



THE INDUSTRIAL RELATIONS SOCIETY OF SOUTH AUSTRALIA

President: A. J. Scriven; *Vice-Presidents:* Professor K. J. Hancock, R. E. Hurst, M.P., Commissioner J. H. Portus; *Hon. Secretary:* C. I. Hayes, c/o Apprenticeship Commission, 50 Grenfell St., Adelaide; *Treasurer:* P. M. Warren, c/o S.A. Public Service Association, 73 Wakefield St., Adelaide; *Committee:* L. B. Boves, W. A. Brown, J. W. Cross, Miss C. Henriott, R. E. Penny, F. Weyerly.

THE INDUSTRIAL RELATIONS SOCIETY OF QUEENSLAND

Patron: The Hon. Mr. Justice Hanger.
President: Professor R. C. Gates; *Secretary:* Mr. S. F. McMannus, Box 1382R, G.P.O., Brisbane, 4001; *Assistant Secretary/Treasurer:* M. W. Prideaux; *Committee:* Messrs. S. Jones, W. Ramm, L. Ledlie, L. R. Wall, S. J. MacPherson, N. J. Mansini, J. P. Coneybeer, D. Fisher, F. W. Brown.

THE INDUSTRIAL RELATIONS SOCIETY OF VICTORIA

Patron: Sir Richard Kirby.
President: W. P. Evans; *Immediate Past-President:* A. P. Aird, Q.C.; *Vice-Presidents:* G. Polites, K. W. McDermott, R. D. Williams and A. E. Woodward, Q.C.; *Secretary/Treasurer:* J. F. Currie; *Assistant Secretary:* K. C. Piesse; *Assistant Treasurer:* J. R. Faichney; *Members:* H. H. Bishop, K. W. Hince, Professor J. Isaac, J. Robinson, E. P. Rogan, Dr. I. G. Sharp, K. C. Stone, L. C. Whitwell.

THE INDUSTRIAL RELATIONS SOCIETY OF WESTERN AUSTRALIA

President: D. W. Oxnam; *Vice-Presidents:* G. A. Piesley, Professor I. Bowen; *Hon. Secretary:* P. H. Carville, c/o 569 Wellington Street, Perth; *Hon. Treasurer:* A. Petridis, Faculty of Economics and Commerce, The University of Western Australia; *Committee:* A. G. Barker, F. S. Cross, A. N. Hitchman, D. J. Scott, W. McBeath, J. Currie, A. Jones.

The Journal of Industrial Relations

The Journal of the Industrial Relations Society of Australia

Articles	97	INCOMES POLICIES— <i>Bruce R. Williams</i>
	104	A REVIEW OF DEVELOPMENTS IN INDUSTRIAL RELATIONS 1967/68— <i>A. E. Woodward</i>
	116	VICTORIAN WAGES BOARDS: THEIR ORIGINS AND THE DOCTRINE OF THE LIVING WAGE— <i>P. G. MacCarthy</i>
	135	EXTERNAL FACTORS OF CONTROL IN U.S.A. LABOR UNION LOCALS— <i>Jim L. Munro</i>
	146	INDIAN WORKERS' OPINIONS ON TRADE UNION LEADERSHIP— <i>Norman F. Duffy</i>
	154	NOTES—BOOK REVIEWS
	176	BOOK NOTES—SOCIETY NEWS

Sydney
University
Press

Registered at the G.P.O., Sydney, for transmission by post as a periodical



Legislation and Decisions Affecting Industrial Relations

Editor: C. P. MILLS
University of Sydney

THE METAL TRADES WORK VALUE REVIEW

FOLLOWING THE events recounted in the last issue of the *Journal*¹ in relation to this case, there have been some remarkable developments concerning the application of the award increases to the actual rates of pay ("absorption") and their application to other industries and awards ("flow-on").

The most immediate issue was that of absorption, the unions claiming the benefit of the increases in award rates as well as continuation of the existing differentials between the minimum award rates and the rates actually being paid by the employers, while the employers' organizations asserted that over-award payments should be absorbed in the increases in minimum rates flowing from the December 1967 decision of the Commonwealth Arbitration Commission. Widespread strikes followed, including a one-day stoppage of metal trades employees on a national basis, and employers resorted liberally to the use of the penal provisions of the Conciliation and Arbitration Act. A step, apparently unprecedented in such circumstances, was the blanket order made by the Industrial Court on February 8, 1968, requiring the unions to refrain from any breaches of the bans clause of the Metal Trades Award at any plant within the State of New South Wales.² Both sides took up extreme and intransigent positions, and neither the criticism of the Commission's decision by the Minister for Labour and National Service nor the rain of penalties on the unions contributed anything towards a rapprochement.

