in Victoria are defined by section 30 (1) of the Labour and Industry Act 1958 (Vic.). There is no express provision empowering Victorian wages boards to direct reinstatement. The term 'non-employment' in section 30 is vastly different from words such as 'reinstatement' and 're-employment' on which jurisdiction is based in some of the other states.

Further, the general words in section 30 (1) might be construed in the light of the basic principles of statutory interpretation. One such principle is that, since every citizen is at liberty prima facie to carry on his business in his own way within the law, it will not be held that the legislature has intended by any statute to restrict that
liberty unless it has expressed that intention by plain words or by necessary implication. Moreover, when general words are inserted in a statute they will ordinarily be given no wider meaning than is necessary to carry into effect the Act's object and purpose. On the other hand, it has been held that the general words in the opening paragraph of the definition of 'industrial matters' in other jurisdictions authorise industrial tribunals to award reinstatement.

In Austral Bronze Co. Pty Ltd v. Non-Ferrous (Metal Strip) Wages Board, Banbury C.J. examined the purpose of the Tasmanian wages boards system at length. His Honour concluded that a wages board was constituted as a subordinate legislative body for the purpose of making determinations 'of general application prescribing terms and conditions of employment in respect of the trade for which it is established ...'. A wages board could not, therefore, direct the reinstatement of an employee as this would involve the exercise of judicial or arbitral functions. Moreover, since an application for reinstatement does not relate to the 'direct current mutual relations of employers and employees', it could not be entertained by a wages board.

The wages boards system which operates in Tasmania is broadly similar to that which exists in Victoria and, it is submitted, the reasoning in the Austral Bronze Case is equally relevant in the Victorian context. Thus it appears wages boards in Victoria may not order reinstatement.

The Victorian Industrial Appeals Court heard an application for reinstatement in Collard v. L.F. Pratt Motor Cycles Pty Ltd. Although it found that the employee had been wrongfully dismissed, it did not order reinstatement; it merely held that the employee was entitled to one week's notice or wages in lieu thereof. The unofficial report of this case does not disclose whether the application was
rejected on jurisdictional grounds but it implies that even if the jurisdiction exists the Industrial Appeals Court is reluctant to exercise it.

To this point remedies for wrongful dismissal and lawful dismissals which are unjust, harsh or unreasonable have been examined. It remains to consider the remedies provided for an employee dismissed in breach of the 'victimisation provisions'.

(viii) Unlawful Dismissals

In the federal sphere, the Australian Industrial Court is empowered to direct the reinstatement of an employee victimised for his legitimate trade union or industrial activity. This provision is undoubtedly valid since it is incidental to the Federal Parliament's power to make laws under section 51 (xxxv) of the Constitution. It appears then, that the complainant need not establish an interstate industrial dispute in order to invoke section 5 of the Conciliation and Arbitration Act 1904-1973 (Cth). Moreover, since the jurisdiction is vested in the Australian Industrial Court, section 71 of the Constitution is satisfied.

The power to order reinstatement of employees dismissed or demoted in contravention of section 5 is discretionary, and will only be exercised in special circumstances. A delay in instituting proceedings under section 5 may prejudice the employee's chance of regaining his position. Further, the fact that the employee discharged has obtained other employment which is not 'materially less beneficial' than employment with the defendant employer may persuade the Australian Industrial Court to refuse reinstatement.

The Industrial Conciliation and Arbitration Act, 1961-1974 (Qld) contains a provision substantially similar to section 5 of the federal Act. In Queensland, the jurisdiction to order reinstatement
in victimisation cases is conferred upon the Industrial Court or an industrial magistrate. Similarly in New South Wales the Industrial Commission or an industrial magistrate may direct reinstatement of employees dismissed in breach of section 95 of the Industrial Arbitration Act, 1940, as amended (N.S.W.).

Section 61 (2)(d) of the Industrial Arbitration Act, 1912-1971 (W.A.) gave the Industrial Commission of Western Australia power to require an employer to re-employ a worker dismissed in contravention of section 135 of that Act. But section 61 (2)(d) has now been repealed. It is doubtful, therefore, whether the Commission has jurisdiction to order the reinstatement or re-employment of an employee victimised for legitimate industrial activities. Similarly, in the wages board states, there does not appear to be jurisdiction to order reinstatement in these cases.

South Australia is the only jurisdiction in which damages may be awarded to an aggrieved party. Such damages may amount to more than simply a reimbursement of lost wages. Moreover, it is expressly provided that the monetary remedies afforded to an employee dismissed for taking part in industrial proceedings in or before a Conciliation Committee shall not restrict or limit his right to seek an order directing his re-employment. Presumably an employee dismissed on these grounds can seek an order for re-employment in pursuance of section 15 (1)(e) of the Industrial Conciliation and Arbitration Act, 1972 (S.A.).

On the other hand, the South Australian provision which prohibits an employer dismissing or demoting an employee because of industrial activity or because the employee is entitled to the benefit of an award or industrial agreement does not mention a remedy of re-employment. Yet, once again, the complainant would qualify for an order under section 15 (1)(e).
At common law the remedies for wrongful dismissal are grossly inadequate. Damages do not reflect the true nature of the employee's loss: they do not include compensation for the indignity of the dismissal, the injury to reputation or feelings or the difficulty of obtaining other employment; nor do they compensate for the loss of valuable 'rights' incidental to the job. If the dismissed employee performs his obligation to mitigate the meagre damages to which he is entitled, he may forfeit his chance of reinstatement by an arbitral order or award.

A quantum meruit claim is a limited remedy because the plaintiff loses his right to wages for the proper period of notice. Declarations or injunctions could be useful remedies since they would, in effect, enable the employee to continue in the employment. Unfortunately these forms of relief are not available to the ordinary employee despite some recent suggestions to the contrary.

The common law provides no remedy for an employee whose dismissal is lawful although harsh, unjust or unreasonable. Provided the employee is given the appropriate notice or wages in lieu thereof, he has no grounds for complaint at common law even if the dismissal was capricious, arbitrary or discriminatory.

Realistically the only viable remedy for the employee wrongfully or unjustly dismissed is reinstatement or adequate compensation at the option of the employee. In no Australian jurisdiction is this option available to the aggrieved party. Industrial tribunals in New South Wales, South Australia and, apparently, Queensland have jurisdiction to order reinstatement in these cases. The remedy is discretionary and some decisions where reinstatement is refused suggest that the tribunals have not thrown off the shackles of managerial prerogative.
Industrial tribunals in the federal sphere and probably Western Australia, as well as the wages boards in Victoria and Tasmania, have no jurisdiction to order reinstatement. In effect then, the majority of workers in award employment in the private sector are not entitled to reinstatement in the event of a harsh or wrongful dismissal. And even in those jurisdictions where reinstatement is available it is not generally an individual remedy: except in South Australia the proper applicant is the employee's union. This leaves non-unionists without ready access to the remedy.

For the employee unlawfully dismissed in breach of the victimisation provisions of the sundry industrial arbitration statutes the position is somewhat brighter. He may be entitled to reinstatement in New South Wales, Queensland, South Australia and the federal sphere. On the other hand, there appears to be no such jurisdiction in Western Australia, Tasmania or Victoria. Moreover, if the victimised worker does not wish to be reinstated he may not be awarded compensation for the dismissal as an alternative remedy.
1. **Introduction**

Redundancy and retrenchment may further erode employees' job security. The expression 'redundancy' is normally used to describe the situation where an employee's skills become surplus to his employer's manpower requirements. Often the term is reserved for permanent manpower changes caused by the introduction of mechanisation or technological innovations. 'Retrenchment', on the other hand, may refer to a temporary cut-back in staff caused by a recession or market fluctuation. Whatever their semantic differences, redundancy and retrenchment have one common factor: they strike at the heart of job security. For this reason, the terms will be used interchangeably in this paper to cover dismissal and displacement of employees through no fault of their own.

Such a general description masks the often-painful fact that redundancy causes personal hardship. To take a recent example. On Friday 21 June 1974 Leyland Australia dismissed over 1,000 employees at its Waterloo plant in Sydney because of the 'credit squeeze' and shortage of components. It was reported that Leyland gave the dismissed workers a week's pay in lieu of notice and pro rata four weeks' annual leave.¹

The retrenchments provoked an angry reaction from vehicle industry union officials who criticised the Government's economic policies which, they claimed, contributed to the retrenchments. Faced with the prospect of further retrenchments, the New South Wales Secretary of the Vehicle Builders' Employees' Federation, Mr J. Thompson, asserted:
Some of our members employed at Leyland have 18 years' service behind them. We won't allow the company's employees to be turned out of the gates like mangy dogs.²

Initially the Federal Government washed its hands of responsibility for the affair. Less than a fortnight after the sackings, the Prime Minister told a press conference in Canberra:

'It's not the government's fault if Leyland finds it more difficult to sell its products than other companies find to sell theirs.'³

The retrenchments had a traumatic impact upon the individual workers dismissed. Some idea of their bewilderment and dejection can be gained from the following comments:

I joined the staff only a month ago as a press operator after seeing the company's big advertising campaign for new staff. I have no idea what I will do for another job, but I need one soon. (Mr Con Gianoutsos, father of four, from Redfern.)

I thought my nine months' service might be enough to keep my place, but it wasn't. (Mrs Lena Tawhi of Bondi.)

The company has treated all its production workers shabbily. To notify a staff that 20 per cent of them have been sacked and then wait another two days to name the unlucky ones is unfair. (Mr Mike Harrison, 21, of Villawood.)⁴

Later in the year Leyland's position deteriorated but with government assistance it evolved a plan for rationalising its operations. Unfortunately the plan involved further retrenchments. Moreover, the employees who survived the initial wave of dismissals in June were workers with relatively long service but little prospect of industrial retraining. As Mr Laurie McDonald, one of Leyland's production planners, put it: 'All we know is motor work. We're not suited for anything else. Give us something else and we'll curl up and die.'⁵

Redundancy is a 'man-made phenomenon' with disturbing consequences for those who bear its burden. It is becoming a fact of economic life. What then has the law done to cushion its impact? In general, the law provides no remedy for employees dismissed or displaced through redundancy although industrial tribunals have forged
some solutions in particular cases.

2. Jurisdiction of Industrial Tribunals

(i) The Statutes

The industrial arbitration and wages board statutes in Australia either define the "industrial matters" over which the tribunals have jurisdiction or contain sections delimiting the powers and functions of the tribunals. In most cases this jurisdiction appears to be founded upon a continuing relationship of employer and employee. As mentioned earlier, a dismissal automatically terminates the employment relationship. On this reasoning an industrial tribunal may not have power to determine a redundancy dispute.

In South Australia, the statutory definition of "industrial dispute" expressly provides:

An industrial dispute shall be deemed not to have ceased where, in consequence of such dispute, the relationship of employer and employee has ceased as between the parties thereto or any of them.

At first sight this definition appears to suggest that a dispute over retrenchment may be an industrial dispute even though the dispute arises after the employment relationship has terminated. But on closer scrutiny it seems that this part of the definition only applies where the employment relationship is terminated in consequence of an industrial dispute, for example by dismissals in response to a strike.

Certain paragraphs of the definition of "industrial matter" in the Queensland Act clearly envisage regulation of the post-employment situation. Paragraph (c) was examined in the previous chapter. Fisher argues that this clause may be sufficiently broad to cover "most elements of a redundancy situation." Certainly retrenchment caused by the progressive introduction of automation and mechanisation into industry is a matter involving the public interest. In addition, the paragraph suggests that continuity of
employment and reinstatement may be regulated. But it is doubtful if this regulation applies to a redundancy situation. The only case in which the paragraph has been invoked in recent times involved a dispute over reinstatement, not redundancy. Further, in the absence of discrimination, industrial tribunals in other jurisdictions have refused to order reinstatement where employees are dismissed by reason of redundancy.18 Admittedly, the paragraph in the Queensland Act is somewhat different from its counterparts in other jurisdictions but the policy of these tribunals in refusing reinstatement of retrenched workers would, it is submitted, be equally relevant in the Queensland context.

The statutory definition of "industrial matter" in the Queensland Act also includes any question "whether monetary allowances shall be made by employers to employees in respect of standing back or waiting time imposed by the conditions of the employer's enterprise or because of intermittency of industrial operations or other causes."20 Thus, it appears that the Industrial Conciliation and Arbitration Commission is empowered to regulate certain terms of a temporary abeyance of employment. The implication is that, although employment is temporarily discontinued, the employment relationship survives. This situation is, however, fundamentally different from a redundancy where the employment is terminated.

To sum up, in most jurisdictions there is no express provision indicating that the industrial tribunals have jurisdiction to determine disputes over retrenchment. On the other hand, the phrasing of the statutory definition of "industrial matter" in the Queensland Act implies that the Industrial Conciliation and Arbitration Commission may have this jurisdiction.
(ii) Judicial Interpretation of "Industrial Matters"

The High Court has frequently grappled with the term "industrial matters". Although the definition of this phrase in the Conciliation and Arbitration Act 1904-1973 (Cth) differs from its counterparts in most of the states, the High Court's decisions in this field seem to have had a subtle, but nevertheless significant, effect upon the approach of state industrial tribunals in redundancy disputes.

The propositions which emerge from the High Court's analysis are simply stated but difficult to apply. Firstly, an industrial matter is an issue which directly relates to, and is within, the scope of a current employment relationship. Secondly, matters which fall outside the contract of service may yet be within the scope of the term provided a sufficient nexus with the employment relationship can be established. Thirdly, whether or not a redundancy dispute relates to an industrial matter may depend more upon the way the claim is phrased than the underlying issue. Finally, management's decision to retrench is not, of itself, an industrial matter.

Behind these principles lies an often-unarticulated policy of respect for managerial rights. This is yet another obstacle to reform of the law of redundancy at both state and federal level.

(iii) Respect for Managerial Rights

Industrial tribunals will rarely disturb management's rights to select or dismiss employees, to distribute them throughout the workplace, to allocate work, to determine what machines shall be used and how they shall be operated.

However, the tribunals may interfere with a managerial decision which causes employees unreasonable hardship. The introduction of a new system of working will involve such hardship if the manning
provided for by the company is insufficient to carry out the work required or if the working conditions are such that they warrant specific relief time or special rates of pay. Normally intervention will be warranted when management's exercise of its rights imposes an unreasonable burden on its employees or has harsh or unreasonable consequences for the employees. The tribunal has the difficult task of reconciling management's claim to operate its business in an efficient manner with the interests of employees directly affected by management's decisions.

Notwithstanding their ill-defined jurisdiction in redundancy situations and their policy of non-interference with management's rights, Australian industrial tribunals have considered the problem of retrenchment intermittently.

3. The Tribunals' Response

(i) Redundancy caused by a cessation or curtailment of the employer's operations

Three recent cases which came before the Flight Crew Officers' Industrial Tribunal give some insight into the scope of its jurisdiction to deal with this form of redundancy.

The first case involved a claim for severance pay for fourteen members of the Australian Federation of Air Pilots retrenched when the major part of Ansett-ANA helicopter fleet in which they were engaged was sold to another company.

Professor J.E. Isaac, Chairman of the Flight Crew Officers' Industrial Tribunal, criticised the employer for its failure to consult with the Federation when the terms of sale were being negotiated. He also admonished the Federation for its negative attitude to securing employment for the retrenched pilots.
The Chairman suggested two guidelines for an ad hoc consideration of a severance pay claim:

(1) the degree of hardship the retrenched persons are likely to suffer through loss of accumulated benefits of service, including lost opportunities of other and more secure employment, and costs of movement;

(2) the extent to which the employer could reasonably have been able to prevent or mitigate such hardship.\(^{37}\)

Although Professor Isaac thought that the amount of money compensation warranted would vary from person to person, the Federation's claim sought severence pay scaled according to seniority. Despite the form of the union's demand, he took a number of factors into account in devising an appropriate scale. Compensation ranged from one month's pay for pilots with less than one year's service to five months' pay for pilots with four or more years' service.

In addition, the Chairman directed that the retrenched pilots be given a right of re-employment by the airline in order of seniority if there were suitable positions open to the pilots in the future.

In the second case\(^ {40}\) the Australian Federation of Air Pilots applied for an order varying the Jetair Australia Limited Air Pilots' Agreement 1970 by the addition of a new severance pay clause. The application was filed in response to Jetair's decision to retrench fifteen pilots and twelve first officers some five days earlier. It appeared that the company was compelled to cease operations because 'the Government's Two Airline Policy prevented it from importing the jet equipment it needed to operate properly'.\(^ {41}\)

The Flight Crew Officers' Industrial Tribunal (K.D. Marks) decided that the purpose of severance pay was to compensate 'an employee who, having been in employment with an employer for a considerable period and having expected that employment to continue as
a career, finds his services no longer required by the employer because of a surplus of his classification within company requirements.\(^{42}\)

Further, the tribunal considered that an employee's entitlement to terminal compensation depended upon three conditions. First, the employee must have an expectation of a career with his employer and must have served his employer in excess of two years. Second, the retrenchment must be caused by factors within the employer's control such as an alteration in the company's procedure, changes in function or technological development requiring a reduced payroll. Finally, the employer must continue to operate as a going concern. Since, in the present case, the second and third conditions were not satisfied, the tribunal refused to grant the variation.

An important factor in this decision was the finding that the pilots who joined Jetair knew of the Government's Two Airline Policy and understood its implications for the company. They took a 'calculated risk that the company would either obtain the third licence or be able to successfully operate as an exempt operator'.\(^{43}\) Thus they could not complain when their hopes were not realised.

Perhaps more than anything else, the Jetair decision highlights the defects in a piecemeal development of redundancy law. The tribunal referred to three cases\(^{44}\) in which severance pay was considered, and concluded that, unless a claim for terminal compensation fell within the compass of these cases, it should not be allowed. It did this even though none of the cases cited purported to lay down any precedent. Indeed, one of the cases\(^{45}\) expressly disclaimed any such intention. All the earlier cases appeared to approach the claims for severance pay on their merits. With respect, the tribunal should have followed this example instead of approaching the issue with a pre-conceived and circumscribed view of its own jurisdiction.
In October 1971 the Flight Crew Officers' Industrial Tribunal was again the forum for a redundancy dispute. On this occasion the Australian Federation of Air Pilots challenged a decision by Qantas Airways Ltd to retrench 138 second officers and cadets. Although these pilots were dismissed with the period of notice prescribed by the award, the Federation contended that the dismissals were unjustified since they were "compounded in error and mismanagement".

The tribunal declined to interfere with management's decision since the notification of dispute did not raise an industrial matter. It drew a distinction between an employer's act which itself relates to an industrial matter and the causes and effects of an employer's act which relates to an industrial matter; only the former allowed the tribunal to assume jurisdiction. Further, the award merely obliged Qantas to give a certain period of notice of possible termination on account of redundancy; there was no obligation to justify dismissals on that ground.

The Federation applied to the High Court for a writ of mandamus to the officer constituting the tribunal to determine the industrial question submitted to it. The High Court unanimously upheld the decision of the tribunal endorsing its reasoning on the industrial matter issue. It mattered not that many of the retrenched pilots had dropped 50% in salary to join Qantas on the faith of its assurance of secure and permanent careers. Nor was it material that the discharged pilots had, in some cases, been employed for only a month before the retrenchment notices issued. Here, then, the steps the employer could have taken to minimise the hardship was not a weighty factor. The decision to retrench involved a question of managerial policy. As such it was not a proper subject matter for an award or order.
The Commonwealth Conciliation and Arbitration Commission has also considered the plight of employees displaced by a close-down of operations. When the Stockton-Newcastle Ferry Service was replaced by a bridge, ferry masters and engineers employed in the service were retrenched. The Merchant Service Guild of Australia applied to the Commission for an award of redundancy payments. But Mr Justice Franki, who first heard the matter, rejected the Guild's claim. On appeal, the Full Bench of the Commission decided that payments by way of 'solatium or consolation' should be made to some of the retrenched workers.

The Commission instructed the parties to confer upon the assessment and calculation of the severance payments since this was a matter 'uniquely within the qualification of the parties ...'. But it indicated that it would not be prepared to include in any award variation a payment of more than ten weeks' base rate of pay for any individual employee.

The Commission also expressed the view that the terminal compensation should be less for men who were in their thirties and in their late fifties and early sixties. Presumably it thought that senior employees had only a relatively short period of employment left in their working life and the compensation should reflect this fact. This reasoning may be anomalous since employees in their late fifties and early sixties would find it much more difficult to obtain alternative employment than employees many years their junior. If anything, their stake in their employment is greater than the other employees retrenched.

The ferry masters and engineers on the Stockton-Newcastle ferry had known for around five years that their employment would be terminated when the bridge was completed. They were also aware for over two years that the alternative employment offered by the employer
might involve a drop in wages. Why then, were they entitled to severance pay? The answer lay in the fact that the retrenched workers were engaged in an essential public service which had to be maintained until alternative arrangements could be finalised for the convenience of the public.

The Lysaght Case also involved redundancy caused by a cessation of operations. On 21 April 1972 Lysaght Brownbuilt Industries announced its decision to close down some sections of its Newcastle plant whose operations had not been economically viable for some time. It stated that the closure would be effected by the end of December 1972. Some 600 workers were affected by the decision.

At a conference with the relevant unions shortly after the announcement the company made an offer which was modified in subsequent discussions. The final offer was a generous 'package deal' which incorporated early retirement on superannuation benefits for employees over sixty. It promised workers in the 50-59 years of age bracket gratuitous severance pay increasing on a scale with age and length of service. Further, the company guaranteed each worker a gratuitous payment of $55 per year of past service. In effect, this ensured that all workers would receive the same benefits as members of the Wages Employees' Retirement Fund, although in the latter case the gratuities would be financed by the fund. The company also offered a lump sum gratuity of $250 to all regular workers who remained to the date specified for their retrenchment or retirement.

The unions disputed only one feature of the company's offer: the scale of severance pay based on age and length of service. They proposed a more generous formula.

The matter was referred to the Commonwealth Conciliation and Arbitration Commission where Mr Commissioner Clarkson adjourned the hearing to allow the parties to explore the possibilities of retraining.
and relocation of the retrenched workers. He stressed the gravity of the situation: 'When all is said and done, what we are talking about here is people, not just pawns on an industrial chess board.' In particular, he expressed concern for the welfare of the workers in the critical 45-60 age bracket noting that there were some two hundred employees facing retrenchment who were over forty-five years of age with twenty-six or more years' service.

When the hearing resumed, he maintained this attitude. He decided that the company's offer should be modified to provide a gratuitous payment of $10 per year of continuous service for employees in the 45-51 age group. With this exception, he thought the offer was a 'fair and reasonable proposition'. The Commissioner fortified his conclusion by pointing to the Stockton Ferry case where the Full Bench of the Commission decided that men in their forties and fifties should be given more consideration in retrenchment than those in the younger or older age groups.

Mr Commissioner Clarkson also directed that any retrenched workers who accepted alternative employment within 'the B.H.P. group' should have a period of three months within which to decide whether this new employment was suitable. If within this period they decided on reasonable grounds that it was unsuitable they would qualify for the severance pay offered by the company.

The Commissioner stressed that he was 'constrained to act within the framework created by the parties and, in particular, by the company's offer'. For this reason the award, in his opinion, 'should not be viewed as a precedent in any future cases regarding redundancy payments'.

The Federated Ironworkers' Association of Australia appealed from this decision to the Full Bench of the Commission. The union's basic complaint was that the award did not give adequate compensation
to employees in the lower age groups, many of whom had lengthy periods of service with the company. It also argued that the award should not have taken the Wages Employees' Retirement Scheme into account since this was a contributory fund.

The Full Bench of the Commission listed a miscellany of factors which are relevant in computing severance pay when an employer closes down or partially closes down his establishment. It stressed that calculation of severance pay is a complex exercise involving many contentious and weighty issues. The Full Bench focused upon some of these issues to emphasise 'the tentative and circumscribed nature' of its decision if it were sought to be used as a precedent.

Like Mr Commissioner Clarkson, the Full Bench stated that they felt obliged to act within the framework of the company's offer. Thus, they decided that their award could be integrated with the contributory retirement scheme. Nevertheless, the Commission accepted the union's submission that employees in the lower age groups were not adequately compensated. It also decided that the amounts payable under the scale of severance payments awarded should be increased.

The Full Bench pointed out that Newcastle was, to some extent, isolated from other industrial areas, and that it was difficult to obtain jobs of a comparable standard in the local region. This finding was, no doubt, influenced by the fact that seventy workers were still unemployed at the time of the appeal proceedings.

In effect, the Commission awarded compensation of approximately one week's pay for each year of service for all employees with five or more years' service with the company. In addition, members of the retirement plan were allowed to retain their benefits under that scheme. The Commission did not modify the other features of the company's offer. When the dust settled one could not say that the employees were handsomely compensated for the loss of their jobs.
Employees retrenched when their employer finishes a limited project are, however, much worse off. Take one example. In 1971, the Conciliation and Arbitration Commission rejected an application for terminal compensation by building workers discharged when contracts on the Yallourn W. Power Station were completed. The Commission pointed out that employment in the construction industry was essentially itinerant and that this fact was recognised by the 'loaded' hourly rates of pay.

(ii) Redundancy due to Technological Change

Employees retrenched or displaced as a result of technological change have a more legitimate claim for compensation and assistance from their employer. Australian industrial tribunals have come to recognise this claim despite the tentative approach reflected in an early decision, Re Clerks (Oil Companies) Award 1966. There the H.C. Sleigh group of companies became involved in a dispute with the Federated Clerks Union over the displacement of employees. In essence, the union claimed permanent employment on certain conditions for their members.

The Commonwealth Conciliation and Arbitration Commission was not prepared to require the Sleigh group to retain its employees at their present place of employment until retiring age; such an imposition would be too restrictive on the employers. The Commission merely suggested that the parties confer with a view to agreeing upon adequate compensation for the retrenched employees. It stressed that many real human problems may be involved in cases of this nature and that it is important for employees to be consulted both personally and through their union when technological changes are being planned. Further, it warned that it might intervene in the interests of industrial justice, if in the future, it appeared that employees' welfare
had not been properly safeguarded in company planning. But, for the present, the fact that the company had failed to give the employees and their union an adequate advance warning of the impending redundancy was not sufficient to warrant an award of severance pay.

This timorous approach is understandable: the union's claim raised a novel issue with which the Commission was not familiar. On the other hand, the Commission missed a golden opportunity to define an employer's responsibilities in this situation.

In Qantas Airways Ltd v. Australasian Airline Navigators* Association the Flight Crew Officers' Industrial Tribunal made a bolder attempt to deal with the problems which might arise as a result of technological innovations. The parties assumed that technological displacement might take place in the future, and they negotiated methods of dealing with this issue. After a series of conferences and hearings only one item remained in dispute: the re-adjustment allowance to be paid to navigators who might be displaced by technological changes other than the Doppler system. By agreement, the parties referred this matter to the tribunal for arbitration.

Although the main issue before the tribunal was assessment of severance pay, the Chairman, Professor J.E. Isaac, commented in passing that the company had fully discharged the employer's obligations prescribed in the National Labour Advisory Council's guidelines 'Adjusting to Technological Change'. In particular the airline had given the navigators a considerable amount of notice of the anticipated changes.

Professor Isaac regretted that there was no objective criterion for fixing the re-adjustment allowance for the navigators. But he repeatedly stressed that the airline had no obligation to guarantee its navigators' employment until retirement. This contention was implicit in the Association's claim. He also rejected
the argument that the re-adjustment allowance should contain a punitive element in cases where the company could have avoided the displacement of navigators.72

In fixing severance pay in advance, Professor Isaac did not think it was fair to consider the prospects for training and transfer to jobs with equivalent status and income. Thus he declined to 'reward' the airline for its offer of retraining and alternative employment by reducing the amount of the re-adjustment allowance.73

In calculating the terminal compensation, Professor Isaac adopted a 'dual hardship-compensation principle'.74 He decided that severance pay should compensate the employee for the hardship likely to be suffered. This hardship element involved unemployment, relocation, the likelihood of lower income in the future, and finally, the loss of superannuation and other fringe benefits. In addition, severance pay should be awarded to the navigators for their loss of 'job-property', their investment in their job as a career. This was the compensation element. These various factors were difficult to quantify. It was perhaps inevitable, therefore, that Professor Isaac emphasised the navigators' anticipated drop in income. In fact, this appeared to be the paramount factor.75

The Chairman recommended a re-adjustment allowance of one month's pay for each year of service for navigators who leave the airline's employment as a result of displacement. There was to be no upper limit on years of service which could be credited. On the other hand, only navigators who had served the company in that capacity for five years would qualify for the compensation. To this basic scale, an age loading of one half of a month's pay for each year over forty was added.76 This reflected the Chairman's awareness of the diminished re-employment and retraining prospects for the more senior navigators.
Professor Isaac thought that his recommendations were a compromise between 'equity and administrative feasibility'. They aimed at a general standard of equity for a group of persons since an individual treatment for each displaced navigator was pregnant with practical difficulties. One theme pervades his judgment: the matter could be better determined by the parties through compromise and agreement.

This reluctance to impose a solution upon the parties can also be seen in Senior Commissioner Taylor's decision upon the Vehicle Industry 1972 Award. The Vehicle Builders' Employees' Federation claimed severance pay on the basis of four weeks' normal pay for each year of service. The employers, in this case the major vehicle manufacturers in Australia, responded with an offer of an increased period of notice for employees who are discharged because of redundancy. Employees under fifty years of age with twelve months' continuous employment would be entitled to an additional day's notice for each year of service up to twenty years' service, and two additional days' notice for each year in excess of twenty. On the other hand, employees fifty years of age or older would be given two additional days' notice for each year of service.

The term 'redundancy' in the company's offer was given a limited meaning. While it covered a surplus of employees created by 'technological and/or method changes', it did not include retrenchment caused by market fluctuations or economic recessions.

In terms of the offer, an employee who was under notice because of redundancy could terminate his services at any time with the appropriate notice and still receive a monetary payment equal to 50% of the award wages he would have received for ordinary hours in the period between his counter-notice and the expiry of his employer's notice. The employee would forfeit this entitlement if he failed to
give at least one week's counter-notice.

If, on the other hand, an employer decided to terminate the services of an employee already under notice because of redundancy he would have to pay the employee wages in lieu of the extended period of notice in the company's offer. But an employer would only be liable to pay these wages if this early termination was 'through no fault of the employee'. This qualification is clearly open to abuse by an unscrupulous employer. 'Fault of the employee' does not necessarily mean misconduct or other behaviour warranting summary dismissal. For example, an employee who was too slow in performing tasks assigned by his employer might be at 'fault'.

The Union, however, concentrated their attack upon the definition of 'redundancy' arguing that employees retrenched for any reason should be entitled to the scaled benefit. The reason for this stand is clear: market fluctuations and fall-offs in orders frequently cause large scale retrenchments in the vehicle building industry. An award clause covering redundancy should extend to this situation.

The Commonwealth Arbitration Commission overruled the union's objection. It was enough that the company's offer contained substantial benefits for vehicle building workers. Senior Commissioner Taylor stated that, at this stage, he was not prepared to go further. Accordingly, the terms of the company's offer were incorporated in the award without alteration.

New South Wales and South Australian Provisions on Redundancy

In New South Wales and South Australia, industrial tribunals are more prepared to deal with the problems of redundancy arising from the introduction of technological changes or mechanisation. In both states, certain tribunals are empowered to insert in awards
provisions dealing with this issue. Space permits only a brief analysis of the New South Wales jurisdiction.

Section 88G of the Industrial Arbitration Act, 1940, as amended (N.S.W.) obliges the Commission, a Committee, or an Apprenticeship Council on application to incorporate in an award or industrial agreement clauses relating to the obligations, duties and responsibilities of an employer upon the introduction or proposed introduction of mechanisation or technological changes in his industry.

The tribunal must also insert provisions relating to the employees to whom notices of termination are to be given in these circumstances, and clauses governing the form, effect and consequences of such notices. These notices of discharge must be not less than three months. The tribunal is required to fix a finite period; it may not provide, for example, that the period of notice shall be not less than a specified term.

The tribunal may also prescribe a qualification period after which an employee will be entitled to the benefit of an award or agreement made in pursuance of the section.

In addition, it must specify the notifications to be given to the Registrar, the Director of the Vocational Guidance Bureau and the Director of Technical Education, and include this direction in the award or agreement.

Unlike the South Australian provision, the New South Wales section is mandatory; it obliges the tribunal to do certain things. Further, if an application is made under the section the tribunal cannot postpone action until the mechanisation or technological changes are actually introduced into the industry.

Section 88G and its South Australian counterpart represent the only serious legislative attempt to regulate the problems created by redundancy. Yet these provisions do not apply to retrenchment.
caused by economic recession, market fluctuations, mergers, takeovers, or the curtailment or cessation of operations.

(iii) **Redundancy due to Insufficient Work**

Where a redundancy occurs as a result of insufficient work for the particular employee retrenched, the approach of the industrial tribunals has, with one exception, been equally disappointing. An application to vary the determinations governing the working conditions of professional staff engaged in the Snowy Mountain Hydro-Electric Authority was brought before Deputy Public Service Arbitrator Wilson when it appeared that some of the staff would be retrenched due to insufficient work. The Deputy Public Service Arbitrator decided that the retrenched employees should be given monetary compensation to cushion the hardship caused by the loss of accumulated benefits and costs of relocation. His variation gave a retrenched or displaced employee the option of taking a lump sum calculated on the basis of length of service, accepting an alternative position with a lower salary and a lump sum representing three times the difference between the annual salaries of the two positions up to a certain maximum, or submitting his case to an independent arbitrator where he thought it was not reasonable for him to accept an alternative position with a lower salary. The cardinal feature of the variation was its flexibility.

By comparison, employees retrenched by private enterprises due to insufficient work have fared poorly. Industrial tribunals in the Commonwealth sphere and in N.S.W. have refused to order reinstatement where employees were dismissed because of a lack of suitable available work. It might be thought that the failure to award terminal compensation to these employees could be attributed to the strategy of the unions in pressing solely for reinstatement. However,
in Boilermakers' and Blacksmiths' Society of Aust. v. Frigite Industries S.A. Ltd the Commonwealth Arbitration Commission refused to order reinstatement or award any other compensation.

(a) Stand-down Provisions

The problem of insufficient work for employees has also arisen under the stand-down provisions in awards. Where the award contains such a clause the employer is permitted to advise employees in advance that their services will not be required on the following day or days.

The basic principle inherent in a stand-down clause, that of sharing available work, was described by one tribunal as a 'very humane custom'. It is intended that an employer will invoke his right to stand-down employees during slack periods rather than resort to the 'frightening alternative' of dismissal. Thus, where unemployment is caused by insufficient work, a stand-down clause replaces the employer's right of dismissal with notice or wages in lieu thereof with a duty to distribute the available work equitably. But an employer's right to dismiss for reasons unconnected with the slack times remains intact.

Initially at least it is up to the employer to decide whether employees can be 'usefully employed' within the meaning of a stand-down provision. This phrase has been interpreted to mean 'usefully employed to the benefit, advantage or profit of the employer'. Thus, the availability of 'fill-in' work outside the employee's normal classification is largely immaterial. If, after examining his overall situation, an employer concludes that employees cannot be usefully employed, he is entitled to stand down the employees and deduct wages for the period of lay-off. A tribunal will be reluctant to interfere with management's decision if it appears that the employer is unable
to carry out his normal operations.⁹

To comply with the typical award provision, the employer’s action in deducting wages of employees stood down must not be taken prematurely.¹⁰ Further, an employer is usually only entitled to invoke the stand-down clause when his normal operations are unavoidably stopped for reasons beyond his control.¹¹

The employer carries the onus of establishing that the cause of the work stoppage is beyond his control¹² but it is not necessary to submit this proof in advance.¹³ The following reasons are common and legitimate grounds for a stand-down: suspension of a temporary power service during reconstruction of premises;¹⁴ shortage of materials;¹⁵ and rain.¹⁶

On the other hand, industrial tribunals have shown a willingness to intervene where the employer abuses his rights under the stand-down clause. Attempts to use the clause indiscriminately for purposes outside its ambit is strongly resisted by the tribunals.¹⁷

Until recently, the principle of "collective responsibility"¹⁸ was accepted as sufficient ground for deducting the wages of employees stood down in purported compliance with an award provision. This view has now been soundly rejected.¹⁹

A stand-down notice given for an indefinite period will not normally be a breach of the award.²⁰ In such a case the employee is faced with the choice of ending his employment and seeking another position or waiting for the resumption of work. If he adopts the latter course he will be out of work during the lay-off. Yet, if he secures another position he may be unable to resume work with his former employer when the stand-down is over. This places the employee in a quandary.

The interpretation of stand-down provisions in awards is just one of the many ways in which Australian industrial tribunals have...
dealt peripherally with a potential redundancy situation. A brief survey of these indirect methods is warranted.

(iv) Peripheral Methods of Handling Redundancy

(a) Seniority

Seniority clauses are often inserted in awards or industrial agreements governing the employment. The effect of this type of provision is that seniority should be considered by an employer in deciding which employees are to be retrenched. But seniority will not be the paramount consideration; it merely ranks with a number of other factors which management is entitled to consider.

The consequences of not observing the seniority clause are not entirely clear. In some cases the tribunal will direct the parties to confer with a view to reinstating the employee retrenched in disregard of the seniority clause. This approach, of course, raises the problem that another employee will be displaced or dismissed when the retrenched employee is re-employed. In other cases the tribunal will uphold management's decision to displace the employee even though the seniority clause has not been observed.

