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BUTTERWORTHS INDUSTRIAL LAW SERIES

LABOUR LAW IN AUSTRALIA

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CHAPTER 8

ENFORCEMENT OF COMMONWEALTH AWARDS

The concept of compulsory settlement of disputes is only acceptable if two purposes can be served. The first of these is that the imposed conditions are reasonably just to both sides to the dispute; the second is that, if the former is achieved (even though the parties may not have obtained the exact terms they were seeking) the externally imposed settlement is one which is calculated to ensure that the community will not be disrupted by further disputes between the parties governed by award for the period that it is to remain in force. It is for this reason that, as has been seen,[1] the public interest is to be taken into account by the Commission when making awards.

At any rate, this was the *raison d'être* of the system when it was first introduced. The nature of the scheme was that there should be compulsory arbitration only when national catastrophes had to be averted. Viewing it from this cosmic perspective Higgins was to speak of the system as "A New Province for Law and Order".[2] Thus it was to be expected that there would be severe repression of conduct which might threaten the attainment of industrial law and order. Accordingly, the original penal provisions imposed vicious sanctions. The first Act prohibited lock-outs and strikes. To prove that it meant it, the legislation provided for the imposition of a penalty of £1000 if this prohibition was violated, a truly enormous penalty in those days.[3] Gradually, these overt anti-strike provisions were whittled down, to be replaced altogether in 1930[4] by other means of enforcement.

It is clear, therefore, that methods of enforcement vary with the changing nature of (i) industrial relations and (ii) the scope of the jurisdiction of the arbitration machinery. Today the former are more complex than ever before and the latter has increased to the point where quite inconsequential disputes may be settled by the federal body.[5] It is, therefore, pertinent to examine the modern system of federal award enforcement.

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1 See Chapter 5, *ante*.

2 Published Sydney, 1922. Also found in (1915), 29 Harv. L. Rev. 13; (1918), 32 Harv. L. Rev. 189, and (1920), 34 Harv. L. Rev. 105.

3 Section 6, *Commonwealth Conciliation and Arbitration Act* 1904. Note that in 1920, s. 6A was added which made it an offence (attaching the same penalty) for persons or organizations bound by an award or entitled to its benefits to lock-out or strike.

4 Section 6, *Commonwealth Conciliation and Arbitration Act* 1930.

Let it be noted at the outset that there is a paradox in the system. It is an avowed aim of the scheme that parties should reach agreement rather than be governed by externally imposed conditions. But for agreement to eventuate there must be bargaining. The process of bargaining in the industrial world is unreal unless the parties are enabled to use economic weapons. The major weapons are the lock-out and strike. Hence any system that in the final analysis imposes a binding award which is not to be disturbed for a protracted time[6] will tend to discourage the use of economic weapons and, therefore, the bargaining process.

From what sort of conduct does the award need protection? There are two major situations. The first is where an individual seeks to interfere with the reign of the award. This, in turn, principally arises in two kinds of circumstances:—

(a) Disobedience by an individual bound by the award to the conditions imposed by it; and

(b) attempts by individuals to have others disobey the conditions imposed by the award.

The second is where organizations allegedly obstruct the operation of the award. Here again two kinds of situations ought to be distinguished:—

(a) Where the organization is directly or indirectly involved in conduct causing interference with peaceful implementation of the award wherever it applies; and

(b) where some members of the organization act contrary to the terms of the award and thereby involve the organization.

The former of these concerns the large lock-out or strike situation which is the modern equivalent of the national catastrophe. The latter category is the involvement of the organization in what is basically a local grievance dispute. An obvious question that arises is whether the same provisions should govern these differing obstructions to the operation of the award.

A. SANCTIONS AIMED AT INDIVIDUALS

1. Redress for individuals harmed by non-obedience of the award

An award prescribes certain conditions of employment. These conditions are to be met by the parties to the award. It follows that either an employer or an employee who suffers damage as a result of a failure to carry out these prescriptions ought to have a remedy which will enable him to recover the losses incurred. But an award of damages will not always be the appropriate remedy. For instance, where it is the employee who violates the award by, say, not working overtime which can be reasonably demanded or not working a shift which the

6 And it is protracted because of the operation of s. 58 (2) of the Act, see Chapter 7 of Book Two *ante*.

award dictates he may be asked to do, there is little point in giving the employer the right to recoup the financial loss incurred. To combat this kind of individual flouting of the award the most efficient armoury is the creation of an offence with an accompanying penalty. Expectably the *Conciliation and Arbitration Act* 1904-1970 provides for such a sanction.

Section 119 (1) recites that—

> "where any organization or person bound by an order or award had committed a breach or non-observance of a term of the order or award a penalty may be imposed".

If the penalty is imposed by the Industrial Court, the maximum fine that may be levied is 1000 dollars; where it is imposed by other courts it is 250 dollars.[7] The other courts empowered to impose sanctions under s. 119 (1) are—

> "any District, County or Local Court or Court of summary jurisdiction that is constituted by a Judge, by a Police, Stipendiary or Special Magistrate or by an Industrial Magistrate appointed under any State Act who is also a Police, Stipendiary or Special Magistrate".

Note that s. 119 (1) was recast in this way as part of the 1970 amendments[8] (which will be further discussed below). The forerunner of s. 119 (1) (which bore the same number) also permitted the same courts to impose sanctions for breaches and non-observance of orders and awards; but the penalties were of a different order. The amount that could be exacted by way of penalty was to be the maximum penalty provided by the award, or the maximum penalty that could have been provided for by the award in the case where the award-maker had made no such provision. Now, s. 41 (1)(c) of the pre-1970 provisions gave the Commission power to

> "fix maximum penalties for a breach or non-observance of an award, not exceeding One hundred pounds in the case of an organization or an employer who is not a member of an organization bound by the award or Ten pounds in the case of a member of an organization".

That is, the sanction for breach was much less severe than it is under the new s. 119 (1). Consequently the penal aspect of the earlier s. 119 (1) was not very significant. Indeed, the legislature must have seen the purpose of that section as being basically non-penal, for it also drafted s. 122 which simply recited that—

> "No person shall wilfully make default in compliance with any order or award. Penalty: Forty dollars."

The very fact that an express prohibition for *wilful* interference was included seems to be a good indication that it was felt that the means

7 Section 119 (1D).

of sanction described in s. 119 was not seen as analogous to the imposition of punishment for the commission of a crime. Thus in ***Newstead Wharves Stevedoring Co. Pty. Ltd. v. Chamberlain; Ex parte Chamberlain,***[9] it was held that the imposition of a penalty under s. 119 did not permit the registration of a conviction with its attendant consequences of imprisonment upon default of payment. Support for this position was found in other sections which then, as now, allowed the penalty to be sued for and recovered by the people enumerated in s. 119 (2),[10] as well as be paid into Consolidated Revenue.[11] In addition, where a penalty under s. 119 has been imposed the Registrar may be asked to file a certificate to that effect in a federal or State court which has civil jurisdiction to the extent of the amount involved. Upon such filing, the amount owed shall be enforceable in the same way as any other final judgment of the relevant court.[12]

Thus s. 119 was not really meant to be a stick to be wielded whenever the arbitral system was being upset by some obstreperous parties. Rather it had overtones of providing a remedy against a single individual's breach of a term of the award which is not capable—by itself—of really fouling up the system of conciliation and arbitration. That is, where damages would be inappropriate and/or where the offence against the award was the result of carelessness, misunderstanding or, at most, a single person's refusal to co-operate in respect of one aspect of the award, all that the system required was a mild rap over the knuckles plus the possibility of financial redress where it was appropriate. The lightness of fine in the original s. 119 met the first need, and ss. 119 (3) and 123 of the present (and old) Act, the second. The first of these provides that if, during the course of proceedings for the imposition of a fine, it becomes apparent that an employee has not been paid an amount to which he is entitled under an order or an award, the court concerned may order that the employee recover the amount of underpayment which relates to a period of no more than

9 [1954] St. R. Qd. 331.

10 Section 119 (2) reads:—

"Any such penalty may be sued for and recovered by—

(a) the Registrar; or

(aa) an Inspector; or

(b) any organization which is affected, or whose members or any of them are affected by the breach; or

(c) any member of any organization who is affected by the breach; or non-observance; or

(d) any party to the award or order; or

(e) any officer of any organization which is affected, or any of whose members are affected, by the breach, who is authorized under the rules of the organization to sue on behalf of the organization."

