JOB SECURITY OR INCOME SUPPORT

BY CHRISTOPHER ARUP*

Legal safeguards for individuals of employment or income will be one part of a government's reaction to fluctuation and change in industries. Mr Arup examines present federal asssurances of security of employment and income and capacities to implement further assurances in line with overall economic rationality. He concludes that there are limitations both in present assurances and capacities which require changes in the law.

INTRODUCTION

Job security and income support are increasingly issues of public debate. Omens of economic and environmental dislocation and adjustment abound at a time when growing government responsibility for welfare is under attack. It is therefore timely to review the limits of the role of the Australian government's agencies in this field.

This review is restricted to the support given by direct regulation and assistance to those whom our society expects to work and to those who normally rely upon employment for their income. It is an examination of existing legal rights and capacities. The classification of supportive measures used by the International Labour Office (ILO) in its 1974 survey of the application of its Recommendation on Termination of Employment is followed. The reader will be well aware of the need for various private efforts to secure employment and income and government action to influence the economy to provide employment and protect income. But in times of conflict of interests and competition for resources, personal legal rights and duties become essential too.

The review commences with the principal role of the industrial tribunals, taking the Australian Conciliation and Arbitration Commission (hereinafter referred to as "the Commission") as its example. While State tribunals, within their own territory and subject to the paramountcy of the federal scheme, enjoy a larger capacity to regulate industrial subject-matter, it has not been their practice to do so, nor of their Parliaments to authorise them to do so.

As a third industrial force, the Commission has secured for employees certain minimum standards that private bargaining at the same stage would not have achieved. But because of constitutional limitations, the Commission is empowered by the Conciliation and Arbitration Act 1904-1976 (Cth) (hereinafter referred to as "the Act") only to prevent and settle interstate industrial disputes by conciliation and arbitration. Consequently it cannot really make decisions that seem to either party to be too extreme or uneconomic. Because the Commission's powers rest on

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a circumscribed but inadequately defined power, its initiatives are subjected to frequent review by the High Court. It is exercising a rather blunt instrument in a highly charged arena.

INDUSTRIAL AWARDS

Notice of Termination

The first relevant effort of the Commission to secure employment was its introduction of the requirement of a week's notice, or pay in lieu, to terminate employment. It is argued that a week's notice or pay in lieu gives a worker a little time to find a new job. It also discourages employers from readily putting off employees as the supply of work fluctuates. It therefore contributes to security of employment.

Weekly hiring is now the usual basis of hiring in industries covered by awards. Concomitant with the specification of weekly hiring is the requirement of a week's notice or pay in lieu if the employer wishes lawfully to terminate employment. Under this arrangement, employment is of indefinite duration but of a minimum period of a week.

From its beginnings, the Commission decided to deal with and rule upon matters of duration and termination. The early Presidents were not content to leave these matters to private bargaining. But this did not mean that they departed significantly from prior arrangements in industry.

In particular they accepted without comment the principle that the employer be free to dismiss his employees at any time without demonstrating a valid reason. The underlying basis for their attitude was probably that both employer and employee should be free to choose his counterpart. However, freedom for the one does not necessitate freedom for the other. But to be fair to the Commission, the employees' claims at the time probably did not extend beyond notice: notice being the determinant at common law.

Why did the Commission award weekly hiring in industries where hiring had been casual, hourly or daily? There was an element of social concern, particularly on the part of Higgins J., to ensure adequate provision of the needs of family life.[1] There was also repeatedly a co-optative design. Both Higgins J. and later Beeby J. spoke of the desirability of both securing steadier employees who would identify with their place of work, and of eliminating the unrest and disaffection that insecurity and idleness promote.[2] Weekly hiring was also a proper

[1] *Australian Timber Workers' Union* v. *John Sharp and Sons Ltd* (1920) 14 C.A.R. 811, 836-837; *Amalgamated Society of Engineers* v. *Adelaide Steamship Company Ltd* (1920) 15 C.A.R. 297, 319.

[2] *Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association* (1914) 8 C.A.R. 52, 72; *Amalgamated Engineering Union* v. *Metal Trades Employers Association* (1929) 28 C.A.R. 923, 972.

recognition of the benefit to employers and society of the availability to industry of a pool of reliable, skilled workers.[3]

Early Commission cases suffered from a lack of detailed statistical evidence. So to the conviction that weekly hiring was socially desirable must be added the belief, rather than the knowledge, that industry could cope economically and organisationally with it.

Nevertheless, in these early days the Commission still attempted to consider the award of weekly hiring in the context of the industry in question. If, indeed, the pattern of employment had been fairly regular and continuous, there was evidence that weekly hiring was feasible. If, on the contrary, the flow of work had been intermittent and unpredictable, there was evidence that weekly hiring was not practicable.[4]

Thus for many years there have been significant industries where weekly hiring did not operate at all, or at least not for the bulk of the workers. But the Commission was not always sure that the supply of work could not be predicted, planned or distributed by the employers so as to permit weekly employment for a core of workers. Yet, as we shall see, it declined to tell the employers how to run their business.[5] Instead it would recommend that they try, in consultation with the workers, to devise a system of work flow and/or engagement that would facilitate security or regularity.[6]

Safeguards for casuals

The Commission did award minimum safeguards for those who followed an industry and remained on shorter notice or a casual basis.[7] The most important of these provisions was for casuals to receive a loading on a weekly employee's wage rate to take some account of their intermittency of earnings and ineligibility for benefits such as sick leave.[8]

Many awards[9] also specified that if those on a casual or short-term basis were required to start work, they were entitled to a minimum period of work, such as three hours, or pay in lieu, before termination could be effected. In a few industries this extended to attendance money.

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[3] *Metal Trades Award, 1941—Consolidation* (1945) 57 C.A.R. 278, 282.

[4] *Wool and Basil Workers Federation* v. *William Angliss & Co. (Australia) Pty Ltd* (1932) 31 C.A.R. 846, 854; *Australian Builders Labourers Federation* v. *T. R. and L. Cockram Pty Ltd* (1942) 47 C.A.R. 167, 171; *Amalgamated Engineering Union* v. *Alderdice & Co. Pty Ltd* (1927) 25 C.A.R. 364, 378.

[5] *Infra* pp. 159-161.

[6] *Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association* (1914) 8 C.A.R. 52, 73.

[7] *Australian Builders' Labourers' Federation* v. *Archer* (1913) 7 C.A.R. 210, 220.

[8] *Graziers Association of New South Wales* v. *Australian Workers Union* (1936) 36 C.A.R. 295, 301.

[9] *Amalgamated Society of Carpenters and Joiners* v. *A.U.S.N. Co. Ltd* (1942) 48 C.A.R. 261, 280; *Waterside Workers (Attendance Money)* case (1952) 74 C.A.R. 176, 183.

Such loadings and guarantees were not calculated to meet fully the effect upon earnings of intermittent unemployment due to depressed business conditions, trade fluctuations or an excessive number of workers following an industry. The Commission said that such cases required a carefully planned and administered unemployment insurance scheme constructed by legislation or collective agreement, a measure the Commission was not equipped to evaluate or implement.[10] And further in the Commission's view, the problem could not be solved by simply loading wage rates in order to cover the losses as this would only make it difficult for workers to obtain employment and would therefore increase unemployment, an obviously greater evil.