The Metal Trades Employers' Association claimed the public interest as justification for its actions: it would be "abdicated its responsibility to its members, to industry and to the community if it failed to use all legal processes available in this situation".³ It was able to boast that by February 16, 1968, it had obtained 52 "no strike" orders in relation to New South Wales; it had laid over 200 contempt charges against unions and had already obtained orders for the payment of fines totalling \$20,000. On a single day, 70 charges of contempt had been listed for hearing before the Industrial Court (sitting in Canberra, on February 13), but the Court stopped the day's proceedings when 20 charges had been heard, hoping that a postponement of the remainder would foster industrial peace, and in respect of the nation-wide one-day strike it halted the fines on each union when the total reached \$1,000. The total of fines on the six unions involved in the charges heard on the day was \$5,350.⁴

The employers had very early taken the question of absorption to the Arbitration Commission. Gallagher, J. and Commissioner Winter had chaired a conference between the parties on December 19 (only eight days after the original decision). On January 25, 1968, the employers formally applied to the Commission for rescission of the December decision, on the ground that the unions were refusing to accept absorption of the new increases and that had been the very basis of the decision. When this application came before Senior Commissioner Taylor on January 31, he adjourned the matter for a hearing before the President on February 6, but in the meantime he exhorted

the parties to call a truce, "a complete one, devoid of threats and counter-threats, of hostile attacks and counter-action". Two days later the unions affirmed the earlier decision to hold a national stoppage on February 6.⁵

On that day, the President of the Commission announced that the employers' application would be heard by a bench of five members of the Commission; in addition to the members who had participated in the first decision (Gallagher, Moore J. and Commissioner Winter), there were added the President himself and Senior Commissioner Taylor. The hearing commenced on February 14 and the decision was given just seven days later.

In the decision of February 21,⁶ the majority took the view that the December decision should be varied to the extent that only 70 per cent of the increases then announced should go into effect for the time being (provided that no increase was to be less than \$1.60). The deferred portion of the increases would take effect from a date to be determined by the bench that will sit in August to hear the next economic case.

This was said to be "an essentially practical decision", an attempt to find a solution to the strikes and disputes which had resulted from the "changed circumstance" that there was to be "neither complete nor partial absorption", a circumstance that had not been known in December. Gallagher, J. dissented from this decision: he thought that the December increases had been soundly based and should be allowed to take effect; in his opinion, over-award payments were matters for private arrangements between the parties, who he thought could reach some compromise if they fully recognized their respective responsibilities.

That appears to have settled the question of absorption. It was hardly a logical decision, nor was it easily reconcilable with the December reasoning of the Commission, but in the circumstances that was probably unavoidable. The short statement by Gallagher, J. evinces both logic and consistency, but whether any compromise could have been reached is now only a matter for conjecture. Certainly, neither side had previously shown the slightest indication of any concession to the other.

From the strictly legal point of view, the most curious aspect of the whole affair has been the effect of the Commission's statements on over-award payments. Such payments are, by very definition, outside the Commission's awards, and yet paradoxically the Commission became involved in a major dispute on these payments. The inferences in the December decision probably sparked off the dispute, because they led the Metal Trades Employers' Association to claim that its actions were no more than attempts "to carry out the Commission's stated intentions".⁷ And the whole basis of the February decision is that these payments shall continue at their previous level, and yet this is left to mere inference from the decision; it is nowhere expressly stated.

As a result, the gap between the award rates and the going rates has not been reduced (although the December decision almost certainly intended that this should be so), and the structure of over-award payments has been greatly strengthened, although they have not been adopted as part of the award.

In relation to the second question—whether there should be any flow-on to other awards—the parties have shown considerably more reasonableness. The nature of the work value exercise undertaken in the Metal Trades Case justified the restriction of the outcome to that award, with the possibility of extension to other cases where comparability of work and conditions was shown. Initial union reaction seems to have been to demand an automatic flow-on to other awards, irrespective of any relationship with the metal trades industries, and initially employers took the line that there should be no

However, the most interesting part of the Court's judgment was its interpretation of the provisions of the award. Their Honours were all agreed that the prohibition against having work done away from the employer's factory extended both to the case where the work was to be done under a contract of employment, and to the case where the work was to be done under a contract which is not a contract of employment; that is, it applies to the letting out of work to any person, whether as an employee or an independent contractor. As to the exception (unless the person holds a permit as an outdoor worker), the Court held that this permit can be issued only to a person who is an employee in the strict sense. The effect of this is that the employer is prohibited from making any contract with any person for the performance of work outside the factory, except a contract with another for the performance of work by the second for the first. This is a startling proposition! Authorities were quoted to show that such a provision might well be justified as a means of preventing the employer from evading his obligation to pay award rates for work done in relation to his business, and it is clear enough that a form of subcontracting will provide a means of evasion of award obligations, but this provision goes much further: it will apply where there is no intention of avoiding any obligations to employees at all. To this extent, it has nothing to do with the relations of employers and employees, and it seems possible that the award is invalid.