11 Section 120.

twelve months prior to the commencement of proceedings. Section 123 just simply recites that—

> "An employee entitled to the benefit of an award may at any time within twelve months from any payment by way of wages in accordance with the award becoming due to him, but not later, sue for the same in any court of competent jurisdiction."[13]

Thus Part VI of the Act, prior to the 1970 amendments, provided for recovery of employee losses because of the employer's default, and in a minor way for punishment of breaches or non-observances of awards by individual employees or employers. But it was clear from the very nature of the penalties available and the emphasis on recovery of amounts due that it was not intended to protect the award-system from being undermined by flagrant, collective industrial action in disobedience of the Commission's dispositions. That is, the provisions were not in any practical sense large-scale deterrents. This rôle was then fulfilled by the contempt power vested in the Industrial Court.

The 1970 amendments have, potentially at least, changed this picture. By permitting a fine of 1000 dollars to be imposed by the Industrial Court for a breach or non-observance of an order or an award which under the former s. 119 would only have attracted a fine of 200 dollars in the case of an organization or an employer and 20 dollars in the case of an individual, it could be inferred that the legislature has altered its attitude with respect to non-collective offences. In part this could be so. One of the arguments involved in the industrial upheaval which led to the 1970 amendments was that under the existing system employee organizations faced severe penalties for collective action because the structure of the contempt power provisions was such that they alone, as a matter of practicality, would be caught by the sanctioning system; whereas employers were most unlikely to fall foul of the contempt power sections. Hence, employers only had to fear the sanctions imposed under s. 119, and these were far too light to act as a deterrent.[14] It is plausible, therefore, to believe that the legislature, when it set about to rationalize the penal powers under the Act, might have tried to still trade union criticism by making employers liable to severe penalties for non-collective offences against an order or an award. This potential interpretation of legislative intent has some merit, for the new penal provisions (discussed below) which replace the contempt of court mechanism have this much in common

13 This section was discussed in Chapter 6 of Book One where recovery of wages by employees was considered. It will also be referred to again in Chapter 9 of Book Two where the interaction of the federal award with the contract of service is examined.

14 See at pp. 543 *et seq.*, *post*, for an exposition of the nature of the contempt

with their predecessors:— they are basically aimed at collective action which, for practical purposes, is only likely to be undertaken by trade unions, thus still leaving a gap with respect to the punishment of individual employer activity.

On the other hand, however, it is to be noted that the same offence will only attract a maximum fine of 250 dollars if brought in one of the other courts enumerated in s. 119 (1). The very fact that an action for these offences can be brought in minor courts suggests that the legislature still believes that individual offences of this nature do not present a clear and present danger to the arbitral system. This is further borne out by the fact that the legislature has left unchanged s. 122 which imposes a penalty of 40 dollars for wilful default. It does not seem rational that the legislature wished to increase the penalty for individual offences and yet not augment the penalty for wilful default. It seems much more likely that there has been a draftsman's oversight. Section 119 (1D) which sets out the new penalties, has attempted to streamline the verbiage. In so doing, it recites that *all* penalties to be imposed by the Industrial Court (subject to one exception) may go up to a maximum of 1000 dollars, and that in all other cases of imposition of penalties, that is, in cases where other courts impose them, the maximum shall be 250 dollars. It is submitted that this attempt at streamlining has created needless difficulties. While it is true that the Industrial Court does not have to impose the maximum penalty, the immediate past history of the Industrial Court's attitude to the sanctioning process is far from reassuring.[15] It is quite possible that the Industrial Court might impose fines of more than 250 dollars. Further, let it be noted that, if it is decided that it is in fact the intention of Parliament to make employers liable to penalties equivalent to those levied against employee organizations, s. 119 (1D) cuts two ways. There is nothing which prevents the larger penalties—if they are to be imposed—being exacted from individual employees who, acting quite alone, refuse to work overtime or a particular shift in accordance with the award, or worse still, are difficult shop stewards. It is, of course, unlikely that such a serious weapon would be utilized against individual employees as trade union reprisal is likely to be quick and nasty. But in moments of great industrial stress such things do occur, witness the use of s. 138 (to be discussed below) from time to time.

To sum up, then: there are penalties imposed by the system aimed at keeping recalcitrant individuals, who really do not seriously threaten the arbitration machinery, in line. This is coupled with a mechanism which enables the recovery of losses incurred by breaches or non-observances of an order or an award. The new sanctions have more

potential bite than their predecessors which provided similar compensatory machinery for individuals.

2. Section 138 of the Conciliation and Arbitration Act

The thrust of this section is easily gleaned from its wording. As it covers a variety of situations, it is more convenient to set the section out in full than to attempt to summarize it.

Sections 138 reads:—

"(1) A person who holds office in, or is otherwise an officer of, an organization or branch of an organization, or the agent of an organization or branch of an organization, shall not, during the currency of an award—

(a) advise, encourage or incite a member of an organization which is bound by the award to refrain from, or prevent or hinder such a member from—

(i) entering into a written agreement;

(ii) accepting employment; or

(iii) offering for work, or working,

in accordance with the award or (in the case of an agreement, employment or work that relates to or is work to which the award applies) with an employer who is bound by the award;

(b) advise, encourage or incite such a member to make default in compliance with the award;

(c) prevent or hinder such a member from complying with the award;

(d) advise, encourage or incite such a member to retard, obstruct or limit the progress of work to which the award applies by 'go slow' methods; or

(e) advise, encourage or incite such a member—

(i) to perform work to which the award applies in a manner different from that customarily applicable to that work; or

(ii) to adopt a practice in relation to that work,

where the result would be a limitation or restriction of output or production or a tendency to limit or restrict output or production.

(2) The last preceding subsection extends to advice, encouragement, incitement, prevention or hindrance in relation to employment or work with or for a particular employer or of a particular kind.

(3) In a prosecution for a contravention of this section it is a defence to prove that the reason for the conduct charged—

(a) was unrelated to the terms and conditions of employment prescribed by the award; or

(b) was related to a failure or proposed failure by an employer

ing, directly or indirectly, terms and conditions of employment and made by a prescribed tribunal in pursuance of a law of the Commonwealth other than this Act, and also includes provisions in force by virtue of such an award or order.

Penalty: Two hundred dollars."

The constitutional foundation of the section is the incidental power. The argument is that such a sanction has to be available because it is important to protect "the arbitral settlement of disputes from defeat, impairment or circumvention, in other words of ensuring the practical efficacy of awards".[16] Now, as industrial organizations are the core of the system, it follows that it is organizations which must be prevented from interfering with "the practical efficacy of awards". This section aims at the officers and agents of organizations, inasmuch as they will often be responsible for the organizations' actions.

What is being punished under the section is the intentional obstruction of the award system. Thus in the ***Australian Boot Trade Case***, Dixon, C.J., pointed out that to convict an officer or an agent "[T]he ground or reason of the advice, encouragement, incitement, prevention or hindrance must be that the agreement, employment or work was in accordance with the award or with an employer bound by the award as the case may be."[17]

Thus it is that it is a defence against a prosecution for a contravention of this section to show that the conduct charged was related to a failure by the employer to observe the award.[18] Advice, encouragement, etc. under those conditions will not be the primary cause of interference with the award, and thus it will not be intentional because the officers or agents of the organization had not formed an intention to so interfere until they believed that the award was being undermined.

Although the conduct charged must be intentional, the section has a wide scope. This is the result of the judicial interpretation given to it.

In ***Pegg v. Taylor***,[19] the defendant was found to have used deliberate, provoking go-slow tactics and language calculated to encourage his workmates to hold their employers in disrespect, as well as to imbue in them a reluctance to work in accordance with the spirit of

16 Per Dixon, C.J., in ***Australian Boot Trade Employees' Federation v. Commonwealth*** (1954), 90 C.L.R. 24, at p. 41.

17 (1954), 90 C.L.R. 24, at p. 37. At one stage though the Industrial Court held that it was sufficient if the action of the officer or agent interfered with an employer bound by the award, see ***Cockle v. Isaksen*** (1958), 1 F.L.R. 139 (Spicer, C.J., dissenting). But since then the legislation has been amended and this interpretation no longer governs.

18 Section 138 (3)(b). In so far as s. 138 (3)(a) provides a defence it would seem unnecessary. Whenever the conduct charged is unrelated to the terms of the award, it ought not to fall within the net of s. 138, that section being constitutionally valid only because it provides protection from interference with the award

the award. It was a clear enough case of contravention of s. 138 of the Act, but it was interesting that the Industrial Court held that it was of no import that the defendant had sought to excuse his conduct by showing that the employer was planning to introduce a tally system which the award prohibited. The Court's attitude to the requirement of intent was even more strikingly evinced in ***Bennett v. Milliner.***[20] There the defendant had told one of the employees not to work a certain machine, because in the defendant's view it ought only to be worked by qualified lithographers. The employee concerned was only qualified as a letterpresser. It was held that the defendant had contravened s. 138. The Industrial Court indicated that the award provisions could not be read as the defendant sought to do, and that, therefore, the employer was entitled to have the employee work the relevant machine. In coming to this conclusion the Industrial Court indicated that the award provisions were a little ambiguous on the point, and that to come to the defendant's view there ought to have been more explicit language in the award. The merit of the Court's interpretation is of no moment here; suffice it to note that, given the fact that interpretation is necessary and that the intention of the award-maker is not always well expressed,[21] the approach by the Court gives s. 138 a wider scope than one would expect to be given to a penal statute. This is underscored further by the fact that in ***Bennett v. Milliner*** the court went on to hold that even if the defendant honestly believed that his interpretation of the award was correct, the charge would still have been proved as ignorance is no excuse.[22] The negation of intent is clearly hard to accomplish.

