Penal Colony

To

Penal Powers

Revised Edition

by Jack Hutson

Printed in Australia by Backyard Press, 54 Greville Street, Prahran, Victoria for the Amalgamated Metals Foundry and Shipwrights' Union 136 Chalmers Street, Surry Hills, N.S.W. 2010

Typeset in Plantin by Courier Typesetters, La Trobe University, Bundoora, Victoria.

Registered in Australia for transmission by post as a book

First published 1966
Fourth edition 1978
Revised edition 1983

ERRATA

Contents, Section 11: delete page number 11, insert 43
Contents, Section 12: delete page number 12, insert 46
page 36, 1st para, 6th line: insert "1887" and "1898"
page 66, 2nd para, 8th line: delete "offices" insert "officers"
page 66, 6th para, 6th line: after "1200" insert "awards and"
page 70, 3rd para, 5th line: delete "registered" insert "registering"
page 70, 5th para, 4th line: after "numbers" insert "of Deputy Presidents"
page 82, 4th para, 4th line: delete "West" insert "Western"
page 97, 1st para, 3rd line: delete "by ruling" insert " The Court ruled"
page 103, 5th para, 1st line: delete "1984" insert "1985"
page 154, 5th para, 4th line: after "and" insert "the": delete "that"
page 225, 6th para, 1st line: delete "As" insert "At"
page 226, 5th para, 4th line: delete "a" insert "the"
page 227, 2nd para, 11th line: after "capitalist" insert "State"
page 234, 3rd para, 2nd line: delete "was": after "prosecuted" insert "an"
page 236, 5th para, 1st line: delete "Chief"
page 244, (d) para, 1st line: delete "nor" insert "no"
page 247, 4th para, 2nd line: delete "life" insert "lift"
page 258, 2nd para, 2nd line: after "the" insert "Permanent and"
page 296, 4th para, delete repeated para
page 297, 3rd para, 3rd line: delete "which"
page 309, 4th para, 1st line: delete "organisation" insert "employer"
page 309, 5th para, 1st line: delete "organisation" insert "a trade union"

DEDICATION

To my fellow members of the Amalgamated Metals Foundry and Shipwrights' Union to assist them to a deeper understanding of the arbitration system, and so enable them better to cope with its complexities.

Also by
JACK HUTSON
Six Wage Concepts.
Inflation – The Silent Robber.

Contents

PART 1 HISTORICAL BACKGROUND

PART II THE SEVEN SYSTEMS FOR FIXING WAGES AND CONDITIONS

PART III WAGE FIXATION

PART IV THE COMMONWEALTH PENAL POWERS AND OTHER REPRESSIVE INDUSTRIAL LEGISLATION

Introduction First Edition

In 1901 the first Commonwealth Government of Australia was given power under paragraph XXXV of Section 51 of its Constitution "to make laws for the peace, order and good government of the Commonwealth with respect to the prevention and settlement of industrial disputes extending beyond the limits of any one State." These few apparently simple words have affected the workers of Australia more personally than the rest of the Constitution put together, for out of them has grown the elaborate system of compulsory industrial arbitration which now sets the national level of wages and working conditions. Having no parallel elsewhere among the industrialised nations of the world, the system is as native to Australia as are the platypus and the kangaroo – and is in its way just as curious.

Almost as curious is that the written comments of the trade unions on a system that plays such a major role in industrial life has been limited over the past sixty years to only a few pamphlets, leaflets and resolutions. This lack of comment is no doubt because of the general aceptance of the arbitration system, the concentration on practical short-term solutions of day-to-day problems, and an indifference to any analysis of their activities. These are all marked characteristics of the trade unions, for as has been said of their close relative, the Australian Labor Party, they "are more instruments of power than instruments of ideas."

It was in fact my own fruitless search for some trade union analysis of the system for the enlightenment of our members that compelled me to painfully make one of my own. It was first published in serial form in the Amalgamated Engineering Union Monthly Journal, and the Commonwealth Council decided to publish it in book form following requests that this be done from members throughout Australia.

It aims to do four things. The first is to show by a brief historical survey just how a compulsory industrial arbitration system actually came into being in Australia. The second is to survey the mechanics of the system to demonstrate how it operates and how best to cope with it. The third is to analyse the fixation of wages by the system and the tactical problems this raises. The fourth is to examine the

penal powers of the system and the tactical problems they raise. If some clarity comes to the reader my aim has been achieved and that will be my reward; if I have failed and confusion results the arbitration system can always be blamed!

It will become apparent that the underlying thesis is that a trade union should not be the docile agent of the capitalist state that the arbitration system is designed to make it, but that it should maintain the maximum independence of industrial action and regard the system as only one of the means of improving the wages and conditions of its members. This has always been the consistent attitude of the A.E.U., and there has never been any secret about it as shown by its recognition by some of the commentators outside the trade union movement who have written books on the arbitration system. All I have done is to spell it out in more detail in order to deepen the already good appreciation the rank and file have of the general attitude of their union. Some critics cry that this is wanting to have the best of both worlds, and even try to make a moral issue out of it. The primary responsibility of a trade union however, must always be to its members and not to an instrument of a capitalist state, moreover a state operating on the dubious moral basis of the exploitation of labour for private profit.

The analysis of various aspects of the arbitration system which has been made in this book shows that by adopting certain correct tactics it is possible for the trade unions to make gains. But the mistake must not be made of thinking that this is all that is required to be understood, for to do so is to fall into the error of asusming that it is only necessary to understand how capitalism works in order to solve the wages problem. It is true that a clear understanding of the arbitration system is necesary in order to make gains, for it is designed to act as a defence in depth of monopoly capitalism against the demands of the trade unions. But the intention of this material is not to just fix the minds of trade unionists solely on how to get the most from the capitalist system; wider issues are involved. If the workers want a permanent solution to the wages problem in their favour they will have to turn their minds to changes in the social system under which they live that can provide a permanent solution.

Some issues have been sharply raised in the hope that a little heat may generate some light by provoking constructive debate around them. On re-reading the text this should not be too difficult as a rocket appears to have been launched at everybody in sight; if anyone has escaped it is more by accident that intent.

Appreciation must be expressed for the invaluable assistance given to me by the officials of the A.E.U., particularly to those in Melbourne with whom I have been most closely associated. This book is an individual effort, so any errors or defects are my responsibility. But many of the ideas contained in it are the product of much effort to get to the heart of a question and so find the way forward for the members and their union.

And finally, a word of caution. This book states the position at the time of writing, but industrial events move on at a fair pace, legislation is amended, and new decisions are made by tribunals, so some statements could therefore be made out of date by subsequent events.

