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
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<th>PAGE</th>
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In Chapter 1, recognition, job security, responsibility, advancement and reasonable supervision were identified as important factors in job satisfaction. The purpose of this appendix is to consider whether major sociological studies verify or contradict this premise. Only a brief account of these studies will be attempted.

**Maslow's Hierarchy of Needs**

In 1943, Maslow developed the notion that man's behaviour responds to the following hierarchy of needs:

1. Physiological needs (e.g. air, rest, food, etc.)
2. Safety needs (freedom from danger or deprivation)
3. Social needs (friendship and identity with a group)
4. Esteem needs (self respect, reputation, etc.)
5. Self-fulfilment needs (realisation of potential growth, full use of talents, etc.)

Maslow believed that when man satisfies his needs at one level of the hierarchy, he will concentrate upon satisfying his needs at the next level. Thus, man's goals can be viewed as a progression up the steps of the hierarchy. Since the majority of workers in societies with high standards of living can readily satisfy their physiological, safety and social needs, Maslow deduced that these factors do not have a strong motivational value. In his view the upper level needs were more likely to stimulate workers, and industry should direct its attention to these needs.

He devised his model primarily as a framework for future research. Unfortunately, there are very few empirical studies which either confirm or refute his theory. Nevertheless it seems true that
Maslow's hierarchy is a reasonably reliable gauge of the a priori needs of industrial workers and possibly managerial employees. Beyond this, the implications of the theory are untested. In particular, the suggestion that satisfaction of higher order needs improves performance has not been verified.

The higher order needs in Maslow's hierarchy correspond to the interests in recognition, responsibility and advancement mentioned in Chapter 1. Job security and supervision do not appear to be prominent in the model although the former could possibly be classified as a safety need, while the latter might be a social need.

Maslow was primarily concerned with motivation. He claimed that safety needs and social needs were not strong motivators but this does not mean that they are unimportant to employees. There is, therefore, nothing in Maslow's model which is inconsistent with the catalogue of interests listed in Chapter 1.

Herzberg's Two-Factor Theory

Several years after Maslow's research, Herzberg, Mausner and Snyderman studied job satisfaction among 203 engineers and accountants in the Pittsburgh area. They asked their subjects to mention periods in which they felt exceptionally good or bad about their jobs. They then used a content-analysis procedure to identify the important factors in the subjects' jobs in these periods.

Their results are controversial. They found evidence to suggest that factors contributing to satisfaction differ from those which cause dissatisfaction. The former were termed 'satisfiers'. Since these were tied to the performance of the task, they believed that 'satisfiers' had a positive influence upon motivation and productivity. Further, they claimed that the satisfiers or motivators had a salutary effect upon labour turnover, mental health and attitudes of
management. But motivators were just one side of the coin.

On the other was a set of factors they called 'dissatisfiers' or 'hygiene factors'. Pay, job security, technical competence of supervisor, relationship with supervisor, policy and administration, working conditions and amenities and relationship with workmates fell in this category. These hygiene factors have a negative effect upon job satisfaction: unless they are maintained at a reasonable level acceptable to employees, they will create dissatisfaction. Further, unlike 'satisfiers', hygiene factors do not have a definite motivational value. Thus, any improvement of these factors above the expectations of employees will not improve performance or job satisfaction. This is because dissatisfiers are not bound up with the actual performance of the employee's task.

Herzberg's motivators broadly correspond with the upper level needs in Maslow's hierarchy. In addition Herzberg's 'hygiene' factors are substantially similar to the needs operating at the lower levels of Maslow's model. It appears, then, that Herzberg's study is consistent with Maslow's view that lower level needs, once adequately satisfied, have little motivational force.

Limitations of Herzberg's Research

The 'Pittsburgh study' prompted a great deal of further research, a complete analysis of which is beyond the scope of this paper. However, a brief account of the limitations of Herzberg's study and its implications is warranted.

Herzberg's two-factor theory of job satisfaction was founded upon data obtained in interviews with some 200 engineers and accountants. This fact alone raises doubts about the generality of the theory. Moreover, the interviewees were selected from companies operating within a thirty-mile radius of Pittsburgh.
Myers replicated Herzberg's work using identical interview methods upon his 282 male and female subjects who were on five different employment levels ranging from assemblers to Ph. D. scientists. In all, 715 sequences were reported. Among the engineers in Myers' study, the results corresponded convincingly with Herzberg's findings. Moreover, Myers concluded: 'For most individuals the greatest satisfaction and the strongest motivation are derived from achievement, responsibility, growth, advancement, work itself and earned recognition'.

The Myers' study is not the only confirmation of the two-factor theory. In 1966, Herzberg himself cited ten studies of seventeen populations which supported his model. But in all this research the method used was essentially the same as that used by Herzberg in his original study: a semi-structured interview in which the subject was asked to recall critical incidents. In other studies which depart from this method the results are, to some extent, equivocal on the validity of Herzberg's theory.

McEwen is a prominent critic of Herzberg's methodology. He claims that the original study was restricted to one measure of job attitudes and that there is a need for more than one method of measurement before the theory can be accepted. Further, he points out that the critical events technique could lead to biased results. In addition, recall often involves distortions of fact and the procedure also called for the interviewer to interpret the subjects' answers.

But perhaps the most cogent criticism of Herzberg's methodology is that he reported no validity or reliability data and gave no measure of overall job satisfaction. Likert makes the latter point well:

'It is not the level of favourableness or unfavourableness of response to an item which shows the importance of that item in influencing the overall job attitudes. Its importance is revealed by the extent to which it is correlated with the total or over-all job attitude score.'
Vroom exposed one further shortcoming in Herzberg's theory: it cannot accommodate the problem of individual differences in motivation. In a work of major significance, Vroom explained motivation in terms of three related concepts: 'valence', 'instrumentality' and 'expectancy'. 'Valence' refers to the strength or intensity of an individual's desire to achieve a particular result or goal. 'Instrumentality' refers to the individual's perception of a link between an initial, short-range goal and an ultimate, long-range goal. In other words 'instrumentality' relates to an individual's capacity to see the causal relationship between a secondary goal and a primary goal, the secondary goal being simply the means to an end. 'Expectancy' is concerned with first-level goals only. It relates to a belief that a certain course of conduct will lead to the attainment of the initial goal.

To take an example, if an employee's ultimate goal is promotion, then the strength of his desire for this goal is valence. If he believes that the path to promotion is higher production he will produce more. This is the instrumentality factor. The expectancy concept comes into play when the worker considers how he will increase his production. Performance then varies according to the product of the valence of promotion and the instrumentality, in this example, increased production.

Vroom, like many other experimenters in this field, is primarily concerned with motivation theory. Although he points out that Herzberg neglected the individual differences in workers, he does not challenge the factors Herzberg thought were important elements in job satisfaction.

Herzberg's theory emerges from this analysis in a tarnished condition. Despite some support from Lodahl and others, it is clear that the two-factor theory has not been verified. Indeed
opposition to Herzberg’s theory seems to be widespread. Yet one part of Herzberg’s study seems to have weathered the storm: his catalogue of factors which affect job satisfaction. The thrust of his critics’ attacks have been directed at the two-factor theory itself and the motivational value of Herzberg’s motivators and hygiene factors.

A more recent study, however, suggests that the level of pay is the paramount interest of the modern, affluent worker. In this project Goldthorpe and his colleagues selected 229 workers from three companies operating in and near Luton, a town in south-west Bedfordshire. The three companies were engaged in car assembly, light engineering and chemical production.

Goldthorpe reported that, in the main, the subjects saw their relationship with their firm as almost exclusively contractual. Further, the majority of the workers regarded their job as a means to an end, usually an improvement in their standard of domestic living. Thus the pay packet was by far the most important factor to the interviewees. In addition, the subjects appeared to have an apathetic approach to their work and matters associated with their job. On these findings, Goldthorpe suggested that work was not a central life interest for these employees; the respondents were more inclined to be committed to the interests of one group - the conjugal family.

If Goldthorpe’s theory is correct, it stands much of the earlier sociological research on its head. His study stresses one variable that is much neglected in job satisfaction research - ‘the wants and expectations which men bring to their work’. This is an important contribution but it seems to be one of the few redeeming features of the project.

The subjects in the Luton study could be loosely described as atypical. Goldthorpe, himself, admits that the sample was to some extent ‘self-selected’ for a high level of motivation towards material...
gains: *By restricting our sample to married men in the younger age-
groups we increased the probability of encountering instrumental 
orientations to work*. Is it any wonder then, that the Luton 
findings reveal that the subjects were primarily interested in their 
level of pay? The results are, to a large extent, method-bound. They 
are not consistent with the bulk of job satisfaction research and, 
even to the untrained eye, they appear to be of dubious merit.

In any event, Goldthorpe's study does not disprove the thesis 
that employees are interested in a broad range of job factors. Indeed 
one of his key findings was that the subjects deliberately sought 
higher pay rather than the opportunity for advancement, self-development 
or responsibility at work. It seems a reasonable inference that the 
subjects were prepared to sacrifice these interests for more immediate, 
and possibly, short-term goals.

Conclusion

What conclusions can be drawn from this brief overview of 
job satisfaction theories?

Firstly, it seems clear that there is, as yet, no magic 
formula which explains job satisfaction. Indeed it appears likely 
that a complex web of factors affect job satisfaction, not the least 
of which are the personal characteristics of the worker himself and 
the nature of his job.

Secondly, much of the research is concerned with motivation 
and the factors which will improve employees' performance, reduce 
labour turnover or create a better relationship between workers and 
management. In the present analysis, the fact that there is no proven 
correlation between job satisfaction and these matters is of secondary 
importance. The main interest lies in those factors of a job which 
are significant to employees. On this point the preponderance of
opinion is clear: the interests mentioned in Chapter 1 affect overall job satisfaction. True, they are only part of the picture but they are included in nearly all catalogues of factors which affect job attitudes. Whether they are motivators or hygiene factors is immaterial. The cardinal fact is that they are important to employees.
EMPLOYER-EMPLOYEE RELATIONSHIP SURVEY : REPORT

The writer's survey was concerned with certain aspects of the employer-employee relationship. Its primary purpose was to gather information. In addition, it attempted to test whether there was any difference between Australian companies and foreign companies in their relationship with their employees.

Survey Method and Population

Questionnaires were mailed to chief executives in 350 companies over the period July - August 1973. Subjects were selected primarily for their size, it being assumed that employment would be concentrated in large companies. Unfortunately there is no comprehensive information available as to the workforce employed by large companies operating in Australia. Accordingly 300 of the companies were chosen from The Australian's Top 1,000 Companies by means of a pooled ranking of three criteria: capital employed, nett profits and market capitalisation.

A further fifty companies were selected from the Directory of Overseas Investment in Australian Manufacturing Industry 1971. All these subjects were over 50% foreign-owned either directly or indirectly, and all, of course, were manufacturing companies.

It was possible to determine the ownership only of manufacturing companies included in the survey. There were 225 such companies, 143 Australian and 82 foreign-owned.

Response

One hundred and fifty companies responded with completed questionnaires, an overall response rate of 42%. This response was somewhat disappointing. It can no doubt be partly attributed to the
length of the questionnaire and the nature of the subject matter. Many of the nine questions involved multiple-choice answers - a time consuming exercise. With regard to subject matter, one respondent stated that he 'nearly tore the whole thing up' when he read Question 1 which dealt with company objectives. Another claimed he understood the purpose of Question 1: it was 'to show that company management is not responsive to employees' interests'. In fact, it was hoped that answers to the question would show that management is, in practice, attentive to employees' interests.

Eight respondents replied anonymously notwithstanding the writer's express undertaking not to identify the respondents in any way in reporting the results of the survey. One company advised: 'your questionnaire was too "fishing" in relation to our activities and ... as a result we are unable to complete your forms'. Similarly, in the follow-up interviews, several executives were reluctant to discuss certain issues such as dismissals and retrenchment. These were regarded as confidential matters.

Twenty-five companies advised that they were unable to complete the questionnaire either because of the diversity of their operations or because their operations were in a 'state of flux' after a merger or take-over. Several companies declined to return a completed questionnaire on the ground that their small workforce made the questions meaningless. Investment companies dominated this group.

In spite of these obstacles, completed questionnaires were received from companies which employed over 440,000 employees. Tables 1 and 2 show the survey population grouped according to size and ownership. There was no significant difference in response rate for local and foreign-owned companies. In this, as in all other calculations, significance was tested by the $\chi^2$ formula with a Yates correction. The level of significance adopted was .05.
<table>
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<th>SIZE RESPONSES</th>
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<tr>
<td>500 - 2,000</td>
<td>63</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
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</tr>
<tr>
<td>TOTAL</td>
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</table>
Of the 150 respondents, 83 were manufacturing companies. It was possible to identify the ownership of 79 of these companies.

Table 2

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<td>500 - 2,000</td>
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<td>2</td>
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<tr>
<td>TOTAL</td>
<td>44</td>
<td>35</td>
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</table>

Company Objectives

Question 1 was undoubtedly the most difficult and most controversial in the questionnaire. It asked: 'How does your company's management body rank the following objectives in order of priority? Please list preferences 1-5'. Then followed a list of five objectives. Two of these, maintaining security of employment for company employees and providing welfare schemes and fringe benefits for employees, were included because they are 'employees' interests'. Another two, profit
maximisation and reasonable return to shareholders, were listed because they are traditional 'shareholder interests'. The remaining objective was production of goods and services in an efficient manner. For present purposes, this may be regarded as a neutral interest. It is, in part, consumer-oriented but that need not concern us here. The first four interests are the material factors in the survey.

Tables 3 - 7 show the companies which did not rank both shareholder interests as the paramount objectives. Of particular interest are tables 3, 4 and 5 where the subjects rated one or both employee interests higher than both shareholder interests. This is inconsistent with the traditional notion of paramountcy of shareholders' interests which underlies much of Australian company law.

In all, 42% of the respondents ranked one or both employee interests higher than strict company law theory would require. Forty per cent of the Australian companies and 48% of the foreign companies were among this group. This appears in Table 8.
Table 3
Companies ranking each employee interest above each shareholder interest.
(i.e., E.E. above S.S.)

<table>
<thead>
<tr>
<th>SIZE</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
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<td>500 - 2,000</td>
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<td>1</td>
<td>6</td>
</tr>
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<td>2,001 - 5,000</td>
<td>1</td>
<td>3</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>TOTAL</td>
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<td>2</td>
<td>2</td>
<td>6</td>
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<tr>
<td>n = 150</td>
<td></td>
<td></td>
<td>n = 35</td>
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</table>

Table 4
Companies ranking one employee interest above both shareholder interests.
(e.g., E, S, S, E.)

<table>
<thead>
<tr>
<th>SIZE</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
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<tbody>
<tr>
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<td>6</td>
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<tr>
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<tr>
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<td>3</td>
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<td>n = 150</td>
<td></td>
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<td>n = 44</td>
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### Table 5
Companies ranking the objectives as follows: - E, S, E, S.

<table>
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<th>% of Respondents in that category</th>
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<td>5</td>
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### Table 6
Companies ranking both employee interests above one shareholder interest (e.g. S, E, E, S).

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<th>SIZE AND OWNERSHIP</th>
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<th>% of Respondents in that category</th>
<th>Foreign</th>
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<tr>
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<td>7</td>
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<tr>
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<td>13</td>
<td>1</td>
<td>25</td>
<td>3 n = 35</td>
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<tr>
<td>TOTAL</td>
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<td>9</td>
<td>2 n = 44</td>
<td>5</td>
<td>3 n = 35</td>
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### Table 7
Companies ranking one employee interest higher than one shareholder interest (i.e. S, E, S, E).

<table>
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<td>38</td>
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<td>43</td>
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<td>11</td>
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<td>21</td>
<td>11</td>
<td>25</td>
<td>10</td>
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### Table 8
Companies which did not rank both shareholder interests as paramount.

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<th>% of Respondents in that category</th>
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<td>42</td>
<td>18</td>
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<td>49</td>
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Table 9 lists those companies which ranked both shareholder interests higher than both employee interests. Over forty percent of the respondents fell in this category. Moreover, 41% of the local companies and 34% of the foreign respondents answered in this manner.

Table 10 shows the size and ownership of the companies which declined to rank the objectives. There were thirteen (9%) in this group; four (9%) were Australian and four (11%) were foreign companies.

Eight per cent of the respondents preferred to group the objectives. For example, some ranked two or three interests as equally important. The details of the companies in this category are shown in Table 11.

<table>
<thead>
<tr>
<th>SIZE</th>
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<th>% of Respondents in that category</th>
<th>Foreign</th>
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</tr>
<tr>
<td>2,001 - 5,000</td>
<td>14</td>
<td>36</td>
<td>3</td>
<td>21</td>
<td>6</td>
<td>67</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>8</td>
<td>50</td>
<td>3</td>
<td>75</td>
<td>3</td>
<td>75</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>62</td>
<td>41</td>
<td>18</td>
<td>41</td>
<td>12</td>
<td>34</td>
</tr>
</tbody>
</table>

n = 44

n = 35

n = 35
### Table 10
Companies not ranking the objectives.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>SIZE AND OWNERSHIP</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td></td>
<td>2</td>
<td>7</td>
<td>1</td>
<td>25</td>
<td></td>
<td></td>
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<tr>
<td>500 - 2,000</td>
<td></td>
<td>3</td>
<td>5</td>
<td>1</td>
<td>5</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td></td>
<td>4</td>
<td>10</td>
<td>2</td>
<td>14</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td></td>
<td>3</td>
<td>19</td>
<td></td>
<td></td>
<td>2</td>
<td>100</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>TOTAL</td>
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<td>13</td>
<td>9</td>
<td>4</td>
<td>9</td>
<td>4</td>
<td>11</td>
</tr>
</tbody>
</table>

**Note:**

- Total respondents: 150
- Australian respondents: 44
- Foreign respondents: 35

### Table 11
Companies grouping objectives.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>SIZE AND OWNERSHIP</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td></td>
<td>2</td>
<td>7</td>
<td>1</td>
<td>25</td>
<td></td>
<td></td>
</tr>
<tr>
<td>500 - 2,000</td>
<td></td>
<td>5</td>
<td>8</td>
<td>1</td>
<td>5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td></td>
<td>5</td>
<td>13</td>
<td>2</td>
<td>14</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>12</td>
<td>8</td>
<td>4</td>
<td>9</td>
<td>2</td>
<td>6</td>
</tr>
</tbody>
</table>

**Note:**

- Total respondents: 150
- Australian respondents: 44
- Foreign respondents: 35
The respondents grouped in Tables 10 and 11 almost invariably explained that the objectives were interwoven or interdependent. Once again, this is inconsistent with traditional company law principles: in the classic formula, shareholder interests have undisputed priority.

There was no significant difference between Australian companies and foreign companies or between small and large companies in the answers to Question 1.

The responses to Question 1 reveal merely what management said it considered important. Whether management which ranked employee interests higher than required by company law are, in fact, responsive to employees' interests is another matter. An attempt was made to examine this issue on the basis of the data collected in the survey. Respondents were divided into two groups: Group A, which did not rank both shareholder interests paramount and Group B, which did so rank the objectives.

The answers of these two groups to certain key questions in the remainder of the questionnaire were analysed to ascertain whether there was any significant difference between the two groups. The issues selected were: whether the companies had a joint consultation scheme which considered matters other than safety; whether the companies provided their employees with four or more of the items of information listed in Question 4 (a); whether the companies had dismissed employees in the last three years on grounds of incompatibility with other employees, unsatisfactory performance of job because of factors outside the employee's control or because of advancing age; whether the companies had dismissed employees with no stated reason in the last three years; and, finally, whether the companies provided severance pay for workers retrenched in the relevant period.

Tables 12 - 18 show the results of this follow-up to Question 1. In fact, there was no significant difference between Group A and Group B.
Nor was there any significant difference between local companies in Group A and local companies in Group B or between foreign companies in Group A and foreign companies in Group B.

Table 12

Companies having a joint consultation committee which considered matters in addition to safety.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>GROUP A</th>
<th>NO.</th>
<th>GROUP B</th>
<th>NO.</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>1</td>
<td></td>
<td>UNDER 500</td>
<td>3</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>8</td>
<td></td>
<td>500 - 2,000</td>
<td>12</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>5</td>
<td></td>
<td>2,001 - 5,000</td>
<td>5</td>
</tr>
<tr>
<td>OVER 5,000</td>
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<td></td>
<td>OVER 5,000</td>
<td>1</td>
</tr>
<tr>
<td>NOT Sized</td>
<td>1</td>
<td></td>
<td>TOTAL</td>
<td>21</td>
</tr>
</tbody>
</table>

n = 63 27%  
n = 62 34%
Table 13
Companies providing their employees with information on four or more of the items listed in Question 4 (a).

<table>
<thead>
<tr>
<th>GROUP A</th>
<th></th>
<th>GROUP B</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>SIZE</td>
<td>NO.</td>
<td>SIZE</td>
<td>NO.</td>
</tr>
<tr>
<td>UNDER 500</td>
<td>6</td>
<td>UNDER 500</td>
<td>6</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>21</td>
<td>2,001 - 5,000</td>
<td>8</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>4</td>
<td>OVER 5,000</td>
<td>6</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>2</td>
<td>TOTAL</td>
<td>33</td>
</tr>
<tr>
<td>TOTAL</td>
<td>45</td>
<td>n = 63</td>
<td>71%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>n = 62</td>
<td>53%</td>
</tr>
</tbody>
</table>
Table 14
Companies who had dismissed employees for incompatibility with their workmates during the relevant period.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>GROUP A</th>
<th>NO.</th>
<th>GROUP B</th>
<th>NO.</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>3</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>7</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>6</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>1</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NOT Sized</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>19</td>
<td>18</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

n = 63 30%  n = 62 29%
Table 15
Companies which had dismissed employees during the relevant period for unsatisfactory performance because of factors outside employee's control.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>GROUP A</th>
<th>NO.</th>
<th>SIZE</th>
<th>GROUP B</th>
<th>NO.</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td></td>
<td>4</td>
<td>UNDER 500</td>
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<tr>
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<td>2,001 - 5,000</td>
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<td>6</td>
<td>2,001 - 5,000</td>
<td></td>
<td>7</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td></td>
<td>2</td>
<td>OVER 5,000</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td></td>
<td>2</td>
<td></td>
<td></td>
<td></td>
</tr>
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<td>TOTAL</td>
<td></td>
<td>29</td>
<td>TOTAL</td>
<td></td>
<td>26</td>
</tr>
</tbody>
</table>

n = 63 46%  n = 62 42%
Table 16
Companies which had dismissed employees during the relevant period for unsatisfactory performance of job as a result of advancing age.

<table>
<thead>
<tr>
<th>GROUP</th>
<th>SIZE</th>
<th>NO.</th>
<th>GROUP</th>
<th>SIZE</th>
<th>NO.</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>UNDER 500</td>
<td>-</td>
<td>B</td>
<td>UNDER 500</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>500 - 2,000</td>
<td>2</td>
<td></td>
<td>500 - 2,000</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>2,001 - 5,000</td>
<td>4</td>
<td></td>
<td>2,001 - 5,000</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>OVER 5,000</td>
<td>2</td>
<td></td>
<td>OVER 5,000</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>8</td>
<td></td>
<td>TOTAL</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>n = 63</td>
<td>13%</td>
<td></td>
<td>n = 62</td>
<td>21%</td>
</tr>
</tbody>
</table>
Table 17
Companies which had dismissed employees for no stated reason in the relevant period.

<table>
<thead>
<tr>
<th>GROUP A</th>
<th>SIZE</th>
<th>NO.</th>
<th>GROUP B</th>
<th>SIZE</th>
<th>NO.</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>5</td>
<td></td>
<td>UNDER 500</td>
<td>3</td>
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<tr>
<td>500 - 2,000</td>
<td>3</td>
<td></td>
<td>500 - 2,000</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>5</td>
<td></td>
<td>2,001 - 5,000</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>-</td>
<td></td>
<td>OVER 5,000</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>13</td>
<td></td>
<td>TOTAL</td>
<td>15</td>
<td></td>
</tr>
</tbody>
</table>

n = 63 21%  
n = 62 24%
Table 18
Companies which had paid severance pay to employees retrenched or made redundant in the relevant period.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>NO.</th>
<th>SIZE</th>
<th>NO.</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>2</td>
<td>UNDER 500</td>
<td>2</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>7</td>
<td>500 - 2,000</td>
<td>3</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>7</td>
<td>2,001 - 5,000</td>
<td>7</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>3</td>
<td>OVER 5,000</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td></td>
<td>NOT SIZED</td>
<td>1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>19</td>
<td>TOTAL</td>
<td>16</td>
</tr>
<tr>
<td>n = 25</td>
<td>76%</td>
<td>n = 25</td>
<td>64%</td>
</tr>
</tbody>
</table>

Joint Consultation

Question 2 was a straightforward question on joint consultation. Nearly half the respondents reported that they had a formal joint consultation committee. Sixty-four per cent of the local companies and 49% of the foreign companies used this form of consultation.
Representation

In over half of the companies with committees, employee representatives were in the majority. On the other hand, in only a small number of companies did managerial representatives hold a majority or even equal representation. The composition varied in about one-fifth of the committees.

Selection of Employees' Representatives

Management appointed the employees' representatives in 41% of the companies which had joint consultation committees, and in slightly more than one-fifth of these companies this was the sole means of selection. Nearly a third of the companies provided that the employees' representatives would be shop stewards or other union representatives; only 12% of the committees used this as the sole means of recruiting employee representatives. In over half the companies with committees employees elected their own delegates, and a third of the firms used this means exclusively.

Three of the committees used all three methods of selection, while thirteen companies used two of the means listed.

Meetings of the Committees

The overwhelming majority (83%) of the committees met regularly, the remainder on an ad hoc basis.

Matters Considered by the Committees

By far the most common matter considered by the committees was safety. Ninety-four per cent of the committees dealt with this issue. Indeed in 27% this was the only subject considered.

Other matters handled by the committees were as follows:

- amenities 56%
- working conditions 53%
- work rules 47%
- operating procedures 44%
fringe benefits 42%
welfare schemes 41%
plant layout 26%
retrenchment 17%
redundancy as a result of technological change 14%
proposed technological changes 14%
company policy 11%

There was no significant difference between local and foreign companies or between large and small companies in their answers to Question 2.

Worker Participation in Management

In answer to Question 3 (i), 38% of the respondents advised that they objected to worker participation in matters directly related to their employees' work environment and working conditions. Forty-three per cent of the Australian manufacturing companies and 34% of the foreign companies fell in this group.

On the other hand, 40% of the respondents reported that they did not object to this form of worker participation. Thirty-nine per cent of the Australian companies and 37% of the foreign companies answered in this way.

Just over one-fifth of the respondents were undecided in their attitude on this point. Among this group were 18% of the local companies and 29% of the foreign companies.

Tables 19 - 21 supply the detailed data. There was no significant difference in the answers by small and large companies or by local and foreign-owned companies.
### Table 19
Companies which objected to worker participation in matters directly related to their employees.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>8</td>
<td>30</td>
<td>10</td>
<td>45</td>
<td>3</td>
<td>38</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>24</td>
<td>38</td>
<td></td>
<td>45</td>
<td>5</td>
<td>31</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>15</td>
<td>38</td>
<td>6</td>
<td>43</td>
<td>3</td>
<td>33</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>8</td>
<td>50</td>
<td>3</td>
<td>75</td>
<td>1</td>
<td>50</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>57</td>
<td>38</td>
<td>19 n = 44</td>
<td>43</td>
<td>12 n = 35</td>
<td>34</td>
</tr>
</tbody>
</table>

### Table 20
Companies which did not object to worker participation in matters directly related to the employees.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>13</td>
<td>48</td>
<td>3</td>
<td>75</td>
<td>2</td>
<td>25</td>
</tr>
<tr>
<td>500 - 2,000</td>
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<td>44</td>
<td>10</td>
<td>45</td>
<td>4</td>
<td>44</td>
</tr>
<tr>
<td>2,001 - 3,000</td>
<td>14</td>
<td>36</td>
<td>4</td>
<td>29</td>
<td>1</td>
<td>50</td>
</tr>
<tr>
<td>OVER 3,000</td>
<td>5</td>
<td>31</td>
<td></td>
<td></td>
<td>13</td>
<td>37</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>61</td>
<td>41</td>
<td>17 n = 44</td>
<td>39</td>
<td>13 n = 35</td>
<td>37</td>
</tr>
</tbody>
</table>
Table 21
Companies which were undecided in their attitude to worker participation in matters directly related to their employees.

<table>
<thead>
<tr>
<th>SIZE AND OWNERSHIP</th>
<th>SIZE</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UNDER 500</td>
<td>6</td>
<td>22</td>
<td>1</td>
<td>25</td>
<td>3</td>
<td>38</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>11</td>
<td>17</td>
<td>2</td>
<td>9</td>
<td>5</td>
<td>31</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>10</td>
<td>26</td>
<td>4</td>
<td>29</td>
<td>2</td>
<td>22</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>3</td>
<td>19</td>
<td>1</td>
<td>25</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NOT ANSWERED</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>32</td>
<td>21</td>
<td>8</td>
<td>18</td>
<td>10</td>
<td>29</td>
</tr>
</tbody>
</table>

A higher percentage (60%) of companies objected to worker participation in management on such issues as productivity, marketing and investment policies. The percentages of local and foreign companies reporting this type of attitude were 55% and 57% respectively.

While 40% of the respondents did not object to the kind of participation described in Question 3 (i), only 17% did not object to worker participation in matters peripheral to the work. Twenty-seven per cent of the Australian companies and 9% of the foreign firms responded in this manner.

As in Question 3 (i), 21% of the respondents were undecided in their attitude to this type of participation. Furthermore, the percentages of Australian (18%) and foreign companies (31%) with this response were similar to those which appeared in reply to the first part of Question 3.
Tables 22 - 24 break down the respondents to the question according to size and ownership. There were no significant differences between small and large companies or between local and foreign companies in the answers.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>SIZE AND OWNERSHIP</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>18</td>
<td>67</td>
<td>Aust.</td>
<td>3</td>
<td>75</td>
<td>6</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>35</td>
<td>56</td>
<td>12</td>
<td>55</td>
<td>8</td>
<td>50</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>21</td>
<td>54</td>
<td>6</td>
<td>43</td>
<td>4</td>
<td>44</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>13</td>
<td>81</td>
<td>3</td>
<td>75</td>
<td>2</td>
<td>100</td>
</tr>
<tr>
<td>NOT Sized</td>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>90</td>
<td>60</td>
<td></td>
<td>24</td>
<td>20</td>
<td>57</td>
</tr>
</tbody>
</table>

n = 150
n = 44
n = 35
### Table 23

Companies which did not object to worker participation in management in matters such as productivity, marketing and investment policies.

<table>
<thead>
<tr>
<th>SIZE AND OWNERSHIP</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Aust.</td>
<td>Foreign</td>
<td></td>
</tr>
<tr>
<td>UNDER 500</td>
<td>6</td>
<td>22</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>14</td>
<td>22</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>5</td>
<td>13</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td>25</td>
<td>21</td>
<td>11</td>
</tr>
<tr>
<td>TOTAL</td>
<td>26</td>
<td>17</td>
<td>12</td>
<td>27</td>
</tr>
</tbody>
</table>

### Table 24

Companies 'undecided' in their approach to worker participation in management in matters such as productivity, marketing and investment policies.

<table>
<thead>
<tr>
<th>SIZE AND OWNERSHIP</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Aust.</td>
<td>Foreign</td>
<td></td>
</tr>
<tr>
<td>UNDER 500</td>
<td>3</td>
<td>11</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>13</td>
<td>21</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>12</td>
<td>31</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>3</td>
<td>19</td>
<td>1</td>
<td>25</td>
</tr>
<tr>
<td>TOTAL</td>
<td>31</td>
<td>21</td>
<td>8</td>
<td>18</td>
</tr>
</tbody>
</table>
In answer to Question 4, the respondents reported that they provided their employees with information on the following matters:

- contributions to employee welfare schemes: 75%
- company policy and operations: 74%
- plans for development and expansion: 67%
- the reasons for redundancy and retrenchment: 57%
- proposed technological changes: 57%
- productivity: 48%
- contributions to community interests: 43%

Four companies (3%) provided information on items other than those listed while only one company did not supply any of this information to its employees.

There was a significant difference between local and foreign respondents in the disclosure of information on company plans for development and expansion and contributions to community interests. In both instances, foreign companies were more inclined to provide this type of information. The raw data appears in Tables 25 - 26.
### Table 25
Companies which provided their employees with information on plans for development and expansion.

<table>
<thead>
<tr>
<th>SIZE SIZE AND OWNERSHIP</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
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<td>75</td>
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<td>63</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>40</td>
<td>63</td>
<td>11</td>
<td>50</td>
<td>13</td>
<td>81</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>27</td>
<td>69</td>
<td>7</td>
<td>50</td>
<td>7</td>
<td>78</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>13</td>
<td>81</td>
<td>2</td>
<td>50</td>
<td>2</td>
<td>100</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>101</td>
<td>67</td>
<td>23</td>
<td>52</td>
<td>27</td>
<td>79</td>
</tr>
</tbody>
</table>

n = 150

### Table 26
Companies which provided their employees with information on company contributions to community interests.

<table>
<thead>
<tr>
<th>SIZE SIZE AND OWNERSHIP</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>10</td>
<td>37</td>
<td>3</td>
<td>75</td>
<td>4</td>
<td>50</td>
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<tr>
<td>500 - 2,000</td>
<td>25</td>
<td>40</td>
<td>7</td>
<td>14</td>
<td>6</td>
<td>67</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>20</td>
<td>51</td>
<td>25</td>
<td>1</td>
<td>50</td>
<td></td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>9</td>
<td>56</td>
<td>1</td>
<td></td>
<td>1</td>
<td>50</td>
</tr>
<tr>
<td>TOTAL</td>
<td>64</td>
<td>43</td>
<td>14</td>
<td>32</td>
<td>21</td>
<td>60</td>
</tr>
</tbody>
</table>

n = 150
There was no significant difference between large and small companies in the answers to Question 4.

Of the sixty-five companies which did not give information to their employees on the reasons for redundancy or retrenchment, nearly one-fifth had retrenched employees within the three years preceding the survey. Eighteen per cent of the Australian companies and 23% of the foreign firms in this category had retrenched staff in the relevant period. Table 27 supplies the details.

Sixty-four companies did not advise their employees of proposed technological changes. The details of these companies appear in Table 28. Only three of the companies in this group had, in fact, dismissed employees on grounds of redundancy in the three years preceding the survey.

<table>
<thead>
<tr>
<th>SIZE</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
</tr>
<tr>
<td>2 (n = 15)</td>
</tr>
<tr>
<td>13</td>
</tr>
<tr>
<td>1 (n = 3)</td>
</tr>
<tr>
<td>33</td>
</tr>
<tr>
<td>1 (n = 3)</td>
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<tr>
<td>33</td>
</tr>
<tr>
<td>500 - 2,000</td>
</tr>
<tr>
<td>3 (n = 28)</td>
</tr>
<tr>
<td>10</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
</tr>
<tr>
<td>5 (n = 13)</td>
</tr>
<tr>
<td>38</td>
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<tr>
<td>2 (n = 3)</td>
</tr>
<tr>
<td>67</td>
</tr>
<tr>
<td>OVER 5,000</td>
</tr>
<tr>
<td>2 (n = 7)</td>
</tr>
<tr>
<td>28</td>
</tr>
<tr>
<td>2 (n = 3)</td>
</tr>
<tr>
<td>67</td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
<tr>
<td>12 (n = 65)</td>
</tr>
<tr>
<td>18</td>
</tr>
<tr>
<td>3 (n = 16)</td>
</tr>
<tr>
<td>18</td>
</tr>
<tr>
<td>3 (n = 13)</td>
</tr>
<tr>
<td>23</td>
</tr>
<tr>
<td>SIZE AND OWNERSHIP</td>
</tr>
<tr>
<td>--------------------</td>
</tr>
<tr>
<td></td>
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<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
<tr>
<td>n = 150</td>
</tr>
</tbody>
</table>

Means of Communication

The respondents used a variety of means of communicating with their employees:

* newsheets or bulletins 60%
** intra-company communiques 56%
*** direct consultation on an ad hoc basis 50%

Directors' report 29%

* Seven Companies (5%) used this means exclusively.
** Six Companies (4%) used this means exclusively.
*** Five Companies (3%) used this means exclusively.

Only 7% of the respondents reported that they used some other form of communication with their employees.

Tables 29 - 32 give the detailed responses to this question.
### Table 29

Companies which issued information to their employees via Directors' report.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>8</td>
<td>30</td>
<td>2</td>
<td>50</td>
<td></td>
<td></td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>13</td>
<td>21</td>
<td>5</td>
<td>23</td>
<td>2</td>
<td>13</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>12</td>
<td>31</td>
<td>4</td>
<td>29</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>9</td>
<td>56</td>
<td>2</td>
<td>50</td>
<td>1</td>
<td>50</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>43</td>
<td>29</td>
<td>13</td>
<td>30</td>
<td>3</td>
<td>9</td>
</tr>
</tbody>
</table>

* n = 150

### Table 30

Companies which used intra-company communiques as a means of conveying information to their employees.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>11</td>
<td>41</td>
<td>2</td>
<td>50</td>
<td>2</td>
<td>25</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>29</td>
<td>46</td>
<td>12</td>
<td>55</td>
<td>4</td>
<td>44</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>26</td>
<td>67</td>
<td>12</td>
<td>86</td>
<td>2</td>
<td>100</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>16</td>
<td>100</td>
<td>2</td>
<td>50</td>
<td>2</td>
<td>100</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>84</td>
<td>56</td>
<td>28</td>
<td>64</td>
<td>15</td>
<td>43</td>
</tr>
</tbody>
</table>

* n = 44

* n = 35
### Table 31
Companies using direct consultation on an *ad hoc* basis as a means of issuing information to employees.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>11</td>
<td>41</td>
<td>1</td>
<td>25</td>
<td>4</td>
<td>50</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>28</td>
<td>44</td>
<td>14</td>
<td>64</td>
<td>6</td>
<td>40</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>22</td>
<td>56</td>
<td>11</td>
<td>79</td>
<td>3</td>
<td>33</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>12</td>
<td>75</td>
<td></td>
<td></td>
<td>2</td>
<td>100</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>75</td>
<td>50</td>
<td>26</td>
<td>59</td>
<td>15</td>
<td>43</td>
</tr>
</tbody>
</table>

Table 32
Companies using a newsheet or bulletin as a means of conveying information to their employees.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>10</td>
<td>37</td>
<td>2</td>
<td>50</td>
<td>5</td>
<td>63</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>37</td>
<td>59</td>
<td>13</td>
<td>59</td>
<td>8</td>
<td>50</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>26</td>
<td>67</td>
<td>8</td>
<td>57</td>
<td>7</td>
<td>78</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>15</td>
<td>94</td>
<td>2</td>
<td>50</td>
<td>2</td>
<td>100</td>
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<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>90</td>
<td>60</td>
<td>25</td>
<td>57</td>
<td>22</td>
<td>63</td>
</tr>
</tbody>
</table>
Significantly more local companies than foreign companies used a director's report as a means of disclosing information to employees.

As might be expected, there was a significant difference between small and large companies in their use of intra-company communiques: larger companies listed this means more often than small companies.

Strangely enough, significantly more large companies than small companies reported that they used direct consultation on an ad hoc basis.

There was also a significant difference in the use of newsheets or bulletins, large companies favouring these more than small companies.

### Multiple Forms of Communication

Around 13% of the respondents used all four means of conveying information. While just under one-quarter of the respondents used three of the forms listed, over 30% of the companies used two of the means.

Predictably, significantly more large companies used multiple avenues of communication with their employees.

### Fringe Benefits

The respondents provided a variety of fringe benefits for their employees:

- Superannuation: 90%
- Work clothing: 67%
- Bonuses: 50%
- * Traveling expenses: 45%
- * Housing and accommodation assistance: 29%
- Cash payments or share acquisition: 23%

* These benefits were significantly more common in large companies.
The survey did not inquire into the coverage of these fringe benefits as this has been adequately considered elsewhere. The important point for present purposes was how these schemes were administered.

**Administration of Fringe Benefits**

In the overwhelming majority of companies (89%), the schemes were administered by management and, indeed, in over 60% of the schemes management were the sole administrators.

Tables 33 and 34 show this data in greater detail.

<table>
<thead>
<tr>
<th>SIZE AND OWNERSHIP</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Aust.</td>
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<tr>
<td>UNDER 500</td>
<td>26</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>54</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>34</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>16</td>
</tr>
<tr>
<td>TOTAL</td>
<td>134</td>
</tr>
<tr>
<td></td>
<td>n = 150</td>
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<tr>
<td></td>
<td>n = 44</td>
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<td>n = 35</td>
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<td>SIZE AND OWNERSHIP</td>
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<tr>
<td></td>
<td>Under 500</td>
</tr>
<tr>
<td></td>
<td>500 - 2,000</td>
</tr>
<tr>
<td></td>
<td>2,001 - 5,000</td>
</tr>
<tr>
<td></td>
<td>OVER 5,000</td>
</tr>
<tr>
<td></td>
<td>Not sized</td>
</tr>
<tr>
<td>TOTAL</td>
<td>95</td>
</tr>
</tbody>
</table>

Personnel officers were responsible for the schemes in nearly one-quarter of the respondent companies. As might be expected, this was significantly more common in the larger companies which are more likely to have personnel departments. In 17% of the companies, personnel officers were in sole charge of the fringe benefits.

Tables 35 and 36 supply the data on these points.
Table 35  
Fringe Benefits Administered by Personnel Officers.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>n = 150</td>
<td>36</td>
<td>24</td>
<td>9</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SIZE AND OWNERSHIP</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>4</td>
<td>15</td>
<td>1</td>
<td>25</td>
<td>3</td>
<td>38</td>
</tr>
<tr>
<td>500 - 2,000</td>
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<td>17</td>
<td>3</td>
<td>14</td>
<td>3</td>
<td>19</td>
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<td>2,001 - 5,000</td>
<td>13</td>
<td>33</td>
<td>4</td>
<td>29</td>
<td>3</td>
<td>33</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>7</td>
<td>44</td>
<td>1</td>
<td>25</td>
<td>2</td>
<td>100</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 36  
Fringe Benefits Administered Solely by Personnel Officers.

<table>
<thead>
<tr>
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<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>n = 150</td>
<td>26</td>
<td>17</td>
<td>6</td>
</tr>
</tbody>
</table>

<table>
<thead>
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<th>SIZE AND OWNERSHIP</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
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<tbody>
<tr>
<td>UNDER 500</td>
<td>4</td>
<td>15</td>
<td>1</td>
<td>25</td>
<td>3</td>
<td>38</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>7</td>
<td>11</td>
<td>2</td>
<td>9</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>8</td>
<td>21</td>
<td>2</td>
<td>14</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>6</td>
<td>38</td>
<td>1</td>
<td>25</td>
<td>1</td>
<td>50</td>
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<tr>
<td>NOT SIZED</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

TOTAL  
n = 150  
26  
17  
6  
n = 44  
14  
5  
n = 35  
14
Only nineteen (13%) of the companies had charged a joint committee of employees and management with responsibility for the administration of the schemes. Except as indicated above, there was no significant difference between small and large or between local and foreign companies in their answers to this question.

Dismissal

All but five of the respondents (97%) had dismissed employees in the three years preceding the survey. Question 6 listed various reasons for dismissal and asked the respondents to tick those which were relevant in this period. The results were as follows:

- Misconduct: 84%
- Unsatisfactory Performance of Job because of factors outside the employee's control: 43%
- Retrenchment because the company had no more work for the particular employee: 39%
- Incompatibility with other employees: 31%
- Unsatisfactory performance of job as a result of advancing age: 17%
- Redundancy as a result of technological change: 2%

Over one-fifth of the respondents had dismissed employees with notice or wages in lieu of notice for no stated reason. Table 37 groups the companies in this category.
Unfortunately, the great majority of the respondents did not provide figures on the number of dismissals for each of the reasons listed. The most common reason for this failure was that it was extremely difficult to calculate the number of dismissals since central records were not kept.

It is interesting to note that at least thirty-three of the forty-six companies which reported dismissals for incompatibility had more than 500 employees on their payroll; four of these companies employed over 5,000 employees. These figures are given in greater detail in Table 38.
Significantly more large companies than small companies advised that they had dismissed employees because of unsatisfactory performance attributed to advancing age. In addition, there was a significant difference between the answers of local and foreign companies on this point: more Australian companies had dismissed on this ground in the relevant period.

Moreover, significantly more small companies reported retrenchments than did large companies.

Tables 39 and 40 supply the details on these points.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>11</td>
<td></td>
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<td>4</td>
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<tr>
<td>500 - 2,000</td>
<td>15</td>
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<td>6</td>
<td></td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>14</td>
<td></td>
<td>8</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>4</td>
<td></td>
<td>2</td>
<td></td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>2</td>
<td></td>
<td>25</td>
<td></td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>46</td>
<td></td>
<td>17</td>
<td></td>
<td>8</td>
<td></td>
</tr>
</tbody>
</table>
### Table 39
Companies which had dismissed employees because of unsatisfactory performance of job as a result of advancing age.

<table>
<thead>
<tr>
<th>SIZE AND OWNERSHIP</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Aust.</td>
<td>Foreign</td>
<td></td>
</tr>
<tr>
<td>UNDER 500</td>
<td>3</td>
<td>11</td>
<td>1</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>7</td>
<td>11</td>
<td>3</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>7</td>
<td>18</td>
<td>4</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>7</td>
<td>44</td>
<td>3</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

n = 150

### Table 40
Companies which had retrenched employees in the relevant period.

<table>
<thead>
<tr>
<th>SIZE AND OWNERSHIP</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Aust.</td>
<td>Foreign</td>
<td></td>
</tr>
<tr>
<td>UNDER 500</td>
<td>8</td>
<td>30</td>
<td>25</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>16</td>
<td>25</td>
<td>18</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>23</td>
<td>59</td>
<td>9</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>9</td>
<td>56</td>
<td>3</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>2</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

TOTAL

n = 58
Retraining Schemes

Only about 17% of the respondents had a scheme for training displaced or redundant employees in new skills.

Of the 118 companies which did not have a retraining scheme, fifty-two (44%) had retrenched or laid-off employees in the three years preceding the survey. Here there was a significant difference between small and large companies: the latter more commonly had a scheme. Table 41 groups the respondents in this category according to size and ownership.

<table>
<thead>
<tr>
<th>SIZE AND OWNERSHIP</th>
<th>SIZE</th>
<th>% of Respondents in that category</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>8</td>
<td>32 n = 25</td>
<td>1 n = 4</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>16</td>
<td>34 n = 47</td>
<td>4 n = 15</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>21</td>
<td>64 n = 33</td>
<td>8 n = 11</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>5</td>
<td>56 n = 9</td>
<td>1 n = 2</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>2</td>
<td>44 n = 118</td>
<td>14 n = 32</td>
</tr>
<tr>
<td>TOTAL</td>
<td>52</td>
<td>44 n = 118</td>
<td>14 n = 32</td>
</tr>
</tbody>
</table>
Severance Pay

Sixty-two companies had retrenched employees or made employees redundant in the relevant period. Of these companies, forty-two (68%) provided severance pay for the employees laid-off. There was no significant difference between small and large or local and foreign companies in the answers to Question 8.

Table 42 contains the details.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>% of Respondents in that category</th>
<th>AUST.</th>
<th>% of Respondents in that category</th>
<th>FOREIGN</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>50</td>
<td>4</td>
<td>4</td>
<td>2</td>
<td>50</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>59</td>
<td>10</td>
<td>9</td>
<td>1</td>
<td>33</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>72</td>
<td>18</td>
<td>3</td>
<td>2</td>
<td>100</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>100</td>
<td>9</td>
<td>100</td>
<td>80</td>
<td>1</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td>1</td>
<td>100</td>
<td>8</td>
<td>57</td>
</tr>
</tbody>
</table>

Table 42: Companies which had provided severance pay for employees or made redundant.
Nearly all these companies granted the severance pay on a gratuitous basis but the method of computing these payments differed markedly.

Eleven companies gave payments ranging from one to two weeks' pay per year of service, while eight firms granted a similar benefit based on years of award service.

Twenty-one companies provided some other form of benefit. Seven, for example, gave the displaced worker a vested withdrawal benefit from the firm's superannuation scheme. One company simply gave the employees 70% of their anticipated retirement pension benefit.

Three months' salary was the uniform standard for all employees retrenched in one company, while another granted pro rata long service leave entitlement with a qualifying period of three years' service. Yet another merely gave credit for accumulated sick leave.

Three companies provided other forms of benefits tailored to the particular circumstances. Eight respondents were slightly more specific. They reported that their schemes were founded upon a basic graduated scale of terminal compensation with provision for tailoring the severance payments to individual needs and hardships.

Almost one-third of the companies which had retrenched employees or made employees redundant in the relevant period provided no terminal compensation. There was no significant difference between local and foreign or large and small companies on this point.

These results appear in Table 43.
Table 43

Companies which provided no severance pay for employees retrenched or made redundant in the relevant period.

<table>
<thead>
<tr>
<th>SIZE AND OWNERSHIP</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>SIZE</td>
</tr>
<tr>
<td></td>
<td>No.</td>
</tr>
<tr>
<td>UNDER 500</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>n = 8</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>n = 17</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>n = 25</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>2</td>
</tr>
<tr>
<td>TOTAL</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>n = 62</td>
</tr>
</tbody>
</table>

In answer to the final question, 60% of the respondents advised that none of their employees was entitled to severance pay in the event of retrenchment or redundancy. Of these ninety companies, some thirty-nine (43%) retrenched or laid-off staff in the relevant period.

Tables 44 and 45 give the detailed responses. There was a significant difference between large and small companies on this point: more large companies with no severance pay provision had retrenched employees in the relevant period.
### Table 44
Companies in which none of the employees were covered by severance pay provisions in award or industrial agreement.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>19</td>
<td>70</td>
<td>3</td>
<td>75</td>
<td>7</td>
<td>88</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>37</td>
<td>59</td>
<td>11</td>
<td>50</td>
<td>9</td>
<td>56</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>21</td>
<td>54</td>
<td>7</td>
<td>50</td>
<td>6</td>
<td>67</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>11</td>
<td>69</td>
<td>3</td>
<td>75</td>
<td>1</td>
<td>50</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>2</td>
<td>24</td>
<td>n = 44</td>
<td></td>
<td>n = 35</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>90</td>
<td>60</td>
<td></td>
<td>55</td>
<td>23</td>
<td>66</td>
</tr>
</tbody>
</table>

Table 45
Companies which had retrenched employees in relevant period but were under no obligation to provide severance pay.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>6</td>
<td>32</td>
<td>1</td>
<td>33</td>
<td>4</td>
<td>57</td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>11</td>
<td>30</td>
<td>3</td>
<td>27</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>14</td>
<td>67</td>
<td>6</td>
<td>86</td>
<td>4</td>
<td>67</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>6</td>
<td>55</td>
<td>2</td>
<td>67</td>
<td>1</td>
<td>100</td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>2</td>
<td>43</td>
<td>n = 24</td>
<td></td>
<td>n = 23</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>39</td>
<td>43</td>
<td></td>
<td>50</td>
<td>10</td>
<td>43</td>
</tr>
</tbody>
</table>
Three companies replied that the final question was "not applicable", six did not know the position and sixteen simply did not answer the question.

Of the remaining thirty-five companies, one-fifth reported that under 25% of their work force were entitled to severance pay if retrenched or dismissed because of redundancy.

Ten companies (29%) advised that 25 - 50% of their payroll were so covered, while 51% indicated that between 50 and 100% of their employees were entitled to terminal compensation upon retrenchment.

These figures appear in greater detail in Tables 46 - 48.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>SIZE AND OWNERSHIP</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>1</td>
<td>20</td>
<td>1</td>
<td>1</td>
<td>n = 1</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>n = 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>4</td>
<td>29</td>
<td>1</td>
<td>1</td>
<td>n = 6</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>n = 14</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>2</td>
<td>20</td>
<td>1</td>
<td>1</td>
<td>n = 3</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>n = 10</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>2</td>
<td>20</td>
<td>1</td>
<td>2</td>
<td>n = 8</td>
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</tr>
<tr>
<td></td>
<td>n = 4</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>7</td>
<td>20</td>
<td>1</td>
<td>9</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>n = 35</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 47
Companies in which 25-50% were entitled to severance pay.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
<td>1</td>
<td>20</td>
<td>n = 5</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>500 - 2,000</td>
<td>3</td>
<td>21</td>
<td>n = 6</td>
<td>33</td>
<td>1</td>
<td>33</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>3</td>
<td>30</td>
<td>n = 4</td>
<td>50</td>
<td></td>
<td></td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>2</td>
<td>50</td>
<td>n = 1</td>
<td>100</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>10</td>
<td>29</td>
<td>n = 11</td>
<td>45</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>n = 35</td>
<td>29</td>
<td></td>
<td></td>
<td></td>
<td>5</td>
<td></td>
</tr>
</tbody>
</table>

Table 48
Companies in which 50-100% of employees are entitled to severance pay.

<table>
<thead>
<tr>
<th>SIZE</th>
<th>No.</th>
<th>% of Respondents in that category</th>
<th>Aust.</th>
<th>% of Respondents in that category</th>
<th>Foreign</th>
<th>% of Respondents in that category</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNDER 500</td>
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<td>60</td>
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<tr>
<td>500 - 2,000</td>
<td>7</td>
<td>50</td>
<td>n = 6</td>
<td>50</td>
<td>3</td>
<td>100</td>
</tr>
<tr>
<td>2,001 - 5,000</td>
<td>5</td>
<td>50</td>
<td>n = 4</td>
<td>50</td>
<td>1</td>
<td>33</td>
</tr>
<tr>
<td>OVER 5,000</td>
<td>2</td>
<td>50</td>
<td>n = 1</td>
<td>100</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NOT SIZED</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td>18</td>
<td>51</td>
<td>n = 11</td>
<td>45</td>
<td>5</td>
<td>63</td>
</tr>
</tbody>
</table>
CONCLUSION

With a sample of only 150 companies one cannot really draw any firm conclusions which purport to be representative of the entire population. Nevertheless, the respondents' answers at least give some ideas of trends and practices within those companies. Moreover, the respondents did employ a not inconsiderable proportion of the Australian work force engaged in the private sector. It may be possible, therefore, to venture a few general conclusions from the survey findings.

(i) There appears to be no fundamental difference between large and small companies and local and foreign companies in the matters raised in this survey. There are significant differences on certain details but, in general, these were minor points.

(ii) The thesis that management's task involves a balancing of interests receives considerable support from the survey findings.

(iii) Formal joint consultation committees tend to play a rather menial role concentrating mainly on safety matters.

(iv) Opposition to worker participation in management in matters directly related to the employees' environment and working conditions is not as firm as one might imagine. On the other hand, a clear majority of the respondents were opposed to worker participation in management in matters peripheral to the work.

(v) The range of information passed on to employees and the means of communication appear to be grossly inadequate as a foundation of worker participation in management.

(vi) Relatively few respondents gave employees any responsibility in the administration of fringe benefit schemes even though this is one area in which employees are interested and capable of playing a role.

(vii) The number of companies which had dismissed employees for incompatibility with their work mates and unsatisfactory performance
of the job because of sickness or injury appears to be alarmingly high. Further, a considerable number of companies had dismissed without stating a reason for the discharge.

(viii) Provision for retrenched workers appeared to be inadequate. Nearly half the companies which had retrenched employees in the relevant period had no retraining scheme and nearly one-third of the respondents provided no severance pay for retrenched or redundant employees. Moreover, binding arrangements for severance pay were non-existent in more than half of the respondent companies, and many of these firms had already experienced retrenchments and redundancy in the three years preceding the survey.
COPY OF EMPLOYER-EMPLOYEE RELATIONSHIP QUESTIONNAIRE

Most questions can be answered by ticking or numbering the appropriate answer. For the purposes of this questionnaire 'management' may be taken to mean 'those persons who play a part in making decisions which determine the aims of the company and the methods of achieving those aims'. 'Employee' may be taken to mean 'a worker who does not have executive authority'.

OBJECTIVES

1. How does your company's management rank the following company objectives in order of priority? Please list preferences 1 - 5.
   - Maintaining security of employment for company employees [ ]
   - Production of goods and services in an efficient manner [ ]
   - Profit maximisation [ ]
   - Providing welfare schemes and fringe benefits for employees [ ]
   - Reasonable return to shareholders [ ]

JOINT CONSULTATION

'Joint consultation' may be described as 'a process whereby employees are consulted about matters which affect them and given an opportunity to make suggestions which are considered by management before it makes its final decision on the subject'.

2. (a) Is there any formal means of joint consultation on safety or other matters between management and employees in your company?
   - Yes [ ]  
   - No [ ]

If 'no' please go to Question 3 (f)
If *yes* please specify whether this joint consultation occurs within the confines of a committee(s)? Yes [ ] No [ ]

If *no* please indicate briefly the nature of the joint consultation practised in your company.

(b) How many members of the joint consultation committee(s) are representatives of:-

Management [ ] Employees [ ] Some other group [ ]

If some other group is represented on the committee please indicate the nature of the group represented.

(c) Are the employees' representatives

   (i) appointed by management [ ]
   (ii) shop stewards or other union representatives [ ]
   (iii) elected by the employees [ ]

(d) Does the committee consider any of the following matters:-

   (i) plant layout [ ]; (ii) policy formulation [ ];
   (iii) operating procedures and work rules [ ];
   (iv) amenities [ ]; (v) working conditions [ ];
   (vi) proposed technological changes [ ]; (vii) redundancy of company employees as a result of technological innovations in the company [ ]; (viii) retrenchment of employees for any other reason [ ]; (ix) welfare schemes and fringe benefits [ ]; (x) safety measures for employees [ ].

(e) How often are the joint consultation committee(s) convened?

3. Would your company's managing body have any objections to the introduction of employees' participation in management in the sense that employees play a role in the decision-making process which frames company policy,

   (i) in matters directly related to the employees' environment and working conditions e.g. redundancy, retrenchment, discipline,
58

INFORMATION

4. (a) Does your company provide its employees with information on any of the following matters?

   (i) productivity [ ]; (ii) company policy and operations [ ]; (iii) company plans for development or expansion [ ]; (iv) contributions to community interest [ ]; (v) contributions to employee welfare schemes and recreational facilities for employees [ ]; (vi) the reasons for redundancy or retrenchment [ ]; (vii) proposed technological changes in the company [ ]; (viii) any other matters: Please specify.

   (b) In what manner is this information provided?

      (i) director's report [ ]; (ii) intra-company communiques [ ]; (iii) direct consultation on an ad hoc basis [ ]; (iv) periodic newsheets or bulletins [ ]; (v) in some other way, please specify:

FRINGE BENEFITS

5. (a) Does your company provide any of the following fringe benefits for its employees?

      Profit sharing schemes either through cash payments to employees or share acquisition by employees [ ]; housing and accommodation allowances [ ]; travelling expenses [ ]; work clothing [ ]; bonuses [ ]; superannuation schemes [ ]; other benefits, please specify:
Please indicate how the fringe benefits schemes are administered. Decisions on individual allocation on fringe benefits are made:

(i) by management [ ]; (ii) by personnel officers [ ]; (iii) by employees [ ]; (iv) by a joint committee of management and employee representatives [ ]; (v) by some other means: please specify:

DISMISSAL

6. Has your company discharged any employees in the last three years?  

Yes [ ]  No [ ]

If 'yes' please indicate the reason for the dismissals by ticking the appropriate square. Where possible indicate the approximate number of employees discharged in the adjoining column.

<table>
<thead>
<tr>
<th>Reason</th>
<th>Approximate number of employees discharged</th>
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<tbody>
<tr>
<td>(i) dismissal for misconduct e.g. refusal to obey lawful instructions,</td>
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<tr>
<td>drunkenness, dishonesty</td>
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<td>[ ]</td>
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<td>(ii) redundancy as a result of technological change in the company</td>
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<td>[ ]</td>
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<td>(iii) incompatibility with other employees</td>
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<td>(iv) unsatisfactory performance of job because of factors outside</td>
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<tr>
<td>employee's control e.g. through sickness or injury</td>
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<td>(v) unsatisfactory performance of job as a result of advancing age</td>
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<td>(vi) retrenchment because the company had no more work for the</td>
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<td>particular employee</td>
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<td>[ ]</td>
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<td>(vii) dismissal with notice or wages in lieu for no stated reason</td>
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<td>[ ]</td>
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<tr>
<td>(viii) Other reasons, please specify</td>
<td></td>
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</tbody>
</table>
7. Has your company a scheme for training retrenched or redundant employees in new skills? Yes [ ] No [ ]

If 'yes' please specify the nature, purpose and scope of the training scheme.

8. If your company has retrenched any employees over the last three years either because of labour-saving technological changes or lack of work for some other reason, was any severance pay provided for the employees retrenched? Yes [ ] No [ ]

If 'yes' were the severance payments made in pursuance of an award provision or on a gratuitous basis? Yes [ ] No [ ]

On what basis was the severance pay calculated? e.g. one week's pay for each year of service.

How many employees were retrenched by your company during the last three years?

9. Please indicate the approximate percentage of your company's employees who are entitled to severance pay in terms of an award or industrial agreement if they are retrenched for reasons beyond their control.
1. Introduction

Superannuation has many faces. Once regarded as an attractive fringe benefit, it is becoming recognised as an integral part of the wage package deal - a form of deferred pay. Certainly it is a retirement benefit but it is also, like long service leave, a reward for long service - a financial commitment which is based upon a certain period of continuous service usually with one employer. Thus, although it may not recognise the quality of an employee's service, it at least pays tribute to the length of that service. In this sense, it acknowledges the employee's long term contribution to the enterprise.

Superannuation schemes may be arranged on a contributory or a non-contributory basis. In the former, the employee agrees to contribute periodic payments, usually a fixed proportion of his wages, to a fund. The overwhelming majority of schemes in Australia fall in this category. In the latter, the employee does not contribute to the fund which is created and maintained by his employer.