Security for weekly employees

How secure has the Commission made the employee by its prescription of a week's notice? There are two main deficiencies.

(a) *Suspension*

The Commission has contributed to residual insecurity by empowering employers to suspend employees without pay in certain circumstances.[11] At common law the employer has in general no right to suspend rather than to terminate employment, but the parties of course may expressly agree to the inclusion of such a term or it may be implied in clear cases by incorporation of a local work-rule, a collective agreement or custom.[12]

Recently employees in some depressed industries have been reported to have agreed to work short-time to save their jobs. Is such a contract inconsistent with their award? The High Court has said that employees and employers can contract for a period of notice longer than that which their award requires because an award only prescribes a minimum.[13] But, in my view, a contract allowing suspension would be inconsistent, if not with the terms of an award which contained a standdown clause, or even just weekly hiring, then with its intention to cover the field in the matter.

In relation to both suspension and termination, the common law principle that the parties may agree to their own terms allows them more scope than arbitration. However, it virtually accepts any inequality of bargaining power between the two parties and if private contract were

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[10] *Australian Glass Workers Union* v. *A.G.M. Co. Ltd* (1927) 25 C.A.R. 289, 291; *Merchant Service Guild* v. *Commonwealth Steamship Owners Association* (1928) 27 C.A.R. 482, 506.

[11] *E.g. Metal Industry Interim Award* (1971) 140 C.A.R. 905, 929 (Cl. 19); *Glass Workers Award* (1971) 139 C.A.R. 23, 37 (Cl. 16); *Vehicle Industry Award* (1972) 142 C.A.R. 121, 125 (Cl. 6); *Storemen and Packers (General Stores) Award* (1969) 128 C.A.R. 581, 584 (Cl. 8).

[12] *E.g. Hanley* v. *Pease and Partners Ltd* [1915] 1 K.B. 698; *Marshall* v. *English Electric Co. Ltd* [1945] 1 All E.R. 653; *Devonald* v. *Rosser & Sons* [1906] 2 K.B. 728. But note *Browning* v. *Crumlin Valley Collieries Ltd* [1926] 1 K.B. 522.

[13] *Kilminster* v. *Sun Newspapers Ltd* (1931) 46 C.L.R. 284.

to be allowed freer rein by arbitration, bargaining on a collective basis would have to be facilitated by the law, rather than complicated as it now is.

(b) *Standdown clauses*

Many awards do empower employers to standdown employees when they cannot be usefully employed because of an interruption to operations for which the employer cannot be reasonably held responsible, such as a strike, a breakdown of machinery, a restriction of the fuel supply or a shortage of raw materials can bring about. But in most such cases, employers cannot deduct pay for only part of a day.

Standdown clauses were seen as a necessary corollary to the award of weekly hiring.[14] Some have even been inserted by consent. They afford management some flexibility, particularly in industries vulnerable to lightning strikes or physical mishaps. They have been considered preferable to periodic, selective unemployment. But clearly they undermine security of income from employment.

Their limits are uncertain. In *Re Textile Industry (Woollen and Worsted Section) Award 1950*,[15] the Industrial Court considered a wide provision permitting the deduction of pay "for a standdown of employees at any time when no work is offering"[16] where an employer simply experienced a shortage of orders. The Court held that the provision did not imply that the standdown had to be in the nature of a sudden emergency or an unexpected or temporary difficulty arising at long or irregular intervals. On the other hand, the Court considered that it would not justify the employer in adopting a regular four-day week on the pretence that he was working a five-day week with a standdown every Monday.

The common, general standdown clause empowers the standdown of employees who cannot be usefully employed because of a stoppage of work by a cause for which the employer cannot reasonably be held responsible. It suggests that the cause must physically obstruct some employees from working.[17] The standdowns must come at the time when there actually is no useful work. So the ordinary clause will probably

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[14] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1922) 16 C.A.R. 231, 247, 285; *Re Variation—Gas Employees (N.S.W.) Award* (1948) 62 C.A.R. 639. See generally Mills, "Legislation and Decisions Affecting Industrial Relations" (1973) 15 Journal of Industrial Relations 399.

[15] (1963) 5 F.L.R. 328.

[16] *Id.* 329.

[17] *Amalgamated Engineering Union* v. *Metal Trades Employers Association* (1942) 47 C.A.R. 615; *Gordon Edgell and Sons Ltd* v. *Food Preservers Union* (1947) 61 C.A.R. 513; *Re Metal Trades Award* (1958) 13 Industrial Information Bulletin 88. This point is not definitively resolved, *e.g. Pickard* v. *John Heine and Son Ltd* (1924) 35 C.L.R. 1, 8; *Australian Workers' Union (S.A. Branch)* v. *Pioneer Concrete (S.A.) Pty Ltd* (1974) Law Book Co. Industrial Arbitration Service Current Review 68.

never justify a system of turns or short-time adopted because of a shortage of orders.[18] The Commission would have to insert a special authorising clause.

For a long time the Clothing Trades Award[19] permitted employers in times of slackness of trade to stand off employees in turn, or to work shortened hours if the employees' agreement was obtained. And during the Great Depression, similar clauses were inserted in a number of awards to allow employers to ration work on a short-time or turns basis.[20]

Standdowns do not legally terminate employment, but they clearly affect income. This problem is now partly overcome in a few awards which permit employees to obtain other employment during the standdown.

Employers are also often empowered to close down temporarily.[21] In this case, employees receive what holiday pay is due to them but this does not always cover the period of the closedown.

Length of notice

Weekly workers can periodically be given notice and subsequently re-engaged when work again becomes available. A week's notice is not a great constraint upon a large organisation that plans ahead. Also loadings are generally not made for this sort of intermittency. An exception has been the small lost-time loading in the clothing manufacturing industry where for a long time weekly employees were entitled to only two days' notice.[22] In a similar vein, some awards insist that if a weekly employee has his employment terminated within six months of his engagement, he is to receive casual rates retrospectively.[23]

Essentially this sort of intermittency is not considered by the Commission because it sees weekly hiring as a major safeguard. Weekly hiring

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[18] *Re Textile Industry (Woollen and Worsted Section) Award 1950* (1963) 5 F.L.R. 328; *Re Carpenters and Joiners Award* (1971) 17 F.L.R. 330; *Electrical Trades Union* v. *Evans Deakin Industries Ltd* 1975 17 A.I.L.R. Rep. 608.

[19] *E.g. Federated Clothing and Allied Trades Union* v. *Andrews and others* (1925) 22 C.A.R. 913; *The Clothing and Allied Trades Union* v. *Acme Frocks* (1965) 110 C.A.R. 3. Note now *Footwear Manufacturing Industry Award* (1963) 102 C.A.R. 473, 495 (Cl. 6).

[20] *E.g. Health Inspectors Association* v. *City of Greater Brisbane and others* (1931) 30 C.A.R. 322; (1932) 31 C.A.R. 141.

