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argued that disputes in the Pilbara iron ore industry displayed certain regular properties and that these were contingent upon the prevailing sectional autonomy profile of management-labour relations which characterises this industry.

The analysis and subsequent discussion concerning long term industrial relations reform were predicated on the assumption that there were sufficient reasons and opportunities for reconstruction. While the industrial disputes pattern points towards such a conclusion a more penetrating investigation into this issue might be helpful especially if one or more of the parties see little need for change.

There is some evidence to suggest that serious obstacles might lie in the path of industrial relations reform in this industry. It was noted in passing that, on both management and labour sides, dissension and divisiveness were not uncommon. Nor is it clear that the industrial relations function is accorded sufficient authority within management hierarchies. It is therefore possible that industrial relations reform in the industry must await resolution of internal organisational problems experienced by the respective parties.

These considerations lead to two final points: what role, if any, might independent researchers play in attempts to improve industrial relations in the Pilbara? And, to what extent is reform possible without the restructuring of industrial relations more generally? I believe that researchers can make a substantial contribution to reform by acting in a catalytic resource capacity. Briefly, this function would entail the conduct of research which focused on problems on which the parties *jointly* required further information and analysis. In addition, the researchers might also aid the parties (again jointly) to clarify various policy options and fashion their strategies accordingly. Indeed, the research team might have a useful role to play in resolving, through constructive mediation, the intra-organisational difficulties referred to above. Of course, the parties will have to be extremely careful in selecting a research team and a further implication worth noting is that the role of the researchers should not in any way detract from the role of the Industrial Commission whose prime function is to prevent and resolve *current* industrial disputes.

Finally, at this stage it is impossible to say whether industrial relations reform in this industry requires changes to the Western Australian or Commonwealth legal framework. Certainly, legal impediments to reform do exist, for example, the law relating to union amalgamation and the continuing, though reduced, emphasis on compulsory third party intervention in industrial relations. These factors do not encourage professionalism in the field of management-labour relations. Thus, if more comprehensive reforms are required it is time for politicians, the media and other influential groups to play a constructive role in fostering negotiations between employers and representatives of the trade union movement on a much broader front. Decrying the high incidence of strikes *per se* is really quite pointless.

The Application of Industrial Torts in Australia

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The Swanson Committee's proposition that common law actions in tort are "dead-letters" in practice, even though they are still available for use in theory, is examined in this paper. Tort law tends to indicate that there are five essential ingredients which are necessary to procure a breach of contract. Other industrial torts may be brought for interference with economic relations or loss of services and, while this type of tort is out of date, it can still apply. Tort action for civil conspiracy or intimidation also provides areas of relevance for industrial activity. As a result of this analysis the author questions the accuracy of the Swanson Committee's proposition. The conclusion notes that many areas of union activity not "caught" by the Commonwealth Conciliation and Arbitration Act, the Commonwealth Crimes Act and the New South Wales Crimes Act may in fact be "caught" by the 1974 Trade Practices Act which, the author contends, opens up a whole new area of statutory liability for unions.

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The purpose of this paper is to pursue the comments made in the Swanson Committee's *Report to the Minister for Business and Consumer Affairs on the Trade Practices Act* where it was said that:

> There are some common law actions in tort which might, in theory, be available but these are in most cases dead-letters in practice.

Is this a fair summation of the current position?

Common law actions in Australia may have less application than in the United Kingdom because of the conciliation and arbitration machinery. However, the so-called industrial and economic torts of procuring breach of contract, interfering with economic relations, conspiracy and intimidation have recently had their expanding and healthy existence indicated by the courts. Moreover, the High Court recently spelt out circumstances where recovery was allowed to a person who suffers harm and loss as the consequence of unlawful, intentional and positive acts of another.[1] There is no shortage of authority for the proposition, therefore, that the industrial torts are far from dead-letters in practice.

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1. *Beaudesert Shire Council v. Smith* (1966) 120 CLR 145 at 155-156.

Possibly, the Committee's comments should be read in the light of the alternative remedies available for fact situations that may come within those covered by the industrial torts. Indeed, these are many. There is the system of compulsory industrial arbitration under the *Conciliation and Arbitration Act* 1904 (Cth.); there are the remedies afforded by the state and federal *Crimes Acts* and, as from 1977, there are sections in the *Trade Practices Act* 1974 (Cth.) that are designed to catch fact situations that would be also actionable in tort. Dead-letters? In the writer's opinion, the position today is far from that described by the Committee.

Procuring Breach of Contract

Consider the following example: Company A dismisses a politically active employee. He is employed by Company B, but Company A persuades suppliers of Company B not to deal with Company B until the employee is dismissed.[2]

Tort law provides a remedy in this situation for interference with contractual rights in an action known as the *Lumley v. Gye*[3] tort (that of procuring breach of contract):

> A violation of a legal right committed knowingly is a cause of action, and . . . it is a violation of a legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.[4]

The facts of *Lumley v. Gye* involved a contract between a Miss Johanna Wagner and the plaintiff under which Miss Wagner undertook to perform at the plaintiff's theatres exclusively for a contracted period. The defendant, with malicious intent, enticed Miss Wagner to abandon the contract and to abandon performances at the plaintiff's theatres. The cause of action therefore was that the defendant had "maliciously intending to injure plaintiff . . . enticed and procured (Miss) Wagner to break her contract with plaintiff". The action was successful. The case has become authority for the proposition that if a third party procures a breach of contract, whether with malice or not, the third party will be liable to the party injured by the breach of contract.

The example given above would indicate a procuring of a breach of contract at common law, as well as under the new sections of the *Trade Practices Act* 1974 (Cth.),[5] because Company A has procured breach of contract by the suppliers of Company B.

2. B. G. Donald and J. D. Heydon, *Trade Practices Law, Restrictive Trade Practices, Deceptive Conduct and Consumer Protection*, Vol. 1, Law Book Co., Sydney, 1978, p. 481.
3. (1855) 2 El & Bl 216.
4. Per Lord Macnaughten in *Quinn v. Leathem* [1900] AC 495 at 510; quoted in *Brimelow v. Casson* [1923] All ER 40 at 46 per Russell J.
5. s45D. See below.

For the procuring of a breach of contract to be actionable, there are a number of "essential ingredients" recognised by the courts:

(1) There must be a breach of an existing contract and the contract interfered with must be enforceable and valid. For example, in the *Daily Mirror Case*,[6] the National Federation of Newsagents, Booksellers and Stationers sought to blackban the *Daily Mirror* because of a proposed reduction in newsagents' margins on a proposed price increase. One question was whether there had been a direct inducement, but it was held that where A (the newsagents) uses B (their retailers' federation) to communicate the inducement to C (the publishers), there had been sufficient direct intervention to constitute direct interference.

Lord Denning put it thus:

> It seems to me that if anyone procures or induces a breach of contract, whether by direct approach to the one who breaks the contract or by indirect influence through others, he is acting unlawfully if there be no sufficient justification for the interference.[7]

(2) There must be an actual interference with the contractual relationships and no action will lie, despite extreme pressure, if no breach of contract results. There must, therefore, at common law, be breach of an actual contract.

This proposition has been confused by the recent case of *Torquay Hotel Co. Ltd. v. Cousins*.[8] In that case, an injunction was granted against a union which was causing a supplier (Esso) to stop supplies (oil) to the union's target under a standing contract. Despite the fact that there was no actual breach of contract because of a clause in the contract,[9] the mere fact that a breach of contract was intended was found to be sufficient to create liability on the part of the union. In other words, because of the interference with the contractual relations, the union was held liable.