The problem of reconciling managerial prerogative with the seniority principle is illustrated by Australasian Coal and Shale Employees' Federation v. J.A. Brown and Abermain Seaham Collieries Ltd. There Mr Justice Drake-Brockman's order for variation of the award recognised management's complete and unfettered right in the free selection of those employees who would man new mechanical units while providing that any present employees (if competent) should be selected in order of their seniority. In effect, the variation provided that redundant employees should, where possible, be absorbed into the employer's new operations in order of seniority. This was, to some extent, an interference with management's right to distribute the
labour force through its plant as it saw fit.

Employees who have already been retrenched will usually be unable to invoke a seniority clause in an interim award obtained by their union as a result of the retrenchment since such an award will not normally operate retrospectively. Thus, if seniority is to rank as a guiding principle in retrenchments the employees' union should press for the inclusion of an appropriate clause in the award before a redundancy crisis arises.

Seniority is one system of preferential treatment in redundancy. Industrial tribunals have also granted preference to union members in retrenchments.

(b) Other Measures

Another strategy which some tribunals have used is to postpone the hardship involved in a redundancy. This can be done in a number of ways. For example, the tribunal may restrict the employer's right to engage new labour where it appears that employees face imminent retrenchment. In a recent Western Australian case, Mr Commissioner D.E. Cort at a Compulsory Conference succeeded in obtaining an undertaking from certain employers that no permanent foremen would be made redundant until the parties determined the terms and conditions of retrenchment.

In Queensland, the Industrial Conciliation and Arbitration Commission is given power to prohibit the working of overtime in any calling covered by a state award if it appears that a distribution of the available work will relieve unemployment or will serve 'any other purpose which appears to the Commission to be good and sufficient ...'. Such a provision undoubtedly encompasses a redundancy situation.

To sum up, a wide range of strategies has been developed by various industrial authorities in their tangential treatment of
redundancy situations.

(v) **Conclusion**

Doubts surrounding the jurisdiction of industrial tribunals to deal with the post-employment relationship have, in some cases, stifled their response to the very real problem of redundancy. It seems to be beyond the competence of some industrial tribunals to direct training, retraining, re-location or re-employment of redundant workers. Only in New South Wales and South Australia has the legislature attempted to dispel these doubts about jurisdiction and even there the relevant legislation has a limited scope.

Judicial interpretation of the term 'industrial matters' has become a semantic exercise far removed from the realities of industrial relations. In redundancy cases before federal industrial tribunals, the parties assume that the authority has jurisdiction or, at least, agree to abide by the tribunal's recommendation. Many of these recommendations would not survive a jurisdictional challenge. And the tribunals themselves are conscious of the threat of such a challenge for they often confine their awards to slight modifications of the employer's offer.

Respect for managerial prerogatives further restricts the role tribunals could play as a buffer against the impact of retrenchment. Management is urged to consult with employees and their unions when planning technological changes or mechanisation but there is no obligation to do so. Further, management's evidence that a redundancy exists will normally be accepted without question. Only in rare cases have industrial tribunals decided to intervene to postpone or alleviate the hardship caused by redundancy. Management has no obligation to assist the retrenched workers obtain other employment. In most cases, it is not even required to advise the unemployment bureau of the
No consistent pattern emerges from the decisions upon severance pay, and there are no general objective criteria which determine an employee's entitlement to this compensation. Age and length of service are important factors but even senior employees with long service will not be entitled to severance pay if they are employed in a speculative venture.

In general, there are no established criteria for selection of employees to be retrenched. Seniority is the only concession to employees' interests and this is not always an equitable basis for selection.

Industrial tribunals consider the problem of redundancy in an ad hoc manner when a dispute arises or when unions fear that retrenchments are imminent. In these cases, monetary compensation often seems to be regarded as a panacea for the retrenched workers. One can understand the unions' attitude: to their members, severance pay is a tangible, and readily identifiable, benefit won by the union. But the tribunals cannot be excused. They have made very little effort to lay down general guidelines for dealing with redundancy or to define management's responsibilities in a retrenchment situation. In this respect, the law has failed to provide a comprehensive, or even adequate, solution to the hardship caused by redundancy. It has skated around the problem without coming to grips with the fundamental issues involved.
1. Participation

Although members of a company are not, in the eye of the law, part owners of the undertaking, they have the right to participate in company affairs, particularly in matters which affect their investment. Membership is conferred through the medium of shareholding and by that means alone. It is not granted to a person simply because he is employed by the company. Indeed, no matter how physically, mentally and emotionally involved an employee becomes in the company, he is not given the status of membership unless he acquires shares in the company.

The consequences which flow from this fact are manifold.

(i) No Role in Policy Formulation

Firstly, employees have no right to play a role in the formulation of company policy: they are not entitled to call or requisition company meetings, nor attend and vote at these meetings; consequently they have no right to address a general meeting or to demand a poll. Further, management need not even consult them about take-over bids, plant shut-downs or rationalisation of staff. Yet all these factors may vitally affect their investment in the company.

(ii) No Right to Information

In general, employees have no rights to information about the company, its financial position or its management: they are not entitled to a copy of the memorandum and articles of association, the annual balance sheet and profit and loss account, or the directors' statutory report; further, they may not requisition company circulars and
(iii) **No Legal Control over Management**

Finally they have no formal control over the management of the company: they cannot elect or remove directors; they are unable to apply for a winding up or to seek an alternative remedy under section 186 U.C.A. if the company is being managed in an oppressive manner detrimental to their interests; in addition, they cannot initiate an inspector's inquiry into the company's affairs; nor can they commence proceedings for breach of directors' duties or controlling shareholders' duties.

(iv) **No Role in the Administration of the Policy**

While company law denies employees a role in the formulation of company policy, labour law generally precludes them from participating in the administration of this policy.

(a) **Respect for Managerial Prerogatives**

To some extent most awards restrict management's freedom to carry on its business as it thinks fit but Australian industrial tribunals are generally reluctant to intrude further upon management's preserve. Traditionally, they have declined to intervene unless it can be shown that management's action has caused employees some injustice, oppression or undue hardship. Management's right to control an employee's work appears to be the fundamental ingredient of the employer-employee relationship. Industrial tribunals will not usually disturb this right. Certainly they would reject any demand that control of the employer's business be handed over to its employees.

Moreover, employees or their unions are not generally entitled to exercise an indirect control over the operation of the enterprise by vetoing or challenging management's decisions. To quote Barwick C.J.:
2. _Advancement_

Promotion disputes also seem to fall outside the jurisdiction of most industrial tribunals in Australia. In _R. v. Railways Appeals Board and Commissioner for Railways (N.S.W.); Ex parte Davis_, McTiernan and Taylor JJ. doubted whether the promotion of an employee was an "industrial matter" within section 4 of the _Conciliation and Arbitration Act 1912-1955 (Cth)._ In Mr Justice McTiernan's view: 'If the Parliament intended promotion to be an "industrial matter" the omission to mention it expressly is strange, having regard to its importance'.

Fullagar J., who dissented, thought that a Conciliation Commissioner had jurisdiction to include in an award a provision relating to promotions and appeals against promotions.

More recently, two state industrial tribunals reached opposite views on the jurisdictional issue even though the type of employment in each case was identical.

In the first case, _Fire Brigade Officers' Award_, the Industrial Commission of South Australia held that a Commissioner could prescribe mandatory provisions as to the manner in which an employer ought to classify or promote employees. This issue was clearly an industrial matter since it directly pertained to the employer-employee relationship and because it could be treated as a term of or ancillary to the contract of service. The Commission conceded that a matter of managerial prerogative was also involved but this did not exclude jurisdiction. Since the employer's promotion practices had been unfair in the past, the Commission decided that it was justified in encroaching upon normal management rights in the interests of industrial justice.
Just over a year later, the Industrial Appeals Court of Victoria considered a similar claim. It held that the fixing and designation of ranks and promotion of employees to these ranks was not an industrial matter. Nor was it within the powers of a wages board. Rather, the question of promotion was a managerial matter and, therefore, beyond jurisdiction.

(i) Selection Criteria

A company is entitled to create a new classification and introduce a line of progression governing promotions provided these measures do not operate unfairly upon employees. Industrial tribunals have occasionally granted concessions to employees' interests by inserting seniority provisions and rosters for promotion in some awards.

The seniority clause will normally be qualified by the phrase 'all other things being equal' so that management's right to promote its employees according to their ability and the exigencies of the business are relatively unimpaired. In addition, employers will not be bound to observe seniority in promotions unless this principle is embodied in the award or enshrined in an established custom or practice.

(ii) Promotion Appeals

Although industrial tribunals have been chary of prescribing criteria of selection of persons for promotion, they do, on occasions, entertain appeals against promotions.

In New South Wales and Queensland, it would appear that industrial tribunals have power to determine this type of claim. In those jurisdictions the definition of 'industrial matters' includes the words 'the right to ... refuse to ... reinstate in employment ...'.
These words are perhaps inappropriate to describe a claim of an employee to be promoted over the employer's appointee, but they nevertheless confer jurisdiction to determine such a dispute.  

Management’s appointment will only be reviewed if the company acted so unfairly or unreasonably as to warrant the tribunal’s intervention. In a recent case, the Industrial Commission of New South Wales reviewed a managerial decision to promote a particular employee over a workmate whose seniority, practical experience and union membership gave him a legitimate claim to the appointment. In the interests of good industrial relations and justice, Cahill J. recommended that the employer reconsider its decision.

The Industrial Commission of New South Wales may also intervene when certain employees suffer an unexpected delay in their opportunities for promotion. In Argent’s Case, the Commission ordered an employer to cancel the appointment of an employee to the position of chief train controller. The employee had been demoted to this rank on disciplinary grounds. He had reached his former position through a line of progression other than that followed by train controllers. In effect, the Commission prevented an ‘outsider’ disrupting the order of promotions within a particular division.

In the absence of an express provision granting jurisdiction to determine disputes over the right to reinstate, it would seem that industrial tribunals in the other states and in the federal sphere have no power to overrule management’s decisions upon particular promotions.

3. ‘Reasonable and Decent’ Supervision

(i) Appointment of Supervisors

Industrial tribunals have repeatedly affirmed management’s right to select employees for a particular task. Employees may not
campaign for the appointment of a particular supervisor or for the rejection of certain candidates for a supervisory position. If they do so they are guilty of misconduct justifying dismissal.  

(ii) Removal of Supervisors

On the other hand, employees may agitate for the removal of a supervisor. Such a protest provides no justification for the summary dismissal of those who complain. But tribunals are unlikely to accede to the workers' demands as they will not normally interfere with the appointment of a supervisor even if they doubt the wisdom of management's choice.

Similarly, the amount of supervision and the competence of supervisors are essentially matters for management. However, if management's supervisory practices offend the principles of industrial justice, the tribunals will intervene.

4. Conclusion

Although strong and strategic unions have made occasional forays into managerial rights, the industrial tribunals' policy of non-interference in these issues has left certain areas of managerial prerogative almost unscathed. This policy presents a major obstacle to the development of comprehensive principles for the settlement of plant-level disputes. Respect for managerial rights is not, however, the only factor which militates against an adequate solution of problems arising at the work place.
1. The Problem of Jurisdiction

In the federal sphere the 'interstateness' requirement deprives arbitral tribunals of jurisdiction over local, intra-state disputes. Notwithstanding this impediment, federal tribunals frequently hear and determine plant-level disputes. Where the parties waive the jurisdictional objection it may be possible to persuade a Conciliation Commissioner to settle the matter in dispute. The success of this practice depends almost entirely upon the disposition of the Commissioner who hears the claim and an agreement between the parties to abide by the Commissioner's direction. A Commissioner cannot be compelled to determine the dispute. Conversely the parties cannot be obliged to follow his recommendation.

Where employees involved in the plant-level dispute work under a federal award, and the federal tribunal refuses to entertain the claim, it appears that the matter may go unresolved. If a state tribunal stepped in, its ruling would be open to challenge on the ground that it was usurping federal jurisdiction.

State tribunals are not restricted by the 'interstateness' requirement and can therefore determine local disputes involving employees who are covered by state awards and employees who are not covered by any awards. But, apart from the jurisdictional problem there is some doubt whether Australia's industrial relations systems have established suitable machinery for the resolution of local grievances.
2. Machinery for Settlement of Plant-Level Disputes

(i) Boards of Reference

Section 50 of the Conciliation and Arbitration Act 1904-1973 (Cth) empowers the Australian Conciliation and Arbitration Commission to insert a provision for a board of reference in an award or, on the application of an organization or person bound by an award, appoint a board of reference for the purposes of the award. Most federal awards contain a board of reference clause.\(^5\)

The Industrial Commissions in Western Australia\(^6\) and South Australia\(^7\) may also provide for boards of reference in their awards. These bodies exist in Queensland and New South Wales jurisdictions; in Victoria each wages board may appoint a board of reference\(^8\) but it seems that these boards are not used extensively in that state.\(^9\)

The Wages Boards Act 1920 (Tas.) makes no special provision for boards of reference although a wages board may require anything to be done under its determination to be done subject to the satisfaction of the Chief Inspector or the chairman of the wages board.\(^10\)

(ii) Functions

Boards of reference may serve a variety of purposes many of which are not germane to the present study.\(^11\) Normally a board of reference is charged with the function of resolving disputes arising under awards and settling disputes over matters specifically assigned to the board by the award. Of particular interest in the present discussion is the use of these boards to review managements\(^9\) personnel decisions involving the discharge, stand-down and reclassification of employees.

Unfortunately, boards of reference may only deal with these issues in a peripheral manner. For example, in the case of an employee who has been summarily dismissed, the board will merely decide whether
the employee is entitled to pay in lieu of notice and whether the employer's action was justified under the award. Again, boards of reference may be asked if management's action in standing down employees is permissible in terms of the award. The board's function here is primarily fact-finding. Moreover, reclassification of employees comes before the boards as a demarcation dispute or a dispute over extra pay but not as a dispute about promotion or demotion.

The composition and informal procedure of boards of reference make them useful appendages in the Australian industrial relations machinery. Their prompt decisions can do much to arrest discontent at the local level. Further, they adapt awards to the conditions prevailing in a particular enterprise; this degree of flexibility is essential in our legalistic system of industrial relations. The potential of boards of reference has not, however, been fully realised because the boards operate under grave jurisdictional limitations.

(iii) Limitations

The functions of a board of reference are usually limited to matters arising under or specified in the award creating the board. Unless a plant-level dispute is related to the award governing employment in the industry, the board of reference has no jurisdiction to hear the matter. Disputes arising from the personnel decisions of management in the day-to-day administration of the workplace will often have little to do with the relevant award. Indeed, the arbitral authority which made the award in the first instance would have been careful not to encroach upon management's right to run its business as it sees fit.

Furthermore, in the federal sphere, a board is enjoined from interpreting awards or enforcing its own decisions since these are
essentially judicial functions, and a board of reference may not be
invested with the judicial power of the Commonwealth. In those
states which have boards of reference, questions of interpretation
and enforcement of awards are assigned to the judicial authorities
established under the industrial arbitration legislation in that
state.

In the result, boards of reference in both federal and state
spheres are concerned primarily with disputes of fact arising out of
the application of the award or determination; they cannot interpret,
they cannot arbitrate, they cannot give their decisions retrospective
effect. The parties in an industrial relationship are well aware of
these limitations, and can use them to their own advantage.

It is inevitable that the decisions of boards of reference
upon disputes of fact occasionally come very close to award interpret-
ations. While in theory this is not permissible, in practice it may
go unchallenged because of the concurrence of the parties and the
disposition of the chairman. Thus there appears to be a vast gulf
between what boards of reference are authorised to do and what they,
in fact, do to settle a dispute.

3. Other Machinery for Settlement of Plant-Level Disputes
   (i) Arbitral Jurisdictions

Australia's industrial relations systems provide a variety
of authorities to which parties can have recourse for the settlement
of disputes arising at the work place. The disputants may resort to
the principal arbitral tribunal in the jurisdiction which may dispose
of the matter by an award variation. More frequently the major
tribunal will simply determine the dispute on its merits and issue its
decision.
In some jurisdictions, industrial magistrates have power to settle local disputes while in other jurisdictions conciliation committees have this power. Moreover, in all jurisdictions, a local grievance may be ventilated at a compulsory conference summoned by a Conciliation Commissioner. Where the dispute involves the interpretation or enforcement of an award, the parties may invoke the jurisdiction of an industrial court.

(ii) Wages Board States: Victoria and Tasmania

Wages boards were originally devised to curb the abuses arising from 'sweating' in manufacturing industries. In later years wages boards' determinations came to regulate wages and working conditions principally in the unorganised sector of the work force who are engaged in small scale undertakings. The consenses of opinion seems to be that the wages board system, at least in Tasmania, provides adequate industrial regulation for those employees beyond federal jurisdiction.

A determination generally operates as a common rule for the industry. Accordingly local grievances arising in individual enterprises are not within the purview of the system.

In Tasmania, the Minister is empowered to call a compulsory conference which may dispose of a local dispute, but this procedure is not available in Victoria. Thus, the fear that the wages board system would take the management of the business out of the hands of employers and place it in the hands of the chairmen of the wages boards has not been vindicated.

4. Conclusion

The Australian Conciliation and Arbitration Commission is unable to establish machinery for the settlement of local disputes in
the round. It can only create boards of reference charged with the supervision of routine matters arising out of awards properly made. In theory, the jurisdiction of boards of reference in both federal and state spheres is heavily circumscribed; in practice, these boards enjoy some degree of success as a means of settling local grievances. A former President of the Commonwealth Conciliation and Arbitration Commission paid the following tribute to the work of the boards in the federal arena:

The success of these boards has been remarkable, and has been reflected in the fact that there are only two or three appeals each year from about a thousand decisions. Boards of reference have become one of the safety valves in our system for the conciliating of disputes in which both parties do participate with signal success.

On the other hand, Hutson reports that only 208 boards of reference were used in 1966 for the whole area of the Commission's jurisdiction. He points out that only seventeen boards were used by parties to the Metal Trades Award in that year. Professor De Vyver's study of Australian boards of reference some years earlier provides further evidence of the limited use made of boards in the federal sphere. In the period 1950-1955, parties to the Metal Trades Award resorted to boards of reference an average of twenty-nine times per year. Moreover, little use is made of the boards in some states while in others they simply do not exist.

Decisions of boards of reference may frequently be impeached on jurisdictional grounds if one of the disputants decides it will not co-operate. Further, the utility of these bodies as a means of resolving plant-level disputes depends to no small degree upon the view the chairman takes on the jurisdictional points.

Alternative methods of disposing of plant-level grievances are available in most jurisdictions but there is no machinery specifically tailored for the settlement of these local disputes. In addition,
the techniques of industrial regulation normally practised by
Australian industrial tribunals are not well-suited to the settlement
of disputes at individual enterprises. A tribunal which is
customarily concerned with the prescription of wages and general
working conditions for an industry or even for the disputants can be
excused for clinging to a guideline of non-interference with managerial
prerogatives when faced with a local dispute over a routine matter.
This policy must be recognised as a major fetter upon the tribunals' ability to cope with intra-plant grievances.
PART III

ARGUMENT FOR REFORM
1. Historical Background

Before the Industrial Revolution the British economy was predominantly agrarian. The bulk of the work force was engaged in agriculture, the balance as craftsmen, tradesmen, servants or soldiers. Workers on the land enjoyed a measure of security because long periods of notice were commonly required to terminate their employment. And in these local communities, masters were paternalistic towards their servants.

A craftsman in the country or in a small town was also better off than his counterparts in the cities. As Gaskell put it: "He lived a peaceful life amongst his own people, and was a respectable member of society ..." He worked at home or in a small workshop and he was often able to supplement his wages with a small farming income.

Weavers in the cities were not so fortunate. Their only income was wages, and they were economically dependent upon their employer. Yet here, too, the master-servant relationship was essentially personal. Mantoux reports: "About 1720 an "eminence manufacturer" of Manchester would go down to his workshop at six o'clock in the morning, breakfast with his apprentices on oatmeal porridge and then set to work with them." And Toynbee observed that the manufacturer "was literally the man who worked with his own hands in his own cottage." Thus, in the eighteenth century, the master was usually both owner and manager of his workshop.

As the Industrial Revolution gained momentum, partnerships appeared to be increasingly inadequate as a means of attracting and marshalling capital. They suffered from two major defects: unlimited liability and discontinuity. Each partner was liable to the extent of "his last shilling and last acre." And the firm was, in theory, dissolved by the death of one partner. Entrepreneurs sought a more
viable commercial unit and their search led to the joint stock company.

During the early decades of the nineteenth century these companies proliferated. Although they changed the structure of the capitalist economy they had little immediate effect upon the master and servant relationship; the companies were merely projections of their owners' personalities. In 1844 there were only twenty-four woollen manufacturing companies in existence. And the mills throughout the West Riding area were "principally owned and occupied by clothiers in shares".  

Company crashes characterised the first half of the nineteenth century. In December 1825 following the failure of several banks, "panic set in and the value of shares fell 60-80% or vanished". According to a reliable estimate made in 1827, only 127 of the 624 companies formed in 1824-1825 survived the crisis. Again, in 1834, many investors suffered in ill-fated speculative ventures. Against this background, it is little wonder that nineteenth century companies Acts were designed to protect the investing public.

In this period, as now, company law treated shareholders' interests as pre-eminent. The Act of 1844 gave statutory recognition to joint stock enterprises and demanded adequate information about the company for investors. Subsequent company legislation has confirmed the legislature's faith in the disclosure policy.

The Census of 1851 revealed that the scale of industrial organization was still quite small by modern standards. This was the first census in which masters were asked to state the number of their servants. Approximately 130,000 replies were received. One-third advised that they had no hired workers. Of the remainder, 76,000 masters reported having fewer than 10 hired servants, 9,000 had between 10 and 49, and 1,000 between 50 and 90 workers. Thus, less
than one per cent of the masters had a work force in excess of 50. Part of the reason for this small scale activity lay in the fact that unlimited liability discouraged investment. But there was mounting pressure to grant joint stock companies the privilege of limited liability. Ironically some advocates claimed that this privilege would permit a marriage of the employees' skill and capital and would prove "an instrument of immense latent capacity for elevating the whole labouring class". Indeed, some argued that it was the workers' clear and undoubted right to have use of this instrument... Further The Economist suggested that limited liability could resolve the problem of friction between capital and labour by enabling workmen to be partners in the success of the undertaking.

Finally, in 1856, the prejudice in favour of individual enterprises was overcome, and limited liability was granted to any group of seven persons upon registration of a memorandum and articles of association in compliance with a procedure laid down in the Act of 1844. With the advent of limited liability, companies multiplied and invaded most sectors of the economy. On 19 May 1865 The Times complained that the whole country was becoming "one vast mass of impersonalities". While this was perhaps an exaggeration, it was true that the Act of 1856 set the stage for a fundamental change in the master and servant relationship.

Limited liability companies attracted capital investment. The family firms and partnerships were rapidly giving way to companies in which ownership and control were divorced. A distinct class of shareholders grew up. Trevelyan describes this group as "an element in the national life representing irresponsible wealth detached from the land and the duties of the landowner; and almost equally detached from the responsible management of business". Even then the
shareholder played a passive role in company affairs. To quote Trevelyan: "The "shareholder" as such had no knowledge of the lives, thoughts or needs of the workmen employed by the Company in which he held shares, and his influence on the relations of capital and labour was not good." 16

Salaried managers stepped into the vacuum left by the departure of the shareholders from active management. Gone was the personal relationship between the owner-manager and his servants.

The vast amount of capital invested in limited liability companies hastened the expansion of the factory system. The Industrial Revolution was now in full swing. Workers were recruited into the system and subjected to a new form of discipline. No longer was the tempo of production set by the seasons or the weather. Now the master determined the pace. As Wadsworth and Mann put it: "Whatever else the domestic system was, however intermittent and sweated its labour, it did allow a man a degree of personal liberty to indulge himself, a command over his time which he was not to enjoy again." 17

When artisans and craftsmen entered the factory they surrendered control over their instruments of production; they no longer owned their own tools. Moreover, the factory system fragmented and standardised their work making it difficult for them to take pride in their workmanship. For these workers, factory employment entailed a loss of status.

Industrial discipline was hard. Production demanded regularity and accuracy. Masters enforced strict standards of punctuality and punished negligence severely, especially if expensive machinery was damaged. Usher observes: "The capitalist employer became a supervisor of every detail of the work: without any change in the general character of the wage contract, the employer acquired new powers which were of great social significance." 18
The main penalty was, of course, dismissal or threat of dismissal and this was a most effective sanction during the irregular periods of employment in the nineteenth century. For minor infractions, masters levied fines. These were not merely small change. 'Their general level was high and was meant to hurt.' Surprising as it may seem, corporeal punishment was also used for some offences.

In this period then, employers and managers were pre-occupied with the exigencies of business. Little attention was given to any new responsibilities which might arise out of the changes in the pace of output and industrial organization in the factory, mine or workshop. Only a handful of the more successful employers continued the tradition of paternalism towards their employees. To the majority of managers, employees were merely an adjunct to capital. Like raw materials, labour was a commodity to be bought and used and discarded if unsuitable. The worker's status and security were matters 'of economic circumstances rather than social obligation.'

Laissez-faire was the prevailing economic and political philosophy throughout the nineteenth century. Thus, some of the worst abuses of the factory system were said to be justified on the basis of freedom of contract: workers were free to leave their master and sell their labour elsewhere if they resented the way they were treated. But this ignored the fact that unemployment was high because of a rapidly increasing population. Competition for jobs was fierce and freedom of contract, a facade. Even Adam Smith noticed the inequality of bargaining power:

A landlord, a farmer, a master manufacturer, or merchant, though they did not employ a single workman, could generally live a year or two upon the stocks which they have already acquired. Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate.

There could be no real freedom of contract while the servant was totally
dependent upon his master for his subsistence.

The *laissez-faire* philosophy forestalled legislative reforms. State intervention, it was argued, might hamper growth and reduce profits. But the State slowly awakened to its role of industrial watchdog. It secured basic improvements in working conditions and recognised trade unions. Later it guaranteed the individual's freedom of association and right to strike. Yet for the greater part of the nineteenth century, trade unions were legally impotent. Their powers of negotiation were ill-defined, and direct action was illegal. The workers stood alone and they had not yet learned the rules of the game. This is a fact of fundamental importance.

Much of our company law and master and servant law has its roots in nineteenth century England. The foregoing account shows that there were several important themes in that period but only three are material here: paramountcy of shareholders' interests, freedom of contract, and property rights. Let us examine the relevance of these notions to the modern corporation.

2. The Underlying Theory: 3 Themes

(i) **Paramountcy of Shareholders' Interests**

When companies were groups of investors who pooled their risk capital to organise and operate a business enterprise it may have been legitimate for the law to focus upon protection of shareholders' interests. Since shareholders risked their capital and savings, the law treated them in much the same way as it treated the owner of land; they alone were entitled to the profits of their investment just as the landowner was entitled to the product of his toil. For this reason shareholders were granted, and continue to enjoy, a pre-eminent position in company law. In law, a company is an association of persons in an autonomous legal entity with a distinct personality
which enables it to carry on business, own property and contract debts. As Galbraith points out, this image is highly normative: it describes what the corporation should be, not what it is in reality.

The modern investor does not contribute his savings to an enterprise in the same way as his nineteenth century predecessor did: he does not invest money to enable the company to purchase plant or expand its operations; he does not normally take the 'risk' of a new economic venture; he simply purchases a liquid, intangible asset only remotely connected with the company property on which production depends; generally the transaction by which the modern investor purchases shares is far removed from the original investment of the founders or proprietors of the enterprise.

Nor is the modern shareholder's risk equal to that of his nineteenth century ancestor. Before the advent of limited liability an investor was liable to the extent of 'his last shilling and last acre'. In the modern company the shareholder's risk is limited to the extent of his investment (and, of course, any unpaid calls on his shares). And the modern shareholder can spread his risk over several stable companies thereby protecting himself against crippling losses. Generally speaking, the most today's shareholders risk is a loss of income; there is only a remote possibility of a loss of capital.

Further, the modern investor bears little resemblance to the owner-manager or entrepreneur of the Industrial Revolution. He does not normally contribute managerial expertise to the enterprise and he has delegated control over the instruments of production to others. In most cases he has become a mere purchaser of dividend income. Yet, in recognition of this passive, relatively safe investment, the law requires that the company be managed solely in
the interests of the shareholders. Tawney makes the point well.

In modern industrial communities the general effect of recent economic development has been to swell proprietary rights which entitle the owner to payment without work and to diminish those which can properly be described as functional.26

Moreover, the modern shareholder's role in corporate finance is diminishing. The Vernon Committee reported that the major source of capital expenditure by all companies in the economy was company saving. The proportion for all companies throughout the period 1954-1961 was over 70%, the balance being derived from share and debenture issues, financial intermediaries and banks in that order.27 Further, the major buyers of ordinary and preference shares in Australia are the institutional investors, not individual shareholders.28

Certain features characterise the development of companies in the present century: the fragmentation of family capitalism, the separation of ownership and control, dispersed shareholding in large corporations and the emergence of management as a self-perpetuating organ of corporate government.29 These are not in dispute. There is, however, a controversy about the implications of these factors.

On one hand, the 'managerial revolution' school30 contends that management now has considerable freedom to neglect shareholders' interests since investors are no longer a potent force in the company: they argue that ownership without control is impotent and insignificant. On this view, managers have sufficient latitude in the large corporation to follow autonomous goals31 which may not necessarily coincide with shareholders' interests.

On the other hand, some argue that the emerging class of managers will merely act as executors or caretakers of the company property on behalf of the passive shareholders.32 On this view, managers tend to identify with and defend the interests of private property, and they will act in the interests of the shareholders.
Separate studies by Rolfe\textsuperscript{33} and Encel\textsuperscript{34} suggest that there is a significant degree of social homogeneity among Australian executives and directors. These managers may, therefore, align themselves with, and aspire to, the propertied class. But it does not follow that they will manage their companies in the interests of investors. And even those commentators who assert that managers are caretakers of corporate property must concede that directors are expected to be stewards only for the largest, most influential, shareholders, not the members as a whole.

Thus, on either interpretation of the evidence, the traditional theory of the paramountcy of shareholders' interests is not in tune with the realities of the modern corporation.\textsuperscript{35} This does not mean that managers should now be the sole beneficiaries. Nor does it mean that the influential shareholders should enjoy this status. Rather, it clears the way for consideration of the relative merits of the claims of other groups within the enterprise.\textsuperscript{36} And employees have a legitimate claim to recognition.

Company law is unrealistic in its failure to recognise that industry involves a combined effort in which employees participate with management and shareholders. Indeed, the association which the law does recognise - shareholders, creditors and directors - is incapable of production or distribution of goods or services.\textsuperscript{37}

In the modern company, the shareholder's risk pales by comparison with that of the employee. The employee's security and livelihood are, in many cases, tied to the fortunes of the company. He invests his labour and he cannot normally spread this investment over several companies. If his employer goes into liquidation or is forced to retrench him, his long term investment is forfeited. He may seek another job but there, his work, his pay and his working conditions may not be as good as in his former position. For the
employee in a company town, displacement may involve a long period of unemployment or a domestic upheaval.

Further, company employees spend the major part of their daily lives travelling to and from work and in the service of the company. The typical shareholder, on the other hand, is not totally dependent upon dividend income and pays only cursory attention to share price lists in the daily newspaper.

An employee contributes his whole personality to his work and he is absorbed in social, psychological and economic relationships in his work place. In return, the law requires management to respond with largely material benefits. When the industrial worker gave up his tools he suffered a diminution of status; he also lost his independence. Unlike the craftsman or artisan before the Industrial Revolution, the modern industrial worker is not usually a 'producer'. The organization, not the worker, produces goods and services. In addition, the individual employee's responsibility over his work has declined. He has lost the recognition which his eighteenth century forebears enjoyed as an incidental feature of their work. The law has done little to compensate him for this loss.

In the early decades of the Industrial Revolution, the entrepreneur was the owner-manager of his business. He directly participated in the undertaking by investing not only his capital but also his labour.

Today, with control of the large companies concentrated in a few hands, the typical shareholder plays only a passive role in company affairs. Widely dispersed shareholding prevents him from bullying or even influencing management. He has become an almost functionless figure. He is often geographically separated from fellow members, and is commonly incapable of organising any effective opposition or challenge to management's proposals. In theory, general
meetings give shareholders a voice in company affairs but in a large company these ceremonies are little more than specious rituals. The theory disguises the fact of the shareholders' impotence. True, the shareholder may have a vote but the vote is worthless. The franchise gives shareholders only a chimera of power.

Perhaps the shareholder has no desire to govern his company. The typical shareholder is inexperienced in business affairs and too pre-occupied with his own full-time job to interfere with management. Further, he may spread his investment over several companies thereby fore-feiting his chance of exercising some influence in one enterprise. The fact that the average shareholder buys and sells his shareholding often suggests that he has little genuine or enduring interest in the fortunes of a particular firm.

Shareholders' poor attendance at general meetings and their failure to appoint proxies to vote in their place are further evidence of their apathy. In most instances, shareholders in the large corporation are merely 'rubber stamps' for management's policies. In general, only a drastic decline in dividends or a threat to their capital investment will provoke an outcry from shareholders. In Schumper's view, 'Dematerialized, defunctionalised and absentee ownership does not impress and call forth moral allegiance. Eventually there will be nobody left who really cares to stand up for ...

There are two reasons why the traditional theory underlying much of our company law is inadequate. The first is that it fails to recognise that shareholders are no longer the motive force in the large corporation. And the second is that it denies employees' legitimate claims to participate in company decisions.

The large company is one of the most pervasive influences in an employee's life. It determines where he will work, what work he
will do, who will be his supervisor, his advancement and discipline, his wages, and the time of his holidays. In short, the corporate employer has almost unfettered control over his sustenance and livelihood. In remote company towns, management assumes the role of a 'quasi-governmental agency': it provides not only employment but also accommodation, schools, health and recreational facilities.

The law grants employees the franchise in the often-remote political arena, yet denies them a voice in the organization which intimately affects their lives and those of their dependants. The ordinary employee plays no part in policy formulation or definition of company objectives. And he is not entitled to be consulted on matters which directly affect his security, prospects for advancement or working conditions.

But would it help to extend the corporate franchise to employees? Perhaps employees would fail to exercise their votes intelligently just as shareholders have done in the past. On the other hand, the average employee's stake in the company is more significant than the typical shareholder's investment. Moreover, employees are, on the whole, better-organised than shareholders. They can assemble at their workplace, whereas communication is a problem for a widely dispersed body of shareholders. Again, employees are familiar with such concepts as group solidarity. Their bond of unity is stronger than a desire for maximum dividends.

(ii) Freedom of Contract

Soon after the Statutes of Labourers fell into disuse, the law came to regard the employment relationship as one founded on contract - a bargain concluded between equals. Cracks appeared in this facade early in the nineteenth century but they were largely overlooked. Yet in 1911, Higgins J. asserted: 'The power of the
employer to withhold bread is a much more effective weapon than the power of the employee to refuse his labour.\textsuperscript{51} And in the next year His Honour repeated this sentiment: "The power of giving or refusing employment is a tremendous factor in the bargain, an unfair weight thrown into the scale, like the sword of Brennus."\textsuperscript{52} Unions were weak in this period and employees suffered from this lack of collective power. But even when the unions gained strength and consolidated their position they did not entirely redress the imbalance inherent in the contract of employment.

To a great extent, the presumed equality of bargaining power is still a myth. It is often 'set at nought by economic facts'.\textsuperscript{53} Principal among these is the fact that we have become a nation of employees\textsuperscript{54} almost totally dependent upon wages for income. To quote Tannenbaum: 'For our generation, the substance of life is in another man's hands'.\textsuperscript{55} Kahn-Freund also expresses the point with characteristic clarity:

the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment".\textsuperscript{56}

During the nineteenth century both parties to the contract of service wanted short periods of notice of termination.\textsuperscript{57} Under this arrangement, employees could take full advantage of the irregular labour market. But short periods of notice are no longer to the employee's benefit. The increasing specialisation demanded by modern technology in particular and industrial society in general means that the modern employee has fewer avenues of employment open to him. He may not be able to drop one job and pick up another.

Further, the inadequacy of the notice required at common law is without doubt one of the main reasons why employees rarely resort
to their common law remedy of damages for wrongful dismissal.

The traditional notion of freedom of contract has probably survived as the hub of the employment relationship simply because the relationship was fitted into a legal framework. Behind this facade it has been adapted and distorted but the framework itself has protected it from a complete revamping. Thus, the employer's right to dismiss an employee arbitrarily or capriciously, without reason or cause, can still be defended, in theory, by reference to the contractual principle of mutuality: since the employee may resign on a whim he may not complain of a capricious dismissal. This principle also allows an employer to dismiss an employee without stating a reason. As one executive put it: 'Why should we give him a reason? we don't ask him for one when he applies for a job'. Failure to state the grounds for dismissal is by no means uncommon. Indeed, in the writer's survey over one-fifth of the respondents reported dismissals in this category in the three years preceding the survey.

Nearly one-third of the respondents, many of them large companies, had dismissed employees in the relevant period on grounds of incompatibility with other employees. When economic units were small there was perhaps some justification for allowing a master to discharge his servants if they could not get on with their work mates. In the large, modern company incompatibility should not automatically be treated as sufficient cause for discharge. Yet this is the law-contract law.

Ironically, courts justify freedom of contract in the employment relationship as a protection for the employee. This obscures the fact that the courts are really upholding management's disciplinary power.