Contravention of s. 138 is committed not only where there is a direct interference with the award, as per s. 138 (1)(b), (c) and (d), but also where the interference is with the spirit of the award, as per s. 138 (1)(e). Further, it is not restricted to the conduct of parties to the award; officers, and agents of an organization not party to the award, will be successfully charged if all the other requirements are proved. Whilst speaking of the persons potentially chargeable, note that in the ***Australian Boot Trade Case***,[23] Dixon, C.J., thought that the word "agent" could only cover people authorized to act on behalf of the organization and acting within the scope of that authority when advising and inciting etc. Any wider concept of "agent" might fall foul of the constitutional requirement that s. 138 is to be justified as incidental to s. 51 (xxxv) of the *Constitution* because it would make

20 (1959), 1 F.L.R. 312.

21 See discussion of the specific provisions enabling a Commissioner to clear up his own award in Chapter 6, *ante*. Note also that Boards of Reference are often appointed to sort out precisely the sort of problem which gave rise to the difficulty in ***Bennett v. Milliner*** (1959), 1 F.L.R. 312

people liable who were not sufficiently close to the control levers of organizations. Note further that the constitutional requirement makes s. 138 (1)(e) of doubtful validity inasmuch as it is concerned with the productivity of an enterprise rather than the working of an award, although these two matters might well be closely linked.

Knowing who can be punished when the conduct threatens the award, it only remains to point out that one kind of conduct can give rise to many contraventions. Thus in ***Bennett v. Milliner*** when telling the employee not to work the machine, the defendant was convicted of both advising *and* inciting. It is almost superfluous to say that this is an unusual way of reading a penal provision. Certainly it gives the section added bite, for it is easy to imagine the utterance of a statement accompanied by graphic behaviour or gestures, which is advice, incitement, encouragement to prevent, hinder, obstruct etc. Multiplicity of convictions for one instance of rebellion seems a little excessive, especially as the conduct may often be part of postures struck in a continuing bargaining situation, which the system supposedly encourages. For instance, in ***Watson v. McIvor,***[24] there was a dispute about the computation of wages. One H was advised to quit unless certain requests were met; conditional notice was given. The advice to H was considered a contravention under s. 138, even though it was accepted by the Court that H would have left the employment without that advice, and apparently had only been advised to resign publicly to strengthen the union's case on wages.

Manifestly, s. 138, as interpreted by the Industrial Court, has very wide application. It is no doubt true that the section is seldom used. But the potential is there, and it may well act as a hidden deterrent (as, incidentally, may the new possibility of a large fine under s. 119, the Industrial Court having shown in its interpretation of s. 138 a rather zealous approach to ensure the efficient working of the system). In any event, even if an employer is too wise to prosecute under s. 138, any other member of the public might initiate proceedings. This was enunciated in ***Pegg v. Taylor,***[25] where it was held that s. 13 of the *Crimes Act* 1914-1966 (Com.) merely codified the common law position of federal criminal law in this respect.[26]

In sum, s. 138 is not calculated to foster good industrial relations, despite the obvious policy to this effect which underlies its enactment

24 (1959), 14 I.I.B. 289.

25 (1959), 1 F.L.R. 274.

26 The section reads:—
"Unless the contrary appears in the Act or the Regulation creating the offence, any person may—
(b) institute proceedings for the summary conviction of any person in

3. The Commonwealth Crimes Act

This omnibus-type criminal statute includes provisions which repress the use of the lock-out, strike and boycott. The justification for this is that the sanctions are needed to prevent the dislocation of interstate and overseas trade and commerce and the working of Commonwealth services and authorities.

Accordingly, the provisions are not linked in any way with the award system. They are couched in such wide language, however, that they could well be used to enforce federal arbitration. Thus s. 30J provides that, where there is in the Governor-General's opinion "a serious industrial disturbance prejudicing or threatening trade or commerce", the Governor-General may make a Proclamation to that effect.[27] The potential scope of this power is enormous: there is no mention anywhere of what is a "serious industrial disturbance". Once a proclamation has been made, any person who "takes part in or continues, or incites to, or urges, aids or encourages the taking part in, or continuance of a lockout or a strike" connected with interstate trade and commerce or Commonwealth public service, shall be guilty of an offence.[28] Note that both incitement and encouragement as well as actual participation is punishable (compare s. 138 of the *Conciliation and Arbitration Act*). The penalty on conviction is imprisonment for one year, and for foreigners, deportation by order of the Attorney-General.

Section 30K is aimed at preventing interference with interstate trade and commerce and the efficient working of Commonwealth public services and authorities by more indirect industrial action: threats, intimidation and boycotts. Under this section the penalty, once again, is most severe. Conviction may lead to imprisonment for one year. Something of the potential scope this section might have can be gauged from the decision by the Supreme Court of Victoria in ***Howell v. Doyle.***[29] There a ship carrying cargo was on its way from New Zealand to England. It was to be loaded and unloaded in Melbourne. The ship had been declared "black" in New Zealand, and the corresponding union in Melbourne stated that it would refuse to work the ship to support their New Zealand colleagues. During the ensuing wrangling, the employees were addressed by the defendant who spoke in support of a resolution to put a ban on the ship. It was held that this conduct was a contravention of s. 30K of the Crimes Act (Com.) even though the defendant, not being an employee or a prospective employee, would not participate in the boycott himself.

27 There has been one such Proclamation. See Gazette, 1951, p. 623; Com. S.R. 1951, p. 802. It was revoked in the same year. Gazette 1951, p. 1892.

It is no doubt improbable that these sanctions will be invoked frequently against trade union activists. But their very availability may act as a deterrent to individual militants. The same argument was made in respect of s. 119 and applies to s. 138 of the *Conciliation and Arbitration Act*. The inhibiting effect of all these provisions is hard to estimate. Depending on one's viewpoint it could be reasoned that, if these provisions act as a deterrent, they justify their existence. But against this must be balanced the possible deleterious effect on industrial relations caused by the actual utilization of the sanction clauses.[30]

B. SANCTIONS AIMED AT ORGANIZATIONS

1. The new legislation

There are many ways with which employee unions can wage economic warfare. They include boycotts, go-slows, mass resignations, refusal to work under contract, overtime bans, giving bad publicity to employers concerned and so forth.[31] But in Australia the centre of attention is acknowledged to be the strike. It has frequently been pointed out that a strike is merely a symptom of industrial conflict and that its importance should not be unduly emphasized.[32] But it is none the less a fact that in the Australian context the merits of the various systems of labour regulation tend to be measured by reference to the incidence of strikes. It has been argued that this is due to the spectacular nature of a strike which "lends itself to exaggerated and sensational reporting".[33] Further, and perhaps more importantly, employers and employees in Australia have identified themselves with directly contradictory positions on the nature of strike action. Employers argue that it represents resort to lawlessness and must, therefore, be suppressed at all costs, whereas employees hold to the tenet that the right to strike is a fundamental right which, if taken away, would undermine the freedom of the worker. Given these attitudes and the fact that the compulsory arbitration scheme was devised as a direct result of the spectacular strikes of the 1890's, it is to be expected that the federal legislation's attempt to sanction collective industrial offences has been preoccupied with the regulation of strikes and lockouts.

30 And as has been seen, they have all been used at some time or another, s. 138 of the *Conciliation and Arbitration Act* quite frequently.

31 See A. E. C. Hare: *The First Principles of Industrial Relations* (MacMillan), Ch. 1.

32 See D. W. Oxnam: The Incidence of Strikes in Australia—in Isaac & Ford—*Australian Labour Relations; Readings*, ch. 1.

(a) The Contempt of Court Provision

The early sanction legislation has already been outlined.[34] It will be remembered that it went through distinct phases. Initially, there was a rigid prohibition of all strikes and lock-outs; this gradually gave way to a stage in which deregistration of an obstreperous organization became the only real weapon against collective strike or lock-out action. Then an old device was revived: the use of the injunctive power. It will be remembered that this was given bite by making the Arbitration Court a Court of Superior Record. The machinery erected led to much union dissatisfaction and eventually constitutional crisis. The result of the ***Boilermakers Case*** has also been discussed. But the separation of legislative and judicial functions by the creation of two bodies, the Arbitration Commission and the Industrial Court, did not lead to a different form of sanction. The use of injunctive proceedings, or the contempt power as it became known, continued until 1970. To evaluate the new mechanism, the old one must be examined in order to pinpoint the defects which the new legislation seeks to overcome.