This case has been the subject of much academic discussion, concluding with the proposition that the tort of interference with contractual relations has been widened because in this case relief was given even though there was no breach of contract.[10]

But was it? One writer states the position of *Torquay* boldly:

> It is only Lord Denning who can be said to have introduced anything new into the law relating to the tort; and the law cannot be relied upon for

6. *Daily Mirror v. Gardner* [1968] 2 QB 762.
7. *Ibid.*, 781.
8. [1969] 2 Ch. 106; see also *D. C. Thomson & Co. Ltd. v. Deakin* [1952] Ch. 646.
9. The *force majeure* clause: "neither party shall be liable for any failure to fulfil any term of this agreement if fulfilment is delayed, hindered or prevented by any circumstance whatever which is not in their immediate control including . . . labour disputes".
10. Glasbeek, H. J., *Lumley v. Gye—The Aftermath* (1975) 1 Mon. LR 186 at 202; Heydon, J. D., *The Future of the Economic Torts* (1975) 12 UWAL Rev. 1, 3; K. W. Wedderburn and P. L. Davies, *Employment Grievances and Disputes Procedure*, University of California Press, 1969, p. 120.

> the . . . propositions attributed to it by such writers as Wedderburn, Heydon, Sykes or Glasbeek.[11]

In other words, there was a threatened breach of contract (oil had been ordered from Esso, striking workers refused to allow its delivery, this would lead to breach of contract on the part of the plaintiffs).

(3) The defendant must know that such a contract exists. As "an act of inducement is not by itself actionable", there must, therefore, be an intentional invasion of contractual rights; negligence of itself will not suffice. The act of inducement, however, may be either indirect or direct. Where there is indirect inducement, it is more difficult to show the defendant knew of the contract. But to be actionable, the means used must have been unlawful in themselves. For example, in *J. T. Stratford and Son Ltd. v. Lindley*,[12] the means used were those of a blackban or secondary boycott. Action was taken by the plaintiff (chairman of the board of the employer) against the defendants (officers of a trade union) for their order to their members to "blackban" the plaintiff's business which, as a result, came to a standstill. Damages and an injunction were sought for injury caused and they were granted. Exact details of the plaintiff's contracts interfered with were unknown by the union, but it was said to be "unreasonable to infer" that the union knew contracts would be breached as a result of the "blackban".

However, not every use of unlawful means will lead to tort liability. In *Allen v. Flood*,[13] the principle stated was that it is not actionable for a person to threaten to do what he is legally entitled to do, whether his motives are inspired by malice or not. That case is authority for the proposition that, at common law, a spiteful interference with the trade of another is *not* actionable at common law if no unlawful means have been used.

The unlawful means used to threaten to injure trade or business are in effect those applying to unlawful interference such as procuring another person to break a contract with an employer, or using fraud to cause damage.

Breaches of statute may also amount to unlawful means giving rise to tort liability: this leads to the possible application of this tort in Australia today.

On the other hand, the means used to interfere with contract may be direct. The principle adopted by the law is that the means giving rise to direct interference need not be, in themselves, unlawful. Hence, the example can be cited of the situation in *Lumley v. Gye*, where the employee was encouraged to break her contract with the plaintiff.

(4) The breach or threatened breach must flow from the defendant's

11. Owen, G. A., *Interference with Trade—the Illegitimate Offspring of an Illegitimate Tort*, (1976) 3 Mon. LR 41 at 64.
12. [1965] AC 269.
13. [1898] AC 1.

conduct and, moreover, damage must be proved. What damages will be included in assessment?

In *Jones v. Fabbi*,[14] a recent Canadian decision, there was a breach of contract by the defendants causing business losses to the plaintiff. *McGregor on Damages* was quoted on the question of assessment of damages:[15]

> The primary protection afforded by the tort ushered in by *Lumley v Gye* is against business losses; business men cannot complain of injured feelings alone. If, however, pecuniary loss is shown, then *Pratt v British Medical Association*[16] is authority for allowing, in addition, damages for non-pecuniary loss.

Damages were not awarded, however, to include loss to the plaintiff for repossession of a truck used in his business on the *Wagon Mound* test:[17] that was not reasonably foreseeable. But foreseeable loss of profits from lost business contracts was recoverable in damages.

Malicious intention has proved to make an otherwise lawful act unlawful. In *Allen v. Flood*[18] the union involved requested of the employer the dismissal of members of a competing union. The request was granted; action was brought by dismissed employees with no success, on the basis that the actions at all times were lawful.

(5) The technical requirements of this tort can be easily fulfilled. The difficulty facing the law in this area (without legislative intervention) is therefore to balance genuine union or industrial activities with the preservation of law, order and individual liberties. With most strikes being illegal by statute in New South Wales, and all other states except Victoria, the unlawful act required to establish the tort of inducement of a breach of contract can be easily come by.[19]

Interference with Economic Relations

Consider the following example: A, an employer, is wrongfully deprived of his servant B's services.

Another "industrial tort", separate but linked to the one discussed above, is that of the liability arising in tort for interference with economic

14. (1973) 37 DLR (3d) 27.
15. Per Hinkson J. at 34, quoting from 13th ed., 1972 at 893.
16. [1919] 1 KB 244.
17. *Overseas Tankships (UK) Ltd. v. Morts Dock and Engineering Co. Ltd.* [1961] AC 388.
18. [1898] AC 1.
19. For recent examples of damages awarded for the tort of interference with contractual relations, see *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1976) 69 DLR (3d) 114; *Woolley v. Dunford* [1972] 3 SASR 247. See also Noel Latham's case (as yet unreported; *The Australian*, February 25, 1978, p. 1) where an order was made by Lee J. in the Supreme Court of New South Wales ordering the Federated Municipal and Shire Council Employees' Union from, *inter alia*, doing or causing to be done any act which was calculated to bring about the termination of the plaintiff's employment.

relations or loss of services. This action is a feudal relic, deriving from an employer's action in trespass for interference with property; in time, this became liability for interference with the employer's right to the employee's services.

The modern trend has been to narrow this tort because it has been thought to be out of touch with the modern world.[20] Progressively, this body of law has fallen into disuse: for example, actions for enticement of a spouse were characterised by Diplock L.J. as "no more than legal fossils incapable of further growth beyond the point of binding precedent".[21] But the trend has been to limit cases to those where the master loses the services of a servant through injuries received by the servant.[22] To that extent, therefore, this tort, of feudal origin, is still alive in Australia today.

Civil Conspiracy

Consider the following example: Company A makes threats not to honour contracts with Company B because of (for example) political views held by Company B (an unlawful act by unlawful means).

Conspiracy as a tort arises from a combination of which the "real purpose . . . is the inflicting of damage on A as distinguished from serving the bona fide and legitimate interests of those who so combine" which results in damage to A.[23] The common law definition of the tort is that of Willes J. in 1868:

> A conspiracy consists . . . in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means.[24]

There are two facets of the tort: two or more persons combining

(1) to commit an unlawful act by unlawful means is actionable; likewise
(2) two or more persons combining to commit a lawful act to injure the plaintiff in his trade or business.[25] In the first instance, the focus is on the means; in the second, it is on the end.

These will now be considered separately:

(1) In an unlawful act by unlawful means, if the act itself is a tort (e.g., intimidatory threats to break contracts as in *Rookes v. Barnard*,[26] or by

20. For example, per Denning, L.J. in *IRC v. Hambrook* [1956] 2 QB 641 at 660; *Eleventh Report of the Law Reform Committee for Scotland*, (Cmnd. 1997), 1963.
21. In *Pritchard v. Pritchard v. Sims* [1967] P 195, 209.
22. *Attorney-General for New South Wales v. Perpetual Trustee Co.* [1955] AC 457 at 484.
23. *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] AC 435 at 443 per Viscount Simon L.C.
24. *Mulcahy v. R.* (1868) LR 3 HL 306 at 317.
25. *Quinn v. Leathem* [1901] AC 495 at 510 per Lord Macnaughten.
26. [1964] AC 1129.

procuring breaches of contract,[27] or a crime) a combination to procure it and to injure the plaintiff will be actionable.