[21] *E.g. Metal Industry Interim Award* (1971) 140 C.A.R. 905, 933 (Cl. 21). Note also the award of seasonal allowances in special industries. *E.g. Storemen and Packers (Wool Selling Brokers and Repackers) Award* (1968) 124 C.A.R. 431, 451 (Cl. 12); *Storemen and Packers (Skin, Hide, Wool & Produce Stores) Award* (1968) 124 C.A.R. 387, 407 (Cl. 12). Workers in truly seasonal industries present an income problem too if they require but cannot obtain jobs over the whole year.

[22] *Amalgamated Clothing and Allied Trades Union* v. *Arnall & Sons* (1928) 26 C.A.R. 76, 107; *The Clothing and Allied Trades Union* v. *Acme Frocks* (1965) 110 C.A.R. 3. *Cf. Amalgamated Society of Carpenters and Joiners* v. *Adelaide Joinery Works* (1962) 101 C.A.R. 433, 484.

[23] *Shipwrights (Shore) Award* (1968) 126 C.A.R. 537, 546 (Cl. 18); *Ship Painters and Dockers Award* (1969) 128 C.A.R. 251, 266 (Cl. 10).

is encouraged, even if the award often leaves the employer with an express choice between weekly, part-time and casual hiring.[24]

Campaigns to make weekly hiring the usual form extended on into the forties. In a few special industries the issue is still being resolved.[25] At the same time, other award employees have had their period of notice increased. For instance, bank officials are now entitled to one month's notice, insurance and shipping clerks to two weeks.[26]

Nevertheless limits are apparent. In 1968 oil clerks sought an award of truly permanent employment for those employees who served for five continuous years. After disposing of jurisdictional objections based on the Act, the Commission held that such a term would be unduly restrictive of employers and considered a requirement of compensation for retrenchment instead.[27]

Increasing the length of the period of notice required will strengthen security of employment. Long periods of notice may be appropriate in cases of block reductions in a workforce to allow time for argument about their necessity and for plans to alleviate their effects. Long periods may also be appropriate in individual cases where commitment to and dependence upon a job have been engendered. Perhaps this is why several awards already prescribe an increase in the period of notice as a function of the employee's years of service.[28]

In some situations, however, unless a power to suspend employees is introduced, then the increase in the period of notice becomes impractical (for example, in situations where the work runs out quickly). Clearly a power to suspend assists the employer afflicted by cyclical shortfalls or physical interruptions but presents income problems to his employees, even if its exercise has to be strictly justified to them or a tribunal. Therefore it is pertinent to ask what prospects of income support a worker who is to be unemployed or underemployed possesses.

INCOME PROTECTION UPON TERMINATION

Severance pay

Here the only relevant effort of the Commission has been the occasional award of severance pay. Severance pay is lump sum compensation for seemingly permanent retrenchments. It allows a worker a little

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[24] The fixation of minimum wages complements this view *e.g.* the early "living wage" was really only a wage rate. If a full week at that rate was payable, the employee was to be able to satisfy the normal needs of an average family for the next week. However, the present minimum wage is even less ambitious. Award specification of duration and termination requirements is a necessary condition for security of income.

[25] *Re National Building Trades Construction Award* 1975 17 A.I.L.R. Rep. 377.

[26] *Insurance Officers (Clerical Indoor Staffs) Award* (1971) 141 C.A.R. 1035; *Clerks (Shipping) Award* (1965) 109 C.A.R. 537, 553 (Cl. 11); *Bank Officials (Federal) (1963) Award* (1969) 128 C.A.R. 215, 225 (Cl. 25).

[27] *The Clerks (Oil Companies) Award 1966* (1968) 122 C.A.R. 339.

[28] *E.g. Insurance Officers (Clerical Indoor Staffs) Award* (1971) 141 C.A.R. 1035, 1041 (Cl. 18).

more time to find another job. Mainly because it is by no means the general rule in Australia, it is unlikely to act as a deterrent to termination by the employer.

The Commission and its offshoot, the Flight Crew Officers' Industrial Tribunal, have awarded severance pay on only a small number of occasions in the last decade. More has been paid under private agreement, often between the employer and the employees rather than the employers and the unions.

The Commission has so far expressly declined to formulate principles on eligibility for severance pay. Indeed only a few cases coming before the Commission have concerned claims to cover retrenchments generally in an industry rather than applications for pay in actual and particular instances of termination.

Few firm principles have emerged from these cases, but it appears that the following four guidelines have at least gained some tentative measure of acceptance:

(a) The Commission may be more willing to award severance pay to skilled, white-collar workers, particularly if they had entertained warranted career expectations.[29] Their length of service may also be relevant.

(b) The Commission may be more willing to award severance pay to workers who lack the prospect of imminent, new employment.[30] Their age may be considered. Their location may affect their prospects. The length of actual notice may also be pertinent, and indeed if the terminations are only pending, the compulsory period of notice may be extended. Re-employment with the same employer, or at least a high priority to it, may be recommended.[31]

(c) The Commission may be more willing to award severance pay to those made redundant by technological or methods changes rather than economic conditions.[32] However, economic redundancy has been compensated when the employer was not closing entirely.[33]

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[29] *Re The Jetair Australia Ltd Air Pilots' Agreement* (1970) 136 C.A.R. 967; *Johns and Waygood Ltd* v. *The Australian Builders' Labourers' Federation* (1971) 139 C.A.R. 521.

[30] The *Snowy Mountains Authority* case (1969) 24 Industrial Information Bulletin 1633; *Merchant Service Guild* v. *Department of Main Roads, N.S.W.* (1971) 140 C.A.R. 875; *Federated Ironworkers' Association* v. *John Lysaght (Australia) Ltd* (1972) 28 Industrial Information Bulletin 669, 671.

[31] *Australian Federation of Air Pilots* v. *Ansett-A.N.A.* (1968) 122 C.A.R. 951; *Qantas Airways Ltd* v. *Australasian Airline Navigators Association* (1971) 140 C.A.R. 1072. Note Industrial Arbitration Act 1940-1976 (N.S.W.) s. 88G; Industrial Conciliation and Arbitration Act 1972-1975 (S.A.) s. 82. See generally Yerbury, "Technological Change and Industrial Relations in Australia" in G. W. Ford (ed.), *Redundancy* (1973) 35.

[32] *Re The Jetair Australia Ltd Air Pilots' Agreement* (1970) 136 C.A.R. 967; *The Vehicle Builders Employees Federation* v. *General Motors-Holden's Pty Ltd* (1972) 142 C.A.R. 95, 117.

[33] *Australian Federation of Air Pilots* v. *Connellan Airways Pty Ltd* (1970) 134 C.A.R. 964. Now note *Re Wattie-Pict Brooklyn Severance Pay Award* 1975 17 A.I.L.R. Rep. 980.

(d) The manner in which the employer is retrenching may be relevant. If the employer has been high-handed or abrupt, he may face a "penalty" or at least an inducement in the future to consult with and consider his employees when planning changes.[34]

Severance pay is designed to compensate somewhat arbitrarily for the loss of benefits long service usually attracts or to assist the worker with his consequential expenses while he finds other employment. The amount is usually calculated by adding a week's pay (or more) for every year of service.