A fund may provide a retirement benefit based upon a 'benefit-promise' or a fixed-contribution plan. In a 'benefit-promise' scheme the retirement benefit is usually a defined percentage of the member's final salary averaged over the last three or five years of his employment. The majority of schemes fall in this category. Funds founded on a fixed-contribution or accumulation basis provide a retirement benefit obtained by investing the employer's and the employee's contributions.
Retirement benefits usually take the form of a lump sum although in a considerable number of schemes an employee is given the option of taking a pension in lieu of the lump sum. Superannuation schemes often provide total and permanent disability benefits and on-the-job death cover. It is also common for funds to specify the withdrawal benefit to be paid to a member on dismissal, retrenchment or resignation.

2. Coverage of Occupational Superannuation

The breadth of private superannuation coverage in Australia is hard to estimate. A comprehensive survey of superannuation schemes in nearly 600 firms in 1972 found that 46% of all employees in the firms surveyed were members of a superannuation scheme. The percentage was higher for salaried employees than wages employees, and higher for males than females. These findings may over-estimate the coverage of private superannuation as nearly 17% of the respondents made no provision for superannuation. In addition the firms included in the survey are larger than average, and their schemes' provisions may well be more generous than those contained in the average smaller scheme.

3. Superannuation and Federal Awards

At the outset, it is important to note that the law in this area has not sought to impose duties and responsibilities upon company management. There is no legislation in Australia directly regulating private superannuation schemes. Further, although industrial tribunals have conceded that the provision of superannuation by employers is beneficial to industry and the community, fair and reasonable, and consistent with industrial justice, they have refused to incorporate provisions for superannuation in awards. In 1937 Dethridge C.J.
dismissed such a claim by stating simply that it was a matter 'quite beyond the power of ... [the Commonwealth Court of Arbitration] to impose and enforce'.

The major obstacle to the incorporation of superannuation in federal awards came twelve years later in the Hamilton Knight Case. There, a union’s claim for a pension scheme through an award failed for two reasons. First, the claim sought to impose obligations upon employers after the employment relationship had ceased: it did not pertain to an existing employer-employee relationship. McTiernan and Williams JJ. rejected the pension claim on this ground. Dixon C.J. described one paragraph in the union’s log of demands as ‘an attempt to give to a relationship which has in fact ceased to be that of employer and employee that character in law just because the definition of “industrial matters” makes that expression mean all matters pertaining to the relations of employers and employees’. But the Chief Justice did not appear to dismiss the claim on this ground. Rather the claim failed, in his view, because it offended section 48 (1) of the Conciliation and Arbitration Act 1904-1951 (Cth), the provision governing the life of awards. Similarly, Fullagar J. found that if the pension claim were inserted in an award it would create rights after the expiration of the period allowed for operation of the award. Thus the claim fell outside the jurisdiction of the federal tribunals.

Webb and Kitto JJ. dissented holding that the pension claim was arbitrable. Webb J. decided that such a provision was an incentive to and a reward for long service with an employer. Thus, it pertained to the relations of employers and employees. In essence, it was a form of deferred remuneration and clearly an industrial matter. Kitto J. concurred. In his view, the claim fell within the opening words of the statutory definition of an industrial matter and also paragraphs (b)
and (h) of that definition. In particular the claim sought a pension as a condition of employment upon certain terms. This finding appears incontestable.

Webb and Kitto JJ. further agreed that the provision governing the duration of awards did not go to jurisdiction; it merely indicated that the union's claim was impractical. As Webb J. pointed out: 'The legal power is not limited by considerations short of impossibilities'.

On the whole, the reasoning of the dissenting judges appears sounder than that of the majority. Long service leave is undeniably an industrial matter. How, then, can a kindred benefit like superannuation be beyond jurisdiction? Like the workers' compensation claim which succeeded in the Hamilton Knight Case, superannuation directly relates to something that happens during a current employer-employee relationship. The mere fact that payment is postponed until after the employment relationship has ceased should not deny jurisdiction.

Nevertheless, as the law stands at present, superannuation is not an industrial matter. Further, it may not be included in federal awards since an award can only be made to last for five years.

4. Superannuation and State Awards

In those states which prescribe a definite maximum duration for the awards or determinations of their industrial tribunals, the reasoning of Dixon C.J. and Fullagar J. in the Hamilton Knight Case could apply. Thus, any attempt to insert superannuation provisions in awards or determinations in those states would appear to be doomed to failure.

In addition, the view that superannuation is a non-arbitral matter, since it imposes obligations upon employers after the relation-
ship had ceased, might influence industrial tribunals in all states,\textsuperscript{36} with the possible exception of Queensland.\textsuperscript{37}

The law then, does not \textit{impose} duties and responsibilities upon company management in respect of superannuation. Rather it attempts, first, to \textit{induce} employers to provide superannuation benefits and, second, to regulate the conditions on which these benefits are granted. Space permits only a brief examination of the relevant income tax legislation.

\section{Regulation through Taxation Legislation}

The \textit{Income Tax Assessment Act} 1936-1974 (Cth) controls the creation and management of superannuation schemes in, at least, two important ways: firstly, the income of a superannuation fund may be granted an exemption from income tax provided certain prescribed requirements are met;\textsuperscript{38} secondly, an employer's contributions to a fund will be disallowed as taxation deductions unless the payments and the fund satisfy a series of conditions.\textsuperscript{39}

On a narrow view, only the deductibility provisions will influence company management since it is these concessions which directly determine the taxation relief the company can obtain through a superannuation scheme. For this reason, the following section will focus on the requirements which must be satisfied before the company can obtain an allowable deduction for its contribution to a superannuation fund.

On the other hand, a company could substantially reduce the cost of its superannuation scheme if an exemption on the income of the fund is granted. The exemption provisions are, therefore, vitally important. They, too, play a major role in determining the nature of superannuation in Australia. Unfortunately space prohibits an analysis of those provisions.
A company will be entitled to a taxation deduction for its contributions to a superannuation fund provided the scheme satisfies the requirements of Subdivision AA Division 3 of the *Income Tax Assessment Act 1936-1974* (Cth).

(i) *Section 82 AAC – the key section*

The operative section is section 82 AAC. Subject to the succeeding provisions of Subdivision AA, it allows a deduction for all amounts which the taxpayer sets apart or pays in the year of income as or to a fund for the purpose of making provision for superannuation benefits for, or for the dependants of, an eligible employee provided the right of the employee or the dependants to receive the benefits is fully secured.

(a) *Creation of the Fund*

The first element of the section requires the taxpayer to set apart or pay in the year of income 'an amount or amounts as or to a fund'. Where the company contributes to the fund by cheque the section is not satisfied until the cheque is honoured. Moreover, in *Winchcombe Carson Ltd v. Commissioner of Taxation* (N.S.W.), Mr Justice Owen stressed that 'payment' is not the only means of contribution contemplated by the section. An assignment of assets or the setting aside of an amount would suffice.

It appears, however, that the 'setting apart' must have some legal effect. The making of book entries without more will not satisfy the section. Further, execution of a deed of trust which merely clarifies an existing arrangement cannot be said to be a setting apart or payment in the year of income for the purposes of the section. Although the section does not demand the creation of a trust, almost invariably the fund receiving the amounts set apart or
paid will be regulated by a written instrument in the nature of a trust deed defining the rights of employees and their dependants to receive the superannuation benefits. Section 88 AAC at least contemplates the constitution of a fund to which contributions can be made, and in which amounts will accumulate, to provide a reserve for the purpose specified in the section. 47

(b) Purpose of the Contribution

To qualify for an allowable deduction under the section, the taxpayer must set aside or pay the amount "for the purpose of making provision of superannuation benefits" 48 for certain persons. This purpose is broadly similar to the purpose required in section 23 F 49 but the purpose element in section 82 AAC relates not to the reason for establishing or maintaining the fund but rather to the intention of the taxpayer in making the contribution to the fund during the year of income. In determining whether the taxpayer had this purpose it is permissible to look at the surrounding circumstances as well as the language of the deed itself. 50 The court may also examine the background leading up to the creation of the scheme 51 and its actual operation. 52

There is some doubt whether section 82 AAC requires the amount contributed by the taxpayer to be devoted exclusively to the benefit of employees. Unlike the sections dealing with the income of the superannuation fund, section 82 AAC does not state that the fund must be "established and maintained solely" 53 for the provision of superannuation benefits. It would appear, then, that section 82 AAC does not demand the same degree of 'exclusiveness'. 54

(c) 'Fully Secured' Rights

The final requirement of section 82 AAC is that the rights
of the employees or their dependants to receive the superannuation benefits must be 'fully secured'. The purpose of this provision is to deny the employer an allowable deduction for his contributions to the fund where the fund remains directly or indirectly under the control, or within the disposition, of the employer, so that the rights of employees and their dependants to receive the benefits provided by the scheme are liable to be defeated at his option.\textsuperscript{55} On the other hand, if the fund is administered by a committee of company employees the security of rights requirement will be satisfied.\textsuperscript{56}

The authorities establish that what must be 'fully secured' are the rights of the members of the fund to receive the benefits provided by the scheme.\textsuperscript{57} Further, \textit{Federal Commissioner of Taxation v. Northern Timber and Hardware Co. Ltd}\textsuperscript{58} decided that these rights must be secured in legal form. There, the taxpayer claimed a deduction under the former section 66 (which is the verbal equivalent of section 82 AAC). The Full Court of the High Court of Australia held that the rights of the employees to receive the benefits made in the company's accounts were not fully secured as the fund remained under the employer's unfettered control and could be abolished by the stroke of a pen.\textsuperscript{59} Thus, a mere book entry in the company's accounts will not fully secure the rights to receive the benefits.\textsuperscript{60}

The authorities are divided on the issue of when the rights to receive the benefits must be secured. The better view seems to be that the critical time is when the employer's contribution is set apart or paid.\textsuperscript{61} However, in a 1960 Board of Review decision\textsuperscript{62} two members of the No. 1 Board considered that it was enough for the rights of the employees to become fully secured at any time up to the end of the year of income in which the amount is paid to the fund. Whichever is the correct view\textsuperscript{63} on this point, it is now established that a superannuation deed may not secure the rights of employees retrospect-
The division of opinion as to when the employee's rights must be fully secured could result in injustice to particular employees. If an employee qualifies for a superannuation benefit in the year of income but before his rights to receive the benefits are fully secured he may be unjustly deprived of his entitlement.

The rights which are to be fully secured must be real and not merely imaginary. The paragraph envisages rights of a positive nature and not simply negative rights precluding the fund being applied for any other purpose. To ascertain whether the rights to receive the benefits have been fully secured it appears the court may consider the reasonableness or propriety of any condition, whether precedent or subsequent, affecting the rights of employees to receive the benefits.

Whether the court can consider the investment policy of the trustees of the fund is a matter of conjecture. Gavan Duffy C.J. and Starke J. in *Metropolitan Gas Co. v. Federal Commissioner of Taxation* were of opinion that the court was expected to ascertain whether the management and investment of the fund are properly safeguarded. On the other hand, Mr Justice Taylor in *Driclad Pty Limited v. Commissioner of Taxation (Cth)* questioned this approach. The proper management of a superannuation fund is vital to the interests of employees and it is unfortunate that there are conflicting opinions on this issue.

The full import of the final requirement of section 82 AAC cannot be appreciated in the abstract. When judicial pronouncements are translated into practical realities one obtains a more accurate meaning of the phrase 'fully secured'.

In *Metropolitan Gas Co. v. Federal Commissioner of Taxation*, the High Court examined the following clauses of the company's superannuation deed:
Clause 29: that upon the dismissal of a contributor he shall forfeit his right to a refund of all contributions made by him to the fund, and shall cease to have or participate in any of the benefits sought to be created by the trust instrument.

Clause 30: that in case a contributor joins or takes part in a strike, he forfeits his rights to a refund of his contributions or any participation in the superannuation fund.

The High Court did not consider Clauses 29 or 30 unreasonable. In the words of Rich J.:

Clauses 29 and 30 of the deed merely provide conditions of the right conferred, and go only to the nature and measure of the benefit, pension or retiring allowance, and not to the security of the right to receive them.

With respect to the learned judge, Clause 29 does not merely relate to the 'nature and measure' of the benefit to be provided. It could empower an employer to disqualify an employee from taking any of his accruing benefits under the scheme. The condition subsequent expressed in Clause 29 could unjustly deprive an employee of anticipated benefits: forfeiture of the employee's contributions and rights flows simply from the fact of dismissal; the clause does not require the dismissal to be for just cause.

Their Honours referred to the fact that strikes in connection with undertakings for the supply of light and water constitute 'a grave danger to the public ... and involve serious losses to the undertakers'. Accordingly, they regarded Clause 30 as a reasonable stipulation in the circumstances. While the learned judges were undoubtedly swayed by policy considerations in relation to this clause, their decision creates a disturbing precedent.

It is important to note that an employee who ran foul of Clauses 29 and 30 forfeited not merely participation in the superannuation fund but also his own contributions to the fund. Nevertheless, the High Court regarded the rights of employees under the trust instrument as fully secured. On this reasoning an employer who dismissed an employee a few years before retirement to avoid paying a substantial
retirement benefit would still be entitled to a taxation deduction for his contributions to the fund in that year of income.

Furthermore, the High Court in Metropolitan Gas Co. v. Federal Commissioner of Taxation\(^\text{72}\) did not consider that Clause 37 detracted from the security of employees' rights under the trust instrument. This clause provided 'that the Directors of the Company with the approval in writing of the trustees, may make and alter rules, including the rules relating to investment scale of contributions and grants or benefits'. True, the trustees would be bound by fiduciary obligations in deciding whether to approve any amendments proposed by the directors of the company. But it would appear that the interests of employees would be more adequately safeguarded if the sole responsibility for approving alterations of the rules lay with the members of the fund.

In Winchcombe Carson Ltd v. Commissioner of Taxation (N.S.W.)\(^\text{73}\) the company's superannuation deed gave the company a lien in certain circumstances upon the employee's contributions or on the amounts payable under his policies, for debts due by the employee to the company. This clause could detract from an employee's right to receive the benefits promised by the scheme, and could, in fact, defeat the basic purpose of superannuation - provision of retirement benefits. Yet Owen J. held that the clause was unobjectionable and that the member's rights were fully secured.

If what must be fully secured is the right to receive superannuation benefits, should not the law insist upon some degree of vesting, portability or preservation of the employee's benefits? Unless these features are widely adopted by superannuation schemes changes of employment will erode an employee's retirement benefit. In the result, he may arrive at retirement with little or no superannuation entitlement - he may have no right to receive superannuation
benefits. The final requirement of section 82 AAC has not been interpreted so as to encourage the creation of vesting, preservation or portability of superannuation but it does have a latent potential in this field.  

(ii) The Amount of the Deduction

The deduction allowable to a taxpayer in respect of any one employee, other than an employee who is associated with the taxpayer, is limited to $400 or 5% of the total remuneration whichever is the greater unless the Commissioner is of the opinion that there are special circumstances which justify the allowance of a greater deduction.

Section 82 AAE was devised against a background of tax avoidance schemes whereby an employer would finance a substantial part of its provident fund at the expense of the Commonwealth by choosing to establish the fund at a time when large profits were being made and very high rates of tax were operating. Whilst the provision was 'enacted with due regard to such proclivities' an additional purpose of the section was to give 'reasonable recognition to continuing provident schemes under which annual contributions are made by employers'.

The Commissioner's discretion in section 82 AAE has been narrowly construed. The Chairman of the Board of Review in 14 C.T.B.R. Case 34 ruled that the Commissioner cannot increase the deduction for reasons which he thought sufficient or where he was of the opinion that it would be fair and reasonable to do so. A prerequisite of the exercise of the Commissioner's discretion is the existence of 'special circumstances'. But the section gives no indication of the type of 'special circumstances' which will be regarded as sufficient.

On one view, 'special circumstances' cannot be considered in the abstract: it is necessary to establish what are normal circumstances before the Commissioner can determine whether special circumstances exist.
A recent Board of Review decision\(^80\) doubted this approach.

Two members of the Board, Mr Davies and Mr Thompson, saw its defects in trying to discern a legislative or factual standard from cases which contained no consistent theme. They suggested that the better approach was to view the whole circumstances of the case in order to ascertain whether special circumstances existed which warranted the exercise of the discretion.\(^81\) The reasonableness of a retiring allowance could, in their opinion, be weighed against the following considerations:-

(1) what would suffice to meet the case of an average employee?
(2) what would be adequate provision for old age?
(3) what would be a just reward for the employee's services?\(^82\)

It would appear preferable to maintain a flexible approach in considering what are 'special circumstances' for the purposes of section 82 AAE(b). The issue has come before the Boards of Review on a number of occasions but it is difficult to extract a coherent body of principles from their decisions. It appears that the following circumstances may be regarded as 'special' for the purposes of the paragraph:-\(^83\)

(1) Length of past service\(^84\)
(2) Short period before retirement\(^85\)
(3) Physical and mental strain causing early retirement\(^86\)
(4) Nature of the services rendered and their worth to the employer as measured by the remuneration paid\(^87\)
(5) Considerable fluctuations in company profits.\(^88\)

Circumstances which do not qualify as 'special' in terms of section 82 AAE(b) are the following:-

(i) Industry on the part of an employee\(^89\)
(ii) The fact that a contribution is an initial one\(^90\)
(iii) Reward for past pioneering services.\(^91\)
Several decisions of the Boards of Review have affirmed that a working criterion of what is a reasonable benefit is an amount equal to twice the annual salary at the time of the contribution. Yet in Case No.II (1960) 11 T.B.R.D. 63 the Board rejected as a 'special circumstance' the fact that the contributions claimed as allowable deductions would provide the employee at age sixty-five with one-and-one-third times his present annual salary.

It is for the Commissioner to determine whether there are special circumstances warranting an increase in the deduction allowed under the section in respect of the contribution made on behalf of each employee concerned. But the employer who claims a deduction in excess of the prescribed maximum has the onus of establishing that these circumstances exist in respect of each employee.

If, as 14 C.T.B.R. Case 34 suggests, section 82 AAE was enacted to curb abuses of the taxation concessions available to employers for contributions to superannuation funds and to give 'reasonable recognition to continuing provident schemes', it would seem that the decisions of the Board of Review do not consistently reflect this policy. How would tax evasion be encouraged or 'reasonable recognition' of contributions to continuing provident schemes be exceeded, by allowing industry on the part of an employee and reward for past pioneering work to qualify as 'special circumstances'?

The confusion created by section 82 AAE(b) was probably the reason for the Commissioner's decision that, beginning with the income year ended 30 June 1970, 'the amount of a reasonable benefit by reference to which the amount of contributions deductible under section 82 AAE(b) may be settled will be calculated by applying the scale which is used in determining a reasonable benefit, on normal retirement, for the purposes of section 23 F (2)(h)'. But section 82 AAE (b) only applies when special circumstances are made out. The Commissioner's
ruling has not altered this. Thus, before the Commissioner's scale of reasonable benefits can be invoked, a taxpayer must establish that special circumstances exist which warrant an increase in the deduction allowed by section 82 AAE (a). Only when these circumstances are established will the Commissioner be guided by the scale of reasonable benefits in determining what deduction will be allowed.

(iii) Benefits Foregone

In the succeeding sections of Subdivision AA there are various qualifications to the provisions of section 82 AAE, notably section 82 AAG which concerns the position of terminated benefits or benefits foregone. The Ligertwood Committee found that the legislation relating to deductions allowed for superannuation contributions was being abused by the application of lost or forfeited benefits among employees in an inequitable and discriminatory manner. In accordance with the Committee's recommendation legislation was enacted in 1964 which required that benefits foregone be applied within a specified time for certain approved purposes. The sanction for non-compliance with this requirement was a reduction in the deduction allowed for the employer's contributions.

This part of Subdivision AA proved cumbersome and amendments were made in 1965 on the ground of administrative convenience. These amendments enabled the trustees of the fund to seek approval of a scheme for the application of terminated benefits (section 82 AAG (1)). Provided the approved scheme is followed in the year of income the deduction allowed to the employer-taxpayer will not be reduced. If the approved scheme is disregarded the complex provisions of sections 82 AAH - 82 AAL inclusive apply in respect of the terminated benefits unless the Commissioner can be persuaded to excuse non-compliance with the scheme.
Where the foregone benefits are not applied in an approved manner the amount of the deduction which would otherwise be allowed under the preceding provisions of Subdivision AA is reduced by the value of the previous deductions which amount is ascertained in accordance with section 82 AAI - section 82 AAL inclusive and section 82 AAP. For present purposes it is not necessary to discuss the intricacies of these sections. It is sufficient to note that the amount by which a taxpayer's allowable deduction would be reduced if he did not comply with an approved scheme acts as a powerful inducement to employers to apply terminated benefits for the approved purposes.

The approved purposes specified in section 82 AAG (1)(a) and (b) relate to the provision of benefits for other members of the fund or their dependants. The legislature has chosen to protect the interests of the remaining members of the fund rather than the withdrawing member's right to an adequate retirement benefit. While the law's attempt to curb discriminatory practices in the application of lost or forfeited benefits is to be applauded, the fact remains that the individual employee who has resigned, withdrawn from the fund or been dismissed, is deprived of an accrued benefit.

Superannuation schemes commonly provide that upon resignation, withdrawal from the fund and, in some cases, dismissal, an employee is entitled to a refund of his contributions with or without interest. Only in rare cases will an employee who withdraws from the fund for any reason be entitled to the amount his employer contributed on his behalf or a vested benefit.

The fundamental purpose of superannuation is to assist employees make provision for their retirement or for their dependants in case of death before retirement. To the individual employee superannuation is a personal benefit. This fact is recognised by the legislature in the definition of superannuation benefits.
also acknowledged by the Board of Review in 8 C.T.B.R. Case 35. Yet section 82 AAG does nothing to encourage employers to ensure that individual employees who resign or who are dismissed receive vested benefits. In fact, some of the purposes the Commissioner has suggested for the application of benefits foregone provide a direct incentive to employers to disregard the position of the individual employee.  

(iv) Unfunded Superannuation Benefits

In the course of his Second Reading Speech for the Income Tax and Social Services Contribution Assessment Bill (No. 3) 1964, the Treasurer warned that 'it would be foolish to sacrifice effective tax reforms at the altar of simplicity'.  

Despite the 1965 amendments to the income tax provisions affecting superannuation funds and administrative directions which have modified the application of these provisions in practice, the revenue legislation relating to superannuation schemes remains highly complex. When introducing the 1965 amendments the Treasurer explained that it had not been found possible to diminish the area of discretionary power given to the Commissioner.  

Faced with the intricacies of the legislation and the vagaries of administrative discretion which play such a large role in the application of the Act, some employers prefer to arrange superannuation benefits upon an unfunded basis. To the extent that the law discourages employers from formalising their superannuation commitment, it has failed to provide adequate protection for employee’s interests in this benefit. 

Employers usually rely on section 78 (1)(c) of the Income Tax Assessment Act 1936-1974 (Cth) to claim an allowable deduction for unfunded superannuation benefits. In effect, the section allows deductions for amounts paid to employees on or after retirement or to their dependants. These deductions are available whether the amounts
are paid by way of pension or in a lump sum.

But the amounts for which a deduction is claimed must be paid as 'pensions, gratuities or retiring allowances'. This category of payments appears to be quite comprehensive and would seem to include all forms of payments which may be made to employees or their dependants on or after the employee's retirement provided the payments are made bona fide in consideration of the employee's past services in a business producing assessable income. Payments allowable under section 51 (i) are excepted. In practice deductions are allowed under section 78 (1)(c) for amounts paid to an employee after his services have terminated while payments made to employees during their employment normally fall within section 51 (i) of the Income Tax Assessment Act 1936-1974 (Cth).

The requirement that amounts for which deductions are sought must be paid in good faith presents little difficulty to a public company which makes a payment to a retired employee. Generally the company's statement that the payment is in consideration of the past services of the employee will not be challenged.

The Commissioner determines the amount of the allowance granted under section 78 (1)(c). In forming his opinion he should concentrate upon whether the amount has been paid in good faith in consideration of past services. In practice, the Commissioner when determining the limit of the deduction under section 78 (1)(c) may be guided by his experience with section 23 F and section 82 AAE (b). But there would appear to be no theoretical justification for this practice.

From the point of view of protection of employees' interests it is highly desirable that superannuation provision be funded. Benefits provided by a formal arrangement are more secure and generally better defined. Payment is not dependent upon the financial position of the employer when the employee's benefit falls due. Further, the
employee's accrued entitlement is not normally available to the company's creditors.

In unfunded schemes the employer is not able to spread the amount allowed as a deduction for superannuation payments over a series of years. However, if the employer is a resident public company which sets aside a certain amount for investments in other companies and pays superannuation benefits out of the dividends it receives from these investments, it will incur very little tax liability through the scheme. Income from the investments would be taxed at the public company rate but the company would be entitled to a rebate on the dividend income. Further, the company would be entitled to an allowable deduction for superannuation benefits paid during the year of income provided the payments fall within section 78 (1)(c).

Ironically, the law may actually encourage the growth of unfunded superannuation schemes even though these schemes provide less security for employees' benefits.

6. Proposals for Reform

(i) Extension of Superannuation Coverage

One of the basic limitations of existing private superannuation schemes is their restricted coverage. Proposals for reform of superannuation law cannot ignore this fact.

Over the past two decades occupational superannuation has grown dramatically and one might think that eventually the greater majority of employees in the private sector would be members of a scheme. On the other hand, overseas experience suggests that the development of private superannuation stagnates when approximately 50% of the work force is covered. Mindful of this, several overseas countries have introduced national superannuation schemes founded upon compulsory contributions from employers and employees.
While proposing a national superannuation scheme for Australia, the Hancock Committee rejected a compulsory levy upon employers. This conclusion is probably one of the most controversial features of its report as there was an 'overwhelming presumption' in the evidence submitted to the committee that a contributory scheme of national superannuation would inevitably involve a levy upon employers as well as employees. The committee itself conceded that employer groups were resigned to a contributory scheme financed, in part, by employer contributions. Indeed, this was 'the most striking feature' of their submissions.

Why then, did the Hancock Committee come down strongly against such a levy?

Firstly, in the committee's view, shared contributions would not alter the incidence of the cost burden: employers would simply pass on their share of the expense to employees either as wage-earners or as consumers. Employees would find that employers would oppose future wage demands with more tenacity, while, as consumers, workers would be met with higher prices for goods and services.

On the surface this reasoning appears quite sound. But it presupposes that employers are completely free to manipulate market forces. This is simply not so. Under pressure from unions, employers may not be able to cut-back on future wage settlements. Nor is their freedom to raise prices untrammelled. The Prices Justification Tribunal focuses public opinion upon employers who disregard the tribunal's recommendations upon fair price rises. And in our inflation-conscious community, mounting consumer militancy may force employers to be more cautious about price increases.

The Hancock Committee also suggested that a scheme involving no employer contributions had 'major economies'. For one thing, employers would not be obliged to maintain a record of contributions.
levied in respect of each individual in their employment. Such a record could be quite complex involving regular calculations of the individual's total earnings. Further, under the committee's proposed scheme there would be no need for employers to keep the central body administering the scheme informed of the employment history of each employee. It is true then that substantial administrative costs would be saved, but at what price? Without employer contributions the national scheme will be restricted to very frugal benefits.25

Perhaps the primary reason for exempting employers from the obligation to contribute lies in the political arena. A levy upon employers would probably take the form of a federal payroll tax. The Hancock Committee noted that this form of taxation was transferred to the states in September 1971.26 It believed that any attempt by the Australian Government to re-introduce a federal payroll tax would raise a 'politically sensitive issue'.27 In any event, the Report suggested that scope for increases in payroll tax may have been preempted, at least temporarily, by the recent history of tax rate adjustments.28 Hence, the committee concluded:

Even if employer contributions were favoured on theoretical grounds - which they are not - politically and administratively, they would be difficult to implement because of the 33 year history of payroll taxation in Australia.29

Early in its report, the committee expressed the view that widespread support is 'fundamental to the success of national superannuation'.30 Yet, by rejecting a levy upon employers, it runs the risk of alienating the labour movement. Employees who are members of superannuation schemes are accustomed to the notion of dual contributions. They will become suspicious of a national scheme which requires them to contribute but which lets their employers off 'scot-free'.

The committee proposed two quite different forms of a national superannuation scheme, the details of which need not detain us here. The important point for present purposes is that the level of benefits under either scheme would not be sufficient to maintain employees in their pre-retirement standard of living. Many employees will continue to rely upon occupational superannuation for an adequate retirement benefit. The committee was well aware of this fact. They stressed that it is "simply unrealistic" to suppose that existing occupational superannuation plans could be replaced by a single comprehensive scheme. Indeed, one of its main findings was that a dual system of national and private superannuation is inevitable. It remains to consider how occupational superannuation can be extended and improved.

The Hamilton Knight Case enjoins federal industrial tribunals from including superannuation provisions in federal awards. There are two objections to such provisions. Firstly, they do not, it is said, relate to an industrial matter largely because the obligations which they create fall due after the employment relationship has ceased. This obstacle could be overcome by providing superannuation in the form of a lump sum accruing immediately upon retirement or death. In such a case the superannuation issue would arise during the currency of an employment relationship, and would, therefore, raise an industrial matter. To dispel doubts on this point it would be useful to include superannuation in the statutory definition of industrial matters. This reasoning is equally relevant to the state arbitration and wages board systems.

The second objection is easier to answer. In the Hamilton Knight Case the High Court found that the proposed pension scheme ran foul of the predecessor of section 58 (1) of the Conciliation and Arbitration Act 1904-1973 (Cth), the provision which governs the life...
of awards. It is true that section 58 (1) would make a normal superannuation scheme almost unworkable but this objection should not go to jurisdiction. Federal and state tribunals could be empowered to award superannuation. And the practical problem presented by section 58 (1) and its equivalents in the states could be avoided by a simple amendment exempting superannuation awards from compliance with the sections. This has been done for long service leave which is, in some respects, a kindred benefit. It could be done for superannuation awards.

Awards are indeed cumbersome vehicles for reform of superannuation law. But the main significance of the above proposal is that it would take superannuation out of the realm of managerial initiative and bring it within the scope of bargaining and arbitration, if necessary. This would inevitably lead to an expansion of occupational superannuation for wages employees. Employers would no longer be able to resist pressure for extension and improvement of private superannuation on the ground that they were not obliged to introduce a scheme in the first place.

Mere 'coverage does not necessarily imply participation in a scheme yielding an adequate degree of protection'. It will be necessary to improve existing occupational superannuation schemes. How can this be done?

(ii) Disclosure Requirements

A major shortcoming of the existing income tax provisions regulating private superannuation schemes is that an employer may qualify for allowable deductions for his contributions to a superannuation scheme even though the members have not been given comprehensive information about the plan and have not been periodically advised of their entitlement.
The much-maligned Victorian Superannuation Bill 1971 contained many defects and has apparently been abandoned. However, some features of the draft promised more protection for employees' interests than the present income tax legislation requires.

Basically, the Bill proposed that only registered superannuation schemes would be eligible for an exemption from stamp duty and concessions with regard to the probate duty on the death of members. As a condition of registration under the Act, a scheme would be obliged to provide each employee becoming eligible to join the scheme with a written explanation of the terms and conditions of the plan and his rights and duties thereunder. In addition, scheme members would be entitled to a triennial report outlining their contributions, their entitlement and such other information as might be prescribed under the Act.

A similar provision obtains in the United States. Administrators of voluntary pension plans covering more than twenty-five employees are required by law to deliver to each member or beneficiary, upon written request, a comprehensive and up-to-date description of the plan and an adequate summary of the latest annual report. The administrator has thirty days within which to comply with the request. If he does not do so he is liable to pay the member or beneficiary fifty dollars a day from the date of such failure plus reasonable attorney's fees and costs. The information in the description of the plan and summary reports is quite detailed and would ordinarily be sufficient to advise employees of their entitlement.

Copies of plan description and annual reports must also be filed with the Secretary of State who must keep them available for inspection. Wilful violation of these requirements attracts stiff penalties. The Act is open to abuse but it does at least set an
The degree of disclosure contemplated by the Victorian Bill would seem to be adequate. But it may be desirable to follow the American precedent by requiring plan administrators to file certain information with an official supervisory body. This data could then be expertly scrutinised to ascertain whether there had been any abuses in the administration of the scheme. The supervisory authority should also be empowered to correct abuses by direct action or by recommending withdrawal of taxation concessions on the employer’s contributions to the scheme.

(iii) Withdrawal Benefits

Under the existing income tax legislation an employee’s rights may be ‘fully-secured’ even though he forfeits his own contributions on dismissal.\(^5^5\) Equally, there is no guarantee of a minimum withdrawal benefit upon resignation or retrenchment.\(^5^6\) Certainly, in all these cases a refund of employee’s contributions without interest would seem sufficient to satisfy the Commissioner that the fund fully secures the members’ rights. The present legislation seems more concerned with directing the foregone benefits towards the interests of the remaining members than with the employee who leaves.\(^5^7\)

(a) Vesting

At the core of this issue of an appropriate form of withdrawal benefit lies the debate about ‘vesting’. ‘Vesting’ may be described as the ‘extent to which the rules of a superannuation scheme give a withdrawing member an unconditional right to the accrued benefit (or its equivalent) held in the fund on his behalf’.\(^5^8\) Under full vesting an employee who withdraws from a scheme will receive not only a refund of his own contributions but also a credit for his employer’s contrib-
(b) Arguments against Vesting

The arguments against vesting of superannuation benefits are manifold. Firstly, it is said that employers establish superannuation schemes as a means of attracting and retaining employees; if a vested benefit is required after a short period of service employers will lose their 'hold' upon qualified or trained personnel. Inherent in this reasoning is the notion that superannuation is a gratuitous reward for long and faithful service, a 'pat on the back' at retirement.

While this view of superannuation was once tenable, it is quite inappropriate in modern employment conditions. Increasingly, employees and their representatives are coming to regard superannuation as deferred pay. On this view, the employee earns his superannuation benefit by his continued service. While this approach may lack a sound legal foundation, it does reflect the understanding of many employees.

It is also sometimes suggested in support of the 'deferred pay' theory that employees and their unions moderate their wage demands when superannuation is part of the employer's 'package deal'. While it would be difficult to confirm or refute this suggestion, there seems to be little evidence that unions take individual employer's superannuation schemes into account when pressing wage demands.

Moreover, as noted earlier, wage fixation in Australia is largely a centralised and general process often far removed from the workplace.

Perhaps the most cogent argument against vesting is simply its cost. If the withdrawing member is entitled to a vested benefit this may impair a scheme's ability to meet its commitments to the members who remain in the scheme until retirement or death. In fact, many employers budget their scheme on the assumption that benefits
foregone will be available for retiring employees.

Does this mean that vesting would cause many schemes to be wound up? On this issue the Hancock Committee commented:

It is conceivable that compulsory vesting could lead to the winding-up of some schemes and deter employers from introducing new schemes. However, foreign experience does not indicate that these effects would be widespread.\(^63\)

It does seem unlikely that employers would be able to terminate their schemes even if they wished to do so. Employers have come too far now to turn back. In fact, they need superannuation.\(^64\) It has become an accepted and expected condition of employment in certain sections of industry.\(^75\)

The precise cost of implementing full vesting would vary from scheme to scheme. Palmer estimates that it would add 10% to the employer's cost of running his superannuation scheme\(^76\) but in many cases the cost may be much higher. One thing is clear: the cost will be substantial. What can be done to minimise this necessary outlay?

There is one simple, but politically unpalatable, answer: repeal the '30/20 requirement'.\(^67\) If this were done fund managers would have more latitude in their investment policy. More importantly, it would no longer be necessary to invest nearly one-third of the fund's assets in public securities which provide a yield far below commercial rates.\(^68\) Trustees and managers would probably still invest some assets of the fund in these securities in the interests of stability but the removal of the 30/20 restriction would greatly enhance a fund's income-earning potential. This, in turn, would reduce the employer's cost of maintaining the scheme.

The proposed measure would not be popular with the government whichever party was in power. But the 30/20 ratio was introduced for an ulterior political motive of improving the market for public securities.\(^69\) And if the government is genuinely interested in
improving superannuation in Australia, here is a place to make a start. The 30/20 requirement should not be allowed to stand in the way of reform. In any event, the proportion of government securities held by superannuation schemes does not appear to be significant. Perhaps the repeal of the investment requirement would not have a profound effect on the market for public securities.

Employers also point out that they established superannuation schemes on their own initiative, without any pressure from governments or unions. Why then, should they tolerate any interference with the way they manage their schemes? The Sydney Chamber of Commerce recently expressed a similar sentiment when it opposed portability of pension benefits in occupational schemes as 'an unwarranted intrusion of Government into private enterprise'.

There are two answers to this approach: one philosophical, one pragmatic. The first was discussed in Chapter 11 when the cherished notion of managerial rights was challenged. The second answer lies in the fact that the community has, in effect, heavily subsidised employers' superannuation schemes through taxation concessions. In return for this generous and continuing subsidy, the community in general and employees in particular must surely be entitled to demand that private schemes provide vested withdrawal benefits.

There is one final argument against vesting: if this feature were introduced, it would involve substantial administrative difficulties in amending superannuation trust deeds. Yet some amendments would probably be required in any event as a result of the Hancock Committee's recommendations. Further, this problem might be overcome by allowing trustees or fund managers to amend deeds to comply with the new requirements without first obtaining the approval of the fund members. There could be a right of appeal for
fund members against any alteration in the scheme which seemed unnecessary or excessive. A precedent exists in section 76 of the New Zealand Superannuation Act 1974.

On balance, it seems that some degree of vesting is both desirable and possible. But what form should it take? Firstly, it would be necessary to increase the benefit which accrues on withdrawal. This would, of course, vary with the cause of the termination of employment but an equitable standard of vesting would demand that employees who resign or who are retrenched or dismissed for reasons other than serious misconduct should be entitled to a benefit equivalent to their own contributions and those of their employer adjusted by an appropriate rate of interest. For employees dismissed for serious misconduct, the withdrawal benefit should be simply the member’s contributions plus interest at the rate earned by the fund. Under no circumstances should any of these benefits be forfeited or reduced. If the employee has embezzled or borrowed money from his employer, an ordinary action at common law should be used for recovery of the sum involved.

Initially, it might be sufficient to grant this level of vesting only to employees withdrawing after a certain period of service, say ten years, or after the same period of fund membership. This would reduce the early costs of the vesting provision. Later the qualifying periods could be progressively lowered.

(c) Preservation and Portability of Pension Benefits

Simply granting more generous withdrawal benefits will not protect the superannuation benefits ultimately available for employees on retirement. Compulsory preservation or portability of superannuation rights will be necessary to ensure that an employee arrives at retiring age with an adequate benefit. There are several overseas and local
precedents of preservation and portability.

The most recent example is the New Zealand Superannuation Act 1974. In general, a contributor to the national scheme established under that Act shall not be entitled to withdraw any amount to his credit in the national fund. When a contributor changes his employment his credit is preserved in the fund. If the employee is a member of an approved restrictive scheme or an alternative scheme he must be given a transfer value on change of employment at least equivalent to the sum of his own contributions and the minimum employer contributions which would have been required had he been a member of the national scheme. Interest at a prescribed rate will be added. This portable benefit may be paid to the national fund or an approved private scheme. It may not be given to the withdrawing member. Thus the New Zealand scheme embodies certain features of vesting, preservation and portability.

The United Kingdom also proposes to introduce compulsory preservation of pensions. As from April 1975 the preservation provisions of the Social Security Act 1973 will require that all occupational pension schemes should at least 'preserve or otherwise safeguard the pension rights which the early leaver has earned at the time he leaves'. Eventually the British Government will oblige firms which contract out of the national scheme to preserve a pension for a withdrawing member of at least the amount of the guaranteed minimum pension promised by the national scheme for the relevant period of contracted out service.

Whitehall has also undertaken to provide a facility for the State scheme to buy back members of a private scheme which ceases to enjoy contracted out status or members who leave an exempt scheme after only a short period. But the British Government has stressed that this would play 'only a limited role'.
In Australia, preservation and portability are largely confined to public employment. For example, the Commonwealth Superannuation Act 1922-1973 requires preservation of superannuation benefits. The Act contemplates that, subject to certain conditions, a contributor may transfer his accrued entitlement in the Commonwealth scheme to an 'eligible superannuation scheme' or elect to retain the equity in the Commonwealth scheme and benefit from the preserved benefit at a future date.\(^{85}\)

Certain eligibility requirements must be satisfied before the new forms of portability and preservation, namely 'transfer value' and 'deferred benefit', will be available: a 'transfer value' will only be granted if a former contributor becomes a member of an eligible superannuation scheme within three months after withdrawal from the Commonwealth scheme; a 'deferred benefit' may be provided in lieu of a portable benefit when the former contributor enters 'public employment' within three months of ceasing to be a contributor or on having completed twenty years' 'eligible employment'.\(^{86}\)

The Commonwealth Superannuation Act 1922-1973 also makes elaborate provision for the Commonwealth scheme to accept portable benefits from an employee who enters the employment of the Commonwealth or an approved authority.\(^{87}\)

In the private sector, the Victorian Superannuation Bill 1971 promised preservation of superannuation benefits for employees with either ten years' continuous employment with their employer or ten years' membership in a registered scheme. An early leaver who satisfied either of these conditions would be entitled to a deferred benefit payable at the scheme's normal retirement age or age seventy, whichever was earlier. The deferred benefit would be retained or preserved in the registered scheme or transferred to either another registered scheme, a life office, a friendly society, the Superannuation
Fund to be established by the Act or any other prescribed body. It would be up to the administrators of the scheme to decide whether to preserve or transfer a deferred benefit. Conversely, no registered scheme would be obliged to accept an assigned benefit.

Under the Victorian draft an early leaver could at any time within five years after his termination of employment elect to take a lump sum in lieu of a deferred retirement benefit. Herein lies the Achilles' heel of the Bill. In effect, it would allow an employee to opt out of the preservation provisions. Experience shows that employees usually prefer a lump sum withdrawal benefit rather than a preserved pension or a transfer value. Indeed, they may resign with the express purpose of obtaining this ready cash. If employees are given freedom of choice in this matter the whole purpose of superannuation will be defeated: employees who have changed jobs during their working lives and who have elected to take a cash benefit on withdrawal will arrive at retiring age with little or no superannuation.

(d) An Ideal Form of Preservation?

All forms of preservation create problems. The 'clearing house' scheme whereby an employee's withdrawal benefit is placed in an acceptance fund run by the Government or a life office or other private institution is perhaps the neatest arrangement. But even here the clearing house fund managers must have sufficient investment skill to ensure that the member's benefit is not eroded by inflation. They must also keep up to date a multiplicity of small accounts involving considerable administrative costs.

Despite these drawbacks, the clearing house method has distinct advantages over a scheme which merely preserves the benefits in the former employer's scheme. In this arrangement, the managers of the private fund must keep track of the former employee. Further,
if the employer's scheme is founded on a benefit-promise plan it may be difficult to combine the administration of the plan with the funding of former employees' benefits. Perhaps the primary advantage of the clearing house model is that the acceptance fund is always there to receive transfer values and pay-out benefits to eligible employees.  

The transfer value method of portable superannuation is probably the ideal solution for early leavers. It avoids duplication in records and allows former employers to wash their hands of employees who resign or who are dismissed. Moreover, the employee's retirement benefit will ultimately come from one source, the superannuation fund of his last employer. This is a great administrative advantage.

On the other hand, the transfer value system is not without blemish. Firstly, some employers have schemes which are unable to accept a portable benefit, and many employers have no scheme at all. Secondly, an employee may not be able to buy equivalent benefits in the new scheme. Conversely, since transfer values are calculated on the assumption that the early leaver is an average employee, the new employer may find that the portable benefit is undervalued. If the new employee obtains rapid promotion with substantial pay increases, his employer may feel morally obliged to make up the deficiency in the transfer value in order to provide an adequate retirement benefit. Finally, there may be some qualifying period in the new scheme preventing immediate entry. What happens to the portable benefit in the meantime? Is an employee covered by death benefits in this interim period?

It would seem wise to allow the managers of the private fund to decide what form of preservation or portability should be used but a list of alternatives should be provided as in the Victorian Bill.
Subject to this range of options, preservation or portability must be compulsory. To ease the initial burden of these measures it may be necessary to 'phase in' their development. Private superannuation schemes have become recognised, if at times unwilling, partners in the nation's social security system. In these circumstances it seems illogical to make the provision of adequate retirement benefits dependent upon an employee's service with his last employer. Superannuation benefits must reflect the earnings of an employee's working career.

(iv) Inflation-proofing

Unless superannuation entitlement is escalated both before and after retirement it will not fulfil its essential purpose.

Announcing its commitment to a state pension scheme which would protect benefits against the corrosive effects of inflation, the British Government declared:

If people are to face retirement without continual anxiety about money, they must have a guarantee that the value of their pension rights will be maintained both while they are being built up during working life and after the pension has been put into payment. Indeed, so changed is the situation - even in the last three years - that no proposals coming forward today would be regarded as realistic without such a guarantee.

The proposed British scheme has two components: a base level equivalent to the amount of the single flat rate pension when the scheme is introduced and an earnings-related supplement of one-quarter of the member's earnings between the base level and a ceiling of seven times that amount.

Occupational schemes will be permitted to contract out of the state scheme in which case the employer and his employees will pay reduced contributions to the national scheme. This partial exemption will be granted only on certain conditions. Among these is a requirement that the private scheme provide a pension based on final salary
or average salary revalued in line with the general growth in earnings with an annual accrual rate equivalent to at least one eightieth \((1\frac{1}{4}%)\) of pensionable salary as defined in the scheme. Once the employee qualifies for a pension equal to half his pensionable salary on retirement the employer will no longer be obliged to 'dynamise' his pension entitlement at the prescribed rate.\(^2\)

Exempt occupational schemes must also escalate preserved benefits. They are obliged to provide a guaranteed minimum pension on retirement. This benefit is equivalent to the pension the withdrawing member would have obtained on earnings up to the ceiling level had he been a member of the state scheme for the period of contracted out service.\(^3\)

In Australia, final salary superannuation schemes are becoming more common but, apart from this, formal provisions for uprating superannuation benefits before retirement are rare. The British model provides a useful general precedent for reform. The appropriate accrual rate is, of course, basically an actuarial question. Here we are concerned only with the need for such a provision.

Inflation-proofing after retirement is not uncommon in Australia but it is often undertaken on an informal and discretionary basis. By contrast, the Commonwealth Superannuation Scheme for employees of the Australian Government has recently introduced a set formula for escalating pensions in retirement.\(^4\) The Pollard Report which recommended this measure pointed out that this is an expensive undertaking, one which many private schemes may simply be unable to attempt.\(^5\) Yet unless there is some uprating provision, superannuation benefits will be substantially eroded during retirement.

Certainly the ambitious formula adopted by the Commonwealth scheme may be beyond the reach of many private schemes but a start, however modest, should be made. Professor Pollard observed that the
30/20 ratio makes it 'virtually impossible for private pension funds to guarantee to maintain even the purchasing power of their pensions'.\(^6\) Repeal of the 30/20 legislation would greatly enhance the private schemes' chance of approaching the Commonwealth standard.

(v) **Investment Control and Supervision**

The foregoing proposals are of no avail if the superannuation scheme is insolvent. The investment and solvency of a superannuation fund are, therefore, of critical importance.

One of the most controversial features of the Victorian Superannuation Bill was its attempt to regulate the investment and solvency of superannuation funds.\(^7\) A registered scheme would be allowed to invest only 10% of the net book value of its assets in a single person or enterprise. If the fund's investment exceeded that level prior to registration it would be permitted to increase its investment in the unit at the annual rate of 10% of the increase in the book value of its net assets in the preceding year.

These restrictions were widely criticised on the ground that they would hamper a flexible investment policy.\(^8\) Yet the investment limit seems to be a sensible provision aimed at spreading the risk involved in the fund's investments. Perhaps the figure of 10% is too restrictive but the proposal seems to be sound in principle. The New Zealand Superannuation Scheme sets a similar limit on investments of the national fund and new alternative schemes.\(^9\) Without such a restriction fund managers would be free to acquire substantial holdings in the employing company or its associates. While this may in some instances be a sound investment it raises the question whether the fund is being operated for the sole interest of the beneficiaries.

The Victorian draft, however, went much further. It would require fund managers to obtain prior written approval from the
Superannuation Commission before investing in shares, property and unit trusts. This curtails the administrators' investment freedom and is hard to justify.

In addition, the Victorian Bill proposed that the Commission be given power to wind up schemes which appeared to be insolvent. This power would only be exercisable after a certain procedure had been observed. First, the Commission would notify the managers of the apparent deficiency. The Commission could then suggest certain changes in contribution and/or benefits. If the Commission and the administrators were unable to reach agreement upon the appropriate remedial measures within a reasonable time, the Commission could demand that the scheme be wound up.

A periodic examination of the liquidity of private superannuation funds would further safeguard employees' interests. This is common in public superannuation schemes in Australia and it has been recently introduced in the New Zealand Superannuation Scheme. There the trustees or managers of approved private schemes are required to submit annual reports in a prescribed manner to the Government Actuary. He may demand the trustees or managers to furnish further information about the fund. In addition, the administrators of benefit-promise schemes founded on unallocated funding must supply him with an actuarial report on the level at which contributions are required to support the benefits for members of the scheme. This data must be submitted as soon as practicable after the end of every third year or at such shorter intervals as the official actuary may require.

If the actuary is not satisfied with the security of benefits or the adequacy of the management in an approved private scheme he may order the scheme to be wound up. This is a severe sanction which would ensure that the solvency of funds is maintained.
As the debate surrounding the Victorian draft shows, investment control and supervision is a sensitive issue but it seems reasonable that control along these lines should be exercised in the interests of scheme members. Sensibly administered, it would greatly enhance the protection of employees' superannuation benefits.

7. Constitutional Avenues of Reform

Superannuation, as such, is not mentioned in the Constitution. Nevertheless there are several paragraphs in section 51 of the Constitution which are relevant to this subject.

Placitum (xiv), for example, empowers the Australian Parliament to make laws with respect to 'Insurance other than State Insurance, also State insurance extending beyond the limits of the State concerned'. The question arises: does this paragraph authorise the creation of a compulsory national superannuation scheme founded on contributions from employers and employees?

Federal control over insurance extends to any form of insurance throughout the Commonwealth except insurance undertaken by a state government and confined to the limits of the state. Superannuation is not simply provision for retirement. It may involve substantial death and disablement benefits. It may, therefore, be a form of insurance against death and incapacity.

Assuming this view to be correct, can the Commonwealth create a national superannuation scheme? It is submitted that paragraph (xiv) may confer this power. Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association held that the provisions of the Conciliation and Arbitration Act 1904 (Cth) dealing with the incorporation of associations of workmen and employers were within the 'industrial power'. By analogy, it could be argued that section 51 (xiv) contemplates the creation of a Commonwealth instrumentality for the
purpose of federal control over insurance. Equally, if the ‘corporations power’ enables Federal Parliament to incorporate the corporations described therein, the creation of a national insurance scheme may well be within the ambit of placitum (xiv).

The major obstacle to a compulsory national superannuation scheme founded upon the insurance power appears to be that placitum (xiv) may not empower Federal Parliament to compel employers and employees to contribute to the scheme. If the Commonwealth had such a power it might also be argued by parity of reasoning that it could require citizens to bank a certain percentage of their salary each week with the Commonwealth Bank. It would seem, therefore, that section 51 (xiv) does not authorise a compulsory levy upon employers and employees.

The same is apparently true of the invalid and old-age pensions paragraph and the social services power. The former enables the Commonwealth to prescribe the conditions on which pensions may be granted and the amount of same. But the history of the paragraph suggests that it does not empower the Commonwealth to provide or control pensions from sources other than Consolidated Revenue. In particular, it seems that the sub-section does not authorise a compulsory levy upon employers.

The social services paragraph gives the Commonwealth power over, *inter alia*, ‘the provision of ... pensions’. In *British Medical Association v. The Commonwealth* the High Court by a convincing margin ruled that the power was limited to the provision of certain benefits and services by the Commonwealth. While these benefits and services need not be provided directly – they may be provided through contributory schemes or separate schemes established for the purpose – corporations, employers or employees may not be compelled to contribute.

This leaves the Federal armoury in the field of superannuation rather depleted. There remains, of course, the taxation...
power. This has been used, and could be further used, to regulate private superannuation schemes indirectly. Here the Commonwealth is on safe ground. True, this power is a fairly blunt instrument for reforms but Federal Parliament may have no alternative.

The major shortcoming in using the taxation paragraph is that superannuation coverage would eventually stagnate leaving a significant proportion of the work force without adequate provision for retirement. To some extent this problem could be overcome if, as suggested earlier, superannuation were accepted as an 'industrial matter' within the jurisdiction of Australia's industrial arbitration machinery. This would precipitate a spread of superannuation coverage. The actual provisions in the schemes could be regulated directly through awards or indirectly through the superannuation provisions of the income tax legislation. In either case, it would be possible to implement most of the proposals relating to adequate disclosure requirements and vesting and security of benefits. There is one notable exception. The Commonwealth would not be able to compel employers to pay a portable superannuation benefit to a 'clearing house' upon a member's resignation, dismissal, or withdrawal from the firm's scheme. But a national superannuation scheme could be authorised to accept transfer values voluntarily paid by employers in these circumstances.

8. Conclusion

To sum up, although a national scheme will extend the coverage of superannuation, the benefits provided will be very modest. Private funds will still play a vital role. These schemes may be expanded by making superannuation an industrial matter. In addition, the security of member's benefits may be strengthened by improved disclosure requirements, vesting, preservation, portability, inflation-proofing and investment control.
These proposals would greatly increase the cost and administrative difficulties involved in running a private superannuation scheme but the ultimate goal - adequate retirement provision - justifies these drawbacks. Moreover the costs could be off-set by the removal of the 30/20 requirement and by a more flexible approach to property investment. If superannuation provision involves a partnership between the State and the private sector, then each partner must be prepared to pull its weight. Finally, it appears that the Constitution would not prevent Federal Parliament prescribing the load company management is to carry.
1. **Introduction**

The controversy which the *corporations power* has recently attracted contrasts with the lack of judicial attention it has previously received. The High Court has directly considered the provision on only three occasions: *Huddart Parker & Co. Pty Ltd v. Moorehead*\(^2\) in which the majority took a circumscribed view of the placitum; *Strickland v. Rocla Concrete Pipes Ltd*\(^3\) where the High Court rejected this narrow view but left the precise ambit of the power undefined; and, finally, the *St George County Council Case*,\(^4\) which answered some questions but raised others.

2. **The Described Corporations**

   (i) **Foreign Corporations**

   Of the corporations described in section 51 (xx) of the Constitution, the first mentioned are the easiest to identify. They are corporations foreign to the Commonwealth, or, in other words, formed outside the Commonwealth.\(^5\) This interpretation is reinforced by contrasting *foreign corporations* with *trading or financial corporations* which must, to fall within the sub-section, be *formed within the limits of the Commonwealth*.\(^6\) Thus, a corporation formed outside Australia will be within power whatever its nature, purpose or activities. Corporations formed within Australia, however, are within power only if they answer the description *trading or financial*.

   (ii) **Trading Corporations**

   One judicial opinion that has bedevilled the interpretation of this phrase is Mr Justice Isaacs's forceful dissent in *Huddart Parker & Co. Pty Ltd v. Moorehead*\(^2\).
a purely manufacturing company is not a trading corporation; and it is always a preliminary question whether a given company is a trading or financial corporation or a foreign corporation. This leaves entirely outside the range of federal power, as being in themselves objects of the power, all those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading ... 

There are a few points to note about this statement. First, the comment was unnecessary even in a dissenting judgment: the appellant was a coal merchant and clearly within the statutory description. Second, the suggestion that a 'purely manufacturing company' and 'domestic corporations' constituted for mining or manufacturing purposes fall outside the power is an obstacle to a broad construction of the sub-section. Indeed, Isaacs J. believed the statutory description itself was sufficient to protect the states' autonomy in the company law area.

The Concrete Pipes Case neither endorsed nor rejected Isaacs's dictum. The respondents in that case were manufacturers and distributors of concrete pipes. Only Barwick C.J. and Menzies J. expressly stated that the respondents were 'trading corporations' within the statutory description. This is interesting for, although the respondents were not 'purely manufacturing' companies in Isaacs's terms, they could fit the description: domestic corporations constituted for manufacturing purposes. Perhaps it can be explained on the ground that the issue was not fully argued in the Concrete Pipes Case. On the other hand, it might suggest that there is an internal inconsistency in Mr Justice Isaacs's comment.

Windeyer and Owen JJ. cast further doubt upon the passage. They intimated in argument that Isaacs's distinction between trading corporations and manufacturing corporations 'may now be untenable'.
The subtle implication from the Concrete Pipes Case\textsuperscript{17} then, is that a company may be a 'trading corporation' even if it undertakes manufacturing.

The St George County Council Case\textsuperscript{18} gives a better insight into the likely scope of the statutory description. The Commissioner for Trade Practices had instituted proceedings against the council claiming that it was engaging in 'monopolization', an examinable trade practice under the\textit{Restrictive Trade Practices Act 1971-1972} (Cth). The council sought a writ of prohibition to restrain proceedings before the Trade Practices Tribunal. It alleged that it was not a 'trading corporation formed within the limits of the Commonwealth' within section 5 of the Act.

The council supplied electricity within a certain area. It also supplied, installed, serviced and repaired electrical appliances. Moreover, it charged fees for these services. It did not generate the electricity,\textsuperscript{19} nor was there any evidence that it manufactured the appliances. Clearly the council was not a manufacturing corporation but was it a trading corporation?

The High Court split 3:2 on this issue. All judges, however, agreed that a corporation which trades is not necessarily a trading corporation; something more than just trading is required to bring a corporation within the statutory description.\textsuperscript{20} They approached the matter as a question of interpreting the term 'trading corporation' within section 5 of the\textit{Restrictive Trade Practices Act 1971-1972} (Cth). It was not argued that the Act itself was beyond the legislative power conferred by section 51 (xx) of the Constitution.\textsuperscript{21} Strictly speaking, therefore, the case is not definitive on the point of Commonwealth legislative competence. On the other hand, the words of the statutory definition were almost identical with those in placitum (xx), and the case will, no doubt, be treated as an important chapter in the development of the placitum.
Of the majority, Menzies and Gibbs JJ. adopted a 'purpose' approach reminiscent of the one Isaacs J. used in Huddart Parker. They enquired: for what purpose was the corporation formed? This does not mean that they entirely concur in Isaacs's view. When Menzies J. cited Isaacs's dictum he appears to have done so more to distinguish a trading corporation from a municipal corporation than to indicate approval of Isaacs's distinction between a manufacturing corporation and a trading corporation. Gibbs J. simply remarked: 'It is unnecessary to decide whether or not Isaacs J. was right in saying that a purely manufacturing company, or a mining company, is not a trading corporation ...'. While it would be going too far to interpret this comment as an implied disapproval of Isaacs's distinction, it is interesting to note that Gibbs J. declined the opportunity to come down strongly in favour of the dichotomy.

Menzies and Gibbs JJ. concluded that the council was constituted for local government purposes, and was, therefore, outside the statutory description 'trading corporation'.

The other member of the majority, McTiernan J., took up a semantic point in the definition section of the Restrictive Trade Practices Act. The section referred to 'a trading corporation' not 'any trading corporation'. Further, the Act as a whole was intended to deal, and did in fact deal, with only certain kinds of trading corporations, namely, those engaged in private or free enterprise. Since the council did not fall in this category, it was beyond the purview of the Act. To McTiernan J., therefore, the answer lay in the object and subject matter of the Act.

There are two common strands in the majority judgments: in the first place, the purpose for which a corporation is constituted is to be determined from the constitutive document, in this case, the Local Government Act, 1919 (N.S.W.); secondly, a 'trading corporation'
is a special kind of corporation with certain inherent (rather than imputed or acquired) characteristics which distinguish it from other corporations.

Barwick C.J. and Stephen J. dissented. They decided that the council was a trading corporation. The Chief Justice examined its 'current activities'. Since the council's predominant and characteristic activity was trading, it was a trading corporation. It mattered not that it was also a municipal corporation for it could be a hybrid.

Stephen J. took a slightly different course. He examined the activities the corporation was intended to undertake or those which, in fact, it had undertaken. Thus, while Barwick C.J. looked at the corporation's actual activities, Stephen J. considered the corporation's actual or intended activities.

By stressing that a corporation's activities could place it in the category 'trading corporations' both Barwick C.J. and Stephen J. settled for a more pragmatic test than the 'purpose' approach used by Menzies and Gibbs JJ. It is now common practice to insert 'powers' in the company's objects clause and to list every conceivable object in that clause. The objects are usually couched in the broadest terms and normally contain a catch-all provision to cover any gaps left by the draftsman. If the powers contained in the Third Schedule of the Uniform Companies Act are incorporated, then it will be even more difficult to discern the company's purpose, or even the sole or predominant activity for which it was formed. The search for the company's purpose could become a highly artificial exercise.

On the other hand, the test suggested by the dissenting judges relates to the activities the company has, in fact, undertaken. Further it is easier to apply since it turns on concrete facts rather than abstract analysis.
What then, is a 'trading corporation' within placitum (xx)? On the present state of the authorities it appears that such a corporation is 'an antecedently existing entity' with certain 'innate characteristics'. In other words, a corporation is not a trading corporation simply because it engages in trading activities.

The St George County Council Case decided that a local government corporation could be identified from its constitutive document. Whether this approach will be applied generally remains to be seen but it will be a much more difficult proposition to try to determine the purpose of an ordinary private or public company from its memorandum of association. In these cases the High Court might be persuaded to examine the current activities of the company in order to decide whether it is a 'trading corporation'.

Howard argues that there are three reasons why the High Court is likely to take a broad view of the statutory description in section 51 (xx). Firstly, the Concrete Pipes Case affirmed the constitutional principle in the Engineers' Case and unanimously rejected the majority's reasoning in Huddart Parker because it was based on the erroneous doctrine of reserve powers. Howard points to the Chief Justice's warning against a 'narrow or pedantic' approach to the question whether a particular law is within the scope of placitum (xx). Menzies J., too, indicated that 'grants of power should be construed broadly and not narrowly'. On the other hand, the general approach of the High Court in the Concrete Pipes Case was one of caution. Barwick C.J. and Menzies, Gibbs and Walsh JJ. refused to give opinions as to the exact scope of the corporations power. Clearly, the High Court wishes to retain the right to develop the law in this area on a case-by-case basis.