J. HUTSON
Arbitration Office,
Melbourne.
30/10/65.

taken place. The State systems also enable a union to deregister itself. For example, when the New South Wales Branch of the Australian Workers' Union wanted to substantially change its constitution it deregistered itself, and after making the change it applied for and obtained reregistration. If a State registered union was deregistered it had the option of moving to federal coverage, but in March 1982 the Fraser Government took steps to block that avenue of escape. A Bill was introduced containing several proposed amendments to the Arbitration Act. One of them required the Registrar to refuse to consent to alteration of the rules of an organisation to enable it to include in its membership persons who were members of a State registered organisation. The Bill was held up in the Senate and made redundant by the election of the Labor Government.

But in any case there could be no way of preventing members of a State registered union from resigning from it and then joining the federally registered one.

38. The Fall Of The "Old" Penal Powers

THE fall of the "old" penal powers was brought about by the combined effect of two overlapping developments which took place over 1968 and 1969. Such a dramatic chapter in the history of the penal powers and the trade union movement clearly calls for an examination because of what that can reveal about the operation of the penal powers and the tactics used by the trade unions to make them inoperative. The following limited survey has therefore been made to facilitate understanding of what was a complicated series of events, pending the writing of a full account of them by someone.

The first development which contributed to the fall of the penal powers occurred in 1968. It had its origin in the decision of the Arbitration Commission on 11 December 1967 to grant work value increases in the Metal Trades Award. The decision encouraged the employers to absorb the increases granted into existing over-award payments. The two major metal employer organisations advised their members to do that, but when they began to do so in January 1968 there was an immediate spate of protest stoppages demanding non-absorption. The intensity of the struggle was reflected in the official strike statistics, for they gave the time

lost in the quarter ending March 1968 as nearly four times that of the same quarter in 1967.

The employers response to the stoppages was the wholesale use of the penal powers. As one press commentator said, "the orders flew about like confetti at a wedding." The peak was reached on 21 February 1968 when the Industrial Court dealt with 107 summonses against six metal unions, imposed fines totalling $17,050 on five unions plus legal costs, and found six unions guilty on 40 charges with legal costs only. Over the whole period 405 fines totalling $98,000 were imposed while legal costs were $87,000, making the total bill $185,000. And that was when the dollar was worth a good bit more than it is now. The amount of fines was in fact more than the total that had been imposed in the previous ten years.

The struggle rapidly escalated. On 6 February the metal unions held a 24-hour national protest stoppage of their members. On 8 February the metal employers obtained from the Industrial Court a blanket restraining order for twelve months covering some 2,750 metal factories in New South Wales. On 8 February the ACTU took over control of the dispute and a meeting of the Disputes Committee recommended to the ACTU Executive that a national 24-hour protest stoppage be held of all unions affiliated to the ACTU unless the dispute was settled within a week. The President of the Commission then moved in and was able to prevent the imminent confrontation with a further decision to grant the increases in two instalments without any absorption, which was accepted by the parties.

The struggle prompted two metal unions to make historic decisions about the fines that had been imposed on them. One decision was made by the Federal Council of the Boilermakers and Blacksmiths' Society held over 14 to 18 May 1968. It carried a long resolution on the penal powers which included the important clause,

> "That the outstanding fines for 1968 and all future fines will not be voluntarily paid by our Society. Federal Council further recommends that in the event of the fines being arbitrarily extracted from the Society's finances, Federal Council immediately decide what action be taken by the members of this Society as a protest against this action."

A week later a similar decision was made by the Commonwealth Conference of the Amalgamated Engineering Union held over 19-23 May 1968. It carried a long resolution on the penal powers which included the important clause that:

> "In the light of our own members' clearly expressed determination to fight the penal powers, this Conference determines that no further or outstanding fines will be paid by the AEU and any move to forcibly collect any fines will be met with industrial action by our membership."

On 22 May a special meeting of the ACTU Executive carried a

resolution which advised all affiliated unions not to pay any outstanding fines pending the outcome of negotiations with the Government for the repeal of the penal powers; determined that should any action be taken in respect of already imposed penalties or against any union official the Executive would be called together immediately to determine what action should be taken on a national or State basis to protect them; and declared that the Commonwealth Government must recognise that it could not pursue its adherence to the penal provisions in the face of the determined attitude of the trade union movement. In July, ACSPA also advised its affiliates not to pay any fines.

The second, and decisive, development which contributed to the fall of the "old" penal powers occurred in May 1969. It had its origin in a long period of industrial disputes involving the Victorian Branch of the Australian Tramway and Motor Omnibus Employees' Association, (Tramway Union for short), and the Melbourne and Metropolitan Tramways Board. It used the bans clause that had been in the award since 1958 to take proceedings in the Industrial Court against the Tramway Union. Over five years the result was 40 fines totalling $13,200 imposed on the Union for contempt of restraining orders of the Court. The total legal costs awarded against the Union were also substantial.

On 19 January 1966 Commissioner Horan deleted the bans clause from the award on the application of the union because he considered that it was a hindrance rather than a help in settling the dispute. The Tramways Board appealed against the deletion, but it was rejected without the Union being asked to put its case.

However, the deletion did not save the union from incurring a retrospective penalty. On 21 February 1966 the Industrial Court dealt with five charges of contempt for five days of a stoppage of work that had occurred prior to the deletion of the bans clause. The Court ruled that the union was in contempt on those days, but it would only order the Union to pay the legal costs of the Board.

The first dispute occurred in 1964 in relation to work rosters at a Melbourne tram depot, which incurred three fines totalling $3,000. The second dispute occurred in 1965 in relation to the proposed introduction of one-man buses on a route in Melbourne, which incurred 23 fines totalling $7,800 making a combined total of $10,800.

After persistent pressing from the Industrial Registrar for payment of the fines, the union began paying them off at the rate of $100 a month. In September 1967 the Registrar demanded the immediate payment of $3,000. The Tramway Union replied that it could not pay that amount but was prepared to increase payment to $200 a month, and enclosed the eighteenth instalment of $100, which left $9,000 outstanding. There was no reply by the Registrar to the union's offer of the increased payment.

The difficulty in getting payment from the reluctant Tramway Union made the Registrar consider collecting it. But it turned out that he did not have the power to do that for the Regulations only gave him the power to recover fines by sueing a union for them and not to collect them directly. That defect was remedied in March 1967 by the provision of new Regulations 105A and 105B. Regulation 105A enabled the Registrar to obtain an order from the Industrial Court for the attendance of a debtor to appear before the Court for examination, and to produce such books and documents as were specified to see if there was the means to satisfy the debt. Section 105B enabled the Registrar to obtain an order to garnishee the funds of an organisation for the recovery of money due.

These Regulations were invoked by the Registrar on 12 October 1967 when a writ was served on Clarence Lyell O'Shea, (popularly known as Clarrie O'Shea), the Secretary of the Victorian Branch of the Tramway Union, requiring payment of the outstanding fines. When no payment was made, a bailiff was sent to the office of the Victorian Branch to take an inventory of the property of the union. He was greatly embarrassed by the presence of TV crews who had been tipped off about his visit, so he hurriedly withdrew. A search was also made for the union car which O'Shea used, but without success for it had mysteriously disappeared.