Where the conspiracy is to commit a statutory offence, action for the tort of conspiracy would be an easy matter to bring in Australia in view of the large body of statutory regulations governing industrial law. In other words, the "unlawful means" giving rise to the tort have been created and expanded by statute. Many examples could be given: an agreement by a union to breach a bans clause[28] (making the unionists liable), or an agreement by a union to strike.[29] For example, in *Williams v. Hursey*[30] the High Court held it to be a conspiracy where unlawful means were used by a trade union which infringed legislation[31] on collective bargaining. In this case, the Hurseys, father and son, members of the Hobart branch of the Waterside Workers' Federation, refused to pay a levy imposed by the branch to support the ALP. Their membership of the union was terminated; when called up for work by the Australian Stevedoring Industry Authority, direct action was taken by the union—picketing, assaults, threats and the like. The Hurseys were dismissed from employment as a result and they sought damages. It was held they did have an action for conspiracy based upon actions pursuant to a combination to prevent them by unlawful means from presenting themselves for employment.

Or consider another High Court decision on this point: *True's Case*.[32] In this case, a unionist alleged that he had been invalidly suspended from membership and that the union leaders had "conspired and combined to do the acts alleged with intent to injure him and to coerce his employer not to employ him further".[33] Damages were awarded in tort, because it was shown that the union leaders' intentions were the dismissal of the plaintiff or his enforced resignation. The means used was a strike, and because a strike was unlawful under Western Australian law, the threat was therefore that of an unlawful act:

> A combination to threaten and if necessary carry out an unlawful act as a means of securing an end is actionable as civil conspiracy.[34]

A combination to effect a breach of contract also comes with the first class of conspiracy: i.e., unlawful means to achieve an unlawful purpose.

27. For example, *Daily Mirror Newspapers Ltd. v. Gardner*, footnote 6; *Stratford v. Lindley*, footnote 12.
28. *Conciliation and Arbitration Act* 1904 (Cth.) s119.
29. In contravention of *Industrial Arbitration Act* 1940 (NSW) s99.
30. (1959) 103 CLR 30.
31. *Stevedoring Industry Act* 1956 (Cth.).
32. *Coal Miners' Industrial Union of Workers of Western Australia, Collie v. True* (1959) 33 ALJR 224; for recent Canadian examples to the same effect, see *Mark Fishing Co. Ltd. v. United Fishermen and Allied Workers' Union* (1972) 24 DLR (3d) 585. See also *Edinburgh Developments Ltd. v. Vanderlaan* (1974) 43 DLR (3d) 354.
33. *Ibid.*, per Dixon C.J. at 225.
34. *Ibid.*, per Dixon C.J. at 227.

In *Rookes v. Barnard*,[35] the House of Lords put breach of contract into the class of illegality, leaving a combination to cause a breach of contract as an actionable conspiracy. In this case there was a coercive threat by the members of the Association of Engineering and Shipbuilding Draughtsmen to strike against the employer, BOAC, if a non-unionist claimed damages from the respondents (two fellow employees and a non-employee who was a divisional organiser of the union) for using unlawful means to induce BOAC to terminate his contract of service and for conspiracy to do so.

The appellant employee was successful for he was held to have established a cause of action against the respondents based on the tort of intimidation. Accordingly, a party to the conspiracy could be held liable even if not a party to the contract, as with the union organiser in *Rookes v. Barnard*.[36]

(2) Where two or more persons combine to commit a lawful act to injure the plaintiff in his trade or business (i.e., a conspiracy to injure) they come under the modern law on this point which was laid down by the House of Lords in the *Crofter's Case*:[37]

> Lord Cave L.C. in *Sorrell v Smith*[38] when what he called 'the famous trilogy of cases . . .'[39] were submitted to a close examination . . . formulated as a result two propositions of law which he stated as follows:
> '(1) A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.
> (2) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.'

Legitimate objects have been held to include commercial objects, such as in the *Mogul Case*.[40] In that case, an association of shipowners combined to obtain a monopoly of the China tea trade by "predatory price cutting", i.e., they deliberately undercut the plaintiff and threatened his agents with boycott. The plaintiff was driven from the market. This conduct was upheld by the House of Lords, affirming the Court of Appeal decision:[41] that action for conspiracy would not lie. There was no evidence of personal ill-will or malice, and the interest being protected, trade and competition, was upheld by the Courts.

35. See footnote 26. See also *O'Brien v. Dawson* (1942) 66 CLR 18; *PTY Homes Ltd. v. Shand* [1968] NZLR 105.
36. See footnote 26. Note, however, the *Trade Disputes Act* 1906 (UK) and the *Trade Disputes Act* 1965 (UK). These statutes protect from liability acts done pursuant to the trade dispute. Section 1 of the 1906 Act is substantially enacted in Queensland as s72(1) of the *Industrial Conciliation and Arbitration Acts* 1961-1964: "An Act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of an industrial dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable." The effect is therefore to protect industrial activity, in the UK and Queensland from the judicial sanctions imposed. However, it does not protect intimidation: *Rookes v. Barnard.*
37. *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] AC 435 at 441, 442 per Simon L.C. (Combination between union officials and employers to prevent union members handling supplies for a competitor upheld as valid as protecting legitimate trade interests.)
38. [1925] AC 700, 711, 712.
39. *Mogul Steamship Co. v. McGregor, Gow & Co.* [1829] AC 25; *Allen v Flood* [1898] AC 1; *Quinn v. Leathem* [1901] AC 495.
40. See footnote 39.

In the second of the trilogy, *Allen v. Flood*,[42] action was taken by the plaintiff shipwrights who were dismissed by their employers at the instance of a union objecting to their continued employment. The defendants were the union officials; the reason for dismissal was in effect that of demarcation or preference to unionists. The trial judge and the Court of Appeal gave judgement for the plaintiffs, but the decision was reversed by the House of Lords on the basis that no unlawful means had been used to gain the plaintiff's dismissal. Nor was there evidence of malice on the part of the union. "Competition in labour"[43] was held to be analagous to competition in trade (*Mogul* style) and a justified end.

In the third case of the trilogy, *Quinn v. Leathem*,[44] the intention of the combination was clearly to injure. Union officials had demanded the plaintiff discharge non-union labour employed by him. The officials intervened further and demanded one of the plaintiff's customers withhold supplies (by threatening to call out the supplier's unionist employees). The plaintiff succeeded on the basis that the union officials had maliciously conspired to have the supplies withheld. The situation was put by Lord Lindley thus:

> The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members.[45]

Shouldn't this decision be criticised on the basis that it overlooks a legitimate aim of unionism, that of union solidarity and monopoly, an aim surely as valid as the economic aim in the *Mogul Case*?

McKernan v. Fraser[46] shows a later view of what the Courts define as a legitimate aim for a union. In this case, officials of the established union, the Federated Seamen's Union, sought to defeat a breakaway movement, the Australian Seamen's Union, by encouraging an employer to refuse employment to employees identified with the new movement as well as being unfinancial in the established union. This was held to be a legitimate object of the established union. No malice could be found; rather, the aim of the unionists was to secure solidarity.