To prohibit strike action because it interferes with the federal award-making system presents two major problems. Obviously, the first is to show that a strike in fact interferes with the award. An understanding of the nature of a strike is, therefore, required. The second is that organizations have become the hub around which the arbitration system revolves. Hence, if strike activity is to be forbidden, the deterrent must be aimed at organizations as well as individuals. The latter were always capable of being disciplined; see for instance the existence of s. 138 of the *Conciliation and Arbitration Act*. In addition, where employees take concerted action, they most likely are in breach of contract, as well as potentially committing torts. The remedies available against such individuals have already been detailed in Book One.[35] But it is unreal in a highly unionized country to attempt to control union activity by hitting at individuals. Hence, organized labour as such had to be made subject to the enforcement proceedings. Organizations as such, however, do not go on strike; only their members do. How, then, are organizations to be brought to heel?

The nature of a strike.—In Ch. 3 of Sykes' *Strike Law in Australia* the legal meanings of the words "strike" and "lock-out" are exhaustively examined. It is here intended to adhere to the definitions arrived at in that analysis. It was suggested there that the ordinary understanding of the word "strike" involved "the notion of a quitting, cessation or discontinuance of work in combination and, further, the idea that such cessation must be for the purpose of wresting concessions from

an employer, whilst in some quarters there is the insistence that the demands must relate to conditions of employment, a requirement which would probably exclude many strikes for organizational purposes. It is clearly agreed on all sides that the cessation of work must be used as a *weapon* for the furthering of *some* demand."[36]

The essence then is an acting in concert for the purpose of making a demand upon the employer concerned. This is wide enough to cover the situation where there has been a concerted, intentional refusal to accept an engagement where the industrial circumstances are such that employees normally would accept work, e.g. stevedoring and shearing. Similarly, where the employees offer their resignations with the intent of coercing the employer in that way, there will be a strike. On the other hand, it is doubtful whether a partial refusal to work and a refusal to work overtime fall within the definition of "strike" as given. And "go-slows" certainly do not.[37]

Will a strike as so defined necessarily involve a breach of the award? When the *Conciliation and Arbitration Act* contained direct strike and lock-out prohibitions, those provisions could only be given effect with respect to strikes and lock-outs occurring when there was an industrial dispute or where one had been settled by award. When these direct prohibitions were repealed, and strikes and lock-outs were to be restricted by injunctive proceedings, it was still necessary to show that there was an award in existence which had been breached or was about to be breached by the collective action of some of the parties to it.

In Sykes' *Strike Law in Australia* it is pointed out that the award does not as a rule impose an obligation on the employee to work. Such an obligation only arises by the employee agreeing to do so, that is, by entering into a contract of service. If his consent were not needed to oblige him to do work, then the award-maker would be in a position to command specific employees to work for specific employers, an intolerable attack on freedom as it is understood in our society. But having argued that the obligation to work does not arise from the award, the author points to some difficulties of interpretation.

The award will often contain clauses which set out the mode of performing work, e.g. starting and finishing times, the working of reasonable overtime, the working of particular shifts, etc. Hence it is plausible to argue that a strike would be a breach of the award inasmuch as the employees concerned would not be working according to the mode prescribed by the award. But in *Strike Law in Australia* it is argued that these prescriptions do not amount to the creation of a general duty not to discontinue work, as such an interpretation

36 Sykes, op. cit., p. 44.

would "run counter to the general policy of not placing fetters on the right of the workman to leave his employment for non-industrial reasons".[38]

The bans clause.—To overcome this problem, the award-makers have inserted bans clauses into awards. Effectively these provide that the parties to the award shall work "in accordance with the award", and not interfere with it in any way. It has been held that such a clause does not merely refer to the way in which work is to be done, but to work covered by the award.[39]

The constitutional underpinning for such arbitral prohibition of strike (and other interfering kinds of) activity is the incidental power. It was decided[40] as early as 1936 that clauses in an award which provided that penalties were to be imposed if the union and individual employees did anything which tended to prevent, delay or hinder the departure, running or working or using of ships, or if employees left or refused to accept employment or incited others to do so for the purposes of enforcing any demand concerning a matter expressly provided for in the award, were valid. Latham, C.J., argued: "The provisions in question are, however, plainly directed to industrial matters which are definitely related to securing the actual and effective operation of the award for the purpose of governing the industrial relations of the parties. The necessity and wisdom of including such provisions in a particular award are left to the judgment of the Arbitration Court and not to the judgment of this Court."[41]

That is, providing the prohibition relates to matters raised in an industrial dispute, it will be valid. This approach has been consistently accepted.[42]

Given this power, the award-maker has at hand a means of repressing concerted action by employees, and a weapon with which to curb organizations. As has been seen, ever since the ***Burwood Cinema***

38 Sykes, op. cit., p. 197. The argument in the text summarizes the analysis found at pp. 187-200. Essential to the argument is that basically the award prescribes minimum benefits enuring to employees. That is, the bulk of the obligations imposed are on the employer, not the employee. Consequently, the major obligation of an employee—to work—springs from contract and not award. The point about minimum benefits for employees is taken up in Chapter 9 of Book Two.

39 ***Commonwealth Steel Co. v. Federated Ironworkers Association*** (1952), 74 C.A.R. 84.

40 ***Seamen's Union of Australia v. Commonwealth Steamship Owners' Association*** (1936), 54 C.L.R. 626.

41 (1936), 54 C.L.R. 626, at p. 640.

42 E.g. ***R. v. Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union*** (1951), 82 C.L.R. 208; ***R. v. Galvin; Ex parte Amalgamated Engineering Union*** (1952), 86 C.L.R. 34; ***R. v. Spicer; Ex parte Seamen's Union of Australia*** (1957), 96 C.L.R. 341; ***R. v. Gallagher; Ex***

decision,[43] it has been possible to make organizations party to the award. This has enabled the award-makers to give their awards much wider scope, as well as making it much easier to deal with industrial disputes. But if prohibitions against strikes and lock-outs can be written into awards by way of bans clauses, then it follows that these prohibitions can be directed at all parties to the award, including organizations. It is in this way that strikes have been explicitly made breaches of an award, and that it has become possible to make organizations subject to the prohibition. A typical bans clause would read as follows: "No organization or party to this award shall in any way whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon work being done in accordance with provisions of the award."

Sections 109 and 111.—These were the main penal provisions prior to the 1970 amendments. They were quite simple in design. Section 109 gave the Industrial Court power to order compliance with an award which had been breached, and to enjoin the commission or continuation of a contravention of the Act or breach of an award. The order could be so made that it remained in force for the duration of the award or any other period the Court decreed. If the Court's order was disobeyed s. 111 came into play. It recited that the Court was to have the same power to punish contempts of its authority as the High Court of Australia has. Then it set out in detail how the Court was to proceed in cases of contempt in the face of the Court. Subsection (4) provided the maximum penalties that could be imposed in cases of contempt consisting of failure to comply with a s. 109 order. These penalties were severe:—

"111 (4) .

(a) where the contempt was committed by an organization (not consisting of a single employer)—One thousand dollars;

(b) where the contempt was committed by an employer, or the holder of an office in an organization . . . Four hundred dollars, or imprisonment for twelve months, or

(c) in any other case—One hundred dollars."

To obtain a s. 109 order, a breach of an award had to have taken place or had to be shown to be likely to occur.

Now, as has been shown, a strike is not necessarily a breach of the award. And it is here that the bans clauses served their purpose. It is timely to point out that they were not always inserted into awards. Indeed it was a minority of awards which contained such clauses. In each case, the Commissioner concerned had a discretion whether to insert such a clause or not. He could, of course, insert it upon making the award or at any time during the currency of the award; he could

43 (1925) 25 C.A.R. 529.

do it upon request or upon his own motion. What actually happened was that such clauses were put into some major awards, that is, awards covering a great number of employees and organizations, and as they were usually included in cases where the militancy of unions was well known, they were very effective both as a deterrent to those unions, and indirectly to slightly more timid organizations.

Implementation of the contempt of court provisions.—The whole atmosphere in which the penal provisions operated came to take on an anti-union slant. This was the result of a combination of factors.