Secondly, Howard cites the recognised principle of progressive interpretation. On this principle the words of the Constitution are
not restricted by the meaning they bore in 1901; their meaning may be coloured or expanded by developments since that date. Barwick C.J. applied this principle in the _St George County Council Case_.

Thus, the question in this case should be approached bearing in mind the purpose of the grant of the power and without any special or technical meaning of the description 'trading corporation' derived from nineteenth century usage.

On the other hand, Menzies J. concentrated on the historical meaning of the term 'trading corporations' and gave no indication that the term should be reinterpreted according to modern usage.

In _Huddart Parker_, Isaacs J. referred to the need felt at the time of Federation to control the activities of trading and financial corporations 'whose wealth and power might not be used for the public good'. Today, corporations which answer the technical description of 'trading corporations' or 'financial corporations' are not the only, nor even the principal, types of companies which have amassed wealth and power. By applying the principle of progressive interpretation broadly, the High Court might be able to ensure that manufacturing companies and mining companies, for example, do not abuse their power and influence.

Finally, Howard suggests that the extended meaning given to trade and commerce in the context of section 51 (i) may be applied by the High Court in interpreting section 51 (xx). In the _Concrete Pipes Case_, Barwick C.J. gave support to this suggestion when he referred to the _Bank Nationalization Case_ to point out that trade is not limited to dealing in tangible items such as goods.

If Howard's view on this third point is correct the meaning of 'trading corporation' would be substantially enlarged. Not only could the High Court draw on section 51 (i) case law, it could also apply the meaning attributed to 'trade' in section 92 of the Constitution. To give just a few examples, transport companies, news media companies and property and development companies would be
within the description. Even a mineral prospecting company could be
regarded as a trading corporation since it is engaged in the
transmission of information."^61

Yet would a manufacturing company or a mining company fall
within the statutory description even on this intended construction?
When describing the meaning of *trade and commerce* within section 92
of the Constitution the High Court has treated manufacture and trade
as mutually exclusive activities. Thus, in Beal v. Marrickville
Margarine Pty Ltd^62 Menzies J. declared pithily: *to manufacture is
not, of itself, to trade*.^63 Again, in Grannall v. Marrickville
Margarine Pty Ltd,^64 Dixon C.J., McTiernan, Webb and Kitto JJ. stated:

It is of course obvious that without goods there can be no
inter-State or any other trade in goods. In that sense
manufacture or production ... is an essential preliminary
condition to trade and commerce between the States in
merchandise. But that does not make manufacture [or]
production ... trade and commerce among the States.^65

By contrast, the words *trade and commerce* in section 51 (i)
have traditionally received a broad construction capable of encompassing
manufacturing and mining activities.\^66

If this liberal interpretation were applied to the phrase
*trading corporations* in paragraph (xx) regulation of most forms of
commercial and industrial enterprise would seem to be within power.
Perhaps the only exceptions would be *purely manufacturing companies*
and *purely mining companies*, whatever these may be.

In theory, a subsidiary company could supply goods to its
parent company which could then trade in the goods. In these circum-
stances, the subsidiary company would be beyond the ambit of placitum
(xx) for it would be a purely manufacturing company. A similar result
would follow if a company manufactured goods and assigned them to an
individual trader. But how does the manufacturer benefit from these
transactions? Indeed, it may be liable to substantial gift duties.
Moreover, at least in the first case, it might be possible to lift
the corporate veil to prevent evasion of laws enacted in reliance upon section 51 (xx). In fact, these laws could expressly provide for such a contingency.

There is one final reason why the phrase 'trading corporations' may receive a broad construction. In the St George County Council Case, with compelling logic, decided that a corporation can be a hybrid: a municipal corporation and a trading corporation. By parity of reasoning it might be possible to classify manufacturing and mining companies as 'trading corporations'.

To sum up, there are many grounds for believing that the High Court will not take a restrictive view of the phrase 'trading corporations' in section 51 (xx).

(iii) Financial Corporations

The term 'financial corporations' would probably include investment companies, finance companies, incorporated building societies and companies which lend money on the security of land. One thing is clear: 'financial corporations' do not include banks. Banking corporations are covered by a specific grant of power in section 51 (xiii) and this placitum places a limitation upon the corporations power. Thus, if Federal Parliament wishes to legislate on banking corporations it must rely on section 51 (xiii), not section 51 (xx).

3. Characterisation

Federal Parliament has power to legislate 'with respect to' the corporations described.

To determine whether an Act is within power, the High Court will examine the substance or the true nature and character of the statute. If the direct legal effect of the Act (i.e. what it really does in its operation) is in substance upon a subject matter assigned
to the Australian Parliament, then it will be valid.

This does not mean that any legislation dealing with the specified corporations in any manner, however peripheral, will be sustained. The Act must not merely touch on the subject matter assigned to Federal Parliament; it must have some relevance or connection with the subject matter.

The degree of nexus required has been described in various ways. To Barwick C.J. the 'constitutional formula requires a substantial connection' between the law and the subject matter. Menzies J. hinted that a law dealing with the special disabilities or characteristics of the described corporations would be within section 51 (xx). Similarly, Isaacs J. thought that the placitum would sustain a law which related to the described corporations qua corporations. This is not quite as stringent as Mr Justice Menzies' criterion. Whatever else is required, it is clear that it is not sufficient merely to address legislation to such corporations.

Perhaps the best guidance for construing the prefatory words of section 51 comes from the Bank Nationalization Case. There Latham C.J. remarked: 'the power to make laws "with respect to" a specific subject is as wide a legislative power as can be created'. In a similar vein, Menzies J. declared in the Concrete Pipes Case that grants of power should be construed 'broadly and not narrowly'. Section 51 then, gives the Australian Parliament almost plenary power to legislate upon the subjects listed therein.

4. Scope of the 'Corporations Power'

Assuming that Parliament does relate a law to the corporations described in the appropriate manner, what is the scope of federal power under section 51 (xx)? The broad terms of the paragraph might suggest that the Commonwealth has unlimited power to legislate with respect to
the specified corporations. Several justices have conceded that this is at least a possibility in view of the language used in the placitum.\textsuperscript{86} But the majority of judicial opinions expressed on section 51 (xx) favour some limitation being placed upon the power. Indeed, unless some restriction is read into the placitum it would make superfluous some of the powers carefully assigned to the Australian Parliament by section 51.\textsuperscript{87}

The crucial questions are: what aspects of the corporations may federal legislation control or regulate? and at what stage can the corporations described become subject to federal power? There are five potential areas of federal control: incorporation, internal management, internal-external relations, the business or activities of the corporation, and liquidation.

(i) \textbf{Does the Commonwealth Have Power to Incorporate the Corporations Described?}

(a) \textbf{Judicial Opinion}

The answer to this question may be pivotal. If the Commonwealth has power to incorporate the corporations described, it might follow that the Commonwealth has power to regulate or control the corporations during their existence. At first glance, the arguments denying the Commonwealth this power appear to be formidable.

All five judges in Huddart Parker,\textsuperscript{88} including the dissenting judge Isaacs J., held that section 51 (xx) gave no power to incorporate the corporations described. However, Their Honours' views on this point are obiter dicta since the main issue there was whether the Commonwealth had power to control the activities of the appellant company. Further, the reasoning of the High Court was suspect on a number of grounds. Firstly, all judges except Isaacs J. acted on the 'reserved powers' doctrine which was subsequently rejected in the Engineers' Case.\textsuperscript{89}
The High Court in the Concrete Pipes Case confirmed that the majority in Huddart Parker was wrong in relying on the reserved powers doctrine.

Secondly, in Huddart Parker, Griffith C.J. and Barton J. argued that the Commonwealth had no power to create foreign corporations and, therefore, there was no reason why the Commonwealth should have power to incorporate local corporations of the type described in the placitum. There is a basic flaw in this reasoning. Federal Parliament cannot incorporate a foreign corporation because such a power belongs to that corporation’s country of origin. Indeed, that is what distinguishes foreign corporations from local corporations. In other words, the Commonwealth’s inability to create foreign corporations arises from the very nature of those corporations and the fact that the Commonwealth’s legislative power will normally extend only to its territorial boundaries. By contrast, there is nothing in the inherent nature of trading corporations or financial corporations to preclude federal control of their incorporation.

Thirdly, the whole Court in Huddart Parker considered that ‘formed’ in placitum (xx) meant formed under state laws. Barwick C.J. exposed the error in this reasoning in the Concrete Pipes Case. The Chief Justice pointed out that the Commonwealth had power to incorporate companies under the ‘territories power’ and the ‘trade and commerce power’. Thus the power of incorporation was not exclusively reserved for the states.

True, there are dicta in the Bank Nationalization Case and the Insurance Commissioner Case which repeat the view that the Commonwealth does not have power to incorporate ‘trading and financial corporations’. But it seems clear that the judges in those cases did not undertake an independent inquiry into the scope of legislative power conferred by section 51 (xx). Rather they appear to have relied upon the views expressed in the Huddart Parker Case.
The **Concrete Pipes Case**\(^3\) did not explore the question whether the Commonwealth could legislate to incorporate trading or financial corporations. The issue was not raised on the facts and several members of the High Court declined to express an opinion on the precise scope of section 51 (xx).\(^4\)

In the **St George County Council Case**\(^5\) only Barwick C.J. and Gibbs J. touched upon this broader issue. The Chief Justice used the phrase 'formed within the limits of the Commonwealth' to contrast trading or financial corporations with foreign corporations. In his view, the phrase 'serves to require local incorporation, the locality being any part of Australia'.\(^6\) This, in itself, is not an unusual construction of the phrase. But earlier in his judgment the Chief Justice stated: 'The expression is not confined to corporations existing at the date of the commencement of the Commonwealth but includes corporations whenever and however they have been or may be so incorporated'.\(^7\) Consider the words 'whenever and however they ... may be ... incorporated'. It is interesting to speculate whether Barwick C.J. was hinting that section 51 (xx) grants power to incorporate the corporations described. Certainly his language is broad enough to admit this interpretation.

Referring to the phrase 'formed within the limits of the Commonwealth', Gibbs J. commented:

> Those words include any corporation which has come into existence in Australia, under the authority of ANY LAW OF THE COMMONWEALTH or of a State or Territory. They are not limited to corporations formed in a particular way.\(^8\)

Perhaps Gibbs J. was also implying that the Australian Parliament is competent to incorporate the corporations specified. On the other hand, the preponderance of judicial opinion favours the view that paragraph (xx) does not grant power to incorporate the corporations described therein. Debate on the scope of the paragraph is not, however, confined to the High Court.
The Federal Convention Debates in 1891 and 1897 give little guidance on this issue.\(^9\) In any event, there is a conflict of opinion as to the precise view favoured by the Founding Fathers.\(^10\) Lane suggests that, whatever was their approach at the Conventions, the five founding fathers who sat on the bench in Huddart Parker\(^11\) were convinced that section 51 (xx) gave no power to incorporate companies. This is, of course, true but it is no help in interpreting the placitum.

(b) **Academic Opinion**

Early commentators tentatively assumed that the Commonwealth lacked the power of incorporation under section 51 (xx).\(^12\) More recently, the controversy has centred upon the opposing views of Professor Lane on the one hand and Frankel and Taylor on the other. Professor Lane contends that the placitum carries no power of incorporation.\(^13\) He relies upon the notion of an assumed federal balance in the area of corporate affairs. If the Commonwealth were allowed to enter the field of incorporation pursuant to section 51 (xx) there would be a 'weighty re-allocation of power in the Federation'.\(^14\) Lane cites several authorities\(^15\) which appear to support this concept of federal balance.

But the 'balance' which existed between the Commonwealth and the states at Federation has already been disturbed by the High Court on several occasions.\(^16\) Federal power is ascendant. It is likely to be further expanded under section 51 (xx) as two members of the High Court in the Concrete Pipes Case\(^17\) cautioned against reading specific grants of power in a narrow or pedantic manner.\(^18\) Moreover, the federal balance concept comes dangerously close to the reserved powers doctrine so soundly rejected in the Engineers' Case\(^19\) and the Concrete Pipes Case.\(^20\) It seems improbable that the High Court would allow this
doctrine to re-emerge, albeit in a disguised form.

Lane also asserts that federal laws relating to trading and foreign corporations can only regulate corporations already formed since other placita in section 51 with persons as their subject matter
relate to persons who 'stand ready and identified, existing independently of Commonwealth action'.

The error in this argument is patent. Of course the Federal Parliament cannot create 'aliens', 'foreign corporations' or 'the people of any race' but this lack of power is caused by the nature of the subject matter. By contrast, the nature of trading or financial corporations does not exclude the Commonwealth from exercising a power to incorporate.

Lane is not without support. After some vacillation, Tonking comes down in favour of Lane's conclusion. In his view, the only laws which section 51 (xx) will sustain in respect of trading corporations are those which deal with the corporations trading activities. Doubtless he bases his opinion, in part, upon the following comment of the Chief Justice in the Concrete Pipes Case:

laws which may be validly made under S. 51 (xx) will cover a wide range of the activities of foreign corporations and trading and financial corporations: perhaps in the case of foreign corporations even a wider range than that in the case of other corporations; but in any case, not necessarily limited to trading activities.

Yet Barwick C.J. expressly refrained from exploring the full scope of the placitum. The above statement cannot be treated as definitive. Further, the Chief Justice himself conceded that the subsection was not necessarily limited to the trading activities of the corporations specified. In addition, Tonking seems to have overlooked the fact that the word 'trading' is simply used to describe one type of corporation within power; it does not define what aspects of those corporations may be regulated or at what stage federal control may be exercised.
Professor Howard also concludes that section 51 (xx) does not empower the Commonwealth to incorporate companies. He bases this opinion on dicta in the Huddart Parker Case and the Bank Nationalization Case. He further argues that the wording of the placitum seems "to assume the anterior creation, under some other power or law, of corporations on which the power operates." As mentioned earlier the dicta in the Huddart Parker Case and the Bank Nationalization Case were just that - obiter dicta. The recent dicta of the Chief Justice and Gibbs J. in the St George County Council Case might encourage Professor Howard to revise his views on the scope of the placitum.

As for the wording of the section, the phrase 'formed within the limits of the Commonwealth' might have been inserted simply to contrast foreign corporations with local trading or financial corporations. There is no clear implication that 'formed' means formed under a power or law other than section 51 (xx). Indeed, if the phrase was inserted merely to provide a contrast between the types of corporations described, there is more scope for arguing that the placitum authorises federal incorporation of certain companies.

Frankel and Taylor cogently criticise Lane's thesis. They argue that the terms of the grant of power in section 51 (xx) suggest that the Commonwealth is to have plenary power to legislate with respect to foreign corporations and local trading or financial corporations. In addition, they suggest that the words 'formed' in the placitum does not necessarily denote an antecedent creation. In other words 'formed' may mean 'to be formed' as well as 'already formed'.

This argument is not new. In 1934 Garran wrote that the phrase 'formed within' carries 'no implication that the corporation must have been formed prior to the Federal power attaching to it'. But Frankel and Taylor have taken this line of reasoning one
step further. They cite an authority which, by analogy, supports the view that 'formed' may have a future connotation. In an earlier article Taylor referred to the definitions of 'company' and 'corporations' in section 5 of the Uniform Companies Acts which indicate that the past participle 'formed' is not confined to the past tense.

This step in Frankel and Taylor's argument seems to be quite sound. If 'formed' implied prior creation, section 51 (xx) would only apply to those corporations in the category described which were already existing at the time of Federation. This result would be ludicrous. The placitum must be intended to apply to corporations formed after Federation as well as those corporations formed before federation if they are still in existence.

This still does not tell us under what laws the corporations formed since Federation may be incorporated. Must they be corporations incorporated under state laws or may they be corporations incorporated under federal laws? The Commonwealth can create corporations under the territories and the trade and commerce powers as well as the incidental power. Here there is no restriction upon the type of corporation which may be incorporated but the power may be exercised only for a specific purpose, for example, the regulation of interstate or overseas trade and commerce. In contrast, it may well be that the power in section 51 (xx) is plenary, yet only in relation to the corporations described therein. If this is so, then the Australian Parliament could make laws with respect to the incorporation of 'trading corporations' or 'financial corporations'.

Perhaps the corporations described in section 51 (xx) were singled out for special treatment because the magnitude of their wealth and power posed a threat to the security of the nation and its citizens. If this is true it would seem reasonable to construe the paragraph so as
to give Federal Parliament power to control the corporations described as corporations of that description. In other words, the Commonwealth should be permitted to control a trading corporation in all its characteristics as a trading corporation. This power would go beyond regulation of trading activities. It might involve control at the incorporation stage for it is here that the structure and the initial objects and powers of the company as a trading corporation are determined.

If, on the other hand, the Australian Parliament has no power to make laws with respect to the incorporation of the corporations specified in placitum (xx), it becomes necessary to consider whether it may regulate the internal management of such corporations.

(iii) Can the Commonwealth Legislate on the Internal Management of the Corporations Described?

Lane places such matters as voting rights of shareholders, statutory meetings of the company and the company’s relations with its employees within this category of internal management. Assuming this classification is correct, federal control over internal management is vital if the proposals suggested earlier are to be implemented through federal legislation under placitum (xx).

Is it true that a company’s relationship with its employees fit neatly into the category of internal management? Employees are not members of the company. Nor would they be given membership of the company under the proposals suggested herein. The employees’ relationship with the company is defined by contract. In this respect employees resemble other ‘outsiders’ such as creditors, consumers and suppliers. Indeed they may simply be classified as suppliers of labour in return for wages and fringe benefits. How then, can employees be within the internal management category? True, industrial tribunals have shown a reluctance to interfere with managerial prerogatives in
decisions affecting employees but this does not make the employer-employee relationship a matter of internal management in the company law context.

But assume for the moment that a company's relations with its employees are a matter of internal management. If this is the case, does the Commonwealth have power to interfere with the domestic management of companies?

Once again Huddart Parker is the starting point. There Isaacs and O'Connor JJ, observed that the Commonwealth did not have power to regulate the internal management of corporations described in section 51 (xx). This view gains support from an early obiter dictum of Griffith C.J. and also from Rich and Williams JJ, in the Bank Nationalization Case. Neither the Concrete Pipes Case nor the St George County Council Case discussed this issue.

Academic opinion on the point seems to be divided evenly. Lane and Tonking argue that control of internal management is beyond Commonwealth power in section 51 (xx).

Lane takes the view that control over internal management is likely to go hand in hand with control over incorporation; since there is no power to incorporate under the placitum, there is no power to regulate internal management. The crux of Lane's reasoning seems to be that internal management is associated with the identity and the continuing existence that flow from incorporation.

Frankel and Taylor again join battle with Lane by suggesting that, even if the Commonwealth is denied the right to incorporate under section 51 (xx), this is no ground for rejecting a power to regulate the corporations during their existence. Similarly in an early analysis Holmes argued that the placitum conferred power to control the domestic or internal management of the corporations even though it did not admit a power over incorporation. More recently, Howard suggested
that a federal law based upon section 51 (xx) and section 51 (xxxix) could 'prevent corporations whose internal structure does not conform to Commonwealth standards from operating'. This certainly involves indirect regulation of internal management.

In summary, judicial opinion against a federal power over internal management under section 51 (xx) is neither definitive nor insurmountable. On balance, academic opinion favours a federal power to control internal management of the corporations described.

The better view seems to be that a federal power to incorporate would also entail a federal power to regulate internal management. But a denial of the first type of power does not preclude the Commonwealth from invoking a power of the second type; it is possible to treat incorporation and internal management as separate and independent issues.

The Uniform Companies legislation requires certain matters to be included in the memorandum and articles of association before a company may be incorporated but there is ample scope for a federal law governing internal structure or management to operate. If this assessment is correct, the proposals for structural reform of company law could be implemented through federal legislation.

(iii) Can the Commonwealth Legislate on the Internal-External Relations of the Companies Described?

Turning now to the companies' internal-external relations - their relationship with outsiders - it seems clear that Federal Parliament has power to regulate this aspect of the specified corporations. Within this category are matters such as the returns to be made, disclosure of 'public' information, auditing and balance sheets, the securities to be deposited, the qualifications of directors running the companies and the place of their registered offices. If the Commonwealth is entrusted with control over these aspects of the
corporations described in placitum (xx), the proposals for industrial reports and labour directorships may be introduced through federal legislation.

The strongest advocate of federal control over the internal-external relations of the companies described was Isaacs J. In the Huddart Parker Case 65 His Honour commented that section 51 (xx) empowered 'the Commonwealth Parliament [to regulate] the conduct of the corporations in their transactions with or as affecting the public'. 66 And later: 'But whether any given provision is part of the federal power or not must, as I view it, depend on whether it includes or is necessarily incidental to the control of the conduct of the corporations in relation to outside persons'. 67 Higgins J., too, would apparently concede that the Commonwealth has power to regulate the internal-external relations of companies. 68 Moreover, as Lane points out, there was some sympathy with this view in the Concrete Pipes Case. 69 It appears, therefore, that the Commonwealth has power to control the 'outward exercise' of the corporations' faculties and capacities. 70

(iv) Can the Commonwealth Regulate the Business and Activities of the Corporations Described?

The judgments in the Concrete Pipes Case 71 put it beyond doubt that the Australian Parliament is competent to regulate the trading activities of the specified corporations. Lane suggests that section 51 (xx) may only permit the Commonwealth to regulate the corporations' business as trading or financial corporations. 72 But as Barwick C.J. remarked in the Concrete Pipes Case, 73 the corporations power is 'not necessarily limited to trading activities'. 74

There is some doubt about the extent of this power over the companies' business. In the Bank Nationalization Case, 75 Rich and Williams JJ. took the view that the National Parliament could not
prohibit the corporations described in section 51 (xx) from carrying on business; it could only prescribe regulatory conditions upon which the corporations could operate throughout the Commonwealth. In Mr Justice Starke's opinion, the Commonwealth was empowered to govern and regulate the operations of the corporations but not to suppress all such corporations nor to nationalise their activities.

On either approach, the Commonwealth might be able to prohibit the corporations carrying on business unless stipulated conditions are observed. Paragraph (xx) would then be a very potent weapon in the Commonwealth arsenal. The Australian Parliament could effectively compel the corporations described to provide for employee representation on the board of directors, to alter their structure to conform with a co-determination model, to provide for disclosure of certain information to employees and their representatives, to recognise employees' interests in the management of the company and so on.

This seems to be a startling proposition but it is not far from Howard's assertion that the Commonwealth can 'prevent corporations whose internal structure does not conform to Commonwealth standards from operating'. Thus, any power denied the Commonwealth under section 51 (xx) may yet be won by coercing the corporations described into accepting the conditions the Commonwealth imposes upon the corporations' activities. This may encourage the states to forego the power not given to the Australian Parliament by the plactum.

(v) Does the Commonwealth Have Power to Liquidate the Corporations Described?

In Huddart Parker, Isaacs J. suggested that the Commonwealth did not have power to dissolve corporations described. His Honour stated:

extinguishment of a domestic corporation, the creation of which is entrusted to another authority, is, to say the least, in the highest degree improbable, particularly when no substitutive power of creation is entrusted to the federal authority.
To Isaacs J., the power of incorporation and the power to liquidate were linked: since the Commonwealth did not have power to incorporate the corporations described in the placitum, it was also denied the power to dissolve these corporations.

This reasoning proved to be remarkably durable. But its merits need not detain us here because there is an alternative source for the power to liquidate companies. Section 51 (xvii) gives the Commonwealth power to regulate the winding up of insolvent companies. This paragraph could be a useful supplement to section 51 (xx).

One of the proposals mentioned earlier concerned employees of companies compulsorily wound up. It was suggested that these employees be formally advised of the effect of publication of the winding up order upon their contract of employment. Legislation requiring that employees of insolvent companies be given this form of notice could be sustained under section 51 (xvii).

(vi) Is a Labour Code Possible Under Section 51 (xx)?

Thus far, the corporations power has been considered principally as a means implementing the proposals for reform of company law and structure. Does the power have a wider potential? If the placitum empowers the Commonwealth to pass a full Companies Act or even an Act dealing with certain aspects of internal management, internal-external relations and company business, then the Commonwealth might be able to pass a labour code for the companies' workers.

Several justices in Huddart Parker considered this possibility but dismissed it as being beyond power. Their comments were of course purely obiter dicta. Moreover, if the High Court follows the constitutional principle that grants of power are to receive an expansive interpretation, then the Commonwealth may well have power to regulate directly labour conditions in the corporations described.
There are two stumbling blocks for this approach. The first is the rather intangible notion of federal balance. Yet, as mentioned earlier, this notion seems to be atrophying in recent constitutional decisions. The second obstacle was mentioned by Menzies J. in the Concrete Pipes Case. Referring to the grants of power in section 51, His Honour said:

Each subject of enumeration is not exclusive of others and a limit upon one cannot be inferred merely from the existence of another of more particular scope. Nevertheless, when there is to be found a limit in the definition of one subject matter the others should not be construed as enabling Parliament, by legislation on a different subject matter, to override that express restriction ... 

Menzies J. gave two illustrations of limitations on section 51 (xx) arising out of other placita. In the first place, section 51 (xxxii) requires the Commonwealth to give just compensation for any property it acquires in pursuance of its powers. This restriction would clearly apply to any power exercised under paragraph (xx). His Honour also pointed out that placitum (xiii) places a limitation on the "corporations power". Again, this limitation is clear on the face of section 51: those financial corporations which are not banks fall within placitum (xx); those which are banks are covered by paragraph (xiii).

Does section 51 (xxxv) constitute an 'express restriction' upon any power the Australian Parliament may have to regulate labour conditions directly under section 51 (xx)? This issue is of fundamental importance.

The Menzies 'doctrine of implied limitations' depends upon a clear over-lapping - almost a direct conflict - of placita. This simply does not exist in sub-sections (xx) and (xxxv).

The latter relates to interstate industrial disputes in the round. The disputants may be natural persons, trade unions, employers associations or corporations (whether covered by paragraph (xx) or not).
Limitations inherent in the industrial power are referable to this wider sphere as a whole.

Placitum (xx), on the other hand, is confined to a certain subject matter—particular kinds of corporations. Within this compass, the legislative power conferred may be almost plenary.

Further, if the limitations in the industrial power has to be transposed to other placita, why did the High Court uphold the direct regulation of certain industries under section 51 (i), the 'trade and commerce' power? This result would not be possible if the Menzies doctrine applied.

If federal legislation appears to be squarely within the power conferred by placitum (xx) there seems to be little room for a prohibition implied from the industrial power. Moreover, in the Concrete Pipes Case, the High Court appeared to take a hard line on implied prohibitions. It considered that section 51 (i) did not constrain section 51 (xx). Ironically, it was Menzies J. who explained:

Legislation with respect to corporations may also be legislation with respect to trade. A law with respect to corporations is within the power of Parliament notwithstanding that it is also a law with respect to trade, notwithstanding the limited power in relation to trade conferred upon Parliament by s. 51 (i).

By parity of reasoning, it might be argued that a law with respect to trading or financial corporations is within paragraph (xx) even though it deals with the terms of employment of workers in those corporations. If this view is correct, the Commonwealth has near plenary power to regulate matters affecting the employer-employee relationship within the corporations described. Thus, the proposals for reform of the law relating to dismissals and redundancy, promotion and supervision could be implemented through federal legislation. It would also be possible to introduce machinery for processing plant-level grievances along the lines of the New Zealand or West German model.
The states would, of course, retain control of labour conditions in corporations which do not fall within section 51 (xx) of the Constitution. But this control might be so insubstantial as to encourage them to refer the balance of power in this field to the Australian Parliament. In the present political context, such a referral would be extremely unlikely but it is difficult to predict the future course of events. Should the states refuse to refer their residual power to the Commonwealth, the Australian Parliament could resort to its other powers under section 51.

2. See Vol. 1, p. 249.


7. This point is examined in greater depth in the Argument for Reform Part, Vol. 1, 238-244.

8. Strickland v. Rocla Concrete Pipes Ltd (1971) 124 C.L.R. 468 (hereinafter referred to as 'Concrete Pipes Case').

9. Commonwealth of Australia Constitution Act, 1900 (63 & 64, Vict., c. 12) (hereinafter referred to as 'Constitution'), s. 51 (xx).

10. Constitution, s. 51 (xxxv).

11. The West German scheme is discussed below, pp. 369-382.


13. Strictly speaking, however, an award is not of itself a law. Rather it is an instrument which has the force of law. See Dixon J. in Ex parte McLean (1930) 43 C.L.R. 472, p. 484.

15 See e.g.: Conciliation and Arbitration Act 1904-1973 (Cth), s. 4; Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 5 (1); Workers' Compensation Act, 1926, as amended (N.S.W.), s. 6 (1); Long Service Leave Act, 1955-1967 (N.S.W.), s. 3 (1); Annual Holidays Act, 1944, as amended (N.S.W.), s. 2 (1).

16 For an interesting discussion of the technical rights-interests dichotomy, see Paul F. Brissenden, The Settlement of Labor Disputes on Rights in Australia (Los Angeles, 1966), pp. 56-57.


18 See: C.E. Carr and N.F. Dufty, 'Factors Influencing Job Satisfaction' (1961) 1 The Australian Manager 9; Cameron, 'Job Satisfaction of Employees in a Light Engineering Firm: A Case Study'; W.P. Butler, 'Job Satisfaction Among Foremen' (1959) 15 P.P.B. 7; M.N. Oxlade, 'The Work Attitudes of Saleswomen' (1948) 4 P.P.B. 35; N.F. Dufty, 'On the Significance of Wage Rates' (1962) 4 Jou. of Ind. Rel. 32, Table 2, p. 33; Mountain, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 1'; O'Brien, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 2'; Monie, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 3'; Monie, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 4'; Ryder, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 5'; Johnston and Bavin, 'Herzberg and Job Satisfaction'.

The importance attached to job security in these surveys is particularly significant in the light of Australia's post-war record of 'full employment'.
This interest involves the degree of autonomy, the amount of supervision under which one works and responsibility for one's own job. Perhaps the clearest indication of the importance of this job aspect is given by Blumberg. After an extensive review of the job satisfaction material he concluded:

There is hardly a study in the entire literature which fails to demonstrate that satisfaction in work is enhanced or that other generally acknowledged beneficial consequences accrue from a genuine increase in workers' decision-making power. Such consistency of findings, I submit, is rare in social research.


According to Herzberg and his colleagues, workers seek three things from a supervisor: decent treatment, competence and autonomy. In a survey of 155 studies of job attitudes they found that the nature and character of supervision were mentioned more often than any other factor other than the intrinsic aspects of the jobs themselves. See F. Herzberg et al., *Job Attitudes: Review of Research and Opinion* (Psychological Service of Pittsburgh, Pittsburgh, 1957) cited in Blumberg, *Industrial Democracy*, p. 120. The employee's relationship with his supervisor has been repeatedly stressed as an important factor in job satisfaction.

See: Cameron, 'Job Satisfaction of Employees in a Light Engineering Firm: A Case Study'; Mountain, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 1'; O'Brien, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 2'; Monie, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 3'; Monie, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 4'; Ryder, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 5'.

On the other hand, see: Mills, 'Job Satisfaction in Large Factories' and Carr and Dufty, 'Factors Influencing Job Satisfaction' where the subjects gave promotion and opportunities for advancement a relatively low rating.
See: Cameron, 'Job Satisfaction of Employees in a Light Engineering Firm: A Case Study'; Mountain, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 1'; O'Brien, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 2'; Monie, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 3'; Monie, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 4'; Ryder, 'Job Satisfaction of Female Employees in the Clothing Industry: Case Study No. 5'; Oxland, 'The Work Attitudes of Saleswomen'.

See e.g.: Cameron, 'Job Satisfaction of Employees in a Light Engineering Firm: A Case Study'; Jorgenson, 'What Job Applicants Look for in a Company'.


Job security, for instance, is important even to employees who adopt an instrumental approach to their work, for without their jobs these employees might find it difficult to attain their immediate material goals. See generally John H. Goldthorpe, David Lockwood, Frank Bechhofer and Jennifer Platt, The Affluent Worker: Industrial Attitudes and Behaviour (London, 1968).

SECTION 1: EMPLOYEES' INTERESTS IN RECOGNITION OF THEIR SERVICES

CHAPTER 2 THE DIRECTOR'S DUTY TO ACT BONA FIDE IN THE INTERESTS OF THE COMPANY

1 Bubble Act, 1720, 6 Geo. 1, c. 18.

2 (1846) 10 Beav. 1; 50 E.R. 481.


4 The phrase 'interests of the company' has been interpreted as 'the benefit of the shareholders as a general body' in the long term. See Parke v. Daily News Ltd [1962] Ch. 927, p. 963 and Inspector's Report on Savoy Hotel Ltd (London, H.M.S.O. 1954), p. 23. In Gaiman v. National Association for Mental Health (1971) Ch. 317, p. 330 Megarry J. commented: The interests of some particular section or sections of the [company] cannot be equated with those of the [company], and I would accept the interests of both present and future members of the [company], as a whole, as being a helpful expression of a human equivalent.

5 This is the title given to the 'uniform' companies legislation adopted by the Australian States in 1961 and, in some cases, 1962. The various state Acts are not, in fact, uniform. Their citations are as follows:

Companies Act, 1961-1974 (Qld)
Companies Act, 1961, as amended (N.S.W.)
Companies Act 1961 (Vic.)
Companies Act, 1962-1973 (S.A.)
Companies Act, 1961-1972 (W.A.)
Companies Act 1962 (Tas.)

In this thesis the 'uniform' legislation will be referred to as the 'Uniform Companies Act' or 'U.C.A.'


8 For an illuminating article on this point, see P.S. Atiyah, 'Public Benefit in Charities' (1958) 21 M.L.R. 138.
The popular meaning involves the idea of ‘assisting poverty or destitution’. It may perhaps be expressed by the word “eleemosynary”: Chesterman v. Federal Comr of Taxation [1926] A.C. 128, p. 131, P.C.


11 [1951] A.C. 297 (hereinafter referred to as ‘Oppenheim’).
18 ibid.
22 (1900) 48 W.R. 300.
24 (1885) 16 Q.B.D. 163.

Although Hall v. Derby Sanitary Authority (1885) 16 Q.B.D. 163 was approved by the House of Lords in Oppenheim [1951] A.C. 297, Their Lordships suggested that difficulties may arise where all persons employed in a particular trade or profession are employees of the same person or entity. Some of these difficulties may have evaporated since Dingle v. Turner [1972] A.C. 601 suggests that a personal nexus may not always spell invalidity.

26 Re Tree [1945] Ch. 325.
30 See too clauses 10 and 12, Third Schedule, U.C.A.

31 It seems that this requirement is not impossible to satisfy where the trust is for the benefit of the company's employees. See Re Denley's Trust Deed [1969] 1 Ch. 373. But see Re Saxone Shoe Co. Ltd's Trust Deed [1962] 1 W.L.R. 943 for a more restrictive view.

32 Companies Act, 1961, as amended (N.S.W.), s. 382
Companies Act, 1962-1973 (S.A.), s. 386
Companies Ordinance 1962-1974 (A.C.T.), s. 382


34 Companies Act, 1961, as amended (N.S.W.), s. 382.


37 ibid.


41 Legislation in most of these states exempts occupational superannuation funds from the rule against perpetuities. See: Perpetuities and Accumulations Act 1968 (Vic.), s. 17; Property Law Act, 1969-1973 (W.A.), s. 115; Trustee Act 1898 (Tas.), s. 56A. Any other non-charitable purpose trusts for the benefit of employees must comply with the rule.

42 For example, the trust could be set up for a period of twenty-one years from the death of the last surviving direct descendant of King George V living at the time the fund was established.


44 Walsh, p. 178.

45 ibid.

46 ibid.

47 Walsh, p. 178. While Walsh does not use the word 'principal', this is the clear inference from his argument.

48 (1931) 45 C.L.R. 476.


The Court of Appeal considered such a power in an objects clause in Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 Q.B. 656.


Hardy v. Wilson (1882) 8 V.L.R., E., 289.


(1888) 40 Ch. 170.


(1889) 10 L.R. (N.S.W.) 50.


[1910] 1 Ch. 179. In Wimbledon and Putney Commons Conservators v. Tuely [1931] 1 Ch. 190, Bennett J. applied the principle in Cyclists' Touring Club v. Hopkinson [1910] 1 Ch. 179 and approved a proposed superannuation scheme for persons who had retired from the service of the plaintiffs.

(1883) 23 Ch.D. 654, C.A.

Cotton and Bowen L.JJ. In a powerful, but neglected, dissent Baggallay L.J. took the view that the company’s business was not concluded until the winding up was finalised. His Lordship pointed out that the company’s powers to regulate its internal affairs lasted until the winding up was complete. It followed that the company retained power to remunerate its directors and officers.

With regard to the proposed gratuity for the company officials, argument concentrated on the magnitude of the gift. Baggallay L.J. denied that a question of degree was involved and, in the circumstances, decided that the resolution was valid.


(1883) 23 Ch.D. 654.

[1932] 2 Ch. 46.

Re Lee, Behrens & Co. Ltd [1932] 2 Ch. 46, p. 51.


[1962] Ch. 927.


But see N.A. Bastin, ‘Charity At The Boardroom Table’ (1972) 36 Conv. (N.S.) 89.

Re W. & M. Roith Ltd [1967] 1 W.L.R. 432.


[1932] 2 Ch. 46.

Pennyduck J. took this view in Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch. 62.
He appeared to concentrate on distinguishing cases which suggested that directors of a going concern had power to make payments to employees as part of their power to do what is ordinarily and reasonably done in such a business. His Lordship did, however, conclude that the payment to the company officials was invalid since it was not an act done reasonably for the purpose of getting the greatest profit from the business of the company, and was without any prospect of its in any way reasonably conducing to the benefit of the company. See (1883) 23 Ch.D. 654, p. 666, C.A. These statements come close to the expressions used in Mr Justice Bowen's judgment, but nowhere did Cotton L.J. purport to establish a principle which would define the power of the majority to spend the money of the company. With respect to the gratuitous payment to the directors, Cotton L.J. simply concluded that the payment was ultra vires the powers of the company.


4(1913) 16 C.L.R. 50.

5Kaye v. Croydon Tramways Company [1898] 1 Ch. 358, C.A.

6Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654, C.A.

7[1962] Ch. 927.

8Bastin, p. 95.

9(1883) 23 Ch.D. 654, C.A.

10[1962] Ch. 927.

11Bastin, p. 95.

12[1932] 2 Ch. 46.

13Re Lee, Behrens & Co. Ltd [1932] 2 Ch. 46, p. 53. Mr Justice Eve's suggestion was itself impugned by Pennychuick J. in Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch. 62, p. 71. Pennychuick J. commented that the transaction in Re Lee, Behrens & Co. Ltd [1932] 2 Ch. 46 could not have been ratified if it had been ultra vires the company. There is ample authority for this proposition. See e.g. Ashbury Rly Carriage and Iron Co. v. Riche (1875) L.R. 7 H.L. 653.

14[1932] 2 Ch. 46.
[1970] Ch. 62, Pennychuick J. felt that the first question was an inappropriate inquiry in the case of express powers. The second question related primarily to directors' duties but perhaps in part to implied powers. The third question was, in Mr Justice Pennychuick's view, 'quite inappropriate to the scope of express powers'. While Mr Justice Pennychuick's comment on the second question appears valid, his approach to the third question is suspect. See I.H. Leigh, 'Objects, Power and Ultra Vires', a case note on Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch. 62, in (1970) 33 M.L.R. 81, p. 83.

Pennychuick J. took this line in Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch. 62.


18 Hutton v. West Cork Railway Company (1883) 23 Ch.D. 654, C.A.

19 [1932] 2 Ch. 46.


21 The purpose of this arrangement was to allow Roith to make provision for his wife and certain other dependants without dividing control of the companies among them. Presumably he thought such a dissection of control would prejudice the continuity of the business.

22 [1932] 2 Ch. 46.


27 See K.W. Wedderburn, 'Ultra Vires or Directors' Bona Fides?', a case note on Re W. & M. Roith Ltd (1967) 30 M.L.R. 566 where this issue is examined in detail.

28 [1932] 2 Ch. 46.


30 See too Re Birkbeck Permanent Benefit Building Society [1913] 1 Ch. 400.


32 [1962] Ch. 927.

In earlier proceedings for an interlocutory injunction, it was contended on behalf of the company that Daily News had contracted with its newsprint suppliers to compensate the staff retrenched by the sale. The suppliers, in return, agreed to forebear to sue Daily News for its failure to accept the supply of newsprint under a current contract. No evidence in support of this argument was presented in the interlocutory proceedings and the contention was abandoned at the trial. See Parke v. Daily News Ltd [1961] 1 W.L.R. 493.

At the trial the defendants claimed that they had entered into a contract with the company employees to pay the terminal compensation. In substance, Plowman J. concluded that the defendants had no intention to create legal relations with the workers in respect of severance pay. Thus, there was no contract with the workers.

But was there a contract with Associated Newspapers Ltd which would oblige Daily News to make the proposed payment? Plowman J. answered in the negative. There was no independent contractual obligation with the purchaser requiring Daily News to provide gratuitous compensation. The case was essentially different from Kaye v. Croydon Tramways Co. [1898] 1 Ch. 358, C.A.
The defendant company could possibly have bolstered its defence by arguing that the compensation was in the future interests of the business on the authority of Mitchell v. B.W. Noble Ltd [1927] 1 K.B. 719. There, the court decided that an amount of compensation paid to a company director, who possibly could have been dismissed for neglect or misconduct, but to whom compensation was paid in order to avoid adverse publicity which may have injured the company’s reputation, was an allowable deduction under the English equivalent of section 51 (1) of the Income Tax Assessment Act 1936-1974 (Cth).


ibid.


[1951] Ch. 286, C.A.

Greenhalgh v. Arderne Cinemas Ltd [1951] Ch. 286, C.A.


[1962] Ch. 927.

ibid.

ibid.


The Times (London) 16 November 1962, p. 7.

The Times (London) 6 April 1963, p. 5.

[1962] Ch. 927.

The theory is then, dependent upon a residual power in the general meeting. In relation to employees’ interests, this power may exist by virtue of an express clause in the company’s constitution or through section 19 (a) or 19 (c) U.C.A. The theory is also predicated upon the belief that shareholders in a general meeting are not fiduciaries. But even if the members in a general meeting have no fiduciary duty they may still be obliged to vote in the best interests of the company. See Ngurli Ltd v. McCann [1953] 90 C.L.R. 425, p. 438; Cook v. Deeks [1916] 1 A.C. 554, P.C.

The better view seems to be that breach of the directors’ duty to act bona fide in the interests of the company may not be ratified by the members in general meeting. See K.W. Wedderburn, ‘Shareholders’ Control of Directors’ Powers: A Judicial Innovation?’, a case note on Hogg v. Cramphorn Ltd [1967] Ch. 254 in (1967) 30 M.L.R. 77, p. 81. On the other hand, a breach by directors of their duty to exercise their powers for a proper purpose may be so ratified, at least where the resolution approving the directors’ action is carried by the unanimous vote of all members of the company. See Helsham J. in Provident International Corporation v. International Leasing Corporation [1969] 1 N.S.W.R. 424, p. 440.

In essence, Street J. accepted that Miller was in a position of tight liquidity and that it needed capital. But His Honour found that the former policy of the company was to raise this capital through loans rather than share issues. As the liquidity problem had not reached crisis point, Street J. found that there was no pressing need to obtain cash funds through a share issue. Thus, His Honour looked behind this ostensible reason for the allotment.


[1910] 1 Ch. 179.

[1932] 2 Ch. 46.


[1910] 1 Ch. 179.


[1932] 2 Ch. 46. The express power related to employees, and a managing director is not normally an employee of his company. See Hutton v. West Cork Railway Company (1883) 23 Ch.D. 654.


(1968) 121 C.L.R. 483.

Harlowe's Nominees Pty Ltd v. Woodside (Lakes Entrance) Oil Co. N.L. (1968) 121 C.L.R. 483, p. 492 per Barwick C.J., McTiernan and Kitto JJ. in their joint judgment.


(1938) 60 C.L.R. 150.

Mills v. Mills (1938) 60 C.L.R. 150, p. 185.

[1972] 2 N.S.W.L.R. 850.
As Dixon J. put it in Peters' *American Delicacy Co. Ltd v. Heath* (1939) 61 C.L.R. 457, p. 504:

The shareholders are not trustees for one another, and, unlike directors, they occupy no fiduciary position and are under no fiduciary duties. They vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an incident of property to be enjoyed and exercised for the owner's personal advantage.


On the other hand, since shareholders do not, in voting at a general meeting, exercise any fiduciary power, a lower standard of attention to the interests of the company as a whole will be required than that which is expected of the board of directors. See *Peters' American Delicacy Co. Ltd v. Heath* (1939) 61 C.L.R. 457, p. 482 per Latham C.J. See too *Ngurli Ltd v. McCann* (1953) 90 C.L.R. 425, pp. 438-439 where Williams A-C.J., Fullagar J., and Kitto J. commented in a joint judgment:

There are two lines of cases in which it has been held that the courts will interfere to prevent the abuse of powers conferred by articles of association. One instance is where it is necessary to prevent an abuse by the majority of the powers conferred upon a company in general meeting. The other instance is where it is necessary to prevent an abuse by the directors of the powers conferred on them by the articles. The court is more ready to interfere in the second than it is in the first instance. [Emphasis added.]

6 *Allen v. Gold Reefs of West Africa Ltd* [1900] 1 Ch. 656, p. 671.

7 *Greenhalgh v. Arderne Cinemas Ltd* [1951] 1 Ch. 286, p. 291.


9 (1938) 61 C.L.R. 457.


11 [1951] 1 Ch. 286.


13 [1951] 1 Ch. 286.

both Gower and Wedderburn hold the view stated in the text. Gower argues that a resolution of the general meeting ex post facto but an extraordinary general meeting had earlier cleared the way for the scheme by altering the memorandum and articles of the company. In this sense, then, the general meeting approved the transaction prospectively. Yet this sanction did not save Mrs Roith's pension.

Both Gower and Wedderburn hold the view stated in the text. Gower argues that a resolution of the general meeting exempting directors from their duty to act bona fide in the interests of the company could not itself be in the interests of the company. Such a resolution would, therefore, offend the shareholders' duty in general meeting. See L.C.B. Gower, The Principles of Modern Company Law (3rd edn, London, 1969), pp. 566-567. But the duties of shareholders in general meeting are not as stringent as those of directors. See Peter's American Delicacy Co. Ltd v. Heath (1939), 61 C.L.R. 457, p. 482 per Latham C.J. Is it not, then, at least theoretically possible for shareholders to ratify the directors' breach of their duty to act bona fide in the interests of the company? In other words, although an action may be a breach of the directors' fiduciary duty, shareholders might possibly be able to ratify the transaction without themselves offending their more relaxed duty in general meeting.

Gower cites several authorities in support of his proposition: Atwool v. Merryweather (1867) 5 Eq. 464n.; Mason v. Harris (1879) 11 Ch.D. 97, C.A.; Re W. & M. Roith Ltd [1967] 1 W.L.R. 432; Alexander v. Automatic Telephone Co. [1900] 2 Ch. 56, C.A.; Millers (Invercargill) Ltd v. Maddams [1938] N.Z.L.R. 490, C.A.; Ngurli Ltd v. McCan (1953) 90 C.L.R. 425. But it is perhaps true to say that in none of these cases was an independent and unbiased ratification by a well-informed general meeting possible. In some of the cases there had been, in fact, no ratification of the alleged breach of directors' duties at all, although in the circumstances ratification would have been a formality since the culprits controlled the general meeting. See e.g. Alexander v. Automatic Telephone Co. [1900] 2 Ch. 56, C.A., the breach of fiduciary duty must have been the director's failure to institute proceedings in respect of a fraudulent sale by one of the directors to the company promoters, the sale being subsequently adopted by the company. And this breach of fiduciary duty had not been ratified.

Some of the cases appear to be more concerned with the minority shareholders' right to sue rather than ratification. And in none of these authorities was there any real prospect of an objective ratification of the directors' breach of fiduciary duty. This may well be a critical factor. After all, a breach of the directors' duty to exercise
their powers for a proper purpose may be approved by a general meeting yet the loss to the company arising from this breach may be no greater, and no more damnable, than loss caused by a breach of the directors’ duty to act bona fide in the interests of the company. Why, then, should ratification of a breach of the latter duty be disregarded or ineffective in all cases?

Wedderburn takes a different tack. He argues that the company has a right to be managed by the directors bona fide in the interests of the company. Wedderburn believes that this right is analogous to property. Since the general meeting may not ratify an expropriation of company property by the directors, it follows that the meeting may not excuse an expropriation of this right to ‘honest’ management. The chief feature, and perhaps the Achilles heel, of Wedderburn’s theory is the classification of the directors’ fiduciary duty as company property or at least a company advantage. The theory is interesting but there is as yet no firm authority on this point. See generally Wedderburn, ‘Ultra Vires or Directors’ Bona Fides’, pp. 569-570.


22Gower, Modern Company Law, pp. 578-579.

23He relies primarily upon an American decision, Perlman v. Feldmann (1955) 219 F. 2d 173, cert. denied 349 U.S. 952, which held, in effect, that controlling shareholders who sell their shares may be accountable to other members on the ground that they are parting with control of corporate property. For a perceptive analysis of this decision and earlier American authorities, see Richard W. Jennings, ‘Trading in Corporate Control’ (1956) 44 Cal.L.R. 1; Anthony John Boyle, ‘The Sale of Controlling Shares: American Law And The Jenkins Committee’ (1964) 13 I.C.L.Q. 185.

241959 (2) S.A. 426 (Witwatersrand Local Division).

25United Trust Ltd v. South African Milling Co. (1959) (2) S.A. 426, p. 433. Only if the majority receive a larger price at the expense of the other shareholders may their actions be impeached. See 1959 (2) S.A. 420, pp. 433-434.


31 See McElhone v. Australian Mutual Provident Society (1889) 10 L.R. (N.S.W.) Eq. 50 where, although the pensions were approved by the members of the society, the court suggested that directors had this power to grant pensions in their own right. But see: Re W. & M. Roith Ltd [1967] 1 W.L.R. 432 and Re Lee, Behrens & Co. Ltd [1932] 2 Ch. 46 where the provision of a pension for the widow of the managing director was held invalid even though the directors had an express power to grant the pension. In neither case was the company a going concern at the time of the challenge and both cases turned on a breach of directors' duty in the exercise of the express powers.


34 Ibid.


38 Ibid.


42 [1932] 2 Ch. 46, p. 51.

CHAPTER 3 THE LAW RELATING TO EMPLOYEES’ INVENTIONS


2 See below, Vol. 1, p. 244, n. 85.


4 In Australia, Government projects dominate Research and Development. However, in the private sector, it remains true that the larger companies engage in more research than small firms. See Stubbs, pp. 38-39.

5 Re Selz’s Limited’s Application (1954) 71 R.P.C. 158.


8 Triplex Safety Glass Co. v. Scorah [1938] Ch. 211.

9 Ibid.

10 The normal rule is that a term will only be implied into a contract to correct an obvious oversight, and, then, only when the implication is required for the business efficacy of the transaction. See: The Moorcock (1889) 14 P.D. 64; [1886-90] All E.R. Rep. 530; Mackinnon L.J. in Shirlaw v. Southern Foundries (1926), Ltd [1939] 2 K.B. 206, p. 227; Reigate v. Union Manufacturing Co. (Ramsbottom) [1918] 1 K.B. 592, p. 605.

Neither of these conditions existed in Triplex Safety Glass Co. v. Scorah [1938] Ch. 211. There the parties had directed their minds to the issue of ownership of inventions made by the employee. Indeed, an express clause in the contract purported to determine the parties’ rights to such inventions. Further, the business efficacy of the contract would be satisfied, not by vesting the patent rights in the employer, but by granting him a mere licence to use the invention in his business.

One may also doubt whether there was any room for the implication which proved to be decisive in Triplex Safety Glass Co. v. Scorah [1938] Ch. 211. The restraint of trade clause was held to be unenforceable, not void. Thus the clause remained in existence although the employer was not able to enforce the rights which it purported to confer upon him. In these circumstances, it seems surprising that Farwell J. could imply an additional term covering similar ground.

11 Thus, in Edisonia Ltd v. Forse (1908) 25 R.P.C. 546, p. 549, Warrington J. stated:
11 (continued):

It may very well be that, in the circumstances of a particular case, it is inconsistent with the good faith which ought properly to be inferred or implied as an obligation arising from the contract of service that the servant should hold the Patent otherwise than as a trustee for his employer, and a declaration of the Court may be obtained to that effect.


13 To quote the Master of the Rolls in Vokes Ltd v. Heather:

... when you find in litigation concerning relationships such as master and servant references in judgments to obligations of good faith, all they mean is this, that on the true construction of the contract having regard to its subject matter and its surrounding circumstances, there is a contractual obligation on the part of the servant to exercise good faith.

And later:

The introduction of equitable principles, apart from contract, into relationships of this kind is a thing which I think should be, in general, repudiated.

See (1945) 62 R.P.C. 135, pp. 141 and 142, C.A.


15 (1902) 19 T.L.R. 84.


17 ibid.

18 (1908) 25 R.P.C. 546.


21 ibid.


23 (1932) 49 R.P.C. 57 (hereinafter referred to as *Adamson’s Case*).

24 (1917) 86 L.J. Ch. 486 (hereinafter referred to as *Lind’s Case*).

25 (1932) 49 R.P.C. 57.

26 (1917) 86 L.J. Ch. 486.

27 See Banks Report, para. 469.

Eve J. found that, from that moment, the terms of Lind's employment imposed upon him an obligation to place at the disposal of, and treat as the property of, the company the best design which he could, by the exercise of his industry, skill, ingenuity, and inventive ability, produce for the purpose of complying with the essential conditions of the work on which he was employed. See Lind's Case (1917) 86 L.J. Ch. 486, p. 488.


See e.g. Barnet Instruments Ltd v. Overton (1949) 66 R.P.C. 315.


See e.g. Barnet Instruments Ltd v. Overton (1949) 66 R.P.C. 315.

52 Lind’s Case (1917) 86 L.J. Ch. 486, p. 488.

53 ibid.

54 See Wollaston and Knowles v. Chapman (1908) 25 R.P.C. 733 where Eve J. held that an employer is not obliged to exploit a patent for the mutual benefit of the joint patentees.

55 See Triplex Safety Glass Co. v. Scorah [1938] Ch. 211 where a delay of nearly three years did not preclude the employer successfully claiming beneficial ownership in his employee’s invention.

56 Lind’s Case (1917) 86 L.J. Ch. 486, p. 488.


60 (1949) 66 R.P.C. 315.


62 See Re Russell’s Patent; Ex parte Russell (1857) 2 De G. & J. 130; 44 E.R. 937 for a rare exception.

63 Patents Act 1952-1969 (Cth), s. 34 (2).

64 Acts Interpretation Act 1901-1973 (Cth), s. 22 (a).

65 Patents Act 1952-1969 (Cth), s. 154 (1).

In most states the payment of an amount in lieu of long service leave where the entitlement has accrued prior to the termination of the employment is prohibited. Contrast the Long Service Leave Act 1956, (Tas.), s. 9 A (inserted by Long Service Leave Act 1972 (Tas.), s. 6). In some jurisdictions paid employment during the period of leave is prohibited, e.g. Long Service Leave Act, 1958-1973 (W.A.), s. 27 (1); Labour and Industry Act 1958 (Vic.), s. 161 (1); Long Service Leave Act, 1967-1972 (S.A.), s. 13 (1). Under the standard federal awards, an employee on leave is prohibited from employment for hire or reward with any employer he knows is bound by the award: cl. 8 (1) Re Graphic Arts and Metal Trades (Long Service Leave) Awards 106 C.A.R. 412; 108 C.A.R. 740; 108 C.A.R. 1036; 108 C.A.R. 1127. The standard federal award is hereinafter referred to as the *Metal Trades (Long-Service Leave) Award, 1964*.

In 1969-1970, taxation returns revealed that some $235 million was paid to individuals as lump sum retirement or terminal payments. The Hancock Committee estimated that only a minor part of this amount represented accrued long service leave. See: Australia. National Superannuation in Australia. Interim Report of the National Superannuation Committee of Inquiry. [Chairman: Professor Keith Hancock.] June, 1974 (Canberra, 1974), p. 36.

This finding suggests that long service leave entitlement is being taken as leave rather than in the form of monetary payments. If this is so, then long service leave may properly be described as 'respite from work'.


See e.g.: In re Butchers Wholesale (Cumberland) and Other Awards 1953 A.R. 738; Meat Industry Employees (Riverstone Meat Co. Pty Ltd (Long Service Leave) Award 1957 A.R. 135.

11. This is the criterion under the Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (11) and the standard federal award: Metal Trades (Long Service Leave) Award, 1964, cl. 5 (1).

12. See: Labour and Industry Act 1958 (Vic.), s. 154; Long Service Leave Act, 1958-1973 (W.A.), s. 8 (1); Long Service Leave Act 1956 (Tas.), s. 8 (1). In Queensland and South Australia the criterion is "continuous service". See: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), ss. 17 (2) and 19 (2); and Long Service Leave Act, 1967-1972 (S.A.), ss. 4 (1) and 5.

13. See: Labour and Industry Act 1958 (Vic.), s. 151 (1)(a); Long Service Leave Act 1956 (Tas.), s. 5 (1)(a); Long Service Leave Act, 1958-1973 (W.A.), s. 6 (1)(a).


15. Long Service Leave Act, 1967-1972 (S.A.), s. 5 (1)(a) and s. 5 (1)(b).

16. See: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 3(a) (leave of the employer is necessary); Labour and Industry Act 1958 (Vic.), s. 151 (1)(b); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (1)(c) (no time limit is there mentioned); Long Service Leave Act, 1958-1973 (W.A.), s. 6 (1)(b); Long Service Leave Act 1956 (Tas.), s. 5 (1)(b) (no period mentioned). Absences of this nature would not normally sever the "unbroken contract of employment" contemplated by the New South Wales and federal award provisions.

17. See: Long Service Leave Act 1956 (Tas.), s. 5 (1)(b).


19. See: Labour and Industry Act 1958 (Vic.), s. 151(1)(g); and Long Service Leave Act 1956 (Tas.), s. 5 (1)(g). Where, however, the injury causes permanent and total incapacity it would appear that the contract of service is terminated by frustration. Boilermakers' Society of Australia, Queensland Branch v. Evans Deakin & Co. Ltd (1961) 56 Q.J.P. 5.


22. See: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (3)(d); Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (11)(a)(i); Labour and Industry Act 1958 (Vic.), s. 151 (1)(c); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (1)(d); Long Service Leave Act, 1958-1973 (W.A.), s. 6 (1)(c); Long Service Leave Act 1956 (Tas.), s. 5 (1)(c); Metal Trades (Long Service Leave) Award, 1964, cl. 5 (1).

24. See: Long Service Leave Act, 1958-1973 (W.A.), s. 6 (2)(e); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (1)(e); Long Service Leave Act 1956 (Tas.), s. 5 (1)(d); Metal Trades (Long Service Leave) Award, 1964, cl. 5 (1).


27. These provisions simply excuse any interruption which has arisen directly or indirectly from an industrial dispute. See: Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (11)(a)(ii); and Labour and Industry Act 1958 (Vic.), s. 151 (1)(d).


29. See: Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (11)(a)(ii); Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (3)(d)(ii); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (1)(e); and the Metal Trades (Long Service Leave) Award, 1964, cl. 5(1). The Western Australian provision excuses *any absence from duty arising directly or indirectly from an industrial dispute if the employee returns to work in accordance with the terms of settlement of the dispute*. [Emphasis added.] This term 'absence' would probably encompass a 'determination'. See Long Service Leave Act, 1958-1973 (W.A.), s. 6 (2)(e).

30. See: Labour and Industry Act 1958 (Vic.), s. 151 (1)(d); Long Service Leave Act 1956 (Tas.), s. 5 (1)(d).

31. C. Grunfeld, Modern Trade Union Law (London, 1966), p. 325. See also the dicta of Donovan L.J. (as he then was) and Lord Devlin in Rookes v. Barnard [1963] 1 Q.B. 623, pp. 682-683; Denning M.R. in J.T. Stratford & Son Ltd v. Lindley [1965] A.C. 269, p. 285 and Morgan v. Fry [1968] 2 Q.B. 710 which suggest that a strike notice should be regarded as indicating an intention to suspend rather than terminate the contracts of service of the strikers. While this theory probably accords with the realities of the situation and the wishes of both employer and employees, it does cut across the common law principle that suspension of a contract must be consensual. Grunfeld's comment on the effect of strikes upon continuity of employment is particularly relevant in the context of long service leave:

As to those important industrial schemes based in part on the factor of continuity of service, management needs to be exceptionally unimaginative if it tries to use the formal break in continuity of service in such schemes constituted by a lawful strike as a bargaining counter in its negotiations with organised labour. Grunfeld, Modern Trade Union Law, p. 333.

The fact remains that employers can resort to the remedy of dismissal if their employees withdraw their labour. For a recent report of an incident in which seventy-six employees were dismissed for attendance at a stop-work meeting over a compulsory unionism debate, see The Australian 27 March 1974, p. 1. And on 10 May 1974, 1,000 Broken Hill miners were dismissed over a 'go-slow campaign' in support of a wage demand. See The Australian 11 May 1974, p. 11.
See: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (3)(c) (three months' absence excused); Labour and Industry Act 1958 (Vic.), s. 151 (1)(e); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (1)(g); Long Service Leave Act, 1958-1973 (W.A.), s. 6 (2)(f) (dismissal for any reason other than slackness of trade if re-employed within two months is excused); Long Service Leave Act 1956 (Tas.), s. 5 (1)(e). The standard federal award is identical to the Western Australian provision on this point. See Metal Trades (Long-Service Leave) Award, 1964, cl. 5 (1).


See Long Service Leave Act, 1958-1973 (W.A.), s. 6 (2)(d).

See: Long Service Leave Act, 1958-1973 (W.A.), s. 6 (2)(g); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (1)(f); Metal Trades (Long Service Leave) Award, 1964, cl. 5 (1).