41. (1889) 23 QBD 598.
42. [1898] AC 1.
43. *Ibid.*, 164 per Lord Shand.
44. See footnote 39.
45. *Ibid.*, 536.
46. (1931) 46 CLR 343.

To convert a combination into an unlawful conspiracy at common law would, in the opinion of Evatt J., take therefore some malevolence: the combination must have been entered into with " 'disinterested malevolence' or something closely thereto".[47]

Civil conspiracy survives, therefore, as a tort independent in itself. This proposition was stated by Atkin L.J., in 1921:

> It appears to me to be beyond dispute that the effect of the two decisions of *Allen v Flood* and *Quinn v Leathem* is this: that on the one hand a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise unlawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another.[48]

This proposition was quoted in a recent article on the separate existence and/or the continued survival of civil conspiracy.[49] The author noted[50] that conspiracy by lawful means will be difficult for any plaintiff to prove in view of the wide definitions given by the Courts to legitimate interests. In fact, in *Allen v. Flood* the Court said that the best protection for a plaintiff would be that "against spite and malice the best safeguards are to be found in self-interest and public opinion".[51] Conspiracy by unlawful means, however, has proved to be more effective for the plaintiff in view of the wide view of "unlawful means".

Intimidation

Consider the following example: because of C's political views, A threatens an unlawful act against B unless B injures C.

In addition to the three "industrial torts" discussed above, the situation where one person threatens to commit an unlawful act in relation to another person is actionable as the fourth industrial tort, the tort of intimidation. Coercion of a person by threats of violence or other illegal means which result in loss to the other party, or to a third party, makes up the gist of the tort. The tort requires evidence of intention; the plaintiff must be the person intended to be injured by the defendant.

The existence of the tort was recently confirmed or, as one writer put it, "discovered"[52] in *Rookes v. Barnard*,[53] where the plaintiff was able to

47. Per Cardozo C.J. in *Nann v. Raimist* (1931) 255 NY at 319; quoted by Evatt J., *ibid.*, 410.
48. *Ware and De Freville Ltd. v. Motor Trade Association* [1921] 3 KB 40 at 90, 91.
49. Heffey, P. G., *The Survival of Civil Conspiracy: a Question of Magic or Logic* (1975) 1 Mon. LR 136 at 145.
50. *Ibid.*, 185.
51. See footnote 18 at 152, 153 per Lord Macnaughten. See also *Latham's Case*, footnote 19 where an order was made against the defendant union restraining it from conspiring to injure the plaintiff in his employment.
52. Davidson, A. P., *The Skeleton in the Cupboard; Master and Servant Legislation and the Industrial Torts in Tasmania*, (1977) Tas. LR 117 at 138.
53. See footnote 26.

recover against fellow-employee officials of the union, and against the non-employee union official, for conspiracy to commit the tort of intimidation against him.

There are a number of requirements for the tort to be proved:

(1) Where a threat is given, it must put extreme pressure on the person at whom it is aimed to take a particular course of action;[54] i.e. the threat must be of the "or else" kind.[55] The coercive element is what distinguishes a threat from a warning—for example, in *Rookes v. Barnard*[56] there was a threat that the BOAC employees would come out on strike if the plaintiff was not dismissed. This was more than a warning. Other cases, like *Huntley v. Thornton*[57] and *Stratford v. Lindley*[58] show there is no intimidation where the union official informs an employer the men may strike.

(2) The act itself and the means must be illegal. There is no intimidation if the act threatened is lawful.[59] Accordingly, in *Morgan v. Fry*[60] the Port of London Authority was held to be entitled to dismiss the employee Morgan and the means (strike) adopted by Fry on behalf of the union were valid and lawful as a strike notice had been given of the required statutory duration. No illegal means were used, as in *Rookes v. Barnard*; accordingly Rookes succeeded while Morgan failed.

There are many examples of illegal means being used that can give rise to the tort of intimidation: a "stop list" by a trade association,[61] or, for example, a threat to strike contrary to the provisions of a bans clause.[62]

(3) To prove intimidation, there must be evidence that the person threatened has complied with the threat.[63]

(4) Can otherwise intimidatory conduct be justified in view of the definition of intimidation as the threat of illegal actions? In one recent case,[64] Lord Denning remarked that union officials may be justified in applying pressure to an employer to have a "troublemaker" removed. But the question of justification awaits further judicial definition. The position of intimidation under the common law in Australia is marked with "ominous potential"[65] because of the prevalence of anti-strike legislation and the absence of any

54. Per Lord Herschell in *Allen v. Flood* [1898] AC 1 at 29.
55. Per Turner P. in *Huljich v. Hall* [1973] 2 NZLR 279 at 288.
56. See footnote 26.
57. [1957] 1 All ER 234.
58. See footnote 12.
59. Per Lord Wright in the *Crofter Case*, footnote 37, at 467.
60. [1968] 2 QB 710. See also *Pete's Towing Services Ltd. v. Northern Industrial Union of Workers* [1970] NZLR 32.
61. *R. v. Denyer* [1926] 2 KB 258.
62. *Conciliation and Arbitration Act* 1904 (Cth.) s32.
63. *Morgan v. Fry*, footnote 60, at 724 per Lord Denning MR; *J. T. Stratford & Son Ltd v. Lindley* [1965] AC 269 (footnote 12); *Huljich v. Hall*, footnote 55 at 285, 286 per McCarthy J. (CA).
64. *Cory Lighterage Ltd. v. TGW* [1973] 2 All ER 558.
65. J. G. Fleming, *The Law of Torts*, Law Book Company, Sydney, 5th edition, 1977, p. 687. See also *Latham's Case*, footnote 19 where an order was made against the defendant union restraining it from intimidating the Council (employer) so as to cause it to terminate its contract with the plaintiff.

tort immunity for industrial action. Fleming suggests that not every street march can lead to tort liability in intimidation; rather, there must be more—such as stronger tactics to coerce submission. But the fact of the existence of the tort of intimidation is not in question.

Do the Industrial Torts Apply in Australia Today?

The common law position has been extensively discussed in the preceding parts of this paper.

The question raised by the heading of this part derives from the words of a recent legal investigation committee appointed by the Commonwealth Government. The Swanson Committee,[66] in its *Report to the Minister for Business and Consumer Affairs on the Trade Practices Act 1974 (Cth.)* in considering the effect of anti-competitive practices on traders imposed by employees or unions—i.e., the fact situations considered above giving rise to tort liability—described the common law position thus:

> There are some common law actions in tort which might, in theory, be available but these are in most cases dead-letters in practice.[67]

Conduct of the type described in the four sections above will in fact be caught by the following legislation in New South Wales:

(1) *Conciliation and Arbitration Act* 1904 (Cth.)
(2) *Crimes Act* 1914 (Cth.)
(3) *Trade Practices Act* 1974 (Cth.)
(4) *Crimes Act* 1900 (NSW)

This legislation does not necessarily replace the common law principles raised above; but as a matter of practicability, statutory remedies may provide a more clearly defined path for the litigant because, as valid as the common law remedies may be, Australia does have a system of compulsory conciliation.

The statutory remedies are discussed below.

The Conciliation and Arbitration Act 1904 (Cth.)

The Act does provide machinery for the preservation and enforcement of awards of the tribunals. Because of its operation, the common law remedies have not evolved in Australia as they otherwise may have: this point was adverted to by Evatt J. in *McKernan v. Fraser* where he noted the tort of "conspiracy to injure" had seldom arisen because of the system of compulsory industrial arbitration, and the imposition of penalties on strikes.[68]

There is no doubt the industrial torts continue to exist, even though they may have fallen into some disuse in the face of the Act. Remedies are

66. *Trade Practices Act Review Committee, Report to the Minister for Business and Consumer Affairs*, AGPS, Canberra, 1976 ("The Swanson Report").
67. *Ibid.*, p. 86.
68. (1931) 46 CLR 343 (footnote 46 at 380). These dicta were approved in *PTY Homes Ltd v. Shand* [1968] NZLR 105 at 109 per Haslam J.

provided by the Act that would strike at the situation enumerated above, viz., procuring a breach of contract, interference with economic relations, conspiracy or intimidation.