On 27 October 1967 garnishee orders were presented to the Commonwealth Bank for the withdrawal of the money that the union had on deposit there. That totalled $3,741, so $441 of that was used to defray costs and $3,300 used to pay off some of the outstanding fines. That left the total still owing at $5,700. After that the union decided not to pay any more money to the Registrar and to stop appearing in the Industrial Court when summonsed there.

In November 1967 the Victorian Branch became involved in a third industrial dispute over a member who had driven a tram during a 24-hour stoppage held in protest against proposed increases in fares and cuts in services. On 16 December 1967 four of the members who had refused to work with that member after the stoppage, and had been suspended, were summoned by the Tramways Board to appear before the Industrial Court for a restraining order to be made against them. However, the Court decided not to proceed against them on the grounds that they had already been sufficiently penalised.

On 19 December the Tramway Union had a restraining order made against it on the application of the Tramways Board. On 30 December the Industrial Court imposed three fines totalling $200 on the union in its absence for contempt of the Court's order. That brought the amount of outstanding fines to $5,900. On 7 January 1968 the Court imposed eleven more fines totalling $2,200 on the union in its absence for contempt of the Court's order. That brought the total of outstanding fines to $8,100.

Apart from the harassment of the union, Clarrie O'Shea was subject to personal harassment since late 1968 by being put under the surveillance of the Commonwealth police.

The Tramway Union also had incurred further legal costs of $5,076

from two lost High Court cases in relation to the one-man bus operation dispute. Those costs were paid under protest when a Sheriff entered the Sydney office with a court order to take possession of it until the costs were paid.(There were also two other High Court cases involving only the Tramways Board).

What made that hurt more was that the costs had been incurred by defending two decisions of Commissioner Horan which supported the position of the Tramway Union, but were successfully challenged in the High Court by the Tramways Board. As it had, in effect, been defending the Arbitration Commission, the Union applied to the Attorney-General and the Minister for Labour and National Service for reimbursement of the legal costs, but without success.

On 31 January 1969 the Tramway Union was summonsed before the Industrial Court on nine charges of contempt of a restraining order, but it did not appear. The Court said that the union would continue to flout it so long as no steps were taken to enforce its orders. It said that if the Tramways Board wanted the Court to impose any further penalties the Board should investigate what powers it had to collect the fines, and if it had none it should seek the assistance of the Registrar. The Court concluded by finding the union guilty of the nine contempts, but reserved the matter of penalty for future determination.

The Tramways Board found that it had no authority to collect the fines, so any further action was up to the Registrar. On 18 February 1969 he obtained a summons from the Industrial Court for O'Shea to attend the Court on 20 March 1969 for oral examination and to produce the financial records of the Victorian Branch, but he did not attend.

On 6 March 1969 the Australian Council of the Tramway Union met in Hobart and made the crucial decision to resist the collection of fines in a unanimous resolution in which it was said:

> "Council gives notice in the event that the Court seeks to collect such fines and costs from other branches or proceeds against the person of the Victorian Branch Secretary or any other officer of the union, immediate stop work action will take place in all States to determine on further industrial action against the application of the Penal Clauses to our Union. Such action to be mandatory on all Branches."

When O'Shea did not answer the summons of 20 March the Registrar obtained its extension to 10 April. When O'Shea did not answer that one, the Registrar obtained a summons for O'Shea to attend on 30 April to answer a charge of contempt of the Industrial Court for not answering the summons of 10 April. When he did not attend, the Court imposed the maximum fine of $500 on him in his absence for contempt, and a summons was issued for him to attend at 10.30 a.m. on Thursday 15 May 1969. The Registrar also obtained a writ for bailiffs to seize O'Shea's goods and chattels for the recovery of the fine. However, in view of subsequent developments the writ was never executed.

Meanwhile O'Shea had taken the precaution of withdrawing the money held by the Victorian Branch of the Union in the Commonwealth Bank and cashing some Commonwealth bonds that it held, and placing the monies in another bank under another name. That was to evade any garnishee orders that might be used as they had been in 1967.

Clarrie O'Shea and his supporters then decided that the time was ripe for him to respond to the summons to appear in the Industrial Court on 15 May. It was assessed that the general feeling against the penal powers had grown to the extent that it could give him effective support against any penalty that might be imposed on him.

The 27 unions that had withdrawn from the Victorian Trades Hall Council called a rally of their Shop Stewards and Job Delegates to be held on the same day at 8.30 am at the Festival Hall, and those of other unions were invited to attend. Some 5,000 attended and were addressed by Clarrie O'Shea and other speakers. A resolution was carried which expressed support for the Tramway Union and determined that a 24-hour stoppage be held if punitive action was taken against any official, union funds or property. A proposal to march to the building in the city in which the Industrial Court sat was greeted with cheers.

Clarrie O'Shea headed the march for part of the way, and then left it to appear in the Court shortly after 10.30 a.m. A single judge was on the Bench in the person of Judge Kerr. (He later achieved further notoriety as the Governor-General of Australia who sacked the Whitlam Labor Government in 1975).

In the witness box O'Shea said that he did not want an adjournment or legal representation, and challenged the authority of the Court to deal with his case. He refused to take an oath or affirmation because he then would have had to answer questions about the union funds truthfully, and he said he had not come to tell lies. He refused to answer questions about the finances of his union or to produce its books when ordered to do so by Judge Kerr. In brief, O'Shea said that his members felt that their union had been unjustly fined, that they were protecting their funds and the rights of working people from the viciousness of the penal provisions, and he was acting under the direction of his members.

In brief, Judge Kerr said that if O'Shea chose to defy the Court in order to make some protest about what the law was, he must take the consequences. Judge Kerr said that he could not allow a debate about whether the law was just or not, for while the law remained in its present form the Court had a duty to see that it was carried out. He finally asked O'Shea if he was defying the Court, and O'Shea replied that was the position. Whereupon Judge Kerr found him guilty of contempt of the Court, and committed him to prison to be detained there until he provided proper answers to the satisfaction of the Court, or until the Court ordered otherwise. The 63-year-old Clarrie O'Shea was then taken to Pentridge

jail in police custody. There he was put in the prison hospital because the prison doctor in the usual medical examination found that O'Shea had a heart condition.

During the hearing a lively demonstration was held in the street before the building in which the Court was sitting.

On the same day the ACTU Executive met and carried a strongly worded resolution which condemned the jailing of O'Shea; instructed the ACTU officers to immediately initiate negotiations with the Government for his release and the remission of fines and costs on the Tramway Union; and if this was not successful for an emergency meeting of the Executive to be convened to determine the steps to be taken to implement ACTU policy. Resolutions of protest against the jailing of O'Shea were carried by many unions, and by the white-collar peak councils of ACSPA and HCCPSO.