The question of the validity of this provision was raised, but the Court refused to determine it, saying that it was bound by s. 60 of the Conciliation and Arbitration Act (award of Commission not to be called in question in any court, and not subject to prohibition, etc., in any court on any account). It seems difficult to accept this reasoning. Section 60 is a private section, cast in the widest possible terms which, on the face of them, apply to the High Court of Australia; to the extent that the section purports to prevent that Court from reviewing the validity under the Constitution of an award made by the Commission, the section will be ineffective.³⁴ Joske, J. justified his adherence to the view expressed on this point by his colleagues by saying that the section was a limitation on the jurisdiction of the Industrial Court and it was bound by this limitation, but the words of the section are not expressly directed to a limitation of the jurisdiction of the Industrial Court, nor of any court. The section purports to apply to *all* courts, and its operation is one of protecting the Arbitration Commission from *any* form of judicial review of its actions; it appears simply to shut the judiciary out from what is essentially part of the judicial function.

The second case concerned commission agents engaged by the Western Australian Totalizator Agency Board to operate its agencies throughout the State.³⁵ The interesting aspect of this case was the almost schizophrenic attempt on the part of the board to produce a contract that would give it the most detailed control over the actions of the agent and yet leave itself free of the responsibilities that would accrue to it if it were the employer of the agent. In one agreement, the agent was made responsible for all persons employed in the agency; these were to be servants of the agent, not of the board, but the agent could not engage or dismiss any such person without the approval of the board, which might also require the agent to dismiss any person employed in the agency. The operating manual issued to the agents stated in its introduction that the instructions it contained were for the information of board "employees" only and were confidential, but the agent was required to ensure that the manual was available to the agency staff for

reference at all times; any instruction issued by the office was considered to have been communicated to "an employee" when it has been "published" in the manual or any amendment thereof. Commissioner Cort, of the W.A. Industrial Commission, had little difficulty in deciding that the agent was an employee of the board.

The contract which the board had drafted for the engagement of its agents did not really assist its case: it required the agent strictly to observe all operating procedures and systems, administrative instructions and other directions and rulings made or laid down by the board; to use only such stationery as the board provided or approved, and to be in personal attendance during the hours that the agency was required by the board to be open for business. But the board apparently was not much concerned with the terms of its own agreements: there were in fact two standard forms of agreement, one signed by two-thirds of the agents, the other by the remainder, and the board had acted as if all had signed the same agreement; it had purported to vary the agreed method of calculating the remuneration of the agents (to the benefit of some, but to the detriment of others) by mere notification to the agents, and it had effected other unilateral alterations of the agreed terms. All in all, it had shown itself rather contemptuous of the contractual rights of those who it now claimed were "independent contractors" with it, and the Commissioner was hard-pressed to find any area in which the agent was free to exercise his independent discretion to any substantial degree.

STRIKE LAW

Several strikes by employees in the State's electricity generation system recently prompted the introduction in the Victorian Parliament of an amendment to the Essential Services Act. The previous penalties on union officials, striking employees and persons inciting strikes in State services had been found to be nugatory in the case of short sudden strikes, because of the proposals sought to remove the latter provisions. The amending bill was narrowly defeated in the Legislative Council.³⁶ Strikes by painters and dockers employed at the State Dockyard, Newcastle, despite the efforts of the union to avoid such incidents, led the Commonwealth Arbitration Commission to include in the award a bans clause directed to individual members of the union employed at that establishment.³⁷ Commissioner Horan, in his decision in this matter, drew attention to amendments to the Conciliation and Arbitration Regulations in March 1967, and suggested that these amendments demonstrated an intention that bans clauses might be made so that they bound individual employees to refrain from strike action in appropriate cases.

It is comparatively rare for provisions against strikes to impose a penal liability on the striking employees themselves. The two instances mentioned above are no doubt special cases: the first was an attempt to deal with a case which seriously affected the public interest, and in the second it was apparent that the strikes were occurring in spite of, and not because of, union activity. However, the threat of direct penalties on the employees, as a sanction against strike action, may prove to be somewhat impracticable. Even where union members strike in defiance of union policy, it would be difficult to imagine the union remaining neutral in the face of prosecution of its members by employers.

REFERENCES

1. Page 54.
2. 1968 A.I.L.R. Rep. 28.