As well as the potential restriction on the scope of the contempt power by leaving to the Commission discretion to refuse to insert bans clauses, the legislation provided another hurdle to be overcome before the penal powers could be invoked. This was in the guise of s. 109A. This provided a "cooling-off" period. It was to operate as follows: if the s. 109 order was sought because there was an anticipated breach of an order or award, then the Commissioner had to be notified and not until 14 days had elapsed from the day of notification, could an application for such an order be entertained by the Industrial Court (or 10 days if the Court could be shown that the breach would occur within that period). But this section was largely ineffective. This was the consequence of its subsection (3) which recited that where the application was for both an order under s. 109 (1)(a) and (b), the cooling-off provisions did not apply. The former of these paragraphs related to applications for orders in respect of past breaches of the award. It became customary to apply simultaneously for orders in respect of past and future breaches, it having been held by the Industrial Court that an order in respect of future breaches could be made where it was shown that there had been a relevant breach in the past; what was relevant was to be left to the discretion of the Court.[44] In the end, although this was not a necessary consequence, the "cooling-off" period became non-functional and by the simple device of asking for both a s. 109 (1)(a) and s. 109 (1)(b) order, the contempt powers were given bite.

The situation was not helped by the Industrial Court's attitude to trade unions in breach of an award or who could reasonably be expected to commit such a breach. The Court always had a choice as to whether to make a s. 109 order or not. But, in fact, even when the Court found that the union had done everything in its power to secure its members' compliance with the award, an order has been made.[45] In

44 *Metal Trades Employers' Association v. Boilermakers' Society of Australia* (1965), 20 I.I.B. 919.

45 See *Goodyear Tyre & Rubber (Aust.) Ltd. v. Federated Rubber & Allied Workers Union of Australia* (1963), 18 I.I.B. 919, where the Court unani-

one notorious instance, some of the members of the executive of the N.S.W. Branch of the union had supported a motion to stop a strike at a mass meeting of the strikers, but one member of the executive had moved an amendment in favour of continuing the strike and this amendment was carried. The union was eventually held to be in contempt of an order existing at the time of the meeting.[46] As if all this were not enough the Industrial Court's attitude of righteousness in respect of violations of its authority is dramatically illustrated by a series of cases in which the Court held that s. 111 did not limit the total number of fines that could be imposed to one, if successive contempts of the same order were proved. The common instance of this kind of case occurred where an order not to strike had been made. The union would then act in breach of that order; a fine followed. The union members returned to work, then struck again or did not ever go back to work. Yet another fine would be imposed.[47] This, of course, was perfectly logical given the sanction machinery the Court had to implement for, as Dunphy, J., once suggested, there was theoretically separate liability for "every moment of time that the ban continues".[48] But, as is usual in law, logic taken to its extreme will lead to undesirable results. Other illustrations of this were the cases where an order not to strike was disobeyed by a union. In any one such strike more than one employer is likely to be affected. The Court has held that each of these employers could succeed separately in having the union fined for breaching the order.[49]

This last point focuses attention on yet another drawback of the old enforcement sections of the Commonwealth Act. It was the employer who initiated proceedings. From the trade union point of view this, coupled with the Industrial Court's rather intransigent attitude, proved that the system was designed to oppress the forces of labour. The fact that unions were very seldom, if ever, represented at contempt hearings is attributable, in part, to the trade union belief that there was no point in fighting these cases.[50] This *malaise* was not lessened by the fact that the bans clauses (which were the necessary prerequisite to the functioning of the penal system) were more often than not inserted at the behest of the employers bound by the award. The Commissioner of course could use his discretion as to

46 ***Dourcy v. Wool and Basil Workers Federation of Australia*** (1962), 17 I.I.B. 1356.

47 ***Casimir v. Waterside Workers Federation of Australia*** (1962), 17 I.I.B. 699.

48 ***Commonwealth Steamship Owners Association v. Waterside Workers Federation of Australia*** (1960), 2 F.L.R. 328, at p. 331.

49 ***Caterson v. Australian Air Pilots Association*** (1958), 13 I.I.B. 901.

50 This point was well made and illustrated by C. P. Mills: "The Practice of the Commonwealth Industrial Court in Strike Cases" (1957)

whether he ought to include a bans clause or not. He also had discretion as to two other important matters.

The first of these was the width of the bans clause. The High Court has consistently upheld a clause which forbade the employees or the union from taking any action whatsoever to enforce demands concerning any matter expressly provided for in the award.[51] Thus to alter circumstances at all, that is, to obtain more than the bare minima provided for by the award, the union had to rely on the goodwill of the employers. An invidious position, and one which was in direct opposition to the stated aim of our industrial system that there be a bargaining situation.

The second of these important aspects of the Commission's discretion was that it is up to each Commissioner making an award to decide its maximum length of operation, with a ceiling of five years. In the last Chapter it was shown that the limit so imposed by the award-maker does not prevent the parties from either obtaining a new award or having the existing one varied. It was also demonstrated, however, that theoretical difficulties often give rise to serious practical problems and that these were exacerbated by the fact that the award provides only minima. This supposedly means that the parties are free to bargain for better terms than those provided by the award. Now, if the award is to last a reasonably long period, it is obvious that in an economy such as ours, the minimum conditions provided for the benefit of the employees will soon be out of step with the rising cost of living in the community. This brings us back to the paradox mentioned in the introductory remarks of this Chapter. If the basis of a system is that, failing voluntary agreement by the parties, an independent tribunal is empowered to finally settle the dispute, it would make sense to ensure that the settlement is really final. That is, some means of direct enforcement to preserve the *status quo* arrived at must be available. A refusal to work, encouraged by an organization must lead to disruption of the settlement. This cannot be permitted and strikes ought, therefore, to be prohibited. But on closer examination, the above line of argument may be thought to be inapplicable to the peculiar brand of compulsory arbitration found in Australia. The awards made in settlement of a dispute are not final. They merely provide for the minimum conditions that an employee must be granted in his employment in a particular industry. The system is one which envisages that collective bargaining shall take place. Thus only minima are laid down, leaving the parties free to agree to institute "over-award" conditions. If this is to work adequately, the employees must be left their main bargaining weapon, that is, the power to coerce. So we have come full circle (as is inevitable in a system that is predicated on contradictory premisses): prior to award-making, there ought to

be freedom to strike, then, when settlement is made, this right ought not to be available; but because of the nature of the settlement imposed, the power to bargain successfully ought to be available. If, as the narrative of their implementation suggests, ss. 109 and 111 were in fact, if not in theory, anti-strike provisions, the logic of the system required that they be repealed.

There were two other aspects of the pre-1970 penal provisions which led to their repeal. The first of these was that the sanctions with their heavy penalties and the overtones of criminal stigma attached to them upon imposition, were also available in circumstances where they were manifestly inappropriate. Reference is here being made to those situations when the cause of industrial dislocation was not an organized strike to back a demand for better wages, hours and the like, but rather the result of a local grievance which, having given rise to the inflammation of tempers, had caused the trade union organization to come in and back its membership. The dispute may well have been about the promotion of a particular man, his right to overtime or some such issue. The severity of the impact of the contempt proceedings was obviously disproportionate to the disturbance to the award system created by a grievance dispute of this nature. Yet, as will be seen, the sledgehammer was occasionally used to quash such minor upheavals.

The penal powers of ss. 109 and 111 were available in yet another situation where they were most inappropriate. Anti-strike clauses, even if they make sense as economic measures, are inept to deal with political activity. One of the truisms of Australian political life is that trade unions play a large rôle in it. This, of course, is also the case in many other countries, but in Australia, more so than in most, trade unions are directly involved in politics. After all the Australian Labor Party is, historically, the trade union movement's representative. Thus it is not surprising that trade unions here view the realization of political objectives as one of their prime goals. One of the weapons in trade unionism's armoury is the power to strike. Political strikes are not uncommon in Australia;[52] whenever they occur it is likely that the more militant unions will participate. And, of course, it is those unions which invariably are saddled with bans clauses in the various awards to which they are parties. It is exceedingly doubtful whether ss. 109 and 111 were relevant to this kind of industrial action.

The *Tramways Cases* again—The sanctions' aspect.—As was seen in the previous Chapter, the ***Tramways Cases*** led to serious legal difficulties. But more significant than the niceties of legal reasoning already examined were the side-effects of treating the disputants' quarrels as if they were examination questions for precocious students. In fact what occurred was that every time that the employees had their demand rejected, they took direct action to further their claim. The employers were not slow in going to the Industrial Court to point out that by so acting the men were in breach of the existing award. A fine would then result. By the time that the award that the union was seeking was finally granted, a large amount of money was outstanding.