The survival of some of the anachronistic contractual principles might be explained on the ground that the courts have not
been given the opportunity to reappraise these old rules in the light of modern conditions. It is true that the common law on dismissals is dying of starvation, but that is not the whole picture. For example, in *Cyril Leonard & Co. v. Simo Securities Trust Ltd.*, the Court of Appeal missed a golden opportunity to jettison the patently unjust rule in *Boston Deep Sea Fishing and Ice Company v. Ansell*.

While the law has placed the employment relationship in the pigeon-hole of contract, it has been curiously selective in deciding what contractual principles it will apply. Thus the courts have consistently refused to order specific performance of the contract of service. This rule, no doubt, recognises the personal nature of the employment relationship. Yet when the law comes to compute damages for wrongful dismissal it ignores the personal elements in the contract: it grants no damages for the stigma of dismissal, mental anxiety or hurt feelings caused by the discharge, the manner of the dismissal or any imputation of dishonesty conveyed thereby. This is only part of the law's general failure to award damages which reflect the true nature of the employee's loss.

Australian employees' job security depends as much upon trade union pressure and the vagaries of the labour market as it does upon the law. It is true, as Kahn-Freund observes, that employees' power is collective power. More will be said of this later. The second factor, the state of the labour market, can hardly be sufficient protection for employees. The labour market is fickle. Whether there is one more vacancy than there are applicants or one more applicant than there are vacancies decides which of two worlds the wage-earner shall live in, and makes all the difference between two industrial systems.

What the law needs is a new conceptual framework for the employment relationship - one that fits the reality of modern industrial society. Contract law is simply inadequate as a body of rules governing
the duration and termination of the contract of service. Perhaps it is now time to recognise that security of tenure is a form of property, that a job is now a valuable right. If the law granted employees proprietary rights in their employment it could logically protect employees from harsh or arbitrary dismissal. It could also demand compensation for the worker's loss of investment in his job, or, alternatively, it could order reinstatement. None of these objectives can be achieved within the existing contractual framework.

The notion of freedom of contract also restricts the law's ability to recognise employees' interests in their inventions. The basic principles governing this issue were developed during the late nineteenth century. Britain's Industrial Revolution was still a little unsteady on its feet, and it would seem that the law's sympathy lay with the employer-entrepreneur rather than the employee. While the courts have not been unmindful of employees' interests in their inventions, it does appear that the law was, and is, slanted fairly steeply in favour of the employer.

Not only is the employer favoured by the law, in many cases he virtually makes 'the law'. The contract of service of an employed inventor or researcher is drawn up by the employer with few concessions to the interests of the employee. Indeed it is this freedom of contract principle which enables the employer to obtain rights to the beneficial ownership of inventions which, at common law, would belong to the employee-inventor.

Today, an inventor is normally an employee, not an entrepreneur. In general, contemporary inventors are dependent upon their employers for sponsorship and continued employment. The costs of research and invention preclude much small scale activity. In the private sector, the larger companies dominate research and development.
programmes, and it is the larger companies which are in a position to take full advantage of these subsidies. Under these circumstances, equality of bargaining power between an inventor and his corporate employer is becoming increasingly attenuated.

The law on employee inventions has developed in a disjointed manner and few coherent principles are established. Much depends upon the particular terms of the employment and the circumstances in which the invention was made. A study of the cases reveals a lawyers' paradise of distinguishable features. With this in mind, litigation to establish an employee's rights takes on an element of speculation. Apart from the costs of litigation and the limited prospects of success, an employee may be deterred from challenging his employer's claim to the invention through fear of dismissal or victimisation.

The law gives the employed inventor little direct stimulus to exercise his creative talents. True, he may be formally recognised in the patent, but he is entitled to no extra compensation for his efforts unless he can persuade a court to grant him beneficial ownership of the patent. Courts have declined to apportion the beneficial ownership of a patent as between an employer and an employee because of the difficulties inherent in such an exercise. But mere difficulty of calculation should not deter the court from deciding upon an equitable division of the rights attached to a patent. Whatever compensation the employed inventor receives is granted ex gratia and not as of right.

Promotion is another way of rewarding an employee for his inventive faculty. But promotion is not always possible or even desirable. There may be no vacancies in the employer's hierarchy to which the successful inventor can be promoted. On the other hand, a promotion may involve an inventor in administrative or supervisory duties beyond his capability: a good scientist is not always a good
Further, the employee may not feel that his promotion is directly related to his creative efforts, and it is the employee's subjective assessment which determines his level of incentive and job satisfaction.

The present means of recognising employees' creative genius are inadequate but are there any other compelling reasons for reform?

The Australian Government has eroded the tariff protection enjoyed by Australian industry, and management may be forced to expand local technological research and experiment to compete with imported products. Unfortunately, Australian industry seems to be lagging behind its overseas counterparts in technological development. It may well be impossible or impracticable to attempt to close this technological gap or even diminish it significantly. But that is not the sole purpose of encouraging local research and development.

Local researchers and inventors who are given some incentive to use their ingenuity will be better able to assess the merits of imported technology and to make appropriate modifications for the domestic market. Employers will also benefit directly from inventions which reduce the costs of labour and materials or increase production.

In the long term, the community gains from economic progress. The patent system itself recognises the public's interest in progress. This interest will be fostered if employees are encouraged to inquire, to create and to invent. Local research and development may also have a salutary effect upon the nation's balance of payments deficit although it is difficult to quantify the likely impact.

The problem of stimulating an employee's approach to his work is primarily the responsibility of management. But the law can play a role in this area.
Respect for Private Property Rights and Their Modern Analogue, Managerial Prerogatives

As mentioned earlier, laissez-faire dominated the economic and political philosophy of nineteenth century England. Under this policy private property rights were almost inviolate. The owner-manager was given virtually unbridled freedom to run his business as he saw fit. Indeed, laissez-faire was seen as the guarantee of growth and the efficient use of resources, labour and capital. When corporate property divided into two components, passive ownership and active control, the law overlooked this fundamental change in the nature of the property. To transpose a theory devised for the close corporations of the Industrial Revolution to the large modern company involves 'a vast optical illusion', or at least a distortion of the original theory. Yet the transition caused barely a ripple in the law.

In 1910 the President of the Conciliation and Arbitration Commission was still able to defend every employer's right to 'carry on his own business on his own system so that he may make the greatest profit within his reach'. This masks the fact that, in many companies, those who now carry on the business are not the owners. The traditional theory might yet be well-founded if management were directly accountable to 'the owners' for its everyday decisions. The fact is that management is not responsible in this way. The ordinary shareholder in a large modern company is an impotent, functionless figure. Thus the law accepts two abstractions in order to accommodate the modern company within the traditional theory: firstly, it overlooks the fact that the owners no longer manage the business; secondly, it disregards the fact that management is not always the servant of the shareholders.

Not only has the nature of company property changed beyond recognition, but the implications of property rights in this new era are dramatically different. In the nineteenth century, the typical
company was small in relation to its market. The scale of the enterprise ensured that it would act responsibly, or so it was thought. In any event, management's decisions had a limited impact.

Today, when employment is concentrated in large companies, executive decisions are often social and political issues. They are no longer purely economic matters; now they can intimately affect the lives of thousands of employees and the community at large. Management's mandate has not changed. What has changed are the implications of the mandate. It is no longer legitimate to conceal this fundamental development behind a smokescreen of private property rights. Respect for private property rights was justifiable when the property was 'private'. But company property has outgrown this description. When a large vehicle manufacturing company can defend a decision to retrench 5,000 workers without severance pay by an appeal to private property rights and managerial freedom to run its business, it is time to modify the traditional theory.

The slogan 'managerial rights' is not merely part of the folklore of labour relations. It does hinder the law's attempts to foster or protect certain important interests of employees. Thus, the law's failure to develop a code of job security rights, to make re-instatement and/or adequate compensation freely available in dismissal cases, to require advance notice and consultation regarding impending redundancy, and, finally, to review managerial decisions upon promotions or supervisory appointments can all be explained, at least in part, by the reluctance of industrial tribunals to encroach upon management's domain.

Managerial prerogatives also hamper the development of more equitable and more secure superannuation and long service leave benefits. Long service leave is, of course, governed by statute or, in some instances, by award, whereas superannuation is regulated indirectly
through taxation and revenue legislation. Further, long service leave is an 'industrial matter'; superannuation is not. Yet these two benefits have much in common. For one thing, they both accrue over a long period in recognition of the employee's services.

In the present analysis the key issue is whether the law should ensure that employees actually receive the benefits they are promised and guarantee that they are not deprived of these benefits through no fault of their own. In essence, the issue is one of managerial freedom. For example, the question whether an employee should receive a 'vested' superannuation benefit when he resigns or is dismissed involves management's right to run its business, and, in particular, its superannuation scheme. Again, managerial rights are involved when one considers whether a certain period of service to an industry or with a national company and its associates in several states should qualify an employee for long service leave.

A fresh approach to managerial rights would greatly expand the jurisdiction of the industrial tribunals. They would be able to act upon all the issues discussed above. Managerial prerogative is, after all, an evolutionary concept. As time goes by, it will be eroded more and more. This process of accretion will be nudged along if it is recognised once and for all that, in some areas, managerial rights are the main fetters upon the tribunals' jurisdiction. 96

Although much of the theory which determines management's responsibilities to its employees is obsolete, perhaps there is little cause for concern: the theory may be so inappropriate in modern conditions that it is disregarded. Unfortunately there are several indications that this is not so. In particular, the parties have not yet found a panacea for plant-level unrest.
1. Introduction

Local grievances cover a broad spectrum. At one end of the scale is the 1973 Ford strike at the Broadmeadows plant. In the early negotiations the dispute was ostensibly about a claim for wages, 45% in excess of the award. Later a union leader asserted that the cause of the dispute was essentially hostility to the speed of the line and 'assembly line blues'. The sequence of events preceding and during the strike will be examined elsewhere. At this point it is sufficient to note that the protracted strike cost the company the fruits of nine weeks' production amounting to $60 million; workers employed by the company lost approximately $3 million in wages. In addition, the violence which erupted on 13 June 1973 at the Broadmeadows plant caused an estimated $10,000 damage to factory installations.

At the other end of the scale are the minor disputes which arise over relatively routine matters such as promotion, transfer, discharge and stand-down of employees, supervision, and management's decisions on the nature, allocation and organization of the work. It is important to emphasise that any of these disputes can explode with large scale repercussions if they are not defused at an early stage. Disputes over domestic issues are not confined to factories or to assembly line, blue collar employees. They may arise in the white collar sector, in offices, banks, emporiums, and airports.

2. Level of Dissatisfaction

While there is not sufficient evidence to generalise about the level of job satisfaction of Australian employees, surveys by both government and independent researchers reveal that, in some
establishments, job satisfaction is only moderate, while in others it is curiously low.

3. Reactions against Plant-Level Problems

(i) Passive Responses of Individual Employees

(a) Absenteeism

Employees may express a passive protest against their position in the plant or work place by absence from work, resignation or simply a negative approach to their job.

It is estimated that absenteeism costs Australian industry nearly $1,000 million a year in lost production. In Victoria alone, an estimated 52,000 workers are absent from their jobs each day. If Victoria can be taken as representative of the trend in the whole of Australia's civilian work force, it appears that well over 68 million working days are lost each year through absenteeism. When it is considered that a record 6.3 million working days were lost through industrial disputes in 1974, and an estimated 3.5 million working days through industrial accidents, the amount of working time lost by absenteeism is a staggering figure.

Absenteeism can be attributed to a variety of factors, and, in many cases, it results from genuine illness or injury. But Mr Peter Diehm, director of the Foundation for the Research and Treatment of Alcoholics and Drug Dependents, believes that some absences (about 20% on Mondays and Fridays) can be directly related to alcoholism. Unfortunately, in the past, there has been little significant research into the underlying causes of absenteeism although the Department of Labour is at present undertaking an extensive survey of the problem. What little research has been done in Australia suggests that employees with bad attendance records are more dissatisfied with their foremen and the work task itself than are their fellow employees. There also
appears to be a correlation between an employee's general level of job satisfaction and his attendance record.\textsuperscript{14}

\textbf{(b) Resignation}

If an employee terminates his employment on his own initiative this may in some cases be taken as a rejection of his situation in the workplace. Many subjective factors may influence an employee to decide to leave his job\textsuperscript{15} but it appears that labour turnover can be partly attributed to such factors as low job satisfaction and dissatisfaction with supervision and management.\textsuperscript{16} While a higher labour turnover rate is common among employees who had a short length of service on their previous job and among single employees or employees who are married with no children,\textsuperscript{17} much will depend upon conditions in the individual enterprise and the personal characteristics and aspirations of the employees.\textsuperscript{18}

Labour turnover statistics show that the separation rate for male manual workers who left their jobs in a survey period in March 1972\textsuperscript{19} was 4.2\%, while the separation rate for female manual workers who chose to leave their employment was 6.6\%.\textsuperscript{20} On an annual basis the separation rate for male manual workers in all industries during 1972 would be in the vicinity of 50\%; the separation rate for all female manual workers in industry would be approximately 80\%.

The official labour turnover survey does not indicate what percentage of the separation rate can be ascribed to individuals who leave their employment several times in the year. The figures are a guide to the number of separations in industry, not the number of employees who resigned. Thus, they are rather unreliable as a gauge of employees' dissatisfaction with their jobs.
Dissatisfaction and frustration at the work place may have an adverse effect upon an employee's performance of his job. The following comment of a young assembly worker employed at General Motors' new automobile plant in Lordstown, Ohio shows how frustration breeds hostility:

you can't light up a cigarette or anything like that. It's in - they price you for it. And I think this is what brought about some sabotage - the men's only form of retaliation is that. Men today, I feel, least I feel, want to feel like individuals, they don't want to be a machine where you just take a screw and you oil it and you're okay, you know. They want to be respected.^^

The violence which occurred during the Ford strike at the Broadmeadows plant suggests that vehicle building companies operating assembly lines in Australia are not immune from this reaction. And the problem is not confined to the assembly line.22

(ii) Industrial Disputes Arising at the Work Place

By far the greatest number of industrial disputes in Australia last for not more than one day.23 An early estimate suggested that the participation rate of Australia's non-agricultural employees in strikes of one day or less was nearly sixteen times that of their counterparts in the United States.24 This phenomenon has puzzled American researchers.25 One observer attributes the short strikes in Australia to 'the unattended grievances of the rank and file, and the spontaneous outbursts that are the workers' reactions against tensions and frustrations on the job'.26

On the other hand, some Australian commentators claim that short strikes are simply used as strategems in negotiations over interests.27 And there is some merit in this claim. While a strike is not essential to establish that a dispute exists,28 it will attract the attention of an industrial tribunal, and ensure that the union's
The number of industrial disputes of duration up to one day in 1972 numbered 1,052. In the same year, disputes caused by claims over wages and hours of work totalled only 897. That leaves at least 155 short strikes unaccounted for. Some of the items in the category 'physical working conditions' could be termed 'interests'. There were 275 such industrial disputes in 1972. Perhaps these explain the 155 short strikes which could not have been claims over wages and hours. On the other hand, the category 'physical working conditions' is dominated by such items as safety and ventilation. There is some evidence to suggest that strikes over these issues tend to be lengthy. If this is so, it may be possible to discount disputes over physical working conditions as substantial contributors to the number of short strikes in Australia.

It appears then, that the short strikes cannot be entirely explained as part of a negotiation process over interests.

When one passes to the statistics dealing with the method of settling industrial disputes in Australia, it appears that nearly 60% of industrial disputes in 1972 were settled by the strikers returning to work with no negotiation between the parties. Disputes settled in this matter involved just over 80% of all the workers involved in strikes, but accounted for only about 54% of the total working days lost through strikes in that year. A reasonable inference from these figures is that disputes in this category were of very short duration.

Workers are unlikely to abandon claims over interests without negotiation or resort to arbitration since there exists an effective means of settling the dispute. By contrast, workers may be forced to forego claims involving managerial policy either because management will not compromise or because the workers believe that an industrial tribunal would uphold management's decision if the matter were
It seems reasonable to conclude that many of the disputes settled by resumption of work without negotiation are in fact militant gestures in protest against managerial policy. Certainly short strikes are often used to back up claims over 'interests' but that is not the whole picture.

Disputes over managerial policy and physical working conditions taken together have consistently caused more disputes than wages claims although the number of workers involved and the number of working days lost in disputes over wages is considerably greater. Oxnam points out that physical working conditions fall mainly within the jurisdiction of the states' Departments of Labour and factory inspectorates while managerial policy is regarded as the concern of internal management. If the industrial tribunals adopted a more sympathetic attitude to workers' protests against managerial policy they would make much greater progress in their attempts to handle plant-level disputes.

4. Underlying Causes of Plant-Level Disputes

The official statistics of the causes of industrial disputes shows only the 'direct causes of stoppages of work' and even then only the 'stated' cause of the dispute is recorded. The stipulated reason for an industrial dispute may not be the actual cause of the dispute; industrial stoppages may be the external symptoms of a most disturbing internal disorder. While it is impossible to generalise about factors contributing to friction at shop level in different establishments, it is important to attempt some analysis of the causes of problems arising in plant-level relationships. Only then will it be possible to suggest what the parties can do to minimise this friction. Plant-level relationships do not operate in a vacuum immune from the influences of
external factors such as the level of full employment in the community and the general industrial climate which prevails between employer and employee representatives on a national or industry level. However, most factors which influence a plant-level relationship exist within the plant or company.

(i) Lack of Communication

A lack of effective communication can escalate conflict at shop level. It is vitally important to advise employees of company rules. Yet, of the seventeen companies surveyed by Paquin, only four issued the employees with written rules; the remainder advised employees of the company rules in an informal manner.

The employee should also be made aware of the standard of performance expected of him. This can be done initially through induction and training procedures and periodically by a supervisor. Unfortunately, it appears that formal induction and training programmes are not common in Australian companies. Nor is the need for training of potential supervisors widely recognised.

With wages and general working conditions being determined by industrial tribunals concentrated in Australia's capital cities, it is understandable that attention has been diverted from the work place. High-level representation of both sides of industry in negotiations and before the tribunals accentuates this tendency. In large companies the decisions of directors at board meetings far removed from the work place may be sound in terms of marketing or investment policy, but this will not guarantee the smooth functioning of an organization; the human implications of these decisions at plant level must also be taken into account. To achieve a balance, management must be able to assess the impact of their decisions on the work place in advance, and explain the reasons for their policies to the employees directly affected.
effective chain of communication is essential for a healthy plant-
level relationship.

Australian management has adopted a variety of means of
informing employees of company policy and decisions and obtaining
'seedback' from employees. Early in 1963 a survey of forty-one Victorian
undertakings was conducted to collect information about the preparation
and distribution of house magazines. The survey was intended to be
a 'follow-up' to an earlier survey carried out in 1954. While the
average space allotted in the magazines to management matters fell
from 13.6% in 1954 to 12.5% in 1963, several editors reported that
this type of news item was popular among employees.

Information on personnel practices and policies as well as
rules and conditions of employment features prominently in employee
handbooks. These booklets suffer from the need to condense inform-
ation with the result that much of the material presented is difficult
to read. And very little allowance is made for migrant workers
with language difficulties. Notice boards and periodic newsheets
are other means of written communication used by Australian firms with
some success.

Joint consultation through management-employee committees is some-
times used to facilitate a two-way flow of information in some enterprises.
These committees fall into two main categories: special purpose and
general. The former is designed to consider only one matter such as
safety or welfare. General committees have a much broader scope
covering such items as production methods, physical working conditions,
employees' health and safety, amenities, employees' grievances,
attendance and time-keeping, welfare schemes and recreational
facilities.

An early survey of management-employee committees in fifty-one
firms found that general committees existed in twenty-eight firms, while the
remainder had established special-purpose committees. The aims of the general committees were to allow joint consideration of problems by management and employees and better communication between these parties. There was no evidence to suggest that these objectives had been achieved.

Gordon examined the extent of joint consultation in industries engaged in the manufacture of steel and steel products, chemicals, textiles, electrical goods, milk products, building materials and shipping in the Newcastle area. The twenty companies surveyed were divided into two groups: the steel and steel products industries and the non-steel industries. The former group consisted of twelve companies of which seven had a work force of 500 or under. With one exception, the larger companies in the steel industries group restricted management-employee consultation to safety issues. Of the smaller steel companies only two indicated the existence of joint consultation committees and again these were confined to safety matters.

Four major concerns and four smaller companies comprised the non-steel group. Two of the larger companies in this group had joint consultation in the form of management-employee committees while the other two companies reported joint union-management consultation. One company advised that it had established joint consultation committees on safety, canteen and bonus matters as well as a settlement of disputes committee. The latter consisted of management and union representatives. None of the smaller non-steel companies reported joint consultation procedures although in these companies senior management was readily accessible for consultation on an informal basis. Gordon's survey is useful in that it indicates the diverse approach to joint consultation in different industries, and even in different companies within the same industry.
A later survey\textsuperscript{56} carried out on a much larger sample over a broader geographical area confirmed some of Gordon's findings. Of the 308 undertakings surveyed, only seventy-nine had established some form of joint consultation. In nearly half of the firms with formal joint consultation committees, the committees considered safety matters only. The composition and scope of the committees surveyed differed markedly.

The inescapable conclusion is that joint consultation is not widely practised in Australian industry, and, where it is, used it is carried out on an informal basis.\textsuperscript{57} Management-employee committees may assist in moulding the parties in an organization into a smooth-functioning unit,\textsuperscript{58} but there is little evidence to suggest that these committees are essential links in the chain of communication between management and workers.

Australian companies also deal with grievances in an informal manner. Apart from Gordon's survey,\textsuperscript{59} there is little information at present available on this topic. Gordon found that the larger companies in both the steel industries group and the non-steel industries group adopted a policy of trying to settle grievances at the lowest level possible. Failing settlement by the foreman, the party could take his grievance through a hierarchy of authority involving the production superintendent and later the industrial officer until settlement was achieved. The groups differed in their approach to intervention by the employee's job delegate or union official. The steel group tended to discourage the early entry of the union into negotiations over the grievance. Companies in the non-steel group allowed the workers' job delegate to intervene if the grievance was not satisfied at foreman level.

The smaller companies in each group shared the policy of disposing of grievances at the lowest level possible but they appeared
to be more prepared to enter into informal discussion between management and the employees concerned; grievance processing in the smaller firms generally followed a much more flexible line.

In contrast with their American counterparts, Australian grievance procedures appear to be largely informal. In spite of this lack of uniformity, our grievance procedures dispose of the bulk of grievances arising at the work place and represent an effective means of communication between an employer and its employees.

A healthy system of communication permits employees to make suggestions and contribute ideas about their work. Apart from fostering an employee's interest in his job, this 'feed-back' of information enables management to assess how its policies are being received by employees. A comprehensive survey of employee benefits and services in mid-1971 of 1,221 establishments throughout Australia indicated that only 22% of the undertakings had a staff suggestion scheme. Twenty-two establishments were considering the introduction of a scheme. The failure rate among the suggestion schemes was quite high, twenty-five firms reporting that they had terminated their schemes. It would appear that there is ample scope for the extension of suggestion schemes in Australian companies.

(a) Union Organization at Plant Level

Australia's industrial relations system tends to bolster up small, weak unions with the result that the interests of unionists working in some plants are not adequately represented. Australian unions have been criticised for their neglect of the problems of members on the job. Kuhn's analysis of the federal and state rules of thirty-two large Australian unions accounting for two-thirds of the total Australian union membership revealed that only four unions provided for any kind of shop organization in their rules.
overwhelming majority of the unions had "no recognised, formal union activities at the place of employment except at the specific direction of the top officers". Further, a survey conducted by the Department of Labour and National Service confirmed that shop organization was in a very rudimentary stage and that plant-level machinery for treatment of workers' local problems was rare.

The criticism of Australian unions has not gone unchallenged. Hutson argues that union officials who were not attentive to the routine problems of their constituents would be jeopardising their own tenure. This argument may have ended the controversy if the Ford strike at Broadmeadows had not erupted on 13 June 1973.

(b) Ford Strike

Ford employees resolved to strike on 18 May 1973 in support of a claim for wages 45% in excess of the award rate. The company offered an increase of only 5% in its negotiations with Mr L. Carmichael, Assistant Federal Secretary of the Amalgamated Metal Workers' Union, and Mr L. Townsend, Assistant Federal Secretary of the Vehicle Builders Employees' Federation. When the union leaders put the terms of settlement proposed by the company to the workers, the majority decided to resume work the following Wednesday, 13 June. Violence broke out at the plant on that date when approximately 1,000 workers rioted in protest against the return to work. The company reacted by standing down the employees who were prepared to return to work until it could be sure they would be able to work in safety.

After prolonged negotiations under the auspices of Mr Justice Moore of the Commonwealth Arbitration Commission, the company agreed to increase the number of relief operators on the production line, to provide increased spacing between units on the assembly line and to grant an afternoon tea break. The claim for an increase in wages was
ultimately resolved by arbitration in favour of a 7% rise. Ford workers paid dearly for these benefits as an estimated $3 million was lost in wages. The underlying cause of the Ford dispute became blurred by the assertions and counter-assertions of the parties involved. On the management side, Mr E. Witts, director of Ford’s industrial relations suggested that the strike was caused by the disappointment of migrant workers when the company rejected the union’s ambitious claim for a 45% over award margin in wages. A union leader lay the blame on ‘the inhuman character of mass production’ and the speed of the production line. Whatever may be the real reason or reasons for the strike, the violence unleashed during the Ford riot was not directed solely against company property. Mr Townsend had to be guided to safety by a shop steward, and Mr Carmichael had his coat torn by an angry worker. Militant strikers claimed that their union officials had ‘sold them out’. It seems clear that the officials completely misinterpreted the feelings of the rank and file. Addressing a mass meeting of the strikers two days after the riot, Mr Carmichael confessed: ‘I have made a mistake and you have taught me a lesson’. The error of union officials in failing to grasp the mood of their members is understandable in view of the problem of communicating with migrant workers who, in all, spoke forty different languages. But unions must overcome the language barrier if they are to communicate with their members effectively.

(c) Other problems facing unions

Language difficulty is just one of the problems facing unions in their representative role. Diversification and decentralisation of industry have bedevilled effective union organization at the workplace. The multiplicity of unions which exist in Australia results...
in duplication of effort, inadequate staffing and leadership, and wastage of financial resources.  

(d) What can Unions do to narrow the communication gap?

Only rarely will the local branch of a union correspond with the enterprise. Since official union organization within the plant is, in many cases, not feasible, unions have had to rely on other means of communicating with their members. Many state and federal awards contain a 'rights of entry' clause which permits an authorised union official to visit the employer's undertaking during working hours for certain purposes. The usual right of entry clause will allow the union officer to inspect and, if necessary, copy time and wage records kept by the employer. The union officer will also be permitted to discuss legitimate union business with members during lunch hour or non-working time, and ascertain whether the members have any grievances about their wages and working conditions. It appears that a right of entry clause does not authorise a union official to call a meeting of members for the purpose of taking a vote on an issue or participate in such a meeting in any way. In practice, union officials are usually given a degree of latitude in exercising their rights of entry but officials who encourage or instruct union members to strike may have their authority revoked. The visits of union officials are, of necessity, intermittent. However, unions can exert a continuing influence upon the enterprise through their shop stewards.

In theory the shop steward should be able to fill the communication gap between the union branch and members at the workplace but the official policy of a number of unions is adverse to the shop steward movement. Nevertheless shop stewards are common in the larger unions. They are normally given relatively menial tasks such
as the collection of union dues, enrolment of new members, and
distribution of union material to members. They are in a good
position to detect breaches of the award, and are encouraged to report
all such breaches or suspected breaches to union officials. In most
cases, shop stewards are authorised to investigate the complaints of
union members in the plant and discuss these grievances with manage-
ment representatives. If the matter cannot be resolved in this way,
the shop steward is expected to contact union officials; he is not
usually authorised to initiate any remedial action such as calling
a stop-work meeting. In general, it may be said that the shop steward
is to promote the interests of his union among his work mates and to
keep the union informed of the interests of its members.

In some of the larger undertakings shop committees consisting
of shop stewards of different unions from a particular plant or
department have grown up. These committees provide an opportunity
for shop stewards to co-ordinate their handling of local problems.
Unions are acutely aware that shop committees could usurp traditional
union prerogatives such as the right to negotiate over wages and
general working conditions. Indeed, shop committees have been viewed
by unions and management alike as a potentially disruptive force in
industrial relations. For these reasons the trade union movement
has had reservations about the growth of shop committees and has
sought to restrict their role.

If unions cannot satisfy the need for official shop floor
representation, rank and file employees may look to shop stewards or
shop committees for representation and protection of their
interests. Should this happen it might be necessary to afford the
shop steward more legal protection against dismissal or victimisation
and grant him preferential treatment in retrenchment or redundancy
situations. Union amalgamations will facilitate research, improve
staffing and leadership and avoid duplication at branch, state and federal level but they will not entirely obviate the need for 'grass roots' representation at the work place.

(ii) Inadequate Knowledge of Rights and Obligations

One result of the gap in communication which exists at plant level is that parties left to their own resources tend to overstep their authority and act on assumptions which, at times, have no basis in law or fact. In Walker's survey, 16.4% of the personnel officers interviewed thought that 'ignorance' was one of the main causes of industrial strife in Australia; 18% of the executives surveyed listed this factor, while only 4.8% of union leaders felt that it was significant.99

The small size of the overwhelming majority of Australian undertakings1 fosters the growth of informal plant-level relationships. Management at the local level may have difficulty keeping up with changes in their award and statutory obligations.2 Unions, too, encounter this sort of problem. And despite frequent warnings from industrial tribunals3 shop stewards frequently exceed their limited authority.

(iii) Managerial Prerogatives

(a) Promotion

Managerial decisions can contribute to tension and frustration at plant level. In some industries a worker's earning prospects depend on his promotion opportunities.4 Even without this link between promotion and earnings, promotion is one means of recognising the achievements of a worker and giving him responsibility. The importance of these factors to employees should not be underestimated.5 By classifying promotion as a managerial matter rather than an industrial
matter, Australian industrial tribunals have failed to come to grips with an issue of vital concern to employees. The tribunals' stand on this matter would be justifiable if management acted responsibly in considering and making promotions. However, there is some doubt that this is the case.

A survey of formal employee appraisal schemes in sixty-six Australian undertakings in 1966 revealed that 69.6% of the firms cited 'promotion' as one of the purposes of their appraisal scheme. Thirty-nine percent of the entire sample reported no training was given to the persons appraising the employees, and it appeared that none of the respondent firms had a formal training scheme specially designed for training personnel in rating procedures. Moreover less than half the union leaders surveyed by Walker felt that 'anyone with ability who is willing to work can get to the top'.

(b) Supervision

Supervision is a frequent cause of plant-level friction. While 81% of the personnel officers and 89% of the employers interviewed by Walker agreed that 'most foremen treat their workers fairly', only 72% of union leaders felt that the proposition was accurate.

The supervisor plays a complex role at shop level. He is in close contact with employees under his charge and is usually responsible for seeing that a certain level of production or efficiency is maintained. He may play a part in the induction, placement, training and dismissal of employees. In some cases he will be consulted about an employee's suitability for promotion.

A survey of supervisory practices in industry in 1956 found that supervisors were generally selected on informal lines. While 70% of the organizations surveyed saw the need to train supervisors, the report concluded: 'it seems probable that the neglect of techniques of
proven worth, and reliance on the emergence of the right man with sometimes only sporadic or perfunctory assistance, must result, generally speaking, in supervision of lower calibre than need be.  

It would appear that a more constructive approach to the training of supervisors is warranted. In view of the key role played by a supervisor at the local level, it is rather surprising that the law does not require management to consider employees’ views as to the suitability of the persons appointed to this position.

(c) Control of method of work

One feature which emerged from the Ford strike was the dissatisfaction of employees with the company’s method of organising the work. When Mr Justice Moore heard the union’s claim relating to wages he stated: "I do not consider that the question of payment for annual leave or extra relief periods come within the terms of the inquiry which I undertook and I make no comment about them." This statement implies that the Australian Conciliation and Arbitration Commission could be given the task of inquiring into the employer’s work methods but previous attempts of the union to obtain information about time measurement methods and the fatigue allowance built into the time cycle from companies in the vehicle building industry have failed. As in other industries, management can stand behind the bulwark of managerial prerogatives.

As demands that an employee be given the right to enjoy his work increase, the tribunals may be pressed to revise their attitude. The Australian work ethic is in the process of change. Young persons now entering the work force have attained a higher educational standard than their forebears, and may expect more satisfaction from their jobs. The whole approach of tribunals in compensating workers for doing unsavoury, monotonous or tedious jobs by payment of 'dirt money' or the allowance of extra recreational leave may be challenged. Migrant
workers unaccustomed to the privileged status of managerial prerogatives may begin to exert an influence. The days when workers are prepared to be treated as 'human fodder'\textsuperscript{17} or 'mere animated cog[s] in the capitalist's machinery'\textsuperscript{18} are numbered. In the years to come employees will demand to be consulted about decisions that directly affect them in their working environment.\textsuperscript{19}

The law would do well to develop a more receptive attitude to these demands. Even in 1920, Mr Justice Higgins saw that 'there can be no stable equilibrium in the present position - "Here is your work; there are your wages; it is not your business to discuss to what work you are to apply your powers"'.\textsuperscript{20}

(iv) Lack of Co-operation

Lack of co-operation was listed as one of the main factors contributing to industrial strife in Australia by over 44\% of the personnel officers, nearly 24\% of the union leaders and just over 21\% of the executives surveyed by Walker.\textsuperscript{21} This lack of co-operation or common aim is to some extent inevitable. To quote Higgins J. again: 'The war between the profit-maker and the wage-earner is always with us'.\textsuperscript{22} Much of the conflict between employer and employed stems from the latter's efforts to obtain a greater share of the fruits of production,\textsuperscript{23} but much of the suspicion and distrust between the parties arises at plant level.\textsuperscript{24}

It has often been observed that the compulsory arbitration systems obviate the need for employers and unions to negotiate responsibly.\textsuperscript{25} The parties are aware that arbitration can be sought if they fail to reach agreement on certain issues. On the other hand, there appears to be general agreement between the parties that a greater degree of co-operation is desirable.\textsuperscript{26}
Part of the problem appears to be that the parties have little opportunity to engage in continuing consultation on a long term basis. Certainly informal consultation at plant level seems to be an adequate solution in some cases, but for the satisfactory handling of the many problems which arise at the work place a more formal arrangement may be necessary. A continuing process of genuine communication could do much to remove the distrust which exists between the parties in many undertakings.
1. Can Reform be left to Management?

The inadequacy of traditional theory and the dimensions of plant-level problems show that reform is necessary. Some argue that corrective measures can be left to management. But one may doubt the efficacy of this approach. In the first place, management's view of its employees' interests and aspirations is often misguided.

A recent survey to ascertain the chief executive's view of what his employees want from their job was conducted among 150 executives from firms of varying sizes throughout Australia. A preliminary mail questionnaire listed ten job aspects and the executives were asked to rank these in the order of importance they thought their employees would rank them. In addition, the executives were encouraged to suggest any other factors they considered important to their employees. The questionnaire was followed up by a short interview.

The survey found a marked discrepancy between what the respondents ranked as important to their employees and what employees in other job satisfaction studies have repeatedly stated to be important job factors. In particular, the respondents over-emphasised the significance of wages and physical working conditions, under-emphasised the importance of communication and interest and challenge, and all but overlooked such factors as recognition of individual efforts and status or extent of responsibility. Further, the majority of the executives who expressed an opinion thought that security, opportunities for advancement, interest and challenge and communication were more important to men than to women. This finding appears to be inconsistent with several job satisfaction surveys in which women ranked these aspects highly.
In general, the results of the survey support earlier studies which suggested that management was unable to predict correctly their workers' rankings of certain job aspects. This lack of perception in identifying employees' interests and aspirations can be partly attributed to the informal and, at times, unreliable sources of information used by management. While management persists with these sources, they will continue to misinterpret workers' needs and wants.

Even when management is fully aware of their workers' interests, it may doggedly refuse to respond. In other words, some managements will be content to cling to their prerogatives until they are forced to surrender by the law, trade union pressure or even public opinion. Indeed the industrial arbitration systems will support managements who become intractable on this issue.

Take an example of management's resistance to an encroachment upon their domain. Despite the warning issued in the Clerks (Oil Companies) Case, the National Survey of The Employment Effects of Technological Change reported in 1971 that the overwhelming majority of firms which had introduced technological changes in the relevant period had not consulted the appropriate unions prior to the change. Of the firms reporting displacement caused by technological changes, only 30% had consulted with the unions, while only 42% of the firms reporting retrenchments consulted the unions in advance. This example illustrates that management will not yield its prerogatives lightly.

Thus, reform cannot be left to management. Since management is often oblivious of the importance of certain interests of its employees, its reforms could well be ill-conceived and ill-directed. Further, if the matter is left to management nothing will be done in some areas because it jealously guards its 'divine right to manage'. Where proposals for reform do not coincide with its interests, it will
2. Would Reform Sabotage the Market Mechanism?