See: Metal Trades (Long Service Leave) Award, 1964, cl. 5 (1); Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (11)(iii); Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (3)(d); Long Service Leave Act, 1958-1973 (W.A.), s. 6 (1)(d); Long Service Leave Act 1956 (Tas.), s. 5 (5).

See too Defence (Re-establishment) Act 1965-1973 (Cth).


See: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17(12); Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (11)(d); Labour and Industry Act 1958 (Vic.), s. 151 (5)(a); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (3); Long Service Leave Act, 1958-1973 (W.A.), s. 6 (1)(d); Long Service Leave Act 1956 (Tas.), s. 5 (5).

See Long Service Leave Act, 1958-1973 (W.A.), s. 6 (2)(h).

See Long Service Leave Act 1956 (Tas.), s. 5 (1)(da), and s. 5 (1)(h)(iv).

If the employee can persuade the employer to grant leave, this will not present a problem. See Vol. 1, p. 70-71.

For an example, see Ingamells v. Howlett (1953) 9 I.I.B. 1032 where it was held that an absence of five weeks on account of sickness did not break continuity of employment since the employer had granted leave for that period.
See Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (3)(a); Labour and Industry Act 1958 (Vic.), s. 151 (1)(g); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (1)(e); Long Service Leave Act, 1958-1973 (W.A.), s. 6 (2)(c); Long Service Leave Act 1956 (Tas.), s. 5 (1)(i). In Western Australia there is an additional provision excusing any absence other than those discussed above unless the employer, during the absence or within fourteen days of the termination of the absence, gives written notice to the employee that the continuity of his employment has been broken by that absence: Long Service Leave Act, 1958-1973 (W.A.), s. 6 (2)(i).

In Queensland, where an employee has been dismissed or stood-down by the employer or where he himself terminates his service by reason of illness or injury and he is subsequently re-employed, the period of his absence will not apparently be counted as qualifying service: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (3)(b).

Absence arising directly or indirectly from an industrial dispute may not be counted as qualifying service by any of the state statutes or the standard federal award. See: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (3)(d); Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (11); Labour and Industry Act 1958 (Vic.), s. 151 (2); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (1); Long Service Leave Act, 1958-1973 (W.A.), s. 6 (3); Long Service Leave Act 1956 (Tas.), s. 5 (2); and Metal Trades (Long Service Leave) Award, 1964, cl. 5 (1).

Interruptions made by the employer by reason of slackness of trade are not counted in any of the state statutes or the federal code.

Absence through a dismissal followed by a re-employment within two months is not counted in Victoria, South Australia, Western Australia, Tasmania or the standard federal award.

An absence by leave of the employer is not taken into account in computing the period of qualifying service in Victoria, Western Australia, South Australia or Tasmania.

Absence through injury sustained in the course of employment is not counted in Victoria. Nor is the absence excused on account of pregnancy counted in that state.

In Western Australia, any reasonable absence on legitimate union business where the employer refused leave is not counted as qualifying service. Nor is the absence contemplated by s. 6 (2)(i) of the Long Service Leave Act, 1958-1973 (W.A.) counted as qualifying service.

It appears that only the New South Wales statute excludes from qualifying service the period of absence caused by an employer who seeks to evade the long service leave provisions. See Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (11).

See: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (17); Long Service Leave Act, 1955-1967 (N.S.W.), s. 14 (13)(b)(i), (ii), (c) & (e); Labour and Industry Act 1958 (Vic.), s. 151 (1A), Long Service Leave Act, 1967-1972 (S.A.), s. 5 (6) and (7); Long Service Leave Act 1956 (Tas.), s. 5 (3A), (3B), and (3C). Western Australia appears to be the only exception: the relevant statute in that state contains no provision relating to service in related companies. This is a serious defect.


52 Re An Employee of Federal Hotels Ltd (1965) 59 Q.J.P. 153 (hereinafter referred to as the 'Federal Hotels Case').

53 ibid.

54 See Broken Hill South Ltd v. Commissioner of Taxation (N.S.W.) (1937) 56 C.I.R. 337, p. 375 where Dixon J., (as he then was) commented that 'it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability...and that 'it is of no importance upon the question of validity that the liability imposed is ... altogether disproportionate to the territorial connection...'.


58 ibid.


60 1971 A.R. 246. The material facts were as follows: the employee was engaged in Victoria; he served a training period of about two years in the United States, and it was agreed that he would return to the head office of the company at Ballarat in Victoria after his training period; the company was at all material times duly incorporated in Victoria, although it was registered in New South Wales as a foreign company in August 1958.


63 ibid.


65 (1939) 62 C.L.R. 68.


67 Constitution, ss. 118 and 51 (xxv) and State and Territorial Laws and Records Recognition Act 1901-1964 (Cth). And see generally P. Nygh, Conflict of Laws in Australia (2nd Edn, Sydney, 1971).


2. See: Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (3). See too: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (13)(c); Labour and Industry Act 1958 (Vic.), s. 156 (1); Long Service Leave Act, 1967-1972 (S.A.), s. 7 (1); Long Service Leave Act, 1958-1973 (W.A.), s. 9 (1)(a); Long Service Leave Act 1956 (Tas.), s. 10 (1) for the position in the other states. See also Metal Trades (Long Service Leave) Award, 1964, cl. 8 (1).

3. The limitation period specified in the New South Wales statute is two years. See Long Service Leave Act, 1955-1967 (N.S.W.), s. 12 (1). If the employee brought his claim in Tasmania it may well be that the New South Wales limitation period would be regarded as a procedural issue and the Tasmanian tribunal might apply the lex fori. Since the limitation period provided in the Tasmanian statute is one year, the employee's remedy would still be statute-barred. See Long Service Leave Act 1956 (Tas.), ss. 13 (1), 20.


11. The definition of 'business' in the Victorian statute and the standard federal award includes 'trade, process, business or occupation,' and includes any part of such business; the corresponding Queensland section refers to the transmission of the 'calling carried on by the person who is an employer'; in Western Australia and Tasmania the transmission provisions give no definition of the term 'business'. 'Business' is defined in the South Australian Act to include 'any part of a business'. The New South Wales section is similar.

In Queensland the definition reads: ""transmission" includes but without limit to the generality of the meaning thereof, transfer, assurance, conveyance, assignment or succession, and derivatives of that term shall have a corresponding meaning." Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (16). See also: Labour and Industry Act 1958 (Vic.), s. 151 (3)(b); Long Service Leave Act, 1967-1972 (S.A.), s. 5 (4)(5); Long Service Leave Act, 1958-1973 (W.A.), s. 6 (4)(ii); Long Service Leave Act 1956 (Tas.), s. 5 (3); and Metal Trades (Long Service Leave) Award, 1964, cl. 5 (5).


Cocker v. Lident Laboratories 1973 A.I.L.R. Rep. 546 provides a good example of this difficulty. There the Industrial Commission of Western Australia in Court Session found that there had been no transmission of a business because, inter alia, the transaction involved a purchase figure below half of what an established dental practice could be expected to realise and because the vendor had tried unsuccessfully over a period to dispose of his dental practice as a complete entity. The Industrial Commission concluded that a sale of goodwill was not involved in the transaction. See also Long Service Leave 1968 A.I.L.R. Rep. 22.


While there is ample authority to the effect that the publication of a compulsory winding up order operates as a notice of discharge to company employees, such a dismissal may not, ipso facto, terminate the contract of employment itself. Where a liquidator retains the services of a company employee to assist in the course of the winding up, the employee's continuity of employment is preserved notwithstanding the publication of the winding up order. See Vol. 1, pp. 142-143, and Re Associated Dominion Assurance Society Pty Ltd and the Life Insurance Act (1962) 109 C.L.R. 516.

The only exceptions appear to be Queensland and Tasmania. See Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (3) (e) which deems service to be continuous if the employee is employed by the transmittee within three months of the transfer of the business. See also Long Service Leave Act 1956 (Tas.), s. 2 (4) where a two months' break is disregarded.


Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (3)(e) and Long Service Leave Act 1956 (Tas.), s. 2 (4).

Indeed, it is not uncommon for contracts for the sale of a business to contain provisions obliging the vendor to dismiss all his employees with the intention that the purchaser has no long service leave liabilities to take over. See 'Long Service Leave: Some Comments on the Legislation in Victoria' (1961) 35 L.I.J. 286, p. 291.

If it were argued that the employer-vendor was dismissing his employees with the intention of avoiding obligations in respect of long service leave, the employer could presumably point out that the discharge was necessary because of the cessation of his business.

See Long Service Leave 1968 A.I.L.R. Rep. 22 where the chairman of the board of reference which heard the claim expressed sympathy for the position of the employees in the transfer of the business since they may be unable to understand the legal implications of the transaction.

This term is used in the New South Wales, Victorian and South Australian provisions and the standard federal award. See Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (2)(a)(iii); Labour and Industry Act 1958 (Vic.), s. 154 (2)(c)(1); Long Service Leave Act, 1967-1972 (S.A.), s. 4 (5)(a) and Metal Trades (Long Service Leave) Award, 1964, cl. 6 (2).


ibid.

ibid.


It is submitted that the Industrial Commission of South Australia, in that case, placed too much emphasis upon the probable effect of the employee's unauthorised absence of two days upon the other employees. Surely a dismissal of the employee concerned without forfeiture of long service leave entitlement would have calmed any disruptive effect the employee's conduct may have had, or be expected to have, on her workmates.


Thus, where an employee used abusive words in an argument with a manageress over extra bags of washing which had to be done before an inspection by an officer of the Mines Department, the conduct did not amount to 'serious misconduct': Bell v. Beale & Co. Pty Ltd (1958) 13 I.I.B. 106.


28 Thus in Myer Emporium (S.A.) Ltd v. Clemens (1970) 37 S.A.I.R. 53, the President of the South Australian Industrial Commission refused to take into account the fact that the employee might have avoided a forfeiture of her proportionate entitlement by giving her employer appropriate notice.

29 Re Brown and Australian Iron & Steel Ltd 1956 A.R. 849 provides an example. There an employee dismissed for fraudulently completing a false sick leave claim forfeited his proportionate entitlement.

30 In Re Nicholls (1967) 61 Q.J.P. 89, the Queensland Industrial Court classified as 'serious misconduct' an employee's action in using his employer's vehicle for private purposes contrary to the express instructions of the employer. In the circumstances of that case, the employee's conduct was also probably 'wilful misconduct'.

31 (1965) 45 W.A.I.G. 407.


Again in Rusalen v. Tanner 1968 A.I.L.R. Rep. 196 an employee who absented herself from her position for twelve days prior to her dismissal lost her proportionate entitlement because the medical certificates she tendered to her employer were regarded by the appropriate authority as unsatisfactory.

35 (1964) 44 W.A.I.G. 818.


37 Forwood Down W.A. Pty Ltd v. Brandis (1964) 44 W.A.I.G. 818. This case was followed recently in Singer Australia Ltd v. Cardigan (1970) 50 W.A.I.G. 895. There the employee who was the manager of a branch of the company, attended to a service call for which he received a cheque for $3.50. The manager issued an interim receipt endorsed on a business card. He later deposited the cheque in the cash drawer at the branch and removed $3.50 in cash which he retained. When his action was discovered he was dismissed. He explained that he had taken the amount as an advance against the purchase of an appliance which he hoped the customer would buy. He then returned the money to the company.
It appeared that, to some extent, his initial action could be attributed to his desire to perform well in a sales competition operated by the company. It was not suggested that he had retained the money dishonestly although his action was in contravention of an established practice of the company to issue an official receipt and deposit takings daily with the company. The Western Australian Commission in Court Session decided that the manager's departure from the established practice amounted to 'serious misconduct'. Accordingly the manager forfeited his pro rata long service leave entitlement.

41. (1964) 44 W.A.I.G. 818.
43. (1965) 45 W.A.I.G. 407.
44. (1964) 44 W.A.I.G. 818.

45. See Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (2)(b)(d); Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (2) (iii); Labour and Industry Act 1958 (Vic.), s. 154 (2)(c)(i); Long Service Leave Act, 1967-1972 (S.A.), s. 4 (5)(c); Long Service Leave Act, 1958-1973 (W.A.), s. 8 (2)(c)(i); Long Service Leave Act 1956 (Tas.), s. 9 (3); Metal Trades (Long Service Leave) Award, 1964, cl. 6 (2).

46. Long Service Leave Act, 1955-1967 (N.S.W.), s. 4 (2)(iii); Labour and Industry Act 1958 (Vic.), s. 154 (2)(c)(i) and the Metal Trades (Long Service Leave) Award, 1964, cl. 6 (2). In Western Australia, the employee may have to satisfy a board of reference that his resignation can be justified on account of his 'illness' or 'domestic or other pressing necessity'. In Tasmania, he will forfeit a pro rata entitlement unless he can satisfy the Chief Inspector that his 'illness', etc. was of such a nature as to justify termination. See: Long Service Leave Act, 1958-1973 (W.A.), s. 8 (3) and Long Service Leave Act 1956 (Tas.), s. 8 (2)(c)(ii).

Industry Act 1958 (Vic.), s. 154 (2)(c); Long Service Leave Act, 1958-1973 (W.A.), s. 8 (2)(c) (*injury* which is of such a nature, in the opinion of the board of reference, to justify the determination); Long Service Leave Act 1956 (Tas.), s. 8 (2)(c)(ii) (*incapacity* certified by the Chief Inspector as of such a nature as to justify the termination); Metal Trades (Long Service Leave) Award, 1964, cl. 6 (2).


48 See: Labour and Industry Act 1958 (Vic.), s. 154 (2)(c); Long Service Leave Act 1956 (Tas.), s. 8 (2)(c)(ii); and Long Service Leave Act, 1958-1973 (W.A.), s. 8 (2)(c).


50 See British Motor Corporation (Aust.) Pty Ltd v. Chance 1965 A.R. 364, p. 366, per McKeon J. His Honour dissented in that case on the evidence but his judgment appears to contain an accurate statement of the law.


53 This follows from the fact that the words *on account of* will be interpreted to mean *because of*: British Motor Corporation (Aust.) Pty Ltd v. Chance 1965 A.R. 364.


56 Ibid.

57 See R. Fowler Limited v. Crennan (1966) 21 I.I.B. 1193 where the Victorian Industrial Appeals Court concluded that *a finding that he [the employee] was suffering from such an illnes would be quite unwarranted on the medical testimony of a general practitioner who had seen Mr Pratt on only one occasion ...*. See also Durkin v. Baulderstone 1969 A.I.L.R. Rep. 93.

58 See Ballard v. Liddy Classic Fibrous Plaster Pty Ltd (1963) 18 I.I.B. 1193. See too British Motor Corporation (Aust.) Pty Ltd v. Chance 1965 A.R. 364 where a claims storeman who resigned on account of a chronic mental disability that resulted in a recurrent *anxiety state* was held to be entitled to a payment in lieu of long service leave.


63 ibid.


67 See Wood v. Harris Scarfe & Sandovers Ltd (1965) 45 W.A.I.G. 398 where an employee who left her employment in the fifth month of her pregnancy and lost her baby some six weeks later was held to be entitled to a payment in lieu of long service leave.


69 ibid.


76 An employee who fails to specify that he is resigning on account of illness, incapacity or domestic or other pressing necessity when he actually gives notice will not forfeit his right to a pro rata payment. See: Re Transport Workers' (Long Service Leave, A.C.T.) Award, 1961
76 (continued):


78 Eyles v. Cook (1967) 13 F.L.R. 42.

79 See: Long Service Leave Act, 1955-1967 (N.S.W.), s. 7 (1)(2); Labour and Industry Act 1958 (Vic.), s. 160; Long Service Leave Act 1956 (Tas.), s. 15.

80 See Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 123.

81 (1939) 62 C.L.R. 68, p. 80.

82 See: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (9); Long Service Leave Act, 1955-1967 (N.S.W.), s. 5 (2)(a); Labour and Industry Act 1958 (Vic.), s. 153; Long Service Leave Act, 1967-1972 (S.A.), s. 11 (1). In Western Australia a board of reference may grant an exemption if it is satisfied that there is an existing or proposed scheme conferring benefits in the nature of long service leave which in its opinion are or will be, viewed as a whole, not less favourable to the whole of the employees of that employer than the benefits prescribed by the Act: Long Service Leave Act, 1958-1973 (W.A.), s. 5 (1). The Tasmanian provision follows the pattern of the other states. See Long Service Leave Act 1956 (Tas.), s. 7 (1).

83 See: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 17 (a); Long Service Leave Act, 1955-1967 (N.S.W.), s. 5 (2)(a); Long Service Leave Act 1956 (Tas.), s. 7 (1). In Victoria, the applicant must establish that the private scheme would 'better serve the interests' of the workers. See Labour and Industry Act 1958 (Vic.), s. 153. The Industrial Commission of South Australia is empowered to grant an exemption for an employer's scheme if the benefits provided under the scheme are not less favourable than those specified in the statutory provisions or if, for any other reason which appears to the Commission to be just and equitable in the circumstances of the case, an exemption should be allowed. See Long Service Leave Act, 1967-1972 (S.A.), s. 11 (1). See too Long Service Leave Act, 1958-1973 (W.A.), s. 5.

84 See: Long Service Leave Act, 1955-1967 (N.S.W.), s. 5 (2)(d) and s. 5 (4); Long Service Leave Act, 1967-1972 (S.A.), s. 11 (5); Long Service Leave Act, 1958-1973 (W.A.), s. 5 (2); Long Service Leave Act 1956 (Tas.), s. 7 (2)(5),(6).
In re Wire Fence (Other Than Barbed Wire) Makers And Tubular Gate Makers (State) And Other Awards 1952 A.R. 91 followed in Kennedy v. Board of Fire Commissioners 1967 A.R. 455.


See; Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), ss. 17 (9), 19 (3); Long Service Leave Act, 1955-1967 (N.S.W.), s. 5 (2)(c)(i). Note that the right of election must be expressly provided for in the employer's scheme in Queensland.

Long Service Leave Act 1956 (Tas.), s. 7 (1).

Long Service Leave Act, 1967-1972 (S.A.), s. 11 (1).

Emphasis added.

Labour and Industry Act 1958 (Vic.), s. 153 (1). In Western Australia there appears to be no express provision enabling an employee to elect to be covered by the statutory scheme rather than the employer's exempted scheme. Furthermore, s. 5 of the Long Service Leave Act, 1958-1973 (W.A.) refers to an exemption granted to an employer 'in respect of his workers'. It may well be that the Western Australian provision is not open to the interpretation suggested for its Tasmanian, Victorian and South Australian counterparts.


SECTION 2: EMPLOYEES' INTEREST IN JOB SECURITY

CHAPTER 5  DISMISSAL

If a contract of employment cannot possibly be performed within a year the agreement must, in those states where s. 4 of the Statute of Frauds 1677 29 Car. 2, c. 3 or its equivalent is still in force, be in writing and signed by the party to be charged or his agent. See Clarke v. Tyler (1949) 78 C.L.R. 646, p. 653, per Dixon J. If the employment is for a fixed period more than one year the contract falls within the purview of the section and must be in writing even if either party is given power to determine the contract by giving six months' notice: Hanau v. Ehrlich [1912] A.C. 39. But if one party's obligation is intended to be completed, and is in fact completed, within the year, the statute does not apply: Michelmore v. Breen [1920] St. R. Qd. 266. This situation is unlikely to arise in the employment relationship.

Where a contract offends the statute it will be unenforceable, and neither party will be able to sue on the contract to enforce an obligation. In this event, an employee could of course sue on a quantum meruit for wages earned but not paid.


In most Australian jurisdictions employers are obliged to exhibit a true copy of any award or determination regulating the employment of their workers in a conspicuous place at the workplace, shop or factory. See: Conciliation and Arbitration Act 1904-1973 (Cth), s. 198 (1)(d) and regulations made thereunder; Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 127; Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 96 (2); Labour and Industry Act 1958 (Vic.), s. 38; Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 76 (publication by Registrar in Gazette) and s. 108 (2); Industrial Arbitration Act, 1912-1973 (W.A.), s. 82 (award is available for inspection in office of Registrar); Wages Boards Act 1920 (Tas.), s. 29 (4) (closely resembles s. 82 of the Industrial Arbitration Act, 1912-1973).
5 (continued):
(W.A.). But these provisions do not ensure that the individual 
employee is aware of the essential terms of his employment.


7Around 88% of Australia's work force are affected by awards or 

8See Metal Trades Award 1952, cl. 19, 73 C.A.R. 324, p. 442 
(Consolidated in 1968 - Print No. B 3422).

9See e.g. Printing Industry Employees' Union v. Jackson & O'Sullivan 
Pty Ltd (1957) 1 F.L.R. 175.

10See e.g. Allen v. Commissioner for Railways (1906) 8 W.A.L.R. 
178. See also Australian Workers' Union v. Mackay Harbour Board; Re 
Keane (1939) 33 Q.J.P. 124 where the employer was held to be justified 
in dismissing an employee for absenteeism even though the award stated 
only that the employer could summarily dismiss an employee on grounds 
of 'disobedience, dishonesty, incompetency or drunkenness'.

11Quoted in 'Low-level flying encouraged in New Guinea', The 
Australian, 27 February 1974, p. 3.


13See 'Pilots give no strike undertaking', The Australian, 
6 December 1973, p. 4.

14Mr Len Coysh, Assistant Secretary of the Australian Federation of 
Air Pilots, in an interview with the writer, dated 16 August 1974.


16Coysh in an interview with the writer, dated 16 August 1974.

17Charles Wright, 'T.A.A. may employ dismissed pilot', The Australian, 
17 May 1974, p. 5.


19Coysh in an interview with the writer, dated 16 August 1974.

20Coysh in an interview with the writer, dated 16 August 1974.

21Coysh in an interview with the writer, dated 16 August 1974.
The grievance procedure embodied in the agreement does not apply to any matters relating to operational safety: Airline Pilots' (Domestic Operators) Agreement 1972, cl. 50A (i).


Bullock v. Wimmera Fellmongery and Woolscouring Company Limited (1879) 5 V.L.R., L. 362; Mackenzie v. Union Fire & Marine Insurance Co. of New Zealand (1880) 1 L.R. (N.S.W.) 103.

5 Eliz., c. 4. See R.J. Harrison, 'Termination of Employment' (1972) 10 Alberta L.R. 250, p. 260. Blackstone thought that the presumption was founded upon a principle of natural equity, that the servant shall serve and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not. Commentaries, 8th edn. (1778), Vol. 1, Ch. 14, p. 425 quoted by Fenton Atkinson L.J. in Richardson v. Koefod [1969] 1 W.L.R. 1812, p. 1818. See too De Stempel v. Dunkels [1938] 1 All E.R. 238, p. 247, per Greer L.J.


26 In Williams v. Beckett (1871) 2 A.J.R. 114 the presumption was rebutted by evidence that the plaintiff's contract of employment provided that wages were to be paid at a certain amount per week and that if the plaintiff served for three months his coach fare would be refunded. Again, in R. v. Newton Toney (Inhabitants) (1788) 2 Term Rep. 453; 100 E.R. 244, the payment of weekly wages excluded the presumption since that was the only circumstance from which the duration of the contract is to be collected. See Buller J. at (1788) 2 Term Rep. 453, p. 455; 100 E.R. 244, p. 245.

In Hile v. Coraki Municipal Council (1915) 3 L.G.R. 51, the presumption was rebutted by the terms of the payments made to the contractor. If the employment is at the will of the master or for so long a time as he shall want the servant, the presumption is rebutted (R. v. Elslack (Inhabitants) (1855) 4 Doug K.B. 211; 99 E.R. 845; but the presumption will not be rebutted by the employer's reserving the right to dismiss at a moment's notice (R. v. Sandhurst (Inhabitants) (1827) 7 B. & C. 557; 108 E.R. 831). An obligation to pay wages at periods of less than a year, weekly (R. v. Great Yarmouth (Inhabitants) (1816) 5 M. & S. 114; 105 E.R. 993) or monthly (Fawcett v. Cash (1834) 5 B. & Ad. 904; 110 E.R. 1026) will probably, though not necessarily, (R. v. St Andrew, Pershore (1828) 8 B. & C. 679; 108 E.R. 1195) rebut the presumption. Payment at irregular intervals may be sufficient to exclude the presumption (Bayley v. Rimmell (1836) 1 M. & W. 506; 150 E.R. 534). For an example of elaborate evidence adduced in rebuttal, see De Stempel v. Dunkels [1938] 1 All E.R. 238.
28 [1938] 1 All E.R. 238.
34 ibid.
35 (1880) 1 L.R. (N.S.W.) 103.
36 (1912) 14 W.A.L.R. 91.
37 (1942) 66 C.L.R. 252.
43 Hogan v. Tumut Shire Council (1954) 54 S.R. (N.S.W.) 284.
45 ibid.
46 See e.g. Down v. Pinto (1854) 9 Exch. 327; 156 E.R. 139 where employment for "at least three years" at the "option" of the employer on an annual salary was held not to be a hiring at will.
47 See e.g.: Bullock v. Wimmera Fellmongery and Woollscouring Company Limited (1879) 5 V.L.R., L. 362; Cook v. Sydney & County Bank (1882) 3 L.R. (N.S.W.) 273.
49 Mackie v. Wienholt (1880) 5 Q.S.C.R. 211.


52 [1936] 3 All E.R. 322, C.A.


55 (1957) 100 C.L.R. 526.

56 Orr v. University of Tasmania (1957) 100 C.L.R. 526, pp. 530-531.

57 See e.g. Metal Trades Award 1952, cl. 19.


59 See Wild v. Great Matrix Ruby Mining Co. Ltd (1890) 24 S.A.S.R. 48 where the facts that the employee was engaged in a responsible position as manager of the defendant company's mine in an isolated area, that communication was difficult and that the company made no provision for relieving the plaintiff after his dismissal, were held sufficient to rebut the presumption of weekly hiring raised by the weekly salary. See also Tyers v. Barmera Packing Co. Ltd [1930] S.A.S.R. 123.

60 Whim Well Copper Mines Ltd v. Pratt (1910) 12 W.A.L.R. 166.


62 Dearden v. Tasmanian Timber Corporation (1907) 3 Tas. L.R. 23.

63 See e.g.: Mirror Newspaper Co. v. Crozier (1911) 13 W.A.L.R. 70; Edwards v. Dowsett (1914) 20 A.L.R. (C.N.) 17.


65 (continued):

(N.S.W.) 103; Healy v. Law Book Company of Australasia Pty Ltd (1942) 66 C.L.R. 252, p. 255, per Latham C.J.

66 See e.g. Broadhurst & Co. Ltd v. Robinson (1903) 29 V.L.R. 447.

67 See e.g. Williams v. Byrne where Patteson J., after concluding that the arrangement was a yearly hiring, stated: "How long such notice must be, we need not now determine" (1837) 7 Ad. & El. 177, p. 183; 112 E.R. 438, p. 440; Beeston v. Collyer (1827) 4 Bing 309, p. 311; 130 E.R. 786, p. 787; Mackenzie v. Union Fire & Marine Insurance Co. of New Zealand (1880) 1 L.R. (N.S.W.) 103; Jackson v. Hayes Candy & Co. Ltd [1938] 4 All E.R. 587.

68 In Jackson v. Hayes Candy & Co. Ltd [1938] 4 All E.R. 587 after concluding that the presumption of yearly hiring applied, Du Parcq L.J. stated:

It follows that, although I have no doubt that notice could properly have been given on Aug. 7, 1936, to terminate the contract on Dec. 19, it was not possible to do what the defendants purported to do.

See [1938] 4 All E.R. 587, p. 592. It will be recalled that the defendants purported to terminate the arrangement by one month's notice. Thus, the above statement is open to the inference that, while one month's notice was not reasonable, a little over four months' notice might have sufficed. See too: Williams v. Byrne (1837) 7 Ad. & El. 177, p. 182; 112 E.R. 438, p. 440; Wood v. Wellington Woollen Co. (1895) 14 N.Z.L.R. 296; Tubbs v. Auckland University College Council (1907) 27 N.Z.L.R. 149; Thomson v. Ross [1923] N.Z.L.R. 32; Gould v. McCrae (1907) 14 O.L.R. 194.


73 Foxall v. International Land Credit Company (1867) 16 L.T. 637, p. 639, N.P.
A well-known custom in a particular district may be incorporated in a contract of employment: Carus v. Eastwood (1875) 32 L.T. 855.

Mirror Newspaper Co. v. Crozier (1911) 13 W.A.L.R. 70; Foxall v. International Land Credit Company (1867) 16 L.T. 637; N.P.

Williams v. Byrne (1837) 7 Ad. & E1. 177; 112 E.R. 438; Metzner v. Bolton (1854) 9 Exch. 518; 156 E.R. 221.

In Buckingham v. Surrey & Hants Canal Company (1882) 46 L.T. 883 the defendant employers adduced no evidence of the alleged custom, and accordingly, Grove J. (with whom Mathew J. concurred) rejected the argument that a customary notice period applied. However, in George Edwardes (Daly's Theatre) Ltd v. Comber (1926) 42 T.L.R. 246 express evidence of custom was sufficient to counter the argument that the employee was employed for an indefinite period and entitled to reasonable notice only.


ibid.


Nicoll v. Greaves (1864) 17 C.B.N.S. 27, p. 34, per Erie C.J.

See e.g. Healy v. Law Book Company of Australasia Pty Ltd (1942) 66 C.L.R. 252.


See Metal Trades Award 1952, cl.19.

See e.g. Insurance Officers (Clerical Indoor Staffs) Award 1973, c.No. 1130 of 1973, cl. 18 which provides that, except in cases of misconduct or absence from work without reasonable cause, employees with less than ten years' service shall be entitled to two weeks' notice, and that employees with ten or more years' service shall be entitled to four weeks' notice.


90 ibid.


92 ibid.

93 Adams v. Union Cinemas Ltd [1939] 3 All E.R. 136, p. 142 per Du Parcq L.J.

94 Speakman v. Calgary City (1908) 9 W.L.R. 264, p. 265, per Berk J.


96 Re Illustrated Newspaper Corpn (1900) 16 T.L.R. 157; Williams v. Byrne (1837) 7 Ad. & El. 177; 112 E.R. 438.


98 Lowe v. Walter (1892) 8 T.L.R. 358, N.P.

99 Chamberlain v. Bennett (1892) 8 T.L.R. 234.

1 (1894) 10 T.L.R. 647.


3 e.g. the mode of payment and the character of service (McCarthy v. Windeyer (1925) 26 S.R. (N.S.W.) 29; the responsibilities of the job and the nature of the employment as well as what the parties themselves regarded as reasonable notice (Mulholland v. Bexwell Estates Company Limited (1950) 66 (Pt 2) T.L.R. 764.


13 On the other hand, Hepple and O'Higgins point out that the appointment was subject to the approval of the Northern Ireland Minister of Health and Local Government. They suggest that this fact may have given the employment a statutory flavour; B.A. Hepple and Paul O'Higgins, Individual Employment Law (London, 1971), p. 11.

14 See Australian Tramway Employees' Association v. Prahran and Malvern Tramways Trust (1918) 25 C.L.R. 394.


A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.


18 On the other hand, in Glover v. B.L.N. Ltd [1968] Irish Jurist 322-323, a technical director of a company was held to be entitled to a hearing before dismissal because his job 'resembled that of the holder of an office'.


25 Ibid.


31 Australian Journalists' Association v. John Fairfax Pty Ltd (1959) 14 I.J.B. 610. Yet a functional test was applied in Jupiter General Insurance Co. Ltd v. Shroff [1937] 3 All E.R. 67, P.C., even though the respondent was manager of the appellant's life assurance department.


35 Clouston & Co. Ltd v. Corry [1906] A.C. 122; Ridgway v. Hungerford Market Co. (1835) 3 Ad. & El. 171; 111 E.R. 378; Smethurst v. Municipal District of Wyalong (1902) 2 S.R. (N.S.W.) 469; Griffin v. London Bank of Australia Limited (1919) 19 S.R. (N.S.W.) 154. But compare English and Australian Copper Co. Ltd v. Johnson (1911) 13 C.L.R. 490, p. 499 where Griffith C.J., with whom Barton J. concurred, stated: 'It is for the Court and not for the jury to say whether the defendants were
justified in dismissing the plaintiff*. It is submitted that this comment was coloured by the fact that there a gross breach of faith was involved. As a matter of law this justified the summary dismissal.

36 See e.g. English and Australian Copper Co. Ltd v. Johnson (1911) 13 C.L.R. 490.

37 (1888) 39 Ch. D. 339.


39 English and Australian Copper Co. Ltd v. Johnson (1911) 13 C.L.R. 490. See also Adami v. Maison De Luxe Limited (1924) 35 C.L.R. 143.

40 See English and Australian Copper Co. Ltd v. Johnson (1911) 13 C.L.R. 490.

41 See Boston Deep Sea Fishing and Ice Company v. Ansell (1888) 39 Ch. D. 339, C.A.

42 See Adami v. Maison De Luxe Limited (1924) 35 C.L.R. 143.


44 Blyth Chemicals Ltd v. Bushnell (1933) 49 C.L.R. 66.


46 Australian Tramway Employees* Association v. Prahran and Malvern Tramways Trust (1918) 25 C.L.R. 394.


49 Beattie v. Parmenter (1899) 5 T.L.R. 396.


54. This seems to be a reasonable implication from *Pepper v. Webb* [1969] 1 W.L.R. 514, C.A.


The controversy appears to be somewhat sterile as, in practice, the employee has little option but to accept the dismissal. As Williams J. pointed out in *Automatic Fire Sprinklers Pty Ltd v. Watson* (1946)
63 (continued):

72 C.L.R. 435, p. 476, even if the contract is not discharged "its purposes have failed".

64 (1972) 12 K.I.R. 409.

65 Australian Workers* Union v. Edols (1918) 12 C.A.R. 58.

66 Ex parte Moss (1885) 6 A.L.T. 255.

67 See Re Waterside Workers* Awards (1957) 1 F.L.R. 119.


69 See Metal Trades Award 1952, cl. 19.


71 In Boston Deep Sea Fishing and Ice Company v. Ansell (1888) 39 Ch. D. 339, pp. 364-365, Bowen L.J. stated that an employee dismissed for wrongful behaviour "cannot take advantage of his own wrongful act to insist that the contract is rescinded".

72 Workers who depend upon state legislation for their annual leave would seem to be in no danger of forfeiting a pro rata entitlement if they are summarily dismissed for misconduct. See e.g. Annual Holidays Act 1944, as amended (N.S.W.), s. 4 (3). On the other hand, employees whose annual leave rights depend upon a federal award may lose the right to pro rata leave if they are instantly dismissed for misconduct. Indeed, even where the summary discharge is without legal justification the employee may forfeit his entitlement. This is because the standard federal award provides that payment in lieu of annual leave is only payable where "an employee lawfully leaves his employment or his employment is terminated by the employer through no fault of the employee". (Emphasis added.) See Metal Trades Award 1952, cl. 21. See too Dowling v. Oven Door Bakery Pty Ltd 1971 A.I.L.R. Rep. 681.

73 See Vol.1, pp. 82-87.

74 See Vol.1, pp. 150-151.


76 (1930) 46 T.L.R. 294.

Even in 1899 Channel J. was able to state: "It is quite impossible, and I shall not attempt, to give an exhaustive definition of what is misconduct which justifies dismissal without notice": Baster v. London and County Printing Works [1899] 1 Q.B. 901, p. 904.


See Pepper v. Webb [1969] 1 W.L.R. 514, C.A. where Harman and Russell L.J.J. found that the dismissal of a head gardener was justified on grounds of insolence and wilful disobedience.


Dispute between Bondi Bowling Club Ltd and the Federated Liquor and Allied Industries Employees' Union concerning the dismissal of a steward (Francis) employed at the Club 1972 A.I.L.R. Rep. 132.


This can be implied from Joseph v. Australian Stevedoring Industry Authority (1960) 94 C.A.R. 685.


1(1906) 8 W.A.L.R. 178.


3(1906) 8 W.A.L.R. 178.

Compare Re Associated Newspapers Ltd v. Printing Industry Employees' Union of Australia, N.S.W. Branch 1956 A.R. 315, where the Industrial Commission of N.S.W. held it had jurisdiction to make an award excusing employees from performing work in connection with the publication of another company's newspaper where the employees of the other company were on strike.

e.g. Geracitano v. Grote Street Service Station (1971) 38 S.A.I.R. 20 where it was held that an employee was justified in declining to accept a direction to take annual leave in contravention of clause 9 of the Service Stations and Parking Stations Conciliation Committee Award.


Consolidated Press Ltd v. Thompson (1952) 52 S.R. (N.S.W.) 75.

Adami v. Maison De Luxe Limited (1924) 35 C.L.R. 143, p. 151 per Isaacs A-C.J.


This was the unfortunate implication from Turner v. Mason (1845) 14 M. & W. 112; 153 E.R. 411.

Consolidated Press Ltd v. Thompson (1952) S.R. (N.S.W.) 75.


Minister of State for the Navy v. Federated Engine Drivers' and Firemen's Association of Australasia (1964) 107 C.A.R. 806 where the employee dismissed had refused to carry out a lawful instruction seven times in one hour and forty-five minutes.

(1959) 53 Q.J.P. 95.

This case was heard by a Canadian arbitration panel but it would seem that a similar result could have been reached before an Australian industrial tribunal or at common law. See Alfred Avins, Employees' Misconduct (Allahabad (U.P.) India, 1968), p. 53.


See Avins, Employees' Misconduct, p. 9.


At that time a dismissal for misconduct defeated a claim to pro rata long service leave entitlement upon termination of the employment.

The Industrial Court considered that the employee concerned was 'considerably late for work': (1960) 54 Q.J.P. 85, p. 88.

41 Printing Industry Employees' Union of Australia v. Jackson and O'Sullivan Pty Ltd (1957) 1 F.L.R. 175.


43 In Jupiter General Insurance Co. Ltd v. Shroff [1937] 3 All E.R. 67, the Privy Council upheld the discharge of the manager of the appellant company's life assurance department. The manager had recommended the issue of an endowment policy upon a life which the managing governor had a few days earlier refused to reinsure. In their Lordships view: 'if a person in charge of the life assurance department, subject to the supervision of superior officers, shows by his conduct or his negligence that he can no longer command their confidence, and if, when an explanation is called for, he refuses apology or amendment, it seems ... his immediate dismissal is justifiable:

44 In Savage v. British India Steam Navigation Company Limited (1930) 46 T.L.R. 294, a ship's captain who started on his voyage without investigating why his ship was down at the head thereby endangering the lives of 440 people was held to be guilty of gross negligence justifying summary dismissal. A crane driver who was negligent in the handling of his equipment causing extensive and costly damage to the fly-jib was also held to have been justifiably dismissed on the spot. (Federated Engine Drivers' and Firemen's Union of Workers of W.A. and Hamersley Iron Pty Ltd 1969 A.I.L.R. Rep. 265.) On the other hand, a European correspondent who failed to send a letter containing material he had collected was successful in his claim that his summary dismissal was wrongful since his neglect did not strike at the root of the contract (Gould v. Webb (1855) 4 E. & B. 933; 119 E.R. 347).

45 (1930) 46 T.L.R. 294.


49 e.g.: Australian Workers' Union v. Laman (1958) 53 Q.J.P. 35 (unauthorised obtaining of goods by the employee on employer's credit); W.D. & H.O. Wills (Aust.) Limited v. Jamieson 1957 A.R. 547 (unauthorised removal and subsequent appropriation of company timber); Re Avon Products Pty Ltd and Reilly 1969 A.R. 153 (unlawful removal of article from the employer's possession); Australasian Meat Industry Employees' Union v. Thomas Borthwick & Sons Australasia Ltd (1968) 122 C.A.R. 10 (employee
deliberately misled foreman as to the severity of an ailment in order
to obtain permission to leave the works; the employee took this action
in order to be able to attend a race meeting on that afternoon);
Sparre v. Conigrave 1970 A.I.L.R. 621 (buying goods for friend and
undercharging for them); Singer Aust. Ltd v. Cardigan (1970) 50 W.A.I.G.
895 (breach of established company practice by retaining payment received
for a service call against the purchase price of a new appliance which
the employee hoped the customer would buy); English and Australian Copper
Co. Ltd v. Johnson (1911) 13 C.L.R. 490 (false assay of ore); Boston Deep
Sea Fishing and Ice Company v. Ansell (1888) 39 Ch. D. 339 (receipt of a
secret commission).

D. 339. On the other hand, in the absence of an express clause in the
contract of service, an employer is not entitled to dismiss an employee
instantly on grounds of dishonesty before the employee was engaged:

51 1956 A.R. 849.

52 See e.g. Plumbers* and Gasfitters* Employees Union of Australia v.

[1967] 2 Q.B. 279, C.A.


55 Australian Leather & Allied Trades Employees* Federation v. Cooper

56 Clouston & Co. Ltd v. Corry [1906] A.C. 122, p. 129 per Lord James
of Hereford.


59 Cuckson v. Stones (1858) 1 El. & El. 248, p. 257 per Lord Campbell
C.J., 120 E.R. 902, p. 906; Jackson v. Union Marine Insurance Co. (1874)
L.R. 10, C.P. 125.

60 Boilermakers* Society of Australia, Queensland Branch v. Evans
N.S.W.R. 416.

61 Hall v. Carr; Ex parte Carr (1921) Q.W.N. 6.

62 Whim Well Copper Mines Ltd v. Pratt (1910) 12 W.A.I.R. 166.
65. (1873) 4 A.J.R. 86.
68. By analogy with Whim Well Copper Mines Ltd v. Pratt (1910) 12 W.A.L.R. 166.

At least where the employment is not resumed and in the absence of an express provision to the contrary in the award. See Re Coal Mining Industry (Miners) Award (1959) 14 I.I.B. 175. In Great Britain, Marshall v. Harland & Wolff Ltd [1972] 1 W.L.R. 899, a recent decision of the National Industrial Relations Court promises much greater security against dismissal for illness. In particular it ruled that a contract of service could not be frustrated by illness if the absence was for a shorter period than that covered by the firm's sick pay scheme.

70. See e.g. Pearce v. Foster (1886) 17 Q.B.D. 536 where the summary dismissal of a confidential clerk for speculative dealings on the stock exchange was upheld because the employer was a firm of merchants with substantial investments in securities.

Again in Langhorne v. Bennett (1877) 3 V.L.R., L. 108, an employee who planned to divert his master's business to a third person was instantly dismissed and the discharge was sustained. On the other hand, in Blyth Chemicals Ltd v. Bushnell (1933) 49 C.L.R. 66, a manager dismissed because he became chairman and sole or principal shareholder of a potential rival company and because he did not obtain a covenant that the company would not compete with the employer, succeeded in his claim for damages for wrongful dismissal.


73. See e.g.: Re Dispute at Metal Manufactures Ltd (Re Hutchinson) [1948] A.R. 818 (intimidation of a fellow employee: dismissal justified); Dispute at Lonsdale plant of Chrysler Aust. Ltd - Vehicle Industry Award 1970 A.I.L.R. Rep. 237 (assault upon foreman: dismissal justified). See also Australasian Meat Industry Employees' Union v. Thomas Borthwick & Sons (Australasia) Ltd (1968) 122 C.A.R. 10 (assault upon a fellow employee at conclusion of union meeting: held dismissal justified although reinstatement was recommended).
In the lower court, Green J. pointed out that Orr's conduct had a detrimental effect upon the University's reputation and standing. His Honour took the view that Orr would undoubtedly be prejudiced in favour of the student, and, therefore, he would be unable to exercise his functions impartially. In particular he could no longer be entrusted with marking of examination papers, recommending students for prizes, or conferring of degrees. See [1956] Tas. S.R. 155, p. 150. See also McPherson v. City of Toronto (1918) 43 D.L.R. 604 where the Ontario Supreme Court appeared to apply Victorian moral standards in upholding the dismissal of a fireman on the ground of sexual immorality in off-duty hours.


Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 101; Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 95; Labour and Industry Act 1958 (Vic.), s. 204; Industrial Conciliation and Arbitration Act, 1972 (S.A.), ss. 156, 157; Industrial Arbitration Act, 1912-1973 (W.A.), s. 135; Wages Boards Act 1920 (Tas.), s. 66; Conciliation and Arbitration Act 1904-1973 (Cth), s. 5.

E.I. Sykes, 'Labor Arbitration in Australia' (1964) 13 Amer. Jou. of Comp. Law 216, p. 239.

The 'victimisation' provisions in all states have similar wording. Only the Queensland section penalises a refusal to employ any person on the prohibited grounds.

All states, except South Australia and Victoria, have similar wording in their unlawful dismissal provisions.

In South Australia, an employer is prohibited from injuring an employee in his employment by reason only of the fact that the employee is, or is not, an officer or member of an association, or is entitled to the benefit of an award or industrial agreement: Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 157. On the other hand, an employer is not prohibited from altering an employee's position to his prejudice by victimisation on these grounds. Nor is an employer penalised for injuring an employee in his employment or altering an employee's position to his prejudice in consequence of the employee's becoming a member of a Conciliation Committee, or being a party to, or giving evidence in proceedings before an industrial tribunal. Further, an employer is not prohibited from these lesser forms of victimisation where the employee takes part or becomes involved in any industrial dispute. See Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 156.

In Victoria victimisation falling short of dismissal is not prohibited.
The New South Wales and Queensland provisions are almost identical. In Victoria, Western Australia and Tasmania, the relevant provision reads "by reason merely of the fact ..." (emphasis added). Thus if the employer's motives are mixed (some lawful, some unlawful) the dismissal or other victimisation will not be penalised. In South Australia, the relevant words in section 157 are "by reason only of the fact ...". It does not follow that employees in South Australia face the same hurdle as their Victorian, Western Australian and Tasmanian counterparts: for the defendant, in South Australia, is obliged to show that the employee was dismissed or injured in his employment "for some substantial reason other" than the prohibited grounds: Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 157.

This provision corresponds broadly with this limb of the Commonwealth section.

The relevant provisions in Queensland, New South Wales, South Australia and Western Australia cover union officials and members. Moreover, the Queensland, Western Australian and, possibly, the South Australian sections protect officials and members of unions that have applied to be registered. But South Australia appears to be the only state where officials and members of an unregistered union are covered. No state prohibits victimisation 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.

The New South Wales and South Australian sections protect employees who are officials of Conciliation Committees. Moreover, in South Australia, an employee who act in the capacity of a member of a Conciliation Committee is protected. There is no similar provision in the New South Wales Act.

The relevant provisions in the wages board states, Victoria and Tasmania, safeguard employees who are members of these boards. The Tasmanian section also penalises employers who discriminate against employees who act in the capacity of members of a wages board.

The unlawful dismissal provisions in the Queensland, South Australian and Western Australian statutes have almost identical wording. In Tasmania, the relevant words of the section read "entitled to the benefits of a determination of a board". There is no equivalent provision in Victoria.

The Queensland section also prohibits victimisation of an employee who "has claimed the benefit of an industrial agreement or an award". This corresponds closely with the New South Wales provision.

The phrasing of the Queensland, New South Wales and Tasmanian sections corresponds with this part of the federal provision; the South Australian section is broadly similar. There is no equivalent provision in Western Australia or Victoria.

In most states victimisation of an employee who proposes to appear as a witness or to give evidence in a proceeding under the Act is not prohibited. On the other hand, the Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 101 (2) penalises an employer if he threatens to dismiss an employee, or to injure him in his employment, or to alter his position to his prejudice.
The Victorian and Tasmanian sections prohibit the dismissal of an employee who has given an inspector information with regard to matters under the relevant wages board statutes. The Tasmanian provision also confers protection upon an employee who gives information about his working conditions to an officer of an organization or association of employees to which he belongs: Wages Boards Act 1920 (Tas.), s. 66 II A. The phrase, 'working conditions', is quite broad; it encompasses far more than the employee's entitlement under an award or statute.

The New South Wales provision is similar. It protects an employee who has informed any person that a breach or suspected breach of an award or industrial agreement has been committed by the employer (emphasis added): Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 95 (b1). Note an employee giving information about a breach of statutory obligations or discrimination short of an infringement of an award or industrial agreement is not protected. See generally Bowen v. Read 1956 A.R. 873.

In the Queensland, South Australian, Western Australian and Commonwealth jurisdictions there are no equivalent provisions. But see: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 101 (1)(d) and Conciliation and Arbitration Act 1904-1973 (Cth), s. 5 (1)(d).


The Queensland provision is identical to the Commonwealth section, while the New South Wales provision is broadly similar. There is no equivalent clause in the Western Australian or South Australian statute. But see Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 156 (1)(b). In Tasmania and Victoria an employee who absents himself from work through being engaged in duties as a member of a wages board will be protected even if he does not apply for leave, provided he gives his employer reasonable notice of his intention.

This provision was inserted in the federal statute by Conciliation and Arbitration Act 1973 (Cth), s. 6. It arose out of the Federal Government's concern to protect shop stewards from victimisation in the pursuit of legitimate activities on the shop floor. There are three major qualifications in this provision: first, the officer or delegate must act lawfully; second, his actions must be for the purpose of promoting or safeguarding the interests of the organization or its members, (probably an objective test); third, the actions must be within the scope of his express authority properly conferred by the organization of which he is an official or delegate.

There is no equivalent provision in the state statutes.
In Queensland the penalty for any of the prohibited forms of victimisation is $200. In New South Wales, South Australia and Western Australia it is $100. The Victorian penalty is $50. This penalty was introduced by the Factories and Shops Act 1910 (Vic.), s. 4. It has not subsequently been increased. See S.G. Alley, Industrial Law in Victoria (Melbourne, 1973). The Tasmanian provision prescribes the lowest penalty, $40.

See generally King v. Hickson’s Timber Impregnation Co. (Aust.) Pty Ltd (1972) 20 F.L.R. 353 on the appropriate penalty for breach of the unlawful dismissal provisions. See too Joiner v. Muir (1969) 15 F.L.R. 340 where no penalty was imposed even though the offence was established.

The Queensland provision is identical. Thus in Queensland a candidate for union office is protected from threats to dismiss but not the actual discharge! And a former union official is protected neither from the threat to dismiss nor the dismissal itself.

In Tasmania, employees are, in certain circumstances, protected from a threatened dismissal but, once again, candidates for union office and former union officials are not safeguarded. Further, the Tasmanian provision does not penalise the dismissal of an employee who proposes to appear as a witness or proposes to give any evidence in a proceeding under the Act.

This form of intimidation short of discharge is not penalised in New South Wales, Victoria, South Australia or Western Australia.

There is no equivalent provision in any of the state statutes dealing with unlawful dismissals.

In Queensland and New South Wales the provision is identical with Conciliation and Arbitration Act 1904-1973 (Cth), s. 5 (4). The Western Australian and Tasmanian sections carry a stricter onus since the defendant is obliged to show that the victimisation was for some reason other than that mentioned in the section. In Victoria, the Crown apparently has the onus of establishing all the elements of the offence including the employer’s improper motive. See Alley, p. 213. The South Australian provision is broadly similar to its counterparts in the Queensland, New South Wales and federal jurisdictions.

The remedies available to the victim of unlawful dismissal are discussed in Vol. 1, pp. 183-184.

Industrial Conciliation and Arbitration Act 1961-1974 (Qld), s. 101 (1).


See Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 95 (b1).
The only exceptions are the federal and Queensland jurisdictions. See: Conciliation and Arbitration Act 1904-1973 (Cth), s. 5 (l)(d) and Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 101 (l)(d).

Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 101 (2).

Conciliation and Arbitration Act 1904-1973 (Cth), s. 5 (lA).

The Queensland provision prohibits a threatened dismissal of a candidate for union office or a person who proposes to give evidence in an industrial proceeding, but it does not penalise the dismissal of these persons.

In May 1968, only 33% of Victorian employees were affected by local determinations and collective agreements. See Labour Report No. 57, 1972 (Canberra, 1973), p. 132.

In May 1968, over 72% of Western Australian employees worked under local awards and industrial agreements. See Labour Report No. 57, 1972, p. 132.


In Queensland, proceedings may be instituted by an industrial union, a member or officer thereof, an industrial inspector, an employer, the Minister or any other person interested in the cause or matter: Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), Schedule 1, clause 1. Thus, in Queensland an aggrieved party has an individual right of complaint.

In South Australia, proceedings for an offence under section 156 of the Industrial Conciliation and Arbitration Act, 1972 (S.A.) may be initiated and prosecuted by the aggrieved party or by an inspector. Section 157 contains no guidance as to the proper prosecutor in an offence under that section. Likewise the Victorian, Tasmanian and Western Australian provisions make no mention of the proper complainant. Presumably the Crown is the normal prosecutor in these cases. See: Labour and Industry Act 1958 (Vic.), s. 204; Wages Boards Act 1920 (Tas.), s. 66; Industrial Arbitration Act, 1912-1973 (W.A.), s. 135. See also Alley, p. 213.

The procedure in New South Wales is distinctive. A prosecution under section 95 of the Industrial Arbitration Act, 1940, as amended (N.S.W.) may not be instituted without the leave of the Industrial Commission. An applicant must establish a prima facie case or a reasonable case before leave will be granted. He must have weighed down the scales in his favour on all those facts which he must establish in order to support the charge. In addition, he must point to facts, which, if they were left unexplained, would raise an inference that his dismissal contravened the section. See: Re Tailoresses' Union of N.S.W. (1902) 19 W.N. (N.S.W.) 89; Anderson
Where the applicant is a trade union, leave will be withheld unless the union is registered as an industrial union under the Act: Watkins v. Hanrahan 1968 A.R. 287. A prosecution may be instituted by the secretary of the appropriate union but leave to prosecute will not be granted where it appears that the secretary is acting on his own initiative and in opposition to his union: Sheridan v. Central District Ambulance Committee [1927] A.R. 342.

If the employee dismissed has a strong prima facie case of victimisation and he is not a member of a registered union, the Industrial Commission may institute proceedings on its own motion: Watkins v. Hanrahan 1968 A.R. 287.

If the parties are not prepared to accept the ruling of the tribunal, the question for decision would inevitably involve an exercise of the judicial power of the Commonwealth. The proper body to exercise this power in this context is the Industrial Court or another court vested with jurisdiction under the section. See: R. v. Gough; Ex parte Cairns Meat Export Co. Pty Ltd (1962) 108 C.L.R. 343; R. v. Gallagher; Ex parte Aberdare Collieries Pty Ltd (1963) 37 A.L.J.R. 40; Re Association of Professional Engineers; Ex parte City of Perth (1973) 47 A.L.J.R. 724.

Conciliation and Arbitration Act 1904-1973 (Cth), s. 5 (4). For details of the provisions in other jurisdictions, see Vol. 2, p. 188, n. 83.

Conciliation and Arbitration Act 1904-1973 (Cth), s. 156.


ibid.


Conciliation and Arbitration Act 1904-1973 (Cth), s. 5 (4).

17. ibid.


23. ibid.

24. (1917) 23 C.L.R. 199.


28. In United Furniture Trade Society v. Anthony Hordern & Sons [1904] A.R. 74, the dismissal of a union member partly because he was incompetent was sustained. Under the present Commonwealth, New South Wales and Queensland provisions the dismissal would not be upheld as 'mixed motives' are no longer a defence. But in Victoria, Western Australia and Tasmania, a dismissal partly for incompetence and partly for industrial activity could be sustained. A dismissal is penalised in those states if the employer discharges the employee 'by reason merely' of the employee's legitimate industrial activity. Since this was not the sole reason, the dismissal would be upheld. In South Australia, section 157 of the Industrial Conciliation and Arbitration Act, 1972 (S.A.) would produce a similar result. But see section 156 of the Industrial Conciliation and Arbitration Act, 1972 (S.A.).


37. Ibid.


43. As in the New South Wales, South Australian and Western Australian unlawful dismissal provisions.

44. As in the Queensland statute.

45. As in the federal Act.

46. (1972) 20 F.L.R. 353. In this case, the court's reluctance can only be partly attributed to the fact that the prosecutor did not seek the maximum penalty.


McPherson suggests that the rationale of the rule is probably the 'natural desire to free employees from the obligation of continuing to serve a doomed employer'. But it is also true in many cases of voluntary liquidation that the company's days are numbered. See e.g. Re Matthew Bros Ltd (In Liquidation) [1962] V.R. 262.

The statutory priority conferred upon certain wages and salaries in the payment of creditors in a winding up may not apply to damages for the wrongful dismissal constituted by the winding up order; these damages are compensation for the company's breach of contract in failing to give the appropriate notice; they are not wages and salary. See U.C.A. s. 292.


Re Oriental Bank Corpn; MacDowall's Case (1886) 32 Ch. D. 366.

Re Oriental Bank Corpn; MacDowall's Case (1886) 32 Ch. D. 366, p. 369.


[1905] 1 Ch. 357.

[1918] 1 K.B. 592.


Graham, p. 52.


17. U.C.A., s. 236 (1)(a).

18. [1941] Ch. 241.

19. Re Great Eastern Electric Company Limited [1941] Ch. 241, p. 244. See also Bankruptcy Act 1966 (Cth), s. 134 (1)(b); Ex parte Emmanuel; Re Batey (1881) 17 Ch.D. 35, C.A.; Clark v. Smith [1940] 1 K.B. 125. These references dealing with the powers of the trustee in bankruptcy to carry on the business of the bankrupt provide inferential support for the proposition in the text. Bankruptcy is a fairly close analogy to a voluntary winding up resolution since neither of itself terminates a contract of service. See Thomas v. Williams (1834) 1 AD. & E. 685; 110 E.R. 1369.

20. For the classic statement of the effect of this section, see Re Wiltshire Iron Co.; Ex parte Pearson (1868) 3 Ch. App. 443, pp. 446-447.

21. In Re General Rolling Stock Co. (Ltd), Chapman's Case (1866) L.R. 7 Eq. 346, Lord Romilly M.R. stated: 'The Winding-up Order ... is notice to all the world of the winding up'.

22. Carden v. Albert Palace Association (1886) 56 L.J. Ch. 166; Re A.I. Levy (Holdings) Ltd [1964] Ch. 19. But see Re Miles Aircraft Ltd; Ex parte Barclay's Bank Ltd [1948] Ch. 188.


27. Reid v. Explosives Co. Ltd (1887) 19 Q.B.D. 264, C.A.


32 Griffiths v. Secretary of State for Social Services [1974] Q.B. 468, p. 486. There, Lawson J. held that the contract of a titular managing director survived the appointment of a receiver and manager who was merely a supervisor of the company’s financial affairs: the role of the receiver and manager was not inconsistent with the continuance of the managing director’s contract.

33 [1940] A.C. 1014.


35 See Southern Foundries (1926) Ltd v. Shirlaw [1940] A.C. 701. In this case it was not the change of control itself but rather the action of the new controllers which terminated Shirlaw’s tenure.

36 Re R.S. Newman Ltd [1916] 2 Ch. 309.

37 Vol. 1, pp. 149-153.

38 See Re Oriental Bank Corpn, MacDowall’s Case (1886) 32 Ch. D. 366.
In which case the amount specified will be the measure of damages provided it represents a genuine pre-estimate of the damage. Dunlop Pneumatic Tyre Co. Ltd v. New Garage and Motor Co. Ltd [1915] A.C. 79, pp. 86-88 per Lord Dunedin; Arlesheim Ltd v. Werner (1958) S.A.S.R. 136; Imperial Tobacco Co. (of Great Britain and Ireland) Ltd v. Parsley [1936] 2 All E.R. 515, C.A. In Cromer v. Harry Richards' Tivoli Theatres Limited [1921] S.A.S.R. 325, the clause providing that £50 was to be paid to a dismissed theatrical artiste as compensation for cancellation of her contract was held to apply only where the termination was by notice. Since there, the written notice accompanying the payment of the £50 amounted to summary dismissal, the clause did not prevent the artiste from recovering additional damages.

Hadley v. Baxendale (1854) 9 Exch. 341.

Chaplin v. Hicks [1911] 2 K.B. 786; Manubens v. Leon [1919] 1 K.B. 208. Thus, an amount in respect of maintenance of the plaintiff as a witness while he awaited the trial was not included in the damages awarded in Norton v. Williamson (1884) 6 A.L.T. 101.


Baker v. Denkera Ashanti Mining Corpn Ltd (1903) 20 T.L.R. 37, N.P.

Baker v. Denkera Ashanti Mining Corpn Ltd (1903) 20 T.L.R. 37, N.P. is frequently cited for this proposition. It should be noted however that Grantham J. in that case was prepared to award damages which included two months' salary and the other expenses. Presumably His Lordship was referring to board and lodging which the defendant had contracted to provide. See also: Brazil v. Fletcher (1899) 15 W.N. (N.S.W.) 273.


In determining whether the wages have been earned much will depend upon the terms of the particular service contract. See e.g. Harris v. Foote's Bus Service Ltd (1963) 30 S.A.I.R. 259. See generally E.I. Sykes & H.J. Glasbeek, Labour Law in Australia (Sydney, 1972), pp. 79-86.
The standard award provision provides that an employee who is summarily dismissed for certain offences will be entitled to wages up to the date of the dismissal. See Metal Trades Award 1952, cl. 19, (1950) 73 C.A.R. 324, p. 442.

In theatrical and similar employment a dismissed employee may be awarded damages for loss of the opportunity to enhance his reputation and prestige, e.g. Marbe v. George Edwardes (Daly's Theatre) Ltd [1928] 1 K.B. 269; Clayton (Herbert) & Jack Waller Ltd v. Oliver [1930] A.C. 209; Withers v. General Theatre Corp'n Ltd [1933] 2 K.B. 536, C.A.


See too: Re Golomb and William Porter and Co. Ltd's Arbitration (1931) 144 L.T. 583, C.A. where it was held that a company manager was not entitled to recover damages for loss of prestige or publicity upon his dismissal, and Collier v. Sunday Referee Publishing Co. Ltd [1940] 2 K.B. 647 (chief sub-editor).


Maw v. Jones (1890) 25 Q.B.D. 107 which is authority for a proposition contrary to that expressed in the text, may be confined to its particular facts. There an apprentice was wrongfully dismissed and the court found that the jury should have been directed that they could take into account the difficulty a discharged apprentice would have in securing alternative employment. One of the principal reasons why the Court of Appeal in Hill v. C.A. Parsons & Co. Ltd [1972] Ch. 305, C.A. found that damages were an inadequate remedy for the plaintiff was that damages could not be awarded in respect of the difficulty of obtaining fresh employment. This case is discussed in Vol.1, pp. 157-159.