52 S. Silverman in *Political Strikes in Australia* (which is Ch. 2 of Australian Labour Relations—Readings (Eds. Isaac & Ford)) lists 23 such major strikes since 1916. This list does not include the many inarticulated political confrontations which occur because of union personnel's wishes to harm its political opponents. The list really [illegible]

In 1969 the Tramways Board and the union clashed again. This time the quarrel was not related directly to the unionists' well-being. One Pesteranovich had failed to bring in his tram when the union had ordered that all tram drivers do so in order that a stop-work meeting might be held. The ensuing facts are buried in a mountain of reported accusations and counter-accusations thrown about by the employer, the union, and Pesteranovich. The essence of the story is that upon his eventual return Pesteranovich had in a rather outspoken manner told the union what it could do with its orders in general (and, like any other good pleader would have done, denied all knowledge of the particular order in question). The union demanded that Pesteranovich apologize. Its view was that unionism would be weakened if it could not discipline its recalcitrant members, and indignantly, that women had been present when Pesteranovich had made his views so vehemently known. The alleged offender remaining stubborn, the union called upon the employer for help. This failed and thereupon the union decided that its members would refuse to work when rostered with Pesteranovich. A conciliator managed a compromise. Pesteranovich partially apologized. The union then requested the transfer of Pesteranovich to another depot. It was the employer's turn to be morally indignant: it declared that it would do nothing to interfere with the right of the individual to stand up for his liberties. Every time Pesteranovich was rostered a unionist would refuse to work with him.[53] The employee would then be suspended; fines were sought to be imposed on the union for its part in disrupting the work to be done in accordance with the regulating award. At one such an attempt, Dunphy, J., tersely told the informant that there was no point in imposing penalties if they were never exacted. It had become known to the Industrial Court that the one-man bus dispute fines had never been paid. Together with the more recent penalties, $8100 was outstanding. The Court instructed the applicant to collect these moneys.[54]

53 One union member at least agreed to work with Pesteranovich, and he too was put on the "black list".

54 *The Age*, Saturday, 18 January 1969. Dunphy, J.'s words, as quoted there [illegible]

Mr. O'Shea, the Union's Secretary, publicly declared[55] that his union would not pay the fines. He reasoned that as in the one-man bus disputes the High Court had eventually had to admit it had been in error, the order that was made could have been made much earlier, rendering the direct action of the union unnecessary. Hence, the fines were due to the High Court's bungling and not the union's malevolence. (This clearly did not do away with the necessity of paying the balance of the amount owed because of later fines.)

A public charade then ensued. The Registrar's office vainly tried to serve Mr. O'Shea in order to have him appear before the Court. When Mr. O'Shea was served he flatly refused to appear. A groundswell of unrest gathered momentum during this time. Soon it became apparent that Mr. O'Shea had substantial backing in the Union movement, and that this support did not just arise out of sympathy for the Tramways Union because of its particular problem, but rather out of discontent with the whole system of enforcing Commonwealth arbitral decisions.

Thus when Mr. O'Shea finally did appear before the Court[56] and was ordered to be imprisoned for the contempt of court he displayed when refusing to be examined and to give up the books of his union, a series of violent demonstrations hit Victoria, and then other States. Mr. O'Shea was released when a citizen paid the outstanding fines, and some of the heat went out of the dispute.[57]

In the ensuing truce the Australian Council of Trade Unions managed, after hurried talks with the Government, to obtain a statement[58] that the Government in consultation with the employers, the A.C.T.U. and the Department of Labour and National Service would undertake a serious review of the penal clauses. To underscore its position the A.C.T.U. had advised its affiliates not to pay any fines imposed under the existing contempt powers. Thus, the artificiality of legal pedantry and irrelevance of judicial logic to industrial conflict had led to such violent upheaval that changes in the machinery were forced upon the Commonwealth.

(b) The 1970 Amendments

The major defects in the contempt powers as described can be summarized as follows:—

(i) The Industrial Court could have exercised its discretion much more often in favour of unions by refusing to make orders in hearings

55 As reported in *The Herald*, 4 February 1969.

56 On Thursday, 16 May 1969.

57 One Dudley McDougall was the charitable donor. It is doubtful whether the union movement regarded him with much charity, as by his gift he removed the fire with which they were attempting to blow the powder bag of penal

only attended by applicant employers, who often only brought evidence in the form of affidavits. Further, the separation of powers doctrine which resulted in the ***Boilermakers*** decision, had had as its consequence the enforcement of an award, made with the purpose of preserving industrial peace, by a tribunal which had no connexion with the award-making function, and what was more important, no expert knowledge of the parties' situation in the particular industrial setting giving rise to the award. The potential harm that could be done because of this situation can once again be illustrated by reference to the ***Tramways Cases.*** When the Commissioner found that the High Court continuously rejected his attempts to make an award or order along the lines that the union had requested, he felt himself justified in removing the bans clauses from the existing award.[59] In other words, his special knowledge of the situation convinced him that the imposition of penalties on the union in these circumstances was not warranted. Yet, the Industrial Court felt itself obliged to make s. 109 orders and impose s. 111 penalties because, whatever the merits of the union case, it was a "law-breaker."

(ii) Associated with this adherence to the letter of the law was the fact that the Industrial Court, more often than not, imposed the maximum fine available. In addition, it was not loath to treat a continuing strike as a repeated series of daily breaches of its order.

(iii) Section 109A, the "cooling-off" section was too easily skirted, heightening the effect of (i) and (ii) above.

Underlying all these particular problems was, as has already been suggested, the paradox of having any kind of anti-strike law in a system that supposedly promotes collective bargaining in general, and for over-award benefits in particular.

The new provisions preserve the tenet that certain kinds of economic warfare will be prohibited in specific circumstances. But they do attempt to cure the evils of their predecessors listed above.

The new procedure involves a much more efficient "cooling-off" period. Before an application can be made to the Industrial Court for the imposition of a penalty, a party or organization bound by the award to whom it appears that a contravention of a term of the award has been or is about to be committed, must give notice to the Registrar to this effect.[60] Once notice is thus given, a presidential Commissioner appointed by the President is to take charge and take all steps he thinks necessary to settle the problem. To do so he may use any of the powers that a Commissioner would have available to him.[61] That is, the penal

59 ***Tramway Employees (Melbourne) Interim Award*** **1958** (1966), 21 I.I.B. 18 (Commissioner Horan).

60 This is the effect of a new section inserted in the Conciliation

powers are not to be invoked unless there has been a chance of more conciliation and arbitration. In the Second Reading Speech by the Minister for Labour and National Service of the Bill which contained these provisions, the Minister carefully pointed out that the giving of the rôle of negotiator and settlor "to only Presidential Members of the Commission is an earnest of the effort on the part of the Government to ensure that all reasonable steps are taken to solve disputes without the need for their existence to result in the use of sanctions".[62]

A cynical observer might remark that the giving of this rôle to Presidential Commissioners was in fact window-dressing. After all, prior to the insertion of the 1970 provisions, whenever a dispute was imminent, a Commissioner had a duty to set into motion the conciliatory and arbitral mechanisms he controlled.[63] While it is true that, under the old provisions, the party feeling aggrieved could have gone straight to the Industrial Court, it would have been quite feasible to prevent this by making it compulsory to notify the Commissioner in charge of the industry rather than a Presidential Commissioner. Indeed, this might have made more sense in as much as the former would be much better acquainted with the peculiarities of the industry than the latter.

On the other hand, the fact that notice must first be given at all to an award-maker before recourse can be had to the judiciary, as well as provide an effective "cooling-off" period, does prevent the harm that may result from having the legally permissible, but industrially indefensible, imposition of penalties when the arbitrators might well consider this the worst possible thing to happen from an industrial relations' point of view.

If the Presidential Commissioner cannot find a satisfactory solution, then he shall issue a certificate stating that there is conduct which hinders, prevents or discourages the observance, or the performance, of work in accordance with the award, providing he is satisfied that the conduct arises out of the proceedings before him and that the issuance of the certificate is not undesirable having regard to the terms on which a settlement of the dispute has been or could be based.[64] When the certificate is given the party aggrieved may apply for the imposition of a penalty by the Industrial Court under the amended s. 119 of the Act.

The Industrial Court has discretion as to whether or not to impose a penalty, and if it does, as to how much it ought to be. As has been

62 Parliamentary Debates (Hansard), 27th Parl. 2nd Session; Friday, 5 June 1970, p. 3080.

63 See the powers and duties given by ss. 23 and 28 of the Act, discussed in Chapter 5 of Book Two, *ante*.

seen the maximum amount that may be exacted is 1000 dollars.[65] But knowing that the Industrial Court had a similar discretion under ss. 109 and 111, and remembering how that power was exercised, it seems likely that the Court as presently constituted might well see it as its duty to impose the maximum penalty whenever a certificate is issued under s. 32A. That this is not a far-fetched inference can be gauged from the fact that the legislature having given the discretion, has also attempted to ensure that, if it is not exercised favourably for the party condemned by certificate, it should not operate too severely against such a party.

To this end s. 119 (1A) prescribes that where the Court finds that there have been two or more breaches of an award, then it may find that those breaches constitute a "course of conduct". The 1970 amendments added to s. 4 of the Act the following:—

> "(3) A reference in this Act to engaging in conduct includes a reference to being, whether directly or indirectly, a party to or concerned in the doing of any act or thing."