Management has a good theoretical justification for this stand. It can assert that the traditional lore of economics - the law of the market place - commands them to make profit maximisation their primary objective. Only then will goods be produced and services provided efficiently. Only then will the price of their products and services be determined realistically and dispassionately.\(^\text{11}\)

When competition was perfect, when no one trader or group of traders could dominate the market, this approach may have been valid. Today, the increasing concentration in industry\(^\text{12}\) has made the law of the market place largely irrelevant. The vagaries of the market have, to a great extent, been replaced by a planned equation of supply and demand.\(^\text{13}\) The large modern corporation is no longer a slave of the market. In Wheelwright's words: 'Today the big corporation is much more a determinant of the market than it is market determined'.\(^\text{14}\)

While managers may still be pledged to profit maximisation, this is no longer necessary for survival. They now have sufficient latitude to fulfil responsibilities to groups other than shareholders. On the other hand, opponents of reform argue that an expansion of managerial responsibilities could distort the market mechanism and that there is no viable alternative to the competitive norm as a regulator of the economy.\(^\text{15}\) Yet no one is denying that profit is important. Indeed, even the most ardent reformers would concede that management should be directed to make as much profit as possible after fulfilling its responsibilities to groups other than shareholders. The large corporation has a choice of goals. It need not compulsively pursue profit as an end in itself.
Many companies, however, are still subject to market pressures. The rash of liquidations which followed the Australian Government's decision in 1973 to lower tariffs puts this beyond dispute. These companies would have some difficulty implementing the reforms which will be proposed, especially where the measures involve increased costs or administrative expenses. This is a perennial obstacle to reform. But it should not follow that employment conditions in large, profitable enterprises must be maintained at the standard which impecunious companies can afford: the minima should not become the maxima.

Rather, the Government should bear the responsibility for assisting certain companies to reach the prescribed standards by phasing in the proposals or by direct subsidy. Alternatively, companies with below, say, 100 employees could be exempted from compliance with the new measures, at least for an initial period. Such a provision would not, of course, be appropriate for all the proposals. For instance, there is no legitimate reason why small companies should be exempted from the proposals relating to unfair and wrongful dismissal. The ultimate solution will vary according to the nature of the proposal. The main point is that there are several strategies available to minimise the cost of the measures for those companies which cannot afford the burden.

3. Would Reform Make Corporations Miniature Welfare States?

Some commentators claim that if the rhetoric of reform is translated into practical form, this might invite increased government intervention. By enlarging and socialising management's responsibilities, the law might blur the distinction between government and business. Yet even without a proper mandate management exerts a powerful influence upon employees' lives. And governments have not attempted to regulate
this influence by imposing rigid fetters upon management's powers. Why, then, should governments choose to intervene when the company's responsibilities to and relationship with its employees is put on a more legitimate basis?

Further, despite the emergence of the large company as a major social phenomenon, the powers of these corporations is puny by comparison with those of government. Which modern company can, for example, print its own money, control immigration or tax its constituents? Even Australia's largest public company, the Broken Hill Prop. Co. Ltd, seems relatively small beside the Postmaster General's Department which is the largest trading organization in Australia. As at 30 June 1971, the Department had 125,371 employees on its payroll. At the same date, B.H.P.'s workforce totalled 56,000.

4. Traditional Resistance to Reform

Management traditionally opposes reforms which will curtail their freedom of operation. Thus, when the Workrooms and Factories Law Amendment Bill was introduced in the Victorian Legislative Assembly on 18 November 1884, management's supporters described the Bill as 'repugnant to English instinct' and 'in restraint of trade'. The main provisions of the Bill prescribed that the hours of all females and boys under sixteen were limited to forty-eight per week. This policy of limiting hours of work soon became an accepted part of our labour law, yet in 1884 it aroused fierce opposition from manufacturers.

Again, in 1947 when the Commonwealth Arbitration Court reduced standard working hours from forty-four to forty hours per week, it stated:

It has been the historic role of employers to oppose the workers' claims for increased leisure. They have, as is well known, opposed in Parliament and elsewhere every step in this direction, and this case is no exception.
The arguments have not changed much in 100 years.

Employers have feared such things as a threat to profits; an added obstacle to production; a limitation upon industrial expansion; and a threat to internal and international trade relations ...

And history has invariably proved the forebodings of employers to be unfounded. Although the Arbitration Court was there concerned with standard working hours, clearly its comment has a general significance to any proposal for reform.

Management's right to manage is an evolutionary concept, not a sacrosanct, inviolate notion. As time goes by, it must be modified to meet the reasonable expectations of workers and the community. When this fact is realised, much of management's justification for opposing reform disappears.

To sum up, reform is both necessary and possible, and it cannot be left to management's discretion. But simply because management cannot or will not implement reform is no reason for the law to leap into action. Management does not act in a vacuum. It is part of our pluralist society. It operates under a series of social, economic and political restraints. Are these enough to protect employees' interests?

5. Countervailing Forces

(i) Social Restraints

Public opinion is one of the most significant social restraints against arbitrary action by management. Although public opinion is usually dormant and difficult to arouse, if it is ignored by company management, the public may press the state to interfere in company affairs. And there are many impartial and vigilant observers of the corporate system in the community, for example, the responsible press, politicians and academics, who may be able to stimulate the public into
But the inherent disadvantage of public opinion is that, once aroused, it tends to over-react to a situation. Moreover, it is difficult to see how citizens could be regularly shaken from their inertia to police company management.

Berle sees another restraint in the 'corporate conscience' which he describes as follows:

Corporate managements, like others, knowingly or unknowingly, are constrained to work within a frame of surrounding conceptions which in time impose themselves. The price of failure to understand and observe them is decay of the corporation itself. Such conceptions emerge in time as law ... 

Berle's concept, by its very nature, defies legal consolidation. He admits it provides no criteria of responsibility. 'There is no recognised body of doctrine by which [management] must test their choices as they act from day to day.' The 'corporate conscience' then, is a form of incoherent law. Until it finds its way into a concrete legal obligation, it will be only a theoretical fetter upon management.

(ii) Economic Constraints

Competition is now only a feeble restraint upon the power of the large corporation. In the modern context, competition among the larger firms tends to be 'imperfect'; it bears little resemblance to the law of the nineteenth century market place. Even if it did conform to the Victorian model, this would not guarantee that management would act responsibly. Rather it would simply give management an excuse for its failure to assume responsibilities towards its employees.

(iii) Political Restraints

The political intervention of the State in company affairs is only rarely invoked, and then only to correct the most flagrant abuses of corporate power. The threat of interference is too remote to be an
effective safeguard for employees’ interests. Moreover, ad hoc intervention by the state would not give employees lasting protection.

Professor Galbraith argues that the main regulators of the corporate system are the countervailing powers, such as the trade unions, which tend to neutralise the power of the modern company. But as Galbraith himself admits, this theory of mutual restraint depends upon a delicate balance of power in the economy. When unemployment is high, the countervailing power of trade unions diminishes. This is a simple fact of industrial life. Thus, trade unions cannot always be relied upon to force new responsibilities upon management.

Further, some employees prefer not to join a union. Why should their sole avenue of redress be through a union? This seems inconsistent: in order to preserve their personal autonomy in the face of their monolithic employer they are expected to submerge their individuality in a large union. Unions provide vital protection for their members against abuses of the employer’s power but they are, in some cases, only poor substitutes for the safeguards which could be achieved through law.

It is submitted that the social economic and political restraints are not sufficient to foster or protect employees’ interests. They do not fill the gap left by the law. The restraints are informal and intermittent. In some instances, they are nothing more than pious hopes; in others they are difficult to activate. In all cases they are only general limitations; they confer no specific rights upon employees.
Given that the countervailing forces in society cannot guarantee management will act responsibly towards its employees, why should the law intervene? Is there any theoretical justification for granting the law a more prominent role in regulating management's relationship with its work force? At the root of this question lies a perennial theme of jurisprudence - the role of the law. This is not the place to embark upon a discussion of the voluminous literature on this subject. It will be sufficient to touch upon the tenets of the sociological school of jurisprudence for, in this school, the law's purpose is central. Its main prophets are Rudolph von Jhering and Roscoe Pound.

Jhering borrowed and modified Bentham's felicity calculus of pleasure and pain. He also expanded the notion that the law's objective is to achieve a delicate balance of rival interests. He saw law as an instrument for serving the needs of human society. In his view, social purposes were the mainspring of the law. Yet he realised that purpose is a relative standard; it adapts in response to the social needs of the time. This constant mutuation is, to Jhering, the essence of law's role as an instrument of social control. He also believed that law was only one means of achieving the end of social control. Altruistic motives were another social regulator but these were not sufficient to control society without the coercive backing of the law.¹ On Jhering's view then, a legal sanction might be necessary to enforce management's social responsibilities to its employees.

Jhering's concept of balancing conflicting interests looms large in Roscoe Pound's classic formula of 'social engineering'. This
formula provides an immediate measure of social values competing for recognition. It involves an idea of giving the most complete security and effect to the whole scheme of human demands or expectations, which have pressed or are pressing for recognition and securing, with the least sacrifice of the scheme as a whole, the least friction, and the least waste.²

Pound elaborated upon this concept by suggesting a catalogue of social interests, public and private interests, the reconciliation of which would result in legal progress.³ Paramount among the social interests was 'the claim or want or demand involved in social life in a civilised society that each individual be able to live a human life therein according to the standards of the society'.⁴ Pound saw this in freedom of vocation and the increasing emphasis on freedom in industry.⁵

Social engineering is an evolutionary process. The starting point is the 'claim or want or demand of the individual human being to have something or do something, or, it may be, not to be coerced into doing what he does not want to do'.⁶ The law's function is then to decide which of these interests shall be recognised and within what limits.

Pound himself conceded that his catalogue of interests was not closed. In 1942 he suggested three further 'jural postulates' which warranted recognition.⁷ The first was the job holder's claim to security in his job. Indeed, this claim has become so insistent that Meyers saw a widespread tendency to recognise workers' proprietary rights in their employment.⁸ The second new postulate is the obligation of an enterprise in an industrialised society to bear the burden of human wear and tear caused by its operations. Clearly, workers' compensation legislation is the classic example of the way this interest is recognised. But the claim might also include proposals for dealing with dismissals, retrenchment, pensions, superannuation
and long service leave. Finally, Pound sees emerging a proposition which requires the risk of misfortune to individuals to be borne by society as a whole. Once again demands for reform of redundancy and superannuation law fall within this new postulate.

Pound's additions to his catalogue are surely only tentative concessions to the major developments in industrial society. Indeed, Pound is open to the criticism that he framed his index *for a community of small owners such as the Middle West knew in the epoch first following the Civil War*. It seems true that Pound's classification does not place enough emphasis upon the emergence of the monolithic corporation and the consequential changes in the employer-employee relationship. Yet Pound did stress that social engineering was a dynamic technology. If his catalogue were revised to take account of modern developments it could scarcely omit the increasing demand by workers and their representatives for a say in certain managerial decisions. Nor, indeed, could it overlook employees' interests in job security, advancement, recognition and reasonable supervision.

Both Pound and Jhering advocate a positive, functional approach for the law in pressing towards its objective of social control. In this, they both provide a theoretical platform for the role of the law in regulating company management's relationship with its employees.

But there is one major challenge to this approach in the field of industrial relations. And the challenger, Professor Kahn-Freund, is a formidable opponent. At times he appears to be a disciple of the school of sociological jurisprudence. Thus, he writes that labour law, like other branches of the law, is *a technique for the regulation of social power*. And he believes that labour is principally designed *to regulate, to support, and to restrain the power of management and the power of organised labour*. 
On the other hand, he has often argued that the law should be cast in an abstentionist role in industrial relations. This is not to say that the law should be banished from the stage but rather that it should set the stage for a voluntary system of negotiation between the parties. Law would still be required to establish a framework for this bargaining process, but beyond that law should take a back seat offering directions only when necessary.

The "abstentionist theory" has not escaped criticism. Thus Sorrell soundly asserts that Kahn-Freund places too much emphasis upon the sanctions of the law. The law also prescribes "norms of excepted behaviour" and, to a large extent, Kahn-Freund's view overlooks these norms. Further, the "abstentionist theory" fixates upon the process of negotiation between employers and employees. There may be ample justification for allowing the parties a measure of freedom from legal constraint during this bargaining process but why should the development of industrial law be circumscribed on this ground? Collective bargaining is just one part, albeit an important part, of industrial relations. When one turns to that part of labour law which may be loosely termed individual employment law, an abstentionist role may be completely inappropriate.

Rideout also rejects the "abstentionist theory". He argues that the thesis fosters an unjustified complacency with contemporary labour law. The kernel of his criticism is as follows: "The law should refrain from industrial relations from a condescension born of strength and not from necessity engendered by feebleness." He claims that the parties are not reaching workable solutions to their problems and that the law is not only unwilling to intrude but is also incapable at present of assisting the parties to settle their differences. While this comment was directed at the British system of labour relations, it is of more than passing relevance to Australia. The figures on the
incidence and settlement of industrial disputes verify this.\textsuperscript{20}

Kahn-Freund's thesis is as much an observation of history as a guide to further legislative action. Workers in Great Britain achieved industrial power before they obtained political power.\textsuperscript{21} Generally they have tended to rely upon their industrial strength rather than legislation to advance their claims. Indeed, it seems a fair assessment that the British trade unions won their victories 'without the assistance of and often in the face of the law'.\textsuperscript{22} Can the 'abstentionist theory', then, really be of any guidance for legislative action in Australia, a country where the role of the law in labour relations is much more prominent and widely, if at times grudgingly, accepted?\textsuperscript{23}

The writer believes that the law should play a dynamic role in industrial relations, particularly in that sector which deals with the individual employment relationship. Here the law might be able to avoid the more serious political overtones which sound whenever more extensive regulation of collective labour relations is mooted. Traditionally, law lags behind social change. And this should be so. The law should not reflect fashion and quirks of history. At the same time, the law should not become so distant from the realities of industrial organization that it ceases to be a major force of social regulation. When the gulf between law and social and economic facts becomes as wide as it is at present it is time to narrow the gap.\textsuperscript{24}
CONCLUSION

Once the concept of law as an instrument of social control is accepted, the legislature and the judiciary can set about the task of updating and improving the law. But clearly law will not be the panacea for all the ills of our industrial society. The problems of the modern company employee will not be removed by a slight wave of the legislative wand or by periodic judicial sorties. Measures which do not build upon a healthy relationship between the parties are doomed to failure. Trust cannot be imposed; it must be given an opportunity to grow out of a stable relationship. The problem is how to translate the legal ideal of social control into practical reforms.
PART IV

PROPOSALS FOR REFORM
Specific and general criticisms of the present law have been advanced. An analysis which rests there would be a sterile exercise. Cardozo once wrote:

Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth.¹

In the following chapters a programme for remedial action through the legislatures, the courts and the tribunals will be suggested. In evaluating proposals for reform, preference will, of course, be given to measures which appear to be compatible with our existing legal system and established principles. Nevertheless, it will be instructive to consider overseas developments and their implications for Australia. It is conceded that there may be obstacles to transposing overseas developments into the Australian system.² For this reason, any difficulties likely to be experienced by 'imported proposals' will be discussed.
One basic shortcoming of company law is the absence of a clear definition of directors' duties towards company employees. The authorities suggest that a director may take employees' interests into account only if they coincide with or benefit the long term interests of shareholders. This principle places a fetter upon the freedom of the board. In practice, a duty to take employees' interests into account is widely recognised. It remains for the law to fall into step with managerial practice. There are several approaches which the law could adopt.

1. Judicial Redefinition

In Canada and the United States, at least, the director's duty to act bona fide in the interests of the company seems to be undergoing a metamorphosis. Two recent cases illustrate this development.

In the first case, Herald Company v. Seawell, Hill, Circuit Judge, took an expanded view of the director's fiduciary duty.

We are fully cognizant of the well established corporate rule of law which places corporate officers and directors in the position of fiduciaries for the stockholders. Basic in that rule of law is the profit motive of the corporate entity. In this case we have a corporation engaged chiefly in the publication of a large metropolitan newspaper, whose obligation and duty is something more than the making of corporate profits. Its obligation is threefold: to the stockholders, to the employees, and to the public.

Similarly, in Teck Corporation Limited v. Millar, Berger J. rejected the traditional notion that directors should be attentive only to shareholders' interests. In his view, directors would not offend their duty to act bona fide in the interests of the company if they considered the interests of employees or of the community on a
particular issue provided such consideration was not exclusive or in disregard of shareholders.

These then, are two judicial precedents redefining directors' fiduciary duties. Whether they will be followed by Australian courts is a matter of speculation. But one thing is clear: a complete judicial about-face would be required before this development could be accepted into Australian company law. This would not happen overnight. It would be a slow process. This may not be such a bad thing as gradual change may be more palatable. In the meantime, however, directors would be under no obligation to take employees' interests into account in running the company.

2. A Statutory Duty?

An alternative method of formally recognising the breadth of directors' obligations is to devise an appropriate statutory duty. There are already a few precedents.

Section 70 of the German Stock Corporations Act of 1937 provided that the executive board of a company shall "on its own responsibility manage the company as the good of the business and its staff and the common good of the nation require". The section did not give any of these interests priority; nor did it impose an enforceable duty upon management. Indeed, its terms were so vague that it was virtually meaningless. Whatever management did, it could hide behind the elusive standard of 'public interest', and the courts could do little to make it account for its decisions. Further, section 70 probably reflected Nazi philosophy and this alone may account for its omission from the German Stock Corporation Law, 1965.

The official commentary which accompanied the 1965 Act indicates that the executive board must take account of the interests of shareholders, employees, and the community. In German practice,
The Works Council Act of 1972 grants further recognition of employees' interests. Section 75 obliges the employer and the works council to ensure that all persons employed in the enterprise are treated according to the principles of law and equity. The employer and the works council are also directed to protect and promote the 'free development of personality' of employees engaged in the enterprise.

In Holland, the Verdam Commission proposed that directors be reminded in positive terms that they are expected to 'fulfil their task, within the framework of the public interest, on behalf of the totality of interests in the company and of the enterprise attached to it'. This direction would appear to be too broad. It does not specifically mention that the interests of employees are to be considered although this is implicit in the proposal.

Again, section 203 (3) of the Companies Code of Ghana (1961) drafted by Professor L.C.B. Gower provides:

In considering whether a particular transaction or course of action is in the best interests of the company as a whole a director may have regard to the interests of the employees, as well as the members, of the company...

The section does not create a mandatory obligation to consider employees' interests; its terms are permissive. Nor does it indicate any priority of interests or the weight to be attached to each interest. As yet, it has not been judicially considered, but one local commentator feels that 'it is a welcome piece of innovation and one that is in keeping with a greater social responsibility on the part of companies'.

With these examples in mind, it is possible to suggest a definition which reflects the real nature of the director's essential obligations. To Fogarty,
The ideal formula is probably one which begins by emphasising a company's key role as a market enterprise for producing goods and services on economic terms, but then goes on to make clear, ... that subject to this main purpose a wide range of public and social considerations have also to be taken into account.18

Consider the following definition of a director's duty:

The director's primary duty shall be to manage the company honestly, efficiently and profitably. In discharging this duty directors shall balance the interests of the employees against the interests of shareholders of the company.

This formula follows Fogarty's suggestion by stressing the role of the company as a market enterprise but it goes on to create a positive obligation to balance the interests of employees and shareholders.

At first sight, the notion of 'balance' appears to be imprecise. But the 'balance of interests' concept has gained wide acceptance among company boards and it appears repeatedly in managerial statements.19 To quote Mr J. C. McNeill, managing director of the Broken Hill Proprietary Company Limited:

It is by no means self-evident to me that it is in anyone's interest for the corporation to shoulder social responsibilities which go beyond its responsibilities to its customers, employees and shareholders.

After all, it has a big enough job trying to keep all three parties more or less content.20

The results of the writer's survey21 give only lukewarm support to the traditional legal view that a company should be managed in the interests of the shareholders taking a long term view. The findings suggest that the majority of the respondents saw the role of management as that of an arbiter of different interests.22 Some of these interests are shareholders' interests but employees' interests are also taken into account.

This curious mixture was described by one general manager as follows:

I believe it would be wrong to put the objectives that you mention in an order of priority. All these objectives are very good in themselves but they are all equally part of the whole. I would find it difficult to go on record by saying that share-
holders' interests would rank ahead of profit maximisation, with good products running third, fourth security of employees, and fifth welfare schemes, etc. I don't think it happens that way. I am inclined to put them all as ingredients into a cake - probably after the cake has been cooked, the dividends are tasted by the shareholders but all the ingredients have to go in to obtain a dividend. That's what we are in business for - to provide a reasonable return, and as a result of that we have to use our best ability to produce good products or services at a competitive price because there is an obligation on the part of a responsible company not to defraud the customer. If the principle of making good products is used, profits tend to be maximised if efficient methods are applied, and a fair deal is given to the people who are working in the team. This naturally gives security to employees and the added benefit of additional welfare schemes and goodwill between all ranks in the company should result.23

Further support for the 'balance of interests' notion can be found in overseas research. All but one of the directors interviewed by Shenfield accepted the notion of 'balance of interests'. On the other hand, some directors were apprehensive about the all-embracing nature of the responsibilities this concept implied.24

The proposed formula requires directors to balance only two interests; the indefinite 'interest of the community' does not enter into calculation. This may remove some doubts about the extent of the directors' responsibilities. Employees' interests are favoured over the claims of other groups such as creditors, consumers and the community because the employees' investment in the company warrants special consideration.25 Moreover, in practice, directors are expected to be able to harmonise the often-competing interests of different classes of shareholders and employees.26

3. Nature and Effect of the Proposed Formula

Perhaps the significance of the suggested formula would lie in the fact that, at last, the law would have taken a 'stand' on this issue. It would then have gone a long way towards bridging the gap between the theory and practice in company law. Unless the law accepts this basic development, many of the other proposals made in this thesis will
be still-born. The concept of balance is recommended because of its flexibility. No attempt has been made to rank the interests in order of priority as this might be a futile exercise. 27

During the life of the company the proposed definition would probably make little difference in the management of the enterprise. Perhaps directors would be more inclined to divert a portion of profits for employees' interests. To quote one general manager interviewed by the writer: 'We're conscious of employees' interests but we're not prepared to risk a shareholder challenge by going overboard on employees' welfare'. 28

It may also encourage the board to take more initiative in relation to employees' interests rather than simply respond to the external pressure of trade unions. For example, if a company plant was not operating efficiently, the board could, consistent with this formula, decide to postpone closure of the plant for a short period in the hope that the output or the market would improve. An ultimate decision to close the plant and compensate retrenched employees with a generous severance allowance would also be permitted. But these courses of action are probably open to directors under their present common law duty.

The main effect of the proposed formula would be to diminish the threat of a shareholder challenge since it would give directors some latitude to depart from shareholders' interests.

Where the company ceases to be a going concern, or is faced with liquidation or a take-over, the suggested formula would have more significance. The directors would be obliged to balance the interests of employees in reasonable severance payments and ample notice against the shareholders' interests in a return on their investment. It will be recalled that in Hutton v. West Cork Railway Company, 29 a proposed payment of less than 2% of the nett liquidation proceeds to the company officers
was held invalid. Again, in *Parke v. Daily News Ltd*, the directors' attempt to divide the whole of the purchase price of the business among the employees was thwarted. Under the proposed formula an equitable payment, perhaps more than the 2% in *Hutton*, but substantially less than the 100% in *Parke*, would be permitted. Redundancy law would fix the minimum severance payment and notice period leaving the directors free to increase this minimum to a level consistent with their redefined company law duty towards employees.

The proposed formula would avoid the delay and clumsiness of the procedure ultimately followed by Daily News Ltd's more generous shareholders. Further, employees' interests would not depend upon the charity of individual shareholders. On dissolution of the company, the interests of employees and shareholders diverge, and it would be unjust and unrealistic to leave the employees' entitlement to the whim of shareholders. The typical shareholder might not be as altruistic as the majority of the shareholders of Daily News Ltd who agreed to forego their investment so that the displaced employees could be compensated.

An Hawaiian statute provides an alternative solution to the problem in *Parke v. Daily News Ltd*. It permits the majority of the shareholders to decide whether, and, if so, what amount, of the company's assets shall be set aside on dissolution for redundancy pay. This would seem to allow the majority of shareholders to spend an unlimited amount of the company's money to which minority shareholders have a legitimate claim. The suggested formula would avoid this result because the directors would only be required to devote a "balanced" amount towards a redundancy fund. Thus, the interests of minority shareholders would be better protected under the proposed formula than under the Hawaiian statute.
The suggested redefinition of directors' duties does not create a precise obligation; it is intended to provide a general guidance for directors in setting their goals. But the proposal should not be discarded simply because of this lack of precision. After all, the law 'is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed'.

Perhaps the precise scope of the directors' obligations and authority will be determined only through experience with the new duty. It remains to consider whether the law should provide a remedy for employees who feel they have suffered from a director's decision which breaches the duty.

Clearly, shareholders must be allowed a legal remedy as under the present law. All that has been changed is the terms on which the courts would consider the shareholders' claim: if the director's decision appears to have balanced employee interests against shareholder interests, the shareholders' challenge would be dismissed.

It may be unwise to grant individual employees a remedy for an alleged breach of the statutory formula. Dutch legislation allows trade unions whose members are employees of the company, after consultation with the company's works council, to request a judicial investigation into the affairs of the company in cases of serious mismanagement.

A similar procedure could be devised for Australian company law although it would be advisable to extend the right to request an inquiry to any group of, say, twenty company employees. This extension would permit employees in non-unionised companies to initiate an inquiry. The court which considers the request could appoint an officer to conduct the inquiry if it were satisfied that mismanagement might have occurred. Employees have a vested interest...
in the continued existence of the company, and this procedure would give them a measure of control over serious mismanagement which threatens this interest. Perhaps the mere threat of the employees' initiating an inquiry might be sufficient to secure compliance with the duty.

Where directors have ignored employee interests or failed to balance these interests against those of shareholders, this would not necessarily amount to serious mismanagement. Let us now consider whether employees should be granted a remedy against this type of conduct by directors. Once again the appropriate trade unions or a certain number of employees could be given a right of complaint to a court. But this might expose directors to a multiplicity of suits. It might be more advisable to leave employees without a legal remedy in these cases. The purpose of the formula is not to confer a precise legal remedy upon employees; it is intended to give directors a degree of freedom to harmonise the competing interests of shareholders and employees without constant threat of a shareholder challenge. If experience shows that directors are blatantly disregarding employee interests, then a suitable remedy could be devised to curb this practice. A convenient way of controlling abuses of the duty to balance interests will be considered when the structural reform of company law is mooted in Chapter 20.
1. Reform Through Case Law

As mentioned earlier, there appear to be no Australian cases dealing with the rights of an employed inventor to his invention. This means that Australian courts are free to evolve their own principles on this issue. No doubt English decisions will be regarded as highly persuasive but our courts are not imperatively bound to follow those decisions. One early English decision has a potential overlooked by later cases.

(i) The Principle in Re Russell's Patent

British courts are generally reluctant to apportion the benefits to an invention but in Re Russell's Patent this seemed to be the only course open to Lord Cranworth L.C.. The case involved a contested application for letters patent for an invention of an improved method of manufacturing metal tubes. Muntz was employed as foreman or manager of the applicant's manufacturing plant. Both Muntz and the applicant were capable of making the invention but it was not clear who was the actual inventor. Lord Cranworth found that both parties were 'engaged in the manufacture to which the invention applied', and considered that both parties could be entitled to the invention. Accordingly, he ordered that the parties be treated as if they were joint grantees of the letters patent. He granted the letters patent to two trustees, one named by each party. He also gave a free licence to exploit the invention to each party and their partners (if any).

Re Russell's Patent is an interesting precedent. It provides a third alternative for British courts in cases involving employees'
inventions: the court may grant the beneficial ownership of the patent to the employer, to the employee or to the parties jointly. This final alternative could achieve a just result in marginal cases.

If the courts are prepared to divide the rights to the patent equally between employer and employee, how can they refuse to recognise a lesser contribution by an employee to the invention? Further, the employer in Re Russell's Patent was himself capable of making the invention and he made suggestions about the invention before the specification was completed. Yet he was given only a 50% share in the beneficial ownership of the patent. Where an employer's only contribution consists of allowing the employee to use his materials and equipment, his share in the beneficial ownership might be even less than 50%.

Perhaps Re Russell's Patent can be regarded as an exceptional case but it is a precedent which could introduce some flexibility into the law relating to employees' inventions. It is, however, only a minor improvement upon the general judicial approach, and it may be displaced by an express provision in the contract of service assigning all rights in the employee's inventions to the employer.

In the absence of binding English authority, Australian courts might seek guidance from American decisions in this area.

(ii) American Law on the Rights of the Employed Inventor

In many respects, United States law governing the rights of the employed inventor runs parallel to British law. An employee who is hired to invent is bound to assign to his employer any patent he obtains during his term of service. Again, an employee may contract to assign to his employer all rights to inventions he may make during his employment. Moreover, where the employee is merely engaged to make suggestions or improvements to perfect the application of the
employer's invention, any suggestions or improvements made by the employee, which do not in themselves amount to a new invention, will not entitle the employee to claim any rights in the patent. If the employer is entitled to beneficial ownership of an invention, it matters not that he is slow to claim his entitlement.

Like British law, American law recognises a 'free invention' which will belong to an employee absolutely. Thus, where the employee conceives, designs and develops an invention in his own time without any assistance from his employer, he will have sole rights to the patent.

At two material points, American and English law in this area diverge. Where the employee is engaged in a general employment, for example, to design or devise methods of manufacture, American courts are reluctant to construe the contract so as to require the employee to assign any invention made by him in the performance of his general duties. This is a relatively minor departure from English principles.

The major divergence is seen in the 'shop-right' doctrine. Perhaps the clearest statement of this rule and its rationale appears in the judgment of the United States Supreme Court in United States v. Dubilier Condenser Corporation. Romer J. stated the opinion of the Supreme Court as follows:

where a servant, during his hours of employment, working with his master's tools and appliances, conceives and perfects an invention for which he obtains a patent, he must accord his master a non-exclusive right to practise the invention. This is an application of equitable principles. Since the servant uses his master's time, facilities and materials to attain a concrete result, the latter is in equity entitled to use that which embodies his own property and to duplicate it as often as he may find occasion to employ similar appliances in his business.

This non-exclusive, irrevocable licence is called a 'shop-right'. It allows the employer to use the invention in the business without payment of royalty. While it cannot be assigned, it may be transmitted to the purchaser of the employer's business.
It appears that a shop-right will only be implied where the invention was made in the course of the employment, and where it relates to the employer's business. Further, the equitable doctrine can only be invoked by an employer who has made some contribution to the employee's creative effort.

In their treatment of the rights of workers in a general employment and in the creation of the shop-right doctrine American courts have made substantial improvements upon British principles. But the shop-right rule itself has aroused some controversy. Its limits are ill-defined. Will any contribution, however slight, from an employer give rise to a shop-right? It seems that any substantial contribution will suffice. And what is the extent of the employer's non-exclusive licence? Is it confined to the needs of the employer's existing business or does it extend to any future businesses in which the employer may engage? As yet, there are no clear answers to these questions. Consequently, employers have preferred to displace the rule by an express provision in the contract of service. This indirect incentive to regulate the matter by contract may well prejudice an employee's entitlement to an invention made during the course of his employment.

Thus, although American law has made some attempt to safeguard the interests of the employed inventor, it still persists with the notion of freedom of contract in the employment relationship. For this reason American courts, like English courts, have been unable to provide adequate protection for the rights of the employed inventor. In contrast, West German law recognises the weaker bargaining position of the employed inventor and tries to offset this imbalance by statutory protection of his interests.
2. Reform by Statute: The West German Model

The West German Act on Employee Inventions of 25 July 1957 and the complementary Directives on the Compensation to be Paid for Employees' Inventions Made in Private Employment of 20 July 1959 codify the law relating to employees' inventions. A detailed analysis of these lengthy and comprehensive provisions is beyond the scope of this paper. It will be sufficient to highlight the major advantages of the West German scheme compared with the English case law.

(i) Advantages of the West German Model

(a) Procedure

The German Act on Employee Inventions 1957 distinguishes a service invention from a free invention. Service inventions are defined as 'inventions made during employment which either (1) have arisen out of the activity of the employee in the enterprise ... or (2) are substantially based on the experience or activities of the enterprise.' The 'activity of the employee in the enterprise' means the sphere of work and duties allocated to the employee. Employees engaged in research, design or development departments are presumed to have a duty to 'look out for possibilities of improvements and inventions.' Inventions which do not fall into the category of service inventions are free inventions. These belong to the employee exclusively.

An employer is entitled to a prompt, written report of a service invention made by an employee. The employer then has four months after receipt of the employee's report to claim the service invention in writing. If the employer fails to observe this procedure, the service invention becomes a free invention. The employer may make a limited or an unlimited claim to a service invention. Unlimited claims are far more common but they impose
more obligations upon the employer. For example, the employer is required to pay the employee reasonable compensation for the service invention and must file a domestic application for a patent. Compensation must also be paid to the employee where the employer makes a limited claim but then only when the employer uses the invention.

Disputes between employers and employees over rights to an invention or to compensation may be referred to an Arbitration Board in Munich. These proceedings are entirely free of cost and no fees are payable. The Board comprises a legally qualified chairman appointed by the Federal Minister of Justice and two technical assistants who are chosen by the President of the Patent Office from the Patent Office examiners. These assistants are specialists with technical backgrounds, and their main function is to advise the chairman upon complicated matters such as the assessment of compensation. Their role is particularly important in cases where the employee's contribution to the invention is not clearly identifiable.

The procedure prescribed by the German Act on Employees Inventions 1957 is a major advance upon the English system. The employed inventor in England is forced to incur considerable expense in litigating his claim to an invention. In addition, under English law, the entitlement to an invention may not be determined for some years after the invention was made. The West German law provides a prompt, inexpensive procedure for determining rights to an invention: if the employer fails to make a claim to the invention within a prescribed period (four months in the case of a service invention, three months in the case of an alleged free invention), ownership of the invention reverts to the employed inventor.
(b) Compensation for the Employed Inventor

When the employer makes an unlimited claim to a service invention, he is obliged to pay the employed inventor reasonable compensation. The parties may agree upon the type and amount of compensation 'within a reasonable period' after the employer makes his claim to the invention. Failing agreement, the employer may fix the compensation by written declaration and pay that amount to the employee. If the employee does not contest this assessment within two months, both parties are bound by the declared figure. Where the employee is dissatisfied with the employer's calculation, he may refer the matter to an Arbitration Board at any time within the two month period.

The Board's assessment of compensation will take into account the commercial utility of the service invention, the duties and position of the inventor, and the enterprise's contribution to the invention.

The Directives lay down detailed guidelines for this computation. The basic formula is simple. Compensation is calculated by the equation $V = EA$ where $V$ is the compensation payable, $E$ is the value of the invention, and $A$ is the 'participation factor'.

The first step then is to calculate the value of the invention. Usually this is done by assessing what an independent inventor would receive for the sale or use of a similar invention. The Board may compute this figure by adopting a licence analogy or by estimating the benefit gained by the enterprise. In the first method, it assesses the royalty which would be paid under a licence agreement for a similar invention.

The alternative method is much more complicated. It involves an analysis of the costs, expenditures, taxes and profits of the enterprise. Consequently, the licence analogy is the most common method of assessment. Where neither method can be applied the Board
is permitted to make a general estimate of the compensation to be paid.

The employed inventor is not, however, entitled to compensation for the whole of the value of the invention. Compensation is based upon the amount of the benefit attributable to the employee's effort and initiative. Accordingly, the Directives provide a method of estimating the employee's contribution to the invention.

The employee is rated on three variables: the origin of the invention, the means of solving the problem, and the position and function of the employee. Each variable is subdivided into categories and the employee is given a score for each variable depending on the category into which he falls. For example, on the third variable, a general manager would probably score one point while an unskilled worker would score the maximum of eight points. Again, where the idea for the invention is conceived by the employer, the employed inventor would rate a low score on the first variable but if the employee acts entirely on his own initiative he would score highly. The scores on the three variables are aggregated and the sum converted to a notional percentage according to a scale laid down in the Directives. This percentage is known as the 'participation factor'.

The Arbitration Board then calculates the compensation payable by multiplying the value of the invention by the 'participation factor'. In the result, the employee-inventor receives a percentage of the value of the invention, and this percentage roughly corresponds with his contribution to the invention. In most cases, the employee receives approximately 15-20% of the amount he would have received had the invention been a free invention. In the result, the employee-inventor receives a percentage of the value of the invention, and this percentage roughly corresponds with his contribution to the invention. In most cases, the employee receives approximately 15-20% of the amount he would have received had the invention been a free invention. In the result, the employee-inventor receives a percentage of the value of the invention, and this percentage roughly corresponds with his contribution to the invention. In most cases, the employee receives approximately 15-20% of the amount he would have received had the invention been a free invention. If the employer puts the invention to use before this time has elapsed he is
obliged to pay the employee compensation in advance. The Federal Supreme Court has gone even further by requiring an employer to pay compensation for the duration of the grant procedure even if it is subsequently ruled that the invention is ineligible for industrial property protection. Schade concedes that this is a controversial decision but he points out that the compensation in these cases is assessed on a temporary basis and would be substantially less than full compensation.

The compensation provisions recognise that employees, whatever their rank, are entitled to be rewarded for their contributions to inventions. The assessment of this compensation involves a complicated calculation which may be imprecise in many cases. But the expert assessors who assist the chairman on the Arbitration Board are schooled in this type of calculation, and the compensation formula provides for some flexibility in the assessment.

By contrast, English courts faced with the problem of apportioning the benefits to an invention give the patent rights either to the employer or the employee absolutely. And in doing this, English courts have skirted the fundamental issue. They achieve simplicity but only at the expense of justice: the courts find it difficult to estimate the employee's precise contribution to a service invention so they give him nothing! Surely the West German Act provides a more equitable and a more realistic division of the rights to an employee's invention.