Clearly severance pay is not a significant instrument in the promotion of security. The suggestion that it become a widespread right meets the objection that it is uneconomic. Yet several other countries require its payment[35] seeing its main advantage as a means of breaking down resistance to structural change and encouraging mobility. However, it cannot assure the redundant unemployed a continuing, reasonable income, and the short-term gain to the employee may be outweighed by the cost to industry and the risk that the anticipation of the requirement to pay it may discourage rationalisation.

Additionally, severance pay cannot easily cover those small intermittent losses caused by partial unemployment in the form of short-time or temporary lay-offs. For a solution to that problem, one must look to a different type of scheme.

PAYMENT FOR IDLE TIME

The Stevedoring Industry Scheme

With the aid of government facilities, the union and employers in the stevedoring industry reached agreement upon an interesting scheme in 1967.[36] Under this scheme whilst most employees are placed upon a weekly hiring, they are guaranteed a minimum monthly wage. Employers are collectively responsible for the cost of the time for which the employees are not actually working by means of an industry-wide levy upon operative employers according to the manhours worked in their employment. Employees not needed for work at all for a time are employed by a holding company. Entry into and departure from the industry are strictly controlled by registration of all waterside workers and by redundancy declarations and payments.

The scheme is a means of stabilising employment and earnings in an unpredictable industry and at the same time sharing the cost of maintaining a pool of employees upon a rational basis. It approximates to an industry-wide private unemployment insurance scheme, except that no contributions are required of employees.

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[34] *Australian Federation of Air Pilots* v. *Ansett-A.N.A.* (1968) 122 C.A.R. 951.
[35] *E.g.* Canada, Denmark and France.
[36] *National Stevedoring Industry Conference General Report* (1967) 22 Industrial Information Bulletin 546.

The stevedoring industry scheme has its critics. As idle time grows, so does the cost. One cause is inflexibility in the procedure of transfer of employees from idle to active employers. Another criticism is that such a scheme allows individual employers not to plan work supply efficiently and employees to linger unrealistically with an employer or industry that is undergoing structural changes. In the *Interim Report of the Inquiry into Employment in the Building Industry*,[37] the Inquiry rejected the idea of a similar scheme. The Inquiry did not think that a case had been made out for the special treatment of building construction workers in the light of their existing conditions and the nature of the industry.[38] It distinguished the stevedoring industry as one where such a scheme was organisationally feasible because the "industry" was much more identifiable and cohesive.[39]

INDUSTRIAL MATTERS

Discussion of the stevedoring industry scheme, which is referable to the trade and commerce power, leads to a number of interesting questions about the capacity of the Commission. Could the Commission require employers to maintain directly the incomes of their workers during periods of unemployment, particularly on a collective basis? Or could it require employers to make contributions to a private unemployment insurance fund or payments to a public one?

The main legal obstacle is that such payments may not "pertain to the relations of employers and employees" and thus be an industrial matter. This issue is principally one of statutory construction but it does have constitutional overtones.

Contractual relationships

In particular, complications arise where a worker is entitled under an award to receive a payment from an employer, directly or indirectly, only upon the termination of his contractual relationship.

Lump sums

In the leading case of *R.* v. *Hamilton Knight*,[40] a majority of the High Court held that workers' compensation, payable only after termination, was an industrial matter within section 4 of the Act. The qualification for compensation was a work-connected injury and the judges chose that as the reference point for pertaining to relations rather than the time when compensation became payable. Yet the same Court held, by a narrow majority, that the payment of pensions on retirement was not an industrial matter because a worker would only qualify for a pension when relations ended.

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[37] Australia, *Inquiry into Employment in the Building Industry, Interim Report* (1975) (Chairman E. A. Evatt J.).

[38] *Id.* 53-54.

[39] *Id.* 48, para. 7.26.

[40] *R.* v. *Hamilton Knight; ex parte The Commonwealth Steamship Owners Association* (1952) 86 C.L.R. 283.

I agree with Fisher[41] that the nature of the provision and not the moment in time when steps can be taken to enforce it should be the determinant. Clearly, retirement gratuities and severance pay should be safe from challenge.[42] Nevertheless, can payments in respect of unemployment as such be directly attributed to employment and if so then for how long? When are they no longer a reward for service or compensation for termination? As Dixon C.J. said in *R.* v. *Hamilton Knight*, the degree of connexion between the employment and the qualification for payment must be considered.[43]

Maintenance

In *R.* v. *Findlay*,[44] the High Court held that the payment of attendance money could be an industrial matter within section 4. Again Dixon C.J. stressed that a matter with only a remote, indirect or consequential effect upon relations was insufficient. But he pointed out that industrial matters already included much outside the contract of service and its incidents. The power was also concerned with the relations of the two classes collectively in industry. The Act defines "employees" to include "any person whose usual occupation is that of employee in any industry", and "employers" in a corresponding way.[45]

Therefore the Commission could order a waterside clerk's last or next employer to pay him attendance money for the times he had presented for employment but had not obtained it. Attendance was a practice which was normal in the industry and indeed a precondition of engagement, and payment was awarded as compensation for a loss of the freedom to seek work in another industry.

Thus, payments in respect of temporary, periodic unemployment to those who follow an industry may be an industrial matter even if payments are made in respect of a period or at a time when a worker is not actually in a contractual relationship with the paying employer. However, according to *R.* v. *Findlay*, there must be a contractual relationship between the payer and payee at some, not too remote, time. Joint and several liability for attendance money across the industry was

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[41] Fisher, "Redundancy and the Law: Some Recent Problems" (1969) 11 Journal of Industrial Relations 212, 218. Note the "Guidelines for Redundancy Situations in Australian Government Employment" published by the Department of Labour and Immigration, approved by the Australian Government in July 1974. The measures include income maintenance for up to six months to redundant employees, whether they obtain other employment or not.

[42] *The Clerks (Oil Companies) Award 1966* (1968) 122 C.A.R. 339; *R.* v. *Portus; ex parte A.N.Z. Banking Group Ltd* (1972) 127 C.L.R. 353, 360 *per* Menzies J., 371 *per* Stephen J.

[43] (1952) 86 C.L.R. 283, 296.

[44] *R.* v. *Findlay; ex parte The Commonwealth Steamship Owners' Association* (1953) 90 C.L.R. 621.

[45] Conciliation and Arbitration Act 1904-1976 (Cth), s. 4.

held not to be an industrial matter because payments would be made irrespective of whether the employer had ever employed the particular employee.[46] This narrow ruling presents problems for the industry-wide wage levy or unemployment insurance fund. Such schemes will also fail if a court characterises them as pertaining to the relations of employers and other employers, or employers and a fund, rather than employers and employees.[47]

So such schemes have their practical and legal difficulties, and it may therefore be preferable to encourage a system of income support independent of employers or industries.

SOCIAL SECURITY UPON TERMINATION

Unemployment Benefit

The staple source of income support for the unemployed at present is the federal unemployment benefit.