The jailing of O'Shea triggered off a great outburst of protest. The Trades and Labor Councils of Western Australia, South Australia, Queensland, Newcastle, South Coast NSW, and Canberra called 24-hour stoppages of their affiliated unions, and many workplaces held spontaneous stoppages in areas where there was no official authorisation. Overall it was estimated that about one million workers stopped for varying periods over the issue.

The Melbourne Trades Hall Council carried a resolution at its meeting in the evening of the 15 May when Clarrie O'Shea had been jailed, but it only called for the abolition of the penal clauses and then advised unionists that they were not obliged to take part in unauthorised stoppages. The New South Wales Trades and Labor Council carried a resolution on the same evening which only decided to wait on what the ACTU decided to do.

Those resolutions proved to be King Canute affairs because the wave of protest flooded over them. In Victoria there were two 24-hour stoppages which were supported by many more than the 27 unions which called for it to be held. The first one held on 16 May stopped all trains and trams, prevented delivery of most supplies of meat and milk, severely restricted power supply, limited TV and radio transmissions and caused many employers to stand down their employees because of the disruption of power and transport. The second 24-hour stoppage held on 20 May was even more severe in its effect. There was also considerable disruption in the other States.

On 16 May a mass meeting was held at Olympic Park in Melbourne. Afterwards there was a march for another demonstration outside the building which housed the Industrial Court, during which there were scuffles with the police who blocked the street.

On 18 May, the President and two officers of the ACTU met with the Minister for Labour, Mr. Bury, and the Attorney-General, Mr. Bowen. They asked for the release of O'Shea, remission of fines imposed on the Tramway Union, and an examination of the high costs of the penal clauses

which threatened to cripple and destroy trade unions. The Minister said that the only acceptable terms of settlement for them would be for the Tramway Union to pay off the outstanding fines by instalments, and for O'Shea to pay his $500 fine within 14 days of his release. The Government would then be prepared to consider specific issues in relation to the penal powers on a tripartite basis.

On 19 May, the ACTU Executive met with the federal officials of the Tramway Union, who rejected the Government's terms of settlement and refused to put the matter in the hands of the ACTU when asked to do so. On the same day the two Ministers reported to the Cabinet on their discussions with the ACTU Executive. Cabinet decided that O'Shea's contempt would have to be purged before any talks on easing the penal powers could commence, and expressed its determination to fight the threat of continuing strikes.

The growing confrontation between the Government and the trade unions over the penal powers was ended by the intervention of a Mr. Dudley MacDougall on 20 May, acting as what is called a "public benefactor", he handed in two cheques at the Sydney Registry, one in payment of the fine of $500 that had been imposed on O'Shea and the other in payment of the outstanding fines of $8,100 owed by the Tramway Union.

It turned out that he had been an advertising manager of the Australian Financial Review, had never been a member of a union, was retired, and had won a half share of a $200,000 Sydney Opera House lottery. He insisted that paying the fines was his own idea, and that he had done it to help the general public and the country. There were rumours that ASIO was behind the payment because of fears that O'Shea might possibly die in prison if kept there for any length of time in view of his heart condition, in which case the fury of the trade union movement would have been raised to an even higher pitch. However, at the time of writing the rumour had not been substantiated in any way.

On 21 May there was a hearing arising from an application by then Commonwealth Government to have the O'Shea matter listed again. At it the counsel for the Government said that he had been instructed to apply for the discharge of the order of the 6 May requiring Mr. O'Shea to attend the Court to be examined and to produce documents. Judge Kerr announced that O'Shea was no longer in contempt of the Court, discharged the order, and ordered his immediate release.

Clarrie O' Shea was released from Pentridge Jail at 11.30 a.m. to the jubilation of the trade union movement. His resolute stand on trade union principle gave him a well deserved place in the history of the struggles of that movement. At a press conference held after his release Clarrie O'Shea said he was pleased to be out of Pentridge, but was not happy about the way the fines had been paid as that should have been fought out. He knew nothing of MacDougall and believed that the workers would have forced his release even if MacDougall had not intervened. Neither the union nor

he had paid one penny of the fines and he believed other unions would follow.

On 21 May the Labor Party Opposition in the Federal Parliament unsuccessfully moved an urgency motion in both Houses on the refusal of the Government to repeal Sections 109 and 111 of the Arbitration Act. (They were the main medium for imposing fines on trade unions for taking industrial action).

On 22 May 1969 a meeting of the full ACTU Executive was convened to deal with a special report on the penal provisions. A long resolution was carried the crucial part of which was a call on all its affiliated unions not to pay outstanding fines, pending discussions aimed at the repeal of the penal provisions.

At the 1969 ACTU Congress the President, Bob Hawke, said in his opening address that the penal powers were finished. A long resolution was carried later on which demanded the repeal of the penal clauses; instructed the Executive to continue negotiations with the Government to that end; advised affiliated unions not to pay any fines imposed pending the outcome of the negotiations; and determined that should any action in respect of fines be taken against any union or official the Executive would be called together immediately to determine the appropriate action to be taken on a national or State basis.

Bob Hawke proved to be right, because the employers soon abandoned their use of the penal powers. They realised that there was no point in having fines imposed on trade unions by the Industrial Court if the unions were not going to pay them, and if pressing for payment meant an expensive confrontation of the O'Shea kind that was too close to class conflict for comfort.

Consequently, after the burst of fines during the absorption battle there were only three occasions shortly afterwards when employers had fines imposed on unions by the Industrial Court, but none of them were paid anyway. That was the last flicker of the "old" penal powers, for up to the time of writing in 1983 no union had been proceeded against for restraining orders or fines.

No action was taken by the Commonwealth Government for the collection of the outstanding fines until 25 March 1971 when the Prime Minister, Mr. McMahon, issued an ultimatum to an ACTU delegation sent to discuss the penal powers with the Government. It was that a deadline of four weeks to end on 30 April had been set by the Government for the payment of the total fines of $48,150, owed by a number of unions, and if they were not paid before the deadline they would be collected. However, it turned out later that the $48,150 could be divided into two groups because of a change that had been made in the operation of the penal powers in 1970. Consequently there was a group of fines of $37,950 that had been imposed prior to the change, and a group of $10,200 that had been imposed after the change.

It was clear from the ultimatum that the Government intended to make the collection of the fines a trial of strength with the trade unions. This reflected the attitude of Prime Minister McMahon, who had a well-earned reputation as a vicious union basher. But on 20 April 1971 an anonymous public benefactor again came to the rescue by handing in $6,000 in bank cheques at the Melbourne Registry to cover some of the fines owed by the seven unions concerned. The Government, the employers, the ACTU, and the seven unions all strongly denied having paid the fines. At the time of writing the identity of the benefactor was still unknown.