(c) Recognition of Employee's Weaker Bargaining Position

The West German Act overrides any contractual provision which detracts from the statutory rights of the employed inventor. This is a principle of fundamental importance. If the employee's contract of service provides, in advance, that all rights of an employee to
inventions made during his employment are to be assigned to his employer, then this provision is invalid and unenforceable. Again, any agreement which purports to deprive an employee of his right to a free invention or his right to compensation for a service invention will have no effect. Even provisions seeking to avoid the procedural provisions for reporting and claiming inventions will be invalid.

The statutory protection is not confined to agreements concluded in advance. After a service invention is made, the parties may agree upon the amount of compensation payable to the employee. If this compensation agreement is clearly inequitable it will be invalid. Thus West German law has done something which English and American case law has been unable to accomplish: it has recognised the inequality of bargaining power between the parties and it has corrected this imbalance by providing statutory protection for the weaker party.

(ii) Assessment of the West German Scheme

In a recent assessment of the West German legislation, Hans Schade, Chairman of the Arbitration Board in Munich from 1957 to 1971, concluded:

The prevailing opinion appears to be that a realistic application of the Law permits it to function satisfactorily, contributes toward social peace and is also of service to employers. Schade also points out that the awards of compensation granted by the Arbitration Board have not been a burden to industry compared with other labour costs and taxes. Moreover, the West German government subsidises the payment of compensation by a 50% tax exemption on the amounts paid to inventors.

It seems therefore that the West German Act reconciles the legitimate interests of employers, employees and the general public in relation to the rights to employees' inventions. In this it provides a complex, but not unworkable, model for reform.
This chapter outlines proposals for reform of the law relating to long service leave. As in the current law section, the focal point of the discussion will be the employee's right to receive this benefit rather than the amount of leave provided. Thus, the basic inquiry is: how can the employee's right to receive long service leave be strengthened or extended? Chapter 4 revealed two general defects in long service leave law: the loopholes and shortcomings in the law itself, and the technical approach of certain tribunals in interpreting this law. The latter was considered in passing in Chapter 4. Let us now turn to suggestions for legislative reforms.

1. Legislative Reform
   (i) Absences Excused

Several problems appeared in the provisions excusing various interruptions in an employee's continuity of service. In many instances these can be resolved by simple amendments. Thus, for example, the relevant statute or award could provide that an absence of, say, nine to twelve months because of pregnancy would not break continuity of service or the contract of employment. Again, the relevant statutes might excuse absences through strikes whether they relate to industrial matters or not. And the Victorian and Tasmanian statutes could exempt any determination of employment arising out of an industrial dispute provided, of course, the striker was eventually re-employed by his original employer within, say, six months of his discharge. Further, continuity of the employment might be specifically
preserved where an employee dismissed because of slackness of trade is re-engaged, say, twelve months after his retrenchment. This extended period of grace would save the accruing entitlement of a worker dismissed through no fault of his own.

An absence on grounds of legitimate union business or official industrial activities should be excused in all jurisdictions if the employer unreasonably refuses leave. While this exemption would be a great benefit to employees generally, it is essential for employees who hold an official or semi-official position in, for example, a wages board or conciliation committee.

(ii) Interstate Service

Legislative amendments and award variations could also remove some of the more obvious anomalies which appear when an employee claims long service leave based on interstate service. Reform should be founded on the premise that interstate service with a branch of the employer company or with a related company should not interrupt an employee's continuous employment, nor break the employee's contract of employment. Accordingly, such an absence should be expressly excused. Yet this will not save an employee from all the pitfalls involved in this form of service.

Further amendments extending the limitation period in each jurisdiction to, say, six years would greatly enhance an employee's chance of qualifying for long service leave in respect of his total period of service. Ancillary to these amendments, it would be necessary to require employers to keep records of employees' service in interstate branches or related companies. Considering the small number of employees who would be involved in interstate service, this would not be a particularly onerous obligation.
(iii) Transmission

A change in the existing legislation and awards might also avoid the often unjust consequences which flow from the transfer of a business. It could be specifically provided that the technical break in the employees' service consequent upon the transfer would be disregarded if the employees were engaged by the transmittee within twelve months of the transfer of the business. This would be a vast improvement on the existing law. There would then be less opportunity for collusion aimed at defeating employees' claims to long service leave. The transmittee would be liable for the full long service leave entitlement when it eventually accrued but this liability could be offset by an adjustment in the purchase price negotiated at the time of transmission. It might be thought that this proposal would encourage the transmittee not to employ long-serving employees dismissed by the transmittor. To some extent, this is true. But the purchaser would need capable staff to ensure the smooth transmission of the business, and the long-serving employees displaced by the transmission would provide a pool of talent from which the purchaser could draw.

(iv) Onus of Proof

One final problem might be remedied by legislative amendment. As stated in Chapter 4 an evidentiary obstacle faces an employee who asserts that he was dismissed in order to evade award or statutory obligations in respect of long service leave. A revision of the provisions relating to the onus of proof could remove this obstacle. The claimant would carry a prima facie onus of raising a suspicion that his dismissal was effected for an illegitimate motive. This could normally be satisfied by evidence of the employee's length of service. The onus would then shift to the employer to establish that

the claimant was not dismissed in order to evade award or statutory obligations. There is a precedent for this type of provision in the victimisation sections of the industrial arbitration and wages board statutes.\textsuperscript{11}

If the employer is unable to discharge his onus the contract of service would remain unbroken, and the employee's service continuous notwithstanding the dismissal. This is a very effective sanction.

2. Conclusion

The measures outlined above are just some of the amendments which would safeguard an employee's right to receive long service leave and improve his chance of qualifying for this benefit. Coupled with a revised attitude by the courts and tribunals to the technical issues in long service leave claims, these amendments would ensure that an employee is not unjustly or unreasonably deprived of this form of recognition for his long term investment in the enterprise.

Before closing this section it will be convenient to refer to the proposals advanced in Appendix 4 which deals with occupational superannuation schemes for, here again, recognition of service is involved.

The major obstacle to effective and comprehensive reform in this area is the limited coverage of occupational superannuation schemes.\textsuperscript{12} If industrial tribunals were given power to incorporate superannuation provisions in awards, this would take superannuation out of the sphere of managerial initiative and give it a recognised place at the bargaining table.\textsuperscript{13}

But it is not sufficient to extend the scope of occupational superannuation; the rights of the members must be adequately protected.
In particular, members should be given a written explanation of the terms and conditions of the scheme and their rights and duties thereunder. In addition, private schemes should be required to provide a 'vested' withdrawal benefit for employees who resign or who are dismissed or retrenched for reasons other than serious misconduct. Without 'vesting' the basic purpose of superannuation is defeated. The appropriate form of 'vesting' will depend largely upon the nature of the employer's scheme but the law should specify a range of acceptable alternatives.

An insolvent fund provides no security for members' benefits. The law should, therefore, exercise some control over the investment and management of superannuation funds. This could be done by regular investigations of the fund coupled with certain restrictions upon the investment policy of the managers.

Finally, the law should take some steps to ensure that the promised superannuation benefits are not eroded by inflation. A form of 'inflation-proofing' both before and after retirement is necessary.

All these proposals would substantially increase the cost of occupational superannuation schemes. But much of this additional expense could be met if superannuation funds were freed of the 30/20 requirement which, in effect, compels fund managers to invest nearly one-third of their funds' assets in low-yield, public securities.

Measures designed to foster and safeguard employees' interest in recognition of service have been considered. Let us now turn to proposals for reform of job security law.
1. Introduction

An employee facing dismissal will find little solace in the law of job security. Three types of dismissal have been considered: dismissal with notice, summary dismissal and unlawful dismissal. Defects in the current law governing these dismissals can be grouped under four main headings: dismissal procedure, the right of an individual employee to challenge a dismissal, the kinds of dismissal that will be sustained, and, finally, the remedies. The following chapter will develop a series of proposals designed to correct these shortcomings. For convenience, proposals common to all three forms of dismissal will be examined first. Then special measures which relate to a particular form of dismissal will be discussed under the four major headings.

2. Proposals Common to All Forms of Dismissal

(i) Stated Reason for Dismissal

This section is concerned merely with the issue of whether the law sanctions unexplained dismissals; the remedies available to an aggrieved party are considered elsewhere.

Common law courts and industrial tribunals have repeatedly affirmed that an employer is not obliged to give an employee a reason for dismissal. The law does not demand even this elementary mark of fairness and justice. Yet, in many countries, a dismissal for no stated reason will not be sustained.

American collective agreements usually provide that a discharge must be 'for cause' or 'for just cause'. Under this rubric arbitrators
have consistently ruled that an employer must give an employee a stated reason for the discharge at the time of dismissal. Failure to observe this requirement may lead to reinstatement.

While the British Trade Union and Labour Relations Act 1974 does not formally oblige employers to state a reason when discharging employees, this may be a practical consequence of its unfair dismissal provisions. On the other hand, the remedies the Act prescribes would not seem to be sufficient to deter unexplained dismissals.

Under the Italian Law of 15 July 1966, an employee may inquire the reason for his discharge at any time within eight days after the communication of a written notice of dismissal. An employer may disregard a request made outside the prescribed period. But if a request is made within the time limit, the employer has to state a reason for the dismissal within five days following the inquiry. Although the Italian provision formalises the employee’s right to be notified of the reason for his dismissal, the short time limit could work injustice in marginal cases. This minor shortcoming is eclipsed by the fact that Italian law now expressly provides a remedy of reinstatement for employees dismissed with no explanation.

In Great Britain, the fairness of a dismissal under the Trade Union and Labour Relations Act 1974 (U.K.) will be judged at the moment of the discharge; circumstances which come to light subsequently may not be taken into account in deciding whether the employer acted reasonably at the time of the dismissal.

It is submitted that Australian employers should be obliged by law or award to state a reason for every dismissal on the request of the employee discharged. In those jurisdictions where industrial tribunals may award reinstatement, a similar result could be obtained by granting such an order to any employee dismissed for no express reason. This would encourage employers to furnish reasons for
dismissals.

If employees were advised of the grounds for their dismissal they would at least know whether it is worthwhile to contest the discharge. At present they are left entirely in the dark. In addition, dismissal cases often involve conflicting evidence and the employee would be in a much stronger position if the employer's case could be tied to the expressed reason for the dismissal.

As a corollary, the award or statute should provide that an employer may not rely upon grounds discovered since the original discharge. He should be required to justify the dismissal on grounds known to him when he decided to dismiss the worker. This proposal would deter an employer from the customary witch-hunt through his employee's service record in order to bolster his case. It would also prevent an employer provoking an employee to provide grounds for a dismissal which would otherwise be unjustified.13

(ii) Dismissal Procedures Generally

In contrast with Australian law, the law in several overseas countries provides formal dismissal procedures.

In the United States of America, for example, collective agreements often oblige the employer to contact the union either before or immediately following the dismissal.14 In addition, the great majority of these agreements allow employees to appeal against their discharge.15 These complaints are processed through a series of procedural steps leading ultimately to arbitration. Not all grievance procedures require an employer to give the employee an opportunity to reply to the grounds of the proposed discharge but arbitrators will occasionally imply such a requirement from the labour contract.16

In India, an elaborate procedure must be followed before industrial workers can be disciplined. The various steps in the
procedure ensure that the principles of natural justice are followed before management decides to dismiss an employee.¹⁷

British law does not oblige employers to observe principles of natural justice in dismissing their employees but the Trade Union and Labour Relations Act 1974 (U.K.) will deter precipitate dismissals. The Act follows the pattern of the unfair dismissal provisions in the Industrial Relations Act 1971 (U.K.)¹⁸ closely, and decisions of the National Industrial Relations Court, and other courts under the repealed Act, will retain their significance.

In recent proceedings, the Industrial Court decided that, in most cases, an employer should give an employee an opportunity to state his case before resorting to dismissal.¹⁹ Indeed, discharge may be ruled ‘unfair’ solely on the ground that the dismissed employee was not given a chance to answer his employer’s charges.²⁰

The German Works Councils Act 1972 obliges employers to consult the works council prior to any dismissal. Failure to observe this procedure invalidates the dismissal,²¹ and gives the employee concerned a right to sue for compensation. The works council may oppose a dismissal with notice upon certain grounds and within a certain period. If the employer disregards the works council’s objection, he must provide the employee with a copy of the work council’s comment along with the dismissal notice. Provided the works council’s objection was made within the due time and in the proper manner, an employee who takes legal proceedings for a ruling that the employment contract has not been dissolved by the notice will normally be entitled to be retained by the employer at unchanged conditions until the matter is determined by the labour court.

In France, the Act of 13 July 1973²² prescribes a procedure which must be followed before individual dismissals. An employer who plans to dismiss an employee must summon the employee to a meeting and
give the employee the reasons for the interview in a letter. This notice indicates merely the purpose of the meeting, not the grounds for the proposed dismissal. At the interview the employer is obliged to state these grounds and he must give the employee a chance to explain.

The employee may bring along a workmate to assist him to state his case. Thus only a union representative who is an employee of the firm may counsel the interviewee during the conference. This is a major drawback. After the interview the employer must observe a period of reflection, a 'cooling off period', before serving notice of dismissal: the letter of dismissal may not be sent less than one full day after the interview.

It is perhaps too early to predict the impact of the French provisions but clearly they should discourage impulsive dismissals because of the formality of the procedure and the 'cooling off period'. Perhaps the main advantage of the provisions is the fact that the procedure must be followed prior to dismissal: it is much easier to avoid a discharge than to secure reinstatement of an employee after the employment is terminated.

Statutory dismissal procedures are not confined to overseas countries. There are several examples of formal dismissal procedures in the various statutes governing public employment in Australia. Space prohibits a detailed analysis of these provisions. It will be sufficient for present purposes to examine the disciplinary procedure which operates in the Australian Public Service.

The Public Service Act 1922-1973 (Cth) specifies certain offences for which officers may be liable to punishment. Before punishment may be imposed a certain procedure must be strictly observed. The basic principle underlying this procedure is simply that 'No officer may be punished or dismissed without a full inquiry and proper consideration of the reasons for his offence'.

Caiden reports that the statutory dismissal procedure operating in the Australian Public Service enjoys 'considerable confidence'. This support can be attributed in part to the formality of the procedure. Although the scheme has defects, it does at least prevent impulsive dismissals on specious grounds. In the four years 1969/1970 to 1972/1973 only sixty-nine third and fourth division officers were dismissed from the Australian Public Service in pursuance of section 55 of the Public Service Act.

Is the dismissal procedure prescribed for the Australian Public Service relevant to the private sector? Public employment is, after all, a career service with conditions which are not generally matched, and indeed probably cannot be matched, in private employment. The absence of a clear-cut profit motive and clearly-defined standards of efficiency may make the public service a bad yardstick. Yet these factors alone do not account for the relatively high standard of job security enjoyed by public employees. Part of the credit belongs to the dismissal procedure. Again, it is true that public employment lends itself to formal dismissal procedures but this is no excuse for rejecting its experience with this machinery as totally inappropriate to the private sector. White collar workers in the banking and insurance industries are certainly engaged in career services. Why should their job tenure be so dramatically different from that held by employees in the public sector?

In private employment there are no statutory dismissal procedures. Some firms have established dismissal machinery on their own initiative but these schemes do not appear to provide adequate protection against rash dismissal. There appears to be a need for formal dismissal procedures embodied in awards or statutes. The basic machinery should at least give the employee the opportunity to state his case with the assistance
of a union representative from within or outside the firm. Where a union representative or official is not available, the employee should be entitled to seek assistance from a workmate. The formal procedure should also provide that an appeal against the decision to dismiss should lie to a higher level of management. This would ensure that an employee is not exposed to a hasty dismissal. This right to appeal could also involve a sufficient 'cooling off' period. Alternatively, it could be expressly provided, along the lines of the French provision, that a dismissal may not be effected until a short period after the higher level of management considers the employee's appeal. This internal appeal procedure should not disqualify an employee from resorting to an external appeal either to arbitration or at common law.

3. Dismissal Procedure: Proposals relevant to Dismissal with Notice

(i) Formality and Length of Notice

Under Australian law and award provisions, an employee may be given an oral notice of dismissal. It is submitted that a greater degree of formality should be required in terminating an employee's services. A written notice would dispel any doubts about the period of notice given or the date of the notice. This may be important if the employee wishes to contest the dismissal on grounds of inadequate notice. Further, if a remedy for unjust, though lawful, dismissals is conferred upon employees dismissed with notice, a formal requirement for written notice may assist the employee in proving his case. For example, it may be useful for the employee to establish that the dismissal occurred soon after he or she joined a religious or political group or shortly after marriage. The date of the notice may also be important in a claim for pro rata long service leave or superannuation entitlement.
Not only is notice informal, it is far too short. Moreover, it does not generally increase with the employee's age or length of service.

In Great Britain, the Contracts of Employment Act 1972\(^\text{34}\) prescribes certain minimum periods for notice of dismissal. These periods vary according to a person's length of continuous employment ranging from one week's notice for more than thirteen weeks', but less than two years' continuous service to eight weeks' notice for fifteen or more years' continuous service.\(^\text{35}\) There are complicated rules for calculating the period of continuous employment\(^\text{36}\) and express provisions dealing with events which interrupt continuity.\(^\text{37}\)

The statutory minimum periods of notice override any clause in a contract of service providing a shorter period of notice.\(^\text{38}\) On the other hand, either party may waive his right to notice on any occasion and may accept a payment in lieu of the prescribed notice.\(^\text{39}\)

Summary dismissals are not covered by the Act. Thus an employer retains his right of instant dismissal for misconduct.\(^\text{40}\)

With these qualifications, the Contracts of Employment Act 1972 (U.K.) is a rudimentary recognition that an employee's 'equity' in his job increases with length of service.\(^\text{41}\)

Swedish employees are entitled to a minimum of one month's notice of dismissal.\(^\text{42}\) After a qualifying term of service,\(^\text{43}\) this notice increases with age to a maximum of six months' notice at age forty-five.\(^\text{44}\) Thus, Swedish law bases its notice periods on age of the employee rather than seniority in the service of the employer.\(^\text{45}\)

Australian law is backward in its failure to provide adequate periods of notice for employees. Notice should increase with the period of an employee's service. Further, the law should recognise that older employees may find it more difficult to obtain alternative employment after their dismissal. Accordingly, it should guarantee older workers
a longer period of notice.

Employees' rights during an extended period of notice will require special protection. The Swedish\textsuperscript{46} and British statutes\textsuperscript{47} ensure that an employee under notice is not prejudiced in his employment or working conditions. Similar provisions would be necessary in Australia if the periods of notice were increased.

Many overseas statutes governing notice of dismissal do not require a reciprocal period of notice from an employee who resigns. For example, notice of at least one week is required by the Contracts of Employment Act 1972 (U.K.)\textsuperscript{48} while Swedish law\textsuperscript{49} demands at least one month's notice from an employee. These provisions do not prohibit an employee agreeing to give a longer period but they do recognise the basic inequality between employer and employed. Australian law or awards should also provide that, in the absence of agreement between the parties, notice of resignation should be a certain minimum period.

Adequate notice does not, by itself, guarantee job security or even stability in employment. During the notice period, employees must be given time off to seek other employment. The Swedish Job Security Act 1974 provides a model. It states:

\begin{quote}
During the period of notice the employee has the right to have time off with retained employment benefits to the extent that may reasonably be required to visit the labour exchange or otherwise try to find a job.\textsuperscript{50}
\end{quote}

Some Australian awards already contain a similar clause\textsuperscript{51} but this opportunity to seek other employment should be available to all employees under notice of dismissal.

4. Dismissal Procedure: Proposals relevant to Summary Dismissal

A summary dismissal for cause carries a stigma which may make it difficult for the discharged employee to obtain other employment. In addition, such a dismissal may disentitle an employee to valuable accruing benefits. For these reasons it may be necessary to modify the
proposed dismissal procedure where misconduct is alleged.

The law imposes a rather feeble restraint against the indiscriminate use of instant dismissal as a remedy for employee's misconduct. In theory employers are expected to resort to this remedy only where the employee's conduct shows a clear intention to repudiate his contract of service. In practice summary dismissal is freely exercised for comparatively trivial offences. The reason for this divergence between theory and practice seems clear: summary dismissal is swift, inexpensive, final and, in some cases, dramatic; it allows an employer to assert his right to discipline his employees and serves as a reminder to other employees that they face dismissal if they disregard their contractual obligations.

Yet, in many cases, dismissal amounts to disproportionate punishment for an offence. In such instances, the employer has a limited range of options. He can either dismiss the employee or continue him in employment. Only rarely will an employer find it convenient or appropriate to seek damages or an injunction for an employee's breach of contract. Disciplinary matters must be dealt with swiftly. And the delay inherent in litigation makes suits for damages or injunctions impractical forms of industrial discipline.

In the United States, collective agreements commonly provide a series of graduated penalties. The gamut may include an oral caution, an oral warning noted in the employee's record, a written reprimand, disciplinary suspension for a stated period, cancellation of accruing benefits, demotion and ultimately discharge. In many agreements, dismissal is reserved for flagrant violations of the rules of the company, or of the law of the land. Discharge for venial first offences is sometimes expressly prohibited.

As will be seen later, American arbitrators determining disputes over discipline almost invariably adopt the attitude that
punishment must fit the crime. Thus the drastic remedy of dismissal will not be sustained where a lesser penalty would be more appropriate.

Similarly, in Australia, the Public Service Act 1922-1973 (Cth) gives the disciplining officer a variety of remedies other than dismissal. The nature and frequency of disciplinary action taken in pursuance of section 55 of the Public Service Act over a four year period appears in the table below.

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
<th></th>
</tr>
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<tbody>
<tr>
<td>Dismissal</td>
<td>19</td>
<td>11</td>
<td>24</td>
<td>15</td>
</tr>
<tr>
<td>Reduction in salary and/or status</td>
<td>12</td>
<td>14</td>
<td>21</td>
<td>9</td>
</tr>
<tr>
<td>Transfer</td>
<td>2</td>
<td>-</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Fine (over $4)</td>
<td>291</td>
<td>354</td>
<td>295</td>
<td>263</td>
</tr>
<tr>
<td>Fine ($4 and under)</td>
<td>836</td>
<td>875</td>
<td>1,201</td>
<td>1,120</td>
</tr>
<tr>
<td>Reprimands (including cautions)</td>
<td>209</td>
<td>210</td>
<td>206</td>
<td>275</td>
</tr>
<tr>
<td>Total</td>
<td>1,369</td>
<td>1,464</td>
<td>1,748</td>
<td>1,682</td>
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</tbody>
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It is a fair inference from these figures that the small number of dismissals can, at least in part, be attributed to the fact that alternative remedies were freely and easily available. Of these other remedies, fines were the most common.

The advantage of providing a range of penalties in ascending order of severity is that discipline can be related to the gravity of the offence. Further, a broad spectrum of penalties gives an employer more flexibility in disciplinary measures. Management would be able to impose penalties designed to correct, rather than punish, employees.

The problem is to decide what measures should be included in the range of permissible punishment. Clearly oral or written warnings, reprimands or cautions could be used for minor offences, but these are available to employers at present. What is needed is a more formidable penalty which would discipline the offender and deter other employees from similar conduct.

A small fine would seem to be the ideal answer. One industrial tribunal has already regretted its lack of power to impose a fine as a
disciplinary measure. Unfortunately, some unions are firmly opposed to fines as a form of discipline. This resistance might be overcome if the amount and limits of the fine for particular offences were specified in the award or statute. It might also be provided that a levy could be deducted from the employee's pay packet in one or more instalments. The destination of the fine is likely to arouse much suspicion. It would be advisable, therefore, to stipulate that the amount collected should be donated to a charitable institution. If this were done employers would have no incentive to abuse the remedy as their predecessors did in nineteenth century England.

There exists a further obstacle to the inclusion of fining provisions in awards. Fines prescribed in awards would only be recoverable if they were a genuine pre-estimate of the probable damage caused by the employee's breach of contract. Otherwise they would be treated as penalties and, therefore, unenforceable. This difficulty is not insuperable. It could be avoided by a statutory provision authorising the imposition of fines for certain offences.

Disciplinary suspensions avoid many of the problems encountered by fines. A contract of service may be suspended by an employer only where statute or an express or implied term of the contract confers a power to do so. Some awards already provide that an employee may be suspended for misconduct. This development should be extended since suspension is often a merciful alternative to discharge. However, an indefinite suspension may amount to a dismissal. If the law were otherwise, an employer could avoid giving notice or wages in lieu thereof by indefinitely suspending the employee. Care should be taken, therefore, that a suspension without pay is imposed only for the limited period specified in the award. Disciplinary transfers or demotions could also be mentioned in awards as alternative sanctions.
Unions need not fear that these measures are beyond challenge. They could be limited to cases of misconduct, inefficiency, malignering or neglect of duty. Thus, the union could still argue that the employee concerned was not guilty of the offence alleged.

An indiscriminate use of summary dismissal for misconduct could also be discouraged by treating an unwarranted discharge as unfair. The remedies which will be recommended for unfair dismissals could then be invoked.

5. Dismissal Procedure: Proposals relevant to Unlawful Dismissals

In view of the special duties and responsibilities of union officers and delegates added protection should be afforded to them against arbitrary or unwarranted dismissal. If these employees are expected to protect the interests of their fellow-unionists and workmates, they should be insulated from victimisation. Under the present law a union officer or delegate may be dismissed in the same manner as any other company employee. Some countries recognise the special vulnerability of employees in this type of position.

In West Germany, for example, summary dismissal of works councillors requires the consent of the works council or the labour court. If the works council withholds its consent, the employer must apply to the labour court for approval.

British law takes a softer line. Paragraph 133 (5) of the Code of Practice recommends that 'no disciplinary action should be taken against a shop steward until the circumstances of the case have been discussed with a full-time official of the union concerned'. Failure to observe this procedure does not automatically render the dismissal unfair under the Trade Union and Labour Relations Act 1974 (U.K.) but the recommendation is admissible in evidence in proceedings under that Act.
The additional protection afforded employees' representatives in these countries could well be adapted to Australian conditions. The approval of an arbitration commissioner or an industrial magistrate could be required prior to dismissal.

If the proposal for a works council suggested in Chapter 20 is adopted, then it might be more convenient to authorise this body to consent to the dismissal in the first instance. The employer could be allowed an appeal to an arbitration commissioner or an industrial magistrate if consent were withheld.

6. The Type of Dismissals which the Law Will Sustain

A. Dismissals with Notice

In the current law part, it was pointed out that in general a dismissal with notice is lawful notwithstanding a discriminatory motive. This section deals with proposals to remedy this situation.

(i) Discriminatory Dismissals

(a) The Racial Discrimination Bill: Its Scope

The Australian Government hopes to secure the passage of the Racial Discrimination Bill 1974 early in 1975. The Bill will satisfy Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. It prohibits discrimination in many matters other than employment but it is this field that concerns us here.

Clauses 15-17 of the Bill relate to discrimination in employment and advertisements for employment. For present purposes it is sufficient to note that Clause 15 prohibits discrimination against an employee by reason of the race, colour or national or ethnic origin of the employee or any relative of the employee.
The Bill also prohibits discrimination in employment on grounds that a person or any relative or associate of a person is or has been an immigrant. This ground for discrimination is made independent and severable from the rest of Clause 15. This is a prudent course to adopt for this additional ground falls outside the term 'racial discrimination' as defined in the International Convention. Thus if this portion of the clause is held invalid by the High Court in a constitutional challenge based on the 'external affairs' power, the rest of the clause could survive.

(b) I.L.O. Convention No. 111


A country ratifying I.L.O. Convention No. 111 is required to declare a national policy affirming its commitment to the objective of the Convention. In addition, a ratifying country is obliged to pursue a specified range of action designed to eliminate discrimination in employment and occupation.

As one step in this range of action, it is required 'to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance ...' of the declared national policy. But the Federal Government appears to be reluctant, at this stage, to pursue its anti-discrimination policy through legislation. It prefers to rely upon educational programmes and conciliation to promote a climate of opinion favourable to the national policy.
To this end it has established a National Committee on Discrimination in Employment, and Committees in each state. One of the main functions of this body is to consider complaints of discrimination in employment referred to it by the state committees.

In their first year of operation these committees received nearly 600 complaints. Of the 312 complaints on grounds specified in the International Convention, the clear majority were on grounds of sex (164 or 53%), the next largest group being on the ground of national extraction (79 or 25%). Thirty-six complaints on grounds of race were received. By contrast, there were relatively few complaints of political or religious discrimination. Complaints of discrimination by reason of age and nationality were also reported but these are not covered by the Convention.

The number of complaints should not be taken as an indication of the extent of discrimination in employment in Australia. A national advertising campaign launched in March 1974 trebled the number of complaints being received by the committees. When the practice and procedure of the committees become widely known the number of complaints might be expected to rise sharply.

Although these early figures suggest that there are few discriminatory dismissals in Australia, they do indicate that the grounds of discriminatory employment practices are broader than those covered by the Racial Discrimination Bill and, indeed, I.L.O. Convention No. 111 itself. Further, there is some independent evidence of discriminatory dismissal policies in Australia.

The limited scope of the 1974 Bill may force the Federal Government to revise its attitude to legislation prohibiting all forms of discrimination in employment. The Bill does not prohibit discrimination in employment on grounds of sex, religion, religious belief or conviction, political opinion, social origin, age, marital
status or nationality. And since it is tied to the International Convention on the Elimination of All Forms of Racial Discrimination, it may not be amended to cover these forms of discrimination.

Legislation implementing I.L.O. Convention No. 111 would be able to prohibit all these forms of discrimination. And a general prohibition of all forms of discrimination would seem to be preferable to the Federal Government's policy of legislating on some forms of discrimination and providing conciliation as the only remedy against other forms. Yet even legislation in pursuance of Convention 111 would not provide a remedy against dismissals which, although not discriminatory, are simply unfair.

(ii) Unfair Dismissals

Australia is one of the few major industrialised countries of the world which has no general prohibition of capricious or malicious dismissal. It will be useful to consider briefly some of the overseas experience.

(a) Trade Union and Labour Relations Act 1974 (U.K.)

The current unfair dismissal provisions in Great Britain appear in schedule 1 of the Trade Union and Labour Relations Act 1974 (U.K.). Paragraph 4 of the schedule states that every employee covered by the schedule shall have the right 'not to be unfairly dismissed'. This provision gives a misleading impression. The employee's right is, in fact, restricted to complaining to an industrial tribunal that his employer has unfairly dismissed him.

Paragraph 6 (2) lists certain reasons which will normally be regarded as fair grounds for dismissal: those related to the capability or qualifications of the employee; those related to his conduct; redundancy; or where the continued employment of the employee would involve a breach of statutory duty. Even if a dismissal is based on
one of these grounds it may still be unfair if the employer has not acted reasonably in treating the reason for dismissal as sufficient justification for the discharge.\(^\text{94}\)

The Act also regards certain dismissals as automatically unfair. A dismissal because of the employee's legitimate trade union activities falls in this category.\(^\text{95}\) Again, a dismissal for redundancy will be unfair where the persons discharged were victimised for their trade union activities or where the persons were selected for dismissal in breach of a customary arrangement or agreed procedure.\(^\text{96}\)

In general, the protection afforded by the Trade Union and Labour Relations Act 1974 (U.K.) extends only to dismissals or 'constructive dismissals'.

Dismissal is defined in paragraph 5 of Schedule I. An employee shall be taken to be dismissed by his employer if his contract of employment is terminated by the employer with or without notice.\(^\text{97}\)

Paragraph 5 (2)(c) incorporates the notion of 'constructive dismissal'. Thus, if the employee terminates his contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct, he will be deemed to be dismissed for the purposes of the Act.\(^\text{98}\)

The 1974 Act also provides that an employee under notice may give his employer a counter-notice of termination of services without forfeiting his claim against his employer for unfair dismissal.\(^\text{99}\) There are two potential traps in this provision. The employee's counter-notice must be in writing and must be given at a time within the 'obligatory period' of notice required from the employer. Thus, if the employee gives an oral counter-notice, he forfeits his claim. Again, if the employer gives him one month's notice when in fact he is entitled to only one week's notice, a counter-notice must be given in the final week of the four week's notice. If not the employee's rights
to challenge the dismissal lapse. These two restrictions will cause gross injustice if the employee is not conversant with the correct procedure. It is surprising that these pitfalls which appeared in the 1971 Act were not removed in the recent legislation.

Further problems surround the concept of dismissal. Where a contract is terminated by notice, the dismissal dates from the day on which the notice expires or ought to expire. This can be altered if the parties agree to terminate the contract before the notice period elapses. In this case, the consensual termination dates from the date of the agreement, and there is no dismissal. Consequently, the agreement deprives the employee of the right to challenge the dismissal. There is, therefore, ample scope for an unscrupulous employer to defeat an employee's claim before it is litigated.

If Australia were to adopt legislation prohibiting unfair dismissals it would do well to avoid these shortcomings.

(b) Unfair Dismissal Law in Other Countries

Britain is by no means the only country to devise a sanction against unfair dismissal. In the United States, arbitrators overrule unfair dismissals under the rubric of the 'just cause' provisions in collective agreements. West German law states that 'socially unwarranted' dismissals are invalid. A 'socially unwarranted' dismissal is, in turn, defined as a dismissal 'not based on reasons connected with the person or conduct of the employee or on urgent operating requirements precluding his continued employment in the undertaking'. In Italy, the Law of 1966 permits dismissal of an employee with prior notice only in the case of an 'obvious failure to fulfil his contractual obligations, or for reasons inherent in production, the organization of the work or the smooth running of the undertaking'. In France, a capricious or malicious exercise of the employer's power to dismiss
Australia could draw on this overseas experience, particularly the Trade Union and Labour Relations Act 1974 (U.K.) in devising an appropriate form of legislation against unfair dismissal.

B. Summary Dismissal

As we have seen, summary dismissal is often used indiscriminately and illegitimately as a disciplinary measure. Proposals designed to correct this practice can be conveniently considered under the following headings: notice of company rules and essential terms of the contract; dismissal for trivial offences; dismissal in disregard of procedural rules; and, finally, severe or inconsistent discipline.

(i) Notice of Company Rules and Essential Terms of the Contract

One Australian tribunal has recognised that 'if workers are to be disciplined for non-observance of rules, it is fundamental that such rules be brought home to the attention of the workers concerned'. But there is no positive obligation upon Australian employers to inform employees of the essential terms of the contract of service or the basic company rules. Although awards must be exhibited in a prominent position at the work place, they do not tell the employee what is expected of him and the reasons for which he may be dismissed. For example, the award will normally state that the employee may be dismissed for misconduct but it does not indicate what the particular employer regards as misconduct.

By contrast, West German law obliges an employer to inform an employee about 'his duties and responsibilities as well as the type of his work and the way it fits into the operations of the enterprise'. Further, an employee is entitled to be informed within a reasonable
time of any changes in the scope of his work. While these provisions are designed primarily to encourage employees to participate in and identify with the enterprise, they will ensure that an employee is made aware of his obligations.

A similar duty to inform employees could be imposed upon Australian employers either by legislation or industrial awards. Alternatively, tribunals could refuse to sustain dismissal for breach of company rules if the employee was not made aware of these rules before his transgression.

(ii) Dismissal for Trivial Offences

The notion of 'just cause' embodied in most American collective agreements implies that a dismissal will not be warranted unless it is related to the employee's incompetence or improper conduct. In theory, this standard does not differ greatly from that applied by the common law courts and industrial tribunals in Australia. In practice, the application of the standard produces strikingly different results. It is sufficient to note that a dismissal for a trivial matter will rarely be sustained by an American arbitrator. Australian tribunals could learn much from the principles evolved by these arbitrators in interpreting and applying the 'just cause' provisions.

(iii) Dismissal in Disregard of Procedural Rules

American arbitrators almost invariably overrule dismissals which do not follow the procedure outlined in the relevant collective agreement. Thus, where the agreement requires an employer to give the employee a warning or a right to explain his conduct before he decides to dismiss the employee, this procedure must be followed. Even where there is no set procedure, a denial of natural justice will
ordinarily persuade the arbitrator to overrule the discharge and order reinstatement.\(^{22}\)

If the dismissal procedures proposed earlier are incorporated in Australian awards or legislation, industrial tribunals could ensure compliance by upsetting any dismissals which depart from the prescribed procedure.

(iv) Severe or Inconsistent Discipline

As stated earlier, one of the fundamental guidelines American arbitrators use in applying the 'just cause' provisions is the principle that punishment should fit the crime.\(^{23}\) If a dismissal seems to be a severe reaction to the employee's misconduct, the dismissal will be ruled improper. Arbitrators will sustain corrective discipline but will not allow employers to exercise their right of dismissal in a vindictive manner.\(^{24}\) On these principles, arbitrators frequently overrule discharges for a first offence particularly if the employees concerned have good service records. Because the collective agreement provides the employer with a variety of disciplinary measures, the arbitrator will usually prescribe a less severe form of punishment for first offences or for petty misconduct.\(^{25}\) American arbitrators also expect employers to apply disciplinary measures consistently. A discriminatory use of the power of dismissal will not be upheld.\(^{26}\)

This approach runs contrary to our law where the employer has an almost untrammelled right to decide whether he will dismiss an offender. But if awards gave employers a more flexible range of disciplinary measures, our tribunals could develop principles similar to those applied by American arbitrators.