See Tomlinson v. London, Midland & Scottish Ry Co. [1944] 1 All E.R. 537, p. 539 per Cassells J. in the court of first instance. Since the dismissal in that case was not wrongful this view was clearly obiter dicta.


Brazil v. Fletcher (1899) 15 W.N. (N.S.W.) 273.
23 Oudot v. Soulie (1870) 1 A.J.R. 35.

24 See Chaplin v. Hicks [1911] 2 K.B. 786, C.A. where the plaintiff recovered damages for breach of a contract under which she had merely a chance of employment.


27 e.g. Manubens v. Leon [1919] 1 K.B. 208.

28 French v. Brookes (1830) 6 Bing. 354; 130 E.R. 1316 (travelling expenses for family contingent on service for three years; wrongful dismissal after seventeen months: held, damages not to include a sum for family's travelling expenses); Crocker v. Molyneux (1828) 3 C. & P. 470; 172 E.R. 506.

29 See Lavarack v. Woods of Colchester Ltd [1967] 1 Q.B. 278 where damages were not allowed for a voluntary benefit. In Hill v. C.A. Parsons & Co. Ltd [1972] Ch. 305, C.A., both Lord Denning M.R. and Sachs L.J. assumed that damages would not be an adequate remedy because the plaintiff would not be compensated for loss of pension benefits. Apparently it was important for him to serve till the end of his time as his pension depended on his average salary for his last three years. Thus it has been suggested that their conclusion rested on a special finding that the plaintiff's entitlement to a pension was purely within the employer's discretion and not a term of his contract.


In Chaplin v. Hicks [1911] 2 K.B. 786, p. 795, Fletcher Moulton L.J. affirmed the well recognised principle that 'damages, in order to be recoverable, must be such as arise out of the contract and are not extraneous to it'.

On the other hand, an American authority established that in an action for an alleged breach of contract by the employer, loss of benefits under a profit-sharing plan and group insurance scheme was a factor to be considered by the jury in assessing damages even though neither plan may have created any contractual rights in the employee: McLaughlin v. Union Leader Corp 116 A.2d 489, Kenison C.J.


For an example of a contract of service which made participation in the superannuation scheme a condition of employment, see Bull v. Pitney-Bowes Ltd [1967] 1 W.L.R. 273 noted in (1967) 30 M.L.R. 587.


Wigsell v. School for Indigent Blind (1882) 18 Q.B.D. 357, p. 304 per Field J.

See Acklam v. Sentinel Insurance Co. Ltd [1959] 2 Lloyd’s Rep. 683. In Savage v. British India Steam Navigation Company Limited (1930) 46 T.L.R. 294, p. 295, Wright J. commented: “If notice was given and the employment properly terminated before rights to pension or leave pay had accrued, those rights could not be taken into account in assessing damages”. Unfortunately it is not clear from the report what the exact nature of the pension scheme was in that case. But it would appear that the scheme conferred no rights upon an employee until his entitlement accrued. Since Wright J. would have been prepared to consider accrued pension rights in awarding damages, his view appears to be inconsistent with the proposition stated in the text.

Forty-two per cent of the schemes Baker surveyed paid only the members’ contributions on dismissal, while 45% of the schemes refunded the members’ contributions plus interest. See Baker, p. 27. Many of the schemes surveyed provided alternative forms of withdrawal benefit. The implication seems to be that a large number of schemes provided a refund of the members’ contributions where the dismissal was for misconduct, and a refund of the members’ contributions with interest when the dismissal was through no fault of the employee.

Ten per cent of the schemes Baker surveyed paid no withdrawal benefit on dismissal; seventeen of these schemes were contributory! See Baker, p. 28.

Thus, in Hartland v. General Exchange Bank Ltd (1886) 14 L.T. 863, C.A., the fact that the corporate employer was wound up shortly after the dismissal was submitted to the jury as a factor to be taken into account.

Reid v. Explosives Co. (1887) 19 Q.B.D. 264, C.A.


The plaintiff in Yetton v. Eastwoods Froy Ltd [1967] 1 W.L.R. 104 made some sixty-five applications and twenty-four personal approaches for other employment after his wrongful dismissal. Initially he set his sights for a position near his former salary level (£8,000-£10,000 per annum), but, over a period, he was forced to lower his aim to posts carrying a salary of £4,000 a year. He did not seek a position below that level, and he was still unemployed at the time of the trial, over twelve months after his dismissal. Blain J. found that the plaintiff's efforts to mitigate his damages were reasonable in the circumstances even though he thought the plaintiff could perhaps have lowered his sights a little sooner.


In Groves v. United Pacific Transport Pty Ltd 1965 Qd.R. 62, Gibbs J. held that damages for loss of earnings caused by physical injury were compensation for loss of earning capacity rather than compensation for loss of income. Thus His Honour concluded that the damages should be reduced by the amount of tax which the plaintiff would have paid if he had received the damages in the form of earnings. This reasoning is not directly material to damages for wrongful dismissal since there the damages can properly be described as compensation for loss of income.

In the United Kingdom, an award of damages for wrongful dismissal is calculated according to the principle in British Transport Commission v. Gourley [1956] A.C. 185. The amount of the damages is reduced by the tax payable had the plaintiff received the damages as wages or salary rather than compensation for loss of wages or salary. The Gourley principle was applied to damages for wrongful dismissal in Parsons v. B.N.M. Laboratories [1964] 1 Q.B. 95 and Bold v. Brough, Nicholson & Hall Ltd [1964] 1 W.L.R. 201.

Quaere whether damages for wrongful dismissal fall within the category of lump sum compensation paid under compulsion of law in consequence of the termination of employment. If they do, it may be argued that the damages would be taxable under section 26 (d) of the Income Tax Assessment Act 1936-1974 (Cth).

Conciliation and Arbitration Act 1904-1973 (Cth), s. 119; Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 97 (2); Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 93 (1); Labour and Industry Act 1958 (Vic.), s. 200; Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 154; Industrial Arbitration Act, 1912-1973 (W.A.), s. 99 (1) and (2); Wages Boards Act 1920 (Tas.), s. 47 (1).

Conciliation and Arbitration Act 1904-1973 (Cth), s. 119 (3); Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 97 (2); Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 93 (2); Labour and Industry Act 1958 (Vic.), s. 199; Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 171 (1); Industrial Arbitration Act, 1912-1973 (W.A.), s. 99 (3)(a); Wages Boards Act 1920 (Tas.), s. 47 (2).


A quantum meruit claim is useful where the main employment agreement is too uncertain to create legal relations (Stinchcombe v. Thomas [1957] V.R. 509), where the contract is indivisible and unperformed (Steele v. Tardiani (1946) 72 C.L.R. 386), or where the employee wishes to avoid a restrictive covenant in the contract of service (General Billposting Co. Ltd v. Atkinson [1909] A.C. 118).


Fewings v. Tisdal (1847) 1 Exch. 295; 145 E.R. 125.

Automatic Fire Sprinklers Pty Ltd v. Watson (1946) 72 C.L.R. 435, p. 451 per Latham C.J.


Normally the employee's obligation is to perform the work assigned by his employer. See Automatic Fire Sprinklers Pty Ltd v. Watson (1946) 72 C.L.R. 435.


In New South Wales, there has been a recent trend towards revival of declaratory relief. Street J. threw some of the traditional fetters aside in Sutherland Shire Council v. Leyendekkers [1970] 1 N.S.W.R. 356: the jurisdiction to grant a declaration should not be restricted by any preconceived reluctance to allow this form of relief; the power to grant declarations is granted in wide and general terms (See Equity Act, 1901 (N.S.W.), s. 10) but it must be exercised with a proper sense of responsibility; the availability of consequential relief is a factor to be taken into account; the prospect that the remedy will resolve the dispute and the existence of another tribunal competent to hear the dispute are also factors to be considered but they are not decisive; the key factor is the utility of the remedy.

In some cases a declaration may be available at the suit of one party but not the other; there is no inherent mutuality in the jurisdiction.

These views have been approved on a number of occasions. See e.g.: D.C. Wagemaker & Sons Pty Ltd v. Commonwealth Development Bank of Australia (1970) 91 W.N. (N.S.W.) 617; Salmar Holdings Pty Ltd v. Hornsby Shire Council [1971] 1 N.S.W.L.R. 192. But there appears to be no support for the view that declaratory relief will be available in ordinary wrongful dismissal cases.


(1890) 45 Ch. D. 430.


Rigby v. Connol (1880) 14 Ch. D. 482; Hogan v. Tumut Shire Council (1934) 54 S.R. (N.S.W.) 284; J.C. Williamson Ltd v. Lukey (1931) 45 C.L.R. 282, p. 293 per Starke J.

See Young v. Ladies' Imperial Club Ltd [1920] 2 K.B. 522 where an injunction was granted against expulsion from a club.


See Baker v. Gough [1963] N.S.W.R. 1345, p. 1365 where Jacobs J. stated: 'where necessary an injunction should be granted even though the relationship be a personal one'.

88 See Treitel, p. 842.

89 See Treitel, p. 843.


91 [1972] Ch. 305, C.A. (hereinafter referred to as "Hill's Case").

92 (1852) 1 De G.M. & G. 604; 42 E.R. 687.


95 Hill's Case [1972] Ch. 305, p. 316.


97 c. 72.

98 The Industrial Relations Act 1971, c. 72 simply provided that a tribunal may recommend re-engagement or, if such a recommendation is not complied with, grant compensation: s. 106 (4).

99 [1972] Ch. 305, C.A.


3 [1972] Ch. 305.

4 Hill's Case [1972] Ch. 305, p. 324.

5 Hill's Case [1972] Ch. 305, p. 314 per Lord Denning M.R. and p. 320 per Sachs L.J.

6 [1972] Ch. 305.

7 See Conciliation and Arbitration Act 1904-1973 (Cth), s. 4.

8 ibid.
9 See paragraph (k) of the definition of "industrial matters" in section 4 of the Conciliation and Arbitration Act 1904-1973 (Cth).

10 (1958) 98 C.L.R. 586 (hereinafter referred to as "Dobb's Case").

11 Dobb's Case (1958) 98 C.L.R. 586, p. 598.

12 ibid.

13 Dobb's Case (1958) 98 C.L.R. 586, p. 598 (emphasis added).

14 (1958) 98 C.L.R. 586.

15 (1973) 47 A.L.J.R. 724 (hereinafter referred to as "Re Association of Professional Engineers").

16 ibid.


18 See Vol. 1, pp. 164-166.


20 (1958) 98 C.L.R. 586.

21 ibid.


23 (1952) 86 C.L.R. 283.

24 Appendix 4, Vol. 2, pp. 63-64.

25 within para. (k) of the statutory definition of "industrial matters". See Conciliation and Arbitration Act 1904-1973 (Cth), s. 4.

26 Re Association of Professional Engineers (1973) 47 A.L.J.R. 724, p. 731.

27 (1958) 98 C.L.R. 586.


The majority on this point was Barwick C.J. and Menzies and Stephen JJ.

The majority relied upon a passage from Mr Justice Menzies's judgment in R. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board (No. 2) (1965) 113 C.L.R. 228, p. 256 as support for this conclusion.


R. v. Gough; Ex parte Meat and Allied Trades Federation of Australia (1969) 122 C.L.R. 237, pp. 242, 244.


(1973) 47 A.L.J.R. 724, p. 729. Although His Honour suggested that such a clause would not involve an exercise of judicial power, he found that a dispute over the clause would not relate to an industrial matter since it sought to enlarge the jurisdiction of the Commission.


Ampol Petroleum (Queensland) Pty Ltd v. Seamen's Union of Australia (1970) 134 C.A.R. 142 (employee justifiably dismissed for being under the influence of liquor so as to be incapable of proper performance of his work); Australasian Meat Industry Employees' Union v. The Angliss Group (1970) 132 C.A.R. 631 (employee justifiably dismissed for failure to perform her duties in a proper manner); Australian Meat Industry Employees' Union and Newport Freezing Works Pty Ltd 1970 A.I.L.R. Rep. 452 (employee dismissed for deliberate absence from employment in defiance of instructions of works manager and for his action in deliberately misleading a supervisor concerning a temporary job which he had taken and the amount of notice which he was obliged to give in respect thereof: held dismissal justified; reinstatement refused); Australasian Meat Industry Employees' Union v. Thomas Borthwick & Sons (Australasia) Ltd (1968) 122 C.A.R. 10
(employee justifiably dismissed for his having deliberately misled his foreman as to the severity of an ailment in order to obtain permission to leave the works so as to be able to attend a race meeting that afternoon); Feidler Builders Pty Ltd and A.S.C. & J. 1971 A.I.L.R. Rep. 914 (employee justifiably dismissed for poor performance in his work and insubordination, though there were faults on both sides); New South Wales Dept of Public Works v. Australian Builders Labourers' Federation (1968) 125 C.A.R. 435 (employee justifiably dismissed for disobeying a lawful instruction to stop throwing pieces of brick on a building site after previous warnings); New South Wales Dept. of Public Works v. Australian Builders Labourers' Federation (1968) 126 C.A.R. 333 (employees justifiably dismissed for refusal to comply with instructions relating to a check-out procedure); Transport Workers' Union of Australia v. Department of Supply and Development (1949) 64 C.A.R. 103 (employee justifiably dismissed for breach of trust).

There are English authorities to the effect that an employer wrongfully repudiates the contract of service if he makes it impossible for the contract to be continued; actual dismissal is not required (Driscoll v. Australian Royal Mail Steam Navigation Co. (1859) 1 F. & F. 458, N.P.; Re Ruben Bronze and Metal Co. v. Vos [1918] 1 K.B. 315). It is to be hoped that the Australian Conciliation and Arbitration Commission will take cognisance of these should a similar situation arise.


These are discussed in Vol. 1, pp. 132-141.


See e.g. North Australian Workers' Union v. Groote Eylandt Mining Co. Ltd (1970) 132 C.A.R. 407 (where an employee dismissed for absenting himself from duty without leave in order to attend a union meeting, and for making a derogatory speech about his employer in a public bar, was...
successful in obtaining a direction that he be reinstated); Australian Iron and Steel Pty Ltd v. Federated Ironworkers Association of Australia (1968) 124 C.A.R. 9 (where the employee was lawfully dismissed for refusal to obey a lawful instruction. He explained that his refusal was caused by the fact that he was engaged as a union shop steward on union business involving a complaint with respect to a manning scale issue. It appeared that the employee took the action which resulted in his dismissal through lack of knowledge and a misunderstanding which the Commission attributed to a language handicap. As the dismissal was found to be hasty, harsh and unjustified a direction for re-employment was made). See also: Reinstatement of employee at Bowater Scott (Australia) Ltd 1971 A.I.L.R. Rep. 849 and Trico Coy Pty Ltd v. Sheet Metal Working, Agricultural Implement and Stovemaking Industrial Union of Australia (1969) 139 C.A.R. 317 where the Conciliation and Arbitration Commission recommended that an employee dismissed for refusal to obey a lawful instruction be reinstated because his conduct was attributable to feelings of insecurity.


54. (1948) 61 C.A.R. 86.


59. ibid.
Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 20e.

See Industrial Arbitration Act, 1940, as amended (N.S.W.), ss. 30A, 30B.

ibid.

e.g.: Re Dismissal of Union Delegates at Homebush Abattoir 1966 A.R. 371 where it was held that the employer had abused its right of dismissal for misconduct as it appeared that the employees dismissed were not deliberately attempting to obstruct management representatives in the performance of their duties; Re Dispute - Bondi Icebergs Club & Gillespie 1971 A.R. 72 where the Industrial Commission of N.S.W. (Sheehy J.) ordered the reinstatement of an employee who had been dismissed for alleged dishonesty since it had not been shown that the employee was involved in the discrepancy in certain bar trading records. See also Dispute - Dismissal of Fitters by Broken Hill Pty Co. Ltd 1969 A.R. 399 where Kelleher J. ordered the reinstatement of two fitters who had been dismissed for refusing to continue their work. It appeared that the fitters' action was taken in protest over what they considered was a safety issue. See too Re Gas Makers and (Country) Conciliation Committee [1937] A.R. 60 where Webb J. commented that an employee, dismissed because his employer gave way to pressure from an insurance company which bore the cost of a claim for workers' compensation by the employee, would have a valid claim for reinstatement.

Re Bower and Sydney County Council (No. 2) 1951 A.R. 635; Ex parte Casey; Re Sydney County Council (1952) 69 W.N. (N.S.W.) 183; Merritt v. Cobar District Hospital 1973 Industrial Arbitration Service, Current Review 138 where the employee's union deliberately chose not to attend a compulsory conference held before the appropriate conciliation committee. The conference was convened to consider whether the employee should be reinstated in her employment. At the conference the employee acted, and was apparently treated as, a party principal. When the conciliation committee declined to order her reinstatement, she appealed to the Commission.

On appeal, it was argued that the appellant was not entitled to be a party to the proceedings before the committee and accordingly was not entitled to appeal to the Commission from the committee's decision. Because of the special circumstances of the case, particularly the union's attitude, the Industrial Commission of New South Wales in Court Session rejected both these submissions. Although the appellant may not have been entitled to make a formal application for reinstatement in accordance with section 74 of the Industrial Arbitration Act, 1940, as amended (N.S.W.), she was clearly, on the evidence, a party to the proceedings before the conciliation committee. She was also a party 'affected by an order' within section 24 (8)(a) so that she was entitled to appeal to the Commission.

Merritt v. Cobar District Hospital may be regarded as an exceptional case. It carries no promise that individual employees will be allowed ready access to the reinstatement jurisdiction exercised by tribunals in New South Wales.
See: Re Steel Works Employees (Broken Hill Pty Co. Ltd) and Iron and Steel Works Employees (Australian Iron & Steel Ltd - Port Kembla) Awards (No. 1) 1962 A.R. 334 and Industrial Arbitration Conciliation Act, 1940, as amended (N.S.W.), s. 38.


See e.g.: Re Sagar & Carney & Broken Hill Pty Co. Ltd 1965 A.R. 53; Re Whitby & Australian Fertilizers Ltd 1969 A.R. 323.


Re Manson and St Vincent's Hospital, Sydney (No. 2) 1963 A.R. 634.


See Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 5 (c).


1957 A.R. 273.


Re Municipal Employees, Greater Newcastle Salaried Division Award (Re Doberer) [1949] A.R. 686.

Re Government Railways and Tramways (Officers*) Conciliation Committee; Ex parte Winsor [1929] A.R. 235; Re Fitzpatrick and the Council of the Municipality of Bankstown 1954 A.R. 573; Re Reinstatement of an Employee of Mid-Coast Co-operative Meat Society Ltd [1946] A.R. 313. In Re Australian Iron & Steel Ltd (Re Parker) [1946] A.R. 1, the Industrial Commission of N.S.W. declared that it will intervene in every case in which its intervention is necessary to ensure that that is done *which the Commission regards as right and just in the circumstances*. This policy has not been followed consistently in subsequent decisions.


See Re Confectioners (State) Conciliation Committee [1936] A.R. 447 Ferguson J. suggested that 'the problem of the future' should not dissuade the Commission from ordering reinstatement where it was warranted. But more recently Sheldon J. declared that the Commission should consider the likely practical outcome of an order for reinstatement: Re Loty and Holloway and A.W.U. 1971 A.R. 95.


Re Municipal Employees, Greater Newcastle Salaried Division Award (Re Doberer) [1949] A.R. 686. A genuine conscientious belief formed since the employee was employed might also excuse disobedience. See Re Municipal Employees, Greater Newcastle (Salaried Division) Award (Re Davidson) [1949] A.R. 868. Compare Re Municipal Employees, Greater Newcastle (Wages Division) Award (Re Wallace) [1949] A.R. 868, p. 873.

Re Dispute Between Illawarra Deputies and Shotfirers Association and Metropolitan Coal Co. Pty Ltd [1947] A.R. 182 (honest and reasonable belief that work was to be done by members of another union because of demarcation agreement).


See e.g. Western Suburbs District Ambulance Committee v. Tipping 1957 A.R. 273. But the fact that reasons for dismissal are not given does not of itself justify the Commission interfering with management’s decision. See J. Bruinsel and Concrete Constructions Pty Limited 5 July 1956 (not reported).

See e.g. Federated Ironworkers’ Association of Australia, New South Wales Division, and Australian Iron and Steel Pty Ltd 1974 A.I.L.R. Rep. 312.


Re Manson and St Vincent's Hospital, Sydney (No. 2) 1963 A.R. 634.

See Re Dispute - Port Kembla Golf Club Re Casual Cleaners 1971 A.R. 235 where three female casual cleaners, two of whom had been employed by the club over periods of thirteen and six years respectively, were dismissed when the club decided to have its cleaning done by a firm of contract cleaners: Held, though there may have been some hardship for the three employees, reinstatement was not warranted. A reinstatement order will not be granted simply because the employee dismissed had served the employer for a longer period than some of the employees retained. See: Re Dispute Between Amalgamated Hospitals, Homes and Laboratories Employees' Association (N.S.W.) and Board of Grafton Base Hospital (Re Dismissal of Wardsman) [1947] A.R. 86; Evans Deakin Industries Limited v. A.E.U. 1969 A.I.L.R. Rep. 444.

Re Municipal and Shire Council Employees' Conciliation Committee [1938] A.R. 749. In the Commonwealth sphere, an employee who was dismissed with the prescribed period of notice because of his membership in the Communist Party was refused reinstatement (Association of Architects v. Olympic Cables Ltd (1948) 61 C.A.R. 86). It may well be, therefore, that the New South Wales authority would not be confined to the situation where the employer body was comprised of elected political officials.


See Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 11.


See paragraph (d) of the definition of 'industrial matters' in section 5 of the Industrial Conciliation and Arbitration Act, 1961-1974 (Qld).

(1968) 69 Q.I.G. 36.


paragraph (c) of section 5 of the Industrial Conciliation and Arbitration Act, 1961-1974 (Qld).

[1966] Qd. R. 245 (hereinafter referred to as the 'Mount Isa Mines Case').
The case arose out of an industrial dispute which occurred when the company, allegedly at the behest of the A.W.U., refused to re-engage forty-five employees when work resumed after a strike. It was suggested that these employees had fallen from favour with the union during the course of the strike. For this reason, it was alleged, the union pressed the company not to re-employ the applicants. When the application came first before Commissioner Taylor he ordered the company to reinstate the forty-five employees because the applicants had been victimised. On appeal to the Industrial Court, Hanger J. held that even if the employer had discriminated against the applicants this was not sufficient ground for ordering reinstatement. The subsequent proceedings in the Supreme Court substantially endorsed this reasoning. See: Mount Isa Mines Ltd Dispute 1965 A.I.L.R. Rep. 336; Mount Isa Mines Limited Award 1965 A.I.L.R. Rep. 429; Mount Isa Mines Case [1966] Qd. R. 245.

In Mount Isa Mines Limited Award 1965 A.I.L.R. Rep. 429, Hanger J., President of the Industrial Court, expressed the view that no attempt to state all that is included in the phrase 'public interests' could succeed. His Honour thought that all that can be done is to state as the occasion arises whether any particular matter falls within the phrase.

See Australasian Meat Industry Union of Employees (Queensland Branch) v. J.C. Hutton Pty Ltd (1971) 77 Q.I.G. 45 where Commissioner Clarke decided that he had jurisdiction to order reinstatement of an employee whose dismissal, although lawful, was harsh, unjust or unfair. However, in the particular circumstances of the case he refused to grant reinstatement because the applicant was guilty of a technical assault upon a foreman.


In Australasian Meat Industry Union of Employees (Queensland Branch) v. J.C. Hutton Pty Ltd (1971) 77 Q.I.G. 45 Commissioner Clarke, after referring to Re Fitzpatrick and the Council of the Municipality of Bankstown 1954 A.R. 573, stated: 'I am of the opinion that the same principles must be applied under the Queensland Act'.

The tribunal empowered to order reinstatement will normally be the Industrial Conciliation and Arbitration Commission. One thing is clear: an Industrial Magistrate does not have this jurisdiction. See: Australian Workers' Union v. Fairymead Sugar Co. (1955) 49 Q.J.R. 113 and Federated Engine Drivers' and Firemen's Association v. Tableland Tin Dredging No Liability (1948) 42 Q.J.R. 79.

In *R. v. Olsson* (1971) 1 S.A.S.R. 453, section 26 (2) was construed as merely a useful adjunct to the Commission's powers of mediation in relation to 'industrial matters'. The Full Bench also held that jurisdiction under the sub-section was contingent upon the existence of an industrial dispute.

The South Australian legislature acted promptly in response to this interpretation. Section 26 (2) was repealed by section 5 (2) of the Industrial Conciliation and Arbitration Act, 1972 (S.A.). The same Act introduced the present section 15 (1)(e).

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22 Minchin and Gorman and St Judes Child Care Centre (1973) 28 I.I.B. 578, p. 585.

23 Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 15 (1)(e).

24 Ibid.


26 Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 15 (1)(e)


1974 A.I.L.R. Rep. 593. In that case the respondent decided upon an immediate and unilateral implementation of a general retirement policy. In pursuance of this policy it dismissed the hospital’s matron with due notice. Olsson J. considered that the applicant’s age and the industrial realities of the situation made it most unlikely that she would be able to secure another position of equivalent status and salary, at least in the short term. His Honour also pointed out that, as a result of the dismissal, the applicant would incur the substantial expense of maintaining a superannuation policy on her life; prior to the discharge the respondent paid two-thirds of the premium on this policy. These personal and financial hardships which fell upon the applicant as an individual as a result of the dismissal convinced Olsson J. that she had not received ‘industrial fair play’. Accordingly, the application under section 15 (1)(e) of the Industrial Conciliation and Arbitration Act, 1972 (S.A.) was granted.

Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 15 (1)(e).

Re Myer S.A. Stores Ltd 1973 A.I.L.R. Rep. 249 per Bleby J.


ibid.

(1972) 52 W.A.I.G. 892.

Industrial Arbitration Act Amendment Act, 1973 (W.A.), s. 36.


e.g.: Western Australian Municipal Road Boards Parks and Race Course Employees Union of Workers, Perth and Town of Canning (1972) 52 W.A.I.G. 245; Transport Workers Union and Broken Hill Proprietary Co. Ltd (Re Dismissal of Shop Steward Anthony) (1965) 45 W.A.I.G. 43.


ibid.

Commissioner E.R. Kelly, in effect, found that the employer should not be allowed to exercise his ordinary right of dismissal against certain employees who were involved in a strike in protest against Morris's dismissal.

See e.g.: Transport Workers Union and Broken Hill Proprietary Co. Ltd (Re Dismissal of Shop Steward Anthony) (1965) 45 W.A.I.G. 43; Meat Industry Employees Union and Geraldton Meat Exports Pty Ltd (1969) 49 W.A.I.G. 977.

See e.g.: Transport Workers Union and Broken Hill Proprietary Co. Ltd (Re Dismissal of Shop Steward Anthony) (1965) 45 W.A.I.G. 43; Western Australian Municipal Road Boards Parks and Race Course Employees Union of Workers, Perth and Town of Canning (1972) 52 W.A.I.G. 245.


Mt Newman Mining Co. Pty Ltd v. Federated Engine Drivers and Firemen's Union of Workers of Western Australia (1972) 52 W.A.I.G. 75.


Wages Boards Act 1920 (Tas.), ss. 77, 78.

Wages Boards Act 1920 (Tas.), ss. 77, 78.


[1959] Tas. S.R. 118 (hereinafter referred to as 'Austral Bronze')


ibid.


Conciliation and Arbitration Act 1904-1973 (Cth), s. 5.

The section could be upheld upon the same reasoning which led the High Court in Jumbunna Coal Mine, No Liability v. Victorian Coal Miners' Association (1908) 6 C.L.R. 309 to sustain the provisions of the Commonwealth Conciliation and Arbitration Act 1904 relating to the incorporation of associations of employers and employees: unless there was power to safeguard trade unionists in the pursuit of legitimate objectives, the system could not function effectively.


ibid.


Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 101 (5).


An employer is not excused from compliance with a reinstatement order under Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 95 simply because the dismissal was not wrongful: Sheridan v. Central District Ambulance Committee [1928] A.R. 108.

See Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch v. Manx Bricks Pty Ltd (1970) 50 W.A.I.G. 1143. See also Building Trades Association of Unions of Western Australia, Australian Builders' Labourers' Federated Union, Western Australian Branch v. N.J. Hurll & Co. (Vic.) Pty Ltd (1972) 52 W.A.I.G. 892.


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 (1972) 52 W.A.I.G. 892, the Industrial Commission decided that section 61 (2)(d) specified the sole grounds on which reinstatement could be ordered. Now that section 61 (2)(d) is repealed it may well be that there is no jurisdiction in Western Australia to award reinstatement to employees unlawfully dismissed. On the other hand, it may now be possible to argue that the legislature by repealing section 61 (2)(d) soon after the decision in the 1972 case intended to displace the maxim expressio unius est exclusio alterius. With the express reference to reinstatement removed from s. 61 perhaps reinstatement is impliedly available under the general jurisdiction to determine disputes over industrial matters.

Reinstatement is not mentioned in the victimisation provisions in the Wages Boards Act 1920 (Tas.) or the Labour and Industry Act 1958 (Vic.) and on general principles it would not seem to be available in these cases. See: Austral Bronze Co. Pty Ltd v. Non-Ferrous (Metal Strip) Wages Board [1959] Tas. S.R. 118 and R. v. Industrial Appeals Court; Ex parte Frieze [1963] V.R. 709, p. 712 per Sholl J. But in Tasmania see Wages Boards Act 1920 (Tas.), s. 77.

Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 156 (4). Section 157 of that Act has no similar provision.

This is the implication from Australian Workers' Union of Employees v. Ambrose (1938) 32 Q.J.P. 6, a decision upon a similar provision in the Industrial Conciliation and Arbitration Acts, 1932 to 1936 (Q1d).
See Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 156 (4).


CHAPTER 8  REDUNDANCY


3. *Jobless total is not rising - Whitlam* The Australian 3 July 1974, p. 11.


8. See: Conciliation and Arbitration Act 1904-1973 (Cth), s. 4; Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 5; Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 5; Labour and Industry Act 1958 (Vic.), s. 30; Industrial Arbitration Act, 1912-1973 (W.A.), s. 6; Wages Boards Act 1920 (Tas.), s. 23; Industrial Code, 1967-1972 (S.A.), s. 5 and Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 6.

9. South Australia is a clear exception to this statement. See Industrial Code, 1967-1972 (S.A.), s. 5 and Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 6. Queensland is a possible exception. See Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 5(c).


11. As mentioned earlier, in some jurisdictions the industrial tribunals have power to deal with applications for reinstatement. Reinstatement involves the determination of a matter which falls outside the scope of an existing employment relationship. Nevertheless, it appears that the mere existence of a specific power to determine reinstatement applications does not necessarily mean that all disputes arising in the post-employment situation are within the jurisdiction of the tribunals: R. v. Flight Crew Officers' Industrial Tribunal; Ex parte Australian Federation of Air Pilots (1971) 127 C.L.R. 11, p. 20.


Fisher, p. 216.


Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 5.

ibid.

Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 5.

R. v. Kelly; Ex parte The State of Victoria (1950) 81 C.L.R. 64; Re Association of Professional Engineers; Ex parte City of Perth (1973) 47 A.I.J.R. 724.

R. v. Findlay; Ex parte Commonwealth Steamship Owners' Association (1953) 90 C.L.R. 621.


In Australasian Coal and Shale Employees' Federation v. J.A. Brown and Abermain Seaham Collieries Ltd (1940) 43 C.A.R. 757, Mr Justice Drake-Brockman, while recognising management's complete and unfettered right in the free selection of those employees who would man new mechanical units, varied an award by providing that the reduction in hands should be done in order of seniority.
28. In Clerks (Oil Companies) Award 1966 and Federated Clerks Union of Australia v. Golden Fleece Petroleum Ltd (1968) 122 C.A.R. 339, the Commonwealth Conciliation and Arbitration Commission held that a provision which would give employees permanent employment subject to certain qualifications would be unduly restrictive upon the management of the enterprise.


30. In Clancy v. Butchers Shop Employees Union (1904) 1 C.L.R. 181, pp. 206-207, O'Connor J. expressed the view that an industrial tribunal should not prevent management from introducing a labour-saving device or apparatus.

31. Tool Equipment Co. Pty Ltd v. Amalgamated Engineering Union and Australasian Society of Engineers 1970 A.T.L.R. Rep. 537 where a Commonwealth Conciliation and Arbitration Commissioner upheld a management direction that the operation of two semi-automatic milling machines be carried out by one man; Re Dispute - Stamping Skins for Identification at Homebush Abattoir 1966 A.R. 29 where management reduced the number of employees working in a particular section of its business and the Industrial Commission refused to interfere with the decision.


33. Re Steel Works Employees and Engine Drivers etc. (Australian Iron and Steel Ltd, Port Kembla) Awards 1956 A.R. 855, p. 860 per Richards J.


35. The Tribunal is set up by section 88J of the Conciliation and Arbitration Act 1904-1973 (Cth) for the purposes of Part IIIA of that Act. By section 88U (1)(b) the Tribunal is empowered to consider and determine industrial questions in so far as the industrial matters concerned relate to the employment of flight crew officers employed by specified airlines. It is also given power "to prevent or settle by conciliation or arbitration interstate industrial disputes": Conciliation and Arbitration Act 1904-1973 (Cth), s. 88U (1)(c). In this respect the jurisdiction of the Tribunal is broadly similar to that of the Australian Conciliation and Arbitration Commission. The main difference is that an interstate industrial dispute is not necessary to attract the Tribunal's jurisdiction under s. 88U (1)(b).


The factors included: the specialised skill of helicopter pilots; the availability at that time of alternative employment opportunities to most of the pilots even if not on the same standard as their previous employment; the career and security expectations of the pilots in the employ of Ansett-A.N.A.; the short notice given on the termination of their employment; the negative attitude of the Federation in not securing employment for the retrenched pilots; and the general practice prevailing in this industry in other countries. See Australian Federation of Air Pilots v. Ansett-A.N.A. (1968) 122 C.A.R. 951, p. 953.


R. v. Flight Crew Officers Industrial Tribunal; Ex parte Australian Federation of Air Pilots (1971) 127 C.L.R. 11.
Commissioner Clarkson reached a similar conclusion in Federated Ironworkers' Association and John Lysaght (Australia) Ltd 1972 A.I.L.R. Rep. 672.


The factors included: the length of notice given to employees, their periods of service with the company, their ages, whether alternative employment is available in the area, what compensation is already payable to them from existing schemes, the loss of long service and other payments, loss of seniority and security of employment, loss of wages, relocation expenses, and, in some cases, the reasons for the retrenchments.

For example: how far should redundancy compensation stem directly from one employer only? Should an employee be expected to leave his existing area or environment? Should the ease or difficulty of obtaining other employment influence redundancy compensation? How can the relative security of any new employment be calculated, particularly where customs of last in, first off operate? Would the prospect
of substantial severance payments in the future inhibit or endanger employment opportunities with weaker employers? Should severance pay be computed at a flat rate for all employees or at the going rate for each employee? See Appeal by Federated Ironworkers' Association of Australia 1973 Industrial Arbitration Service, Current Review 73, p. 75.


Clerks (Oil Companies) Award 1966 and Federated Clerks' Union of Australia v. Golden Fleece Petroleum Ltd (1968) 122 C.A.R. 339 (hereinafter referred to as the 'Oil Companies Case').


(1971) 26 I.I.B. 2056 (hereinafter referred to as the 'Qantas Case').


ibid.

ibid.

Professor Isaac did, however, concede that the adequacy of provisions for retraining and transfer was a material consideration in calculating severance pay retrospectively. When workers faced imminent retrenchment and their employer had failed to give reasonable notice or to offer retraining or internal transfers, then it might be appropriate to add a 'penalty' to the re-adjustment allowance: Qantas Case (1971) 26 I.I.B. 2056, p. 2060.


For some navigators this re-adjustment allowance would be reduced. Thus, navigators who were near retirement at the time of their displacement would only be entitled to a maximum of 150% of the pay they would have received had they continued as navigators until retirement. If this were not included in the recommendation a navigator displaced shortly before retirement would be better off than he would have been if he were allowed to work until retirement.

Further, those navigators who accepted alternative employment with the airline might not receive the full allowance. If the new
position gave the navigator more than 75% of his former salary his compensation would be reduced according to a graduated scale. If, in the new classification, he earned 100% or more of his former salary he would not qualify for any allowance.


82 A hesitant attitude to problems arising from technologically-induced redundancy was again evident in the Queensland Conciliation and Arbitration Commission's reaction to a union claim to vary the Clerks and Switch-Board Attendants Award in 1968. See The Australian 13 November 1968 and Fisher, p. 219.

83 See: Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 88G and Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 82.

84 While the obligation referred to in section 88G (2)(a) is a general obligation imposed on all employers, it must be exercised by each individual employer as the occasion arises: Re Brickmakers etc. (State) and Other Conciliation Committees 1965 A.R. 490.

85 Section 82 of the Industrial Conciliation and Arbitration Act, 1972 (S.A.) only applies to the obligations, duties and responsibilities of any employer upon the introduction or proposed introduction of automation or other like technological changes by that employer.

86 Section 88G of the Industrial Arbitration Act, 1940, as amended (N.S.W.) obliges the relevant tribunal to make the following provisions regarding the consequences of an employer's failure to give the period of notice specified by the tribunal:

(1) that the ordinary rate of pay shall be paid for a specified period; and

(2) that the period of notice of termination of employment shall be deemed to be service with the employer for the purposes of long service leave legislation.

87 Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 88G (2)(b).
88. Re Brickmakers etc. (State) and Other Conciliation Committees 1965 A.R. 490.

89. Re Brickmakers etc. (State) and Other Conciliation Committees 1965 A.R. 490. In that case the qualification periods prescribed were 12 months.

90. Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 88 (2)(c).

91. See Re Brickmakers etc. (State) and Other Conciliation Committees 1965 A.R. 490. Compare section 82 of the Industrial Conciliation and Arbitration Act, 1972 (S.A.).

92. Re Brickmakers etc. (State) and Other Conciliation Committees 1965 A.R. 490.

93. In Tasmania, the Wages Boards Act 1920 empowers a wages board to make an interim determination in relation to employees engaged in a new process or on a new machine that is introduced in a trade. See s. 25B. But this provision does not purport to regulate redundancy caused by the introduction of the new process or machine; it merely gives a wages board power to prescribe the working conditions of employees engaged in the new process or on the new machine.


The typical stand-down clause provides that an employer is entitled to deduct payment for any day an employee cannot be usefully employed because of any strike or through any breakdown in machinery or any stoppage of work by any cause for which the employer cannot be held responsible. In some awards there is an express stand-down clause; in others there is a provision that employees are to work shorter hours, or that turns are to be observed in employment during slack times. See, for example, Federated Clothing and Allied Trades Union v. Andrews (1925) 22 C.A.R. 913; Amalgamated Clothing and Allied Trades Union of Australia v. Amster (1925) 21 C.A.R. 48.
The approach of industrial tribunals to these clauses reflects their general policy of trying to ensure that the weekly worker obtains a full weekly wage during his period of employment: Federated Clothing and Allied Trades Union v. Andrews (1925) 22 C.A.R. 913, p. 914.


Poullars Pty Ltd v. Amalgamated Clothing and Allied Trades Union of Australia (1938) A.R. 640.


See A.W.U. v. City of West Torrens 1972 A.I.L.R. Rep. 699 where Industrial Magistrate K.D. Hilton found that an employer who had sufficient reserve stocks of liquid fuel for its operations, had improperly stood down employees because of a strike at a refinery which might have caused liquid fuel to be in short supply.

Thus, an employer who laid off workers during a periodic maintenance of plant was not entitled to deduct their wages for the stand-down period because plant maintenance was a normal incident of the industry in question: Application to vary B.H.P. Employees Award 1972 A.I.L.R. Rep. 679.

Again, an employer who failed to provide adequate drainage facilities with the result that he was unable to operate his machines was not allowed to rely upon the stand-down clause: Amalgamated Engineering Union v. Metal Trades Employers' Association (1942) 47 C.A.R. 45.


17. Federated Clothing and Allied Trades Union v. Andrews (1923) 22 C.A.R. 913. For example, an employer is not justified in introducing a regular system of working a four day week upon the pretence that he was, in fact, operating on a five day week with a stand-down on one day of each week: Re Textile Industry (Woollen and Worsted Section) Award 1950 (1963) 5 F.L.R. 328.

18. In its pristine form this principle held that, where work was not available for some employees because of a strike by other employees in the same plant who were members of the same union, then the wages of the men stood down could be deducted by the employer since these men were collectively responsible with the strikers for the stoppage. See C.P. Mills, *Legislation and Decisions Affecting Industrial Relations* (1972) 14 Jou. of Ind. Rel. 195, p. 197.


24. ibid.


28. See the new provision inserted in the Shop Assistants Award (Qld) on 1 July 1970, 1970 A.I.L.R. Rep. 286. See also Federated Liquor and Allied Industries Employees* Union of Australia v. Clovelly Hotel (1961) 98 C.A.R. 813 where an employer was directed to reinstate an employee retrenched in breach of an award provision giving preference to unionists at the point of retrenchment. See too clause 5 of Foreman Stevedores* Award (1961) 98 C.A.R. 924, p. 931.


2. Share warrants are the only exception to the proposition in the text but the issue of share warrants is now prohibited. See U.C.A. s. 57. For a brief note on share warrants, see Ford, Principles of Company Law (Sydney, 1974), p. 204. For the statutory provisions upon membership, see U.C.A., ss. 16 and 115.

3. In the following analysis, reference to an employee shall mean "an employee who does not hold shares in his employer-company".


5. For shareholders' rights on this point, see U.C.A., s. 137.

6. If the members' shares carry a vote, the member has the right to have this vote recorded at a company meeting. See U.C.A., s. 140 and Ford, pp. 418-419.

7. For the shareholder's right to discuss at the annual general meeting any matter arising out of the director's statutory report, see U.C.A., s. 135 (7).

8. Compare this with the shareholder's rights. See U.C.A., s. 139.

9. For the shareholder's rights in a take-over situation, see e.g. Companies Act, 1961, as amended (N.S.W.), s. 180G. See too Gething v. Kilner [1972] 1 W.L.R. 337 where Brightman J. decided that the directors of an offeree company owed a duty to their shareholders to be honest and not to mislead.

10. These matters affect an employee's investment in the company, namely his tenure. The shareholder's investment in the company is protected by the law in a variety of ways. In particular, his investment is safeguarded by the principles which govern the maintenance of share capital. See Ford, pp. 155-166.

11. By contrast, shareholders have a statutory right to receive copies of these documents. See U.C.A., s. 34.

12. Shareholders, on the other hand, have statutory rights to receive these documents. See U.C.A., ss. 164 and 162.

13. For the shareholder's rights on this point, see U.C.A., s. 143.
For shareholders' rights on this point in a public company, see U.C.A., ss. 118, 120. See generally Ford, pp. 297-298.

By contrast, see U.C.A., ss. 222 (1), 222 (1)(c), 222 (2)(b), 223, 259. See generally Ford, Chapter 21.

See generally Ford, pp. 401-408.

Ford, pp. 409-411.

After his study of twenty-three industrial disputes arising out of management's personnel action during the years 1953-1954, De Vyver concluded: 'Arbitrated cases of this type almost invariably were decided in favour of the employer': F.T. De Vyver, 'Settlement of Minor Labor Disputes in Australia' (1961) 12 Lab. L.J. 154, p. 160. De Vyver's study concentrated on disputes arising under s. 28 of the Conciliation and Arbitration Act 1904-1956 (Cth). The cases cited below indicate that respect for managerial prerogatives is also influential in state jurisdictions.


See R. v. Wallis; Ex parte Employers' Association of Wool Selling Brokers (1949) 78 C.L.R. 529, p. 546 per Latham C.J., In Australian Tramway Employees' Association v. Prahran and Malvern Tramway Trust (1913) 17 C.L.R. 680, p. 688, Barton A-C.J. expressed the view that the grant to federal tribunals of power to settle industrial disputes 'does not carry with it a right so far to encroach on the powers of the States as to place the general control of industrial enterprises in the hands of employés in place of the owners because the Court is satisfied that otherwise the employés will not rest in that contentment without which it is feared that industrial peace will not continue'. Although this passage was part of a dissenting judgment it would appear to represent the true position on this point.


(1957) 96 C.L.R. 429.
24 R. v. Railways Appeals Board and Commissioner for Railways (N.S.W.); Ex parte Davis (1957) 96 C.L.R. 429, p. 451.

25 ibid.


27 The claim therefore fell within the description of industrial matters formulated in R. v. Commonwealth Industrial Court; Ex parte Cocks (1968) 121 C.L.R. 313.

28 Here the Commission in Appeal Session relied upon the authority of R. v. Portus; Ex parte Australia and New Zealand Banking Group Ltd (1972) 127 C.L.R. 353.


30 Re Steel Works Engine Drivers, etc. (Broken Hill Proprietary Company Limited) Award 1955 A.R. 804.

31 In Re Dispute between Federated Engine Drivers' and Firemen's Association of Australasia (Coast District) and State Dockyard, Newcastle (1950) 98 I.G. 43, an industrial tribunal in New South Wales held that it had jurisdiction to determine matters concerning seniority in relation to promotions of employees. It founded its decision upon paragraph (e) of the definition of "industrial matters". This paragraph relates to "the right to ... refuse to ... reinstate in employment any particular person or class of persons ...". In jurisdictions which do not have a similar limb in the definition of "industrial matters" or in the sections governing the powers of the tribunals, it is doubtful whether the tribunals are authorised to insert seniority provisions relating to promotion. See: R. v. Railways Appeals Board and Commissioner for Railways (N.S.W.); Ex parte Davis (1957) 96 C.L.R. 429; Federated Gas Employees' Industrial Union v. Metropolitan Gas Company (1917) 11 C.A.R. 267; Appeal against determination of Fire Brigade Officers' Board 1974 Industrial Arbitration Service, Current Review 81. On the other hand, see: Fire Brigade Officers' Award (1973) 28 I.I.B. 589, and Re Australasian Transport Officers' Association v. Commissioner for Railways; (Re Argent) 1971 A.R. 377, where the Industrial Commission of New South Wales held that a promotion dispute fell within the general opening words "matters or things affecting or relating to ... the privileges, rights, or duties of employers or employees in any industry ..." in the statutory definition of "industrial matters".

32 Re Iron and Steel Works Employees (Australian Iron and Steel Ltd) Conciliation Committee (No. 2) [1941] A.R. 777. In Re Steel Works Engine Drivers, etc. (Broken Hill Proprietary Company Limited) Award 1955 A.R. 804, the Industrial Commission (Richards J.) held that a company was entitled to establish a line of progression leading to the classification of "locomotive driver" provided the scheme for promotion was not unjust or unreasonable.


See Re Rylands Brothers (Australia) Pty Ltd No. 2 Award 1964 A.R. 621 where the Industrial Commission of N.S.W. (Richards J.) ruled that the union had not established the alleged practice of promoting employees in accordance with shifts. See too: Re Dispute Between Federated Engine Drivers and Firemen's Association of Australasia (Coast District) v. Broken Hill Pty Company Ltd (Re Appointment of Driver of Soaking Pit Crane) 1950 A.R. 371, p. 376.

Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 5 and Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 5.

See Australian Iron & Steel Ltd v. Dobb (1958) 98 C.L.R. 586, p. 598 per Dixon C.J.


Dispute between Broken Hill City Council and Federated Municipal and Shire Council Employees Union (Broken Hill) 1973 A.I.L.R. Rep. 515.


R. v. Railways Appeals Board and Commissioner for Railways (N.S.W.); Ex parte Davis (1957) 96 C.L.R. 429, p. 431; Dispute between Australian Theatrical and Amusement Employees Association and Ten Channel 10 1974 A.I.L.R. Rep. 604; Appeal against determination of Fire Brigade Officers Board 1974 Industrial Arbitration Service, Current Review 81. On the other hand, see: R. v. Railways Appeals Board and Commissioner for Railways (N.S.W.); Ex parte Davis (1957) 96 C.L.R. 429, p. 431 per Fullagar J.; Fire Brigade Officers Award (1973) 28 I.I.B. 589 and Re Australasian Association of Transport Officers Association v. Commissioner for Railways (Re Argent) 1971 A.R. 377 which suggest that there may be jurisdiction in promotion.
disputes without relying on the words "the right ... to refuse ... to
reinstate" in the statutory definition of "industrial matters".

42 See: R. v. Foster; Ex parte Commonwealth Steamship Owners*
Association (1950) 94 C.L.R. 614, pp. 618-619; Dispute between Broken
Hill City Council and Federated Municipal and Shire Council Employees*
from the Determination of Ambulance Superintendents* Board 1972
A.I.L.R. Rep. 439; Dispute between Council of the City of Sydney v.

43 See e.g. Roper v. Collingridge 1935 St.R.Qd 1 where the
Queensland Supreme Court decided that a union secretary who tried
to use his position to influence voters to vote for his superiors in a
forthcoming union election was guilty of misconduct of a kind warranting
his dismissal. See too Ord v. Public Utilities Commission of the Town

44 Alfred Avins, Employees* Misconduct As Cause for Discipline and
368-369 for authorities on this point.

45 Amalgamated Engineering Union & Australasian Society of
Engineers v. Cockatoo Docks and Engineering Co. Ltd (1942) 47 C.A.R.
284; Broken Hill City Council v. Federated Municipal and Shire Council
Employees* Union (Broken Hill) 1973 A.I.L.R. Rep. 515. See too Higgins,
*A New Province for Law and Order* (1919) 32 Harv. L. Rev. 189, p. 196.

46 Dispute between Council of The City of Sydney v. Amalgamated

47 See Amalgamated Engineering Union & Australasian Society of
Engineers v. Cockatoo Docks and Engineering Co. Ltd (1942) 47 C.A.R.
284, p. 287 per O'Mara J.

48 The Victorian secretary of the Amalgamated Metalworkers* Union,
Mr John Halfpenny, recently asserted:

Control is frequently exercised on the job either by negotiation
or direct confrontation with managements, and my union has been
able to resist changes in work methods which disadvantage workers,
and to reverse decisions to sack people or not hire people whom
we believe have been victimised.


49 The Waterside Workers* Federation of Australia has made consider-
able inroads into management rights in matters such as hiring and
firing, retirement and transfer schemes, pensions and redundancy pay.
For some insight into this development, see National Stevedoring Industry

The Barrier Industrial Council, Broken Hill on behalf of its member
unions negotiated a scheme of redundancy payments with the Mining
Managers* Association in 1969.

For an interesting account of Australian unions* experience with
collective bargaining, see Dianne Yerbury and J.E. Isaac, *Recent Trends
CHAPTER 10  LEGAL MACHINERY FOR SETTLEMENT
OF PLANT-LEVEL DISPUTES

See Vol. 1, Chapter 23, pp. 414-415.

However, Professor K. Laffer has commented that state tribunals could settle plant-level disputes in these circumstances provided they do not encroach upon the jurisdiction of the Australian Industrial Court. See Paul F. Brissenden, The Settlement of Labor Disputes on Rights in Australia (Los Angeles, 1966), pp. 50-51.

In the latter case, of course, the employees would have to persuade a union or the appropriate industrial authority in the state to bring the matter before the tribunal.

See generally Brissenden, Labor Disputes on Rights.

Industrial Arbitration Act, 1912-1973 (W.A.), s. 89.

Industrial Conciliation and Arbitration Act, 1972 (S.A.), ss. 29 (1)(b), 69 (1)(f).

Labour and Industry Act 1958 (Vic.), s. 31.

Hince reports:
By December 1963 twenty-seven wages boards had made provisions for the appointment of a board of reference, but only in the case of thirteen of these boards had the board of reference met in connection with a dispute. Continuous use of boards of reference to solve industrial relations problems has been limited to four boards established in the meat and frozen goods trades.


Wages Boards Act 1920 (Tas.), s. 23 (6).

For example, boards of reference are commonly used in apprenticeship cases: F.T. De Vyver, 'Australian Boards of Reference' (1959) 10 Lab. L.J. 317.

Boards of reference are normally constituted by a chairman (who is the Registrar or Deputy Registrar of the relevant industrial authority in the state) and an equal number of union and employer representatives.
In *Federated Engine Drivers* and *Firemen's Association of Australasia v. Broken Hill Pty Co. Ltd* (1913) 7 C.A.R. 132, p. 144, the Commonwealth Court of Arbitration pointed out that 'a suitable Board of Reference, under the aegis of a strong union, is a safety valve for any industry'.


The High Court's interpretation of the original provision for boards of reference in the Commonwealth Conciliation and Arbitration Act 1904 required that the matters to be assigned to the board of reference had to be specified in the award. See *Federated Engine Drivers* and *Firemen's Association of Australasia v. Broken Hill Pty Co. Ltd* (1913) 16 C.L.R. 245. An amendment to the Conciliation and Arbitration Act 1904 (Cth) in 1920 removed the necessity to mention in the award the specific grievances to be handled by the board of reference.

R. v. Gallagher; Ex parte Aberdare Collieries Pty Ltd (1963) 37 A.L.J.R. 40. For an example of a case where a purported exercise of judicial power by a board of reference was held invalid, see Collins v. Sobb (1962) 4 F.L.R. 124.

See e.g. South Australia: Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 15 (1)(a), (d).


There appears to be a division of opinion as to whether a board of reference in the federal sphere can conclusively determine ex post facto that a given fact or matter of fact forming an ingredient in an offence occurred: see R. v. Darling Island Stevedoring & Lighterage Co. Ltd; Ex parte Halliday; Ex parte Sullivan (1938) 60 C.L.R. 601, p. 618 per Starke J. and p. 620 per Dixon J.

Mr M.P. McCarney, then Federal President of the Vehicle Builders' Employees Federation of Australia, has complained that employers in the vehicle building industry who instantly dismiss employees for failure to perform the work allocated to them in the time allowed for the operation give the employees one week's pay in lieu of notice so as to prevent a board of reference investigating the dismissal. The union's efforts to obtain a board of reference inquiry into the time measurement methods and the fatigue allowance built into the time cycle are thereby frustrated: M.P. McCarney, *Plant-Level Relationships*, a paper delivered at the Thirteenth Annual Industrial Relations Convention 5-7 May 1972, p. 4.

De Vyver, *Australian Boards of Reference*, pp. 319-320 gives some interesting examples of this development.
21 e.g. Ampol Petroleum (Qld) Pty Ltd and Seamen's Union of Australia 1973 A.I.L.R. Rep. 684 where a dispute arose over the noise and vibration levels in certain cabins and at certain periods on a particular vessel. The Commonwealth Arbitration Commission varied the award by a provision which stated that the employees affected by the disturbance were to be granted extra leave accruing at a certain rate. For another example, see The Dining Room Case Complaint No. 855 of 1962, Print A 8668 (Commonwealth Conciliation and Arbitration Commission) cited in Brissenden, p. 94. The problems encountered in using award variation as a method of settling a dispute with a single employer can be seen in Boilermakers' and Blacksmiths' Society and Cockatoo Docks and Engineering Co. Pty Ltd (1970) A.I.L.R. Rep. 104 (Conciliation and Arbitration Commission (Commissioner Watson)).

22 e.g.: Commonwealth Arbitration Commission:


New South Wales: Industrial Commission


Western Australia: Industrial Commission

Mt Newman Mining Company Pty Limited and Federated Engine Drivers' and Firemen's Union of Workers of Western Australia (1972) 52 W.A.I.G. 75 (dismissal case).

Queensland: Industrial Commission


24 See e.g.: Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 20 and Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 69 (1).

25 e.g. Western Australia: Goldsworthy Mining Pty Ltd v. Federated Engine Drivers' and Firemen's Union of Workers of Western Australia (1972) 52 W.A.I.G. 427 (inquiry into suspension of worker, recommendation made, conference concluded); Industrial Arbitration Act, 1912-1973 (W.A.), s. 171.

granted); Industrial Arbitration Act, 1940, as amended (N.S.W.), s.
17A.

Queensland: Industrial Conciliation and Arbitration Act,
1961-1974 (Qld), ss. 39, 40.

South Australia: Industrial Conciliation and Arbitration Act,
1972 (S.A.), s. 27.

Federal sphere: Conciliation and Arbitration Act 1904-1973
(Cth), s. 27.

26 Federal sphere: Conciliation and Arbitration Act 1904-1973
(Cth), ss. 110, 119.

South Australia: Industrial Conciliation and Arbitration Act,
1972 (S.A.), s. 15.

Queensland: Industrial Conciliation and Arbitration Act, 1961-
1974 (Qld), s. 8 (9).

Western Australia: Industrial Arbitration Act, 1912-1973 (W.A.),
ss. 99 (1), 108B.

27 Report of Chief Inspector of Factories for the year ending
31 December 1896, p. 3 quoted in George W. Gough, 'The Wages Boards
of Victoria' (1905) 15 Economic Journal 361.

28 Hince reports: 'The sectors covered by wages boards are
characterised by scattered and small employment units, by a high
proportion of female labour, and of white collar labour': Hince,
'Wages Boards in Victoria', p. 173.

29 E.J.R. Heyward, 'The Tasmanian Wages-Board System' (1936)
12 Economic Record 108; P.C. Molhuysen, 'The Tasmanian Wages Board
System' (1972) 14 Jou. of Ind. Rel. 132. This sector of the work
force is by no means insignificant. In May 1968 it was estimated that
the percentages of employees in Victoria and Tasmania affected by wages
board determinations and collective agreements were 33% and 44.1%

30 Wages Boards Act 1920 (Tas.), ss. 77, 78.


32 R. V. Commonwealth Conciliation and Arbitration Commission; Ex
parte Melbourne and Metropolitan Tramways Board (No 2) (1965) 113 C.L.R. 228,
p. 256 per Menzies J.

33 ibid.

34 Australia. Parliament, Thirteenth Annual Report. The President
of The Commonwealth Conciliation and Arbitration Commission, Parl.

36 ibid.


38 Fisher discusses this point at length in W.K. Fisher, 'Plant Level Relationships: The Role of the Tribunal' (1972) 14 Jou. of Ind. Rel. 264.


1 See the Statutes of Labourers which commenced in 1562, 5 Eliz. 1, c. 4, s. 3. This provision is probably the foundation of the presumption of yearly hiring. For a detailed account of this presumption, see Vol. 1, pp. 102-103, 105-106.


3 Mantoux, p. 366.


6 Hunt, p. 45.

7 Henry English, A Complete View of Joint Stock Companies Formed in 1824 and 1825 (1827) quoted in Hunt, pp. 45-46.

8 Joint Stock Companies Act 7 & 8 Vict. c. 110 & 111 (1844).


11 Ibid.

12 See Hunt, p. 122.

13 i.e. Joint Stock Companies Act 7 & 8 Vict. c. 110 & 111 (1844).

14 quoted in Hunt, p. 149.

16 ibid.


24 On this point, see generally A.A. Berle, 'Property, Production and Revolution' (1965) 65 *Col. L. Rev.* 1.


It is interesting to note that, in Burnham's view, the managerial revolution will not be complete until the State owns the major instruments of production. On this criterion, the revolution would seem to be a long way off in the modern company.

For a detailed description of the goals which are likely to influence managers, see O.G.P. Stanley, *Managerial Theories of the Firm*, Economic Society of Australia and New Zealand, N.S.W. Branch, Economic Monograph No. 271, July 1965.


Rolfe, *The Controllers*.


Rolfe's study of interlocking directorships in Australian companies lends support to the view that managers are caretakers of corporate property. See Rolfe, *The Controllers*, Introduction by E.L. Wheelwright, p. xv. But in 1966 Wheelwright and Miskelly concluded that local corporations in Australian manufacturing industry exhibited the "classic shift" from ownership to managerial control, at least for the majority of assets, and in the strategic sectors. They also stated that this trend may be expected to continue ... See Wheelwright & Miskelly, p. 11.


Wheelwright and Miskelly found that ownership, at least in Australian manufacturing industry, was highly concentrated in a few hands. The total of the largest 20 holdings of each of the 299 companies they surveyed was 3,683 out of nearly 800,000 shareholdings, yet these large holdings accounted for nearly 60% of the total shareholders' funds. The remaining shareholding in the companies was markedly dispersed. Relatively small shareholders with a combined total of 79,6317 holdings held just over 40% of the total shareholders' funds. See Wheelwright and Miskelly, *The Anatomy of Australian Manufacturing Industry*.

Compare these findings with those of a recent survey by *The Australian Financial Review*. There, 3,700 shareholders in the list of 'Top 20' shareholders of 185 of the companies surveyed represented only 3.52% of the total number of shareholders in these companies, yet they controlled an average of 53.66% of the original issued shares. See *The Australian Financial Review* 12 February 1973, p. 1.


See generally Crosland, *Socialism*.


On this point of extending the corporate constituency, see Rostow, *To Whom and For What Ends is Corporate Management Responsible*, pp. 55-56.

ibid.

5 Eliz., c. 4. These statutes commenced in 1562 and were not finally repealed until 1875. See the Conspiracy and Protection of Property Act 38 & 39 Vict., c. 86 (1875), s. 17.
50. The Master and Servant Act 1824 and the preceding legislation made a breach of the contract of employment by the employee a criminal offence, whereas a similar breach by an employer was simply a civil offence. An employee charged under this law was liable to immediate arrest, was tried before a Justice of the Peace (himself often an employer or a landed gentleman) and was denied the right to give evidence in his own defence. This law survived until the Master and Servant Act 1867 and the Employers and Workmen Act 1875. See Fredric Meyers, *Ownership of Jobs* (Los Angeles, 1964), p. 19. Hobsbawm reports: 'the first half of the Nineteenth Century is anything but laissez-faire in its labour relations': E.J. Hobsbawm, *Custom, Wages and Work-load in Nineteenth-Century Industry* in Asa Briggs and John Saville (edd.), *Essays in Labour History* (London, 1960).


55. ibid.


60. Stated in an interview with the writer, 14 December 1973.

61. See Appendix 2, Vol. 2, p. 44.


[1971] 3 All E.R. 1313, C.A.

(1888) 39 Ch. D. 339, C.A.

See Vol. 1, pp. 156-158.

See Vol. 1, p. 150.

Kahn-Freund, *Labour and The Law*, p. 8. There the learned author was referring to the British position but the observation is equally relevant to the Australian scene.

See Vol. 1, p. 275.