The Government put the best face it could on the payment, claiming that it was a victory for the Government because it did not matter who paid the fines as the fact they had been paid upheld the law. It said it would give consideration to whether to proceed with the collection of the $37,950 group of fines, and would hold its hand on the collection of the outstanding $4,200 of the $10,200 group in view of the union challenge to their validity in the High Court. (It eventually ruled in a judgment given in October 1971 that the fines had been validly imposed).

The Government made no further attempt to collect any fines until 7 December 1971, when it announced that it would be demanding payment of the outstanding balance of $4,200 of the $10,200 group of fines. With regard to the $37,950 group of fines, the Government said that it expected the unions concerned to honour their obligation to pay. This meant in effect that it had abandoned any intention of collecting the $37,950.

On 9 December letters were sent to the seven unions concerned demanding payment of the $4,200, but again the impending confrontation was averted by a public benefactor. This time it was the Reverend John Westerman, who handed in a bank cheque for $4,200 at the Melbourne Registry on behalf of a business organisation which he said preferred to remain anonymous. At the time of writing it still was.

After this no further attempts were made by any Government to collect fines nor did any union pay any further outstanding fines, except for three because unusual circumstances compelled them to pay. Two of the unions were the Boilermakers and Blacksmiths' Society and the Sheet Metal Workers' Union. They were in the final stages of achieving their amalgamation with the Amalgamated Engineering Union, but in December 1971 the Registrar notified the B and BS and the SMWU that they had to pay their outstanding fines before he would deregister them, which was the final stage in the amalgamation. But the real crunch was that the two unions were also told that they had only a limited period of grace to pay the fines, and if they failed to pay within the period the deregistration proceedings would be declared null and void. That meant that if that happened the proceedings would have to start all over again.

That presented the three unions involved in the amalgamation with an awkward dilemma. On the one hand, their amalgamation was on the

point of being consummated after over two years of hard work, while on the other hand ACTU policy was opposed to the payment of any fines. It was a bitter pill to swallow, but the Federal Councils of the three unions each met and voted for the payment of the fines. The ACTU was consulted, and the President, Bob Hawke, wrote that the dilemma of the unions was understood but while the payment of fines was contrary to ACTU policy another policy was for the amalgamation of trade unions. The B and BS paid the $17,000 it owed, the SMWU paid the $250 it owed, and the amalgamation was certified in January 1972.

The $4,950 owed by the AEU was not paid at the time because it did not have to be deregistered like the others for it was the basis of the new union. But eventually the amount had to be paid when the Registrar demanded the payment of all outstanding fines if he was to certify the proposed amalgamation of the AMWSU with the Moulders' Union. So the money was paid, and the amalgamation was certified in January 1983. The payment of outstanding fines was not raised in relation to the previous amalgamation of the AMWU with the Shipwrights' Union in 1976.

In August 1969 meetings began between representatives of the Government, the ACTU, and the National Employers' Policy Committee which went over 1971 and 1972. The penal powers were a prominent feature of the meetings, but nothing came from the meetings in relation to them except for a provision in a major review of the Arbitration Act made in 1972 to make the penal powers more acceptable to the unions. When introducing the Bill, the Minister, Mr. Lynch, said that no fines were owed under changes made in the Act in June 1970. As he said nothing about the group of fines owing prior to that date, in effect that meant that the Government had written them off. Speaking in the debate on the Bill, Prime Minister McMahon said that:

> "We are determined to ensure that if fines are imposed under the so-called penal clauses of the Act those fines will be collected. That is a firm statement of intention by the Government."

However, McMahon did not have to try to implement those brave words because he was defeated in the federal election in December 1972, when the Whitlam Labor Government was elected.

Making the "old" penal powers inoperative was a great victory for the trade union movement, and demonstrated the power of the united working class when aroused. It is therefore worthwhile looking at the factors which made for that success in order to see what lessons can be learned from that experience.

The main factor was the determination of a coalition of left forces in the trade union movement that the penal powers had to go because to be free to withdraw one's labour when the terms offered for it were unacceptable was regarded as a hard won basic right that had to be fought for, because without it the trade unions would indeed be tame cats. There appeared to be little chance for some years of getting the penal powers

repealed from the Arbitration Act as that depended on the long shot of having a Labor Government in power with control of both Houses of Parliament. Consequently, it was appreciated that making the penal powers inoperative was going to be a long haul, for the struggle would in essence be one against the power of the capitalist state. Obviously there could no short cuts, so considerable determination and patience would be required to generate the mass movement that would be needed for an effective struggle. As it turned out the struggle was a long one because it took about twelve years for it to be successful.

Another factor making for success was the effectiveness of the strategy that was developed and executed by the left forces. Clarrie O'Shea also worked closely with Laurie Carmichael, then Secretary of the Melbourne District of the AEU, despite their political differences. Carmichael "happened" to be in Hobart on official AEU business when the Federal Council of the Tramway Union was meeting and made its crucial decision to make a stand on the payment of the fines that had been imposed on it.

Another factor making for success was the official policy of the ACTU, for it repeatedly condemned the penal powers although with the main stress on their repeal rather than the taking of effective action against them. For example, a resolution was put at a Federal Unions' Conference held in 1964 for a national protest stoppage to be held on the penal powers, but it was defeated. However, the ACTU policy did have a unifying effect because it laid down in principle opposition to the penal powers. That neutralised most of the right wing and moderates who were opposed to any industrial action being taken for they did not want to be seen as supporting the penal powers. Consequently ACTU policy provided a good umbrella for those unions that were prepared to take action against the penal powers.

In any case, opposition to the penal powers could cut across the usual orientation of unions. For example, according to Clarrie O'Shea, the General Secretary of the Federated Ironworkers' Association, Laurie Short, assured him personally of support. Yet Clarrie was regarded as left wing and Laurie as right wing.

There were however, some elements who were prepared to come out openly against any industrial struggle against the penal powers, and advocate that the trade unions should wait for the return of a Labor Government to have them repealed. For example, the ACTU President, Albert Monk, addressed the Labor Day dinner in Melbourne on 10 March 1969 just before the O'Shea storm broke. He warned against the use of direct action against the penal clauses. He said that he was opposed to them as much as anybody else, that direct action would not remove them, and what had been placed on the statute book by legislation could only be removed by legislation.

There were also elements in the trade union movement who either openly supported the penal powers or had an equivocal attitude towards

them. The support of the penal powers was typified by the statement made by the Secretary of the NSW Branch of the Australian Workers Union, Charlie Oliver, at its 1962 Convention that:

> "We know the benefits that have come to this union from the arbitration system. We could not do without it. Take away the penal clauses and you destroy the system."