Harsh or capricious dismissals can also be discouraged by legislation. As seen earlier, the Trade Union and Labour Relations Act 1974 (U.K.) provides that a dismissal related to an employee's
conduct, capability or qualifications may be unfair if the employer acted unreasonably in treating this ground as sufficient justification for discharging the employee. Used judiciously, this provision could deter employers from severe or inconsistent applications of their remedy of dismissal.

C. Unlawful Dismissal

As mentioned earlier, there are numerous loopholes in the 'victimisation provisions' of the industrial arbitration and wages board statutes. Unless all these defects are corrected, employees who engage in some forms of legitimate trade union or industrial activity will have no legal protection from victimisation. Comprehensive safeguards are essential in this area. In most instances, all that is required is minor amendment of the existing legislation.

It would also seem important for the legislation to stipulate the duration of the protection conferred. The recent Industrial Conciliation and Arbitration Act, 1972 (S.A.) specifies a two month period but this seems to be unnecessarily short. A longer period of, say, six months would appear to be more appropriate.

7. Who may challenge the dismissal? Who has the onus of proof?

A. Dismissal with Notice

(i) Discriminatory Dismissal

(a) Individual Remedy

The Racial Discrimination Bill 1974 provides that a person aggrieved by an unlawful act of discrimination may institute civil proceedings in a court of competent jurisdiction. By providing an individual remedy the Bill recognises that some forms of discrimination are unlikely to generate collective action by unions. But litigation may be expensive for the individual. Accordingly, the Bill gives
Australian Race Commissioners power to investigate complaints of discrimination and to institute proceedings on behalf of the aggrieved party if attempts at conciliation fail. Such a procedure may be protracted but it saves the individual substantial costs.

At the conciliation stage, a commissioner is directed to 'use his best endeavours' to secure a settlement of any difference between the parties and to obtain an assurance against repetition of the discrimination. Unlike the equivalent New Zealand legislation, the Bill does not give a commissioner power to summon persons who may be able to assist his inquiry and require them to give evidence. Nor is a commissioner empowered to compel the production of any documents, papers or things which may relate to the alleged discrimination. This places a severe handicap upon the commissioner's ability to achieve a settlement. Apparently he is expected to rely on his tact and powers of persuasion.

(b) Onus of Proof

Assuming the commissioner fails to negotiate a settlement and institutes proceedings on behalf of the aggrieved party, the question then arises: who has the onus of establishing that the employer has discriminated against the employee? Clause 25 (5) of the Bill merely states that the court may grant remedies 'where ... it is established to the reasonable satisfaction of the court that the defendant' has committed an unlawful act of discrimination.

The court is given two guidelines. First, a company will be liable for the discrimination of its employees if it authorised the employees, either expressly or impliedly, to do the unlawful act. The Race Relations Act 1968 (U.K.) adopts a different approach. It makes an employer vicariously liable for any discrimination practised by an employee in the course of his employment.
unless the employer can prove that he took such steps as were reasonably practicable to prevent the employee from doing in the course of his employment acts of the same description as the act the subject of the complaint. The British Act then, casts an affirmative duty upon the employer. This greatly strengthens the position of the complainant and it should be adopted in the Australian provisions.

Second, the Bill, in its present form, recognises that an act may be unlawful even if it is only partly caused by discrimination. Thus, where an act is discriminatory it matters not that the dominant reason for the act has nothing to do with discrimination. This principle may be readily applied to dismissals: if a discharge is partly motivated by discrimination but predominantly caused by an employee's inefficiency, the Bill may provide a remedy for the aggrieved party.

Apart from these guidelines, it appears that the prosecuting party has the onus of satisfying the court that the defendant has done an unlawful act of discrimination. This is a cardinal error. The fact that the Australian Race Commissioner has no compulsory evidence-gathering power aggravates the problem. In these circumstances it will be extremely difficult for the complainant to establish that a dismissal was inspired by discriminatory motives. As Hepple points out, the real reason for the discriminatory act may lie hidden in the employer's filing cabinets.

The only realistic course to adopt, at least in the civil proceedings, is to place the primary onus upon the defendant. The complainant could be required to make out a prima facie case of discrimination in employment; he cannot, and should not, be expected to go further.

These shortcomings of Racial Discrimination Bill must be corrected before the Bill becomes law otherwise the protection afforded
against a discriminatory dismissal will be largely illusory. If a more general prohibition of discrimination is enacted in pursuance of I.L.O. Convention No. 111, care must be taken to avoid similar pitfalls.

(ii) Unfair Dismissal

(a) Individual Remedy

As mentioned earlier, there is no procedure through which employees in Australia can challenge dismissals which are merely unfair. If jurisdiction to hear claims of this nature is conferred on industrial tribunals, the individual employee aggrieved by the dismissal should be allowed a remedy in his own right.

An individual remedy is essential in these cases because it may not be possible for the discharged employee to persuade the union to take up his complaint. It may be instructive at this point to consider the British and American approaches to this key issue.

In Great Britain, employees clearly have an individual remedy against unfair dismissal under the Trade Union and Labour Relations Act 1974 (U.K.).

In contrast, an individual employee may not sue for unfair dismissal even in the organised sector of the American work force. But this deficiency is offset, to some extent, by the unions' duty of fair representation: the union is required to represent the interests of all the workers in the plant or work place covered by the collective agreement.

(b) Onus of Proof

The onus of proof in cases of unfair dismissal is of pivotal importance. The burden of establishing the fairness of a discharge should be placed squarely on the employer as he is well aware of the
motive or reason for the dismissal.

The Trade Union and Labour Relations Act 1974 (U.K.) deals with the problem in an interesting way. It obliges the employer to show the principal reason for the dismissal and also that it was a reason falling within one of the grounds classified by the Act as *prima facie fair* or *some other substantial reason* which would justify the dismissal of an employee holding the position held by the complainant. Further it is up to the employer to satisfy the tribunal hearing the complaint that he acted reasonably in treating this reason as a sufficient ground for discharging the employee. This is a marked improvement upon the Industrial Relations Act 1971 (U.K.) which appeared to place this latter onus upon the employee.

American arbitrators interpreting the phrase 'just cause' in collective bargaining agreements have made it clear that the employer carries the onus of justifying his disciplinary measures.

If Australian law is to fashion a remedy for unfair dismissal, it would be wise to follow the British or American example.

B. Summary Dismissal

(i) Individual Remedy

At common law an employee can sue for wrongful dismissal but litigation may give him a pyrrhic victory. The remedy at common law is, in most cases, a meagre award of damages. A wrongful dismissal may be challenged before industrial tribunals but an individual employee may be unable to bring his case before these tribunals unless he can persuade the union to take up the cudgels for him.

As mentioned earlier, unions in the United States have a legal duty to represent fairly all employees covered by the collective agreement whether they are unionists or not. Employees in the organised sector, therefore, have access to arbitrators in cases of wrongful
dismissal.

In Britain, the position is not entirely clear. An employee may be able to claim that a summary dismissal for petty misconduct is unfair within the Trade Union and Labour Relations Act 1974 (U.K.). Although the dismissal would be *prima facie* fair since it was "related to the conduct of the employee", it might be ruled unfair if the employer acted unreasonably in treating the employee's behaviour as a sufficient reason for dismissal. At this stage, it is difficult to predict whether this result will flow from the Act but it is consistent with the new provisions.

An employee wrongfully dismissed has a personal grievance. He should not be forced to rely upon his union to advance his claim. The need for an individual remedy is more urgent for that half of the work force which is not unionised. A direct action along the lines of the Trade Union and Labour Relations Act 1974 (U.K.) is preferable to the circuitous method of imposing a duty of fair representation upon the unions. This individual remedy would not supplant the unions' role in processing their members' grievances. Rather, it would be a back-stop for the employee whose complaint is neglected by his union. In addition, it would give a non-unionist a remedy alternative to a common law action. As will be seen, the statutory remedies are much more generous than those at common law.

(ii) Onus of Proof

In cases of alleged wrongful dismissal, the onus of justifying the discharge is already cast upon the employer as part of his defence. If employers were compelled to justify the dismissal on the grounds expressed at the time of the discharge, this onus would have much more significance.
C. Unlawful Dismissal

(i) Individual Remedy

The industrial arbitration and wages board statutes do not clearly indicate that the aggrieved employee has an individual remedy against all forms of 'victimisation'. An individual remedy is needed under the present provisions and, if the statutes are amended as suggested earlier, such a remedy will be essential. For example, it is futile to limit access to the remedies to a union in cases where the union is not yet registered or where the employee is dismissed because he tried to establish a new union in an unorganised work place.

(ii) Onus of Proof

The 'victimisation provisions' should also place the onus upon the employer to establish that the dismissal was not motivated by the employee's legitimate trade union or industrial activities. If the employer were obliged to furnish a reason for each dismissal at the time of the discharge, it would be easier to identify an illicit motive. Alternatively, the employer could be obliged to show that the dismissal was caused by some substantial reason other than the reason alleged in the charge.

8. Remedies

A. Dismissal with Notice

(i) Discriminatory Dismissal

At common law an employee is given no remedy for a discriminatory dismissal with notice or wages in lieu of notice. Nor is a remedy freely available in most Australian industrial relations systems.

The Racial Discrimination Bill 1974 provides a number of remedies all or any of which may be granted to the victim of a discriminatory dismissal.
Damages will probably be the normal remedy. They may include compensation for the loss of any benefit which the aggrieved party 'might reasonably have been expected to obtain if the relevant act had not been done'. In addition, damages may be awarded to the aggrieved party for loss of dignity, humiliation and injury to feelings. This is clearly an advance on the common law measure of damages.

It is doubtful whether a complainant will be entitled to reinstatement. The court may order the defendant to do a specified act directed towards 'placing a person aggrieved ... as nearly as practicable in the position in which he would be if the discrimination had not occurred'. This is an extremely vague grant of power. If an employer asserts that it is impracticable to reinstate the employee will the court refuse reinstatement? The court is also empowered to grant 'such other relief as the court thinks just'. Such broad discretionary power provides a welcome flexibility but the question remains: is reinstatement available for an aggrieved party?

The Bill does not refer to this remedy expressly and it may well be that it will be denied to a complainant. Much will depend upon judicial interpretation of the remedy provisions of the Bill.

In most cases an aggrieved employee will want his job back. Damages are a poor substitute. They will not make it easier for the employee to obtain other employment. Indeed the employee is back to square one since he may once again be the victim of discrimination, this time in the selection process of prospective employers. Reinstatement is available in these cases in the United States, Italy, and possibly Great Britain. It should also be available under the Australian Bill.

The Attorney-General and Minister for Customs and Excise, Senator The Hon. L.K. Murphy, Q.C., declared in his Second Reading
Speech on the October Bill: 'Pious declarations of principle are of little value unless they can be given practical expression'.

Reinstatement is one form of enforcing a victim's rights with a practical remedy. Without this form of relief, Australian anti-discrimination legislation may lose the confidence of those it is designed to protect.

If the Australian Government changes its present policy and decides to legislate in pursuance of I.L.O. Convention No. 111, the above proposals will be equally relevant.

(ii) Unfair Dismissal

In Australia there is no remedy readily and widely available for employees unfairly dismissed. This is a major gap in the law's protection of employees' interest in job security.

Overseas countries differ on the appropriate form of remedy for unfair dismissal. Some countries merely allow employees compensation while others provide for reinstatement or compensation.

American arbitrators almost invariably award reinstatement to an employee unfairly dismissed in breach of the 'just cause' provision in collective agreements. Compensation is normally limited to back-pay since the discharge.

(a) Remedies under The Trade Union and Labour Relations Act 1974 (U.K.)

In Great Britain complaints of unfair dismissal are heard by industrial tribunals under the Trade Union and Labour Relations Act 1974 (U.K.). The tribunals are empowered to recommend the reinstatement or re-engagement of a complainant. Such a recommendation will only be made where the tribunal considers that 'it would be practicable, and in accordance with equity' for the complainant to be reinstated or re-engaged. It may be open to the employer to argue that neither of
these measures is practicable if he is not prepared to re-employ the complainant. Further, the tribunal is only empowered to recommend reinstatement or re-engagement; the tribunal will be unable to compel an employer to comply with its recommendation.

On the other hand, if an employer unreasonably refused to comply with the tribunal’s recommendation, it may increase the award of compensation available to the employee by an amount which it considers ‘just and equitable’ in the circumstances. Kitchin suggested that this may encourage tribunals to make ‘deterrent awards’ of compensation to induce employers to re-employ the complainants. However, the maximum amount of compensation is set at £5,200. Employers may prefer to pay this sum rather than surrender their prerogative. More importantly, the tribunals’ approach to assessment of compensation has led to modest awards in some cases. And the National Industrial Relations Court has put the issue beyond doubt. It recently rejected an attempt by one tribunal to award compensation far in excess of the employee’s actual loss in order to deter employers from refusing to comply with its recommendations.

Reinstatement may yet be secured through industrial action by the employee’s union. Indeed, G. DE N. Clark predicted that organised employees might prefer to rely upon their industrial strength rather than the unfair dismissal provisions.

Compensation was the alternative, and apparently unusual, remedy under the Industrial Relations Act 1971 (U.K.). There is no reason to doubt that this will remain true of the Trade Union and Labour Relations Act 1974 (U.K.). If an industrial tribunal finds that the complaint is well-founded, it may award such amount as it considers ‘just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complaint relates, in so far as that loss was
attributable to action taken by or on behalf of the party in default.\textsuperscript{89} The loss sustained by the aggrieved party includes 'loss of any benefit which he might reasonably be expected to have had' but for the unfair dismissal.\textsuperscript{90}

Although quite generous awards have been made in some cases,\textsuperscript{91} it is clear that compensation may only be given for financial losses.\textsuperscript{92} Thus an employee dismissed without being given a chance to state his case is not entitled to compensation for this factor alone unless it caused him pecuniary loss.\textsuperscript{93} Similarly, no allowance will be made for injury to pride or feelings.\textsuperscript{94} In this, the compensation provisions reflect the common law. Traces of common law can also be seen in the provisions which allow the tribunal to reduce the compensation if the complainant did not attempt to mitigate his loss or if his own conduct contributed to the unfair dismissal.\textsuperscript{95}

Given these qualifications, the compensation awarded by industrial tribunals may be substantially more than a settlement figure proposed by a conciliation officer prior to the hearing. Such an officer is, in certain circumstances, under a duty to promote a settlement of the complaint.\textsuperscript{96} In his eagerness to reach an agreement between the parties, he may persuade the employee to accept a compromise figure. It remains to be seen whether this will happen but the possibility should not be discounted. The employee has little bargaining power in these pre-hearing negotiations. He may be prepared to settle for a lower amount than he would have received from an industrial tribunal.

The remedies provided by the Trade Union and Labour Relations Act 1974 (U.K.) have grave shortcomings. Nevertheless, they are an advance upon the common law.
(b) Italian Law of 15 July 1966

In Italy, under the Law of 15 July 1966, an employer who dismisses an employee without sufficient grounds or a just motive may be obliged either to reinstate the employee or pay compensation ranging from five to twelve months' remuneration. The size of the undertaking, the employee's length of service and the behaviour of the parties are considered in assessing compensation.

Under the Law of 1966, reinstatement was at the option of the employer. Now the court is expressly empowered to order reinstatement. The sanction for non-compliance with such an order is interesting: the employer is obliged to continue paying the employee his wages?

(c) Lessons?

The lesson to be learnt from the overseas experience is clear: if reinstatement is to be provided as a remedy for unfair dismissal, it should be available to the employee at his option, not the option of the employer. There is evidence to suggest that reinstatement is not a viable remedy for employees unfairly dismissed. Indeed, it appears that reinstatement has met with considerable success at least in the organised sector of the American work force. Italian law also permits reinstatement but it is difficult to ascertain how well this remedy works in practice. However, one would think that the sanction for non-compliance with the reinstatement order would guarantee the success of the remedy.

There remains the problem of reinstatement in a small enterprise where personality clashes are likely to recur after reinstatement. G. DE N. Clark suggests that much of this difficulty can be overcome by interim or probationary reinstatement orders. This seems to be a workable solution. If continued employment appears to be
impossible after a trial period, the reinstatement order could be reviewed and compensation awarded.

If the complainant does not wish to be reinstated, he should be entitled to compensation for his dismissal. This should not be tied to common law notions such as contributory negligence or the duty to mitigate damages. Rather it should reflect the concept of 'job property'. And an employee should be compensated for any humiliation and indignity caused by his dismissal.3

B. Wrongful Dismissal: Remedies

It is most unlikely that the common law will develop a remedy akin to reinstatement for employees wrongfully dismissed. Yet reinstatement is a remedy which should be available. This policy has already been accepted in New Zealand, Italy and the United States of America.

(i) New Zealand's Personal Grievance Provisions

The New Zealand model warrants close attention because its basic scheme could be easily followed in Australian industrial systems. The personal grievance provisions outlined in the 1970 Amendment to The Industrial Conciliation and Arbitration Act 1954 (N.Z.) prescribe a standard procedure which is automatically included in the instrument governing the worker's conditions of employment unless the parties to the instrument agree that the procedure will not apply.5 Even if this procedure is not so incorporated, the Minister for Labour may, in certain circumstances, declare that it shall apply to a dispute.6

The final stage of the prescribed procedure involves either private or official arbitration of the dispute. In each case the arbitrator may grant one or more of the following remedies: reimbursement of lost wages, reinstatement and compensation.7
The New Zealand provision is a substantial improvement upon Australian arbitral provisions for handling complaints of wrongful dismissal. Firstly, it formalises the processing of the grievance and encourages pre-arbitration negotiation between the employee's union and the employer. Secondly, and more importantly, the arbitrator may award compensation to the employee. Those industrial tribunals in Australia which have jurisdiction to order reinstatement do not have this option open to them: they must either reinstate, or deny the employee's claim.

Unfortunately, the basis for calculating compensation under the New Zealand provision is not made clear. Common law principles will undoubtedly guide arbitrators in awarding compensation. In addition, the standard procedure does not allow an individual employee to refer his grievance to arbitration. A complaint of wrongful dismissal is essentially a personal grievance and it may be difficult for the employee to convince his union to proceed with his claim. Further, a non-unionist may be unable to invoke the grievance procedure.

(ii) The Trade Union and Labour Relations Act 1974 (U.K.)

The British unfair dismissal provisions avoid some of these problems but encounter others. As mentioned earlier, the Act appears to give a remedy to an employee dismissed for petty or trivial reasons related to his conduct. Moreover, the complaint may be made by the employee himself. If the Act empowered industrial tribunals to order reinstatement and the compensation provisions were altered to reflect a concept of job property, individual employees wrongfully dismissed in Great Britain would be in a much more secure position than their New Zealand counterparts. With these modifications, the British scheme would be a useful model for local legislation.
C. Unlawful Dismissal

An employee dismissed in breach of the victimisation provisions of the industrial arbitration statutes is already entitled to reinstatement. In the wages board states, the victimisation provisions make no mention of reinstatement. Reinstatement should be available in all jurisdictions to employees dismissed for any form of legitimate and lawful industrial activity.

(i) American experience with reinstatement in victimisation cases

A recent study\textsuperscript{10} of the reinstatement remedy under the National Labor Relations Act casts doubt upon the efficacy of this form of relief in victimisation cases. Of the seventy employees reinstated in pursuance of the Act, sixty had subsequently left their employment. Over sixty-six percent of those who had relinquished their job gave "unfair company treatment" as their reason for leaving. This is an astonishing figure. Of even greater significance was the finding that 59% of those ordered to be reinstated refused to return to their position.\textsuperscript{11} And over 88% of the employees who turned down reinstatement gave "fear of company backlash" as the reason for their refusal.\textsuperscript{12}

Around 40% of America's work force in the private sector is organised but employers staunchly resist the spread of unionism. This may explain why reinstatement has met with such limited success. There is a tendency among employers, in the unorganised sector particularly, to victimise union activists even after reinstatement.\textsuperscript{13} Another reason for the failure of the reinstatement remedy in many cases could be the delays involved in obtaining an order.\textsuperscript{14} While his dismissal is being challenged, an employee will find it necessary to seek other work. When the reinstatement order ultimately issues, the aggrieved party may prefer to stay in his new position rather than risk victimisation in
his former position.

The American study is instructive for two reasons. Firstly, it shows that protection against victimisation should continue for a period after reinstatement. Secondly, it suggests that reinstatement may not be appropriate in all cases.

If an employee does not wish to have his job back he should not be denied compensation. Yet compensation is not available in these cases in any Australian jurisdiction. One way of correcting this defect would be to expand the scope of the unfair dismissal proposals put forward earlier.

The Trade Union and Labour Relations Act 1974 (U.K.) treats victimisation dismissals as automatically unfair. And the same remedies are provided for an employee dismissed for trade union activities as are available to an employee otherwise unfairly dismissed.

This pattern could be followed by legislation in each state. In the Commonwealth sphere it would be possible to include compensation within the range of remedies which may be granted by the Australian Industrial Court in victimisation cases.

Basically, then, the remedy available to employees dismissed because of their legitimate industrial activities should be reinstatement or compensation at the employee's option.
1. Introduction

Industrial tribunals have taken the first few halting steps towards dealing with redundancy but much more remains to be done. In this chapter, proposals for reform of selection criteria, redundancy procedures and the assistance and compensation provided for retrenched workers will be examined. Since take-overs, liquidation and receivership all involve potential redundancy they are dealt with here rather than in a separate chapter.

2. Criteria for Selection

Once a company decides that retrenchments are necessary it faces the problem of who to dismiss and who to retain. In many cases, an employer’s freedom of selection is restricted by the qualified seniority principle which is often incorporated in industrial awards or agreements or implied from a trade custom.¹

The seniority rule helps to overcome resistance to change and is readily understood by employees² but it can create difficulties. It directs attention primarily to the employee’s length of service even though this may have little bearing upon the cost of redundancy for a particular employee.³ Moreover, it takes account of the age of the employee only indirectly. Yet there is a wealth of evidence to suggest that older workers have more to lose through redundancy:⁴ in general, they find it more difficult to obtain new employment, and they are often reluctant to undertake retraining. Again, the seniority formula gives no weight to family responsibilities and commitments: a middle-aged worker with six children and nine years’ service may be retrenched before a thirty-five year old employee with ten years’ credit.
French law attempts to strike a balance by requiring employers to establish rules governing the order of retrenchments. Seniority, qualifications, and the number of dependants must be considered in planning retrenchments. The law does not fix any priority among these factors. Nor do the plant rules which often merely restate the statutory criteria. Despite this lack of clear guidance, French law does at least remind employers that their decision is not a purely economic one. Its major advantage is that it highlights the wider implications of redundancy; its major shortcoming is that it largely ignores the age of the employee.

By contrast, Swedish law treats the age of employees facing redundancy as an important, although secondary, factor. Seniority is the paramount consideration but where the employer must choose between two employees of equal seniority, he must retain the older employee. Swedish law also demands that employees be given up to five years' extra seniority at the rate of one month for each month service after age forty-five. Thus, an employee who joined a company on his forty-fifth birthday and served for ten years would be credited with fifteen years' seniority. This formula has an attractive simplicity. It could also be used to convert other variables such as number of dependants into units of seniority.

Probably the best course would be to convert age and family responsibilities into notional seniority units. These could be added to actual seniority, and selection for redundancy could be determined in reverse order of seniority (actual and notional) 'all other things being equal'. This rider would still allow management to retain a foreman or supervisor over an unskilled worker with a higher seniority rating.

The costs of progress through technological changes and rationalisations in industry should not be borne solely by the workers management is prepared to sacrifice. The community has a responsibility
to ensure that the burden of redundancy is distributed in a humane manner. Ultimately, it is the community which benefits from these changes in the structure of employment. Moreover, in the short term, the impact of redundancy upon a local labour market can be devastating. It is not just workers themselves who are affected by the displacement. Their dependants and their creditors - all citizens of the community - are also involved. In short, redundancy is a community problem. The criteria for selecting employees for retrenchment should reflect this fact.

3. **Redundancy Procedures**

   (i) *Prior Consultation with Workers' Representatives.*

   Under French law, an employer is obliged to consult the works committee before retrenching employees. It must advise the committee of the timetable for lay-off and the steps taken to arrange for internal transfers, alternative employment or retraining. The committee is also entitled to a special report on what will be done to assist older workers who will be made redundant. While the committee's role is purely consultative, it can suggest alterations to the list of employees selected for retrenchment.

   The period of advance notice which must be given is set by centrally-negotiated agreements which bind all employers. Its length varies with two factors: the cause of the redundancy and the number to be retrenched. Where the redundancy is caused by a fall-off of product demand, the notice ranges from eight days (where ten to forty-nine persons face retrenchment) to one month (where over one hundred employees are involved). For redundancies attributable to structural or technological changes, the notice period starts at one month, where ten to 200 are to be retrenched, and rises to three months where over 300 are involved.
In contrast, there is no set period of advance warning required from a West German employer. He is simply obliged to inform the works council 'within a reasonable time and in detail' about planned structural or technological changes or plant shutdowns. The works councils, however, rarely receive less than six weeks' notice of redundancies. Thus, both French and German law recognise the right of workpeople's representatives to be notified in advance of an impending redundancy. A similar requirement could easily be imported into our law.

Employees need time to adjust to the impact of redundancy, to plan their future, and to obtain other employment or retraining. It may take some time to explain the reasons for the retrenchment to the employees. This is essential if the lay-off is to be carried out in a compassionate manner. The great advantage of the French and West German provisions is that they allow time for adequate arrangements to be made for the employees retrenched.

A definite period of collective notice is preferable to a vague direction to notify workers' representatives 'as soon as possible' or 'within a reasonable time'. The latter requirement would seem too imprecise to be of any real value.

In cases of technological changes and major re-organizations such as plant shutdowns, three months' notice might be appropriate. Where the retrenchment is caused by a decline in product demand or an economic recession, the employer does not have the same degree of control over the situation. He cannot programme the change: it just happens. In these circumstances a shorter notice of, say, two weeks would seem reasonable. In both cases, the warning periods should be in addition to the individual notice to which an employee is entitled. Further, the advance warning should contain a statement of the reasons for the
proposed retrenchment. This might prevent rumours having an unsettled effect upon the staff.

Take-overs, receivership and liquidation raise special problems. In its evidence before the Jenkins Committee, the British Trades Union Congress made two submissions on the subject of take-overs. Firstly, it suggested that employees' representatives should be given a copy of the offer when the take-over circulars are filed with the Registrar. Secondly, it recommended that these circulars state the offeror's identity and its intentions as to the future of the company and the employees.\textsuperscript{11}

The Committee saw merit in the second proposal but felt that a statutory requirement to that effect would be impractical.\textsuperscript{12} However, British Stock Exchange requirements provide that such a statement shall be included in the take-over offer.\textsuperscript{13} But, as Weinberg points out, the statement is 'obviously not meaningful and is honoured in the breach rather than in the observance'.\textsuperscript{14}

Unfortunately, the Jenkins Committee did not comment upon the Trades Union Congress' first proposal. It felt that its terms of reference prevented it from considering the 'broader economic and social questions' often raised in take-over bids.\textsuperscript{15}

A statutory provision requiring directors to provide company employees and their representatives with copies of the formal take-over offer would save employees from the indignity of first hearing about the take-over bid through the press.\textsuperscript{16} Clearly, secrecy must be maintained during the discussions preceding a take-over offer; a premature disclosure could cause considerable fluctuation in the price of shares.\textsuperscript{17} But after the offeror makes a formal take-over bid employees should be advised forthwith. It may be argued that giving early notice of the take-over offer to employees might well unsettle the staff and prejudice the offeree's chances of selling the business
as a going concern. On the other hand, an early disclosure of the formal offer to employees will force the parties to consider the interests of employees. What was once a matter of collusion and secrecy would become a matter of bargaining.

Since voluntary and compulsory winding up and the appointment of a receiver or a receiver and manager may effect employees' job security, employees and their representatives should be notified of these developments at the time of the resolution or order, as the case may be. In addition, in a compulsory winding up, management should be obliged by law to advise employees forthwith that the winding up order automatically terminates their contract of service. This would avoid the situation where an employee unwittingly works out his period of notice in the service of the liquidator.  

(ii) **Notice to Government Employment Services**

French law requires employers to obtain the approval of the Ministry of Labour before discharging any workers on grounds of redundancy. This is a significant fetter on managerial rights.

The French officials are entitled to a detailed report of the reasons for the proposed lay-off. They may also inquire whether the works committee has been consulted and direct the employer to consider the committee's proposals for mitigating the hardship of the redundancy. In addition, the authorities may encourage the employer to adopt work-sharing measures such as restriction of overtime and reduction in the working week.

If retrenchment cannot be avoided, the Ministry has a number of strategies at its disposal. It may recommend alterations to the list of persons selected for retrenchment; it may stagger the timetable for lay-offs; it may propose relocation or internal transfers; it may persuade the employer to establish a training scheme with the help of
government subsidies. More importantly, the Ministry may withhold its approval until it is satisfied that all retrenched workers are placed in other employment. And even if approval is granted, it may insist that redundant workers be given priority in re-employment at a future date.

The approach of the French authorities differs from locality to locality. If there is a heavy demand for labour in the area, the officials may grant their approval as a matter of course. Where work is scarce, their approach may be more stringent. At one time, the state of the local labour market was their main guideline but a circular of the Ministry of Labour in late 1962 stressed that officials should attempt to avoid the 'often unhappy' consequences workers face 'even when the general employment situation is such as to permit a rapid re-employment'.

If an employer does not abide by the procedure, the dismissals will nevertheless stand. Thus the employer retains the ultimate right to retrench employees regardless of the legal formalities: failure to seek the approval of the Ministry of Labour merely attracts a criminal sanction. Yet, as Mukherjee points out, the Ministry of Labour does not need to coerce employers for it has positive strategies to offer. Employers are prepared to allow the Ministry its watchdog role in return for government-subsidised retraining or relocation schemes.

Unlike his French counterpart, the German employer need not seek the approval of the public authorities for his proposed retrenchments. His obligation is limited to giving the officials advance notice. The German authorities cannot prevent the redundancy although they can delay it for one month. This 'breathing space' gives the authorities time to arrange other employment for the workers to be retrenched. Having given the advance notice, the employer must promptly proceed with the cut-back. If the retrenchments have not been finalised
within four weeks, the employer must give the public authorities another advance notice and the procedure starts over again. Not only is the employer obliged to give notice of impending lay-offs, he must advise the public authorities a year in advance if he can foresee any changes within the enterprise which are likely to affect his demand for labour.

If an employer does not comply with the advance notice provisions, he is liable to pay the costs of retraining the retrenched workers for a maximum of six months. This is the deterrent for myopic manpower policies.

To sum up, both French and West German public employment authorities have an established right to be consulted prior to collective dismissals on grounds of redundancy. As noted earlier, a similar requirement may at present be inserted in New South Wales and South Australian awards dealing with the duties of employers upon the introduction or proposed introduction of automation in the industry concerned. The scope of these provisions should be extended to cover all forms of redundancy. They could then serve as a model for the other states. Once again, the period of advance notice would vary depending on the cause of the proposed retrenchment. The periods suggested for prior consultation with workpeople’s representatives would seem appropriate here also.

Advance notice to local employment offices is an essential part of the manpower planning involved in a retrenchment. It allows the officials time to interview the employees retrenched and ascertain whether they will be suitable for retraining. It also enables the authorities to place the retrenched employee in other work if retraining is impractical or if the employee is unwilling to undertake retraining.
(iii) **Should the Decision to Retrench be Unilateral?**

As stated earlier, the Ministry of Labour in France is empowered to review and investigate the employer's reasons for the proposed retrenchment. In effect, the officials assess whether there is a need for a cut-back in staff; employers are not the sole judges of the need for retrenchment.

On the other hand, West German employers retain more of their prerogative. The West German Public Employment Service may postpone retrenchments but it cannot prevent them taking place. This authority, however, is not the only body with a recognised role in redundancy procedures.

West German employers are required to negotiate with the works council over structural changes in the enterprise. Where the parties cannot reach agreement, either side may appeal for mediation by the president of the statewide labour office. If no action is taken or if mediation fails, the matter may be referred to the conciliation board. Here again, the board is cast as a mediator. It is not empowered to arbitrate; its sole function is to bring the parties together and promote discussion.

If the matter in dispute between the parties is not the structural change itself but rather the arrangements to be made for employees affected by the change, the conciliation board can arbitrate. Thus, where the parties fail to agree upon the compensation to be paid to the employees facing retrenchment, the conciliation board may decide upon an appropriate 'social plan' for these workers. The board is, however, expressly directed to take into account the economic implications of its decision on the enterprise.

In sum, although West German employers retain the right to decide upon retrenchment, it is now a negotiable issue. It is not safely within the realm of managerial prerogatives. Nor is it a matter
for co-determination. Commenting on the role of German works councils in redundancy procedures, Mukherjee observes:

What is already established is a clear right of those whose jobs are going to be at stake to join in consideration of ways and means of averting or reducing the upheaval of redundancy.\(^{28}\)

In general, Australian tribunals regard the decision to retrench as a matter for management, a unilateral decision not open to review. Is this one managerial prerogative that needs to be modified? The French and German provisions suggest an affirmative answer. But some matters must remain within the realm of management. And a decision to cut-back staff is essentially a business decision. This is not to say that management's right to reduce its payroll should be absolute and unfettered. The impact of management's decision upon its workers should clearly be a negotiable issue.\(^{29}\) This would enable the unions to bargain over severance pay, retraining and relocation schemes and allowances, internal transfers and attrition programmes. The union should also be entitled to challenge anomalies and inconsistencies in the list of employees selected for retrenchment.

4. Assistance and Compensation Provided for Retrenched Workers

The Australian Government recently declared its commitment to an active manpower policy.\(^{30}\) In accordance with the recommendations of the Cochrane Committee\(^{31}\) existing training schemes were rationalised and replaced by the National Employment and Training Scheme (N.E.A.T.). This scheme which came into operation on 1 October 1974 is financed out of general revenue.\(^{32}\)

The success of a training scheme may be judged by the quality of training or the success in placing its graduates. But perhaps the most important criterion is the ability of the scheme to attract applicants.
The Cochrane Committee pointed out that the 778 persons undertaking training in existing schemes at the end of 1973 was 'an extremely low percentage compared with other developed industrial nations'. With this in mind, the Committee put forward several proposals designed to improve training facilities and encourage workers to enter retraining. In particular, it recommended that the average adult male award wage be adopted as the basic living allowance for full-time trainees. In December 1973 this wage was $76.28 per week. In the Committee's view, retrainees under eighteen years of age should receive 50% of this figure, while retrainees over eighteen years but under twenty-one years with no dependants would be entitled to 75% of the basic living allowance. The Committee proposed that further allowances be paid to trainees who were required to live away from their normal homes during training. The new training scheme would also pay a trainee's tuition fees and provide a fixed annual allowance for books and equipment necessary for training.

The Committee also recommended that employees displaced by structural changes induced by government policy measures should not forfeit his entitlement under the Australian Government's adjustment assistance scheme. It proposed that these employees be allowed to retrain on the adjustment grant for six months after their retrenchment. Then they would be eligible for the more modest training allowance under N.E.A.T.

The suggested full-time training allowance has one fundamental flaw: it is simply not sufficient to attract large numbers of retrenched employees to retraining. Employees base their financial commitments on their wages. They might not be able to afford a drop of even $10 per week in order to retrain. More likely, a redundant employee will take the first job offered to him so that he will have time to look around for a more suitable position. He may even take a second job.
working nights as a barman, or week-ends as a pump-attendant in a garage. Any job will do as long as he does not suffer a loss of income. Income maintenance is the 'name of the game'.

Some overseas countries have realised that employees must be given an incentive to retrain. In France, for instance, persons over thirty can undertake retraining for a full year on an allowance equal to 110% of the earnings in their previous jobs provided certain conditions are satisfied.\(^{42}\)

Compared with the French provision, the training allowance proposed by the Cochrane Report is a miserly sum.\(^{43}\) The reasons for the Committee's recommendation\(^ {44}\) of a uniform allowance tied to the average adult male award wage are not material in the present analysis. The point is that the training allowance will not be enough to induce all, or even a majority, of the workers retrenched to enter full-time retraining. The importance of this limitation cannot be overstressed.\(^ {45}\)

In Daniel's survey\(^ {45}\) of workers displaced by the closure of the A.E.I. Woolwich factory in South East London, only 12% of the respondents considered retraining under a government scheme.\(^ {46}\) Of this group, 29% advised that they did not go ahead and apply for retraining because the training allowance offered was too frugal.\(^ {47}\) This was by far the most common reason for rejecting the idea of retraining. To persons considering retraining, the level of training grant is of paramount importance.

The unions are also unlikely to be enthusiastic about the level of training allowance. As one union official from a prominent white collar union put it: 'We were adamant about this in our evidence to the Cochrane Committee. The training allowance must be related to the trainee's previous income. Many of our members are earning in excess of $120 per week'.\(^ {48}\)
But even if income maintenance were guaranteed, there will still be redundant workers who either do not know about the retraining scheme or who, for some reason, are reluctant to retrain. To quote Mr G.W. Ford, special adviser to the Australian Government on training schemes:

Research has shown that even in small communities, and using radio, television, endless terminating announcements and all the rest of it, 50 per cent of the people in some places who were eligible for retraining did not know that there was any programme available for them.\(^49\)

The Cochrane Committee itself conceded that some potential trainees may be ignorant of training facilities or may lack the confidence and knowledge to seek training assistance.\(^50\)

Some workers will not even consider training as a possible strategy. Daniel's survey elicited several reasons for this attitude. If a worker feels he is too old for retraining or if he has already acquired a set of skills or a trade, he will often be unwilling to retrain. Again, a retrenched worker who has found, or is confident of finding, other employment will commonly dismiss the idea of retraining.\(^51\)

The N.E.A.T. scheme is still in its infancy and its teething problems are serious. As Mr Cameron, Minister for Labour and Immigration, admitted in November 1974: 'The pressures on the scheme at a time of high unemployment are immense'.\(^52\) In the same month, it was reported that some applicants for retraining would have to wait up to four-and-a-half months before being interviewed by N.E.A.T. officials.\(^53\) Moreover, many waited in vain. At least 9,000 of the first 20,000 people to apply for retraining under the scheme were refused. One of Mr Cameron's advisers explained: 'The Government has to take a realistic look at the employment market and provide assistance to those who will be fairly sure of getting a job. Anything else would be a waste of time'.\(^54\)
Retraining, then, is not a panacea for retrenched workers. It must be combined with other measures over a broad front to cushion the impact of redundancy. And employers must assume some responsibility in this area.