This benefit is funded solely by general taxation revenue. Prior to its introduction in 1945, contributory insurance schemes were mooted, and in 1923 the State of Queensland had implemented such a scheme.[48]

Payment of the benefit is essentially non-discriminatory. The scheme is administered by a large and regionalised Department—the Department of Social Security. Anyone unemployed is eligible for the benefit provided he is willing and able to accept suitable employment and has taken reasonable steps to obtain it.[49] There are age and residential qualifications.

There is no fixed arbitrary limit to the period for which one may receive this benefit. However, the benefit is a flat-rate benefit and its level is below Average Weekly Earnings and the minimum wage. It may even be below the poverty line. Set loadings are made when a recipient has a family to support. The benefit is not earnings-related and there is no public insurance scheme to supplement it. There seems to be an assumption that the recipient can budget on past and future earnings from other sources.

There is a waiting period of at least seven days. The benefit is payable from the seventh day after the day a person becomes unemployed or after the day he makes a claim, whichever is the later.[50] This waiting period may exist as much to reduce administrative costs and abuse as to save on payouts. It means that the benefit is less of an emergency measure.

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[46] (1953) 90 C.L.R. 621, 633.

[47] *R.* v. *Portus; ex parte A.N.Z. Banking Group Ltd* (1972) 127 C.L.R. 353; *Re Application by the Federated Storemen and Packers Union* (1974) Law Book Co. Industrial Arbitration Service Current Review 79; *R.* v. *Commonwealth Industrial Court; ex parte Cocks* (1968) 121 C.L.R. 313.

[48] Unemployed Workers Insurance Act 1922 (Qld), s. 7(1).

[49] Social Services Act 1947-1976 (Cth), s. 107(c).

[50] S. 119(1)(a).

The benefit is not a wage supplement. The benefit is payable to the unemployed. Income from other sources can supplement the benefit to a maximum of six dollars before the benefit begins to reduce dollar for dollar.

Nevertheless there are a few concessions to the intermittently unemployed. A claimant does not have to serve the waiting period more than once in any period of thirteen weeks.[51] But presumably when a claimant is unemployed more than twelve weeks after he last served the waiting period but not after he was last unemployed, he must serve the waiting period again.

A claimant who has been engaged for the past four weeks at least in "casual employment" earning per week no more than six dollars more than the level of the benefit, does not have to serve the waiting period.[52]

In addition, the Department's Instructions are rather loose with the meaning of "unemployed". They empower the payment of benefits to those "stood down", even where the "employment link is broken temporarily rather than permanently", that is where the claimants have ceased work rather than had their employment terminated.[53] The Instructions do not clearly encompass those suspensions produced by award standdown clauses, but one suspects that they attempt to do so. However, there is nothing to say that those stood down are exempted from the waiting period. This rules out those stood down for short periods.

Recent changes by the government in the "work test" have renewed interest in section 120 of the Social Services Act 1947-1976 (Cth). Section 120 empowers the Director-General of Social Security to postpone the date from which a benefit will be payable for such period as he thinks fit, or to cancel a payment, in four situations. The recent changes largely constitute an instruction to postpone the date in the case of a person whose unemployment is due to his voluntary act which, in the opinion of the Director-General, was without good and sufficient reason. What shall be considered good and sufficient reason will only emerge through practice, although it does seem that the government has in mind such reasons as over-taxing or physically dangerous conditions. In my view, section 120(a) draws an arbitrary line between retrenchments that are precipitated by the employee and by the employer. One hopes that the power will not be used in regard to a worker who resigns because he anticipates a decline in his industry and who then encounters difficulty in obtaining fresh employment.

It should be noted that section 120 also empowers postponement or

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[51] S. 119(1)(b).

[52] Unemployment, Sickness and Special Benefits Instructions of the Department of Social Security; Section 2, Sub-section F, Instruction 17(a).

[53] Instructions; Section 2, Sub-section D, Instructions 1 and 2(d). *Cf.* Ogus, "Unemployment Benefit for Workers on Short-Time" (1975) 4 Industrial Law Journal 12.

cancellation in the case of a person who, in the opinion of the Director-General, is a seasonal or intermittent worker and whose income is sufficient for the maintenance of himself and the persons who are ordinarily maintained by him notwithstanding a period of temporary unemployment. Kewley[54] says that this provision was included because seasonal and intermittent workers may receive loaded wages, but that it fell into complete disuse because it was too difficult to administer.

Overall, its inconsistencies make it hard to suggest the essential purpose of the benefit. It appears to be a measure of temporary assistance only. It has little relevance to any type of short period of unemployment, whether it be isolated or recurring. It cannot serve to assist incomes affected by minor diminutions in work through short-time, or temporary lay-offs of less than a week at a time, whether they be caused by cyclical, structural or physical factors. In contrast, other countries such as France meet the problem of partial unemployment with assistance.

Nor does the benefit serve to afford the long-term, involuntarily and totally unemployed a reasonable minimum income in relative or absolute terms. It does not maintain income levels. It is not designed to encourage anyone to relinquish a job or not to find another one.

Structural Adjustment Assistance

In terms of assistance, the unemployment benefit compared unfavourably with the federal government's recent structural adjustment assistance to workers.[55] Under that program, income maintenance was payable for up to six months to persons displaced as a direct result of structural change in the economy deemed by prescription to have been induced by government policy. Two prescribed causes were the 25% across the board tariff reduction and the removal of sales tax exemption from aerated waters.

In general the level of income maintenance allowed under the scheme was the level of the retrenched person's average weekly earnings in the previous six months but not in excess of one and a half times Average Weekly Earnings.

The object of the scheme was largely humanitarian. The government felt particularly responsible for displacement induced by it for the good of the whole economy. But without a means or work test, the scheme may have wasted money and not really encouraged workers to shift to other industries. And under the guise of the scheme, employers may have been able to rest employees for other reasons.

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[54] Kewley, *Social Security in Australia 1900-1972* (2nd ed. 1973) 268.

[55] Australia, Department of Labour and Immigration, *Australian Labour Market Training: Report of the Committee of Inquiry into Labour Market Training* [Chairman D. Cochrane] (1974) (*The Cochrane Report*) 62-63.

JUSTIFICATION AND PERMANENT EMPLOYMENT

This completes the review of existing measures. However, the inquiry would not be finished without an assessment of the Commonwealth's constitutional capacity to provide stronger protection through the Commission or otherwise.

Rather than insist that the employer pay compensation for lawful terminations in specified circumstances, or that the State accept the terminations and be responsible for income maintenance itself, the law might interfere directly with the employers' policies of engagement and termination. Can the Commonwealth empower the Commission to insist that employers only terminate on specified grounds, in particular, only if the termination is justified by the operational requirements of the enterprise or the capacity or conduct of the worker? This is what the ILO 1963 Conference on Termination of Employment recommended.[56] There is a fundamental obstacle.

Managerial prerogatives

The Commission has said that there are many decisions employers make in the interests of their enterprises' profitability and efficiency for which the Commission will not substitute its own opinion or that of the employees.