That the equivocal attitude was no secret was shown by the following comment in an article in the 1962 *Current Affairs Bulletin* on the arbitration system that:

> "There must be many occasions on which trade union officials use as a tactic the threat of court penalties in order to counter the more extreme demands of the highly vocal militant section . . . Moreover, the retention of punitive clauses in the industrial legislation of New South Wales, where a Labor Government has been in power for over twenty-five years, suggests that the sanction of penal fines against award violations is not without trade union support."

And in an article in *The Financial Review* of 11 June 1964 it was said that:

> "ACTU policy restated a number of times over recent years is for the repeal of all penal clauses. While this is the official view, a number of union leaders in all States, particularly in New South Wales, recognise that sanctions are a vital and inseparable part of the arbitration process. . . . Overall, it would be said that moderate union trade union leaders are not enthusiastic, and in some cases, are directly opposed to the repeal of the penal clauses."

Another factor making for success was the illusion of the employers that it was possible to legislate for industrial peace, and seeing industrial relations in the crude terms of crime and punishment. Consequently, they failed to realise that the penal powers were two-edged. One edge could be used by the employers against the trade unions with the aim of making it so expensive for them to take industrial action that they would be discouraged from doing so. But the employers did not realise that the other edge could be turned against them if the trade unions could make the use of the penal powers too expensive for the employers by generating a big enough mass movement in opposition to them. Moreover, the increased use of the penal powers forced those prepared to struggle against them to improve their tactics and leadership, and consolidated the general unity of the trade union movement against the penal powers.

Another factor making for success was that the employers failed to appreciate the mounting frustration and anger among the left forces over the use of the penal powers. The employers only saw union officials in the calm judicial atmosphere of the Industrial Court, which put a restraint on the expression of their true feelings. The employers did not see them fuming in their offices demanding that something be done about the penal powers.

There were a number of aspects of the operation of the penal powers that made them angry. One was the way the legal dice was loaded against the unions, insofar as disputes that were outside the jurisdiction of the Arbitration Commission because they were not interstate could be the basis for proceedings by employers in the Industrial Court. Another aspect was the equation of industrial action with criminal action in a case involving contempt of an order of the Court prohibiting industrial action. In such cases a union was asked if they pleaded guilty or not guilty as if it was some petty thief. Some judges also had the trying habit of lecturing unions as though they were naughty schoolboys, which was hardly calculated to improve the tempers of the unions subjected to it.

The writing of this book was partly prompted by the obvious need for some effective ideological material for the campaign against the penal powers. It was also partly prompted by my infuriating and frustrating experience when appearing on numerous occasions for the Amalgamated Engineering Union in Industrial Court proceedings, something that I soon came to heartily detest. I can well recall an incident in a case in 1963 when I complained about the one-sided operation of the penal powers. Judge Eggleston commented quietly from the Bench that that was a matter which should be taken up elsewhere. My mental comment to that was "Too right!", but the judge and I were not on the same tram. What he obviously had in mind was that the unions should get the Arbitration Act changed. Whereas what I had in mind was that the matter would have to be taken up by intensifying the campaign against the penal powers in the workshops because changing the Act was a remote possibility.

Another aspect the unions found objectionable was the basic assumption that it was they who were always at fault in an industrial dispute, which made them culpable for any incompetent or provocative handling of industrial disputes by an employer or his staff.

The official statistics for industrial disputes list managerial policy as the major cause out of the six divisions in which they are listed, and show that over a period it accounts for around 45% of all industrial disputes. That does not meant that management is solely responsible for all the disputes attributed to managerial policy, but the wide range of matters given as covered by that shows that it is a very sensitive area of industrial relations where inept handling could readily cause industrial disputes. And the chance of that occurring is increased by the poor training of management in even basic industrial relations.

Yet when it came to proceedings against a union in the Industrial Court, the culpability of others than the union for the industrial dispute involved could not be a matter for consideration by the Court. That was because the Arbitration Act required the Court only to decide on the narrow issue of whether the union was associated with any ban, limitation or restriction on the performance of work by its members.

The moderates in the trade union movement were aware of the growing feeling against the penal powers so they pleaded with the employers not to make capricious or too hasty a use of them, that is, not to overdo it. The employers protested that they exercised restraint in their use, pointing out the small proportion of industrial disputes that were taken to the Industrial Court.

The National Civic Council took the view at the time, as it does now, that strikes were part of a "red plot" to destroy the arbitration system, and if only Communist union officials could be removed from office there would be a big reduction in strikes. However, it is unlikely that many employers would be naive enough to believe that if the "reds" were removed strikes would be removed with them. In the period before 1969 when the penal powers were made inoperative the NCC castigated employers for not being selective in using the penal powers. It considered that it was both foolish and unjust to take such unions as the Ironworkers into the Industrial Court which did their best to keep industrial peace, and have them suffer fines and legal costs. According to the NCC the Communist-controlled unions were the cause of all the trouble, so only they should be brought into the Industrial Court to be disciplined.

Although it was the mass movement against the penal powers that was decisive, the trade unions were lucky in the occurrence of some chance happenings that assisted to generate that movement.

One chance happening was the withdrawal of 27 unions from the Victorian Trades Hall Council from 1967 to 1973 because of dissatisfaction with certain aspects of its administration. They formed a Trades Hall Council Administrative and Financial Committee to co-ordinate their activities, and because they refused to pay their affiliation fees the THC suspended them attending its meetings. But that gave the 27 unions a freedom of action that they would not have had if they had been under the restraint of decisions made by a majority of the right-wing dominated THC.

For example, when the O'Shea affair reached a climax the 27 unions were free to organise their own protest actions and to draw in other unions that were prepared to join them. The 27 unions together covered nearly 60% of the total trade union membership in Victoria. That provided a substantial basis for effective mass action, much more so than the small membership of the Tramway Union.

Other chance happenings were two blunders by the employers. One was the attempt by the metal employers in January 1968 to absorb the work value increases granted in the Metal Trades Award. When the metal unions strongly resisted the attempt it was expected that employers would make some use of the penal powers, but who could have foreseen that they would go mad and make such a wholesale use of them that the trade union movement would be brought to a decision not to pay any more fines?

The other blunder was the hounding of the Tramway Union and O'Shea by the Melbourne Tramway's Board, although there can be no doubt that that was done according to instructions from the Victorian Government. At the time the Prime Minister was Mr. Henry Bolte and he had a well-earned reputation as an extreme hard-liner with regard to trade unions. But the hounding proved to be counter productive because it eventually drove the Tramway Union to decide not to pay the fines that had been imposed on it. That was a good example to others and gained support. But who could have foreseen that they would go mad and make a martyr of Clarrie O'Shea, and so slam the door shut on the penal powers?

It could be said that the employers did the trade unions a favour by belting them with the penal powers to the extent that it eventually sank in that the simple and immediate way to end the penal powers was just not to pay any more fines.