5. The Role of the Employer

When an employer decides to retrench staff he will usually face strong opposition from the union's involved. The union's initial strategy is often to close their ranks and resist any reduction in the work force. But once it appears that a cut-back in staff is inevitable the parties settle down to hard-line bargaining over the assistance and compensation to be given to the retrenched workers.

Some companies have already formulated detailed policies on redundancy and these may form the starting point in negotiations. But an abstract retrenchment policy may be changed significantly in response to union pressure and public opinion. The ultimate solution may be a 'package deal' involving a variety of measures.

Not all negotiated agreements on redundancy are generous or even comprehensive. When Leyland (Australia) dismissed over 1,000 employees at its Waterloo plant in late June 1974, it was reported that the retrenched workers received one week's pay in lieu of notice and pro-rata four weeks' annual leave. The company attributed the retrenchments to the 'credit squeeze' and a shortage of components. Yet, less than a fortnight later, the Prime Minister, Mr Whitlam, denied that the government's economic policies were responsible for the Leyland cut-back. Mr Whitlam stated: 'It is not the government's fault if Leyland finds it more difficult to sell its products than other companies find to sell theirs. It would appear then, that the workers dismissed by Leyland would not be eligible for the Australian Government's adjustment assistance. They would be forced
to fall back on their rather meagre severance pay until they found another job. And jobs were not easy to find in July 1974.

6. The Role of Industrial Tribunals

To this point, industrial tribunals have provided little guidance for unions and employers negotiating a redundancy agreement. Indeed, in some cases the tribunals have flatly refused to award severance pay to the retrenched workers. When the tribunals do commit themselves on the level of severance pay, they are quick to stress that their findings should not be used as a precedent. In 1967 the then President of the Conciliation and Arbitration Commission, Sir Richard Kirby, claimed that the time had not come for federal industrial tribunals to devise a redundancy 'code'. The rash of retrenchments particularly in 1974 suggests that this view must be revised.

Not all employers will be generous or humane in their treatment of redundant employees. The industrial tribunals must be prepared to intervene if the unions are unable to negotiate a reasonable redundancy agreement with an employer who retrenches workers. The timorous approach evinced by some tribunals on the issue of redundancy can be traced to doubts about jurisdiction. Much of this doubt can be removed by a specific provision in the definition of 'industrial matters' confirming the tribunals' jurisdiction in these cases.

But more than this, the tribunals must reassess their attitudes to managerial rights. Some tribunals have already accepted the need to restrict managerial prerogatives in redundancy situations. This approach must be extended.

Once the basis of the tribunals' jurisdiction is established, they would have much more control over the dispute and could hammer out workable solutions to some of the problems faced by retrenched
workers. There are now a number of guidelines for the calculation of severance pay. It remains for the tribunals to broaden their approach to the problem so that other strategies for displaced employees are not neglected.

Yet, even if industrial tribunals assume an active role in handling redundancy disputes, there will still be workers retrenched with no severance pay or any other assistance. Employees whose contracts of employment are not regulated by the arbitration systems would be left without any protection against redundancy. For these employees, a solution must be sought in legislation, and one pattern of legislative action is the British Redundancy Payments scheme.

7. British Redundancy Payments Scheme

(i) Mechanics

With the Redundancy Payments Act 1965, Britain forged a distinctive model. Basically, the scheme is designed to provide compensation for certain employees dismissed by reason of redundancy. This compensation is paid from a fund established by the Act and financed by employer contributions. The levy upon employer's is collected by the Department of Health and Social Security along with National Insurance contributions. Employers pay a fixed sum for each employee working a minimum of twenty-one hours per week.

When the employer declares a redundancy he must pay the retrenched workers the amount of compensation prescribed by the Act. He is then entitled to a rebate from the Redundancy Fund. If the employer is insolvent, the fund pays the compensation direct to the workers dismissed.

(ii) Dismissal

Under the Act, a redundant employee becomes entitled to
severance pay upon dismissal. Dismissal involves the unilateral act of an employer. If the employee agrees to a variation in the terms of his contract of employment which would, if imposed upon him, amount to a redundancy, and later resigns because he is disillusioned with the new arrangement, he has not been dismissed. Thus, he forfeits his 'right' to a redundancy payment.

Again, an employee who is allowed to resign after his employer has issued an advance warning of an impending redundancy is not entitled to statutory compensation, for an advance warning does not constitute a notice of dismissal. The Code of Industrial Relations Practice recommends that employees be given as much warning as practicable. Yet, an enlightened management following this advice could defeat the entitlement of employees who took advantage of the early warning to secure other employment.

An employee under notice of dismissal may give a counter-notice to his employer without sacrificing his redundancy payment. Yet, here again, as in the British unfair dismissal provisions, there are two potential pitfalls in the procedure to be followed. Not surprisingly, employees have already run foul of these intricate requirements.

Another trap for the unwary exists in the provisions dealing with 'constructive dismissal'. An employee is deemed to be dismissed if, because of his employer's conduct, he justifiably terminated his employment without notice. Thus, an employee who is courteous enough to give his employer notice in these circumstances forfeits his entitlement.

(iii) Redundancy

It is incumbent upon the employee to establish that he was dismissed. The onus then shifts to the employer to show that the
dismissal was not caused by redundancy. In discharging his onus, the employer faces a statutory presumption that a dismissal is by reason of redundancy unless the contrary is proved. But an employer's evidence that he dismissed an employee for misconduct will rebut this presumption even if there is objective evidence that a redundancy has occurred. Thus, while the tribunal must examine the facts objectively to determine the real cause of the dismissal, the employer's evidence of the reason for the discharge will carry great weight.

(iv) Compensation

Only employees who have been continuously employed for at least 104 weeks with one employer are entitled to a redundancy payment if they are dismissed by reason of redundancy. The amount of compensation depends upon the length of an employee's continuous service for one employer, the employee's age and his weekly wages. Certain interruptions do not break an employee's continuous service.

Workers aged between eighteen and twenty-one are compensated at the rate of one-half of a week's pay per year of continuous service. Workers in the twenty-two to forty age bracket are credited with one week's pay per year of continuous service, while workers between forty-one and sixty-four years of age receive one-and-a-half week's pay per year of service if they are retrenched. Men over sixty-four and women over fifty-nine suffer an erosion of potential benefits at the rate of one-twelth per month. Thus a male employee, six months before his sixty-fifth birthday would be entitled to only half the benefit he would have received had he been dismissed at age sixty-four.

(v) Contracting out

With the exception of certain types of fixed term contracts,
individual employees are not permitted to contract out of their entitlement under the Act. 88 On the other hand, collective agreements providing for voluntary severance pay in lieu of the statutory benefits may be approved by order of the Minister upon the joint application of the parties. 89 There is no express provision requiring the Minister to withhold the exemption unless the benefits under the agreement are as generous or more generous than those available under the statutory scheme. On the other hand, he will not approve a private scheme unless the collective agreement gives the industrial tribunals jurisdiction over disputes arising out of the agreement. 90

(vi) General assessment

As a measure to improve job security the Redundancy Payments Act 1965 scores very lowly. This is not surprising. One of its principal objectives was to reduce resistance to changes in workforce so that management would be able to make more effective use of its manpower. 91 The Act rests on an underlying philosophy that labour mobility is good for the economy. 92 Accordingly, it does nothing to secure a worker's hold on his job. 93 On the contrary, it encourages workers to surrender their security of tenure for cash compensation. 94

Nor does the Act do much to assist a retrenched worker obtain another job at a suitable level. The statutory compensation was intended to encourage retrenched workers to be more relaxed and selective in their search for another position. 95 But Daniel 96 found that the lump sum payments are commonly set aside as savings while employees often take the first job they can find. Further, lump sum payments are not regarded as income because employees find it difficult to relate them to their weekly pay. In Daniel's survey, 28% of the workers who were still out of work over six months after their retrenchment had not drawn on their lump sum for living expenses. 97
It is possible to argue that British employees have not lost job security through the statutory scheme. Rather they have sold it for adequate compensation. This argument implies that a worker makes a rational decision to exchange his job for a lump sum representing the capitalised value of his position. In fact, the worker plays no role in the decision to cut back the workforce. Nor does he have any choice if his employer selects him for redundancy.

Moreover, the cash compensation payable under the statutory scheme is based upon two criteria: length of continuous service and age. Do these criteria accurately reflect the costs of redundancy? It appears that there is a direct relationship between age and period of unemployment after redundancy but long service with another employer may, in fact, be an advantage for a job-seeker.

In addition, the statutory formula makes no allowance for the employee's loss of a sense of security in his job or promotion prospects, for a decline in intrinsic interest in the new job, for the forfeiture of pensions and fringe benefits or for the period of unemployment. It ignores all these factors which are part of the real costs of redundancy. A firm majority (59%) of the respondents in Daniel's survey stated that they would prefer their old jobs to their current occupation even allowing for the redundancy payment they received. This suggests that the statutory severance pay is far from adequate compensation for a compulsory transition from one job to another. The lump sum benefits are merely statutory minima. To regard them as even a rough estimate of the retrenched worker's loss is to mistake rhetoric for fact.

Not only is the statutory compensation inadequate, it is simply not available for the great majority of workers retrenched in Britain. It was estimated that in 1971 only one-third of those dismissed by reason of redundancy received statutory payments. On this estimate,
nearly three-quarters of a million retrenched workers failed to qualify for compensation. This is a staggering figure and a grim reminder of the limited coverage of the Act.

Why are so many employees outside the statutory scheme? The answer probably lies in section 11 of the Act. Only workers retrenched after two years' continuous service with one employer are entitled to a redundancy payment. The majority of workers declared redundant have not apparently served that qualifying period. Employers probably select these short-term employees to avoid incurring the expense of a redundancy payment.

This is a recurrent worry for a retrenched worker. The sense of insecurity he feels after his first dismissal is aggravated by the knowledge that his new position is even more vulnerable. As more and more persons are made redundant, fewer people will have sufficient service to qualify for a redundancy payment. The problem is 'snowballing'.

Thus even if the drafting flaws in the Redundancy Payments Act were avoided, its shortcomings would not disappear. It does not enhance job security. Nor does it adequately compensate for a redundancy. If it can be regarded as a statutory minima for retrenched workers some of its defects can be excused. But there remains the problem of extending the coverage of the Act. This could be done by shortening the period of continuous service required before a displaced worker qualifies for a redundancy payment. Only with substantial modifications could the British Redundancy Payments scheme be a model for local legislation to protect those employees who are not safeguarded by the arbitration system. This legislation would provide a statutory 'floor' on which negotiated agreements and arbitrated awards could build.
8. Conclusion

Severance pay is not a magic formula for solving the problems of redundancy. But together with other measures it can do much to cushion the blow of retrenchment especially if the compensation accurately reflects the worker's loss. It should be designed to tide the employee over until he is able to obtain other suitable employment. Periodic instalments are, therefore, preferable to lump sum payments. The significance of this form of compensation should not be underestimated: for many employees unemployment benefits are simply inadequate and retraining is neither feasible nor attractive.

Responsibility and participation go hand-in-hand. To increase workers' responsibility over their work inevitably involves some extension of their participation in the decision-making process which affects that work. There are several ways of achieving this form of participation. Only one, the West German scheme of Mitbestimmung ("co-determination"), need concern us here.

This section focuses on the West German model for a number of reasons. First, Germany has perhaps the longest history of formal worker participation of any of the major industrialised countries. Second, advocates of co-determination see it as a major factor contributing to the 'economic miracle' of German post-war reconstruction. Third, the West German scheme has had a pervasive influence on the labour law of many Western European countries and the Draft Statute for the European Stock Corporation relies heavily on the West German cadre. Fourth, like Australia, Germany has a tradition of resolving its industrial relations problems through machinery established by legislation. Finally, the West German scheme of co-determination has attracted more comment and controversy than worker participation schemes in other countries.

This section then, will concentrate upon the law and practice, the merits and demerits of co-determination. It will also be instructive to consider whether the West German model would be viable in the present climate of Australian industrial relations.
(i) Meaning of the terms 'Full' and 'Partial' Co-determination

The terms 'full' and 'partial' co-determination can be explained by reference to the two-tier structure of the German board. Each firm has two boards: a supervisory board (Aufsichtsrat) and a managing board (Vorstand).

The supervisory board may elect and remove the members of the managing board and may nominate the chairman of the managing board. Its primary function, as its name implies, is to supervise the executive board. It is entitled to regular business reports from the managing board and may demand additional information, for example, on resolutions at the shareholders' meetings. The executive board is also obliged to submit the corporation's annual financial statements, the report of management, and the auditor's examination report to the supervisory board.

Despite these broad powers, the supervisory board may not itself manage. This is the exclusive province of the executive board. Thus, the typical executive functions carried out by an Australian board of directors would in West Germany be undertaken by the managing board, not the supervisory board.

(a) Full Co-determination

In the full co-determination model established by the Co-determination Law of 1951 there are normally eleven members of the supervisory board, with an equal number of employee and shareholder representatives. The managing board has only three members, one of whom is a labour director approved by a majority of the employee representatives on the supervisory board. Labour directors usually have a background in works council, political or trade union affairs. A commercial manager and a production manager usually make up the complement.
Each member of the executive board has equal status. The labour director is expected to participate objectively in the formulation and administration of general executive policy. While he is not intended to concentrate exclusively upon personnel matters, he would be unwise to neglect them: his authority is undoubtedly enhanced if he has the backing of the works council and the labour members of the supervisory board.

To sum up, there are two distinctive features of full co-determination: parity of representation on the supervisory board and a labour directorship on the executive board. At present, full co-determination exists only in the coal, iron and steel industries (about 7% of industry as a whole), and there only in enterprises employing at least 1,000 employees.

(b) Partial Co-determination

The partial co-determination introduced by the Works Constitution Act of 1952 gave employees one-third representation on the supervisory board. The maximum number of members on the supervisory board varies with the amount of the firm's basic capital. The absolute maximum is twenty-one, the minimum three. The employee representatives are elected by all the employees in the enterprise in a secret ballot. At least two of these delegates should be employed in the firm. Additional candidates may be recruited from the appropriate union.

The Works Constitution Act of 1952 also provided for works councils in each plant above a certain size. Councillors are selected in triennial elections by a secret ballot of all the workers in the undertaking. The 1952 Act gave works councils the right to be consulted about a wide range of personnel and economic matters, and on some measures the council had the power to veto managerial decisions. On the recommendation of the Biedenkopf Report, the co-determination
rights of works councils were extended in 1972. The West German scheme is an interesting model for involving employees in a company's decision-making process. There is, however, considerable doubt about the effects of co-determination upon the participants and the economy generally.

(ii) Effects of Co-determination

One must be cautious in sifting through commentators' accounts of co-determination. In the first place, it seems that some observers have approached their studies with pre-conceived notions. Secondly, and more importantly, second-hand accounts inevitably involve a certain degree of distortion: a commentator must, in many cases, rely on what the participants say they are doing rather than what they are, in fact, doing. For the student with no grasp of the German language, the dangers are heightened. To avoid these pitfalls the following account takes a conservative view of the benefits attributed to co-determination.

(a) Impact on Management

The consensus of opinion appears to be that management has learned to live with co-determination. The expected deadlocks within the supervisory council have not eventuated. Indeed, most decisions of the supervisory board are unanimous.

In partial co-determination, employee representatives are in a minority on the supervisory board. While they may influence the board's decisions, the overriding power rests with the shareholder representatives. To quote one worker representative on the supervisory board of Ford-Werke in Cologne on his experience with issue of investment policy: 'I don't get anywhere. I'm in the minority. We state our point of view, but we always lose the vote.'
Nor has co-determination unduly hampered the executive board. On the other hand, it seems that the 'style' of management has changed, particularly in the full co-determination sector. Gone is the autocratic, almost para-military style of entrepreneurial leadership which typified much of German industry before and during World War II. Hartmann sees this as a clear achievement of co-determination. But in view of the recriminatory mood of workers and the occupation authorities after the war, some modification in management's attitudes was politic and, indeed, unavoidable.

German management's ability to survive under co-determination can be partly attributed to the devices it has used to cushion the impact of the scheme. It is too early to predict whether the Works Council Act 1972 will improve this position but an employer is now obliged to negotiate with the works council on a wider range of issues and disclosure requirements have been strengthened. It would seem that the works council, at least, can no longer be ignored or side-stepped.

The attitude of German management is perhaps best illustrated by their reaction to plans to extend full co-determination beyond the coal and iron and steel industries. While tolerating the present system of co-determination, management is bitterly opposed to its extension. As one German manager complained:

You can no more have democracy in industry than in the army ... The workers get a fixed wage whether or not the firm is doing well. What right therefore have they to a say in the running of it?

The effect of co-determination upon lower levels of management is difficult to estimate. Some thought it would undermine the position of the foreman. An early account found no evidence to support this prediction. On the contrary, it claimed that under co-determination a foreman's job was more attractive because he was less concerned with
discipline and detailed instruction. Foremen reported that co-
determination gave employees a feeling of responsibility which made
them more reliable and attentive. 37

On the other hand, lower and middle management tends to be
neglected by the co-determination scheme. 38 The German Works Council
Act 1972 will not change this. 39

(b) Impact on the Unions

The unions have gained a great deal through co-determination. It grants them formal recognition within plants; 40 it gives them a
major role in selecting the labour director and the worker represent-
atives on the supervisory board; it provides a rallying point for the
factions in the labour movement; and it gives their officials experience
and confidence through participation in management.

Since unions share responsibility in co-determination, they are not as free to make extortionate demands. 41 But there is little
evidence to suggest that the rank and file wish their unions to become
more militant.

The works council with its independent legal status and
extensive co-determination powers has, of course, etched into the
traditional role of the unions. 42 On the other hand, many works
councillors have union backgrounds, 43 and section 74 (3) of the German
Works Council Act 1972 declares that councillors are not prevented from
promoting the activities of their union within the establishment.
Nevertheless, it appears that the councillors are becoming increasingly
independent of the unions. 44

On some fronts, it seems that union status under co-
determination has been enhanced rather than reduced. German unions
recently lobbied for an extension of full co-determination. 45 This
is not really surprising for in the German scheme unions enjoy a lop-
sided influence.\textsuperscript{46}

(c) Impact on the Ordinary Workers

At the close of the war, German workers were demoralised and, in many cases, destitute. Co-determination helped the rank and file back on its feet. This is an historical fact. Whether German workers could have gained similar benefits under an alternative system of industrial relations is a contentious matter.\textsuperscript{47} The important point for the present is that German workers have improved their economic and strategic positions under co-determination.\textsuperscript{48} In Vagt's conservative estimate:

full co-determination has somewhat spurred the rise of wages in the coal and steel industries, in comparison both with other German industries and with the coal and steel industries in the rest of Europe.\textsuperscript{49}

Clegg and Spiro, on the other hand, regard the evidence attributing increased wages to co-determination as inconclusive.\textsuperscript{50} Spiro points out that coal and steel workers have always been the best-paid industrial workers in Germany.\textsuperscript{51} And West Germany's labour shortage and economic boom could well account for the higher wages obtained since co-determination was introduced. Thus, the evidence as to co-determination's effect on wages is equivocal.

Workers' fringe benefits have improved under co-determination but this might also have been caused by other factors. It could, for instance, reflect the attitudes of different managements or simply the different economic capacities in certain industries.\textsuperscript{52} In any event, Clegg observes that the improvement in welfare services 'has not clearly outpaced other industries in similar economic circumstances'.\textsuperscript{53} On the other hand, Vagts concludes that the labour representatives have secured more fringe benefits for workers through co-determination.\textsuperscript{54}
The effect of co-determination in this area is difficult to discern. German management, particularly in industries covered by full co-determination, have a tradition of paternalism. And German workers generally expect a degree of paternalism from their employers. In addition, management is obliged to offer better fringe benefits to retain a work force in what has been a labour-starved economy. On balance, it appears that co-determination has had no significant effect upon fringe benefits.

While co-determination has not guaranteed job security for workers the scheme has enabled management and labour representatives to cushion the impact of plant shut-downs and retrenchment. Labour representatives have successfully negotiated retraining and relocation schemes for retrenched workers. The Works Council Act 1972 gives the works council much greater control over hiring and firing and this will provide increased job security for workers.

There is little evidence that co-determination enhances employees' participation in the enterprise. But the Works Council Act 1972 will improve this position. The Act gives the ordinary worker the right to periodic reports from his employer and the works council. He is encouraged to take the initiative in certain matters which directly affect his position and status within the firm. The new Act also tightens the provisions dealing with works council elections and provides for minority representation on the council. More importantly, a certain number of works councillors must be freed from work. And council meetings may now be convened during working hours. These innovations cannot fail to increase the extent of rank and file participation at plant level.
(d) Impact on Shareholders

While the ordinary employee's involvement in co-determination atrophied prior to the 1972 Act, shareholders have retained considerable control over their enterprises through the general meeting and their representatives on the supervisory board. Hartmann reports that property rights have become less significant, particularly in coal and steel industries, but there is no evidence that shareholders' interests are ignored.

After an investigation in 1955, a committee of the Deutscher Juristentag reported that the investing public 'appears to see' nothing in co-determination which diminishes the value of shares. This is now rather dated, and it may not be a reliable guide to the effect of co-determination on share prices. Moreover, there is some evidence that employee representatives adopt an unorthodox approach to investment policy. This policy could well prove detrimental to shareholder interests. Opponents of the proposed extension of full co-determination have been quick to point this out.

On balance, it appears shareholders have not been oppressed by co-determination but, of the participants, they have gained least of all.

(e) Effect of Co-determination upon the West German Economy

The macro-economic effects of co-determination are perhaps the least significant. Co-determination has not prevented West Germany from enjoying a post-war economic boom. Indeed, it may have made a substantial contribution to Germany's miraculous development by institutionalising industrial discontent and curbing strikes. West Germany's export trade is highly competitive in the world market and the envy of its neighbours. There appears to be no difficulty in attracting foreign investment in West Germany, or in the full co-
determination sector of the Ruhr. Nor has co-determination clearly disturbed the balance of domestic competition. It may have contributed slightly to wage-push inflation because of the parochial way in which it operates but there are other features of the West German economy, such as the acute labour shortage, which could be blamed for this development. In any event, reduced industrial strife has, to some extent, compensated for the slight wage increases.

There is little evidence to suggest that co-determination has improved the productivity or efficiency of workers. On the other hand, even Clegg's sceptical account of co-determination concedes: 'it cannot be shown that co-determination has done any harm'.

(f) Conclusion

The origins of co-determination are rooted in German history and tradition. The mechanics of the scheme are relatively complex but the real controversy surrounds its effects. On the whole, the results of co-determination, in the favourable post-war economic climate, are a little disappointing. Perhaps its major achievements are the provision of effective channels of communication and its beneficial effect upon industrial relations. Entrepreneurial leadership appears to be more legitimate and better-informed. Co-determination has increased the number of participants in the decision-making process and enhanced the status of the worker participants. Above all, co-determination has survived. And it has survived for twenty years in some German industries. Moreover, the Bonn Government plans to extend the scheme, not abandon it. These facts alone justify an examination of the lessons of the West German experience with the model.
(iii) Lessons from the German Model

(a) Participation at Plant and Company Level

The first and most important lesson from the co-determination model is that worker participation in decision-making is most effective if it is introduced at a level close to the employees' working environment. At this level employees are more inclined and better able to participate in the decision-making process. 83

Some commentators have argued that ordinary employees will not gain a sense of participation, responsibility and self-fulfilment through representation of works councillors. 84 True, works councillors and labour representatives in general stand to gain more satisfaction and esteem from the scheme than the rank and file. But though representation is by the few, it can work for the many. 85

(b) Works Council Must Have Decision-Making Power

An effective scheme of co-determination has a local base, preferably at shop or plant level. Low-level participation will not, however, guarantee success unless the local body has some decision-making authority. After reviewing the failures of the works councils established under the Works Constitution Act 1952, the Biedenkopf Commission recommended a substantial increase in the co-determination rights of works councils. 86 Accordingly, the Works Council Act of 1972 gave the councils extended authority over a wide range of issues. 87

(c) A Role for Lower and Middle Management 88

An ideal co-determination scheme would provide a framework within which this group could ventilate grievances and influence management decisions. Indeed, a viable system of worker participation in management would provide representation for all levels of employees in the enterprise.
(d) Is Parity of Representation Essential?

At the top of this pyramidal structure, labour representatives may encounter difficulties. The West German experience with partial co-determination shows that the workers' representatives suffer from their minority position. They are out-numbered, out-maneuved, out-voted and, in some cases, over-awed.

The Bonn Government has announced plans to extend parity of representation on supervisory councils to firms having at least 2,000 employees on the payroll. It hopes to introduce this innovation through legislation to take effect from 1 January 1975.

Parity of representation will not solve all the problems of worker representatives on the supervisory board. What is needed is a prohibition of collusive practices. The management board and the shareholder members of the supervisory board should be enjoined from using tactics such as caucus meetings and sub-committees designed to by-pass the labour representatives and starve them of information.

(e) The Labour Representatives' Divided Loyalties

The labour director on the executive board has an unenviable position. To the foreign observer, the labour director in full co-determination seems to face an insurmountable problem of conflict of interests. To whom does he owe responsibility? How can he reconcile his executive duties on the management board with the interests of his constituents?

German law has taken a firm stand on this issue. Labour members of the supervisory board are required to exercise their functions 'solely for the good of the corporation and its employees while taking account of the common welfare'. This principle is equally relevant to the position of the labour director on the executive board.
Labour directors have somehow managed to juggle the competing interests. Indeed, many commentators assert that they have done this with reasonable success. But even if labour directors have resolved the problems of their position, there are dangers in expecting a labour director to "walk a tightrope" in his day-to-day activities. If he loses his balance he may be accused of violating his duty to act in the interests of the company as a whole. Alternatively, he may be branded a quisling by his constituents. There is, however, some evidence that the rank and file appreciate the labour director's difficult position.

The fact remains that the labour manager works under great pressure. In Hartmann's view this is a "built in weakness of codetermination". A labour director's reaction to the demands of his position may be counter-productive. On the one hand, he may take what appears to be the line of least resistance and become a docile partner in management. If he is completely imbued with the management philosophy his judgment may become clouded. He may lose the objectivity required of a good labour representative. Fortunately, there is little evidence that this has happened in the German scheme. On the other hand, fear of union or rank and file recriminations may force a labour director into an adversary role disrupting the smooth functioning of the board.

The labour director's task would be easier if the law were to reflect the complex nature of his duties. A director's duty formula based upon a "balance of interests" concept might well provide the solution. By expanding the breadth of his duties, the law would minimise the conflict between his duty and his interests.

It might be thought that the institution of labour director raises more problems than it solves. It could, however, be a useful limb in the company's structure if only for its symbolic influence.
Through the labour director the employees gain representation at the level which makes decisions - decisions which may ultimately affect their working lives.

(f) The Flow of Information to Rank and File

The final lesson to be learned from the German experience is that there must be a continuous flow of information from one level of employee representation to another, and more importantly, from all levels to the ordinary workers.

Strauss and Rosenstein\(^4\) point out that members of the supervisory board are prohibited by German law from disseminating business secrets revealed to them at meetings of the supervisory council.\(^5\) This may well prevent information on certain economic and production matters sifting down to the rank and file.

The labour director in the full co-determination sector could easily become remote from the rank and file workers. For this reason, it is vital for him to maintain a close contact with the ordinary workers and the other organs of employee representation within the enterprise. What little evidence there is suggests that labour directors have not become isolated from the ordinary workers.\(^6\) But communication with the supervisory board members, the works council and the ordinary workers is too important to be left to the disposition of the individual labour director. Regular contact with these groups should be required by statute. The Works Council Act 1972 acknowledged this fact and strengthened the disclosure requirements.\(^7\)

Works councillors are, however, subject to some restrictions in their use of the information they receive from the employer. They are prohibited from divulging or utilising technological or business information which the employer has classified as secret.\(^8\) The obligation applies even after they leave the council.\(^9\)
Under the Works Council Act 1972 the employees themselves are entitled to certain information from their employer. This information may give the ordinary employee a greater appetite for participation in company affairs. If employees do become interested in the management of the company, the restrictions placed upon the disclosure of 'confidential information' to ordinary workers are likely to stifle their interest. It seems then, that an effective system of co-determination requires a clear definition of what matters may and may not be disclosed to employees.

The lessons of co-determination show that it is far from an ideal model. But that does not mean that the German experience should be dismissed out of hand. With certain modifications, the German scheme could provide an effective means of employee participation in company decision-making. It remains to consider the obstacles that would be encountered if it were attempted to transplant a modified form of co-determination into Australian law.

(iv) Local Obstacles

(a) Management's Opposition

Management’s opposition to the West German model of worker participation in management could be based upon a number of grounds.

Firstly, Australian management views worker participation in management as an encroachment upon their jealously-guarded prerogatives. This intrusion upon management's 'right to manage' will be strongly resisted. Worker control or even participation beyond a mild form of joint consultation was anathema to all the executives interviewed by the writer. One personnel officer stated: 'worker participation is simply a catch-phrase, like job enrichment. It is nothing more than a topical issue.' A managing director commented in a similar vein: 'Phrases such as "Worker Participation" and "Worker
Control" are in common use today. The customary way in which to take control of a company is to buy it (they all have their price - that's business!)

On the other hand, Mr Max Dillon, deputy managing director of Metal Manufactures Ltd and a former chairman of the National Employers Policy Committee, recently came out in support of worker participation in the decision-making process in areas which affect individuals in their work environment - job restructuring, personnel re-organization, safety measures, training programmes and technological changes. Moreover, pressure for increased worker participation is increasing rather than diminishing.

Taken as a whole, Australian management is conservative. It does not welcome changes which restrict its freedom or affect its delicate balance of power with the unions. Yet a recent international survey of worker participation suggests that it does not erode the influence of managers; indeed, it may even enhance their position.

Management might complain that worker participation would retard the decision-making process when, in some cases, there is an urgent need for streamlined discussion and prompt action. But what management loses in speed it may make up in legitimacy and improved industrial relations. A management fully-informed of the likely reaction of workers to its policies will be in a better position to make a constructive appraisal before reaching a decision. Further, management is less likely to encounter administrative snags if the implications of a policy have been fully considered.

Similarly, management may argue that worker participation cannot remove the conflict between groups within the enterprise; it merely institutionalises the conflict. Indeed, it allows the conflict to erupt in the vital organs of the company. But surely it is better to allow the various interested groups to press their views before a
decision is made. Where problems are anticipated, solutions can be planned in advance and the issue can be considered dispassionately. If management simply confronts its workers with an unfavourable decision as a fait accompli, the parties are likely to take up polarised positions. In these circumstances, it is difficult to reach a balanced solution.

Further, if formal procedures for employee participation are established, acute conflicts can be discovered in time and resolved before a deadlock develops. Australian management would do well to note that German management is not hamstrung by co-determination.

Australian management is reluctant to disclose confidential information to labour representatives lest this information be 'leaked' to competitors. Their fears should be allayed by the German experience. There is no evidence that labour representatives in the German model have breached the confidence of management.

Management also points out that employees lack the expertise to play a role in the decision-making process, particularly on technical and financial issues. To quote one executive of a large manufacturing company: 'It amazes me how anyone can believe a company of this size can be managed by a committee of employees. They would simply not understand what is involved.' Yet, this is more an argument in favour of adequate training for employees' representatives than a reason for rejecting participation under any circumstances.

Moreover, specialist training and instruction of employees' representatives has already begun on a modest scale. The Federal Government plans to launch a national training school for trade unionists in 1975. The programme will cost an estimated $3 million a year. As Mr P. Matthews, Education Officer with the A.C.T.U. and National Director of the proposed national training school, puts it: 'Management has schools like this - why can't we?'.

Management could also quite rightly claim that, at present, they are legally responsible to shareholders for their decisions. If employee representatives were allowed to participate in decisions, management might be liable for the representatives' errors of judgment. This argument can be countered by broadening the ordinary director's duty and clarifying the labour representative's role.

(b) Union Opposition

Like management, unions may fear that their traditional role is challenged by worker participation. The statutory bodies created by a co-determination scheme may be viewed as rivals competing for the support and loyalty of the rank and file. Unions' status and prestige may suffer if workers align themselves with works councils. Further, participation short of control may be regarded as 'tokenism' or a 'confidence trick'. The official policy of the Amalgamated Metal Workers' Union reflects this attitude.

At all times it is absolutely essential for the workers and their Unions to remain independent of all forms of accommodation within capitalist society which is based on private ownership and exploitation so as to always be in a position of most effectively taking action for both workers' day to day interests and the objective of social ownership.

The Vehicle Builders' Employees' Federation, on the other hand, is a strong advocate of worker participation even at board level.

Would co-determination really be a threat to Australian unions? The Australian trade union movement enjoys an entrenched position in our industrial relations system. It is unlikely that its influence would be significantly reduced by worker participation in management.

Moreover, employees' interests can be roughly divided into two categories: on the one hand, there are those interests which have been traditionally protected by the unions; on the other, there are
the interests in achievement, recognition, responsibility and participation. Unions could, of course, foster and protect this latter group of interests but is this necessarily the best way of approaching the issue?

Clegg believes that trade unions should be the sole channel of employees' involvement in the company. Blumberg challenges this view on the ground that workers need more than one set of representatives to protect and advance their various interests. Just as there is a plurality of interests, then so too there should be a plurality of means to represent those interests.

Once it is recognised that employees have a wide range of interests which deserve protection, and that co-determination can be reserved for those interests falling outside the traditional role of the unions, then union opposition should diminish.

The two systems of representation are complementary, not in competition. This does not mean that unions should be excluded from a system of worker participation in management. On the contrary, the expertise and support of the unions will be crucial to the success of the scheme.

Even Clegg concedes that strong and independent-minded unions can weather the storm of managerial responsibility. Many Australian unions are powerful and self-reliant but there are a multitude of small, weak unions in Australia. Would these weaker unions lose their independence through involvement in worker participation? Blumberg argues that any union can survive involvement provided it carefully distinguishes its union functions from its managerial functions. If the union and other labour representatives in a worker participation scheme are kept aware of the opinions of the rank and file before participating in decisions, then they will not find it necessary to abdicate responsibility for decisions. Even now a union which does
not understand the mood of its rank and file cannot escape responsibility for certain decisions. Participation in decision-making has not compromised the position of German unions nor has it alienated them from the rank and file. Australian unions' doubts and fears are understandable but they may be partly attributable to ignorance of the mechanics of co-determination.

If worker participation is to work in Australia, there must, of course, be a sufficient number of people who can fulfil the extremely complex role of labour representatives. This is likely to be the major obstacle facing a co-determination scheme. Union personnel are already hard-pressed to keep up with their normal duties. For many small unions which are poorly-organised at plant level, the problem is compounded.

In general, the Australian trade unions have discouraged the growth of the shop steward movement. Where shop stewards are recognised, their functions are extremely limited. This movement could not, therefore, be treated as a reservoir of talent on which a co-determination scheme could draw.

Rather, the answer lies in a massive education and training programme for labour representatives and potential delegates. As mentioned earlier, this campaign has already begun. It would be quite simple to include in the basic training programme instruction courses on worker participation in management. Employees could be given paid educational leave to attend these courses. This is required by statute in West Germany.

(c) Lack of Co-operation

One of the main factors contributing to the success of co-determination in West Germany has been the union's respect for the law - law which embodies a principle of mutual trust and co-operation.
Although Australia, like West Germany, has a history of regulating industrial relations through a legal framework, there the comparison ends. There is no official policy of co-operation between employers and unions in Australia. Indeed, some of the more powerful unions like the A.M.W.U. believe that they can make more gains outside the arbitration system by direct, coercive action against employers. Mr J. Devereaux, Federal President of the union, put it simply: 'We don't need the arbitration system. We can get what we want through strikes!'. Further, the legalism of the arbitration system itself has made some unions suspicious of further legal intervention in industrial relations.

The industrial arbitration systems themselves have indirectly contributed to this lack of co-operation between management and unions. When the parties enter into negotiations they know that arbitration may be the ultimate solution. As a result they play their cards close to their chests and concede very little in the early stages of bargaining.

In addition, bargaining in the industrial relations systems takes place on an industry, state or national level. By diverting attention away from the work place the industrial arbitration systems hamper the growth of plant-level bargaining which is itself a good foundation for worker participation. Yet, ironically, the fact that unions are often poorly-organised at workplace level might give a works council more room to operate.

(d) Legal Complications

Although co-determination poses no threat to the industrial arbitration systems, substantial changes in other areas of law might be required to accommodate the West German model.