Such a restriction on the Commission's competence is partly attitudinal, partly practical, partly statutory and constitutional. It is the constitutional aspect that is the most far reaching. In any case, this inability and unwillingness to involve itself in issues of managerial judgment limits the Commission's role in securing employment significantly. This limitation manifests itself on such issues as manning scales, the allocation of extraordinary duties, methods of engagement and decisions to reduce the workforce.[57] Although in some way all "industrial matters", these issues are deemed not arbitrable to the extent that they directly call into question and result in interference with the exercise of managerial discretion and judgment.

But, it might well be asked, what industrial topic does not do so? Whether an issue that involves the exercise of managerial judgment is arbitrable depends upon its characterisation which in turn depends upon whether one looks at it from the standpoint of the employer or the employees.

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[56] ILO, *Conventions and Recommendations 1919-1966*, 1060 (Rec. no. 119, 47th Session).

[57] *R.* v. *Flight Crew Officers' Industrial Tribunal; ex parte Australian Federation of Air Pilots* (1971) 127 C.L.R. 11 (the *Qantas* case); *R.* v. *Commonwealth Conciliation and Arbitration Commission; ex parte Melbourne and Metropolitan Tramways Board* (1966) 115 C.L.R. 443 (*Tramways Case (No. 2)*). Also *Australian Aluminium Co. Pty Ltd* v. *Federated Engine Drivers and Firemens Association* (1952) 74 C.A.R. 621; *Morts Dock and Engineering Co. Ltd* v. *Federated Ship Painters and Dockers Union* (1954) 79 C.A.R. 254; *Waterside Workers' Federation* v. *Commonwealth Steamship Owners' Association* (1914) 8 C.A.R. 52.

The constitutionally decisive question is said to be whether the issue directly involves the relationship of employer and employee or not.[58] So if an employer decision, or rather the demand concerning it, can properly be characterised in terms of being a term or condition of employment it may be arbitrable.[59] This may mean that the employer is entitled to decide what is justified according to commercial, technical and even social considerations but that his decision may be assessed on the basis of its effect upon the employees. In this respect and to this extent, it is an industrial matter. It may be that in the inquiry into its effect upon employees, the Commission implicitly and partially reviews whether the practice is operationally necessary.

According to Barwick C.J. in *R.* v. *Flight Crew Officers' Industrial Tribunal; ex parte Australian Federation of Air Pilots*,[60] while an award settling an industrial dispute may legitimately impinge upon management or the exercise of managerial discretion, "management or managerial policy as such is not in my opinion a proper subject matter for an award or order".[61]

In a way, every award of minimum terms and conditions restricts the freedom of management to exercise judgment and choose directions. Arbitration of disputes about whether an employer made a correct managerial judgment in pursuing a course can be pre-empted by removing that course from the options open to him. This is where the issue of grounds for termination is real. However, it seems that even if an issue can be characterised as an industrial matter, the Commission may still decline, largely on an attitudinal basis, to award a term that would severely or unduly restrict the freedom of management to innovate in the interests of the shareholders and the public.[62]

A slightly different version of the same approach is that the Commission will not interfere with the manner in which the management conducts the business unless that manner involves oppressive, unjust or unreasonable demands upon the employees. Undue workload is an example.[63]

So the Commission cannot tell management, directly and expressly,

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[58] *Tramways Case (No. 2)* (1966) 115 C.L.R. 443, 450 *per* Barwick C.J.

[59] *Melbourne and Metropolitan Tramways Board* v. *Horan* (1967) 117 C.L.R. 78; *R.* v. *Gallagher; ex parte Commonwealth Steamship Owners' Association* (1968) 121 C.L.R. 330; *Australian Federation of Air Pilots* v. *Flight Crew Officers Industrial Tribunal* (1968) 119 C.L.R. 16; *R.* v. *Holmes; ex parte Altona Petrochemical Co. Ltd* (1972) 126 C.L.R. 529.

[60] (1971) 127 C.L.R. 11.

[61] *Id.* 20.

[62] *Federated Clerks Union* v. *Public Service Board* (1969) 128 C.A.R. 319; *Australian Glass Manufacturers Co. Pty Ltd* v. *Australian Glass Workers Union* (1950) 66 C.A.R. 175; *Adelaide Steamship Co. Ltd* v. *Federated Clerks Union* (1947) 58 C.A.R. 76.

[63] *Re Theatrical and Amusement Employees Awards* (1964) 106 C.A.R. 623; *Waterside Workers Federation* v. *Commonwealth Steamship Owners Association* (1962) 100 C.A.R. 767.

what is in the interests of the enterprise as a whole and what is not. It may however implicitly say that efficiency and profit must be subject to some safeguards for employees.

Terminations

Terminations are the case in point. In the *Qantas* case[64] the High Court held that the Flight Crew Officers' Industrial Tribunal did not have jurisdiction to review the decision of Qantas to terminate the employment of a number of pilots. The Air Pilots' Federation had argued that the management had made a mistake and that the terminations were not economically necessary.

But the High Court held that the reasons for the decision to terminate, or the soundness of those reasons, were a matter for management and not an industrial matter, and that the Tribunal should have confined itself to the way in which the decision was to be implemented.[65]

On the other hand, in *R.* v. *Gough; ex parte Meat and Allied Trades Federation of Australia*,[66] the High Court considered that a paragraph in the following terms would be a proper subject of an award:

> An employer shall not give notice of termination of employment to a weekly employee or refuse to re-engage a regular daily employee or refuse to re-employ any person employed by him in the preceding twelve (12) months or dismiss an employee without notice harshly or unreasonably.

However, the award in question in that case was struck down because a subsequent paragraph purported to empower the Commission to determine whether individual terminations were in fact harsh or unreasonable and to order reinstatement or re-employment if they were. The Court held that such power was not arbitral and was thus invalid. As a result, there is no indication of how the Commission could administer the quoted paragraph. Present irregular inquiries by State tribunals and the Commission by consent into whether particular terminations are harsh, oppressive or unjust essentially concern the conduct and capacity of the individual worker and his treatment by the employer.[67]

In *The Clerks (Oil Companies) Award 1966*,[68] the full Commission held that a clause providing that "an employer shall not terminate the employment of a clerical employee who has completed five years continuous employment with the employer except upon the grounds of

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[64] (1971) 127 C.L.R. 11.

[65] *Id.* 28 *per* Menzies J.

[66] (1969) 122 C.L.R. 237, 240.

[67] It now seems that an employee covered by a federal award providing for termination by notice cannot avail himself of State legislation empowering reinstatement of those terminated harshly, unjustly or unreasonably, unless the award makes it clear that it did not intend to cover the field: *R.* v. *Industrial Court of South Australia; ex parte G.M.H. Pty Ltd* 1975 17 A.I.L.R. Rep. 290. Note *Re G.M.H. Pty Ltd (Part 1) General Award* 1975 17 A.I.L.R. Rep. 718.