For example, s138 proscribes an incitement to boycott an award. More specifically, the section imposes a penalty[69] on any officer of an "organisation" interfering with the operation of the award system. The validity of the section was upheld by the High Court in 1954 where it was said[70] that provisions on strikes and lockouts were supported by the Commonwealth's power incidental[71] to its industrial power.[72]

Fact situations that would give rise to some or all of the industrial torts have often been dealt with under s138. For example, in *Pegg & Taylor*[73] a union official was charged under s138 for encouraging members of the union "to adopt a practice in relation to the work being performed by them . . . where the result would be a tendency to restrict output".[74] As a result, for example, one boner took twenty-five minutes to sharpen his knife! The offence was found proved and the defendant official fined £40. No defence under s138 was successful. No justification was conceded by the Court, not even the fact that a system of work prohibited by the award was going to be introduced by the employer!

Cases therefore show little restriction on the conduct that can be caught by s138. Fact situations such as secondary boycotts,[75] procuring a breach of contractual relations,[76] civil conspiracy[77] and intimidation[78] clearly would be caught by s138.

Moreover, s138 punishes individuals, not unions.[79]

Whether strikes and lockouts can be covered by Commonwealth legislation was raised in 1935.[80] A clause preventing "direct action" was inserted in the award by the employer. Evatt and McTiernan JJ. took a strong stand against the validity of the clause described by them as "without precedent in the history of Commonwealth arbitration".[81] They held the clause to be void as not falling within the settlement of the dispute between the parties:[82]

69. s138(i)(e)—$400.
70. *Australian Boot Trade Employees' Federation v. Commonwealth of Australia* (1954) 90 CLR 24 at 40 per Dixon J.
71. Commonwealth Constitution s51(39).
72. s51(35).
73. (1959) 1 FLR 274.
74. *Ibid.*, 275. See also *Bennett v. Milliner* [1959] 1 FLR 312.
75. For example, *Daily Mirror Newspapers Ltd. & Gardner*, footnote 6; *Torquay Hotel Co. Ltd. & Cousins*, footnote 8.
76. *Lumley v. Gye*, footnote 2.
77. *Williams v. Hursey*, footnote 30.
78. *Rookes v. Barnard*, footnote 26.
79. *R. Galvin, ex parte Amalgamated Engineering Union Australian Section* (1952) 86 CLR 34 at 39, 42.
80. *Seamen's Union of Australia v. Commonwealth Steamship Owners' Association* (1935) 54 CLR 626.
81. *Ibid.*, 649.
82. *Ibid.*, 655.

> it is impossible to hold that the Arbitration Court has power to include in its awards provisions penalising acts in the nature of lock-outs or strikes.

But the majority view was that the Conciliation Court did have power to so penalise.

The imposition of a "bans clause" by s32[83] is another method by which fact situations giving rise to tort liability can be dealt with. The effect of such a clause is to prevent conduct hindering, preventing or discouraging the observance of an award. If action threatening the observance of an award, or action which breaches an award, the employer so injured can apply for an injunction to restrain the continued breach. Failure to comply with the injunction on the part of the employees in default could then lead to proceedings for contempt of court.

The Act provides for many other remedies,[84] all of which can be said to provide alternative proceedings to action in tort. Penalties for breach of an award can be imposed under s119,[85] or under the penal sections, s109 and s111. The latter sections have, however, since the O'Shea case in 1969, been substantially defused by 1970 amendments.[86] The Act also provides for administrative sanctions such as deregistration of an organisation (under s143(1)(h)) for continued breach or non-observance of an award. Moreover, an award can be cancelled under s62.

The Crimes Act 1914 (Cth.)

This is the second Commonwealth Act dealing with fact situations that would also be actionable as industrial torts.

This act gives wide powers to the Governor-General in s30J to make a Proclamation in the event of a "serious industrial disturbance prejudicing or threatening trade or commerce".[87] Section 30J (2)[88] then provides that 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 strike" is guilty of an offence, which, if committed could lead to imprisonment for up to one year.

Section 30K[89] makes it an offence to obstruct or hinder the performance of Commonwealth public services and aims at preventing interference with interstate trade and commerce.

Offences under these sections are to be tried summarily, because the express words of the *Crimes Act* 1914 (Cth.) show an intention contrary

83. "Power to include in award provision relating to hindering observance of award."
84. See Sykes and Glasbeek, *Labour Law in Australia,* Book Two, Chapter 8, "Enforcement of Commonwealth Awards", Butterworths, Sydney, 1972.
85. Compare *Industrial Arbitration Act* 1940 (NSW) s93.
86. Sykes and Glasbeek, *op. cit.*, p. 552.
87. One such proclamation has been made: see Sykes and Glasbeek, *Labour Law in Australia,* footnote 110, p. 541.
88. See Appendix One.
89. See Appendix Two.

to the *Acts Interpretation Act* 1904 (Cth.) which, by s4, provides that "offences against any Act which are punishable by imprisonment for a period exceeding six months shall, unless the contrary intention appears in the Act, be indictable offences".[90]

The effect of s30K can be seen from two reported cases in the section. In the first, *Archdall's Case,*[91] the SS Cape York was boycotted by the Waterside Workers' Federation because of the stated intention of the ship's owner, the Commonwealth, to man the ship (and others of her class—lighthouse steamships) with crews employed as public servants and therefore subject to the Public Service Acts. All seamen and waterside workers then employed on the ship were called out by the WWF. The ship was declared "black" by transport unions. Fines were imposed on the union leaders concerned; an appeal was dismissed by the High Court.

It was noted that the *Crimes Act* does not excuse those who act "without reasonable cause or excuse . . . (who) . . . boycott". The words were said to be vague[92] but were to be read according to the circumstances. The section is therefore wide open to catch boycotting unionists or persons of any other class.

The second case in point is *Howell v. Doyle.*[93] It also concerned a ship declared "black": the defendants Doyle and Donegan were trade union officials who spoke in favour of supporting a resolution to put a ban on the ship. This conduct was held to breach s30K: even though the union officials could not be personally involved in the boycott. Counsel for the defendants[94] submitted the officials' actions could not amount to procuring a boycott because the principal offence had not yet been committed. That was said to apply only under the aiding and abetting section, s5.

The Trade Practices Act 1974 (Cth.)

This Act promises to open up a new area of statutory liability which will catch many of the fact situations discussed above: secondary boycotts, conspiracy, intimidation and the like. The words of the Swanson Committee in proposing the addition of what is now s45D are important in noting the practical application of the industrial torts in Australia today:

> There are some common law actions in tort which might, in theory, be available but these are in most cases dead-letters in practice.[95]

In view of these words of the Swanson Committee, amendment to the *Trade Practices Act* was seen to be desirable to protect a trader from anti-

90. *R. v. Archdall and Roskruge; ex parte Carrigan* (1928) 41 CLR 128 at 135, 139.
91. *Ibid.*
92. *Ibid.*, 145 per Starke J.
93. [1952] ALR 337.
94. Eggleston K.C.
95. See footnote 66.

competitive conduct by employee organisations. Employee organisations were never excluded from the operation of the Act insofar as they engaged in restrictive trade practices. (There is one exception under s51(2)(a) stating that regard shall not be had to matters appertaining to remuneration, conditions of employment and the like in determining whether a contravention of Part IV has been committed.)[96]

Conduct falling outside the *Trade Practices Act* and the *Conciliation and Arbitration Act* 1904 (Cth.) was the target of the Swanson Committee: especially the secondary boycott. This occurs "where employees of one employer place a boycott upon the dealings of that employer with another person".[97] Accordingly, the Act was altered in 1977 to prohibit boycotts by employees. The new section, s45D,[98] makes it an offence for employees to engage in conduct which hinders or prevents the supply of goods or services to a third person or to a corporation where the conduct is aimed at causing damage to the target or of lessening competition in the market.