In Bennett v. Board of Fire Commissioners of New South Wales Street J. reprimanded a director of a statutory board who used his position as a board member to serve the group who elected him. This
principle could hamper labour representatives in a co-determination scheme. But if the scope of directors' duties is broadened to include the interests of employees, it would seem that Mr Justice Street's objection to disclosure would fall: employee's interests would then be part of the directors' responsibilities.\textsuperscript{50}

The dissemination of confidential information presents another problem. Some restriction upon disclosure by the employee's representatives is necessary but it should be possible to balance the legitimate interests of the employer against the need to keep the rank and file fully informed. Times are changing. Once a balance sheet was regarded as almost a trade secret.\textsuperscript{51} Now Britain's new Industry Bill proposes to abolish corporate privacy.\textsuperscript{52}

If employers are completely free to classify as confidential all material disclosed to labour representatives, the flow of information in the enterprise could dry up. It may be advisable, therefore, to allow a court, in exceptional cases, to determine whether it would be detrimental to the company to disclose certain information to ordinary employees. The possibility of a judicial review might encourage management to take a reasonable line on disclosure. In any event, this problem would possibly resolve itself in practice when labour representatives earn management's trust.

The Donovan Commission saw a further problem in the position of a labour director: should he bear personal responsibility jointly with other members of the board for their decisions or for any misfeasances on their part?\textsuperscript{53} The short answer is 'no'. A labour director is a specialist; he should not be accountable for board decisions which fall outside his range of competence. How, then, is he to be excused?

Section 365 U.C.A. provides a ready-made solution. It gives a court power to relieve a director from liability for breach of duty,
breach of trust, negligence or default on such terms as it thinks fit. But this discretionary relief may only be granted where it appears to the court that the director has 'acted honestly and reasonably, and that, having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence default or breach'. These conditions are cumulative. 54

Provided the labour director acts as a man of affairs dealing with his own affairs with reasonable care and circumspection could reasonably be expected to act in similar circumstances, he will be entitled to relief. 55

None of the foregoing obstacles is insuperable. They could all be overcome if there was a sufficient demand for worker participation.

(e) Employee Apathy

At present, there is little evidence of a popular movement among employees towards workers participation. Further, some workers would be reluctant to become involved in participation. But apathy is not a sufficient reason for disregarding the proposal for co-determination. 57

Local experience with joint consultation shows that some committees have failed through lack of employee interest. But then why should employees be interested in a joint consultation committee? It has no executive authority; it is usually merely an advisory body. In fact, one of the lessons from the joint consultation case studies is that committees should be given important functions. Then, it seems, employees' interest is sustained.

These findings should not, however, cloud the issue. It will be necessary to educate the rank and file to the advantages of co-determination. As the general level of education of persons entering the work force becomes higher, there will be more people looking for
more from their job than good wages, safety and reasonable working conditions. This new group of workers will look for status in their work, and one way to satisfy this need is through participation. While many blue-collar workers are, at present, "consumption-oriented, acquisitive, privalistic and family-centred" impetus for participation in management may well come from white-collar employees, technicians and executives themselves.

(v) Positive Factors

Despite all the obstacles discussed above, there is growing support for some form of worker participation in management on both sides of industry and in the political arena. Moreover, the success of several local worker participation schemes may give a fillip to further experiment.

The South Australian Government has taken the initiative in experiment and education on this subject. Indeed the South Australian Theatre Company Act, 1972 introduces a mild form of worker participation. One of the six governors of the Board charged with the powers, duties and functions of the Theatre Company must be a representative of the company of players. If the players do not elect such a representative within a certain period, the Board must appoint one of the players as the delegate.

The Act also makes a bold attempt to avoid the problem of conflicting interests for the players' representative. The delegate is not obliged to declare his financial interest in any matter relating to the terms and conditions of employment of any person (including himself) comprised in the company of players. Nor is he obliged to refrain from acting in his capacity as a governor of the Board on any such matter. In each case he is excused if his only
financial interest in the issue arises by reason of the fact that he is a subscriber. Should he have a more substantial financial interest in the issue, however, he must observe the disclosure requirement and refrain from acting on the matter.69

On 17 February 1972, the South Australian Government appointed a committee to examine the advantages and disadvantages of direct worker participation within industry and commerce in the state. The committee's one hundred page report was published in April 1973. It reviewed the experience of overseas countries with worker participation schemes but concluded that this experience 'is not crucial in order to form conclusions and make recommendations as to what should be done in South Australia'.70

From the results of its comprehensive survey71 of joint consultation in South Australia, the committee identified several factors72 on which the success of this form of worker participation depended. One of the committee's final recommendations was that joint consultation be fostered on a voluntary basis in all South Australian companies with more than fifty employees.73

This proposal is somewhat surprising. In spite of the overwhelming evidence of the failure of joint consultation overseas,74 the committee concluded that this type of worker participation in management was 'reasonably successful'.75 Moreover, it gave no indication of what results might be gained through joint consultation.76

Even the committee itself alluded to the criticism of joint consultation as an effective form of worker participation.77 And the benefits78 which it did attribute to a successful joint consultation scheme appeared to be more gains for management than the ordinary employees. Indeed, one of its express reasons for favouring joint
consultation was that it did 'not remove managements' ultimate decision-making power, and because no substantial alterations in the structure of management in the companies would be necessary'.

Although worker satisfaction with joint consultation might be implied from some of the benefits the committee saw in a successful joint consultation scheme, one is given the impression that joint consultation is more a management technique than an effective means of worker participation. This impression is reinforced when the committee goes on to discuss the apathy of workers towards joint consultation schemes. The committee, itself, admits that some schemes have been abandoned because the joint consultation council adopted a purely advisory or consultative role.

The Report is, then, essentially conservative. Certainly joint consultation would be more palatable to management, and possibly the unions, at this time but that is not the point. The committee's proposal calls for a viable form of worker participation rather than an effective scheme. The danger here is that the South Australian Government might be encouraged to endorse joint consultation as an end in itself, rather than as a means of preparing the ground for a more effective form of worker participation. If experience with joint consultation proves to be unrewarding, this may dampen interest in a more meaningful form of worker participation.

Experiment with forms of worker participation is not confined to South Australia, nor is it restricted to the public sector. And further research into worker participation schemes is planned. One of the principal resolutions arising from the Industrial Peace Conference arranged by the Minister for Labour was that a comprehensive inquiry be conducted into the extent and prospects of worker participation in Australia.
Workers' participation in management was introduced in other countries as a reaction to a crisis. But this does not mean that co-determination would be unworkable in more stable conditions. In any event, while Australia's industrial relations are not at crisis point, they are considerably strained. The industrial arbitration system seems unable to provide a satisfactory solution.

Australia's spiralling rate of inflation may force employers and the government to win the support of unions and employees in a drive for greater productivity. The co-operation of unions and employees will not be won easily. Employers may be compelled to bargain away some of their prerogatives in return for wage restraint and co-operation. In these circumstances worker participation in management becomes a distinct possibility.

The fifth draft directive issued by the European Commission in October 1972 proposed forms of co-determination largely modelled on German and Dutch law. If Great Britain alters its company law to conform with the directive, Australia would have a model on which to base further discussion and experiment. In particular, the British model would give some guidance on ways of modifying traditional company law principles to accommodate co-determination.

(vi) Conclusion

Worker participation in management has not developed beyond the embryonic stage in Australia but our belated interest in this concept could give us certain advantages. We are, at least, in a position to draw on a wealth of overseas experience and to avoid some of the obvious shortcomings in the overseas schemes. Co-determination is not a panacea but on some issues it may be a viable alternative to confrontation and arbitration. Clearly, as Dr Cairns says, worker participation is still 'far off' but mounting interest in the concept and the pressure for
improved procedures to deal with displacement and redundancy will prompt a closer examination of co-determination as a proposal for reform.
Measures to enhance and protect employees' interests in promotion can be grouped under three headings: selection procedure, criteria for selection and right of appeal.

1. Promotion
   (i) Selection Procedure

   Collective agreements in the United States commonly require permanent job vacancies to be advertised by a notice published on the plant bulletin board. Employees are then given a fixed period of time, say forty-eight hours, within which to file an application for the vacancies.\(^1\)

   A similar selection procedure exists in West Germany. Works Councils are empowered by statute to demand that all or certain types of vacancies be advertised within the enterprise prior to appointment.\(^2\) In addition, job application forms require the consent of the works council. If this approval is not forthcoming the conciliation board is empowered to decide disputes as to content of the forms.\(^3\)

   Formal selection procedures are not unknown in Australia\(^4\) but there is no requirement similar to the West German provision. By first advertising vacancies within the enterprise employers give their employees early notice of the opportunities for advancement within the firm. Nevertheless, this tells an employee nothing about his prospects of promotion.

   West German law has, therefore, gone further. It provides that an employee is entitled to inspect his personnel file and add
his own comment to this record. A works council member may assist the employee with the inspection. What is perhaps more important, the employee may demand an evaluation of his services as well as his opportunities for vocational development in the enterprise. Once again, a works councillor may join in the discussion.

(ii) Guidelines for Selection

In Australia, seniority is often the basis for promotions although employers are reluctant to concede this openly. By contrast, the overwhelming majority of American collective agreements formally recognise seniority as a factor for consideration in selecting employees for promotion. Indeed, in 31% of the agreements surveyed by the Bureau of National Affairs in 1965 seniority was the 'determining factor'. In 29% of the agreements seniority was a subsidiary factor to be considered when other matters such as ability and work experience were evenly balanced; 9% of the agreements placed seniority on an equal footing with other factors. These figures underestimate the importance arbitrators attach to seniority. At arbitration, it will often be the paramount consideration. In practice, the selection of a junior employee over a senior employee will only be upheld if the junior employee has far more ability and work experience.

In West Germany, guidelines for selection and assessment of personnel must be approved by the works council. If an agreement on these guidelines cannot be reached, the conciliation board is empowered to set the general standards. Works councils in enterprises having more than 1,000 employees are entitled to demand the formulation of guidelines on the professional and personal qualifications and social aspects to be taken into account in selecting personnel. Once again, the conciliation board arbitrates in the event of a disagreement.
The selection criteria prescribed by the Public Service Act 1922-1973 (Cth) are a reasonable compromise between the employee's interest in advancement and the employer's interest in efficiency. There, seniority prevails only if applicants are equal in their relative efficiency. 'Efficiency' encompasses special qualifications and aptitude for the discharge of the duties of the office to be filled, together with merit and good conduct.\textsuperscript{16}

This is a reasonable selection standard. It avoids the vagueness of the West German legislation. It also indicates that seniority is not the paramount factor. By making length of service secondary, it ensures that junior employees with initiative and ability are not frustrated by the seniority obstacle. The importance of this point should not be overlooked. Young persons taking up their first job are, in the main, better educated than their predecessors\textsuperscript{17} and more eager for advancement.\textsuperscript{18} A rigid application of the seniority principle could easily stifle their incentive.

(iii) Right of Appeal

In some countries, the law recognises that employees may have a vested interest in challenging their employer's decision to promote another employee.

In the United States, for example, any employee or group of employees is entitled to present promotion grievances to his employer and have them settled without interference from the union. On the other hand, the union has a right to be present and the settlement must be consistent with the current collective agreement.\textsuperscript{19}

Alternatively an employee may enlist the aid of the union to process his grievance. Union officials elected by the majority of the employees in the appropriate bargaining unit are given exclusive statutory authority to bargain with respect to wages, hours and
conditions of employment for all unit employees whether they are union members or not. As a corollary of this privilege of exclusive representation, the union is required to represent all unit employees fairly and impartially.

Under its duty of fair representation a union may not refuse to process a grievance simply because the aggrieved employee is not a unionist: the duty of fair representation is owed to all unit employees, unionists and non-unionists. But despite the potential breath of the union's duty, it appears that it is extremely difficult for an employee to enforce. Several obstacles (some substantive, others procedural) stand in his way. Nevertheless, the union's duty gives employees a right, albeit circumscribed, to challenge promotions.

When a West German worker has a grievance over promotion, he has two avenues of redress: a personal complaint to his employer and action through the works council. The employer and the works council are obliged not to discriminate amongst employees on certain grounds. In particular, discrimination on grounds of sex and age is prohibited. This prohibition could be quite important in relation to promotion grievances.

Perhaps the best example of an entrenched right to appeal against promotions lies not overseas but in the public sector of the work force. Under the Public Service Act 1922-1973 (Cth) an officer may challenge the provisional promotion of another officer if he considers that he is more entitled to the appointment on grounds of superior efficiency or, where efficiency is equal, seniority. The appellant must lodge an appeal with the Public Service Board within a certain period. The board then forwards the appeal and particulars of the officers concerned to the Promotions Appeal Committee in the appropriate state.
The appeal is determined by majority decision of the committee after hearing the submissions of the officers. If the appeal is allowed, the appellant is promoted to the vacant position and the provisional promotion of the respondent is annulled. Where the appeal is dismissed or out of time the provisional promotion must be confirmed by the Permanent Head (in the case of intra-departmental promotions) or the Public Service Board (where an inter-departmental transfer is involved).

In his comprehensive analysis of promotion practices in the Commonwealth Public Service, Subramaniam saw two main advantages in the appeals procedure: first, it was a safeguard against error, and second, it was a safety valve for discontent. He also reported that 'there is evidently more satisfaction in the service with the promotion system than in the inter-war years ...'.

Unfortunately, there is little hard data with which to test this assessment. In the period 1967 to 1971 less than 12% of the appeals lodged against provisional promotions in the Australian Public Service were successful. Does this mean that the appeals committees meekly 'rubber-stamp' the initial decisions of the Permanent Head of the Department or the Public Service Board, as the case may be?

This is not necessarily so. Many of the unsuccessful appeals were, no doubt, frivolous grievances. Again, some appellants may simply have been interested in publicising their qualifications and credentials with a view to future promotions. Another explanation is that the promotion procedure has been operating for a long time and the various departments have reasonably well-settled selection criteria. As one Public Service Board Commissioner put it: 'In these circumstances one would not expect a large number of successful appeals'.

In any event, perhaps the main significance of the Promotion Appeals Committees is that they deter discrimination in promotions:
the promoting authority knows that an arbitrary and capricious decision will be reviewed and overruled by an impartial appeal board.

(iv) A Suggested Procedure for the Private Sector

The first step towards safeguarding employees' interests in advancement is to establish selection procedure and criteria for selection. Without these a right of appeal is virtually meaningless since the reviewing authority has no standards on which to consider the appeal. The basic purpose of selection criteria is to eliminate discrimination in promotions. Certainly subjective factors will continue to play a part in promotions but these should be kept to a minimum. Objective criteria such as are prescribed in the public service statutes leave little scope for arbitrary or capricious promotions.

One side effect of the proposal for selection standards would be that management would find it advisable to maintain service records. If this is the case, employees should be allowed to inspect their personnel file and make written comments thereon along the lines of the West German provision.

Secondly, companies, like their counterparts in the public sector, should be obliged to publicise provisional promotions within the firm. Employees should then be allowed a short period of, say, five working days to appeal against the provisional appointment. If the appeal is upheld by the reviewing authority, be it an industrial tribunal or works council, the provisional promotion could be cancelled and the appellant promoted to the position.

Would this measure interfere with management's freedom to run its business in an efficient manner? The selection criteria would stress efficiency as the cardinal factor in promotions so it seems that this would not be a great handicap for management.
The snag lies in the appeal procedure. Would management be flooded with appeals against routine promotions? In the Australian Public Service over the period 1968-1972 only 25% of provisional promotions were challenged. The promotions appealed against attracted an average of around eight appeals each. These figures suggest that appeals are relatively common in the public service. But there, one would think the work force is relatively homogeneous. Moreover, there were around forty-seven promotions per 500 employees in the Australian Public Service in 1972. While there is no empirical evidence on this point, it seems fair to say that this rate of promotion would not be matched in the private sector. This, in itself, would reduce the potential number of promotion appeals. In addition, the diversity of occupations in the private sector would automatically rule out a large number of appeals on the ground that the appellant was not qualified to perform the duties of the new position.

The law can do little to encourage employers to make promotion opportunities available to their employees. By prescribing selection procedures, criteria for selection and a right of appeal against promotions, it would be making a start.

2. **Relationship with Supervisor**

As an incident of its right to select employees for particular positions management is free to decide who it will appoint as a supervisor. In view of the intimate relationship which exists between supervisors and employees should this freedom remain unbridled?

(1) **Consultation prior to Appointment**

Employees cannot rightly expect to select their own supervisor. This could lead to a chaotic working relationship. On the other hand, workers do have a legitimate claim to be consulted prior to the
As mentioned earlier, in West Germany, guidelines for selection of employees in hiring and changes in classification are not valid unless approved by the works council. Without such approval, management has the option of abandoning its draft guidelines or submitting the dispute to a conciliation board. In large establishments the works council is in a much stronger position. It may demand guidelines for professional and personal qualifications in hiring and classification changes. The conciliation board resolves any dispute on this issue.

The German measure is aimed at establishing selection criteria for supervisors well in advance. Joint consultation could, however, be achieved through the appropriate union or a works council. Either body could canvass the views of the rank and file and advise management of the employees' opinions of the candidates within a specified period of, say, five working days. The role of the union or the works council would be purely consultative. There would be no question of workers' electing their own supervisors. By the same token, management would be unwise to disregard the views of the majority of people who will work under the supervisor on a day-to-day basis.

(ii) Removal of Unsuitable Supervisors

A say in the appointment of a supervisor is not enough to safeguard employees' interests. West German works councils are given the power to co-determine disputes involving employees' relationship with their supervisor. This relationship can generate problems for individual employees. They should be given the right to complain to their employer about their supervisor without fear of discrimination or reprisal.
Moreover, the union or the works council should be permitted to challenge the continued employment of a person as a supervisor if that person is discriminating among employees or treating them unfairly. A complaint could be made before an industrial tribunal. The union could be required to make out a *prima facie* case of discrimination or unfair treatment. This would be a difficult, but not impossible, task.  

In regulating employees' relationship with their supervisors the law has a very limited role. But if the law gave employees or their representatives the right to be consulted before the selection of a supervisor and the right to petition for the removal of an unsuitable supervisor, it would at least have acknowledged the importance of this issue.
PART V

CONSTITUTIONAL AVENUES FOR REFORM
The proposals for reform outlined in the preceding chapters will be \textit{brutum fulmen} unless they can survive a constitutional challenge. This section, therefore, will examine ways of implementing those measures within the present constitutional framework.

In matters which have not been specifically assigned to the Federal Parliament, the states have plenary legislative power within their territorial boundaries. Theoretically, they could implement all the proposed reforms. But it would be politically naive to believe that this would come to pass. Apart from the lack of uniformity which would inevitably result if state legislatures devise their own solutions,\footnote{It is unrealistic to expect all the states to introduce the recommended measures.}

Federal Parliament's legislative power is, of course, bounded by the Constitution.\footnote{If the proposals for reform are to be viable it will be necessary to chart a course around the constitutional restrictions.} This Part examines the limits and potential of a broad range of federal powers.
So controversial is section 51 (xx) of the Constitution, so far-reaching are its implications, that a detailed discussion of the placitum is beyond the scope of this thesis. Yet without the corporations power many of the proposals mentioned earlier might be beyond the competence of Federal Parliament. Clearly this topic cannot be excised but limitations of space demand a compromise. This chapter, therefore, outlines the potential of the power, leaving supporting argument to Appendix 5.

(i) The Described Corporations

There are many grounds for believing that the subjects of the power - in particular "trading corporations" - will be interpreted broadly. It appears that a trading corporation is a particular form of corporation with special inherent characteristics. But the well-established principle of generic interpretation ensures that the term will be given a much wider meaning than it conveyed in 1900. Today, it could include manufacturing and mining companies which market their products.

The other subjects of the paragraph, foreign corporations and financial corporations, are more easily defined. The former are corporations formed outside Australia; the latter include all financial institutions in corporate form with the exception of banks.

A corporation may be identified by the purposes outlined in its constitution or, possibly, by its sole, predominant or characteristic activity.

(ii) Scope of the Power

The scope of paragraph (xx) is shrouded in uncertainty. While the preponderance of judicial and academic opinion suggests that
Federal Parliament has no power to incorporate the described corporations, the arguments in favour of this view are not wholly convincing.

The controversy focuses upon the words, 'formed within the limits of the Commonwealth'. Those who argue for an expansion of federal power through placitum (xx) contend that these words do not necessarily imply an anterior creation of the corporations to which the power attaches. In other words, 'formed' may mean 'to be formed' and, indeed, 'to be formed under a federal law founded upon section 51 (xx)'. Their opponents maintain that the key words mean 'already formed' under the laws of a state or a territory.

If the High Court decides that the Commonwealth has power over incorporation (and there are, at present, no real obstacles to such a finding), Federal Parliament would be able to introduce the proposed structural reforms and, indeed, most of the other measures suggested earlier. It could do this by making incorporation conditional upon compliance with certain requirements as to company structure, codetermination, dismissal procedures and redundancy. If these requirements were not satisfied, incorporation could be denied or withdrawn by compulsory liquidation.

If federal control may not be exercised at the incorporation stage, can it be applied to the internal management of the companies? This is also a controversial issue. Those who argue that paragraph (xx) does not authorise the Commonwealth to regulate this aspect of the corporations assume that incorporation and internal management are interwoven, that an absence of authority to control incorporation automatically denies control over internal management. There is no compelling reason why this should follow. The judicial observations on this issue are now nearly seventy years old. Moreover, even when they were expressed they were not definitive.
Control over internal management may be quite important for, on one view, this involves control over the corporation's relationship with their employees. Assuming for the present that this view is correct, what would federal control over internal management authorise? A complete co-determination model providing participation at all levels in the enterprise could be provided and the matters for co-determination specified. This would enable the Australian Parliament to implement many of the proposals outlined earlier. In particular, participation, promotion, supervision, dismissal procedures and redundancy could be regulated. If employees are classified as outsiders (and one would think that the law is estopped from denying this in view of its approach to the director's duty to act bona fide in the interests of the company), direct federal regulation of the corporation's relationship with their employees would be possible. This would give the Australian Parliament ample power to implement the measures suggested earlier.

It is now too late for the High Court to deny that the Australian Parliament may indirectly control some matters which are beyond its express legislative powers. For this reason the Concrete Pipes Case is immensely important. Because of this case, one thing is crystal clear: Federal Parliament may regulate the trading activities of the corporations described. This power might enable the Commonwealth to determine the conditions on which the corporations will be allowed to carry on trading activities in Australia. In this way Federal Parliament could effectively compel the corporations to introduce a complete co-determination model and to observe certain industrial standards, for example, in dismissals, retrenchments, and promotions. The 'sanction' of withdrawing the 'privilege' of trading would be a powerful inducement for the corporations to comply with the federal requirements.
To sum up, it appears that the 'corporations power' either directly or indirectly grants the Australian Parliament power to implement many of the proposals for reform.
Federal power to regulate industrial relations stems principally\textsuperscript{1} from section 51 (xxxv) of the Constitution.

1. \textbf{Conciliation and Arbitration}

This placitum authorises the Commonwealth to make laws with respect to 'Conciliation and arbitration for the prevention and settlement ...' of certain industrial disputes. After some hesitation\textsuperscript{2} the High Court rejected a \textit{reddendo singular singulis} construction of this phrase.\textsuperscript{3} Thus, both conciliation and arbitration may be used to prevent as well as to settle industrial disputes.\textsuperscript{4}

2. \textbf{Industrial Disputes}

Federal legislative power is further limited by reference to the words 'industrial disputes'.

(i) \textbf{Dispute Must Arise in An Industry}

To be an 'industrial dispute' a disagreement must, first of all, arise in an industry.\textsuperscript{5} The High Court's interpretation of this requirement has followed a tortuous line.\textsuperscript{6} An account of this development is beyond the scope of this thesis.\textsuperscript{7}

It is sufficient to note that the badge of industrialism is generally the character of the individual duties which the employees actually perform.\textsuperscript{8} If the nature of this work is industrial, then the disputants are engaged in an industry regardless of the classification of the employer's undertaking.\textsuperscript{9} In general, the High Court has adopted a fairly broad interpretation of this requirement.\textsuperscript{10} Nearly all the employees the subject of this thesis would indisputably satisfy the 'industry' requirement.\textsuperscript{11}
(ii) Disputants Must Stand in An Industrial Relationship

The second ingredient of an 'industrial dispute', that the disputants stand in an industrial relationship, derives from case law.12

The interpretation of this requirement has not greatly hampered the expansion of federal jurisdiction. About 45% of employees in the private sector affected by awards and determinations and registered collective agreements fall within federal jurisdiction.13 Despite Whybrow's Case,14 it is possible to obtain an award which operates for most practical purposes as a common rule.15 Perhaps the most glaring defects in the law in this area are the cumbrous procedure16 which must be followed in order to achieve this result and the fact that a non-unionist employee who is affected by an award may have no personal right to enforce its provisions.17

(iii) Dispute Must Pertain to An Industrial Matter

An 'industrial dispute' within section 51 (xxxv) must also relate or pertain to an 'industrial matter'.18 Although this term is defined in broad terms,19 the High Court has frequently denied the federal tribunal jurisdiction on the ground that the dispute did not concern an 'industrial matter'.20

Not only has the High Court, at times, refused to apply a literal construction of the various paragraphs of the statutory definition, it has often concentrated on one rather than another paragraph which would appear to be equally, if not more, appropriate to the claim.21

The wide purport of the statutory definition is, therefore, not always the decisive factor. Ironically, the breadth of the phrases in the definition section has allowed the High Court to develop supplementary tests for determining whether a dispute relates to an industrial matter. It was once thought that a dispute about any matter which
touched the employment and affected the mutual business relationship connecting the parties was within federal jurisdiction. This early test was rejected and replaced by a narrower criterion. The dispute need not arise out of a contractual relationship but it appears that it must concern a matter directly relating to an existing industrial relationship of an employer as an employer to employees as employees. This requirement may, however, be relaxed where the matter in dispute has a clear nexus with the performance of work by the employees.

These refined tests contain a fairly flexible standard. The question arises: what factors influence the High Court in conceding or denying jurisdiction.

Sykes and Glasbeek examine this issue in depth. Despite the judicial suggestion that "it is useless to attempt to go behind the principles" established by the High Court in interpreting the industrial power, they argue that all the cases dealing with the industrial matter requirement can be explained by an unarticulated policy consideration — respect for managerial prerogatives.

While this thesis explains a large number of decisions it does not account for all the cases. There are instances where the High Court has declared that the Commission has jurisdiction even though management's rights are intimately involved. Moreover, the managerial sphere is not the only area relatively free from federal control.

Respect for managerial prerogatives must, therefore, be relegated to the position of a firm guideline; it is not an absolute criterion. This does not deny that the policy has had an impact upon individual judges and several decisions. Clearly it has played a significant, if not dominant, role in refining federal jurisdiction over industry.

If it is conceded that many of the limitations placed upon federal arbitral jurisdiction stem from a reluctance to interfere with
management, is there really any constitutional impediment to an increase in jurisdiction at the expense of managerial prerogatives. 35 Certainly the wording of the Constitution and the implementing statute would permit such an extension. All that is necessary under the 'industrial matter' requirement is a direct connection with the industrial relationship of an employer as employer to an employee as employee. 36 It is, however, extremely unlikely that managerial freedom will be substantially eroded by an extension of federal arbitral jurisdiction: the policy of non-interference is too firmly entrenched in the practice of the Australian Conciliation and Arbitration Commission.

3. 'Interstateness'

The final requirement of section 51 (xxxv) is that the dispute must extend beyond the limits of one state. Here there are really two overlapping elements: 'genuineness' and 'interstateness'. In its interpretation of these two elements the High Court has enlarged federal jurisdiction far beyond the boundaries contemplated by the Founding Fathers. 37

The difficulty caused by the 'interstateness requirement' 38 can be ascribed to the fact that the dispute which is an abstract thing must be measured by reference to 'states' which have definite boundaries. 39 While the dispute itself must have an interstate character, the parties need not be two-state employers or two-state unions. The essential element of an interstate industrial dispute is that the disagreement must cover Australian territory that is not confined to the limits of any one state. 40 For present purposes, it is sufficient to note that the High Court has on the whole adopted an expansive interpretation of this requirement. 41

The same is true of the 'genuineness requirement'. State rightist delegates to the Constitutional Convention in 1898 feared
that the scope of the industrial disturbance would be deliberately extended to attract federal jurisdiction. The High Court's general approach to the genuineness requirement has vindicated those fears.

4. Consequences of the Jurisdictional Limitations

The major consequence which flows from the limitations of the industrial power is that the Commonwealth has no power under section 51 (xxxv) to regulate conditions of employment directly through a labour code. Thus, one fact is inescapable: Federal Parliament could not rely upon the 'industrial power' to implement all the proposals outlined earlier. In particular, it could not establish machinery for the hearing and settlement of local intra-state disputes or individual grievances. Thus, it would be unable to provide for works councils or to exercise any effective control over plant-level disputes such as promotion and supervision. Further, the High Court's interpretation of the industrial matter requirement suggests that the Commonwealth could not establish a co-determination scheme under paragraph (xxxv).

What proposals, then, are within the scope of the 'industrial power'? Firstly, the federal long service leave 'code' could be amended where necessary to comply with the measures mentioned earlier. This would be no problem. Similarly, superannuation proposals could be implemented through federal awards although this would not be the most appropriate manner of effecting reform.

In the field of job security, federal awards could probably prescribe general criteria for selecting employees for retrenchment. They could require advance warning of redundancy for the unions and employees but a clause demanding prior notification of planned retrenchments to the Commonwealth Employment Service would probably be beyond power. Severance pay could be provided by the general award
or by an arbitrated decision before the employees are retrenched. By contrast, federal jurisdiction in dismissal cases appears to be relatively hamstrung. In a series of decisions discussed earlier the High Court firmly rejected attempts to confer upon the federal tribunal jurisdiction to order reinstatement. It is, however, possible to avoid the main obstacles by taking a circuitous route.

If a federal union included in a log of demands served upon an employer a claim that he should not dismiss his employees wrongfully, harshly, unjustly or unreasonably and the employer rejected this demand, would this be a dispute as to an "industrial matter"? The emphatic answer is "yes". The first paragraph of the union's demand in R. v. Gough; Ex parte Meat and Allied Trades Federation of Australia contained a similar provision. Commenting on this clause, Windeyer J. declared:

> It is not denied - and in face of par. (k) of the definition of "industrial matters" it could not be questioned - that if the first paragraph stood alone it could properly have a place in an award.

It is possible, then, to insert such a clause in an award settling an original interstate industrial dispute.

But when an employee covered by the award is dismissed will this individual discharge satisfy the 'interstateness requirement'? In essence, the dismissal would be a local matter. It would, nevertheless, be within the ambit of the original interstate industrial dispute. Individual employees could, therefore, complain that their dismissals were in breach of the original award.

But who could hear their complaints? Clearly the Commission could not entertain their claims as this would involve an exercise of judicial power, or at least non-arbitral power. Re Association of Professional Engineers puts this beyond doubt.

The Australian Industrial Court, on the other hand, is empowered to exercise judicial functions. For example, it can impose
afine of up to $1,000 for a breach of a term of an order or award. This penalty could be used to deter an employer from infringing the proposed dismissal clauses in an award. More importantly, the Australian Parliament could give the Court jurisdiction to grant reinstatement or compensation to employees dismissed in breach of the award. Legislation along these lines could be upheld under the 'incidental power' since it would ensure the practical efficacy of the award.

Unions might prefer to keep dismissal cases in the arbitral, rather than judicial, arena suspecting that their chances of success would be better in a tribunal more familiar with the industrial realities of the situation. But the point is that any de facto jurisdiction exercised by the Australian Conciliation and Arbitration Commission is open to challenge. In any event, the unions' fears may be unfounded. In South Australia, the Industrial Court has exercised its reinstatement jurisdiction in a sensible and humane manner. Indeed, in one recent case, it expressly took the industrial realities of the situation into account.

If the Australian Industrial Court were given the proposed jurisdiction it would be able to develop basic guidelines for determining whether a dismissal was wrongful, harsh, unjust or unreasonable. In this way nearly all the proposals outlined in Chapter 18 could be indirectly implemented. For example, the court could insist that employees be given a warning and an opportunity to state their case prior to dismissal. Since the procedure would provide an individual remedy for employees, it would be a vast improvement on the current law.
1. The *External Affairs* Power

There is both judicial and academic support for the view that legislation in pursuance of I.L.O. Conventions and even Recommendations would be within the scope of the *external affairs* power. At present, this proposition is neither firmly established nor untenable; it is simply untested. However, the very existence of the I.L.O. testifies to the mutuality of international interest in labour relations and working conditions. Furthermore, there is a growing awareness of the need to control the operations of multinational corporations. No longer can employment be regarded as a matter of purely domestic concern.

Most forms of discrimination in employment could be prohibited by legislation in pursuance of I.L.O. Convention No. 111. The same legislation could grant an aggrieved party the remedies discussed earlier. The proposals relating to unfair dismissal and dismissal for petty misconduct might also be implemented through federal legislation following I.L.O. Recommendation 119.

The present Australian Government has made it clear that the *external affairs* power will no longer remain dormant. And the Minister for Labour and Immigration has expressed interest in curbing management's right to hire and fire. In these circumstances the scope of placitum (xxxix) is unlikely to remain merely an academic issue.

2. The *Trade and Commerce* Power

The dimensions of the *trade and commerce* power, like those of the *external affairs* power, are largely unknown. Some idea of the potential of placitum in the field of labour law can be gained from
Mr Justice Fullagar's judgment in *O'Sullivan v. Noarlunga Meat Ltd* (No. 1). His Honour stated:

By virtue of that power all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth.

And later, referring to a system of inspection at the point of export, Fullagar J. remarked:

It may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine.

He also observed:

I would think it safe to say that the power of the Commonwealth extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export.

It seems a fair inference from these and other dicta that the conditions of employment in companies engaged in manufacturing or mining products for export either interstate or overseas may fall within the scope of the trade and commerce power.

3. The Taxation Power

In *Fairfax v. Federal Commissioner of Taxation*, the High Court held that a provision granting a taxation exemption upon the income of superannuation funds which invested a certain proportion of their assets in public securities was a valid exercise of the taxation power. If one takes the reasoning in *Fairfax's Case* one step further, a law imposing a special rate of tax upon companies which did not, for example, allow workers to participate in management, or which did not provide a redundancy fund or a retraining scheme for retrenched workers would be valid: the only duty or obligation created by the provision would be a liability to pay tax. In this clumsy, but nevertheless legitimate, way many of the proposals outlined earlier could be introduced.
4. The Patents Power

Section 51 (xviii) of the Constitution gives the Australian Parliament power to make laws with respect to 'patents of inventions and designs'. This placitum must surely include power to determine the conditions on which a patent may be granted. If the patent is to be granted to the employed inventor then he could be obliged to grant a licence analogous to a 'shop right' to his employer. If, on the other hand, the employer is granted the patent he could be required to pay reasonable compensation to the actual inventor or team of inventors.

While the Australian Parliament might not be competent to enact that a particular person was the inventor of an invention thereby excluding judicial inquiry into the matter, it would certainly be able to establish machinery and tribunals for the hearing and settlement of claims relating to patentable inventions.

Federal legislation requiring employees to make prompt reports to their employers of any inventions made during the course of their employment, and giving employees exclusive rights to such inventions if the employer does not claim title within a specified period, would also appear to be valid under placitum (xviii). The same is true of provisions which render invalid or unenforceable clauses in contracts of service which give employers exclusive rights to all inventions made by their employees.

There is therefore ample power within paragraph (xviii) to implement the basic features of the West German legislation dealing with the rights of employed inventors.
In the final analysis, has the law failed to impose adequate duties and responsibilities upon company management for the protection of employees' interests? It is submitted that the law has so failed at least in relation to the interests examined in this thesis. Evidence in support of this conclusion has already been presented. It remains to consider the reasons for this failure.

It is possible to draw four main conclusions from this thesis. The first is that part of the law's failure can be attributed to problems of its own creation. By its classification of certain employees' interests the law builds its own obstacles to reform. For example, the lynch-pin of the law relating to termination of employment is the contract of service. Once the law accepts this proposition, it has great difficulty protecting employees' job security. To be consistent, it is forced to allow the employer to exercise his contractual rights no matter how harsh the consequences.

Secondly, having placed employees' interests in various pigeon-holes, the law rarely steps back to look at the overall effect of its categorisation. Take one of the many examples. Contract law in certain circumstances allows an employee to recover superannuation benefits as damages for wrongful dismissal. The employee will be entitled to the benefits he would have received if he were lawfully dismissed. All this is logical and consistent from the contract law standpoint. It is immaterial that another branch of the law allows an employer to dismiss an employee without a refund of the employee's own superannuation contributions. Indeed, such an employer is still entitled to claim taxation deductions for his contributions to the superannuation fund.
Thirdly, some of the law's inability to recognise changes in the nature of employees' interests can be ascribed to the Constitution itself. The constitutional obstacles to reform are certainly formidable but once again the solution lies in a revision of traditional assumptions which colour the interpretation of the Constitution. It is possible to implement most, if not all, of the proposals outlined earlier without relying on the industrial power. Yet that shackled placitum is treated as the main repository of federal power to regulate industry.

Finally, it appears that the law is not yet ready to recognise and protect the interests selected. To borrow Pound's concept of balancing social interests, the law attaches insufficient weight to the employees' interests. Only when it accepts that they are as important as, say, management's freedom to manage will reform become a definite possibility. The process is gradual and evolutionary. It is already developing in the field of job security and, to a lesser extent, promotion. This thesis indicates how far the law has yet to go before certain employees' interests will be adequately recognised and protected.