The result is that two or more contraventions of a term of the award may be treated as part of one course of conduct and, therefore, only one breach invoking one penalty. But the legislature has also attempted to make sure that this will not lead to flagrant abuses which could amount to attacks on the dignity and authority of the Court. Section 119 (1B) simply provides that where a penalty has been imposed, any subsequent breach of the same term contravened earlier, shall not be treated as arising out of the same course of conduct as the one which attracted the penalty. That is, a new penalty can be imposed.

But this is very much a two-edged sword. Section 119 (1B) also means that once a penalty has been imposed and subsequently a similar breach is committed, the whole of s. 32A proceedings has to be gone through again ere a new penalty can be imposed; i.e. notice to the Registrar, the Presidential Commissioner's attempts to solve the matter, the issuing of a certificate, the exercise of the Industrial Court's discretion in favour of the aggrieved party. All in all, it does seem that two of the major defects have been overcome:— the lack of a "cooling-off" period and the severity of penalty because of the treatment of one course of conduct as a series of daily offences.

There is further protection for employee organizations (for although the provisions apply to both employers and employees, like their predecessors the sanctions are aimed primarily at the strike rather than the lock-out) in that it is now forbidden to the Commissioner in charge of the industry to introduce a bans clause in any award which he makes; this power is now vested in the Presidential Commissioners.[66] Clearly this will be one of the weapons such members will

need to have when attempting to find a solution to a case presented to them under s. 32A. At the time of writing it seems that the Presidential members of the Commission will only reluctantly insert such bans clauses. So far only one application for such a provision has been granted.[67] It does seem, therefore, that although the legislation still accepts that there should be some penal control over collective action which threatens the award-making jurisdiction, it has removed most of the bite from the sanctions which are to do this job.[68] Yet, the Australian Council of Trade Unions is still insisting that there ought to be no sanction provisions at all in the Act, and there was considerable anxiety when the first application for a bans clause under s. 32A was successful.[69]

At this point of time it is impossible to tell whether the fear that these sanctions are also unacceptable has any justification or not. Philosophically it can be argued that there ought to be some control over collective action and that the ones now provided are by no means so repressive that they could be termed anti-strike clauses. Yet, theoretically there are some dangers in the scheme for trade unionism.

On the face of the new legislation it seems that a bans clause may have more widespread effect than it has had heretofore. Section 32A(1) states:—

> "This section applies in relation to a term of an award, however expressed, by virtue of which engaging in conduct that would hinder, prevent or discourage the observance of, or the performance of work in accordance with, the award is prohibited."

It seems that some of the provisions of the award which prescribe the mode of work that is to be done might be read as a clause "however expressed" forbidding the hindrance, prevention etc. referred to in the section. It has already been argued that this would be an incorrect view of the relationship between award and contract;[70] and in any

67 In the Metal Moulders Award, as reported in *The Age*. Since writing this passage a $1000 fine was imposed on The Federated Moulders (Metals) Union of Australia. The Union has said it will not pay—*The Age*, Friday, October 30, 1970.

68 That this was the intention of the legislators is even clearer when it is noted that regulations introduced in 1967 were implicitly continued for the purposes of the new sanction provisions. These Regulations provide that costs could not be awarded in respect of more than one counsel or in respect of Her Majesty's Counsel, unless the Court itself felt this to be justified. Until this the unions had taken a dim view of the Court hearing applications (frequently undefended) by Queen's Counsel with junior, and have the Court add their costs to the total amount payable by the fines eventually imposed.

69 See report quoted in footnote 67.

70 [illegible]

event, no matter how wide the language of the implementing legislation, it cannot be given effect to when its intended scope stretches beyond its constitutional extent. That is, no prohibition can be read as a valid bans clause where it would not be incidental to the efficient working of the award. None the less this cautionary note is sounded because there have been straws in the wind which suggest that more widely cast bans clauses will be considered valid by the High Court.

In ***Ex parte Transport Workers' Union of Australia***[71] there was a demarcation dispute. The employers obtained the insertion of the following bans clause: "The Transport Workers' Union of Australia shall not, in any way, whether directly or indirectly be a party to or concerned in any ban, limitation or restriction upon the performance of any of the work covered by the foregoing demarcation or any ban limitation or restriction which has the effect of limiting, delaying, preventing or interfering with the performance of such work, whether by preventing the movement or handling of goods to or between ships, terminals or depots or otherwise, and whether any such ban, limitation or restriction as aforesaid involves members of the said Union employed on the work the subject of the foregoing demarcation, or not. If on any day the Union is directly or indirectly party to or concerned in any such ban, limitation or restriction, it shall not, on the next day, continue to be party or concerned in such ban, limitation or restriction. On each and every day on which the Union is party to or concerned in any such ban, limitation or restriction, it shall take all steps within its power to bring such ban, limitation or restriction to an end."

The High Court upheld the validity of this clause even though it made the Union liable to sanctions, among other situations, when it was directly or indirectly involved in a ban on work even when its members could not (because of the terms of the award) do the work. That is, there could be an imposition of a penalty even though the non-performance of work as required by the award was non-performance by employees not members of the Transport Workers' Union.

The same bans clause, it will be noted, also contained a provision that every day in breach of the bans clause was to constitute a new offence. It has been seen that s. 119 (1A) attempts to remove the possibility of several fines for the one course of conduct in contravention of a term of the award. But what if the award prescribes a clause like the one in the ***Transport Workers' Union Case***? The legislature has specifically provided that where a bans clause is to this effect, then s. 119 (1A) shall not apply. That is, a continuing breach may be

71 ***R. v. Commonwealth Conciliation and Arbitration Commission; Ex parte Transport Workers' Union of Australia*** (1969), 119 C.L.R. 529; 43 A.L.J.R. 438. The case was discussed in a different [illegible]

grounds for repetitive fining,[72] the only limitation being that the maximum daily fine has been reduced from 1000 to 500 dollars.[73] This will be of particular importance where the continuing breach is one which takes place before or during the proceedings instituted under s. 32A.[74]

Another potential irritant to unions is that the proceedings under s. 32A are still to be initiated by a party aggrieved, viz. for practical purposes, the employers. This was one of the psychological bones of contention in the implementation of the former sanctions; apparently it remains.

And, finally, it is worth reiterating that the danger to individuals is potentially much greater that it was.[75] This is complemented by the width of s. 32A (1) which makes it possible for an individual to be the one to hinder, prevent etc. performance of work in accordance with the award and, therefore, liable to all the ensuing proceedings. This turn of events is unlikely to eventuate, it clearly not being good industrial sense to have it occur, nor is it within the policy of the legislation that it should occur.

ADDITIONAL NOTES

(i) The new provisions perforce caused some amendments to the structure of the Act. The Industrial Court has lost its power to order compliance with an award, and section 109 has been amended accordingly; it remains possible for the Court to make orders in respect of breaches of the Act.[76] Section 111 (4) also has been amended so that the power to fine under that section is limited to breaches of an order requiring compliance with the Act. Section 109A has been repealed altogether. In addition there is a new s. 41 (1)(c).[77]

72 Section 119 (1c) stops s. 119 (1B) from applying where a bans clause to this effect has been included. As if to emphasize its intent, the legislature enacted a new section 41 (1)(c) which empowers the Commission to "include in an award, or vary an award so as to include, a provision to the effect that engaging in conduct in breach of a specified term of the award shall be deemed to constitute the commission of a separate breach of that term on each day on which the conduct continues".

73 Section 119 (1D)(a)(ii).

74 Section 32A (6) provides that "A certificate ... may relate to conduct occurring before, during or after the proceedings under this section".

75 See discussion of s. 119 at p. 536, *ante*.

76 It was inherent to the reasoning in ***R. v. Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union*** (1951), 82 C.L.R. 208, that a breach of an award was not necessarily a contravention of the Act.

77 The new section is set out above in footnote 72. It replaced a section which gave power to the Commissions to "fix maximum penalties for a breach or non-observance of any term of an award" as discussed at p. 533, *ante*.
Note also that the new penal provisions have been made applicable to orders and awards made by the Flight Crew Officers Tribunal and the Coal Industry Tribunal except that the role of the Presidential Commissioner [illegible]

(ii) Section 113 of the Act still permits an appeal from a judgment, decree, order or sentence of a State Court where such a Court has exercised jurisdiction under s. 119. There is no appeal from the Industrial Court's disposition. In addition, s. 114 has been left substantially unaltered.[78] The result is that it still recites that there is to be no appeal from a judgment, decree, order or sentence of the Industrial Court under ss. 107, 109, 110, 111, 112 or under Part VIII or Part IX of the Act; and, further, that in any other case there shall be no appeal from the Industrial Court to the High Court unless the High Court grants leave to appeal.