In introducing the new section,[99] the then Minister for Business and Consumer Affairs, Mr. John Howard, drew attention to recent secondary boycotts in respect of petrol and bread deliveries; the stevedoring industry (where employees of a port authority had interfered with container deliveries to particular companies); and newsprint supplies (where employees of a supplier had interfered with delivering to John Fairfax and Sons Ltd.).

Mr. Howard recognised that the new legislation may have been more appropriately placed in the *Conciliation and Arbitration Act* 1904 (Cth.) but, be that as it may, the new section was to be recommended to the House.

Section 45D does not use the word "union"; nor does it use the expression "secondary boycott". The section instead proscribes "conduct" engaged in by "a person . . . in concert with another person" who "hinders or prevents the supply of goods or services by a third person to a corporation . . . where the conduct is engaged in for the purpose . . . of causing . . . substantial loss or damage to the business of the corporation . . . or a substantial lessening of competition in any market". Section 45D (5) is a deeming sub-section: an organisation of employees is deemed to have engaged in the proscribed conduct if two or more of its members or officers do so; the loss or damage arising from the act of the deemed participant is then thrown against the deemed participant in s45D (6). Penalties differ for bodies corporate and for organisations that are "not a body corporate"; in the former case, penalties under s8 shall be imposed on the body corporate, not its members or officers; in the latter case

96. This exception is maintained in s45D (3).
97. The Swanson Report, *op. cit.*, p. 85.
98. See Appendix Three.
99. Trade Practices Amendment Bill 1977, Second Reading Speech by the Honourable John Howard MP, Minister for Business and Consumer Affairs.

penalties[100] shall be imposed on officers of the organisation and such proceedings shall be deemed to be proceedings against all members of the organisation.

However, more than secondary boycotts are caught by the *Trade Practices Act*: Part IV proscribes numerous other restrictive trade practices: for example contracts affecting competition (s45); monopolisation (s46); exclusive dealing (s47) and the like. Accordingly, it could be suggested that any arrangement in breach of these sections would make up the unlawful means on which tort liability would be based. Or, indeed, action could be taken against the employees under the *Trade Practices Act* itself. But in any event, a contract, arrangement or understanding, indicating concerted action (as proscribed by s45), could incur liability under tort principles as discussed above.[101]

Does the Act oust the "residual liability in tort" rules considered above (in the application of industrial torts today) and make them no longer applicable in Australia? In view of s4M,[102] the answer must be in the negative; common law action and action under the statute could exist together in so far as they provide for different situations.

There is an abundance of American case law and academic discussion on the effect of secondary boycotts under the US antitrust laws:[103] Section 1 of the Sherman Antitrust Act provides that[104]

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal.

100. I.e., penalties under s77 (civil action by the Minister or the Commission to recover a pecuniary penalty imposed under s76—up to $50,000 in the case of a natural person and up to $250,000 in the case of a body corporate); s80 (injunctions); s82 (action for damages for a breach of Part IV or Part V of the Act). Compare the words of Mr John Howard in the House of Representatives, May 26, 1977, at 1985: "the penalties . . . under s45D are no greater than the penalties which attach to the activities of companies . . . there are no pecuniary penalties on individuals under s45D. Only in a limited number of circumstances can civil action be taken against individuals under s45D."
101. Note also the Act preserves the operation of the common law in the area of restraint of trade:
s4M. This Act does not affect the operation of—
(a) the law relating to restraint of trade insofar as that law is capable of operating concurrently with this Act . . . but nothing in the law referred to in paragraph (a) . . . affects the interpretation of this Act.
102. See footnote 101.
103. Podolsky, "The Sherman Act and the Labor Management Relations Act: concomitant application of s1 and s303", *Temple Law Quarterly*, Vol. 46, 1973, p. 450; Woolley, "Is a boycott per se a violation of the antitrust laws?", *Rutgers Law Review*, Vol. 27, 1974, p. 773; Helmer, "Labor Law—Standing—Boycotts and Strikes—A third party can sue for damages caused by a secondary boycott", *Cincinnati Law Review*, Vol. 43, 1974, p. 212.
104. Sherman *Antitrust Act*, §1, 15 USC, §1 (1970).

US case law leads to the proposition that a boycott *per se* may constitute a violation of the antitrust laws. The position of unions involved in secondary boycotts was originally based on the view that unions were to be exempted from antitrust law where they acted in their own self-interest.[105] But the position today must be seen to be different in view of the size and strength of organised unionism. No longer need the encouragement of legal protection be given to unionism.

Accordingly, the problem in *Iodice v. Calabrese*[106] concerned union activity going beyond legitimate labour objectives such as wages, hours, conditions of employment and the like causing injury in the area of labour-management relations and the competitive market.[107]

In this case, the plaintiff had been dismissed from a union; in setting up his own business, he became the target of harassment. There were threats from the union of labour troubles and discouragement of his customers and associates. Counsel for Iodice submitted three contentions: that the defendant union had

(1) breached federal labour law
(2) breached tort law (i.e., intentional interference with contractual relations)
(3) breached federal antitrust law.

On the first submission, the Court found for the plaintiff: there was evidence of illegal means being used to obtain an illegal object.

As to the second, it was held US federal labour law covered the field despite any inherent jurisdiction of the Court—i.e., federal law was said to preempt the area. Two US authorities were relied on.[108] In *Gibbs' Case*,[109] members of the union prevented the opening of a coal mine: this led to interference with Gibbs' contract of employment as mine superintendent. Damages were awarded in tort, but this was reversed on appeal on the basis that federal statute law ousted the application of state law. On the same basis, no recovery was allowed in tort in *Iodice's Case*.

As to the third contention, breach of antitrust law, the Court held for the defendant:

> [p]laintiff has failed to establish by a preponderance of the evidence that the imposition of fines and the apparent acquiescence thereto was part of a combination at conspiracy in restraint of trade.[110]

105. For example, *Apex Hosiery Co. v. Leader* 310 US 469 (1940): union held not to have breached antitrust law when it took control of the employer's plant to force a union claim; see also *United States v. Hutcheson* 312 US 219 (1941).
106. 345 F Supp 248 (SDNY 1972).
107. Podolsky, *op. cit.*, p. 461; *Duplex Printing Press Co. v. Deering* 254 US 443 (1921).
108. *Local 20, Teamsters, Chauffeurs & Helpers Union v. Merton* 377 US 252 (1964); *United Mine Workers v. Gibbs* 383 US 715 (1966).
109. *Ibid.*
110. Quoted by Podolsky, *op. cit.*, p. 463.