This can be seen in several areas of law. The final stage in the piecemeal development of factory legislation was not reached until 1901: Asa Briggs, 'Social Background' in Allan Flanders & H.A. Clegg (edd.), *The System of Industrial Relations in Great Britain* (Oxford, 1963), p. 10.

The first Workmen's Compensation Act in Britain was passed in 1897, and even this enactment was limited in its scope: Workmen's Compensation Act 60 & 61 Vict., c. 37 (1897).

Furthermore, trade unionists were not freed from the yoke of restrictive criminal laws until 1875, and problems in civil law emerged at the end of the century: Briggs, 'Social Background', p. 16.

After a survey of all important cases decided in favour of the employee over a period of fifty years, Peter Meinhardt concluded:

It will thus be seen that by far the larger proportion of decisions on the title to employee inventions were in favour of the employing company and that it is very difficult for an employee to establish a right to an invention in any way connected with the field of operations of the company employing him.


Another study of twenty-five decisions from the Reports of Patent Cases showed that 28% were decided in favour of the employee, in 68% of the cases judgment was given for the employer and in 4% the honours were shared between the parties. R.O.P. Gerntholtz, Principles of South African Patent Law and a Comparative Reference to German Patent Law (Cape Town, 1971), p. 236. These cases could have been result-bound by their facts. But the point is that the factual criteria favour the employer.


Gerntholtz, p. 236.

See Patents Act 1952-1969 (Cth), s. 34 (1)(a).

In Mellor v. William Beardmore & Co. Ltd (1926) 43 R.P.C. 361, the pursuer claimed remuneration from the defenders for the use of his invention in its business. Lord Constable remarked in the course of his judgment: *I have no doubt that on balance the Defendants gained substantially; but on the amount of the gain I find it impossible to put a figure*. Lord Constable nevertheless fixed an arbitrary figure for the remuneration due to the pursuer; difficulty of calculation did not dissuade him from attempting to do justice in the circumstances. The difficulty which would be faced by the courts if they attempted an equitable division of the rights attached to an invention would seem to be no greater than those they encounter in infringement actions involving highly complex scientific problems. See

Difficulties of computation have not been viewed as sufficient justification for denying a litigant a remedy and relief in cases arising in other areas of law. See e.g.: Chaplin v. Hicks [1911] 2 K.B. 786 and Howe v. Teefy (1927) 27 S.R. (N.S.W.) 301, p. 306.

A minority of companies have established suggestion schemes which are designed to encourage employees to contribute ideas about their work. The failure rate among these schemes appears to be quite high, but this may be partly attributed to a negative response from management. See B.L. White & E.R. Jacobs, *A Survey of Suggestion Schemes* (1961) 17 P.P.B. 22; G.J. Prideaux, *Employee Benefits and Services* (1972) 28 P.P.B. 19; J. Thomson, *A Suggestion Scheme Can be Made to Work* (1968) 24 P.P.B. 124.

On the other hand, the participation rate and acceptance rate for suggestions is encouraging. In Thompson's study the average participation rate over a three year period was 23%. The average adoption rate in the same period was 45%. White and Jacobs found that eleven companies with between 500 and 1,000 employees had an average participation rate of 28% and an average adoption rate of 37%.


Compare these findings with the criteria of a successful suggestion scheme put forward by Strauss and Sayles. In their view, a reasonably successful scheme should elicit *25 to 50 suggestions from every hundred employees each year, 25 to 35 per cent of which will be acceptable*: G. Strauss & L.R. Sayles, *Personnel – The Human Problems of Management* (Englewood Cliffs, New Jersey, 1960), p. 665.

Though the awards given under the schemes are often relatively unsubstantial, there is some evidence to suggest that this does not discourage employees from participating in the schemes. See: J.M. Griggs, *Operation of a Suggestion Scheme* (1964) 20 P.P.B. 24; Vickers, *Case Studies* and O.P. Wickham, *Study of a Suggestion Scheme* (1954) 10 P.P.B. 30.

The growth of suggestion schemes should be fostered since they cover a much broader scope than employee inventions. There appears to be a consensus among employer and employee representatives favouring such a development. See K.F. Walker, *Attitudes of Personnel Officers to Industrial Relations* (1967) 17 P.P.B. 17. However, the existence of a suggestion scheme giving property in the employees' contributions to the employer may deprive an employee of his legitimate rights to an invention. See W.J. Gage Ltd v. Sugden [1967] 2 O.R. 151, p. 154.

The percentage of patents granted in this country to nationals in each of the years 1966, 1967 and 1968 was around 11%. Compare this figure with overseas statistics for the same period. In Japan the relevant percentage did not fall below 60% and in 1966 and 1968 was over 66%. In the Federal Republic of West Germany, the percentages of the patents granted in that country to nationals in 1966, 1967 and 1968 were 57%, 58.9% and 57% respectively. The United States percentage in the relevant period did not fall below 77%. These figures are calculated from statistics in the Banks Report, Appendix C (d)(i).


Stubbs, p. 41.


See Woodward, p. 604.

Block estimated that in 1964 the largest 602 companies in Australia employed almost one-quarter of the total Australian work force. See R.O. Block, A Directory of the Top 1,000 Companies in Australia and New Zealand, published by The Australian and cited in Wheelwright and Miskelly, The Anatomy of Australian Manufacturing Industry, p. 1.

Using 1958 figures covering 142 industries which employed 89% of the work force, Karmel and Brunt found that 37% of the work force were employed by 'highly concentrated' industries, while another 13% worked in 'fairly concentrated' industries. They defined an industry as 'highly concentrated' if the largest four firms employed at least half of the workers in the industry. Fairly concentrated industries were those in which the largest eight firms employed half of the workers: P.H. Karmel and M. Brunt, The Structure of the Australian Economy (Melbourne, 1962), pp. 78-79.


General Motors-Holden's Pty Ltd's decision in December 1974 to retrench 5,000 workers is a recent example.

Compare Berle, Power Without Property, pp. 105-106.

This point is well made in E.I. Sykes & H.J. Glasbeek, Labour Law in Australia (Sydney, 1972), pp. 431-433.
CHAPTER 12 DIMENSIONS OF PROBLEMS ARISING AT THE WORK PLACE

1"Inhuman" mass production to blame - unionist* The Australian

2

3Trevor Dawson-Grove, *Ford and others look for soul in the

4See Trevor Hawkins, *Greek Community backs strikers with words

5A survey of ninety-six employees (sixty-nine women, twenty-seven
men) in a light engineering firm employing 500 persons showed that 56%
of the male respondents were less than satisfied with their jobs;
nearly three-quarters of the women were satisfied with their jobs
although 47% were equivocal in expressing their satisfaction. Twenty-
six per cent of the women fell into a 'less satisfied group': C.G.
Cameron, *Job Satisfaction of Employees in a Light Engineering Firm:
A Case Study* (1970) 26 P.P.B. 34.

Seventy per cent of the 197 manual workers interviewed by Lafitte
advised that they were satisfied with their jobs. The degree of satis-
faction with certain job aspects varied greatly ranging from 19% for the
type of work to 57% for relationship with workmates. The percentage who
reported that they were satisfied with their jobs is perhaps distorted
by the emphasis the respondents placed on certain aspects of the job:
P. Lafitte, Social Structure and Personality in the Factory (London,
1958).

A high general level of satisfaction was also reported in a Perth
survey of 524 manual and clerical workers in five undertakings: K.F.
Walker and J. Lumsden, *Employees Job Satisfaction and Attitudes* (1963)
2 Journal of the Institute of Personnel Management (Australia) 5.

6See B.L. White, *Job Attitudes, Absence from Work and Labour
Turnover* (1960) 16 P.P.B. 18. Of the fifty operatives employed in a
small chemical manufacturing plant who were interviewed more than 60%
expressed unfavourable attitudes to each of the following aspects of
their job: foremen, work tasks, pay, production problems, and management.

See also R.T. Martin and J.C. Murray, *Morale Among Railway
Workers* (1958) 14 P.P.B. 58.

In five case studies conducted by the Department of Labour, the
percentage of employees in the 'less satisfied group' ranged from 15% to
49%, with a mean of 32.8%. See: A.D. Mountain, *Job Satisfaction of
Female Employees in the Clothing Industry: Case Study No. 1 (1965)
21 P.P.B. 7; R.D. O'Brien, *Job Satisfaction of Female Employees in the
Clothing Industry: Case Study No. 2* (1966) 22 P.P.B. 39; P. Monie,
*Job Satisfaction of Female Employees in the Clothing Industry: Case
Study No. 3* (1967) 23 P.P.B. 18; P. Monie, *Job Satisfaction of Female
Employees in the Clothing Industry: Case Study No. 4* (1967) 23 P.P.B.
183; L.A. Ryder, *Job Satisfaction of Female Employees in the Clothing
Industry: Case Study No. 5* (1969) 25 P.P.B. 309.
This estimate by the Victorian Employers Federation is reported in 'Sickies cost industry $1,000 m. a year' The Australian 12 February 1973, p. 2.

This estimate was calculated on the basis of the Wage and Salary Earners in Civilian Employment in Australia during 1972: Labour Report, No. 57, 1972 (Canberra, 1973), p. 190.

This estimate is advanced by Mr R.J. Hawke, President of the Australian Council of Trade Unions, in 'Workers want fair share of the cake' The Australian (Supplement), 21 June 1972, p. 3.

In a survey of persons leaving jobs at a Victorian tyre manufacturing factory over an eighteen month period, the reasons given by employees for terminating their employment were predominantly personal: M.C. Knowles, 'Personal and Job Factors Affecting Labour Turnover' (1964) 20 P.P.B. 13. It is submitted that this is not a reliable guide to the actual reasons why employees vacated their positions because employees might be reluctant to specify the real reasons.

See B.L. Poidevin, 'A Study of Factors Influencing Labour Turnover' (1956) 12 P.P.B. 11 and White, 'Job Attitudes ...'.

Actually the survey period is between the last pay period in February and the last pay-period in March of each year. By comparing successive turnover rates for the same month in each year, the official survey attempts to off-set the effect of seasonal fluctuations in employment. Seasonal fluctuations have their greatest effect in food, drink and tobacco industries but if all industries are examined together the influence of these fluctuations on the average separation rate is considerably reduced.

These rates are calculated from the number of engagements and separations expressed as a percentage of average monthly employment in the firms surveyed.
21 See the transcript of 'Blue Collar Blues', a segment of the television programme Four Corners 7 October 1972, Australian Broadcasting Commission, p. 6.


23 Of the 2,298 industrial disputes recorded by the Australian Bureau of Statistics in 1972, 1,052 lasted up to one day. Moreover, strike statistics for the period 1968-1972 support the proposition in the text: Labour Report No. 57, 1972, pp. 223-225.


26 Kuhn, p. 173.

27 In Professor Laffer's view, the 'high proportion of short strikes is about over-award payments though this may not always be the reason given' quoted in Brissenden, p. 108.

Similarly Hutson argues:

In actual fact, it is rare to have stoppages over the operation of the award, and their usual function is to back up claims for increased wages or fringe benefits that are outside the jurisdiction of the system.


28 Caledonian Collieries Ltd v. Australasian Coal and Shale Employees Federation (No. 1) (1930) 42 C.L.R. 527, per Gavan Duffy, Rich, Starke and Dixon JJ., pp. 552-553.


31 Ibid.

32 This is one of the 'direct causes of stoppages of work' recorded by the Australian Bureau of Statistics. Labour Report, No. 57, 1972, p. 225.


36 See Labour Report, No. 57, 1972, p. 227. To take an example, in 1971 managerial policy and physical working conditions accounted for 1,024 out of the 2,404 disputes recorded but these disputes involved only 216,700 workers and lost 508,500 working days. On the other hand, disputes over wages caused only 880 of the 2,404 disputes but involved 755,500 workers and lost 2,173,900 working days.


38 Furthermore, the strike figures do not record strikes involving stoppages for less than ten man days or disputes which did not involve a work stoppage. To take an example, a thirty-minute stop work protest meeting attended by 100 workers would not be recorded in the strike statistics.

39 See Ramsay, 'Not by Bread Alone' for an example of how the nature of a dispute is changed by passage through levels of negotiation and conciliation.

40 See J.L. McCue, 'Plant Level Relationships', a paper delivered to the Thirteenth Annual Convention of the Industrial Relations Society of New South Wales, 5-7 May, 1972, pp. 9-10.


42 Two-thirds of the 156 undertakings Caine surveyed in 1953 had informal induction programmes. Most of the enterprises relied on a form of casual, on-the-job training rather than a formal training scheme. Over 90% of the factories had no trained instructors: M.B. Caine, 'Induction and Training Procedures in Australian Industry' (1954) 10 P.P.B. 34.

43 A 1966 survey of 500 undertakings employing 282,630 persons revealed that only 36% of the firms employing 51-100 employees had any form of systematic in-plant training, while 47% of the firms employing 101-1,000 employees reported such a scheme. Formal schemes for in-plant training were more common in the large undertakings with more than 1,000 employees; nearly 92% reported such a scheme: Helen Taylor, 'Training in Five Hundred Manufacturing Undertakings' (1966) 22 P.P.B. 27.

44 See too R.E. Fredricks, 'Supervisory Practices in Industry' (1956) 12 P.P.B. 31 where only 30% of the sixty-eight organizations surveyed recognised the need to train potential supervisors for their complex roles.
J.P. Devereux, Federal President of the Amalgamated Engineering Union, elaborates on this theme in 'Plant Level Relationships', a paper delivered at the Thirteenth Annual Convention of the Industrial Relations Society of New South Wales, 5 - 7 May 1972.

See also the criticism levelled at the Ford Motor Company Pty Ltd during the Broadmeadows strike in 1973 by the Federal Minister for Labour, Mr Cameron. The Minister claimed that in the Ford dispute 'Australian workers have to fight an industrial contest against somebody whose decisions are being made in the board rooms of New York': 'Cameron Hits out at Ford's remote bosses' The Australian 25 June 1973, p. 1. Whether this criticism is justified or not, it is difficult to discount the effect of the Minister's statement upon the feelings of the striking workers.

The writer's survey results on this issue are discussed in detail in Appendix 2, Vol. 2, pp. 33-39.


Deacon, p. 22.

A 1962 survey of employee handbooks in forty-six undertakings in several states revealed that only two firms allotted less than 10% of the space in their handbooks to personnel practices and policies; only eight firms devoted less than 10% of their content to rules and conditions of employment: J. Gardner, 'Survey of Employee Handbooks' (1963) 19 P.P.B. 17.

Approximately three-quarters of the sample of twenty handbooks examined by Gardner were found to be difficult to read according to Gunning's Fog Index (R. Gunning, The Technique of Clear Writing (New York, 1952). See Gardner, p. 22.

None of the sample of twenty handbooks Gardner inspected were printed in foreign languages although seven companies gave some assistance to migrant workers through interpreters at the induction stage. Most believed migrant workers could pick up sufficient information from fellow employees if they could not understand the handbook.


White and Edmonds, 'Management-Employee Committees in Australia'.

Barry Gordon, 'Industrial Relations Procedures In An Australian Industrial Complex' (1963) 5 Jou. of Ind. Rel. 160.
The findings of the writer's survey also support this conclusion. See Appendix 2, Vol. 2, pp. 26-28.


Gordon, 'Industrial Relations Procedures In An Australian Industrial Complex'.

Professor Kingsley Laffer of Sydney University believes that 99% of grievances at plant level are dealt with 'on the spot, without arbitration tribunals ever hearing of them': K. Laffer, 'The Working of Australian Compulsory Arbitration' in Roberts and Bressenden (edd.) The Challenge of Industrial Relations (Honolulu, 1965), Chapter 5 quoted in Bressenden, p. 108.


Prideaux, p. 34.

ibid.

Prideaux, p. 34. A high failure rate was also revealed in an earlier survey of suggestion schemes: B.L. White and E.R. Jacobs, 'A Survey of Suggestion Schemes' (1961) 17 P.P.B. 22.

At the end of 1971 there were 320 unions in existence in Australia. The largest fifty-three unions in this total included just over 83% of all unionists in Australia: D.W. Rawson, A Handbook of Australian Trade Unions and Employees' Associations Occasional Paper No. 8 (2nd edn, Canberra, 1973).


See: Kuhn, pp. 174-176; Brissenden, p. 108.

Kuhn, 'Grievance Machinery and Strikes in Australia'.

Kuhn, p. 174.

ibid.

ibid.
72. Hutson, review of Brissenden, p. 278.


75. See Trevor Dawson-Grove, 'Ford and others look for soul in the factory'.


79. ibid.

80. See G.W. Ford, 'Unions and the Future' in P.W.D. Matthews & G.W. Ford (edd.), Australian Trade Unions (Melbourne, 1968) where the impact of the multi-product firm on union organization is discussed.

81. Ford, 'Unions and the Future'.

82. In a survey of forty-two geographically isolated work sites most companies reported that joint employer-employee consultation was easier at isolated work places. One company, however, found it more difficult because there were no official trade union representatives on the site. The general climate of industrial relations at these work sites was found to be good although this could be attributed to the desire of management to retain its work force and reduce the excessive rates of labour turnover which were common: Carlie Spencer, 'Personnel Practices at Geographically Isolated Work Sites'.


85. The arbitration statutes in some states authorise the insertion of rights of entry clauses in awards. See Industrial Conciliation and Arbitration Act, 1961-1974 (Qld), s. 136; Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 129A; Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 28 (3), s. 69 (1)(e). The Australian

It appears that the union official can also discuss legitimate union business with non-members Boarding House, Cafe, Etc. Employees (Right of Entry) Case (1947) 21 S.A.I.R. 273

Although the union official can converse with members only during non-working time he may be justified in some circumstances in remaining on the employer's premises for a considerable part of a working day. This action would be justified if, for example, different sections of the employees have their meals at different times and the union officer wishes to interview employees in each section. Re an Application by Maxam Cheese Products Pty Ltd (1941) 35 Q.J.P. 133.

Re Steel Works Employees (Broken Hill Pty Co. Ltd) and Iron and Steel Works Employees (Australian Iron and Steel Ltd - Port Kembla) Awards (No. 1) 1962 A.R. 334.

Kevin W. Hince, 'Unions on the Shop Floor' (1967) 9 Jou. of Ind. Rel. 215.


Orwell de R. Foenander, Shop Stewards and Shop Committees: A Study in Trade Unionism and Industrial Relations in Australia (Melbourne, 1965), p. 61. Foenander goes on to point out that the rules of some of the important unions make no provision for shop stewards.

Hince, 'Unions on the Shop Floor' and World Services & Construction Company Pty Ltd v. Boilermakers' Society of Australia 1961 Industrial Arbitration Service, Current Review 222. The Amalgamated Metal Workers' Union is one organization which has encouraged its shop stewards to play a more positive role in the handling of grievances, at least in the initial stages of negotiations.

Yerbury, 'Union/Management Relations at the Shop Floor', p. 35.


97 For an interesting account of factors tending to increase the influence of shop stewards in Great Britain, see P.A.L. Parker, W.R. Hawes and A.L. Lumb, The Reform of Collective Bargaining at Plant and Company Level, Manpower Papers No. 5 (London, 1971).

98 Australian shop stewards enjoy the basic protection afforded by the 'victimisation provisions' of the various industrial arbitration and wages boards statutes but this protection is given to them in their capacity as employees; with one exception, there is no special protection conferred upon shop stewards because of their position. The exception appears in section 3 of the Conciliation and Arbitration Act 1904-1973 (Cth).

Industrial tribunals have refused to recognise that a shop steward is entitled to preferential treatment in redundancy situations except where a well-established custom or practice grants the shop steward special seniority. See Federated Engine Drivers' and Firemen's Association of Australasia v. Adelaide Brick Co. Ltd (1940) 42 C.A.R. 588, p. 612, and Morts Dock and Engineering Co. Ltd. v. Federated Ship Painters' and Dockers' Union of Australia (1957) 88 C.A.R. 212.

The Conciliation and Arbitration Act 1904-1973 (Cth) extends protection against victimisation to officers, delegates or members of an organization who have done, or propose 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' them by the organization in accordance with the rules of the organization. Although there are several clear limitations in this provision it is clear that the protection afforded a shop steward against victimisation has been strengthened.

99 K.F. Walker, 'Attitudes of Personnel Officers to Industrial Relations'.

1 Ninety-six per cent of Australian factories employ less than 100 people but 52.2% of factory employees work in establishments employing over 100 persons: Walker, Australian Industrial Relations Systems, p. 402.

2 McCue, 'Plant Level Relationships', p. 11.


4 Walker, Australian Industrial Relations Systems, p. 385.
See Appendix 1, Vol. 2.


For a detailed account of the many different tasks undertaken by industrial supervisors, see B.L. Poidevin, 'The Functions of the Industrial Supervisor' (1956) 12 P.P.B. 18.

A survey of supervisory practices in sixty-eight organizations in 1956 found that supervisors took some part in the induction procedure in nearly all firms. In all organizations, supervisors bore some responsibility for advanced training while in 93% of the organizations, supervisors had some say in the promotion of employees: Fredricks, 'Supervisory Practices ...'.

Fredricks, 'Supervisory Practices ...', p. 34. A much more comprehensive survey of 500 undertakings in 1966 reported that only 4% of the small firms (51-100 employees), 14% of the medium sized firms (101-1,000 employees) and 58% of large firms (over 1,000 employees) provided in-plant training for supervisors; in 16% of the small firms, 24% of the medium-sized firms and 66% of the large firms, supervisors attended external training courses: Taylor, 'Training in Five Hundred Manufacturing Undertakings', p. 27.


The projected figure for the proportion of persons aged fifteen to nineteen years who will be engaged in full-time education in 1975 is 42%. See Ford, 'Unions and the Future', p. 199.

Federated Municipal and Shire Council Employees' Union of Australia v. City of Melbourne (1919) 26 C.L.R. 508, p. 555 per Isaacs and Rich JJ.

In some industries these demands have already been made. Claims formulated by the Vehicle Builders' Employees' Federation for negotiations for a new twelve months' award to replace the present award contain a provision requiring representation for the union on company boards. The Australian 12 February 1974, p. 1. See also J.P. Deveraux, 'Plant Level Relationships', a paper delivered at the Thirteenth Annual Convention of the Industrial Relations Society of New South Wales, 5-7 May, 1972, p. 4.


Walker, 'Attitudes of Personnel Officers to Industrial Relations', p. 20.


See R.J. Hawke, 'Workers Want fair share of the cake'.

J.L. McCue, in his paper 'Plant Level Relationships' discusses how employers suspect the motives behind union requests for changes in amenities, and safety procedures etc. He also points out that union resistance to employers' efforts to introduce new work methods or technology can be attributed to suspicion and distrust. See also M.P. McCarney, 'Plant Level Relationships: The Shop Steward'.


CHAPTER 13  PROSPECTS FOR REFORM

1 Fogarty, for example, suggests that practice overrides the defects of the law: M. Fogarty, Company and Corporation - One Law? (London, 1965). There, Fogarty was referring to the inadequacy of British company law.


3 See too p. 269, n. 6.

4 Johnstone, p. 40.


7 See generally Johnstone, pp. 42-43 on these informal sources of information and their reliability.

8 It would appear that the 'traditional model' dominates personnel management in Australia. See generally N.F. Dufty, 'Australian Companies and Their Workers' in K.E. Lindgren, H.H. Mason & B.L.J. Gordon (edd.), The Corporation And Australian Society (Sydney, 1974), Chapter 7. This model holds that only management has the capacity for direction and control. Workers are seen as having no entrepreneurial skill, as merely apathetic or antagonistic operatives. See D. McGregor, The Human Side of Enterprise (New York, 1960), pp. 33-43.


In 1971 Mr J.M. Riordan, Federal Secretary of the Federated Clerks' Union, complained that his union had been consulted about the introduction of about 300 computers into Australian commerce in less than 1% of the cases since March 1968, even though the union covered at least 90% of the employment affected by these computers. See Australia. Dept. of Labour. National Labour Advisory Council, Forum - Adjusting to Technological Change Employment and Technology No. 12 (Melbourne, 1971), p. 33.
11 See generally Eugene V. Rostow, "To Whom and For What Ends is Corporate Management Responsible" in Edward S. Mason (ed.), The Corporation in Modern Society (Cambridge, Massachusetts, 1960) where these views are cogently argued.


14 Wheelwright, Introduction to Rolfe, p. (x).

15 See e.g. Rostow, p. 64.

16 Rostow, p. 68. Theodore Levitt sees a different problem: 'In the end the danger is not that government will run business, or that business will run government, but rather that the two of them will coalesce, as we saw, into a single power, unopposed and unopposable'. See Levitt, p. 47.


19 Berle, The 20th Century Capitalist Revolution, p. 188.


22 Galbraith, American Capitalism, pp. 206-208.

CHAPTER 14 SHOULD THE LAW INTERVENE?

1 See generally Rudolph von Jhering, Law as a means to an end translated from the German by Isaac Husik (New York, 1968).


4 Pound, 'Survey', p. 17.

5 Pound, 'Survey', p. 36.


11 Kahn-Freund, Labour and The Law, p. 5.


14 Sorrell, p. 9.

15 ibid.

16 ibid.

17 Compare E.I. Sykes, 'The Role of Law in Industrial Relations' (1957) 29 Australian Quarterly 21, p. 27.


For Kahn-Freund, this is a familiar point. See Kahn-Freund, Labour Law: Old Traditions and New Developments.


The repeal of the Industrial Relations Act, 1971, c. 72 (U.K.) cannot be cited in support of the abstention theory. That Act attempted to introduce a regulatory system of industrial relations in Britain, an objective achieved in Australia in 1904 and even earlier in some states. The failure of the Act does not show that the law is an ineffective force in industrial relations generally, it simply indicates that that particular statute was imprudent and inappropriate in that particular industrial relations system.

On this slender nexus between law and social change, see W. Friedmann, Legal Theory (London, 1967).
INTRODUCTION


SECTION 1: EMPLOYEES’ INTEREST IN RECOGNITION OF SERVICE

CHAPTER 15  TOWARDS A DIRECTOR’S DUTY TO ACT BONA FIDE IN THE INTERESTS OF EMPLOYEES

1Vol. 1, Chapter 2, pp. 10-51.


3472 F. 2d 1081 (1972).


7See generally Detlev F. Vagts, "Reforming The Modern Corporation: Perspectives from the German" (1966) 80 Harv. L. Rev. 23, pp. 41-48.

8Vagts, p. 46.

9One of the fundamental principles of the Nazi platform read:

It must be the first duty of every citizen to perform mental or physical work. Individual activity must not violate the general interest, but must be exercised within the framework of the community and for the general good.

See Gottfried Feder, Das Programm der N.S.D.A.P. und seine weltanschaulichen Grundgedanken (Munich, 1932), pp. 19-22 quoted in Joachim Remak, The Nazi Years: A Documentary History (Englewood Cliffs, N.J.,


12 ibid.


14 German Works Council Act 1972, s. 75 (2).


16 quoted in Afterman & Baxt, p. 430.

17 Dr A.K. Fiadjoe, in a letter to the writer, dated 10 June 1974. Dr Fiadjoe is the Lecturer in Company Law at the University of Ghana, Legon, Ghana.


The Australian Institute of Directors considers that:

A director's responsibilities extend to the company, its shareholders, its employees, customers and creditors, as well as his fellow directors and, to some degree, to the state.


Larke Consolidated Industries Ltd, in its 1971 annual report, stated that their objective was *To conduct and develop the business of the Group for the benefit of its stockholders and employees having regard to the rights of each*; quoted in N.F. Dufty, *Australian Companies and Their Workers*, in Lindgren and Others, p. 90. See also Australian
19 (continued):

Financial Review 20 June 1972 for a statement of John Walton to the
effect that people are the primary resource of his company which runs
a chain of retail stores. See too The Australian 2 May 1974,
Supplement, pp. 16-17 and United Kingdom. Department of Trade and

See also Research and Policy Committee, Committee for Economic
Development, Social Responsibilities of Business Corporations (1971),
p. 22 quoted in Russell Stevenson Jr, "Corporations and Social
Responsibility: In Search of the Corporate Soul" (1974) 42 The George

20 'Companies "being made scapegoats"'; The Australian 1 May 1974,
p. 4.

21 See Appendix 2, Vol. 2.


25 See Vol. 1, pp. 287-288. The proposition in the text has been recently
accepted by the British Government. See White Paper, Company Law
Reform, para. 59.

26 In this sense the definition would have a 'declaratory' effect.
The impact of this type of provision should not be underestimated.
The Human Rights Bill now before Federal Parliament contains several
provisions of a declaratory nature. The Attorney-General's Second
Reading Speech on the Bill stressed the anticipated educative effect
of this type of provision. Australia. Parliament, Senate, Debates

In the field of race relations, American law has for a long time
attempted to set up an ideal, still perhaps far from full attainment.
See generally K. Lewellyn, 'What Law Cannot Do For Inter-Racial Peace'
(1957) 3 Vill. L. Rev. 30. In this approach the law gives an example
of where it has not lagged behind social change. Rather it has tried
to create a change in opinion and practice. The balance of interests'
concept would involve a similar venture.

27 Memorandum by Mr Harold Wincott, Editor of the Investors'
Chronicle, to the Jenkins Committee. Company Law Committee Minutes

28 Interview with the writer, 12 December 1973.

29 (1883) 23 Ch. D. 654, C.A.

30 [1962] Ch. 927.
31 Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.


33 See Vol. 1, p. 38.


35 [1962] Ch. 927.

36 S. 202 (1)(c) of the Ghanaian Companies Code (1961) suffers from the same defect. See Afterman & Baxt, pp. 427-482 where the material part of this section is quoted.


38 See Pieter Sanders, 'The Reform of Dutch Company Law' (1973) J.B.L. 194, p. 197 where this provision is discussed in detail.

39 The Carl Zeiss Foundation of Jena and the John Lewis Partnership in Britain have appointed trustees who may take action against the directors for gross breaches of the duties prescribed in the firms' trust deeds. Fogarty suggests that courts may be persuaded to intervene in cases of clear and gross violations of the revised formula of a director's duty. See Fogarty, A Companies Act 1970?, p. 121.

CHAPTER 16  EQUITY FOR THE EMPLOYED INVENTOR


4. Ibid.


7. Ibid.

8. Ibid.

9. See e.g. Solomons v. United States 137 U.S. 342, p. 346 (1890).


15. 289 U.S. 178 (1933).


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20. See Neon Signal Devices Inc. v. Alpha Claude Neon Corp. 54 F. (2d) 793 (1931).


26. Arbeitnehmererfindungsgesetz (hereinafter referred to as the 'German Act on Employee Inventions').

27. Richtlinien für die Vergütung von Arbeitnehmererfindungen im privaten Dienst vom 20. 7. 1959 (hereinafter referred to as the 'Directives').


29. German Act on Employees' Inventions 1957, s. 4.


32. German Act on Employees' Inventions 1957, s. 5


34. ibid.
Schade reports: "It is estimated that unlimited claims to an invention are made in about 99 percent and limited claims in only about one percent of all cases where rights are transferred". Schade, *Employees* Inventions - Law and Practice*, p. 250.

An employer is not obliged to file applications for foreign protection of the patent but if he chooses not to do so he must allow the employee to acquire foreign rights to the invention. See German Act on Employees' Inventions 1957, s. 14.


See e.g. *Triplex Safety Glass Company v. Scorah* [1938] 1 Ch. 211.

See German Act on Employees' Inventions 1957, ss. 8, 18.

German Act on Employees' Inventions 1957, s. 12.


German Act on Employees' Inventions 1957, s. 9 (2).

See Gerntholtz, p. 241.


German Act on Employees' Inventions 1957, s. 12.


ibid.

German Act on Employees' Inventions 1957, s. 22.

German Act on Employees' Inventions 1957, s. 23.


ibid.

ibid.
1 Vol. 1, pp. 64-95.

2 See e.g. Vol. 1, pp. 77-82, 88, 91.

3 It may not be possible for awards to include such a clause since this may not relate to an *industrial matter*. On the other hand, long service leave is clearly an *industrial matter* and any reasonable conditions relating to eligibility for this benefit should also be arbitrable. See Re Engine Drivers (South Maitland Railways Ltd) Conciliation Committee [1938] A.R. 266, p. 282. See too C.P. Mills and G.H. Sorrell, Federal Industrial Laws 5th edn of Nolan and Cohen (Sydney, 1974), pp. 228-229.

4 discussed in Vol. 1, p. 68.

5 Vol. 1, p. 70 discusses the present position.

6 The problems associated with the present limitation periods are discussed in Vol. 1, pp. 74-76.

7 Employers are already obliged to maintain certain records for the purposes of long service leave. See e.g. Long Service Leave Act, 1955-1967 (N.S.W.), s. 8. Under the South Australian provision employers are already required to keep records of an employee’s service and entitlement to long service leave for a period of three years after the employee’s services are terminated. See Long Service Leave Act, 1967-1972 (S.A.), s. 10.

8 For a novel solution to a slightly different problem, that of casual or itinerant employees, see Building and Construction Industry Long Service Payments Act, 1974 (N.S.W.). In effect, this Act establishes a central fund from which long service leave benefits are paid to certain workers for their service in the building and construction industry. Since entitlement is no longer based upon service with one particular employer, the workers covered by the Act, in effect, enjoy portability of long service leave benefits. See also Long Service Leave (Casual Employment) Act 1971 (Tas.).
17 Appendix 4, Vol. 2, pp. 96-97.
18 ibid.
19 Appendix 4, Vol. 2, pp. 94-96.
20 Appendix 4, Vol. 2, pp. 87-88.
CHAPTER 18  REFORM OF THE LAW GOVERNING DISMISSAL AND REMEDIES

1 Vol. 1, Chapter 6.


3 Vol. 1, pp. 109, 115.


5 See e.g. Die Tool and Engineering Co. and U.A.W. Local 155 3 L.A. 156 where Arbitrator Dudley E. Whiting ruled as follows: "Under a Company-Union contract whereby a discharge must be for cause, an employee must be informed of his discharge and the reason therefor at the time". Cited in Orme W. Phelps, Discipline and Discharge in the Unionized Firm (Berkeley, 1959), p. 23.

6 Die Tool and Engineering Co. and U.A.W. Local 155 3 L.A. 156 is again a useful example.

7 Trade Union and Labour Relations Act 1974, c. 52 (U.K.) (hereinafter referred to as 'Trade Union and Labour Relations Act 1974 (U.K.)').

8 In reference to the unfair dismissal provisions of the Industrial Relations Act 1971, c. 72 (U.K.) which are re-enacted with several minor amendments by the Trade Union and Labour Relations Act 1974 (U.K.), Samuels argued that in practice employers would probably find it necessary in most, if not all, cases to give written notice of dismissal with reasons. See Alec Samuels, 'Unfair Dismissal' (1972) 122 N.L.J. 453.

This view may have been predicated upon a misconception of the onus of proof which the repealed Act cast upon the employer. Samuels believed that the employer carried the principal onus of proving that there was a good objective reason for the dismissal. In fact, the employer was only required to show that the dismissal was "related to the conduct of the employee" etc. This left the main onus with the employee. See: Industrial Relations Act 1971, c. 72 (U.K.), s. 24 and M.R. Freedland, 'The Burden of Proof in Claims of Unfair Dismissal' (1972) 1 I.L.J. 20.

In Abernethy v. Mott, Hay and Anderson [1974] 1.C.R. 323, C.A., Lord Denning M.R. remarked, without incurring the disapproval of his colleagues in the Court of Appeal, that the principal reason for dismissal should be known to the employee before he is dismissed or he must be so advised at the time of his discharge. More recently, an Industrial Tribunal in Hutchins v. British Railways Board [1974] I.R.L.R. 303 held that an employee charged with an offence before a disciplinary hearing should be advised in advance of the allegations against him. Whether these rulings will establish a general right to be informed of the reasons for a dismissal at the time of the discharge remains to be seen. The Trade Union and Labour Relations Act 1974 (U.K.) now places the primary onus firmly upon the defendant in unfair dismissal cases, and this may hasten the development of such a requirement.
The industrial tribunal hearing a complaint of unfair dismissal may recommend reinstatement or re-engagement: Trade Union and Labour Relations Act 1974 (U.K.), Sch. 1, Part III, para. 17. However, on past experience, such recommendations will be rare: see, e.g. Coleman and Stephenson v. Magnet Joinery Ltd [1974] I.C.R. 25, N.I.R.C. Compensation may also be granted but where the manner of the discharge is the only element of unfairness in the dismissal, the award will be nominal. See Vol.1, pp. 339-340. Thus, there is no effective sanction against dismissals for no stated reason in Great Britain.


St Anne's Board Mill Co. v. Brien [1973] I.C.R. 444. The position is similar in Czechoslovakia. See Labour Code, Dated 16 June 1965 (Sbírka Zákonnou 30 June 1965, No. 32, Text 65) I.L.O. Legislative Series 1965 - Cz. 1 (hereinafter referred to as the 'Czechoslovakian Labour Code'). The Code invalidates any dismissal for which a reason was not stated. In addition, it provides that the express reason may not subsequently be changed. Thus an employer may not justify his action on grounds discovered after the original discharge. The employee's remedy for breach of these provisions sounds in damages: Czechoslovakian Labour Code, ss. 61(1), 209.

Compare Australian law on this point. See Vol. 1, p. 115.

Phelps, p. 23.

Phelps, p. 25.


On the other hand, it is sufficient if substantive justice is done in the procedure preceding dismissal: Neefjes v. Crystal Products Co. Ltd (1972) 13 K.I.R. 142. The Industrial Court does not expect an employer to give the employee an opportunity to explain in all cases. Thus, where the employee's misconduct is so serious that, whatever his explanation might be, it is in the interests of the business to terminate his services, then a dismissal without prior consultation is not unfair: James v. Waltham Holy Cross U.D.C. [1973] 1 I.C.R. 398, N.I.R.C. Moreover, if the employee is given a hearing at a review of the dismissal conducted by the personnel manager, he may not complain that the dismissal was unfair: Henderson v. Masson Scott Thrissell Engineering Ltd [1974] I.R.L.R. 98.

See German Works Council Act 1972, s. 102.


ibid.

ibid.

Act No. 73-680 of 13 July 1973, Art. 24(m).

Williamson v. Commonwealth (1907) 5 C.L.R. 174, p. 179.


In brief, the prescribed disciplinary procedure is as follows:

For minor offences the Chief Officer or other prescribed officer may call upon the officer concerned for an explanation of the alleged offence. After considering this answer, the Chief Officer or prescribed officer may decide that a certain form of punishment is warranted. The permissible penalties are a caution, a reprimand or a fine. Where the penalty imposed by an officer other than the Chief Officer is a fine, an appeal lies to the Chief Officer who may confirm, annul or reduce the punishment. His decision shall be final: Public Service Act 1922-1973 (Cth), s. 55 (2).

The procedure differs where major offences are involved. The offending officer may be charged by the Chief Officer or any other prescribed officer and may be suspended if the alleged offence is serious. The offending officer is entitled to a copy of the charge but apparently the formal charge need not state the specific reason
for the complaint. However, it is necessary to give the alleged offender particulars of the charge in sufficient time to prepare his defence. See Public Service Act 1922-1973 (Cth), s. 55 (3) and Stockwell v. Ryder (1906) 4 C.L.R. 469, a case upon the Public Service Act 1896, 60 Vict., No. 15 (Qld).

Upon receipt of the charge, the officer is directed to reply forthwith in writing, stating whether he admits or denies the truth of the charge, and giving any explanation he desires in relation thereto.

Disciplinary measures may only be imposed if the Chief Officer, after reviewing the available evidence, decides that the charge has been sustained. Where he recommends the dismissal of the offending officer an appeal in a prescribed manner and in a prescribed period may be taken to a specially constituted Appeal Board. See Public Service Act 1922-1973 (Cth), s. 55 (3), (5), (7), (9).

This Board is comprised of an officer elected by and from the officers of the Division in which the appellant performs his duties, a legally qualified Chairman and an officer of the Department to which the appellant belongs. The appeal is decided by the majority of the Board. Each member must take a solemn oath to act impartially in reaching his decision.

Only the Minister or the Permanent Head of the appropriate department may discipline First or Second Division Officers. They may suspend the officer concerned on their own initiative but the suspension must be reported to the Public Service Board. If the officer does not give a written admission of the charge, the Public Service Board must appoint a Board of Inquiry to investigate the charge and report back. If the Board of Inquiry reports that the charge is established, the Board of Commissioners may recommend to the Governor-General that the officer be dismissed. The Governor-General is then empowered to dismiss the officer concerned or to impose such penalty or other punishment as the case demands. See Public Service Act 1922-1973 (Cth), s. 56.

29 Caiden, p. 118.

30 Caiden, p. 111.


32 Paquin found union participation in disciplinary procedures insignificant. In fourteen of the seventeen manufacturing companies he surveyed, unions played no formal role apart from investigating alleged injustices. Only two companies formally advised shop stewards of proposed dismissals, while a third company gave the job delegate the formal right to be present while the employee was reprimanded: J.A. Paquin, 'Disciplinary Policies and Procedures in Industry' (1960) 16 P.P.B. 14, p. 16.
Many countries have recognised this need for formality. See, e.g.: Italian Law on Dismissals, Act No. 604 to issue rules for the dismissal of individual employees. Dated 15 July 1966, Art. 2; The French Law on Dismissals, Act No. 73-680 of 13 July 1973, Art. 24 (m); and the Act Concerning Job Security in Sweden, 1974 (hereinafter referred to as the "Swedish Job Security Act, 1974"), s. 8.


Contracts of Employment Act 1972 (U.K.), s. 1 (1). An employee who serves less than thirteen weeks in continuous employment for one employer is entitled to whatever notice is required by his contract of service or the common law: the Act does not apply to this early period of employment.


ibid.

Contracts of Employment Act 1972 (U.K.), s. 2 (4).

Contracts of Employment Act 1972 (U.K.), s. 1 (3).


Act No. 73-680 of 13 July 1973, Articles 24 (d)(2), (3) and 24 (e).

French law also ties an employee’s entitlement to notice to his length of continuing service with the one employer. By Article 24 (d) of the Act of 13 July 1973, employees with at least two years’ seniority are entitled to two months’ notice, while employees with more than six months but less than two years’ service must receive at least one month’s notice. Any contractual provision prescribing a shorter period of notice than the statutory minimum shall be null and void: Act No. 73-680 of 13 July 1973, Articles 24 (d)(2), (3) and 24 (e).

Swedish Job Security Act 1974, s. 11.

To qualify for the longer periods of notice, an employee must have at the time of the notice of dismissal been in the employment of the employer during the last six months or for a total period of at least twelve months during the last two years: Swedish Job Security Act 1974, s. 11.

Swedish Job Security Act 1974, s. 11.

Compare Czechoslavakian Labour Code, s. 45.

Contracts of Employment Act, 1972 (U.K.), s. 2 and Schedule 2. But these provisions do not apply where the notice prescribed by the employee's terms of employment is at least one week more than the statutory minima: s. 2 (3).

Although the minimum notice required of an employer increases with the employee's length of service, the notice required of an employee remains the same. Section 1 (2) provides that an employee who has been continuously employed for thirteen weeks or more must give not less than one week's notice to terminate his employment. It appears that an employee is simply required to give one week's notice if he resigns but if the contract of service provides for a longer period, clearly that period will apply.

Swedish Job Security Act 1974, s. 11.


See e.g. Metal Trades Award 1952, clause 19 (b)(iii) which obliges employers to grant a regular employee under notice leave of absence without pay for one day in order to look for alternative employment. This differs from the Swedish provision which preserves employment benefits during the leave of absence.


See e.g. Oldcastle v. Guinea Airways [1956] S.A.S.R. 325 for one of the rare cases in which an employer obtained damages in respect of his employee's breach of contract.

Phelps, p. 34 and following gives a detailed account of the available remedies.

Phelps, pp. 28-29.


Acme Industrial Co. and United Automobile Etc. Workers, Local 310 41 L.A. 1176 (1964) provides an interesting example. There the worker was cautioned about his persistent and loud whistling during working hours. Five days later the worker was again told to stop whistling and he was reminded of the initial warning. The worker responded by singing in a loud voice. When he was taken to the company's industrial relations office, the worker reportedly became belligerent and insolent. He was thereupon dismissed. Arbitrator Updegraff ruled that in the circumstances discharge was a severe penalty and awarded the worker reinstatement with seniority, but without back-pay.
An offender may be cautioned, reprimanded or fined for minor transgressions. For more serious offences an officer may be suspended while the formal charge against him is investigated. If the disciplining officer is of opinion that the charge has been sustained, he may prescribe a fine, a reduction in salary, a demotion, or a disciplinary transfer. Alternatively, he may recommend to the Board of Commissioners that the officer be dismissed. Public Service Act 1922-1973 (Cth), ss. 55 (2), (3)(d).

The current Act is the Public Service Act 1922-1973 (Cth).


See Lowry v. Australian Stevedoring Industry Board (1951) 72 C.A.R. 40, p. 41 per Kirby J.

See e.g. Re N.S.W. Government Omnibus Traffic Employees Award 1963 A.I.L.R. Rep. 322. There, the union submitted that, although it was reasonable to permit the employer to make proportionate deductions from an employee’s pay packet for time not spent on duty within the hours of duty (including time lost through tardiness), it was not desirable to impose any further sanction summarily. Commissioner Horan accepted this submission.


The suggested measure would necessitate certain amendments to the Truck Acts which in general prohibit deductions from employees’ wages. But the policy of that legislation would not be offended by the proposal since the deduction is limited and the amount is not retained by the employer: Truck Act of 1900, s. 1(1) (N.S.W.). For a complete discussion of this legislation, see Mills, Industrial Laws, New South Wales, pp. 71-81.

Sykes and Glasbeek point out a further difficulty. Where the same fine is levied for several different offences (some trivial, some major), the fine may be treated as a penalty since it is not genuine liquidated damage. E.I. Sykes & H.J. Glasbeek, Labour Law in Australia (Sydney, 1972), p. 74.

A statutory right to suspend for misconduct was considered in Browne v. Commissioner for Railways (1936) 36 S.R. (N.S.W.) 21.

See Federated Clerks Union v. T.A.A. 1973 A.I.L.R. Rep. 117 where Mr K.D. Marshall, Chairman of the board of reference, referred with approval to the clause in the Clerks (Shipping) Award which allows an employer to discipline an employee by suspending him from duty. See too Mills, New South Wales, Industrial Laws, p. 242.

Bird v. British Celanese Ltd [1945] K.B. 336, p. 341 per Scott L.J. See too Federated Clerks Union v. T.A.A. 1973 A.I.L.R. Rep. 117 where a board of reference upheld the dismissal of an employee for a trivial misdemeanour while hinting that suspension might have been a more appropriate remedy had it been available.

For a more sceptical view of the value of suspension as a disciplinary measure, see Mills, New South Wales, Industrial Laws, p. 243.


Once a right to suspend is exercised, all rights and obligations under the contract are temporarily suspended (Wallwork v. Fielding [1922] 2 K.B. 66, pp. 71-72, 74-75) unless, in the context, the right to suspend is designed to have a more limited operation (Zinc Corporation v. Hirsch [1916] 1 K.B. 541, pp. 554-556, 561, 563). See also Amalgamated Engineering Union of Employees, Queensland v. A. Sargeant & Co. Pty Ltd (1945) 39 Q.J.P. 74, p. 77.

The Industrial Commission of New South Wales has shown a willingness to scrutinise the application of provisions in the steel industry awards which permit stand-down with deduction of pay for misconduct. See Re Steel Works Employees (B.H.P. Co. Ltd) Award (No. 1) 1962 A.R. 334. See also Re Sulphide Corporation Pty Ltd 1965 A.R. 343. There is no reason, then, why industrial tribunals should not be able to safeguard the rights of employees suspended for alleged misconduct. For an example of a reasonable exercise of a disciplinary suspension upheld by the N.S.W. Industrial Commission, see Re Mathieson and B.H.P. Co. Ltd 1967 A.R. 154. There, a leading hand who left his place of work five minutes early and permitted several of his subordinates to do the same was suspended for one day. The Commission held that this was not an unreasonable penalty.

See Vol. 1, pp. 338-341.

German Works Council Act 1972, s. 103. Similarly, in France, an employer must obtain the approval of the factory committee if he wishes to dismiss a personnel delegate, his substitute, a member of the factory committee, or his substitute. Candidates for these positions and union representatives to the factory committees are guaranteed similar protection. If the committee withholds its consent, approval must be sought from a labour inspector.

For a useful discussion of the French provisions, see Seyfarth and others, pp. 222-223. See too Meyers, pp. 60-62. In a similar vein, Chilean law forbids dismissal of "persons such as staff representatives, trade union leaders or shop stewards, and candidates for these posts" without prior authorisation from a special labour judge: Act No. 16455, to issue rules for the termination of contracts of employment, Dated 5 April 1966 (Diario Oficial, 6 April 1966, No. 26409, p. 1). I.L.O.
Legislative Series 1966 - Chile 1, ss. 10, 11.


76 See Trade Union and Labour Relations Act 1974 (U.K.), Sch. 1, para. 3.

In Donnelly v. London Brick Co. Ltd [1974] I.R.L.R. 331, a shop steward discharged after an altercation at his work place was held to be unfairly dismissed in the circumstances; the tribunal considered that the employer's disregard of the procedure outlined in the Code of Practice might have affected the ultimate decision to dismiss the applicant. In the result, the parties agreed to a re-engagement. However, the tribunal was clearly prepared to grant a remedy under the Industrial Relations Act 1971 (U.K.) had the parties not reached this agreement.

77 See Vol. 1, pp. 111.

78 The former Attorney-General and Minister for Customs and Excise, Senator The Hon. L.K. Murphy, Q.C. introduced a Racial Discrimination Bill in the Australian Parliament on 21 November 1973 and again on 4 April 1974 but the bill was not debated on either occasion. The Racial Discrimination Bill 1974 was re-introduced on 31 October 1974 with some minor improvements. The discussion of the Racial Discrimination Bill 1974 in this thesis refers to the Bill introduced on 4 April 1974. The later amendments are relegated to footnotes since the 'cut-off date' for this thesis is 1 October 1974. The Racial Discrimination Bill 1974 re-introduced on 31 October 1974 shall hereinafter be referred to as 'The October Bill'.

79 A copy of this Convention is included as a Schedule to the Racial Discrimination Bill 1974.

80 Some idea of the scope of the Bill can be gained from clause 9. It contains a general prescription of discrimination based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

81 Constitution, s. 51 (xxix).

82 See generally 'Discrimination In Employment And Occupation'. Statement in the House of Representatives by Hon. Clyde R. Cameron, M.P., Minister for Labour, in Australia. House of Representatives, Debates 1973, Vol. 84, pp. 2371-2380 (hereinafter referred to as the 'Ministerial Statement on Discrimination in Employment').

A copy of I.L.O. Convention No. 111 is attached to the Ministerial Statement on Discrimination in Employment.
It includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.


Ministerial Statement on Discrimination in Employment and Occupation, p. 2374.


McGarvie Report, p. 10.

Geraldine Pascall, 'Women make most complaints over bias' The Australian 15 March 1974, p. 3.

Gareth Evans reports that the files of the Aboriginal Legal Services are beginning to show large scale discrimination practised by employers. See G. Evans, 'Anti-Discrimination Laws', a paper delivered at a Research Seminar on 'Aborigines And The Law' held by the Centre For Research Into Aboriginal Affairs, Monash University, Roberts Hall, 12-16 July 1974, p. 2.

In 1964, Mountain conducted a survey of employment policies in relation to married women in forty Australian undertakings. She found that thirty-eight of the forty undertakings required a woman to resign should she become pregnant. In most undertakings women were not permitted to continue work after the fifth month of their pregnancy. Further, the survey suggested that married women not solely dependent on their own income were adversely affected by retrenchment policies in over half of the undertakings which had considered a policy on retrenchment. While the respondents may have had sound reasons for these policies on pregnancy and retrenchment, the policies are nevertheless discriminatory to some extent. The Racial Discrimination Bill 1974 does not cover this form of discrimination. See Ann D. Mountain, 'Employment of Married Women in 40 Australian Undertakings' (1965) 21 P.P.B. 23.

This is so because Article 1 b of I.L.O. Convention No. 111 defines 'discrimination' to include:

such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies. (Emphasis added.)

See McGarvie Report, Appendix 2, p. 31.
The British Industrial Relations Act 1971, c. 72 contained a number of sections relating to unfair dismissal. When that Act was repealed by the Trade Union and Labour Relations Act 1974 (U.K.), the unfair dismissal provisions of the former Act were re-enacted with certain amendments. Thus, many decisions under the old Act will retain their importance in the new context.


Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 6 (8). Thus, the dismissal of a salesman without warning for unsatisfactory sales figures and alleged inability to assimilate technical facts required in his job was ruled unfair because the employer had not acted reasonably in treating these complaints as justification for the dismissal: Hewitson v. Anderton Springs Ltd [1972] I.T.R. 391.

Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 6 (4).

Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 6 (7). For an example, see Trusler v. The Lummus Co. [1972] I.R.L.R. 35.

Where the contract of employment is for a fixed term, an employee is deemed to be dismissed if the term expires without being renewed under the same contract.

This corrects a defect in the repealed Act which gave no protection to an employee who was forced to resign after persistent discrimination or victimisation by his employer.

Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, paras. 5 (3), (4).

This is defined in para. 5 (4) of Schedule 1.

Industrial Relations Act 1971, c. 72 (U.K.).


In Lees v. Arthur Greaves (Lees) Ltd [1973] I.C.R. 90, the Industrial Court observed that where the employer coerces the employee into agreeing to a termination of the contract, the agreement would be disregarded and the termination would be treated as a dismissal. In Lees' Case, however, no undue pressure had been proved. Even if the tribunals are vigilant in protecting an employee's rights in this situation, their hands are tied when the employee voluntarily agrees
to an early termination of the contract. And employees not conversant with the technicalities of the Act might be disposed to do this especially where the employer's conduct makes continued employment unpleasant. See now *Lees v. Arthur Greaves (Lees)* Ltd [1974] 2 All E.R. 393.

6 In Worthington Corp. 24 L.A. 1 (1955), pp. 6-7 Arbitrator Joseph D. McGoldrick defined 'just cause' to 'exclude discharge for mere whim or caprice'. Again in *Lincoln Industries Inc. and United Furniture Workers of America* (1952) 5 A.L.A.A. 69, 158 Arbitrator Gerald A. Barrett stated: 'A disciplinary action against an employer which is unjust, arbitrary, capricious or which fails to possess some reasonable foundation for its support, is discipline without "proper cause"'. See generally Phelps, *Discipline and Discharge*.

7 *Protection against Dismissal Act*, as consolidated on 25 August 1969, s. 1.


9 Act No. 604 to issue rules for the dismissal of individual employees. Dated 15 July 1966, s. 3.

10 Meyers, p. 51.

11 Vol. 1, p. 131.


14 *German Works Council Act 1972*, s. 81 (1).

15 *German Works Council Act 1972*, s. 81 (2).

16 Some American arbitrators have taken this stand in interpreting the 'just cause' provisions in collected agreements: Seyfarth and Others, p. 220.


18 Meyers, p. 7.
See e.g.: John R. Thompson Co. 63-2 A.R.B. para. 8809 and
Universal Match Corp. 64-1 A.R.B. para. 8355. See also Arbitrator
Gerald A. Barrett in Lincoln Industries Inc. and United Furniture

See e.g. Babcock & Wilcox Co. and Steelworkers Local 3059
41 A.L. 862 (1963) and Phelps, p. 141.

See Smith's Transfer Corp. 62-3 A.R.B. para. 9005.

Myron Goldub, Discharge for Cause, p. 29 quoted in Phelps,
pp. 22-23.

Arbitrator W.E. Simkin in Bethlehem Steel Co. and United Steel

Seyfarth and Others, p. 218.

e.g. Rockwell-Standard Corp. and Allied Industrial Workers,
Local 109 41 L.A. 345 (1963) (sleeping on the job, first offence; held:
discharge too severe); Butler County Mushroom Farms and Mushroom Growers
Local 21954 41 L.A. 568 (1963) (horseplay injuring a workmate, first
infraction: discharge overruled).

See e.g. Rockwell-Standard Corp. and Allied Industrial Workers

Trade Union and Labour Relations Act 1974 (U.K.), Sch. 1, para.
6 (8). This issue is determined in accordance with 'equity and the
substantial merits of the case'.

5.

Failure to warn an employee that, unless he mended his ways or
improved his performance, he would be dismissed renders a subsequent
discharge unfair in most cases. See e.g. Young v. E. Thomas & Co.
Ltd [1972] I.T.R. 434. A general warning to all employees that certain
conduct is prohibited will suffice. Connelly v. Liverpool Corporation


Industrial Conciliation and Arbitration Act, 1972 (S.A.), s.
156 (2).

Works committeeemen in France are protected against discriminatory
discharge for a period of six months after their term of office expires:
Seyfarth and Others, p. 222.
32 See clause 25 (2). The October Bill contains an identical provision in clause 25 (4). This Bill also provides that proceedings may not be instituted in respect of discrimination in domestic employment. The April Bill had no similar provision.

33 On this aspect of discrimination, see Bob Hepple, Race Jobs and the Law in Britain (London, 1968), p. 17.

34 See clauses 22, 23, 25 (1). The Commissioner is, however, empowered to decline to investigate a complaint which is trivial, vexatious or out of time (there is a twelve month limitation period). He may also refuse to proceed upon a complaint if the complainant does not have a sufficient interest in the subject matter of the complaint or if there is some alternative remedy reasonably available to the aggrieved party: clause 23 (2).

The Commissioner's approach to these provisions will be crucial. If he takes a restrictive view he may deny a party with a legitimate complaint the advantages of an official investigation. The October Bill contains similar provisions on these points.

35 Racial Discrimination Bill 1974, cl. 24 (1)(b). A Commission has no obligation under the October Bill to obtain an assurance against repetition of the discrimination. See clause 21 (1).

36 Race Relations Act 1971 (N.Z.), s. 16.

37 Powers to compel the attendance of witnesses, to interrogate and to require the production of documents were included in the 1973 draft of the Racial Discrimination Bill. They generated such controversy that the Australian Government decided to excise them from the 1974 Bill. In his Second Reading Speech, The Attorney-General explained this compromise by emphasising that the primary role of a Commissioner was mediation and conciliation, not compulsion: Australia, Senate, Debates, Weekly Hansard No. 4, 1974, p. 674.

The October Bill gives the Commissioner power to summon a compulsory conference of the parties involved and, at the request of the Commissioner, a prescribed authority is authorised to sub-poena persons and documents and take evidence under oath. Failure to attend a conference or give evidence as directed attracts a fine. See clauses 22, 23. A person is not exempted from answering a question or producing a document for a prescribed authority on the ground that the answer or document may tend to incriminate him, but any such answer or document is not admissible in evidence against him in any proceeding other than a proceeding for an offence under clause 23 (7). That clause penalises any person who unreasonably refuses or fails to co-operate with a prescribed authority or who knowingly misleads such an authority in the course of its inquiry. A similar provision exists in New Zealand: Race Relations Act 1971 (N.Z.), s. 15 (5).

38 Lester and Bindman advocate compulsory evidence-gathering powers for the British Race Relations Board. They argue that, without such powers, the Board may be seriously hamstrung in its work 'by its dependence on winning the co-operation of the respondent in order to obtain the necessary information with which to evaluate the complaint against him'. Anthony Lester and Geoffrey Bindman, Race and Law (London, 1972), p. 379.
See now The October Bill, clause 26 (1) which is identical on this point.

The Bill gives the Superior Court of Australia jurisdiction to hear proceedings instituted under the Act, and, as from a date fixed by proclamation, State and Territory Courts will be vested with federal jurisdiction in these matters. The Australian Industrial Court will exercise an interim jurisdiction until the Superior Court is established: clause 58.

Racial Discrimination Bill 1974, clause 17. The October Bill contains an identical provision.

Race Relations Act 1968, c. 71 (U.K.).

Race Relations Act 1968, c. 71 (U.K.), s. 13 (3).

It is sufficient if the employer makes his employees fully aware of his policy upon discrimination; it is not necessary to take formal steps to communicate this policy to the employees. Race Relations Board v. Harris (Mail Order) Co. Ltd, Report of the Race Relations Board for 1971-72, App. VII, Case 6, Westminster County Court, discussed in Hepple & O'Higgins, Encyclopedia of Labour Relations Law Vol. 2, p. 7321.

Racial Discrimination Bill 1974, clause 18. The October Bill includes an identical provision.

The 1973 Draft of the Racial Discrimination Bill provided that in civil (but not criminal) proceedings, the defendant had the burden of proving to the reasonable satisfaction of the court that his act was not racially inspired. The omission of this clause from the 1974 Bill has been described as a political compromise. See Gareth Evans, 'Anti-Discrimination Laws', p. 21.

As mentioned earlier, this omission has been corrected in the October Bill. See clauses 22, 23. But not all evidence collected by a prescribed authority in pursuance of clause 23 is admissible in civil proceedings instituted by the aggrieved party or on his behalf. If the prescribed authority uncovers any evidence which tends to incriminate the employer, this will not be available in the civil proceedings. See clause 23. While this provision may be necessary to facilitate a settlement of the grievance without recourse to litigation, it does hamper the complainant's chance of success in a civil suit. It also, of course, preserves the employer's privilege against self-incrimination. Experience with this provision may show that this privilege is restricted to evidence relevant to those acts which attract a criminal sanction under the October Bill. See clauses 28-30.

Hepple, Race, Jobs and Law, p. 103.
Subject, of course, to certain exclusions from the scope of the Trade Union and Labour Relations Act 1974 (U.K.). See Schedule 1, para. 9 of the Act.

50 See Schedule 1, para. 17. Under the Trade Union and Labour Relations Act 1974 (U.K.), the complainant must present his complaint to an industrial tribunal before the end of the period of three months beginning with the effective date of the termination. However, the tribunal may grant an extension of time where it is satisfied that it was not 'reasonably practicable' for the complaint to be presented in the prescribed period. See Sch. 1, para. 21 (4). The former time limit was twenty-eight days subject to extension. See Industrial Relations Act 1971, c. 72, Schedule 6, cl. 5 (U.K.). This time limit was applied somewhat strictly. See e.g. Ogidi-Olu v. Guys Hospital Board of Governors [1973] I.C.R. 645, N.I.R.C.