[68] (1968) 122 C.A.R. 339.

serious misconduct or of permanent incapacity to perform clerical duties or of the employee having reached the age of 65 years" involved an industrial matter.[69] But the Commission refused to insert such a term because it thought that it would be too restrictive of employers.[70] The case was heard in the context of the oil companies' proposed computerisation and centralisation of clerical procedures. The Commission did recommend that the employees be informed of and involved in the planning as soon as possible, and it supported its recommendation with an indication that it might intervene in the future if the welfare of the employees was not properly dealt with in company planning.[71]

A term that "the employer shall not terminate the services of a pilot by reason of age alone before the pilot has attained the age of 60 years" has also been held to concern an industrial matter.[72]

CAPACITY

What does this analysis indicate about the capacity of the Commission? First, it is open to the Commission, apart from any current attitudinal or practical restrictions, to insist that employment only be terminated upon limited grounds. Section 4(1) of the Act defines industrial matters to mean "all matters pertaining to the relations of employers and employees and, without limiting the generality of the foregoing, includes . . . (k) the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons".

There is evidence that some members of the Commission are growing readier to interfere with management as industry and society change.[73] But given a conservative judicial doctrine of managerial prerogatives, it could be argued that an employer's view that the operational grounds for termination were present ought to be accepted by the tribunal. So the test for the existence of these grounds would be largely subjective.

On occasions the Commission has reviewed terminations on this basis with the consent of both parties.[74] The problem would arise when an employer refused to accept an adverse finding and the Commission ordered reinstatement. An inquiry into whether there was a valid operational ground for the purported termination, and an order of reinstatement if there were not, would be an exercise of judicial power. It would

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[69] *Id.* 343.
[70] *Id.* 344.
[71] *Id.* 345.
[72] *Australian Federation of Air Pilots* v. *Australian National Airlines Commission* 1968 10 A.I.L.R. Rep. 433.
[73] *Australian Theatrical and Amusement Employees Association* v. *Dendy Theatre* 1974 16 A.I.L.R. Rep. 172; *Federated Clerks Union* v. *Aberdeen and Commonwealth Line Ltd* (1970) 132 C.A.R. 126.
[74] *Federated Ironworkers' Association* v. *Stewarts and Lloyds (Australia) Pty Ltd* (1969) 126 C.A.R. 967; *Evans Deakin Industries Ltd* v. *Amalgamated Engineering Union* (1969) 129 C.A.R. 228.

involve the ascertainment and enforcement of existing legal rights under the award.[75]

So while the Commission is empowered to introduce the concept of "just cause" into awards, the Industrial Court would have to consider allegations of breaches of the awards and be empowered by the Act to order reinstatement. The Court has shown the same respect for the autonomy of management as the Commission.

It seems that the Commission is not able to avoid the objection by including in an award a provision empowering itself to review the operational necessity of a lawful termination and to order re-employment as it sees fit. Nor could Parliament empower it to do so as this involves the Commission in the ascertainment of facts which evidently amounts to a judicial determination.[76] And, while it should be possible for the Commission to afford a remedy indirectly by means of the discretionary creation of a new right according to industrial considerations, this provision does not go far enough in that direction. In any case, most new disputes about terminations will not extend beyond the limits of one State.

Standdowns

The Commission has conducted a similar sort of inquiry into operational necessity in relation to its standdown clauses. At times disputes arise over whether employees could not have been usefully employed. Strictly speaking, this is a question for the Industrial Court. In any case, it has been held that the onus in such cases is upon the employer to show the tribunal that he took reasonable steps in the conduct of his enterprise to employ the workers usefully in the sense of result or gain to the business.[77] The tribunal must also decide whether there existed a cause of the interruption for which the employer cannot reasonably be held responsible.[78] Employers would be far more amenable to a tribunal reviewing the justification of a proposed standdown as opposed to a termination, for they stand to benefit considerably more by a standdown provision.

POSSIBLE REDUCTIONS IN THE WORKFORCE

Planning and participation

Efforts to secure employment more indirectly will experience greater difficulties. Decisions about production, distribution and investment policy affect job security but do not directly involve the employment

[75] *R.* v. *Portus and others; ex parte City of Perth* (1973) 129 C.L.R. 312. But note Commissioner Portus' draft award (at 320-321) which was not considered.

[76] *Re Carpenters and Joiners Award* (1971) 17 F.L.R. 330; *Re Railways Awards* 1969 11 A.I.L.R. Rep. 21.

[77] *Re Railways Metal Trades Award* 1967 9 A.I.L.R. Rep. 253.

[78] *Amalgamated Engineering Union* v. *Metal Trades Employers Association* (1942) 47 C.A.R. 45.

relationship.[79] Because there is a domain of managerial topics generically distinct from industrial matters, not only are the issues on which the Commission can arbitrate limited but also the subject matter of collective agreements it can sanction is restricted. Nor for the purpose of conciliation of such non-industrial disputes could the employers be compelled to give notice to unions or public authorities of proposed reductions, or to open their books or negotiate. Indeed the Parliament cannot under this head of power provide for employee representation or participation in the enterprises' decision-making processes.[80]

This is a restrictive interpretation. But the courts have provided the opportunity for constraint by "declaring" that there is a crucial, static aspect of industry that cannot be directly influenced by employees or by government unless other heads of power permit. At the same time the interest of many employees about their industry has been increasing and the character of many employers has become more institutional and amenable to restructuring.

Is justification a desirable measure?

Justification in the ILO's terms does not ensure job security but it does provide a check on employers. There will be situations where reductions in a workforce of an enterprise are economically, technically or socially justifiable. Of course, much will depend upon what inroads into economy and efficiency are acceptable to safeguard employment. For instance, when reviewing the economic desirability of a reduction, should an enterprise be considered as a whole? What level of profit should be allowed? Should managerial mistakes be taken into account? Should the short-term or long-term prospects of the employer be the criterion?

Fully permanent employment is not generally desirable. It is an obstacle to the inevitable rationalisation of wasteful and superfluous industry. But planned or unplanned rationalisation will mean that individuals are displaced for short and long periods. Income support for such individuals is socially desirable, but income support that is tied to a particular industry[81] or that falls far short of maintenance may not encourage mobility.

As the Cochrane Report recommends, there is a need for manpower planning.[82] But in our political economy, the government cannot guarantee everyone some job for it does not control and direct private industry. Its resources and accepted role are too limited to achieve this purpose by

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[79] *Supra* n. 59.

[80] Maher and Sexton, "The High Court and Industrial Relations" (1972) 46 A.L.J. 109. It is just possible that the corporations power could be used to require that employees' interests be represented in or at least respected by the management of some employers.

[81] Isaac, "Employer Provision for Social Welfare" in Hancock (ed.), *The National Income and Social Welfare* (1965) 112.

[82] *The Cochrane Report, op. cit.* vii, 22-23.

means of public employment. Restricted public employment schemes such as the Regional Employment Development scheme are best suited to the temporary alleviation of unemployment in areas worse hit than most. However, a government can and should read the trends in the economy and assist individuals to adjust by subsidising retraining and relocation. So far the National Employment and Training Service has been too indiscriminate to fulfil this aim effectively but it must continue in some form. But any retraining scheme takes time to reach all who need it. Beyond it looms the concept of a guaranteed minimum income.