In Podolsky's article, the inconsistent decisions of the lower US courts on this question are traced,[111] but his conclusion[112] is that the antitrust laws will provide remedy for a plaintiff injured by a union boycott.[113]

The same question arose in Australia in 1977. *Ausfield Pty. Ltd. v. Leyland Motor Corporation of Australia Ltd.*[114] is a recent decision on secondary boycotts under the *Trade Practices Act* before the July 1977 amendments. In this case, an injunction under s80 of the Act was sought by Ausfield (a distributor of spare parts supplied by Leyland) to restrain a ban imposed by the Federated Storemen and Packers' Union on parts destined for Ausfield. The ban was imposed in the course of an industrial dispute and was acceded to by Leyland. Section 51 (2)(a) was relied on by Leyland—that regard shall not be had to industrial claims not in the course of the carrying on of business by an employer even though a restraint of trade was the result. This defence was successful before the judge at first instance.[115] On appeal,[116] however, the arrangement was held not to have direct relationship to questions of employment and the like under s51(2) of the Act. The conduct was held to be in restraint of trade under old s45 (2)(b).

The authorities relied upon[117] by the majority established the proposition that the motives of the union were irrelevant (i.e., to strengthen its wage claim) if the result was an interference with economic relations.

The *Trade Practices Act* therefore promises to open up a new area of liability for industrial activity engaged in by trade unions. Section 45D itself is aimed directly at trade unions, but the other sections of the Act on restraint of trade[118] will also catch activity that hitherto has been the province of tort law.

Moreover, with recent judicial formulations of damages in tort for economic loss,[119] the liability facing any trade union for economic harm

111. *Ibid.*, pp. 463-468.
112. *Ibid.*, p. 481.
113. Two recent US authorities (as cited in footnote 117) are relied on by Podolsky for the proposition that ". . . the problem concerns the availability of appropriate remedies and the potential overlap of the Sherman Act and the Labor Management Relations Act in situations where a labor dispute exists. The principles established in *Pennington* and *Jewel* make both forms of relief entirely possible where there have been concurrent injuries to the spheres of labor-management relations and the competitive market", *ibid.*, p. 459. See footnote 117.
114. (1977) 14 ALR 449; 457.
115. Franki, J., *ibid.*, 449.
116. Bowen C.J. and Northrop J. at 457; Deane J. dissenting.
117. *Re Scottish Daily Newspaper Societies Agreement* (1973) LR 7 RP 378 at 399-400; *United Mine Workers of America v. Pennington* 381 US 657 at 661, 663, 668; *Meat Cutters' Union v. Jewel Tea Co.* 381 US 676 at 687, 688; *United Mine Workers of America v. Pennington* 381 US 657 (1965).
118. Discussed above in footnote 100.
119. *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad"* (1977) 11 ALR 227.

appears to be of some importance. Indirect causation may no longer provide the problems it once did.

The Crimes Act 1900 (NSW)

In addition to the statutory remedies considered above, the *Crimes Act 1900* (NSW) proscribes three fact situations that can also lead to remedies in tort; viz., conspiracy, intimidation and unlawful assembly.

Conspiracy is an indictable offence under s393 of the Act. There must be evidence of an agreement between two or more persons to

(1) do something contrary to law
(2) do something wrongful and harmful to another person, or
(3) use unlawful means in the carrying out of an object not otherwise unlawful.[120]

Watson gives many examples of criminal conspiracies: a conspiracy in restraint of trade,[121] a conspiracy to commit a criminal offence, an agreement to commit an act which leads to public mischief or a combination to injure a person.[122]

The question arises whether a fact situation giving rise to tortious conspiracy will lead to criminal liability in conspiracy. Will a combination that attracts civil liability be indictable? In other words, is the basis of liability the same? In the tort cases considered above[123] it was in fact assumed that the combination was actionable in tort because it would have been an indictable offence.[124] However, as the tort evolved, it came to be seen as a separate remedy in no way reliant upon criminal conspiracy. Accordingly, the same facts may give rise to actions in tort or under s393.[125]

The use of violence or intimidation, trailing a person, hiding tools, watching a person's house and place of business is actionable under s545B, the crime of intimidation.[126] The section has been used in industrial situations: for example, a threat made to an employee by fellow employees unless the former joins the union has been held not to constitute the crime[127] unless personal violence is threatened. Accordingly, one requirement of the offence will be the proof of a threat of personal violence. A threat to picket has been held to come within the section because picketing is expressly forbidden elsewhere in the Act.[128]

An assembly of employees—say, a union meeting—may constitute an unlawful assembly under s545C of the *Crimes Act*. At common law, the definition of an unlawful assembly refers to an assembly of three or more persons with intent to commit a crime or to disturb the peace.[129] The question arises therefore whether an assembly for the purposes of an unlawful purpose, such as, in some circumstances a strike, or interference with contractual relations, would constitute an offence under s545C. Watson notes[130] that if a person is compelled to abstain from his "lawful calling" by an unlawful assembly, the crime of intimidation has been committed.[131]

120. Watson and Purnell, *Criminal Law in New South Wales*, Law Book Co., Sydney, 1971. Volume 1 at 383.
121. For example, *Mogul Case*, footnote 39.
122. For example, *Quinn v. Leathem*, footnote 39.
123. *Temperton v. Russell* [1893] 1 QB 715; *Quinn v. Leathem*, footnote 39.
124. Law Commission No. 76 at 137; see also *McKernan v. Fraser* (1931) 46 CLR 343 at 363 per Evatt J.; the *Crofter Case*, footnote 43, at [1942] 1 All ER 144 ff per Viscount Simon.
125. For example, in the *Zapphir Case*, an employee brought criminal conspiracy proceedings against his fellow employees in the Queensland courts. The case was discussed in the press in May 1977. As yet there is no law report to turn to.
126. The section is in similar terms to s7, *Conspiracy and Protection of Property Act* 1875 (UK); see also *Crimes Act* 1914 (Cth.) s28. "Any person who, by violence or by threats of intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person, of any political right or duty, shall be guilty of an offence."
127. *Gibson v. Lawson* [1891] 2 QB 545.

Conclusion

The extent of the "possible application" of the industrial torts in Australia today cannot be in doubt. Each is supported by authorities as recent as 1977 to show its continued and continuing operation in the common law courts.

Trade Practices legislation gives jurisdiction to the Federal Court of Australia over secondary boycotts; and, of course, the *Conciliation and Arbitration Act* 1904 (Cth.) must not be overlooked as perhaps the reason for the Swanson Committee's association of the industrial torts' status as dead-letters in practice. That is not to say, however, that the industrial torts have no application in the common law courts.

Appendix I

Crimes Act 1914 (Cth.)

Industrial Disturbances, Lock-outs and Strikes

Section 30J

30J (1) If at any time the Governor-General is of opinion that there exists in Australia a serious industrial disturbance prejudicing or threatening trade or commerce with other countries or among the States, he may make a Proclamation to that effect, which Proclamation shall be and remain in operation for the purposes of this section until it is revoked.

(2) Any person who, during the operation of such Proclamation, takes part in or continues, or incites to, urges, aids or encourages the taking part in, or continuance of, a lock-out or strike—

(a) in relation to employment in or in connexion with the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States; or

128. s545B (1) (iv).
129. For example, *R. v. Graham* (1888) 16 Cox CC 420.
130. Watson, *op. cit.*, 489.
131. See also *Party Processions Prevention Act* 1901 (NSW) s3 by which "certain processions or assemblies (e.g., for any political event . . . related to . . . differences between any classes of His Majesty's subjects) . . . shall be deemed to be an unlawful assembly".

(b) in relation to employment in, or in connexion with, the provision of any public service by the Commonwealth or by any Department or public authority under the Commonwealth,

shall be guilty of an offence, and shall be liable on conviction to imprisonment for any period not exceeding one year.