Under the new provision, the tribunal's discretion to excuse non-compliance is couched in more liberal language. Accordingly, it may well be that tardy complaints will be treated more sympathetically. On the other hand, 'practicable' cannot be construed as 'fair, equitable or reasonable'. See Re Affairs of Farquhar [1943] 2 All E.R. 781, p. 783 per Lord Greene M.R. and Shepherd v. Combex Ltd [1972] I.T.R. 454.


For an example of a case where the employer failed to discharge this onus, see Middlemas v. Greenwood Batley [1972] I.R.L.R. 3.

In one sense even a dismissal which falls within the grounds enumerated in Trade Union and Labour Relations Act 1974 (U.K.), Sch. 1, para. 6 (2) is not prima facie fair since the fairness or unfairness of the discharge then depends upon the application of para. 6 (8). See Green v. Southampton Corporation [1973] I.C.R. 153, N.I.R.C.

53 These words need not be construed ejusdem generis with the reasons listed in Trade Union and Labour Relations Act 1974, Sch. 1, para. 6 (2) (U.K.). See R.S. Components Ltd v. Irwin (1973) 15 K.I.R. 191, N.I.R.C.

54 Trade Union and Labour Relations Act 1974 (U.K.), Sch. 1, para. 6 (1). As to the reasons classified as prima facie fair see para. 6 (2).

55 Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 6 (8).

56 The repealed Act simply required the employer to show that the reason for the dismissal fell within one of the categories of dismissal regarded by the Act as prima facie fair or that there was some other substantial reason which would justify dismissing employees from the position concerned. The employee then, it seemed, had the onus of
proving that the employer acted unreasonably in treating the grounds alleged as sufficient cause for discharge. See Industrial Relations Act 1971, c. 72 (U.K.), s. 24 (1), (2), (6).

Freedland suggested that the employer would have little difficulty satisfying the initial burden since a dismissal could easily have been *related to the conduct of the employee* in the words of section 24. The employee would then have been left with the more difficult secondary onus. See M.R. Freedland, *The Burden of Proof in Claims of Unfair Dismissal* (1972) 1 I.L.J. 20

Indeed, Phelps believes that the "prime effect of the phrase "for cause" has been procedural. It puts the burden of proof on the employer for any corrective action prejudicial to the employee." Phelps, p. 33. See too Arbitrator E.E. Hale In the Matter of Howell Refining Co. 27 L.A. 486, p. 491.

Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 6 (2)(b).

Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 6 (8).

Indlustrial Conciliation and Arbitration Act 1972 (S.A.), s. 157(2).


Racial Discrimination Bill 1974, s. 25 (5)(d). The equivalent provision in the October Bill is clause 26 (1)(d)(i).

Racial Discrimination Bill 1974, s. 25 (b). The October Bill contains an identical provision. See clause 26 (1)(d)(ii).

Racial Discrimination Bill 1974, s. 25 (5)(b)(i).

A more specific direction that the court could award reinstatement might be necessary to overcome the judicial prejudice against ordering specific performance of a contract of service.

See Hepple, Race, Jobs and Law, p. 107.


72 Action on a complaint under the Race Relations Act, 1968, c. 71 (U.K.) may be stayed if the complaint has given rise or could give rise to a suit for unfair dismissal under Trade Union and Labour Relations Act 1974 (U.K.). See Schedule 1, para. 28. Under the latter Act, the tribunal hearing the complaint may recommend that the employee be reinstated or re-engaged (para. 17). But an employer may disregard this recommendation and there is little the tribunal can do about it. See Vol. 1, p. 339.

73 Lester and Bindman argue that the court hearing a complaint under the Race Relations Act 1968, c. 71 (U.K.) should be empowered to grant reinstatement. See Lester and Bindman, Race and Law, p. 380.


75 Although industrial tribunals in New South Wales and South Australia will award reinstatement to an employee dismissed where the discharge was harsh, unjust or unreasonable, there is no remedy available where the dismissal is simply unfair. Nor is there any remedy for unfair dismissal in other state jurisdictions or in the Commonwealth sphere. Moreover, there is no remedy at common law for an employee unfairly dismissed.

76 For example, France and West Germany. See G. DE N. Clark, 'Remedies For Unfair Dismissal: A European Comparison', pp. 417, 418.

77 For example, Italy and U.S.S.R. See G. DE N. Clark, 'Remedies For Unfair Dismissal, A European Comparison', pp. 415, 428.

78 Meyers points out that an award of reinstatement is enforceable in the courts: Levy v. Superior Court of Los Angeles County 15 Cal. 2d 692; Meyers, p. 6. See too Phelps, p. 27. For an example, see Acme Industrial Co. and United Automobile Etc. Workers, Local 310 41 L.A. 1176 (1964).

79 Phelps, p. 27.

80 Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 17.

81 Ibid.

82 Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 19 (4)(b).

84. Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 20 (1)


89. Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 19 (1).

90. Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 19 (2)(b). This provision will allow the tribunals to make generous awards of compensation in respect of lost superannuation benefits. See e.g. Scottish Co-operative Wholesale Society Ltd v. Lloyd [1973] I.C.R. 137, N.I.R.C.


For a case on the duty to mitigate damage in this context, see Archbold Freightage Ltd v. Wilson [1974] I.T.R. 133.

96. Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 26 (2).


The problem here, of course, is one of assessment. Damages for injury to reputation and feelings are awarded in tort actions for defamation and false imprisonment: see Walker v. Alltools (1944) 61 T.L.R. 39, p. 40, C.A.; Goslin v. Corry (1844) 7 M. & G. 342, p. 346; 135 E.R. 143, p. 145; Ley v. Hamilton (1935) 153 L.T. 384, p. 386 (H.L.). And, although as Lord Atkin observed, *it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation* (Ley v. Hamilton (1935) 153 L.T. 384, p. 386 per Lord Atkin), this is no excuse for failure to attempt an estimate.


Industrial Conciliation and Arbitration Act 1954, as amended (N.Z.), s. 179.

Industrial Conciliation and Arbitration Act 1954, as amended (N.Z.), s. 179 (4).

Industrial Conciliation and Arbitration Act 1954, as amended (N.Z.), s. 179 (5).


Trade Union and Labour Relations Act 1974 (U.K.), Schedule 1, para. 17.


Stephens & Chaney, p. 33.
Levy reports that in 'an ordinary discharge case about two years may elapse from the time the worker files his charge until ... the time the court of appeals enters a decree' enforcing the National Labor Relations Board's order: H.M. Levy, 'The Role of Law in the United States and England in Protecting the Worker from Discharge and Discrimination' (1969) 18 I.C.L.Q. 558, p. 568.

In the Stephens & Chaney survey, nearly 40% of the workers who refused reinstatement stated that they had obtained a better job before reinstatement was offered: Stephens & Chaney, p. 234.

This principle demands that redundant employees be retrenched in reverse order of seniority 'all other things being equal'.

Seniority is recognised as a key factor in selecting employees for lay-off in many overseas countries. In the United States, for example, the seniority clause in collective agreements is the hub of job security. It determines the order of lay-off and the 'bumping' rights of unit employees. In some plants, seniority merely entitles a senior employee to displace or 'bump' a junior employee in the same department or in a position for which the senior employee is qualified. See generally Seyfarth, Shaw, Fairweather & Geraldson, Labor Relations and The Law in France and the United States (Ann Arbor, Michigan, 1972), pp. 424, 427 and Frederic Meyers, Ownership of Jobs (Los Angeles, 1964), pp. 10-17.

The Chairman of the Flight Crew Officers' Industrial Tribunal recently defended the seniority principle.

This security is part of the reward for accumulated service to the employer; it facilitates the pursuit of a stable career in a particular industry; it provides an objective method free from favouritism in the selection of persons to be retrenched; and it helps to protect those who by reason of advancing age may have greater difficulty in securing alternative employment. The restriction on management rights must be weighed against the humanitarian and industrial considerations involved in the application of the seniority principle.


For a thought-provoking account of the costs of redundancy for 754 workers retrenched when the A.E.I. Woolwich factory in South-East London closed in 1968, see W.W. Daniel, Whatever happened to the workers in Woolwich? (London, 1972). Daniel found a definite and consistent trend for those with longer service to have less difficulty in finding a suitable new job.


For a detailed account of the French provisions, see Meyers, pp. 63-71 and Mukherjee, pp. 188-225.

Act Concerning Job Security in Sweden, 1974 (hereinafter referred to as 'Swedish Job Security Act, 1974'), s. 22.

See generally Meyers, p. 63 and Mukherjee, pp. 195-196.


Mukherjee, p. 232.
The Jenkins Committee pointed out that an offeror might not be able to predict the extent of displacement until he actually took over the business. It also felt that the stated intentions could not be enforced and might encourage inaccurate estimates of the extent of redundancy: United Kingdom. Parliament, Board of Trade. Report of the Company Law Committee [Chairman: The Right Honourable Lord Jenkins] Cmd 1749, June 1962 (London, 1962), para. 267.


Weinberg, p. 187.

Jenkins Report, para. 16.


Australian Associated Stock Exchanges. Official List Requirements (Sydney, 1973), s. 5 reflects this policy.

See e.g. Re Oriental Bank Corpn; MacDowall's Case (1886) 32 Ch.D.366.

For a detailed account of the powers of the French Ministry of Labour in dealing with redundancies, see: Mukhejee, Chapter 12 and Meyers, pp. 63-66.

quoted in Meyers, p. 64.

Mukhejee, pp. 199-200.

A West German employer is only obliged to give the public employment service advance notice of certain forms of redundancy. The obligation depends upon the total work force employed by the enterprise and the number of employees to be retrenched. If the firm employs between twenty and fifty workers, and more than five are to be laid off, advance warning is required. Again, if a firm has 50 to 499 workers, it is obliged to advise the public authorities if 10% of its work force, or more than twenty-five persons are to be retrenched. Large firms with over 500 on the payroll must notify the public employment service if at least fifty employees face redundancy: Mukhejee, pp. 227-228.
Such interviews can take a great deal of time. See *Ineligible seek retraining - and delay the needy* The Australian 26 November 1974, p. 2.

See German Works Council Act 1972, ss. 111-113.

This board is comprised of an equal number of works council and management representatives plus a neutral chairman who has a casting vote.

German Works Council Act 1972, s. 112 (4).

See German Works Council Act 1972, s. 112 (4).

Mukherjee, p. 250.

This is precisely the compromise reached by arbitrators under American collective agreements: Seyfarth and Others, pp. 100-101.


There is, therefore, no levy upon employers. Indeed, employers will only become involved if they agree to co-operate in subsidised in-plant training of retrainees.

Cochrane Report, para. 2.54, p. 16.

It recognised that a viable training scheme must be able to cater for persons from all points in the occupational spectrum. It also recommended that *every endeavour be made to satisfy the ambitions and aspirations of applicants ...*: Cochrane Report, paras. 2.60, 4.37, pp. 17, 48.


ibid.

ibid.

ibid.
The Australian Government provides adjustment assistance for employees who suffer retrenchment because of its economic and fiscal policies. These grants are a form of income maintenance based on the individual's average weekly earnings over the previous six months, subject to a maximum of 1.5 times average weekly earnings. Thus, in December 1973, the level of benefits ranged from around $68.10 per week to approximately $172.80 per week.

The first figure represents the minimum male adult wage at that time, the second represents 1.5 times seasonally-adjusted average weekly earnings for civilian wage and salary earners in all industries combined, as at December 1973.

Cochrane Report, para. 6.27, p. 64.

In May 1971 over 36% of adult male employees (other than managerial staff) in the private sector of industry were earning more than $90 per week. Nearly three-quarters of managerial staff in all industry groups were earning more than $100 per week at that time: Australia. Commonwealth Bureau of Census and Statistics, Survey of Weekly Earnings (Size Distribution), May 1971, (Canberra, 1971), pp. 10, 15.

Mukherjee, p. 224. West Germany's training allowances are also related to the trainee's previous income. But, in West Germany, two other factors increase the basic allowance: the length of the training period and the trainee's family responsibilities. It has been estimated that a married man with two children could get a maximum of 95% of his previous net income if he undertook retraining for twelve months. This level of income increases if the training programme runs on over a year. Indeed, during the later stages of retraining, the maintenance allowance paid by the Federal Institute of Labour might exceed the trainee's earnings in his previous job: Mukherjee, p. 245.

The high level of retraining allowance provided in France and West Germany can, no doubt, be partly explained by the substantial unemployment insurance benefits which are available in those countries. In France, a dual system of Unemployment Insurance (financed by contributions from employers and employees) and Unemployment Assistance (financed from government revenue) operates. Under these schemes benefits are at least 80% of insurable earnings. Extra allowances are available if the employee has dependants.

In the Federal Republic of Germany, unemployment insurance is administered by the Federal Institute of Labour as part of its duties under the Employment Promotion Act of 1969. The scheme is funded from employer and employee contributions. The average benefit is about 62% of prior earnings but a maximum of 82% may be paid if the employee is married with two children. See: Commonwealth of Australia. Australian Department of Labour, Report of Australian Interdepartmental Mission To Study Overseas Manpower And Industry Policies And Programmes 1974 (Canberra, 1974).

With unemployment benefits at this level, employees in France and West Germany might be disinclined to undertake retraining unless the retraining allowances were attractive. One would expect, therefore, unemployment benefits and retraining allowances to be on a roughly comparable level. In fact, the training allowances are substantially more than the unemployment benefits. This suggests that these allowances
are set to encourage workers to retrain rather than to discourage workers remaining unemployed.

44. See Cochrane Report, paras. 6.8 and 6.23.

45. Daniel, Whatever happened to the workers in Woolwich?


47. ibid.


51. Daniel, p. 110. In June 1972 when The Hon. Phillip Lynch, M.P., then Minister for Labour and National Service announced an extension of the now defunct Employment Training Scheme for Persons Displaced by Technological Change, he referred to the scheme’s inability to attract trainees. He cited the ‘typical’ example of seventy-eight employees retrenched by a Victorian firm because of the introduction of new processing equipment. All these workers were advised of the Employment Training Schemes. In fact, thirty-eight made further inquiries about the retraining opportunities available under the Scheme. Yet only two employees actually applied for retraining. See *Employment Training Scheme For Persons Made Redundant By Technological Change*, Press Statement by The Hon. Phillip Lynch, M.P., Minister for Labour and National Service, 7 June 1972 (in the possession of the writer).

The retraining allowance proposed by Cockrane is substantially more than it was when Mr Lynch made the above statement, but the fact remains that some employees are simply not interested in retraining.


55. Indeed, the existing retraining facilities operating in Australia are grossly inadequate to cope with the present level of unemployment. In May 1974 there were only 3,709 persons currently in training under the Federal Government’s sundry training schemes. Just over half of this total were engaged in full-time training. See: Commonwealth of

The "package deal" may include; internal transfer with or without make-up pay for a certain period; relocation with travelling expenses and perhaps some compensation for loss of equity upon the sale of the employee's house; early retirement on pension; severance pay usually calculated on the basis of one or more weeks' pay per year of service with perhaps an increased rate for long service employees; vested superannuation benefits; pro rata long service leave; and finally, priority for re-employment for a certain period, say, one year.


Jobless total is not rising - Whitlam' The Australian 3 July 1974, p. 11.


See e.g. Vol. 1, p. 199.


C. 62 (hereinafter cited as the 'Redundancy Payments Act 1965').

Redundancy Payments Act 1965, Schedule 1, para. 2.

Redundancy Payments Act 1965, s. 30. Since the Redundancy Payments Act 1969, c. 8, the rebate covers half the cost of the statutory severance payment. However, an employer who makes a redundancy payment which he was not obliged to make is not entitled to a rebate from the fund. Nor is an employer entitled to a rebate in respect of any payments in excess of the statutory minima. See: Secretary of State for Employment v. Atkins Auto Laundries Ltd [1972] 1 All E.R. 937; Crest Hotels Ltd v. Secretary of State for Employment [1971] I.T.R. 142.

Redundancy Payments Act 1965, s. 32 (1).

Redundancy Payments Act 1965, s. 1 (1)(a).

Where the variation is imposed upon the employee, he does not forfeit his right to a redundancy payment if he works under the new conditions for some time under protest: Marriott v. Oxford and District Co-operative Society Ltd (No. 2) [1970] 1 Q.B. 189, C.A.


Industrial Relations Code of Practice (London, 1972), para. 46.

Redundancy Payments Act 1965, s. 4 (1).

See Vol. 1, pp. 325-326.


In certain circumstances, employees will be entitled to a redundancy payment if their employer moves his place of business. The statutory definition of 'redundancy' covers three broad situations: where a business ceases; where the place of the business is moved; and where employees become surplus to the employer's business requirements: Redundancy Payments Act 1965, s. 1 (2). Much depends upon the express or implied terms in the contract of employment. If such a move is consistent with that contract, a right to a redundancy payment accrues: O'Brien v. Associated Fire Alarms Ltd [1968] 1 W.L.R. 1916; Murray v. Cape Insulation & Asbestos Products Ltd [1966] I.T.R. 476. Thus, employees who have refused to travel great distances to a new work place have qualified for a redundancy payment. In O'Brien v. Associated Fire Alarms Ltd [1968] 1 W.L.R. 1916, the internal transfer would have involved a move of 120 miles. The Court of Appeal held that such a move was not contemplated by the contract of employment and that the employee who refused the transfer was thus redundant. Again in Buck v. Edward
Everard Ltd [1968] I.T.R. 328, an employee was upheld in his claim for a redundancy payment when he refused to continue work at new premises some seven miles from his former work place.

Conversely, an employee who refuses to continue working at a nearby location may not be entitled to compensation: Margiotta v. Mount Charlotte Investments Ltd [1966] I.T.R. 465; Stevens v. B. Stitcher & Sons Ltd [1966] I.T.R. 456. If the contract of service either expressly or impliedly contemplates that the employee may be obliged to work at a new site or in a certain area, and he refuses a direction to do so, he may not complain that he is redundant. See: Morgan v. Ryan Plant [1966] I.T.R. 306 and Stevenson v. Tees-side Bridge and Engineering [1971] 1 All E.R. 296, D.C.

Similarly, where the kind of work assigned to the employee remains constant but new work methods and techniques are introduced, and the employee is dismissed for failure to adjust to these innovations, he is not entitled to a redundancy payment: North Riding Garages Ltd v. Butterwick [1967] 2 Q.B. 56; Vaux and Associated Breweries Ltd v. Ward (1968) 7 K.I.R. 308, D.C. But compare Loudon v. Crimpy Crisps [1966] I.T.R. 307.

On the other hand, an employer who replaces part of his existing work force with contract labour will be liable to pay the statutory compensation to the employees retrenched: Lang v. Briton Ferry Workingmen's Club & Institute (1966) 1 K.I.R. 800.

79 Redundancy Payments Act 1965, s. 9 (2). For a useful discussion of the effect of this provision, see Hepple & O'Higgins, Individual Employment Law, p. 151. Midland Food Comfort Centre Ltd v. Moppett [1973] I.C.R. 219 is a recent example of the application of the presumption.


80 Certain employees are excluded from rights to redundancy payments. See Redundancy Payments Act 1965, ss. 2, 16, 17. There are also special provisions preserving an employee's continuity of service upon a change in the ownership of the employer's business. See Redundancy Payments Act 1965, ss. 13, 48.

Wages over £Stg40 per week and continuous service longer than twenty years are disregarded in calculating the amount of compensation payable: Redundancy Payments Act 1965, Schedule 1, cl. 3 & 5.

83 See: Redundancy Payments Act 1965, s. 8 (2) and Contracts of Employment Act 1972, c. 53, Schedule 1.

84 Redundancy Payments Act 1965, Schedule 1, cl. 2.
85 Redundancy Payments Act 1965, Schedule 1, cl. 4.

86 For an example of the application of this provision, see Swithenbank v. Platt Bros & Co. (1967) 4 K.I.R. 288.

87 See Redundancy Payments Act 1965, ss. 15, 25 (5)(b).


89 Redundancy Payments Act 1965, ss. 11, 25 (5)(a).

90 Hepple & O'Higgins, Individual Employment Law, p. 158. Exemption orders are rare. Grunfeld pointed out that up to 1971 only two such orders had been made: Grunfeld, The Law of Redundancy, p. 5.

91 See Grunfeld, p. 6 and Mukherjee, p. 19.


93 Indeed, the belief that the scheme enhances job security is one of the myths which surround the Redundancy Payments Act 1965. See Robert H. Fryer, "The Myths of the Redundancy Payments Act" (1973) 2 I.L.J. 1, pp. 2-3.

94 The Act's social objective was to compensate redundant employees for the loss of accrued rights in their jobs: see Lloyd v. Brassey [1969] 2 Q.B. 98, C.A., p. 102 per Lord Denning M.R.


96 Daniel, p. 104.

97 Daniel, p. 96.


99 ibid.

100 Daniel, p. 71.


2 ibid.
Ironically, this may be just as important to out-of-work executives or professional employees as it is to the most menial worker. Indeed, unemployed executives and professional employees may face a much longer period of unemployment than their subordinates. In December 1974, it was reported that the Commonwealth Employment Service was unable to attend to applications from these employees until five weeks after their dismissals. In addition, unemployment benefits were not available in these cases until sixteen to seventeen days after the discharges. See "5-week delay on executive jobs" The Australian 12 December 1974, p. 4.
CHAPTER 20 EMPLOYEES’ INTEREST IN PARTICIPATION

The literal translation of Mitbestimmung is ‘co-determination’. ‘Co-determination’ in this section will be used to refer to the system of worker participation in management operating in West Germany.


See European Stock Corporation, Text of Draft Statute with Commentary prepared by Pieter Sanders (Chicago, 1969), Article IV-2-8.


Vagts points out that a bibliography of items dealing with co-determination occupies several hundred pages. Vagts was referring to Deutsches Industrie Institut, Bibliographie zur Mitbestimmung und Betriebsverfassung (1963). See Detlev F. Vagts, ‘Reforming The Modern Corporation: Perspectives from the German’ (1966) 80 Harv. L. Rev. 23, p. 68.

The basic structure of the German stock corporation is regulated by Aktiengesetz 1965. The other two main forms of business corporations are the mining corporation and the association with limited liability, Gesellschaft mit beschränkter Haftung (G.m.b.H.). These two forms are subject to special statutes but if G.m.b.H.’s and mining corporations employing over 500 employees have a separate legal personality they too must have a two-tier board structure. If this is the case, the relationship between the executive board and the supervisory board is governed by certain provisions of The German Stock Corporation Law of 1965. See s. 76 of the Works Constitution Law as revised by s. 40 Introductory Law to the Stock Corporation Law. See generally The German Stock Corporation Law edited and translated by Rudolf Mueller and Evan G. Galbraith (Frankfurt, 1966) (hereinafter cited as ‘The German Stock Corporation Law’), pp. 6-20.

The German Stock Corporation Law 1965, s. 84.

The German Stock Corporation Law 1965, s. 111 (1).

The German Stock Corporation Law 1965, ss. 90, 125.

The German Stock Corporation Law 1965, s. 170.
12 The German Stock Corporation Law 1965, s. 111 (4).


14 In fact, membership rises in larger firms.

15 Four members directly represent the employees. These representatives are nominated by the works council after consultation with the union. Wage earners and salaried staff each have a delegate. The third member is nominated by the relevant union, the fourth by the national trade union federation. Four members of the supervisory board represent the shareholders. Each group of employee representatives and shareholder representatives is entitled to a fifth member who must be independent of the firm, the unions and the employers' association. The "neutrality" of this fifth member on each side "seems to mean little in practice": Roger Blanpain, *The Influence of Labor on Management Decision Making: A Comparative Legal Survey* (1974) 3 I.L.J. 5, p. 9. These ten members of the supervisory board are formally elected by the general meeting of the company: de Hoghton, p. 218.

The remaining member is selected by a majority of the other ten. This 'eleventh man' is often a civil servant or an academic specialist in labour law. In theory, his main role is to represent the public interest.


19 See Blanpain, p. 9.

20 See generally de Hoghton, pp. 216-218.

21 de Hoghton, p. 217.


23 Vagts, p. 67.
The report entitled *Mitbestimmung in Unternehmen 1970* was presented by a committee under the chairmanship of Professor Biedenkopf. See A. Szakats, 'Workers' Participation in Management: The German Experience' (1974) 16 Jou. of Ind. Rel. 29, p. 44. For present purposes it is sufficient to note that the work councils' co-determination rights in cases of hiring, firing, transfers, changes in classification, planned structural changes and social matters have broadened the scope of worker participation within the enterprise. See German Works Council Act 1972, trans. Heinrich Beinbauer (Chicago, 1972) (hereinafter referred to as the 'German Works Council Act 1972').

As Hartmann puts it: 'verdicts depend on who judges what': Hartmann, p. 148.


Clegg, p. 54; S. Simitis, 'Workers' Participation In The Enterprise - Transcending Company Law?' (1975) 38 M.L.R. 1, p. 9.

Where there is a division of opinion it is not a confrontation between the shareholder representatives and the employee representatives; the neutral 'eleventh man' is, in fact, rarely called upon to make a casting vote: Clegg, p. 54; Vagts, p. 68.


The 1 labour director, in full co-determination, owes his primary duty to the company: see Judgment of Jan. 20, 1956, in 11 Der Betriebs-Berater 240 (Landgericht München), affirmed, Judgment of Sept. 19, 1956, in id. p. 995 (Oberlandesgericht München) cited in Vagts, p. 75. On the other hand, the labour director may become converted to management's philosophy. Hartmann points out that there is a danger of this happening: Hartmann, pp. 144-145. Opinion on this point is divided. Some commentators argue that the workers' representatives have not betrayed their constituents. See e.g. Clegg, pp. 54-55. On the other hand, Fürstenberg reports: 'Those who are obliged to manage adopt management's ways of thought. This is true not only of the employees' representatives on the supervisory boards but also - and in particular - of the labour directors'. See Fürstenberg, 'Workers' Participation in Management in the Federal Republic of Germany', Bulletin No. 6 International Institute for Labour Studies, 1969 quoted in Blanpain, p. 19.

Another reason why the executive board is relatively autonomous is that the supervisory board generally leaves it free to attend to the day-to-day administration of the company.

Hartmann, pp. 141-142.
In some countries, labour representatives are by-passed. Management arranges a meeting of shareholder representatives to discuss issues before a meeting of the supervisory board. When these issues are raised again at the supervisory council's meeting, the vote is a pre-determined, foregone conclusion. Apart from these caucus meetings, management may simply cut off the flow of information given to labour representatives. Again, management may fail to appoint labour representatives to important committees which consider matters of vital concern to employees.

Professor Ramm reports that management is also able to 'play off' the works council against the trade union. Thilo Ramm, 'Co-determination and the German Works Constitution Act of 1972' (1974) 3 I.L.J. 20, p. 24. See also Hartmann, p. 143

Dr Martin Schleyer, director of Daimler-Benz, quoted in Peck, p.41.


Blanpain claims that these personnel 'may constitute a special problem'. They do not want a seat on the works council. Rather, they want a special forum of their own, and, further, a special position on the supervisory board: Blanpain, p. 19.

The definition of 'employees' in the German Works Council Act 1972 excludes executives who by rank or otherwise are authorised to hire and fire employees working in the enterprise or department. Thus, lower and middle management will not benefit from the minority representation provisions of the 1972 Act.

Commenting on the Works Constitution Act 1952, Clegg observed that the works council is a vehicle which allows unions to penetrate firms which would otherwise deny them entry: Clegg, p. 55. The German Works Council Act 1972 confirms this view. Unions are given a statutory right to enter the premises of any industrial or commercial establishment: German Works Council Act 1972, s. 2.

The German Works Council Act 1972 increases union influence in council elections, particularly where such committees have not yet been constituted: German Works Council Act 1972, ss. 14 & 16. There is also an express provision in the new Act reserving the traditional collective bargaining function for the unions: German Works Council Act 1972, s. 77 (3). The local labour-management contract negotiated by the works council may not encroach upon this preserve. In theory, then, there is a clear demarcation of function; in practice, this provision is ignored: Ramm asserts unequivocally: 'nobody ... observes this provision ...': Ramm, p.24.


Clegg, p. 55.
Some 85% of the 180,000 works councillors are members of the unions of the Deutsche Gewerkschaftsbund (D.G.B.) (the West German equivalent of the Australian Council of Trade Unions). Moreover, works councils openly follow union policies. See David Wilson, 'Workers' Voice In The Boardroom' The Observer 2 September 1973, p. 11.

Indeed, works councillors are so independent of the unions that they are now called 'Betriebsfürsten' ('princes of the enterprise'); Ramm, p. 23.


Hartmann, p. 144.

Clegg, p. 56.

A representative survey in the full co-determination sector in 1968 suggests that the workers themselves believe they have made some gains through co-determination: 51% of the respondents mentioned better social services, 22% cited higher wages and salaries, 8% referred to improved working conditions, and 4% to improved job security: Wilhelm Braun, 'Mitbestimmung im Spiegel der Demoskopie' Industriekurier 30 November 1968, p. 3 cited in Hartmann, p. 143.

Vagts, p. 70.

Clegg, p. 53 and Spiro, p. 144.

Spiro, p. 144.

ibid.

Clegg, p. 53.

Vagts, p. 71.

See Vagts, p. 70.

D. Granick in The European Executive (London, 1962) stresses that ownership control is still dominant in German corporate enterprise. In this milieu management is perhaps more inclined to be paternalistic towards its employees.

Vagts, p. 71.

Fuckert cites one example where a supervisory board rejected a proposal to close down a plant until suitable arrangements were made for the workers affected by the closure: Fuckert, Rechtsstellung und Wahlverfahren des elften Mannes im Aufsichtsrat 116 (1964) cited in Vagts, p. 71.
Of the workers Braun surveyed in 1968 only 6% felt that the scheme strengthened their influence on personnel and business policies: Wilhelm Braun, *Mitbestimmung im Spiegel der Demoskopie*, Industriekurier 30 November 1968, p. 3 discussed in Hartmann, p. 143.

Fürstenberg reports that about three-quarters of the workers he interviewed knew that co-determination had been introduced into their enterprise. Further, only half of the interviewees had any concrete ideas about the actual meaning of co-determination and most of these just knew the name of their labour director: Fürstenberg, *Workers’ Participation in Management in the Federal Republic of Germany*, Industrial Institute of Labour Studies Bulletin No. 6 (June 1969), p. 130 cited in Clarke and others, *Workers’ Participation in Management in Britain*, p. 148.

True, 90% of German steel and coal workers elected to strike in support of co-determination and its extension in 1950-1951. But this strike may be attributed more to Hans Bockler’s organizational ability within the DGB and the workers’ desire to demonstrate their revived solidarity than a commitment to co-determination: Spiro, p. 172.

German Works Council Act 1972, ss. 110 (1) and 43.

German Works Council Act 1972, ss. 82-85.

See German Works Council Act 1972, ss. 7-8, 13-14, 16-20. Surveys have revealed that a substantial percentage of undertakings do not, in fact, have works councils even though the Works Constitution Act 1952 required the establishment of works councils in all plants employing five or more employees. See e.g. Fürstenberg, *Workers’ Participation in Management in the Federal Republic of Germany* in International Institute for Labour Studies Bulletin No. 6 (June 1969), p. 105 cited in South Australia. Department of Labour, *Worker Participation in Management, Report of the Committee on Worker Participation in Management Private Sector* (Adelaide, South Australia, 1973), p. 88.

German Works Council Act 1972, ss. 10, 12 and 15. The difficulty of representing the numerous groups within the enterprise was a major obstacle encountered by Works Councils elected under the Works Constitution Act 1952. See Fürstenberg, *Workers’ Participation in Management in the Federal Republic of Germany*, International Institute for Labour Studies Bulletin No. 6 (June 1969), p. 133 cited in South Australian Report, *Worker Participation in Management*, p. 84.

German Works Council Act 1972, s. 38. The actual number of works councillors exempted from normal works duties varies with the number of employees engaged in the enterprise. It ranges from one ‘free’ councillor in enterprises with 300 to 600 employees to eleven ‘free’ members for enterprises with between 9,001 and 10,000 employees. For enterprises above this size, an additional works councillor must be relieved of normal work duties for every additional 2,000 employees.

German Works Council Act 1972, s. 39.

67. Hartmann, p. 143.

68. See Deutscher Juristentag - Untersuchengen 1955, 1, p. 45 quoted in Fogarty, A Companies Act 1970?, p. 102. This finding is interesting for it might have been thought that the peaceful co-existence of management and labour under co-determination would cause a reduction in dividends and a consequential drop in share prices: See Vagts, p. 73.

69. In a more recent comment, Stackhouse reports that some share prices have, in fact, slumped. He cites the example of the Hoesch group where dividends have fallen 8% in the last two years: John Stackhouse, Mitbestimmung as a way of life: How workers play their part in running the West German company. The Australian Financial Review 13 June 1973, p. 3.

70. Vagts, p. 72.


72. Spiro, p. 140.

73. Vagts testifies to the 'fantastically low level' of man-hours lost through strikes in post-war Germany: Vagts, p. 70. Between 1960 and 1971 strikes cost West Germany only twenty-three working days a year for every thousand employees. The corresponding figures for the United States and Australia were 510 and 299 respectively: Lea Fitzgerald, Aust. distant third in the strike stakes. The Australian Financial Review 25 September 1973, p. 13.

74. See Spiro, p. 141.

75. Spiro, pp. 140-141.

76. Spiro, p. 141.

77. Vagts comments: 'codetermination tends to be exercised in a rather parochial way, that is, for the attainment of wage, working condition, fringe benefit, and employment security objectives at the firm involved': Vagts, p. 73. But Spiro points out that this 'company egoism' is not confined to companies under the co-determination scheme; it appears to be a tradition in German industrial relations: Spiro, p. 146.

78. See Vagts, p. 70.

79. See: Clarke and others, Workers' Participation in Management in Britain, p. 148; Spiro, p. 147.
The following is a brief account of the origins of co-
determination. Unfortunately space did not permit a discussion of
this topic in the text.

The concept of worker participation in Germany can be traced
back to the late nineteenth century. (See: de Hoghton, p. 213 and Vagts,
p. 65.) The Workers' Protection Law of 1891 established workers'
committees but these committees were controlled by employers. Article
165 of the Weimar Constitution encouraged workers' co-operation with
employers in determining wages and working conditions as well as the
overall economic development of the means of production: de Hoghton,
p. 214.)

The Industrial Council Law of 1920 reflected the policy of
Article 165. It introduced a measure of real co-determination,
particularly in the procedures established for fixing working conditions.
But the Industrial Council Law was repealed in 1934, and was not revived
during the Nazi era.

Co-determination in its present form emerged soon after the
Second World War. For an excellent account of the events leading up
to the introduction of the scheme, see Edwin F. Beal, 'Origins of
Co-determination' (1955) 8 Industrial Labour Relations Review 483.
As Spiro points out it was born under political auspices: (Spiro, p. 33.)
The allied occupation forces had two primary objectives: to dismantle
the cartels and to purge industrial leadership of Nazi sympathizers.
Hitler's regime received substantial support from the iron and steel
barons of the Ruhr. The Allies hoped that a disintegration of the
cartels would prevent a revival of nationalism and militarism in
Germany. The occupation forces also hoped co-determination would fill
the gap left by the downfall of the powerful industrialists, many of
whom were suspected of pro-Nazi sympathy. Blumberg stresses that the
legitimacy of an established economic elite was challenged and found
wanting. The ideology of co-determination was revived to fill this
'entrepreneurial vacuum': Paul Blumberg, Industrial Democracy: The

German workers grasped de facto control of the factories soon
after the war. Co-determination appeared to be a way of legitimising
and consolidating their position. They were also very conscious of the
need to obtain material benefits and to prevent a repetition of their
traumatic experience under the Nazis. Co-determination promised a
democratisation of industry and a means of keeping industrial leadership
in check. To the workers, it seemed to be a panacea.

The unions, too, saw advantages in co-determination. Hitler
disbanded the unions in 1933, and after the war they found it necessary
to re-group and re-organise their resources. Co-determination appeared
to be the one platform that could accommodate the diverse elements of
the German labour movement. For a complete analysis of the various
ideological strands in the German Labour Movement in this period, see
Spiro, Politics. Soon after the war, the unions set about the task
of securing material benefits for the workers at plant level. By the
time co-determination emerged again, the unions were entrenched in some
plants but they still lacked formal recognition. They saw co-
determination as a means of obtaining a statutory position in every
undertaking.

Employers, on the other hand, were reluctant to oppose co-
determination. They were well aware of the recriminatory mood of the
workers, and they realised that they would jeopardise their positions if they provoked a confrontation on the issue of co-determination. Above all, they wished to avoid being labelled Nazi reactionaries.

Against this background, it appears that co-determination was born in very propitious circumstances. The early development of co-determination took place in the British occupation zone which included the Ruhr. The North German Iron and Steel Control (hereinafter referred to as N.G.I.S.C.) was formed by the military government in 1946 with Mr W. Harris-Burland as its head. Harris-Burland appointed Dr Henrich Dinkelbach chairman of the German Steel Trusteeship Administration, itself a creation of the N.G.I.S.C. And Dinkelbach played a key role in forging the co-determination model. Perhaps his most important contribution was *selling* the proposal to the unions.

The stage was set for the introduction of co-determination in the Ruhr iron and steel plants. By May 1949 co-determination was established in twenty-four steel corporations. The German Trade Union Federation (D.G.B.) was anxious to have this development formally recognised by legislation. It also pressed for the extension of co-determination to mining and other industries. In the face of strong opposition, Chancellor Adenhauer managed to achieve a compromise between employers and unions in the coal and steel industries. As a result the Co-determination Law enacted in April 1951 provided for 'full' co-determination in the coal and steel industry in firms with over one thousand employees. In the following year the Works Constitution Act established 'partial' co-determination in other industries.

82 Some observers claim that the *acid test* for co-determination will be an economic depression. See e.g. Clegg, p. 55. Compare Simitis, p. 15.


85 Wootton, p. 112. Vicarious participation through works councillors may, then, be a meaningful form of participation by the rank and file. It is not an ideal form of participation, but the ideal must yield to the practicalities of business.

86 See: Szakats, p. 44 and Blumberg, Industrial Democracy, pp. 3-4.

87 It is no longer sufficient merely to consult the works councils on certain issues; employees must now obtain their approval before proceeding with a course of action. While it is too early to predict the effect of the new provisions, it seems probable that the significant powers now exercised by works councils will capture the interest of the rank and file.
A recent survey revealed that this group wants a forum of their own and special representation on the supervisory board: Blanpain, p. 19. See too Daniel & McIntosh, p. 109.


Shareholder representatives together with the neutral eleventh man could theoretically overrule the views of the labour members. Further, collusion between the management board and the shareholders' representatives could still rob employee representatives of their effectiveness.


In that case the court reprimanded the labour members for their 'active' participation in a strike against the company. It conceded that the labour members were placed in an ambivalent position but the only solution it offered was the suggestion that the labour representatives would be permitted to participate passively (but not actively) in the strike. In the result, neither the lower court nor the court of appeals found that the company sustained any damage from the defendant's breach of duty in participating in the strike.

See e.g.: Clegg, p. 54; Blumenthal, Codetermination in the German Steel Industries (Princeton Univ., 1956), p. 26 quoted in Szakats, pp. 42-43.

Füirstenberg, too, observes that the involvement of worker directors in the executive functions of the managing board has not prevented 'a greater consideration of the social needs of employees when major changes in technical equipment and plant layout are being planned'. F. Füirstenberg, 'Workers' Participation in Management in the Federal Republic of Germany' International Institute for Labour Studies Bulletin No. 6 (June 1969), p. 123 cited in Clarke and others, Workers' Participation in Management in Britain, p. 149.

Vagts also concedes that 'it has apparently been possible for those involved in codetermination to reach workable solutions to these problems': Vagts, p. 75. And Clegg is forced to admit that conflicts of interest have not erupted in practice: Clegg, p. 54.

The Donovan Commission noted the problems faced by the labour director in the German model. It thought that if he voted on any issue in a way unfavourable to the workers, his vote could well be misunderstood or misinterpreted: United Kingdom, Royal Commission on Trade Unions and Employers' Association 1965-1968 [Chairman: The Rt Hon. Lord Donovan] Report, Cmd 3623, June 1968 (London, 1968), para. 1002, pp. 258-259. In some instances, the other members of the executive board are not sympathetic to the position of the labour director. They persuade him to represent management in collective bargaining or to explain to the workers the reasons for mass retrenchments: Hartmann, p. 145.
Nearly half the workers in Neuloh's survey saw the labour director's main task as a form of arbitration between conflicting pressures: O. Neuloh, Der neue Betriebsstil (Tübingen, 1960) cited in Clarke and others, Workers' Participation in Management in Britain, p. 149.

In Neuloh's survey 64% of the workers reported that they saw the labour director as their representative, and 21% felt that he represented both management and the workers; only 6% thought he was simply a representative of management: Neuloh, Der neue Betriebsstil discussed in Clarke and others, Workers' Participation in Management in Britain, p. 149.

Daniel & McIntosh, p. 148.


Indeed, Blumberg asserts that once the law recognises that shareholder interests can no longer be the sole goal of the enterprise, the conflict of interests objection disappears: Phillip I. Blumberg, 'Reflections on Proposals for Corporate Reform Through Change in the Composition of the Board of Directors: "Special Interest" or "Public Directors"' (1973) 53 Boston University Law Review 547, p. 564. There, Blumberg was referring to the conflict between a 'special interest' directors duty of loyalty to the company shareholders, and his 'interest' in pursuing the goals of his nominors.

Daniel and McIntosh suggest that board-level representation for employees 'is likely to be the least important channel' of employee involvement: Daniel & McIntosh, p. 141.


A survey by Potthoff and others revealed that contact between the labour director-respondents and the workers was good: E. Potthoff, O. Blume and H. Duvernell, Zwischenbilanz der Mitbestimmung (J.E.B. Mohr [Paul Siebeck], Tübingen, 1962) cited in Clarke and others, Workers' Participation in Management in Britain, p. 149.

This finding is backed up by Neuloh's study which indicated that workers understood the complex role of the labour director: Neuloh, Der neue Betriebsstil cited in Clarke and others, Workers' Participation in Management in Britain, p. 149.
At the lower levels of representation, the Works Council Act 1972 has strengthened disclosure requirements. The employer, or his representative, is obliged to take part in the monthly meetings of the economic committee and must inform the committee in detail about the economic affairs of the enterprise. The economic committee is, in turn, directed to report to the works council on every meeting 'promptly and in detail'. The works council is also entitled to comprehensive information from the employer about planned structural changes. This information is then to be passed on to the workers at the works assembly convened every calendar quarter; German Works Council Act 1972, ss. 106 (2), 108 (4), 111, 43 (1).

German Works Council Act 1972, s. 79.

Western European countries which have introduced worker participation in management place some restriction upon the dissemination of confidential information by workers' representatives: Blanpain, p. 17.


Moreover, 38% of the respondents in the writer's survey reported that they objected to worker participation in management on matters directly related to the employee's work and working environment; around 20% were undecided on this point. Opposition to worker participation in management on matters not directly related to the employee's environment and working conditions was much stronger: 60% of the companies objected to this form of participation; while 21% were undecided in their attitude.

The definition of workers' participation in management used in the survey described only a very limited form of participation. The companies were asked whether they objected to employees' playing 'a role in the decision-making process which frames company policy'; the question was not whether they objected to workers' having the decision-making role or to workers' having an equal share of the decision-making power. The survey findings must be viewed in this light. See Appendix 2, Vol. 2, pp. 28-32.

Interview with the writer, dated 30 August 1973.

In his address to the Industrial Relations Society of the Australian Capital Territory in August 1972, Mr G. Polites, Executive Director of the Australian Council of Employers' Federations forecast increasing pressure for some extension of worker participation in Australian industrial management. See South Australian Report, Worker Participation in Management, para. 4.35, p. 26.

Dufty suggests that Australian management may still be clinging to the traditional model of management which involves autocratic leadership and a fairly low opinion of workers' attitudes. See: N.F. Dufty, *Australian Companies and Their Workers* in K.E. Lindgren, H.H. Mason & B.L.J. Gordon (edd.), *The Corporation And Australian Society* (Sydney, 1974), p. 92. Overseas observers have also noted the conservatism of Australian management. See *Profit drop "if workers do not have a say"* The Australian 28 May 1974, p. 4.


*Plant Level Relationships*, a Paper Presented by M.P. McCarney, Federal President of the Vehicle Builders' Employees' Federation of Australia at the Thirteenth Annual Industrial Relations Convention, 5 - 7 May 1972, p. 4. Furthermore, the information which is disclosed is communicated in a very informal manner: See Appendix 2, Vol. 2, p. 36.

David Wilson, *Workers' Voice in the Board Room*, p. 11.

The Australian Council of Employers' Federation has pointed out that: *Employees are not trained for management and are rarely equipped to handle such questions*.: quoted in Walker, *Australian Industrial Relations Systems*, p. 81.

Interview with the writer, dated 13 December 1973.
The New South Wales Labour Council conducted a management course for about forty trade unionists in August 1974. The training school cost the Federal Government about $2,000. The Labour Council's education officer, Mr R. Carr, claimed that the programme would produce shop stewards and full-time organisers who were thoroughly versed in the theory and practice of worker participation.

Moreover, the Tasmanian trade union movement and the Federal Government agreed in June 1974 to spend $103,000 on trade union training during that year. Inter alia, these courses would cover the role of the shop steward. See 1974 A.I.L.R. Industrial Notes, 26 July 1974, p. 12 and 1974 A.I.L.R. Industrial Notes, 28 June 1974, p. 8.


28. quoted in Farr, p. 5.

For a general discussion of the attitudes of Australian trade unions to workers' participation in management, see South Australian Report, Worker Participation in Management, para. 4.23, p. 22.


Indeed, in a recent log of claims, it demanded representation on company boards and the appointment of full-time shop stewards in every plant employing more than 2,000 workers. The employers rejected the first claim but agreed to recognise the provision of senior shop stewards in plants, and to meet half the expense of all shop steward training: Malcolm Colless, 'Car Builders to strike for $35 and 35-hr week' The Australian 2 February 1974, p. 1.

32. See Clegg, p. 21. See also Daniel & McIntosh, pp. 111-138.


White and Edmonds suggest that joint consultation committees are complementary to trade union principles. Although the committees there discussed had no executive authority, it is interesting to note that most of the committees were excluded by the terms of their constitutions from considering 'industrial matters': E. White & L.F. Edmonds, 'Management-Employee Committees in Australia' (1953) 9 Industrial Psychology and Personnel Practice 3, p. 10.

A key to the success of some joint consultation schemes has been union involvement in the planning of the scheme: L.R. Wall and W.P. Butler, 'Management-Employee Committees - The Results of Australian Research' (1959) 15 P.P.B. 40, p. 42. Union representatives may be granted a minority position among the employee representatives. And their presence would not simply be a concession to obtain union approval of the scheme. It may be necessary to fall back on the strength of the union to ensure compliance with the terms of the co-determination scheme.
36 Clegg, p. 77.

37 Blumberg, Industrial Democracy, p. 152.


39 Even Clegg concedes this: Clegg, p. 54.

40 Case studies in joint consultation have found that it is difficult to recruit labour representatives to the committees. See: M. Kangan, 'A Study in Joint Consultation' (1949) 5 Bulletin of Industrial Psychology and Personnel Practice 3; M. Kangan, 'Joint Consultation: Case Study No. 4' (1953) 9 Bulletin of Industrial Psychology and Personnel Practice 3; W.P. Adkins, 'Joint Consultation - A Case Study' (1960) 22 P.P.B., 7.

41 South Australian Report, Worker Participation in Management, para. 4.24, p. 23. The Amalgamated Metal Workers' Union and the Waterside Workers' Federation of Australia are the most notable exceptions to the general comment in the text. For a declaration of the A.M.W.U.'s unqualified support for its shop steward movement, see 'Shop Stewards workshop charter for democracy' Amalgamated Metal Workers' Union, Monthly Journal, January 1974, pp. 7-8.

42 German Works Council Act 1972, s. 37.


45 Emery & Thorsrud, p. 43.

46 Interview with the writer, dated 19 December 1973. Similarly, some militant unions argue that they have already achieved participation by forcing management to reverse certain decisions or to reinstate dismissed employees. This influence is essentially negative. It is more a veto power than participation in management. Moreover, it is usually exercised after the decisions are made; militant unions are rarely allowed to participate in management at the planning stage. Although they have succeeded in making considerable inroads into managerial prerogatives, their power remains de facto. If management decides to take a firm stand on a decision challenged by the union, it can be confident that its stand will be supported by the arbitration tribunals.

48 Compare Maurice Kay, "A Theory of Co-determination" in Clive M. Schmitthoff (ed.), The Harmonisation of European Company Law (London, 1973), p. 158. Moreover, the system of wage determination and union organization in Germany prior to the introduction of co-determination was organised on a similar basis: Vagts, p. 72.

49 (1967) 87 W.N. (Pt 1) (N.S.W.) 307.

If a labour director's duties were extended as suggested, it would also be necessary to amend s. 123 U.C.A., which obliges a director to disclose his interest in a contract entered into by the company. The South Australian Theatre Company Act, 1972 (S.A.), s. 16 provides an interesting precedent for this amendment.


51 Warren Beeby, 'Benn plans to force firms to disclose their secrets' The Australian 10 February 1975, p. 7.

52 Donovan Report, para. 1002, p. 258.


54 Re Duomatic Ltd [1969] Ch. 365, p. 377. He must, however, at least take the trouble to find out what his rights and obligations are: Re Duomatic Ltd [1969] Ch. 365, p. 376.

55 It may be necessary, in certain cases, to obtain legal or professional advice or consult the members or even the creditors: Re Duomatic Ltd [1969] Ch. 365, p. 376; Re Barry and Stame's Linoleum Ltd [1934] Ch. 227, p. 234; Re Gilt Edge Safety Glass Ltd [1940] Ch. 495, p. 502. A labour director would not be excused if he simply accepted what his co-directors said without any independent inquiry: Re Turner; Barker v. Ivimey [1897] 1 Ch. 536, a case on the equivalent provision in the Judicial Trustee Act, 1896, 59 & 60 Vict. c. 35. This is particularly true where his suspicion is aroused: Dalrymple v. Melville (1932) 32 S.R. (N.S.W.) 593, a case upon a similar provision in the Trustee Act, 1925 (N.S.W.).

Although the court will not exempt a director simply because he is not conversant with the issue involved, it may order his co-directors to indemnify him for the loss resulting from his ignorance or negligence. See Re Turner, Barker v. Ivimey [1897] 1 Ch. 536.

As Dr Lloyd Ross pointed out in the Chifley Memorial Lecture in 1959: 'The justification for democracy whether it is political or industrial democracy is not based on interest ...'. Lloyd Ross, 'Workers Participation in the Ownership and Control of Industry', Chifley Memorial Lecture 1959 (Melbourne, 1959), p. 17.


Wall and Butler, p. 47. See also South Australian Report, Worker Participation in Management, para. 4.13, p. 18.

It has been estimated that 42% of males in the fifteen to nineteen age group will be in full-time education in 1975. J.E. Isaac and G.W. Ford (edd.), Australian Labour Relations: Readings (Melbourne, 1967), p. 352 Table 4. In this formative period of education, students are encouraged to assess and criticise. Both these abilities may prompt these school leavers to expect more from their job than a pay packet.


For the views of a more radical wing of the labour movement, see Denis Freney, 'Workers' Control Perspectives' (1973) 39 Australian Left Review 3. See also John R. Robbins, 'Workers' Participation and Industrial Democracy - Variations on a Theme' (1972) 14 Jou. of Ind. Rel. 427, p. 437 for a summary of militant trade unionists' attitudes.

See 'Companies must give staff more say - Cameron' The Australian 21 August 1973, p. 2 for the views of the Minister for Labour, Mr C.R. Cameron, M.H.R. See also Clyde R. Cameron, M.P., 'Modern Technology, Job Enrichment and the Quality of Life' (1972) 14 Jou. of Ind. Rel. 132. The Australian Labor Party is committed to pressing for the adequate representation of workers (through trade unions) 'in the management of banking and insurance; mass media, communications and transport; natural resources development; and secondary industry'. See Australian Labor Party, Platform, Constitution and Rules 1971, Section XIV, Subsection 8 (6), p. 26 quoted in South Australian Report, Worker Participation in Management, para. 4.31, p. 25. See also the statement of the then Minister for Overseas Trade, Dr J. Cairns, M.P. in 'Worker control not on: Cairns. Participation "is far off"' The Australian 27 May 1974, p. 4. Mr Jack Eggerton has been appointed to the board of Qantas in pursuance of Labor's policy and Mr Cameron has supported Mr R. Castely's bid to obtain a seat on the Board of National Mutual Life Association of Australia.

The Opposition, too, has its advocates of some form of worker participation in management. See the statement of the then Minister

65. The success of Edible Oil Industries and I.C.I. with their rudimentary forms of workers' participation in management is reviewed by Elisabeth Wynhausen in 'Toward worker participation' The Bulletin 11 November 1972, pp. 21-22. For a comprehensive review of local experiments in worker participation in management and job enrichment, see South Australian Report, Worker Participation in Management, Chapter 4, pp. 12-19.


67. See South Australian Report, Worker Participation in Management, p. 43. The South Australian Government has acted upon the Committee's recommendation to launch an educational programme upon worker participation in management. An expert, four-man committee has been established as a branch of the Department of Labour in order to advise unions, shop stewards and employers on how to introduce worker participation in industry. See 'Giving workers a say in management' The Australian 5 February 1974, p. 2.


69. South Australian Theatre Company Act, 1972, ss. 6, 16.

70. South Australian Report, Worker Participation in Management, para. 3.5, p. 11.

71. See South Australian Report, Worker Participation in Management, paras. 4.12 - 4.16, pp. 17-19 for a summary of the survey's findings.

72. See South Australian Report, Worker Participation in Management, para. 4.15, p. 19. The factors isolated included: adequate representation from each key section of the organization, adequate time and facilities for labour representatives to meet, discuss and rationalise their proposals before meeting with management and adequate time and facilities for communication with ordinary workers, management representatives must have the authority to make decisions on the majority of matters raised by the board, and management must be genuinely interested in the worker representatives' suggestions and follow these suggestions up with action where appropriate.

73. South Australian Report, Worker Participation in Management, pp. 43, 45.
See: Blumberg, Industrial Democracy, p. 4; Clegg, p. 93; Clarke and others, Workers' Participation in Management in Britain, pp. 46-47.

The Committee merely pointed out that those companies where there had been considerable industrial unrest prior to the introduction of joint consultation reported improved industrial relations under the scheme. See South Australian Report, Worker Participation in Management, para. 4.10, p. 19. For a statement of the benefits which might theoretically be derived from joint consultation, see South Australian Report, para. 5.8, p. 30.

The benefits ascribed were: increased stability, decreased absenteeism, increased quality of workmanship, better service to customers, the elimination of production bottlenecks and increased productivity. See South Australian Report, para. 5.8, p. 30.

The benefits ascribed were: increased stability, decreased absenteeism, increased quality of workmanship, better service to customers, the elimination of production bottlenecks and increased productivity. See South Australian Report, para. 5.8, p. 30.


On the other hand, if Britain did introduce drastic changes in its company law this might encourage Australian legislatures and courts to develop our company law along independent lines.

A recent survey by the International Confederation of Free Trade Unions reveals that the central organizations of trade unions in West Germany, Austria, Switzerland, Denmark, Norway and many other...

88 See the statement of Mr G. Polites, Executive Director of the Australian Council of Employers' Federations quoted in South Australian Report, *Worker Participation in Management*, para. 4.35, p. 26.
SECTION 3: EMPLOYEES' INTERESTS IN PARTICIPATION, ADVANCEMENT
AND REASONABLE SUPERVISION

CHAPTER 21
PROMOTION AND RELATIONSHIP WITH SUPERVISOR

1. See Seyfarth, Shaw, Fairweather & Geraldson, Labor Relations
And The Law in France and the United States (Ann Arbor, Michigan, 1972),
p. 494.

2. German Works Council Act 1972 translated by Heinrich Beinhauer
(Chicago, 1972) (hereinafter referred to as German Works Council Act
1972), s. 93. If the employer fails to offer the position first to
employees within the enterprise, the works council may refuse to approve
the appointment.

3. German Works Council Act 1972, s. 94 (1).


5. German Works Council Act 1972, s. 83.

6. Ibid.

7. German Works Council Act 1972, s. 82 (2).

8. German Works Council Act 1972, s. 82 (2). A works councillor
who participates in such an inspection or discussion is bound to
secrecy unless he is released from this obligation by the employee:
German Works Council Act 1972, ss. 82 (2), 83 (1).


10. 72% of the labor agreements surveyed by the United States Bureau
of National Affairs, Incorporated in 1965, directed that length of
service be considered in promotions. See *Seniority, Layoff, Promotion
and Transfer* Collective Bargaining Negotiations and Contracts, Vol. II:
Basic Patterns in Union Contracts, 1965, p. 75 cited in Seyfarth and
others, p. 496.

11. Seyfarth and others, p. 496.

12. Ibid.

13. See Frank Elkouri and Edna Elkouri, How Arbitration Works (2nd

14. German Works Council Act 1972, s. 95 (1).
This duty evolved from Steele v. Louisville Nashville Railroad Co. 323 U.S. 192 (1944) where the United States Supreme Court held that a union was not entitled to discriminate among the unit employees on grounds of race. In Ford Motor Co. v. Huffman 345 U.S. 330 (1953) the Supreme Court extended the union's duty of fair representation. It held that any form of hostile discrimination infringed the union's duty of 'complete loyalty to the interests of all whom it represents': Ford Motor Co. v. Huffman 345 U.S. 330 (1953), pp. 337-338. And further expansion took place in Humphrey v. Moore 375 U.S. 335 (1964) when the Supreme Court ruled that the duty applied not only to the execution of a collective agreement but also to its application, for example, in the handling of individual grievances.

In 1967, Vaca v. Sipes 386 U.S. 171 (1967), p. 191 a pivotal decision of the United States Supreme Court removed some doubts about the scope of the duty but placed some substantial obstacles in the path of an employee seeking its enforcement. It decided that a union is not obliged to process every grievance submitted to it. On the other hand, it 'may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion ...': Vaca v. Sipes 386 U.S. 171 (1967), p. 191. The union may decline to proceed with a grievance if it decides 'in good faith and in a non-arbitrary manner' that the grievance lacks merit: Vaca v. Sipes 386 U.S. 171 (1967), p. 194. Indeed, the fact that the employee's grievance is meritorious is not sufficient to establish a breach of the union's duty.


In West Germany, an individual employee is entitled to lodge complaints with the proper bodies of the enterprise if he feels he has been discriminated against or wrongfully treated by his employer: German Works Council Act 1972, s. 84 (1). This right is clearly broad enough to cover a grievance over promotion. He may seek the support or intervention of a works councillor: German Works Council Act 1972, s. 84 (1). The employer is, in turn, obliged to advise the employee how his grievance was handled, and must remedy the cause of the
complaint if the grievance was justified. Discrimination against a complainant is prohibited: German Works Council 1972, s. 84 (2) & (3).

An employee may also put his complaint before the works council. If the council feels that the grievance is justified, it must urge the employer to remedy the causes of the complaint: German Works Council Act 1972, s. 85. Disagreement between the works council and the employer as to the merits of the complaint may be resolved by an appeal to the conciliation board. But when the employer undertakes to consider the grievance he must inform the works council of his progress.

German Works Council Act 1972, s. 75.

Public Service Act 1922-1973 (Cth), s. 50 (b).

Public Service Regulations, Regulation 109 (1A).

Public Service Act 1922-1973 (Cth), s. 50 (8).

Public Service Act 1922-1973 (Cth), s. 50 (9), (10).


Subramaniam, pp. 404, 405.

Subramaniam, p. 406. He quickly goes on to point out that satisfaction with the promotion system may be due as much to the greater opportunities in an expanding service as with the system itself.


See generally Subramaniam, p. 403 and following.

ibid.

Mr Des Linehan in an interview with the writer, dated 7 February 1975.

The Racial Discrimination Bill 1974, if enacted, will provide a series of remedies against certain forms of discrimination in promotions but, as stated earlier, the scope of the Bill is too narrow to cover the whole field.
These figures were calculated from the promotion statistics in the Public Service Board Forty-Ninth Annual Report for Year 1972-73, p. 152.


German Works Council Act 1972, s. 95.

German Works Council Act 1972, s. 87.

Compare German Works Council Act 1972, ss. 84, 85.

Under the 'victimisation provisions' of the sundry industrial arbitration statutes a complainant carries a similar onus in some cases. See Vol.1, p. 136.

Moreover, the Racial Discrimination Bill 1974 provides that an aggrieved employee must establish discrimination in employment before he will be entitled to relief.
The so-called Uniform Companies Act is the classic example. Since each of the states introduced a Companies Act based on the draft Uniform Companies Bill, there have been significant departures from this model in some, but not all, states. For a useful summary of the formal sources of current Australian company law, see H.A.J. Ford, Principles of Company Law (Sydney, 1974), pp. 16-17.

The Eastern States Companies Commission in Queensland, New South Wales and Victoria will provide a measure of uniformity in the administration of companies particularly in the routine of filing statutory documents. It will also provide one centre for incorporation of companies in Eastern Australia. But it is important to note that the commission's main tasks will be to protect the investing public and to streamline administrative routines. Employees' interests have not even been mentioned in the proposals.

See: Companies (Interstate Corporate Affairs Commission) Act 1974 (Vic.); Companies (Further Amendment) Act, 1974 (N.S.W.); Companies Act Amendment Act, 1974 (Qld).

1 Constitution, s. 51 (xx).

2 Vol. 2, pp. 102-127.

3 Vol. 2, pp. 102-110.


8 Vol. 2, pp. 112-114.

9 Constitution, s. 51 (xx).


11 Vol. 2, p. 120.
See Vol. 2, p. 120.

See Vol. 2, p. 119 where this view is discussed.

See Vol. 1, Chapter 2, pp. 10-51.