This means in effect that where a State Court makes a decision under s. 119 (1), an appeal lies to the Industrial Court. But where the Industrial Court makes such a decision, including one arising out of s. 32A proceedings, there will be such an appeal if the High Court grants leave. Now, in the former of these situations this possible form of appeal has always been available, but the latter situation is novel—a decision under ss. 109 and 111 was expressly made non-appealable by s. 114. It, therefore, seems unlikely that it was intended that the provisions replacing these older sanctions should alter the situation. Hence it is to be expected that the High Court will not grant leave to appeal should there be such an application before it.[79] But the very fact that application can be made to a tribunal which in no way can lay claim to industrial expertise is unfortunate.

(iv) To help the machinery set up, the amendments enable industrial officers who are employed as specialists by the parties to appear before the Industrial Court.[80]

(v) It is patent that if the blanket sanction provisions of the pre-1970 legislation were inappropriate to collective action arising out of political unrest, the new sanctions suffer from the same defect but to a much lesser extent. They too can be made applicable to political strikes, because such strikes interfere with the award-system. But as a Presidential Commissioner has to issue a certificate before penalties can be sought, it is quite probable that it will be hard to satisfy him that it is in the best interest of industrial relations to have employees penalized for political activity in cases where they are not directly aiming at getting greater industrial benefits.

(vi) There remains the fact, however, that even the rather mild anti-collective action provisions now in the legislation are not appro-

78 The words "one hundred and nine A" have been removed, consistent with the removal of s. 109A itself.

79 It might be plausible to argue that, because s. 119 has been deliberately left out of the list of exceptions in s. 114 even though that section was amended in other ways as a result of the 1970 amendments, there was an intention that the High Court should act as [illegible]

priate to dealing with "rights" issues as opposed to "interest" ones. Whether a particular man ought to be promoted in a particular plant, or transferred to another division, creates quite a different kind of industrial problem than demands for better wages, or shorter hours in the industry. The latter is usually organized by union officials and takes some time to develop; the former begins at the shop level, and more often than not, crops up suddenly. In the heat of the argument the responsibility for action falls on the men in the plant. If no quick agreement can be reached a local stoppage or the like may have begun before the professional trade union and employer advocates have been appraised of the problem. At this stage it may well be that organized labour could be held responsible for the men's conduct. Certainly, the new "cooling-off" period may forestall the blowing-up of a minor issue into a full-size eyeball to eyeball confrontation; but the recourse to s. 32A proceedings itself could, in some cases, inflame matters badly. What is really needed is a mechanism to solve on-the-spot problems without recourse to compulsory award procedures.

The ***Tramways Cases*** acted as a catalyst also in this respect. No doubt the peculiarly local aspect of the Pesteranovich affair and its cataclysmic aftermath had some bearing on the nature of the inquiry that the interested parties undertook. The replacement of the contempt sanctions was the major outcome of deliberations. But the parties represented recognized the shortcomings of the scheme in respect of the "rights" kind of a dispute.

The result was the issuing of a paper entitled "*Principles for Guidance in establishing and using effective procedures for avoiding and settling industrial disputes*" after a series of meetings between the Minister for Labour and National Service, the Attorney-General, representatives of the Australian Council of Trade Unions, and the National Employers' Policy Committee. The essence of the guidelines provided was that there should be a pyramid-like structure for consultation between employers and employees. Both these parties, so the suggestion goes, ought to appoint accredited job representatives who would be primarily responsible for ironing out any plant problems that might arise. The employee representative is to consult with the foreman or supervisor in the first instance; if there is no solution, he is to go to the employer representative and arrange a conference with him within 24 hours of notifying him. If still no satisfactory result is reached then the employee representative ought to go to the local union official who can then meet with all the parties including the employer and his representatives including his association's representatives. This is to be continued until the highest level of management of both parties is reached. Help may be sought from a Conciliator, a member of the Arbitration Commission or any other mutually accept-

This suggestion resembles the prototype American grievance procedure. But there the scheme is part of a situation where there is a duty to bargain in good faith and the bargain reached—including the grievance procedure—is enforceable.[81] What chance of success has the scheme here?

The suggestion will only be workable if parties voluntarily agree to abide by it, and do so. If this does not happen, it is merely an attractively packaged, but functionless proposal. To begin with, it is not likely that trade unions will accept that part of the guidelines which asks that during the consultations work is to be continued. Secondly, it is also part of the scheme that the parties should not have recourse to the arbitral system while the consultation is in train. But, if there is a dispute or an impending one, the Commission has a duty to take action. It may well be that a Commissioner will be satisfied that his best course of action is to have the grievance procedures exercised; on the other hand, as the dispute moves to the topmost part of the consultative pyramid, there will often be a danger that industry-wide dislocation might ensue, forcing him to take action. And finally, the scheme is based on keeping out the officials of organized capital and labour as much as possible because their organizations, being centrally organized, ought not to be involved in "rights" disputes. But these officials are professionals and have a vested interest in remaining active. That this is a very sensitive matter is recognized in the paper itself. Paragraph (e) of the paper, after recommending the selection of accredited representatives goes on to say: "Provided that these arrangements would not restrict an employer or a duly authorized official of an employers' organization or a duly authorized official of a union making representation to each other."

Whatever the eventual success of the proposal, it is significant in as much as it recognizes the limitations of anti-strike measures as provided by the sections 32A and 119 proceedings. In the same vein, it is a very important step forward to have had the legislature recognize that savage penalties do not diminish collective industrial action, and certainly do not aid in the quest for better industrial relations.

2. Administrative sanctions

(a) Deregistration

Section 143 of the Act permits any organization or person interested, or the Registrar, to apply to the Industrial Court for deregistration of an organization. The grounds for such application are manifold, but the only one pertinent to the present discussion is found in s. 143 (1)(h) which makes it a ground for application if—

> "the conduct of the organization (either in respect of its continued breach or non-observance of an award or its continued

failure to ensure that its members comply with and observe an award or in any other respect), or the conduct of a substantial number of the members of the organization (either in respect of their continued breach or non-observance of an award or in any other respect), has prevented or hindered the achievement of an object of this Act."

That is, there is no necessity for a bans clause to have an organization or its members interfere with the award for the purposes of this section. It will be noticed that an organization may even be deregistered if it has failed to control its members adequately or even when the members without the organization's express support interfere with the award. It might have been thought that such a sweeping basis for deregistration is not within the scope of legislation implementing s. 51 (xxxv) of the *Constitution,* but note that the bans clauses to a similar effect in ***Ex parte Tramways Workers' Union*** discussed above was upheld as being incidental to the award made. It seems likely that the High Court at present would support s. 143 (1)(h) in so far as it related to breaches of an award.[82]

The intricacies of the section are not worth exploring: deregistration as a sanction against unions is a dead letter. During the period when the anti-strike provisions had been repealed from the Act (1930 and after) deregistration was a fairly popular means of control. It was argued that by permitting themselves to be organized, unions accepted the means of settlement provided by the arbitration machinery. Therefore, if they struck they repudiated their implied agreement and could fairly be put out of the system. But as one writer has put it: "Experience has rather suggested that 'de-registration', though it hurts the union to the extent that the latter loses its power of enforcement of employer obligations and leaves the field open for registration of a new and possibly hostile union, hurts the Court more as the Court's powers of control are exercisable only over registered unions. The technique of de-registration has not been used for some years".[83]

If any proof were needed of this, it is amply provided by the Air Pilots story. As narrated earlier,[84] this organization voluntarily deregistered because it was not satisfied with the system. So keen was the Commonwealth on retaining control that it instituted the Flight Crew Officers' Tribunal.

82 There may be difficulty, however, inasmuch as the section also permits deregistration where the organization offends "in any other respect". This might be too wide a discretion for a judicial body to have; Mills & Sorrell: *Federal Industrial Law,* 4th ed., suggests at p. 438 that perhaps s. 143 (3E) is included to avoid this problem. It permits a Proclamation to be made enabling the Commissioner to deregister organizations on certain grounds.

83 Sykes: "Labour Arbitration in Australia" (1964), 13 *The American Journal of Comparative Law,* reprinted in Isaac & Ford, op. cit., Ch. 13, at pp. 286, 316.

(b) Cancellation of an Award

Section 62 of the Act permits an organization, persons interested, the Attorney-General and the Registrar to apply to the Commission in Presidential Session for the cancellation or suspension of an award in some circumstances, including where there have been breaches or non-observance of the award. The effect of this is that the offenders lose the benefit of the award. Again this is a method which is little used.

(c) Refusal to Arbitrate while Union Strikes or Offends in Similar Way

This is a method sometimes used by a Commissioner and little needs to be said about it.