The Arbitration Commission also helped to dig the grave of the penal powers by encouraging the employers in the majority Metal Trades Award decision to absorb the work value increases. The minority decision of Deputy President Moore would not have led to that, for he was in favour of granting a smaller amount without any absorption. There is no doubt that his increase would have been accepted by the employers, although with the usual whingeing, and the decision would have then passed quietly into history.

An interesting sidelight on this was given in an interview with President Sir John Moore in the "Bulletin" of 6 June 1978. In that he mentioned that in 1975 he found himself by chance sitting next to Laurie Carmichael, Assistant Secretary of the AMWSU, on a plane trip. He said to Sir John that if the decision of the latter in 1968 had been adopted it would have taken three years longer to get rid of the penal powers.

Another chance happening was that the timing of the absorption struggle and the jailing of O'Shea could not have been much better programmed if the trade unions had done it themselves. Because of its intensity the absorption struggle raised general trade union consciousness about the penal powers. That raised consciousness was then maintained by the working out over a period of the decisions not to pay any fines. Then before that raised consciousness had time to fade the jailing of O'Shea came as the catalyst to release such a powerful protest from the trade union movement that the "old" penal powers were finished.

Looking back, the surprising thing was the slowness of the trade union movement, particularly the left forces, in realising that the most simple and effective way to end the penal powers was not to pay any fines. As it was unions docilely paid the fines imposed on them, with no more resistance than sometimes delaying payment until after some prodding by

the Registrar. Yet, as became apparent in 1967, although he had the power to sue he had not had the power to actually collect fines for twenty years. The matter of not paying fines was never raised at ACTU Congresses until 1969 after the jailing of O'Shea, with the policy prior to that being to solve the problem of the penal powers by obtaining their repeal from the Arbitration Act.

The author was no wiser than anyone else. In the first edition of this book written in 1965 various tactics for dealing with the penal powers were examined in detail, but I did not see the obvious one of refusing to pay the fines although it was staring me in the face. It was not until 1968 that the obvious became obvious.

The blindness of the trade union movement was demonstrated when in 1956 the Boilermakers' Society successfully challenged in the High Court the exercise of both arbitral and judicial powers by the Arbitration Court. The matter went on appeal to the Privy Council which upheld the decision of the High Court that the Arbitration Court could not exercise both powers. In its decision the Privy Council made the caustic comment that:

> "It would be a mockery of the Constitution to establish a body of persons for the exercise of non-judicial functions, to call that body a court and upon that invest in it judicial power - - - It is asked, and no one can doubt that it is a formidable question, why for one quarter of a century, no litigant attacked the validity of this obviously illegitimate union".

Yet that "illegitimate union" had been docilely accepted up to then by the trade union movement, including the left forces, and was never questioned.

When the penal powers were made inoperative there were gloomy prophecies by some that it meant the end of the authority of the Arbitration Commission. As it turned out it meant no such thing for the Commission took the end of the penal powers in its stride and continued to do business as usual. It developed a more relaxed style of work which relied less on technicalities and enforcement and more on the ability of members of the Commission to use their initiative to steer the parties to an industrial dispute to its settlement. The character of the new style was summed up in the comment in the decision on the 1970 Oil Industry Case that:

> " - - - if conciliation fails, any subsequent arbitration would be more realistic if the arbitrators are able to put themselves in the position of negotiators and to regard the arbitration as prolongation or extension of the negotiations."

That the Commission was not too concerned about the loss of enforcement of its awards was shown by the comment of the President, Sir Richard Kirby, in his report to Parliament for the year ending August 1971 that:

> "The present is a time when it is not unnatural to find more strikes than previously - - - in the long term a reduction in strikes can only be brought about any an improvement in industrial relationships. And this is far more likely to arise from changed attitudes of the organised employeers on the one hand and organised trade union movement on the other hand than from any changes in Acts of Parliament."

He later said at a press conference on 22 May 1973 just after his retirement,

> "Penal clauses? I don't think they matter a tinker's cuss. I suppose I shouldn't have answered the question because it could offend both sides, but I honestly think they do not matter . . . The Commission will survive their removal for they are more a matter of political ideology rather than practicability."

It could therefore be said that the employers even did the Commission a favour by spurring the trade unions to make the penal powers inoperative. For by doing that a contentious element was removed from the area of the Commission's work and encouraged it to adopt a more informal style of work. Consequently the system was made more acceptable to the unions and so increased its hold on them.

Members of the Commission were also still able to apply pressures which were available to it within its own jurisdiction to persuade a union to abandon industrial action being taken by all or some of its members. For example, a member of the Commission could refuse to proceed with a hearing until industrial action being taken had ceased. A Deputy President refused to sign the order which made effective a 36¾ hour week for postal workers until bans imposed by the Postal Union on private contractors had been lifted. A Commissioner refused to grant a national wage case increase to the Builders Labourers unless it stopped an industrial campaign in support of a log of claims and put that into the Commission. There are a number of other examples of these kinds of pressure.

A more ingenious pressure was introduced by the Commission when it adopted wage indexation in April 1975. A condition of its continuation was the substantial compliance of the trade unions with the restraint imposed by the principles which had to be complied with. That, in effect, meant the acceptance by the trade unions of a substitute for the penal powers by the acceptance of a self-imposed restraint on industrial action. In its national wage case decision of July 1980 the Commission imposed what was, in effect, a collective fine on all trade unions for industrial

dislocation caused by disputes by discounting of the CPI increase for it. The Commission also threatened to impose other fines by excluding industries or establishmnents from future indexation increases because of excessive industrial disputation in their particular areas.

The employers eventually found that the loss of the use of the penal powers was not such a catastrophe after all, and adjusted themselves to living without them. Employers who wanted to put pressure on a union to drop industrial action that its members were taking found that they had available some do-it-yourself penal powers that could on occasions be reasonably effective in imposing some form of penalty.

For example, the Employers of Waterside Labour obtained a variation of the tally clerks award which enabled them not to pay the guaranteed minimum wage and the laundry and telephone allowances for clerks who took part in unauthorised stoppages. Other employers used the provision in the awards which enabled them to deduct time lost in strikes from the period of entitlement to annual and long service leave. Stand-down provisions already in awards, or obtained by a variation of one, enabled an employer to stand-down employees who could not be usefully employed because of a strike. Employers could also suspend incremental and over-award payments, and productivity bonuses. An employer could apply to the Commission for a union or some of its members to be excluded from the benefit of wage increases that were being granted in its industry award because they were engaging in industrial action. Where an employer deducted union dues from his payroll for transmission to the union, that could be stopped and so create financial problems for the union. Where flexitime was being worked it could be stopped. An employer could apply to the Commission that an improvement in an award should not be granted to a union or one of its branches because industrial action was being taken at the time.

When the "old" penal powers were made inoperative there were forecasts that now that the trade unions were free of all restraint they would just run amok. This assumed that there was a correlation between the existence of the penal powers and the extent of industrial disputation, and that militant unions had been cowed by the penal powers. However, there is no evidence for either assumption. Trade unions that had been prepared to struggle when the penal powers were operative continued to do so, while unions that had not been prepared to struggle did not overnight change into ravening beasts and maul their employers.