GUARANTEED MINIMUM INCOME

Various means have been suggested over the years for the provision of a universal minimum income guarantee. In Australia, both the Commission of Inquiry into Poverty[83] and the Priorities Review Staff[84] have now recommended such a guarantee. Their means would be negative income tax or tax credits, rather than direct social assistance or dividend. In other words, income tax would be assessed by crediting every income unit with a minimum income, and then taxing all other income at a proportional rate. If the income from other sources is such that the tax on it is less than the minimum income, then the unit receives a net cash payment from the government. If the income is such that the tax on it is more than the minimum income, then the unit merely receives a "deduction from tax liability" up to that minimum figure.

The appeal of the scheme is its sweep. It does away with the need to establish the special circumstances upon which the present assistance turns. It more easily reaches the working poor, those who experience partial unemployment and those for whom the minimum wage is insufficient. If its level is realistic, it is less degrading than the benefit to the long-term involuntarily unemployed. It might thus encourage more flexible arrangements in temporarily depressed industries and reduce resistance to the modification or abolition of uneconomic industries.

Such a scheme attracts its critics. As it is a complex subject, I can only mention some of the reservations at this stage. Disincentive to work is one unproven charge against it. Surprisingly, administration is another. The main difficulties of administration include the fixation of the minimum level and its variation with different sized units, the definition of income, the assessment of individual eligibility, and the frequency with which credits are assessed and paid. In particular, as assessment and payment would be retrospective, the scheme would fail to meet head on uncharacteristic income emergencies. A committee attached to the Prime Minister's Department is presently studying the concept.

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[83] Australian Government Commission of Inquiry into Poverty, *Poverty in Australia* (April 1975) 67 ff.

[84] Australia, Priorities Review Staff, *Possibilities for Social Welfare in Australia* (July 1975) 20 ff.

The anticipation of political reaction to the sweep of such a guarantee leads reformists also to consider more qualified changes to fill existing gaps in assistance. One option incidental to the topic of this Article is the payment of family income supplements to large families,[85] a discernible group of the poor in the workforce.

Another option, more directly related to the topic, is the abolition of the waiting period for the unemployment benefit.[86] This suggestion was extended by the Department of Labour and Immigration at one stage to a proposal[87] to pay daily benefits to employees on short-time in selected establishments which sought, because of economic causes, to reduce the level of their activity temporarily or to phase out some part of their activities gradually. The benefit was either to be paid in a lump sum to the employer or direct to nominated employees at a rate of 40 per cent of their wages in respect of a maximum of two days per week for up to three months. Such a proposal also required a reinterpretation of the work test.

A third and major option is the introduction of compulsory unemployment insurance to supplement the unemployment benefit or even wages on an earnings-related basis.[88] Insurance could be funded by contributions from employers and employees, together with a small subsidy and administrative services from the government. Whether the schemes are confined to problem industries or nation-wide, their attraction to a government is their avoidance of extensive, tax funded, welfare. To the unemployed, their attraction is the recognition that emergency needs are related to individual, on-going commitments rather than a minimum standard of living.

The dangers of a scheme attached to a particular employer or industry were noted above in relation to the industry-wide levy. A nation-wide scheme can encourage mobility, provided it adopts a work test or a maximum period of payments. However, the cost and compulsion of a national scheme will raise objections if unemployment is not evenly spread throughout the country or if contributions to it are not tailored to individual risks of unemployment and to levels of payments.

The introduction of comprehensive social security, and in particular either an insurance scheme or a guaranteed minimum income, will also encounter constitutional obstacles. These raise complex issues and so I simply wish to mention the most likely heads of power in this final section.

Heads of Power

The most obvious head of power is section 51(xxiiiA) of the Constitution, the social welfare power, which empowers the Commonwealth to

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[85] *Id.* 25.

[86] Brotherhood of St. Laurence, *The Waiting Poor* (1974).

[87] Australia, Priorities Review Staff, *Assistance for Structural Adjustment, Income Maintenance, etc.* (August 1975) 88.

[88] *Id.* 12.

provide assistance in relation to eleven specified classes of condition.[89] The provision of the unemployment benefit is expressly enumerated. Some argument could arise about the Department of Social Security's interpretation of the word "unemployment" to cover those who are merely suspended, but as the paragraph was intended to be remedial, any interpretation of it should be liberal. Structural adjustment assistance payments to displaced workers are similarly referable but payments to employers to maintain or create jobs might be too remote.

Then, for an insurance scheme or a guaranteed minimum income, there are, in addition to section 51(xxiiiA), at least section 51(ii) (the taxation power),[90] section 51(xiv) (the insurance power)[91] and section 81 (the spending power),[92] all of which separately or in various combinations will provide support to an uncertain degree. Their capacity to authorise both the raising of contributions and the making of payments of social security warrants early attention.

CONCLUSION

There may then be constitutional limits to the Commonwealth's present capacity to secure employment or income directly. The initiatives within and beyond this capacity will largely be determined in the political arena. In summary, the initiatives can be:

1 Leave matters as they are on the ground that economic conditions and social attitudes are not changing.

2 Meet the problem of long-term redundancy—
   (a) by requiring employers to pay severance pay or pensions; and
   (b) by providing income support through unemployment benefits and/or insurance, or a guaranteed minimum income, together with such services as job information, retraining and relocation.

3 Meet the problem of suspensions and short-term retrenchments—
   (a) by removing standdown clauses from awards and lengthening mandatory periods of notice;
   (b) by requiring strict justification of standdowns and terminations in operational and perhaps even social terms; and

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[89] *British Medical Association* v. *The Commonwealth* (1949) 79 C.L.R. 201; *Victoria* v. *The Commonwealth* (1975) 7 A.L.R. 277. See generally Sackville, "Social Welfare in Australia: The Constitutional Framework" (1973) 5 F.L. Rev. 248.

[90] "Negative (or Reverse) Income Tax" (1974) 48 A.L.J. 511 and 560.

[91] *Insurance Commissioner* v. *Associated Dominions Assurance Society Pty Ltd* (1953) 89 C.L.R. 78, 83 *per* Fullagar J.; *Australian Steamships Ltd* v. *Malcolm* (1914) 19 C.L.R. 298, 327 *per* Isaacs J. See generally Cantor, "National Insurance in its Constitutional Aspects" (1928) 2 A.L.J. 219; Kennan, "The Possible Constitutional Powers of the Commonwealth as to National Health Insurance" (1975) 49 A.L.J. 261.

[92] *Victoria* v. *The Commonwealth* (1975) 7 A.L.R. 277; *Attorney-General for Victoria (ex rel. Dale)* v. *The Commonwealth* (1945) 71 C.L.R. 237.

(c) by providing income support through unemployment benefits and/or insurance, removing the waiting period and other obstacles to assistance with partial unemployment, or through a minimum income guarantee.

This Article has shown that these initiatives are legally complicated. They are safeguards capable of careful legal expression as adjuncts to determined federal government economic policy and socially responsive planning and organisation of industries.