(3) For the purposes of this section—

"employee" includes any person whose usual occupation is as an employee;

"employer" includes any person whose usual occupation is an employer;

"lock-out" includes the closing of a place or part of a place of employment, if the closing is unreasonable, and the total or partial refusal of employers, acting in combination, to give work, if the refusal is unreasonable, or the total or partial suspension of work by an employer, if the suspension is unreasonable, with a view to compel his employees, or to accept any term or condition of employment;

"strike" includes the total or partial cessation of work by employees, acting in combination, if the cessation is unreasonable, as a means of enforcing compliance with demands made by them or by other employees on employers, and the total or partial refusal of employees, acting in combination, to accept work, if the refusal is unreasonable, and also includes job control.

Appendix II

Crimes Act 1914 (Cth.)

Obstructing or Hindering the Performance of Services

Section 30K

30K. Whoever, by violence to the person or property of another person, or by spoken or written threat or intimidation of any kind to whomsoever directed, or, without reasonable cause or excuse, by boycott or threat of boycott of person or property—

(a) obstructs or hinders the provision of any public service by the Commonwealth or by any Department or public authority under the Commonwealth;

(b) compels or induces any person employed in or in connexion with the provision of any public service by the Commonwealth or by any Department or public authority under the Commonwealth to surrender or depart from his employment;

(c) prevents any person from offering or accepting employment in or in connexion with the provision of any public service by the Commonwealth or by any Department or public authority under the Commonwealth;

(d) obstructs or hinders the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States;

(e) compels or induces any person employed in or in connexion with the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States to surrender or depart from his employment; or

(f) prevents any person from offering or accepting employment in or in connexion with the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States,

shall be guilty of an offence.

Penalty: Imprisonment for one year.

Appendix III

Trade Practices Act 1974 (Cth.)

Secondary Boycotts

Section 45D

45D. (1) Subject to this section, a person shall not, in concert with another person, engage in conduct that hinders or prevents the supply of goods or services by a third person to a corporation (not being an employer of the first-mentioned person), or the acquisition of goods or services by a third person from a corporation (not being an employer of the first-mentioned person), where the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing—

(a) substantial loss or damage to the business of the corporation or of a body corporate that is related to the corporation; or

(b) a substantial lessening of competition in any market in which the corporation or a body corporate that is related to the corporation supplies or acquires goods or services.

(2) Paragraph 4F (b) does not apply in relation to sub-section (1) of this section but a person shall be deemed to engage in conduct for a purpose mentioned in that sub-section if he engages in that conduct for purposes that include that purpose.

(3) A person shall not be taken to contravene, or to be involved in a contravention of, sub-section (1) by engaging in conduct where—

(a) the dominant purpose for which the conduct is engaged in is substantially related to—

(i) the remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person; or

(ii) an employer of that person having terminated, or taken action to terminate, the employment of that person or of another person employed by that employer; or

(b) in the case of conduct engaged in by the following persons in concert with each other (and not in concert with any other person), that is to say—

(i) an organization or organizations of employees, or an officer or officers of such an organization, or both such an organization or organizations and such an officer or officers; and

(ii) an employee, or two or more employees who are employed by the one employer,

the dominant purpose for which the conduct is engaged in is substantially related to—

(iii) the remuneration, conditions of employment, hours of work or working conditions of the employee, or of any of the employees, referred to in sub-paragraph (ii); or

(iv) the employer of the employee, or of the employees, referred to in sub-paragraph (ii) having terminated, or taken action to terminate, the employment of any of his employees.

(4) The application of sub-section (1) in relation to a person in respect of his engaging in conduct in concert with another person is not affected by reason that sub-section (3) operates to preclude the other person from being taken to contravene, or to be involved in a contravention of, sub-section (1) in respect of that conduct.

(5) If two or more persons (in this sub-section referred to as the "participants") each of whom is a member or officer of the same organization of employees (being an organization that exists or is carried on for the purpose, or for purposes that include the purpose, of furthering the interests of its members in relation to their employment) engage in conduct in concert with one another, whether or not the conduct is also engaged in concert with other persons, the organization shall be deemed for the purposes of this Act to engage in that conduct in concert with the participants, and so to engage in that conduct for the purpose or purposes for which that conduct is engaged in by the participants, unless the organization establishes that it took all reasonable steps to prevent the participants from engaging in that conduct.

(6) Where an organization of employees engages, or is deemed by sub-section (5) to engage, in conduct in concert with members or officers of the organization in contravention of sub-section (1)—

(a) any loss or damage suffered by a person as a result of the conduct shall be deemed to have been caused by the conduct of the organization;

(b) if the organization is a body corporate, no action under section 82 to recover the amount of the loss or damage may be brought against any of the members or officers of the organization; and

(c) if the organization is not a body corporate—

(i) a proceeding in respect of the conduct may be instituted under section 77, 80 or 82 against an officer or officers of the organization as a representative or representatives of the members of the organization and a proceeding so instituted shall be deemed to be a proceeding against all the persons who were members of the organization at the time when the conduct was engaged in;

(ii) sub-section 76 (2) does not prevent an order being made in a proceeding mentioned in sub-paragraph (i) that was instituted under section 77;

(iii) the maximum pecuniary penalty that may be imposed in a proceeding mentioned in sub-paragraph (ii) is the penalty applicable under section 76 in relation to a body corporate;

(iv) except as provided by sub-paragraph (i), a proceeding in respect of the conduct shall not be instituted under section 77 or 82 against any of the members or officers of the organization; and

(v) for the purpose of enforcing any judgment or order given or made in a proceeding mentioned in sub-paragraph (i) that is instituted under section 77 or 82, process may be issued and executed against any property of the organization or of any branch or part of the organization, or any property in which the organization or any branch or part of the organization has, or any members of the organization or of a branch or part of the organization have in their capacity as such members, a beneficial interest, whether vested in trustees or however otherwise held, as if the organization were a body corporate and the absolute owner of the property or interest but no process shall be issued or executed against any other property of members, or against any property of officers, of the organization or of a branch or part of the organization.

(7) Nothing in this section affects the operation of any other provision of this Part.

Industrial Democracy Under Liberal Capitalism: A Comparison of Trends in Australia, France and the USA

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An examination is made of the trends toward new forms of industrial democracy in three liberal capitalist societies: France, the United States and Australia. A three-dimensional framework is introduced which uses the ideology of the labour movement, the degree of control which is sought by employees at the enterprise level and the level at which participation occurs, to compare developments in each country. It is argued that a convergence of approaches is occurring in these countries towards the participatory enterprise, albeit with some variations, within the framework of liberal capitalism.

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DEFINING INDUSTRIAL DEMOCRACY

Industrial democracy has a long history of usage in Europe and North America. One of the first major works in English to use the term was by the early British Fabians, Sidney and Beatrice Webb.[1] In *Industrial Democracy*, written in 1897, the Webbs described the rise of trade unionism in Britain during the nineteenth century which they regarded as the pre-condition for democratic socialism. The Fabian tradition was continued by G. D. H. Cole[2] who saw industrial democracy being achieved through the development of guild socialism. Cole argued that genuine political democracy could only be achieved if industry was organised on a participatory basis and employees were able to become self-governing in the work place. In the United States, early discussions about industrial democracy are found in the writings of John R. Commons[3] and Selig Perlman[4] which stressed the importance of job consciousness and shop

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1. Sidney and Beatrice Webb, *Industrial Democracy*, Sentry Press, New York, 1965. Originally published in London in 1897.
2. G. D. H. Cole, *Self-Government in Industry*, G. Bell and Sons, London, 1919.
3. John R. Commons, *Industrial Goodwill*, McGraw-Hill, New York, 1919.
4. Selig Perlman, *A Theory of the Labor Movement*, Macmillan, New York, 1928.