On the face of it, there did appear to be a cause and effect appearance about subsequent developments, for there was an increase in working days lost in the three years after 1969. However, after that the days lost fell and then fluctuated considerably over the next decade. In 1977 the days lost were even less than in 1969. The main cause of the fluctuations was the economic boom in the early 1970's, the recession in the late 1970's, the euphoria about the anticipated resources boom in 1980-81 that never was, and then the slide into recession.

That the employers came to realise that they had been outmanouvred by the trade unions on the penal powers is illustrated by the following extract from the leader in the September 1971 issue of the journal of the Victorian Automobile Chamber of Commerce.

> "There has been a very well-planned and well-executed campaign to undermine the provisions in the Commonwealth Conciliation and Arbitration Act relating to enforcement of awards . . .
>
> It is popular to say that the collapse of award enforcement commenced from the O'Shea case when party funds released a martyr from imprisonment. This is not true. The refusal of unions to pay fines goes back several years beyond that, and as mentioned above, it did not happen by accident. Just as Hitler published "Mein Kampf" in the early thirties, the Amalgamated Engineering Union issued a book written by its acknowledged communist officer Hutson entitled "From Penal Colony to Penal Powers" in 1966. In this book, Mr. Hutson said at Page 202: 'As the struggle against the penal powers is in essence a struggle against the repression of the capitalist state, the elimination of them calls for a political struggle backed by industrial pressure to have them removed from Commonwealth and State legislation'."

One must take exception to the exaggerated and odious comparison of the first edition of this book to Hitler's "Mein Kampf". Also to the allegation that the funds of some political party were used to pay the fines for the release of Clarrie O'Shea. The person who paid the fines, Mr. MacDougal, strongly denied that, and it has never been proven to be otherwise.

Although most employers came to accept that the penal powers had been made inoperative and came to live with that, some hard-liners among them still hankered after them as indicated by occasional public statements. They welcomed the proposal of Prime Minister Fraser in his policy speech for the February 1983 election that if returned his Government would take steps that could give the Arbitration Commission the power to enforce its awards. They apparently were blind to the obvious prospect that if that did happen the trade union movement would have to fight the battle of the penal powers all over again, and would be in a better position to do so because of the ACTU policy of non-payment of fines and support of a union refusing to pay.

The President of the National Civic Council, Mr. B.A. Santamaria, was always a persistent advocate of the restoration of the penal powers as is demonstrated by the following comment in his column in *"The Australian"* newspaper of 5 December 1980 that:

> "Since the O'Shea case of 1969, I have repeatedly suggested that the entire conciliation and arbitration system has been destroyed by the refusal of the Federal Government to enforce court decisions regardless of the inevitable dislocations, and that it is only a matter of time before the complete breakdown of the system would become

manifest to everyone."

The hard-liners claim that trade unions should obey the law of the land and be punished if they do not. It is a claim for the blind obedience of the law designed to stop any challenge to the power of the established order. It meant obedience not only to good laws but to bad laws such as the racist ones of Nazi Germany. But over the centuries people have insisted that they had the right to disobey what they regarded as tyrannical and unjust laws. Much of the social progress that has been made is because of that disobedience. For example, the Christian religion was established in defiance of the laws of the Roman Empire. The trade union movement in England, from which sprang the Australian one, was established by defying the law of the land over several years.

An example of a refusal to pay fines by trade unionists in a State jurisdiction occurred in Western Australia in 1968 when seven members of the Boilermakers' Society refused to pay a fine of $60 that had been imposed on each of them by the Industrial Commission for engaging in a three-day strike. When they refused to pay they were threatened with a 30-day jail sentence if they continued to refuse. The trade union movement in Western Australia rallied to their support, but the imminent confrontation was avoided when the fines were paid by an anonymous public benefactor.

39. The Rise Of The "New" Penal Powers

THE fall of the "old" penal powers did not mean that penal powers were ended for good. A battle had been won but not the war, for it only required a reactionary government to be elected which was prepared to accede to the pressure from hard-liners for the introduction of "new" penal powers. So it was therefore not surprising that when such a government was elected that its Prime Minister, Mr. Fraser, was the architect of "new" penal powers. A wealthy, hard-line conservative, he had the arrogant belief that those who own property had the right to rule. As for the rest, as he said when he became Prime Minister, "Life isn't meant to be easy." His ruthlessness was demonstrated in the way in which he pushed Billy Sneddon aside to grab the leadership of the Liberal Party in March 1975, and his promotion of the constitutional crisis in November 1975 in order to force the

Whitlam Government out of office.

A confirmed union basher from way back, Fraser was convinced that the only way to deal with the trade unions was a strong dose of law and order. If that meant confrontation with the trade unions, so be it. He was also convinced that there was good political mileage in such an approach. In 1974 Fraser had formulated ideas on industrial relations in a position paper that he sent in November to some influential persons to win their support for his bid for the leadership of the Liberal Party by demonstrating that he was a man of ideas who could give strong leadership. In the paper he wrote of the existing industrial relations where the law of the jungle prevailed. He claimed that there was growing public opinion against industrial lawlessness. He proposed to strengthen the processes of conciliation and arbitration by providing a new framework for settling industrial disputes, and by making a fundamental change to the Arbitration Inspectorate.

In another letter that Fraser sent to some influential persons in January 1975 he promised them an effective return to penal provisions, a powerful industrial 'police force' type operation, and an elaborate framework for settling disputes that would make direct action virtually impossible by means of new legislation. In an address that he gave in January 1975 he introduced what was to be one of his favourite themes when he said that:

> "Companies, employers once had too much power. Changed circumstances and laws have gone to redress that situation. Now some elements of the trade union movement have too much power, and Parliament should not shirk the task of redressing the balance within the community."

Fraser did not shirk that task when he had the overall responsibility for drafting the employment and industrial relations policy of the Liberal and Country Parties, in which he was assisted by Mr. R.I. Viner, another hard-liner on industrial relations. The finished policy document was released on 28 July 2975 by Mr. Fraser, by then Leader of the Opposition, and Mr. Street, then Shadow Minister for Industrial Relations. A considerable amount of work had obviously gone into it for it covered six pages of small print.

In a section entitled "Negotiation, Conciliation, Arbitration" it was proposed to set up an Industrial Relations Bureau as a third arm of the arbitration system. Its purpose would be to ensure the observance of industrial law by taking breaches of them before the then Industrial Court. Nine "unfair practices" of trade unions and employers were listed, and "consequences" provided to punish anybody engaging in them. (Apparently the dirty word "penalties" was considered to be inappropriate for the new order).

An interesting feature of the document was the concepts that had been taken from American practice, such as prohibition of secondary