The Australian Parliament has plenary power to prescribe the terms and conditions of employment of employees engaged in federal government and its administrative agencies (Constitution, s. 52). Moreover, the 'territories power' enables the Commonwealth to regulate industrial matters within the Australian territories (Constitution, s. 122). Federal Parliament has acted in pursuance of the latter section by providing that the scheme of industrial regulation established by the Conciliation and Arbitration Act 1904-1973 (Cth) shall apply with the necessary changes to Australian territories (See: Northern Territory (Administration) Act 1910-1974 (Cth), s. 6 and Seat of Government (Administration) Act 1910-1972 (Cth), s. 5 (a) (b)).


See also the 'trade and commerce power', Constitution, s. 51 (i), discussed in Vol. 1, pp. 418-419 and the 'external affairs power', Constitution, s. 51 (xxix), discussed in Vol. 1, p. 418.

The Commonwealth also has power to deal with industrial matters arising in its own airlines and other airlines: Constitution, ss. 51 (1), 52 and Conciliation and Arbitration Act 1904-1973 (Cth), s. 88U (1)(b).

For a detailed account of Federal Parliament's ancillary powers to regulate industry, see E.I. Sykes and H.J. Glasbeek, Labour Law in Australia (Sydney, 1972), pp. 451-481.

1 Jumbunna Coal Mine, No Liability v. Victoria Coal Miners' Association (1908) 6 C.L.R. 309.


3 ibid.


5 The High Court has oscillated between a broad and a restrictive approach on this point. For cases adopting a broad interpretation, see e.g.: Proprietors of the Daily News Ltd v. Australian Journalists' Association (1920) 27 C.L.R. 532; Australian Insurance Staffs' Federation
6 (continued):

v. Accident Underwriters' Association; Bank Officials' Association v. Bank of Australasia (1923) 33 C.L.R. 517; R. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers (1959) 107 C.L.R. 208 (hereinafter referred to as the 'Professional Engineers' Case').

For examples of the narrow construction, see: Federated State School Teachers' Association v. Victoria (1929) 41 C.L.R. 569; R. v. Commonwealth Court of Conciliation & Arbitration; Ex parte Victoria (1942) 66 C.L.R. 488.

For a comprehensive account, see Sykes and Glasbeek, pp. 385-403.

In the Professional Engineers' Case (1959) 107 C.L.R. 208, the majority judgments appear to endorse a dual test to determine whether the disputants are engaged in an industry. Firstly, one should examine the inherent or presumptive character of the employees' duties; if these duties are of an industrial nature then the parties are engaged in an industry. Professor Thomson describes this test as the 'horizontal test': see D.C. Thomson, 'Professional Engineers' Case' (1960) 34 A.L.J. 35, p. 40. Alternatively, if the nature of the employer's undertaking is industrial then the industry requirement is satisfied irrespective of the character of the individual employees' duties. This is the 'vertical test': Thomson, p. 40.

Thomson suggests that the horizontal test will normally be the vital criterion. Certainly this test explains the Municipalities Case (Federated Municipal & Shire Council Employees' Union of Australia v. City of Melbourne (1919) 26 C.L.R. 508). It would also account for the way the High Court disposed of the State School Teachers' Case (Federated State School Teachers' Association v. Victoria (1929) 41 C.L.R. 569) in the Professional Engineers' Case (1959) 107 C.L.R. 208. But as a guiding principle this test has inherent difficulties. As Sykes and Glasbeek point out the only occupation which has been regarded as unequivocally 'industrial' is manual labour: Sykes and Glasbeek, p. 397. Furthermore, the manual character of work may not always be an adequate criterion. See Pitfield v. Franki (1970) 123 C.L.R. 448, p. 462 per McTiernan J. and p. 467 per Menzies J.

The vertical test can be used to reconcile cases such as: Federated Gas Employees' Industrial Union v. Metropolitan Gas Co. Ltd (1919) 27 C.L.R. 72 and Australian Insurance Staffs' Federation v. Accident Underwriters' Association; Bank Officials' Association v. Bank of Australasia (1923) 33 C.L.R. 517 with R. v. Commonwealth Court of Conciliation & Arbitration; Ex parte Victoria (1942) 66 C.L.R. 488 and Commonwealth Public Service Commissioner v. Government Service Women's Federation (1920) 14 C.A.R. 794. But the vertical test is not the vital determining factor in all cases.

In the Professional Engineers' Case (1959) 107 C.L.R. 208 itself the High Court decided that the occupation of professional engineers was prima facie industrial, and that all the governmental agencies and departments involved were engaged in industry. Yet this did not resolve the issue for the majority conceded that there may be professional engineers whose duties on closer examination were not industrial. In other words they suggested that the prima facie inference from the horizontal test could be rebutted. In effect they
gave the horizontal test a new dimension. See generally Sykes & Glasbeek, p. 398.

In Re Clarkson; Ex parte Victorian Employers’ Federation (1973) 47 A.L.J.R. 772, Gibbs J. decided that the question whether any association of employers in or in connection with any industry exists within s. 132 (1)(a) of the Conciliation and Arbitration Act 1904-1972 (Cth) could be determined by reference to the kind of services which the employers provide. This view leans towards the vertical test but the section lends itself to this analysis. Gibbs J. remarked: 'The industry intended to be described is the industry in which the members of the federation themselves are engaged and not the industry of their employers'. Thus it affords no ground for disturbing the proposition in the text. In any event, Gibbs J. was the only member of the High Court to express a detailed opinion on this point.

9 Professional Engineers' Case (1959) 107 C.L.R. 208, p. 258 per Taylor J. and pp. 270-271 per Windeyer J.

Managerial employees engaged in administrative duties in the companies under discussion would qualify because they would ordinarily be employed in translating policy decisions into industrial activity: Professional Engineers' Case (1959) 107 C.L.R. 208, p. 269 per Windeyer J. Thus their connection with the industrial system could not be regarded as tenuous or indirect. Similarly, those charged with the management, supervision and direction of labour, plant and machinery could be described as being engaged in an 'industry': Professional Engineers' Case (1959) 107 C.L.R. 208, p. 269. Clerical workers and manual labourers in private enterprise undertakings are clearly 'industrially engaged'. See the recent decision of Re Clarkson; Ex parte Victorian Employers’ Federation (1973) 47 A.L.J.R. 772 where the High Court held that there is such a sphere as a 'clerical industry' despite the inelegancy of this term. Moreover, it requires only a slight extension of the reasoning in the Professional Engineers' Case (1959) 107 C.L.R. 208 to hold that professional employees engaged in private enterprise undertakings on a full-time salary basis satisfy the 'industry' requirement.

In the Professional Engineers' Case (1959) 107 C.L.R. 208 Dixon C.J. suggested that nurses employed as casualty staff in a large undertaking could be regarded as involved in an industrial dispute if the undertaking was disrupted by a disagreement about working conditions: (1959) 107 C.L.R. 208, p. 236. Mr Justice McTiernan's dissenting judgment in the Professional Engineers' Case would not recognise the proposition advanced in the text: see (1959) 107 C.L.R. 208, p. 249. Higgins J., in the Municipalities Case (1919) 26 C.L.R. 508, p. 574 expressed the view that doctors and lawyers were not engaged in an industry but His Honour's remarks were clearly confined to disputes arising between doctors and their patients and lawyers and their clients: Sykes and Glasbeek, p. 401.

In Pitfield v. Franki (1970) 123 C.L.R. 448, p. 466, Mr Justice
Menzies gave inferential support to the proposition in the text when he stated: 'Lawyers employed in industry, like professional engineers employed in industry, could, no doubt form an association that would be registrable'.

For landmark decisions upon this requirement, see: Australian Boot Trade Employees Federation v. Whybrow & Co. (1910) 11 C.L.R. 311 (hereinafter referred to as 'Whybrow's Case') and Metal Trades Employers' Association v. Amalgamated Engineering Union (1935) 54 C.L.R. 387 (hereinafter called the Metal Trades Case).

This figure is calculated from the table, Percentage of Employees Affected By Awards, Etc. of Various Industrial Authorities: Australia, May 1968 in Labour Report No. 57, 1972 (Canberra, 1973).

In 1964 Sykes pointed out that there were then 13,000 employer respondents to the Metal Trades Award. See E.I. Sykes, 'Labor Arbitration in Australia' (1964) 13 Amer. Jou. of Comp. Law 216, p. 229. All these respondents would have to be served with the unions' log of demands.

A federal award may not be enforced by a non-unionist who is covered by the award. This is clear from the Metal Trades Case (1935) 54 C.L.R. 387, p. 422 per Rich and Evatt JJ. and p. 443 per McTiernan J. A non-unionist whose wages are prescribed by federal award may have no rights to recovery of his wages under state awards or at common law. See E. Niven, 'Federal Industrial Award and Non-Unionists' (1937) 11 A.L.J. 283.

Conciliation and Arbitration Act 1904-1973 (Cth), s. 4.

The scheme of the definition section shows that it was not intended to be an exhaustive description. On the other hand, the various paragraphs of the definition are so wide that 'one might well despair of
any attempt to widen* the definition: Isaacs J. in Amalgamated
Engineering Union v. Alderdice Pty Ltd; In re Metropolitan Gas Co.
(1928) 41 C.L.R. 402, p. 420.

20 See e.g.: R. v. Wallis; Ex parte Employers' Association of
Wool Selling Brokers (1949) 78 C.L.R. 529; Kelly's Case (1950) 81
C.L.R. 64 and R. v. Hamilton Knight; Ex parte Commonwealth Steamship
Owners' Association (1952) 86 C.L.R. 283.

21 For a recent example of this technique, see: R. v. Commonwealth
Conciliation and Arbitration Commission; Ex parte Transport Workers'
Union of Australia (1969) 119 C.L.R. 529. For an excellent discussion
of the implications of this case, see D.R. Hall, 'Compulsory Unionism

22 See Australian Tramway Employees' Association v. Prahran and
Malvern Tramway Trust (1913) 17 C.L.R. 680 (hereinafter referred to
as the 'Badge Case').

23 See: Kelly's Case (1950) 81 C.L.R. 64 and R. v. Portus; Ex parte
Australia And New Zealand Banking Group Limited (1972) 127 C.L.R. 353,
pp. 362-363.

24 R. v. Findlay; Ex parte Commonwealth Steamship Owners' Association
(1954) 93 C.L.R. 621.

25 Kelly's Case (1950) 81 C.L.R. 64, p. 84; R. v. Portus; Ex parte
Australia And New Zealand Banking Group Limited (1972) 127 C.L.R. 353,
pp. 362-363.

26 This appears from the High Court's treatment of the compensation
claim in R. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners'
Association (1952) 86 C.L.R. 283.

27 Sykes and Glasbeek, pp. 405-433.

28 Dixon C.J. in the Professional Engineers' Case (1959) 107 C.L.R.
208, p. 240.

29 Sykes and Glasbeek, pp. 430-431.

30 The following cases can be explained by the unarticulated
policy thesis:- Kelly's Case (1950) 81 C.L.R. 64; R. v. Wallis;
Ex parte Employers' Association of Wool Selling Brokers (1949) 78
C.L.R. 529; R. v. Hamilton Knight; Ex parte Commonwealth Steamship
Owners' Association (1952) 86 C.L.R. 283 (the pensions claim);
R. v. Commonwealth Conciliation and Arbitration Commission; Ex parte
Melbourne and Metropolitan Tramways Board (No. 1) (1962) 108 C.L.R.
166; R. v. Commonwealth Conciliation and Arbitration Commission;
Ex parte Melbourne and Metropolitan Tramways Board (No. 3) (1966)
115 C.L.R. 443; R. v. Commonwealth Industrial Court; Ex parte
Cocks (1968) 121 C.L.R. 313; R. v. Flight Crew Officers'}
31. The first obstacle for the unarticulated policy thesis is the Badge Case (1913) 17 C.L.R. 680. There, the union's claim clearly impinged upon management's right to control the conduct of employees during working hours and also its right of dismissal. Yet the majority decided that the matter fell within the statutory definition and within the term 'industrial' in s. 51 (xxxv) of the Constitution. This decision can only be reconciled with the thesis if the majority did not regard the claim as a threat to managerial prerogatives. Thus, while the decision itself is difficult to square with the thesis, the judges' approach to the issue of management rights may well have been the determining factor.

Again, in Federated Clothing Trades of the Commonwealth of Australia v. Archer (1919) 27 C.L.R. 207, the union's demands posed a direct challenge to certain aspects of managerial freedom. Nevertheless, the High Court held that these claims were arbitrable. Archer's Case may be a borderline decision justifiable on the ground that the award sought to protect employees from possible award evasions; see Kelly's Case (1950) 81 C.L.R. 64, p. 85. But the fact remains that it cannot be accommodated by the suggested rationale of the cases.

Further, if respect for managerial rights marks the perimeter of federal jurisdiction, why was the workers' compensation claim in the Hamilton Knight Case (1952) 86 C.L.R. 283 held to be arbitrable? Perhaps the answer lies in the fact that the compensation provision could legitimately have been inserted in an employee's contract of service. Moreover, the High Court might have decided that the claim would not hinder management unduly.

For other cases which appear to be inconsistent with Sykes and Glasbeek's theory, see: Melbourne and Metropolitan Tramways Board v. Horan (1967) 117 C.L.R. 78; R. v. Gallagher; Ex parte Commonwealth Steamship Owners' Association (1968) 121 C.L.R. 330; R. v. Holmes; Ex parte Altona Petrochemical Company Limited (1972) 126 C.L.R. 529.

32. In R. v. Portus; Ex parte Australia And New Zealand Banking Group Limited (1972) 127 C.L.R. 353, a union sought an award requiring the employers employing union members to deduct union subscriptions from the members' pay packets. These amounts were then to be forwarded to the union. The High Court declared that such a claim was beyond federal jurisdiction. The union's demand involved a financial relationship of debtor and creditor arising from the earning of salary; it did not pertain to the employer-employee relationship. Thus it did not raise an 'industrial matter'.

But did the union's claim involve a management matter? If the demand had been granted it would certainly have involved management in an inconvenient, cumbersome and costly exercise. But the union's claim was more an issue between the union and its members than a management matter. Indeed, Stephen J. went out of his way to remark that here
there was no question of a restriction upon managerial freedom.

It thus appears that jurisdiction was denied even though managerial prerogatives were not threatened. This appears to be inconsistent with Sykes and Glasbeek's theory.


See Vol. 1, p. 413 n. 30.

Sykes and Glasbeek, p. 432.

Kelly's Case (1950) 81 C.L.R. 64; R. v. Portus; Ex parte Australia And New Zealand Banking Group Limited (1972) 127 C.L.R. 353.

Many of the delegates to the Constitutional Convention in 1898 felt that a provision in the form of Constitution, s. 51 (xxxv) would provide an incentive to expand the area of the industrial dispute so as to attract federal jurisdiction. See, for example, the speeches of Mr McMillan, Sir John Dower, Mr Barton and Mr Reid on 27 January 1898. Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 1898, Vol. 1 (Melbourne, 1898), pp. 184, 188, 206 and 208 respectively.

Higgins, on the other hand, was adamant. 'As if the Federal Parliament would not deal with such a case!' He considered this objection to his proposed amendment a 'mere theoretical grievance'. See Official Record of Debates of the Australasian Federal Convention, Third Session, Melbourne, 1898, Vol. 1 (Melbourne, 1898), pp. 208 and 211.

Another consistent theme in the Convention Debates related to the nature and dimensions of the industrial disputes which would fall within s. 51 (xxxv). Delegates repeatedly stressed that the provision was designed for widespread industrial disputes involving a serious dislocation of trade and industry which could not be effectively settled by the tribunals in the colonies. Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 1898, Vol. 1 (Melbourne, 1898), pp. 180, 181, 185.
For a colourful description of what is meant by an interstate industrial dispute, see Higgins J. in Jumbunna Coal Mine No Liability v. Victorian Coal Miners' Association (1908) 6 C.L.R. 309, p. 313.


R. v. Commonwealth Court of Conciliation and Arbitration and the Australian Builders' Labourers' Federation; Ex parte Jones; Ex parte W. Cooper & Sons (1914) 18 C.L.R. 224, p. 243 per Isaacs, p. 255 per Gavan Duffy and Rich JJ; Caledonian Collieries Ltd v. Australasian Coal and Shale Employees' Federation (No. 1) (1930) 42 C.L.R. 527.

See: R. v. Commonwealth Court of Conciliation and Arbitration and Australian Builders' Labourers' Federation; Ex parte Jones; Ex parte W. Cooper & Sons (1914) 18 C.L.R. 224, p. 256 per Gavan Duffy and Rich JJ; Master Butchers' Meat and Allied Trades Federation of Australia v. Australasian Meat Industry Employees' Union (1932) 6 A.L.J. 239; R. v. Portus; Ex parte Federated Clerks' Union of Australia (1949) 79 C.L.R. 428; R. v. Blakeley; Ex parte The Association of Architects, Engineers, Surveyors, and Draughtsmen of Australia (1950) 82 C.L.R. 54. Caledonian Collieries Ltd v. Australasian Coal and Shale Employees' Federation (No. 1) (1930) 42 C.L.R. 527 is a notable exception. There the High Court ruled that there was no interstate industrial dispute involved: the unions' demand that wages in Queensland and Victoria should not be reduced only became relevant if mines in New South Wales resumed production at a reduced cost; if this did happen the New South Wales dispute would be settled and the fact that separate disputes might then arise in Queensland and Victoria did not satisfy the interstateness test.

Only rarely has the High Court held that an industrial dispute was not genuine. See e.g.: Caledonian Collieries Ltd v. Australasian Coal and Shale Employees' Federation (No. 2) (1930) 42 C.L.R. 558 and R. v. Gough; Ex parte B.P. Refinery (Westernport) Pty Ltd (1966) 114 C.L.R. 384. In both these cases the motives of the union in making the demand proved fatal.

See Menzies J. in R. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board (No. 2) (1965) 113 C.L.R. 228, p. 256.

Appendix 4 examines this issue in some detail: Vol. 2, pp. 82-83.

This would, of course, depend upon whether the High Court would regard the selection criteria as a substantial fetter upon management's freedom to run its business. If the High Court did take this view, then this proposal might not be within the power conferred by Constitution s. 51 (xxv).
Since this issue would arise during a current employment relationship, and since it would, in essence, be related to the employer's right to dismiss its employees, it would appear to be within placitum (xxxv). See Re Association of Professional Engineers; Ex parte City of Perth (1973) 47 A.L.J.R. 724 (hereinafter called 'Re Association of Professional Engineers').

The High Court might characterise a demand for this type of provision as a matter between the employer and the Federal government. In other words, such a claim might not be treated as a matter pertaining to the employment relationship. See R. v. Portus; Ex parte Australia and New Zealand Banking Group Ltd (1972) 127 C.L.R. 353 for a characterisation of an issue on similar lines.

Employees retrenched prior to the making of the severance pay award would not be entitled to the terminal compensation. See Re Association of Professional Engineers (1973) 47 A.L.J.R. 724.


R. v. Gough; Ex parte Cairns Meat Export Co. Pty Ltd (1962) 108 C.L.R. 343 says nothing to contradict this proposition.


It is a judicial body comprising persons appointed for life. Thus it satisfies requirements of section 71 of the Constitution. See Waterside Workers' Federation v. J.W. Alexander Ltd (1918) 25 C.L.R. 434.

See Conciliation and Arbitration Act 1904-1973 (Cth), s. 119.

Amendments to the Commonwealth Act in 1970 deprived the Commonwealth Industrial Court of its power to order compliance with an award. See Conciliation and Arbitration Act 1970 (Cth), ss. 13, 18. This power to order observance of the award is not dissimilar to an order compelling an employer to reinstate employees dismissed in breach of the award. Compensation for the dismissed employee could also be upheld under Redfern v. Dunlop Rubber Australia Ltd (1964) 110 C.L.R. 194.

Re Association of Professional Engineers (1973) 47 A.L.J.R. 724 is a recent reminder of this fact.

This jurisdiction is discussed in Vol. 1, pp. 175-178.

CHAPTER 24 ALTERNATIVE SOURCES OF POWER TO IMPLEMENT THE PROPOSALS FOR REFORM

1 Constitution, s. 51 (xxix).


2 This view gains support from the wording of the placitum itself: 'external affairs' is prima facie a 'general and comprehensive' term: Bailey, p. 308. See too Ffrost v. Stevenson (1937) 58 C.L.R. 528, p. 601 where Evatt J. described placitum (xxix) as a 'great and independent power'.

In R. v. Burgess; Ex parte Henry (1936) 55 C.L.R. 608, p. 687, Evatt and McTiernan JJ. suggested:

the Parliament may well be deemed competent to legislate for the carrying out of "recommendations" as well as the "draft international conventions" resolved upon by the International Labour Organization or other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations.

The power is a great and important one.

See too R. v. Sharkey (1949) 79 C.L.R. 121 which is inferential support for the proposition that an international agreement, short of a binding obligation, may be implemented through the external affairs power. See also Airlines of N.S.W. Pty Ltd v. New South Wales (No. 2) (1965) 113 C.L.R. 54, p. 86 where Barwick C.J. remarked that the placitum would support legislation to secure the benefits conferred under an international Convention. There is, therefore, no magic in the word 'obligation' in this context: Connell, 'International Agreements', pp. 98-99.

3 Bailey, 'Australia and the International Labour Conventions'. See too Sawer, 'Execution of Treaties ...', p. 302 where the author concedes that the expansive interpretation of the power may ultimately prevail.

Professor Lane believes that the 'external affairs' power does not permit Federal Parliament to implement all I.L.O. Conventions or
Recommendations. He argues that there must be a 'mutuality or reciprocity of international interest and concern' in a matter before it becomes an 'external affair'. This classification of issues into 'internal matters' and 'external affairs' is reminiscent of W. Harrison Moore's a priori classification of matters which in se concern external affairs. See: Lane, The Australian Federal System, pp. 153-154; Moore, The Constitution of the Commonwealth of Australia, pp. 461-462.

Lane's criterion of a valid law under placitum (xxxix) provides little guidance and raises problems of characterisation. Moreover, reasoning very similar to that adopted by Lane was rejected by three members of the High Court in R. v. Burgess; Ex parte Henry (1936) 55 C.L.R. 608, p. 641 per Latham C.J., p. 680 per Evatt and McTiernan JJ. See too Garran, 'The Aviation Case', p. 298.

As Bailey points out, the international community has recognised that the improvement of labour conditions in all countries is one of the conditions of international peace and stability ever since World War I: Bailey, p. 307.


Discussed in Vol. 1, Chapter 18.


The Recommendation provides that termination of employment should not take place without a valid reason 'connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service': Recommendation No. 119, Article 2 (a). Member States are left to determine what reasons shall be valid reasons for termination of employment in a manner consistent with national practice and appropriate under national conditions. But the Recommendation does list certain reasons which should not constitute valid reasons for dismissal. It also suggests that an employee should be allowed to appeal against his dismissal to an independent body. Recommendation No. 119, Articles 1, 3 & 4.

The Recommendation is rather vague as to the remedies which should be available to a successful appellant. It provides that adequate compensation should be ordered unless the employee is reinstated with back-pay if this is appropriate. This implies that reinstatement may be at the option of the employer but legislation in pursuance of this recommendation need not follow this pattern: the Recommendation also suggests that the independant appeal body should be empowered to grant such other relief as may be determined by the Member States: Recommendation No. 119, Article 6. Thus, it would be possible for legislation implementing the Recommendation to provide for reinstatement at the option of the employee dismissed.

In cases of 'serious misconduct' the Recommendation suggests that an employee should be given an opportunity to state his case before his
7 (continued):

dismissal becomes finally effective. It also provides that an employer should only resort to dismissal in these cases where he ‘cannot in good faith be expected to take any other course’: Recommendation No. 119, Article 11 (b).

8. The Racial Discrimination Bill 1974 will stand or fall upon the 'external affairs' power. By contrast, the previous Liberal-Country Party Government was anxious to keep a close check upon the 'external affairs' power. See Airlines of New South Wales Pty Ltd v. New South Wales (No. 2) (1965) 113 C.L.R. 54, p. 63.


10. See The Hon. Clyde R. Cameron, M.P., Australian Minister for Labour, 'Managerial Control and Industrial Democracy - Myths and Realities', a paper given at the Australian Institute of Management, N.S.W. Division, President's Dinner at the Sebel Town House Function Centre, Elizabeth Bay, Sydney on 20 August 1973.


13. ibid.

14. ibid.


16. Commonwealth power under s. 51 (1) extends also to intra-state trade which is inseparably linked with interstate trade and commerce: Redfern v. Dunlop Rubber Australia Ltd (1964) 110 C.L.R. 194. Thus if an enterprise wishes to place its intra-state trade beyond the reach of the power it must segregate that aspect of its operations from its interstate trade and commerce activities. Such a division may be difficult or at least inconvenient. See too: Huddart Parker Ltd v. The Commonwealth (1931) 44 C.L.R. 492; Dignan v. Australian Steamships Pty Ltd (1931) 45 C.L.R. 188; Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan (1931) 46 C.L.R. 73.


18. ibid.

The High Court has on several occasions allowed the Commonwealth to regulate a matter indirectly through one of its admitted powers: Herald and Weekly Times Ltd v. The Commonwealth (1966) 115 C.L.R. 418; Attorney-General (Vic.) v. The Commonwealth (1962) 107 C.L.R. 529.

The only obstacle to this development is R. v. Barger (1908) 6 C.L.R. 41. But the trend of recent High Court decisions suggests that Barger's Case (1908) 6 C.L.R. 41 will remain dead and buried. See e.g.: Bonsor v. La Macchia (1969) 122 C.L.R. 177, pp. 184-189, 220-224; Herald and Weekly Times Ltd v. The Commonwealth (1966) 115 C.L.R. 418; Attorney-General (Vic.) v. The Commonwealth (1962) 107 C.L.R. 529. Even if it is exhumed it may be discredited for its reliance upon the 'reserved powers' doctrine. In Fairfax v. Federal Commissioner of Taxation (1965) 114 C.L.R. 1, both Kitto and Taylor JJ. disapproved of R. v. Barger (1908) 6 C.L.R. 528 on this ground.

21. The High Court has directly considered placitum (xviii) only once, in Attorney-General (N.S.W.) v. Brewery Employees' Union of New South Wales (1908) 6 C.L.R. 469. There, the High Court declared that the meaning of the term 'trade mark' in s. 51 (xviii) was to be ascertained from its 'signification in 1900'. Thus, the workers' trade marks defined and dealt with by the Trade Marks Act 1905 (Cth) were not within the paragraph. This finding has no relevance in the following discussion since all the proposals for reform of the law relating to employee's inventions concern patents in the sense that term conveyed in 1900.

Moore's early commentary on the Constitution observed:

it cannot be doubted that the Commonwealth has power to make the field its own and to declare that no grant but its own shall establish, and no machinery but its own control, the peculiar class of rights ...


23. Here, of course, the Commonwealth could invoke the 'incidental power' in Constitution, s. 51 (xxxix).

Machinery for settling disputes between employers and employees over the rights to inventions made during the course of employment may present a problem. A final determination of their respective rights could involve an exercise of the judicial power of the Commonwealth. See: Waterside Workers' Federation of Australia v. J.W. Alexander Ltd (1918) 25 C.L.R. 434; Constitution, s. 71.


It would seem, therefore, that Federal Parliament could not
establish a panel of experts as the decision-making authority. Yet the advantages of the West German model can still be achieved by vesting ultimate decision-making power in a judicial body. One small modification would be necessary. Federal legislation could provide that the judicial body may consult technical experts assigned to the Patents Office or other specialists nominated by the parties, before reaching its decision on the rights to the invention or the compensation payable. Alternatively, the judicial body could be empowered to make a definitive ruling on the rights of the parties and refer the matter to an arbitral body or an official panel of experts for assessment of compensation.

24 Basically this is a characterisation issue. The West German procedure is a matter preliminary to the grant of a patent. Nevertheless, its true nature and character is directly related to patents. Furthermore, its legal effect is to determine who shall be entitled to claim a patent. The rights it creates, the duties and obligations it imposes, concern patents. It seems, therefore, that federal legislation prescribing a similar procedure could be legitimately classified as a law *with respect to ... patents*. For a more detailed discussion of characterisation, see Vol. 2, pp. 110-111.

25 Such legislation would be concerned with who may apply for a patent and who shall be entitled to a grant of letters patent. Both these issues fall within the ambit of paragraph (xviii).


3. M. Beer, Leadership, Employee Needs, and Motivation (Columbus, Ohio, Bureau of Business Research, Ohio State University, 1966) discussed in Hunt & Hill.


7. For a useful bibliography of research testing Herzberg's theory see R. Johnston and R.A. Bavin, 'Herzberg and Job Satisfaction' (1973) 29 P.P.B. 136, pp. 144-147.

8. M.S. Myers, 'Who are Your Motivated Workers?' (1964) 42 Harv. Bus. Rev. 73.

9. Myers, p. 76.

10. See F. Herzberg, Work and the Nature of Man (Cleveland, Ohio, 1966).


12. Ibid.


16 T.M. Lodahl, 'Patterns of Job Attitudes in Two Assembly Technologies' (1964) 8 Admin. Sc. Quar. 482.

17 For a bibliography of research supporting and refuting Herzberg's theory, see Johnson & Bavin, pp. 144-147.


19 Goldthorpe and others, p. 182.

20 Goldthorpe and others, p. 149.
EMPLOYER-EMPLOYEE RELATIONSHIP SURVEY : REPORT

The writer followed up this survey with a limited number of personal interviews.

There are good grounds for this assumption. See Vol. 1, p. 246, n. 92.

The Australian and Finance Week, 'The Top 1,000 Companies' (Sydney, 1972).


Hereinafter, Australian-owned manufacturing companies will be referred to simply as 'Australian companies' or 'local companies' and foreign-owned manufacturing companies will be referred to as 'foreign companies'.

A copy of the questionnaire appears in Appendix 3, Vol. 2, pp. 56-60.


ibid.


Companies which grouped or did not rank the objectives were excluded from this exercise.

Appendix 3, Question 2, Vol. 2, pp. 56-57.


Appendix 3, Question 6 (iii), Vol. 2, p. 59.


Appendix 3, Question 6 (v), Vol. 2, p. 59.
The relevant questions on this point appear in Appendix 3, Question 4, Vol. 2, p. 58.


27. See Appendix 3, Question 9, Vol. 2, p. 60.
This proportion ranges from between $2\frac{1}{2}$% to 7% of pay for wages employees to between 5% and 7% for salaried employees. See Cherry Baker, 'A Survey of Private Superannuation Schemes' (1973) 29 P.P.B. 9, p. 21.

Ninety per cent of the 703 schemes in the 583 firms surveyed by the Department of Labour in 1972 were contributory. The remainder were non-contributory schemes: Baker, p. 19. This finding confirms an earlier survey which reported that contributory schemes were much more common than non-contributory schemes: G.J. Prideaux, 'Employee Benefits and Services' (1972) 28 P.P.B. 19, p. 21.

Baker reports that 65% of the 703 schemes surveyed by the Department of Labour were 'benefit-promise' plans: Baker, p. 23.

Thirty-five per cent of the schemes in the Department of Labour's survey were funded on this basis: Baker, p. 23.

In 61% of the schemes in the Department of Labour's survey, retirement benefits were paid as a lump sum only: Baker, p. 24.

Twenty per cent of the schemes in the survey reported by Baker provided this option: Baker, p. 24.

The Department of Labour's survey found that only 13% of the schemes provided less than the total accumulated contributions in the event of total and permanent disability of the employee: Baker, p. 28.

All but 7% of the schemes in the 1972 survey reported that the benefits payable on death in service were at least the total amounts accumulated on behalf of the deceased: Baker, p. 29.
Ninety-one per cent of the executives and 72% of other salaried employees in the 1972 survey were members of a superannuation scheme but only 32% of wages employees were covered: Baker, p. 15.

While 56% of male employees in the firms surveyed by the Department of Labour were members of a superannuation scheme, only 22% of all female employees were covered: Baker, p. 15.


While 56% of male employees in the firms surveyed by the Department of Labour were members of a superannuation scheme, only 22% of all female employees were covered: Baker, p. 15.


R. v. Hamilton Knight; Ex parte Commonwealth Steamship Owners' Association (1952) 86 C.L.R. 283 (hereinafter referred to as the 'Hamilton Knight Case').

Hamilton Knight Case (1952) 86 C.L.R. 283, p. 301 per McTiernan J., and p. 305 per Williams J.

Hamilton Knight Case (1952) 86 C.L.R. 283, p. 294.

The section was a predecessor of the present section 58 of the Conciliation and Arbitration Act 1904-1973 (Cth).

Hamilton Knight Case (1952) 86 C.L.R. 283, p. 323.

Hamilton Knight Case (1952) 86 C.L.R. 283, p. 308.

These are as follows: *all matters pertaining to the relations of employers and employees*: section 4 of the Conciliation and Arbitration Act 1904-1973 (Cth).

Paragraph (b) reads: *the privileges, rights and duties of employers and employees*: Conciliation and Arbitration Act 1904-1973 (Cth), s. 4.

Paragraph (h) reads *the mode, terms and conditions of employment*: Conciliation and Arbitration Act 1904-1973 (Cth), s. 4.

Hamilton Knight Case (1952) 86 C.L.R. 283, p. 332.

Indeed, even Fullagar J, in the Hamilton Knight Case (1952) 86 C.L.R. 283, p. 318 conceded: *If the provisions of [the definition of *industrial matters*] had alone to be considered, it might be difficult to maintain that the matter in question was not an *industrial matter*. See too R. v. Portus; Ex parte Australia And New Zealand Banking Group Ltd (1972) 127 C.L.R. 353, p. 371 where Stephen J. expressed the view that a demand for retirement benefits could relate to an industrial matter. Further, in Australian Federation of Air Pilots v. MacRobertson...
Miller Airlines Limited (1968) 122 C.A.R. 1033, Professor J.E. Isaac, then President of the Flight Crew Officers’ Industrial Tribunal, was clearly of opinion that superannuation was an industrial matter.


30. (1952) 86 C.L.R. 283.

31. Hamilton Knight Case (1952) 86 C.L.R. 283. See too: Re Pilots (State) Conciliation Committee [1949] A.R. 206; Re Sydney County Council (Salaried Division - General Conditions) Award 1957 A.R. 607, p. 611; Re Hospital Employees (State) Award 1958 A.R. 130.

32. See: Industrial Arbitration Act, 1940, as amended (N.S.W.), s. 87 (not exceeding three years); Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 77 (1) (maximum of two years); Wages Boards Act 1920 (Tas.), s. 29 (2) (two years).


34. (1952) 86 C.L.R. 283.

35. Indeed, in Tasmania, wages boards are expressly prohibited from determining any matter relating to superannuation. See Wages Boards Act 1920 (Tas.), s. 23 (2)(c).


37. The definition of ‘industrial matters’ in section 5 of the Industrial Conciliation and Arbitration Act 1961-1974 (Qld) includes:

- generally all questions as to what is fair and right (having regard to the interests of the persons immediately concerned and of the community as a whole), according to the standard of the average good employer and the average competent and honest employee in all matters pertaining to the relations of employers and employee, whether or not the relationship of employer and employee exists or existed at or before the time of any application to the Court or Commission or at the time of the making or enforcement of any decision by the Court or the Commission. (Emphasis added.)

This limb of the definition suggests that a matter may be arbitrable even though it does not arise during an existing employer-employee relationship. It is interesting to speculate on the potential of this
provision in relation to superannuation. Perhaps the conservative approach evinced by Queensland industrial tribunals in redundancy cases would defeat a claim for superannuation in an award.

The South Australian and Western Australian statutes contain a similar provision although in a much narrower vein: Industrial Conciliation and Arbitration Act, 1972 (S.A.), s. 6 and Industrial Arbitration Act, 1912-1973 (W.A.), s. 6.

38 See Income Tax Assessment Act 1936-1974 (Cth), s. 23F.

Superannuation benefits are defined by section 6 (1) of the Income Tax Assessment Act 1936-1974 (Cth) as: 'individual personal benefits, pensions or retiring allowances'.

This term is defined at length in s. 82 AAA(1). It is sufficient to note that any ordinary employee of the taxpayer company would fall within the definition.


41 (1938) 5 A.T.D. 69. In that case, Mr Justice Owen considered an arrangement whereby a company opened accounts in the company's books in respect of each of its employees and credited those accounts with the employees' contributions plus interest. The company matched the employees' contributions together with interest and credited its contribution to the accounts of the employees. The company's contribution was then written off to the company's profit and loss account by a series of book entries. This scheme was eventually replaced by a new arrangement. The company's total contribution standing to the credit of the employee was used to establish the new superannuation scheme, and the company sought a deduction for the payment in the year the new scheme was created. The learned judge decided that the amount claimed as a deduction was set apart in the years when the company made the entries in its books crediting the accounts of the employees and debiting to profit and loss account the amounts so credited.


44 In Winchcombe Carson Ltd v. Commissioner of Taxation (N.S.W.) (1938) 5 A.T.D. 69, p. 73, Owen J. stated: 'If the Legislature had thought it necessary to require that sums set aside should be vested in a trustee, it would be very easy to say so'.

Provision to meet liability for long service leave under the Labour and Industry Act 1958 (Vic.) has been held not to be a 'superannuation benefit'. See Federal Commissioner of Taxation v. Northern Timber & Hardware Co. Ltd (1960) 103 C.L.R. 650.

Income Tax Assessment Act 1936-1974 (Cth). This section provides an exemption for the income of genuine superannuation funds provided certain requirements are satisfied.


ibid.

In Case All 69 A.T.C. 53, the facts that only the managing director and principal shareholder and certain short-term employees were members of a family company's superannuation fund, and that no employee was informed of his interest in the fund, were considered sufficient to deny the company a deduction for its contributions to the fund.


This is not to say that an extraneous purpose will be condoned by s. 82AAC. See Driclad Pty Limited v. Commissioner of Taxation (Cth) (1968) 42 A.L.J.R. 355.


11 C.T.B.R. Case 33.

See e.g. Metropolitan Gas Co. v. Federal Commissioner of Taxation (1932) 47 C.L.R. 621, p. 631.

(1960) 103 C.L.R. 650.

See too 10 C.T.B.R. Case 37 and 11 C.T.B.R. Case 32 where the members' rights were not 'fully secured' because of the excessive discretion vested in trustees.

But where a service agreement secures the payment of the superannuation benefits, the rights of an employee are fully secured because the agreement creates a binding obligation. In this instance a book entry in the company's accounts will suffice: Case No. F22 (1955) 6 T.B.R.D. 193.


Where a fund is established towards the end of a year of income, the Taxation Department usually relaxes the requirement that the employer's contribution be set apart or paid during the year of income as or to a fund which fully secures the rights of employees or their dependants to receive superannuation benefits. It normally allows the taxpayer company a deduction for its contributions to the new fund in that income year provided the contribution is allocated out of the company's profits for that year and provided the superannuation deed is executed within a short period after the end of the year. See Australian Federal Tax Reporter Vol. 2 (Milson's Point, N.S.W., C.C.H. Australia Limited), para. 43-820.


Metropolitan Gas Co. v. Federal Commissioner of Taxation (1932) 47 C.L.R. 621, p. 631 per Gavan Duffy C.J. and Starke J.

ibid.


(1932) 47 C.L.R. 621.


(1932) 47 C.L.R. 621, p. 636. See too Winchcombe Carson Ltd v. Commissioner of Taxation (N.S.W.) (1938) 5 A.T.D. 69 where Owen J. held that a scheme satisfied the security of rights test even though the employer was empowered to regain some or all of the moneys it contributed to pay the premiums on the particular employee's policy if the employee resigned or was dismissed for misconduct. Owen J. considered this clause was much 'less drastic' than the corresponding clause in Metropolitan Gas Co. v. Federal Commissioner of Taxation (1932) 47 C.L.R. 621.

Metropolitan Gas Co. v. Federal Commissioner of Taxation (1932) 47 C.L.R. 621, p. 632 per Gavan Duffy C.J. and Starke J.

(1932) 47 C.L.R. 621.

(1938) 5 A.T.D. 69.

See Vol. 2, pp. 80-82.

Section 82AAB describes the circumstances in which an employee is associated with a person for the purposes of Subdivision AA.

Income Tax Assessment Act 1936-1974 (Cth), s. 82AAE(a), (b). Section 82AAM provides that where the taxpayer-employer contributes to an unallocated fund the contribution in respect of each employee shall be determined by the Commissioner. Section 82AAF indicates how the
total deduction allowable in respect of one employee is apportioned amongst the contributors where the total contributions for that employee exceed the allowable deduction.

77 14 C.T.B.R. Case 34.

78 ibid.

79 ibid.


83 In this section, the writer relied heavily upon the Australian Federal Tax Reporter for source material.

84 14 C.T.B.R. Case 31 and 14 C.T.B.R. Case 34.

85 14 C.T.B.R. Case 31. However in Case No. L25 (1960) 11 T.B.R.D. 144 this factor was rejected as a 'special circumstance' because the board of review found there was nothing definite as to when the life governing director concerned would retire.

86 15 C.T.B.R. Case 52.

87 Case No. E33 (1954) 5 T.B.R.D. 202; Case No. G36 (1956) 7 T.B.R.D. 209. However the fact that the credit for the company's success was due to the employee was rejected as a special circumstance in Case No. L25 11 T.B.R.D. 144. Nor did the exacting nature of past services performed by the employee qualify as a 'special circumstance' in 14 C.T.B.R. Case 31. The boards of review have adopted the attitude that the section is not to be used as a means of rewarding past pioneering services: Case No. L24 (1960) 11 T.B.R.D. 140.

88 14 C.T.B.R. Case 52.

89 However in Case No. L11 (1960) 11 T.B.R.D. 63 the No. 1 Board of Review ruled that a provision in excess of the statutory maximum was not unreasonable having regard to the employee's experience, his contributions to the taxpayer's operations and the business which he acquired for the taxpayer. By impliedly accepting these circumstances as special the board ran counter to the decision in 14 C.T.B.R. Case 31.

90 14 C.T.B.R. Case 34; 14 C.T.B.R. Case 35.


93 14 C.T.B.R. Case 34.

94 Commonwealth of Australia, Commonwealth Taxation Office, Tax Agents Circular No. 1/1970 'Superannuation Funds: Reasonable Benefits - Sections 23F(2)(h) and 82AAE(b)'.


96 Ligertwood Report, para. 744.

97 Income Tax Assessment Act 1965 (Cth).

98 Income Tax Assessment Act 1936-1974 (Cth), s. 82AAG(8).

99 Income Tax Assessment Act 1936-1974 (Cth), s. 82AAG(11).

1 Income Tax Assessment Act 1936-1974 (Cth), s. 82AAH.


3 ibid.


5 In Public Information Bulletin No. 8 (July 1966) Schedule A, the Commissioner indicated that a scheme for the application of forfeited benefits might provide that these amounts could be applied, inter alia, for either or both of the following purposes:

4. Paying the administrative expenses of the fund.

... 6. Reimbursing a contributor to recompense him for defalcations of an employee whose rights to benefits have ceased or for losses due to misconduct of the employee.

7. Repayment to an employer or other person of contributions made by him to the fund on behalf of the employee whose right to receive the benefits ceased.

See Australian Federal Tax Reporter Vol. 4, 57,858, p. 57,867.

However a payment to the executor of the deceased's estate does not fall within the permissible categories of payments: Case C84 71 A.T.C. 378.

Section 78(1)(c) begins with the words 'Sums which are not otherwise allowable deductions ...'.


Richards, pp. 208-209.

The deduction available under s. 78(1)(c) is further limited by s. 79C which ensures that a taxpayer-employer cannot obtain a taxation advantage by paying superannuation benefits in such a way as to incur a loss.

Income Tax Assessment Act 1936-1974 (Cth), s. 46.

Compare Richards, p. 211. But an employer may be prepared to forego this tax advantage in funding in order to enjoy the freedom and simplicity of an unfunded scheme.


See Baker, p. 12.


For a comprehensive survey of national superannuation schemes in several overseas countries see Hancock Report, Chapter 4, pp. 54-82.

Hancock Report, pp. 159-163.

Hancock Report, p. 158.

H Hancock Report, p. 150.

ibid.

H Hancock Report, p. 159.

H Hancock Report, p. 128.
The Hancock Committee itself stressed that 'unless general-revenue financing continues to provide a high proportion of social security benefits in Australia, substantial contributions will have to be levied from income recipients': Hancock Report, p. 84 (emphasis added).

Hancock Report, p. 162.

ibid.

ibid.

ibid.

Hancock Report, p. 98.

Hancock Report, p. 2.

Under the flat-rate scheme proposed by the Committee a pension of 25% of average weekly earnings would be paid to all retired persons free of means test. A supplementary allowance of about 5% of average weekly earnings would be paid to a pensioner whose income from other sources did not bring his total income up to 30% of average weekly earnings. The alternative contributory earnings related scheme would provide benefits based upon modest contributions during an individual's working life.

Hancock Report, p. 3.

ibid.

Hamilton Knight Case (1952) 86 C.L.R. 283.


(1952) 86 C.L.R. 283.


Conciliation and Arbitration Act 1904-1973 (Cth), s. 58 (3).
Compare the position in the United States where pensions are mandatory subjects of bargaining. See Inland Steel Co. v. N.L.R.B. 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949). Although American unions may not bargain for pensions in respect of retired workers they may bargain about the pensions present employees may receive upon retirement: Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co. 404 U.S. 157 (1971).

Hancock Report, p. 102.

The provisions of the Income Tax Assessment Act 1936-1974 (Cth) which grant a taxation exemption on the income of certain superannuation funds require that the rights of each employee and his dependants to receive benefits from the fund must be defined.

Further, notice in writing of the existence of those rights must be given to the employees not later than a certain date or within such extended time as the Commission of Taxation allows: Income Tax Assessment Act 1936-1974 (Cth), s. 23F(2)(e). In Public Information Bulletin No. 8, the Commissioner stated that the test contained in paragraph (e) will be satisfied if each member of the fund has been notified in writing of the existence of his right to receive benefits under the fund: Public Information Bulletin No. 8, Issued July 1966, in Australian Federal Tax Reporter Vol. 4, 57,858, p. 57,859. To some extent this provision offsets the defects of s. 82AAC of the Income Tax Assessment Act 1936-1974 (Cth). On the other hand this is merely an indirect influence upon management in the administration of the scheme. In any event, the requirement in s. 23F(2)(e) does not guarantee employees sufficient information about the superannuation scheme to which they belong.


Victorian Superannuation Bill 1971, s. 17.

Victorian Superannuation Bill 1971, s. 20(c).

Victorian Superannuation Bill 1971, s. 20(d).


Welfare and Pension Plans Disclosure Act 1958, s. 8 (2).

Welfare and Pension Plans Disclosure Act 1958, s. 9 (b).

See Welfare and Pension Plans Disclosure Act 1958, ss. 6, 7.

Welfare and Pension Plans Disclosure Act 1958, s. 8(2)(b).
Section 9(a) of the Welfare and Pension Plans Disclosure Act 1958 provides that any person "who wilfully violates any provision of this Act shall be fined not more than $1,000, or imprisoned not more than six months, or both".


Vol. 2, p. 70.

Vol. 2, pp. 67-72.

Vol. 2, pp. 75-77.


Tony Lynes, "Talking about Pensions - 1 The Role of Employee Representatives" (1972) 41 Superfunds 19.


Hancock Report, p. 191.

Donald H. McMurchy, "Superannuation Today" (1972) 24 The Chartered Secretary 150.


The 30/20 requirement appears in s. 121C of the Income Tax Assessment Act 1936-1974 (Cth). Unless a superannuation fund which satisfied all the conditions of s. 23F invests 30% of its assets in public securities (including 20% in Commonwealth securities) it will not qualify for a taxation exemption on its investment income. The costs of failing to observe this requirement could be prohibitive as the total investment income of the fund would be liable to tax at an almost punitive rate. For the 1973-1974 income year the rate of tax
payable upon the investment income of s. 23F funds which did not observe the 30/20 ratio was increased to 47.5%: Australia. Parliament, Fifty-Third Report Of The Commissioner of Taxation 1973-74 Parl. Paper 96, 1974 (Canberra, 1974), p. 65.


It has been estimated that revenue foregone in respect of occupational superannuation contributions in 1969-1970 amounted to $120 million. Employers' contributions would make up the bulk of this figure. In 1972-1973 the estimate rose to $150 million: Hancock Report, p. 36. The Hancock Committee concluded: "it is plain that the taxation laws confer a very substantial subsidy on occupational superannuation": Hancock Report, p. 37.

See e.g. Hancock Report, p. 197.

New Zealand Superannuation Act 1974, s. 56(1). The exceptions appear in ss. 56(1)(a) & (b), 52.

Existing occupational schemes must satisfy all the requirements of s. 71 of the New Zealand Superannuation Act 1974 before they are eligible for the Government Actuary's approval as restricted schemes. In particular, the funds must be closed to new members on or after 1 April 1975. Moreover, the transfer value available to retiring or withdrawing members must be at least equivalent to that provided under the public scheme. For members who joined the existing fund or scheme after 6 September 1973, at least 75% of the retirement benefit in respect of contributions after 1 April 1975 must be paid in the form of an annuity.
As to this see New Zealand Superannuation Act 1974, s. 70. The conditions of approval require the applicant to establish that the private scheme will provide equivalent benefits, equivalent transfer values and retirement benefits principally in annuity form.

See s. 75 of the New Zealand Superannuation Scheme 1974.


Better Pensions, para. 68.

Better Pensions, para. 69.

ibid.

Superannuation Act 1922-1973 (Cth), ss. 119U, 119V, 119W.

ibid.

Superannuation Act 1922-1973 (Cth), ss. 119H, 119J.

Victorian Superannuation Bill 1971, s. 18.


Victorian Superannuation Bill 1971, s. 18.


Portability or preservation must be compulsory: McMurchy, p. 297.

Hancock Report, p. 194; Anne Lampe, 'The problems of portability'.

96 Institute of Actuaries of Australia and New Zealand, Statement on Vesting and Preservation of Employee Superannuation Benefits in Australia 5, p. 25.


98 William Phillips, "Making Pension Scheme Benefits Fully Transferable" (1964) British Tax Review 16 points out some of the difficulties involved in calculating an appropriate transfer value for a withdrawing member.


1 Better Pensions, para. 1

2 Better Pensions, para. 58.

3 Better Pensions, para. 59.

4 See Superannuation Act 1973 (Cth).


6 ibid.

7 Victorian Superannuation Bill 1971, ss. 20(a), 23, 24.


9 There, the limit is set at 15%. See New Zealand Superannuation Act 1974, ss. 27, 73.

10 Victorian Superannuation Bill 1971, s. 24.


12 See e.g. Superannuation Act 1922-1973 (Cth), s. 17.

13 New Zealand Superannuation Act 1974, s. 78.
14. New Zealand Superannuation Act 1974, s. 78(3).

15. New Zealand Superannuation Act 1974, s. 78(5).


18. (1908) 6 C.L.R. 309.

19. Constitution, s. 51 (xxxv).

20. This issue is discussed at length in Vol. 2, pp. 112-119.


23. Constitution, s. 51 (xxiiiA).

24. (1949) 79 C.L.R. 201.

25. Latham C.J., Rich, Dixon, McTiernan and Webb JJ. formed the majority on this point. Williams J. found it unnecessary to express a final opinion on this issue.


27. Constitution, s. 51 (ii).


29. The Hancock Committee considered such a proposal but expressed no firm opinion on the issue. See Hancock Report, p. 194.
FOOTNOTES

APPENDIX 5

THE "CORPORATIONS POWER"

Commonwealth of Australia Constitution Act 63 & 64 Vict., c. 12, 1900 (hereinafter referred to as the "Constitution"), s. 51 (xx). Paragraph (xx) reads as follows:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

1 (1909) 8 C.L.R. 330.

2 (1971) 124 C.L.R. 468 (hereinafter referred to as the "Concrete Pipes Case").

3 R. v. Trade Practices Tribunal and Commissioner of Trade Practices; Ex parte St George County Council (1974) 2 A.L.R. 371 (hereinafter referred to as the "St George County Council Case").


5 Taylor points out that this contrast is highlighted by the comma after the words "Foreign corporations". John L. Taylor, "The Corporations Power: Theory and Practice" (1972) 46 A.L.J. 5, p. 7.

6 Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330.

7 Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330, p. 393.

8 Later in his judgment Isaacs J. again referred to manufacturing and mining companies contrasting them with corporations within the statutory description. See Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330, p. 400.

Concrete Pipes Case (1971) 124 C.L.R. 468, p. 486 per Barwick C.J. and p. 495 per Menzies J. But, as Baxt points out, the respondents conceded that they were trading corporations for the purposes of the prosecution and appeal. See R. Baxt, The Concrete Pipes Case - its impact on Australian Business (Sydney, 1971), p. 6.


ibid.


(1909) 8 C.L.R. 330, p. 393. There, Isaacs J. looked at the purposes for which certain corporations were constituted.


Restrictive Trade Practices Act 1971-1972 (Cth), s. 5.


ibid.

Barwick C.J. did, however, insist that 'the power to trade must be within the corporate charter, whether expressly or by implication'. St George County Council Case (1974) 2 A.L.R. 371, p. 377 (emphasis added).

St George County Council Case (1974) 2 A.L.R. 371, pp. 397, 398. On the facts of the case, however, Stephen J. found that both these tests were satisfied: 'the County Council's activities, both as contemplated by the terms of its creation and as they are in fact undertaken, are concerned with trading and with nothing else'.: (1974) 2 A.L.R. 371, p. 401.

While Barwick C.J. focused upon the activities of the corporation 'at the relevant time' or its 'current activities', Stephen J. considered the genesis of the Council's activities and the activities it exercised 'at all material times'. See St George County Council Case (1974) 2 A.L.R. 371, pp. 374, 377 per Barwick C.J., p. 396 per Stephen J. On the facts of the case, this difference in approach was of no consequence, but in other circumstances it might well produce a different result. It is submitted that the proper inquiry should be: what were the activities of the corporation at the material time? If it is necessary to examine its earlier activities to answer this question, then so be it, but where a corporation can be classified by its current activities, its history should not interfere with this classification.

Lane, 'Federal Control of Trading Corporations', p. 239.


Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330.


Howard, Australian Federal Constitutional Law, p. 418.

Concrete Pipes Case (1971) 124 C.L.R. 468.


See Howard, Australian Federal Constitutional Law, p. 418.


(1909) 8 C.L.R. 330.


In the St George County Council Case (1974) 2 A.L.R. 371, p. 402 Stephen J., dissenting, remarked that Isaacs J. in Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330 was, no doubt, directing his mind to the agencies of private enterprise when he spoke of this need for control. Nevertheless, Stephen J. conceded that Isaacs' comment might now apply equally to a corporation with the magnitude of operations of the County Council, even though it was not a private enterprise corporation. Thus a corporation not contemplated at the time the Constitution was framed might yet be within power because of subsequent developments.

Howard, Australian Federal Constitutional Law, p. 418.


Again, in the St George County Council Case (1974) 2 A.L.R. 371, p. 377 the Chief Justice expressed the view that trading may involve dealing in goods or services.

'Trade' in Constitution, s. 51 (i) has the same meaning as 'trade' in Constitution, s. 92: James v. The Commonwealth (1936) 55 C.L.R. 1, p. 60.


Such a company could then be classified as a trading corporation: See Bank of New South Wales v. The Commonwealth (1948) 76 C.L.R. 1, pp. 381-382.


Quick and Garran, p. 607.


On Mr Justice Menzies' test, the law must relate to the specific characteristics of trading corporations as trading corporations; on Mr Justice Isaacs' test, the law must simply relate to trading corporations as corporations.

Concrete Pipes Case (1971) 124 C.L.R. 468.


Concrete Pipes Case (1971) 124 C.L.R. 468, p. 499. See too p. 490 per Barwick C.J.


(1909) 8 C.L.R. 330.

ibid.

ibid.

Griffith C.J. did, however, concede that the words 'formed within the limits of the Commonwealth' in s. 51 (xx) 'may be large enough to include corporations formed by the Commonwealth itself within territory under its exclusive jurisdiction, and corporations created by the Commonwealth itself as instruments of government...': (1909) 8 C.L.R. 330, p. 349.
95 (1971) 124 C.L.R. 468, p. 488.
96 Constitution, s. 122.
97 Constitution, s. 51 (i).
98 In Huddart Parker & Co, Pty Ltd v. Moorehead (1909) 8 C.L.R. 330, Isaacs J., in particular, conveyed this impression. See, p. 394.

1 Insurance Commissioner v. Associated Dominions Assurance Society Pty Ltd (1953) 89 C.L.R. 78, p. 86 per Fullagar J.

2 (1909) 8 C.L.R. 330.
4 Concrete Pipes Case (1971) 124 C.L.R. 468, pp. 490, 511 and 512.

9 The Adelaide Session in 1897 was concerned primarily with the issue of 'uniformity' of provisions in the Companies Acts of the various states but Barton apparently assumed that the paragraph covered 'everything under the Companies Act'. See Lane, Case Note (1972) 46 A.L.J. 407, p. 408. At the Sydney Session in 1891 Sir Samuel Griffith spoke out against giving the Commonwealth the power of incorporation but the debate concerned only the status of corporations: New South Wales. Official Report of the National Australasian Convention Debates (1891) (Sydney, 1891), p. 686.

10 In 1929, the Royal Commission on the Constitution reported: 'it seems certain that this paragraph [i.e. s. 51 (xx)] was thought by members of the Convention to confer power to pass a company law ... as the term company law is generally understood'. See Commonwealth of Australia, Report of the Royal Commission on the Constitution (Canberra, 1929), p. 207. The Joint Committee on Constitutional Review, 1959, Report took a different view. It felt that 'it is uncertain what the Founders intended'. See Lane, Case Note (1972) 46 A.L.J. 407, p. 408.


14 Lane, Case Note (1972) 46 A.L.J. 407, p. 409.

15 e.g.: *Airlines of New South Wales Pty Ltd v. New South Wales* (No. 2) (1965) 113 C.L.R. 54, p. 115 and *R. v. Foster; Ex parte Rural Bank of New South Wales* (1949) 79 C.L.R. 43, p. 83.


17 (1971) 124 C.L.R. 468.

18 *Concrete Pipes Case* (1971) 124 C.L.R. 468, p. 490 per Barwick C.J., p. 499 per Menzies J.


21 e.g.: s. 51 (xix) 'aliens'; s. 51 (xx) 'foreign corporations'; s. 51 (xxvi) 'the people of any race'.

22 Lane, Case Note (1972) 46 A.L.J. 407, p. 409.


25 ibid.


27 *Concrete Pipes Case* (1971) 124 C.L.R. 468, p. 490 per Barwick C.J.


29 (1909) 8 C.L.R. 330.
This was the view taken by Barwick C.J. in St George County Council Case. See (1974) 2 A.L.R. 371, p. 376.


Frankel & Taylor, p. 122. Baxt takes a similar line. See The Concrete Pipes Case, pp. 64-65.


The authority is Mikasa (N.S.W.) Pty Ltd v. Festival Stores (1972) 47 A.L.J.R. 14. There, Stephen J. commented that the past participle 'supplied' in s. 66B(2)(d)(ii) of the Trade Practices Act 1965-1971 might have a future connotation. His Honour remarked that the past participle often 'applies equally to the future as to the past'. See pp. 30-31. But Stephen J. was not laying down a rule of statutory interpretation, he was merely making an observation.


See Constitution, ss. 122, 51 (i) and 51 (xxxix) respectively.


See Lane, Case Note (1972) 46 A.L.J. 407.

Isaacs J. felt that the Commonwealth would be unable to prescribe a schedule of wages and hours for the employees of the corporations described in s. 51 (xx). See Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330, p. 396.

See Vol. 1, p. 213.


Compare Re Edgar and The Companies Act 14 Dec. 1972 (unreported) 1973 A.C.L.D. D.T. 183 where the New South Wales Supreme Court (Street C.J. in Equity) ruled that the overall industrial relationship between a company and its staff is an integral part of the management of the company’s business.

(1909) 8 C.L.R. 330, p. 371 per O’Connor J. and p. 395 per Isaacs J.


Lane, Case Note (1972) 46 A.L.J. 407.

Tonking, p. 249.

Lane, Case Note (1972) 46 A.L.J. 407.

ibid.

Frankel and Taylor, p. 121.


Howard, Australian Federal Constitutional Law, p. 419.

See U.C.A., ss. 18 and 29. It may be noted that these Acts do not require companies applying for incorporation to submit a standard form of memorandum and articles of association. The company can, within certain limits, be constituted as its creators see fit. They may decide to provide that one of the company’s objects shall be to maintain security of employment for its employees or that employees shall be
represented in a two-tier board structure. If they do so decide their plans will not be thwarted by the Uniform Companies Acts.

64 Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330.


66 ibid.


68 Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330, pp. 412-413.


70 See Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330, p. 396 per Isaacs J.

71 See e.g. Barwick C.J. in Concrete Pipes Case (1971) 124 C.L.R. 468, p. 490.

72 Lane, *The Concrete Pipes Case*, p. 626.


74 Concrete Pipes Case (1971) 124 C.L.R. 468, p. 490.


76 Bank of New South Wales v. The Commonwealth (1948) 76 C.L.R. 1, p. 304.


79 Under s. 51 (xxxvii) the Australian Parliament is given power to legislate on any matter in which the states' legislative power has been referred to the Commonwealth. But opinions expressed at the recent Australian Constitutional Convention indicate that the states are unlikely to vacate the company law field. See e.g. *Australia. Minutes Of Proceedings And Official Record of Debates Of The Australian Constitutional Convention, Sydney, 3-7 September 1973* (Sydney, 1974), p. 196.
Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330.


Huddart Parker & Co. Pty Ltd v. Moorehead (1909) 8 C.L.R. 330.


See e.g. Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (1920) 28 C.L.R. 129.


This limitation was highlighted by the Bank Nationalization Case: Bank of New South Wales v. The Commonwealth (1948) 76 C.L.R. 1. See also: Quick and Garran, p. 607 and Howard, Australian Federal Constitutional Law, pp. 418-419.

See: Huddart Parker Ltd v. The Commonwealth (1931) 44 C.L.R. 492; Dignan v. Australian Steamships Pty Ltd (1931) 45 C.L.R. 188; Victorian Stevedoring and General Contracting Co. Pty Ltd and Meakes v. Dignan (1931) 46 C.L.R. 73. See also: R. v. Wright; Ex parte Waterside Workers' Federation of Australia (1955) 93 C.L.R. 528.


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