# GIVE UP YOUR CLAIM OR GIVE UP YOUR BILLET: LEGAL REDRESS FOR VICTIMISED TRADE UNIONISTS IN AUSTRALIA

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*An objective of all industrial legislation in Australia is that employees victimised because of their participation in the industrial relations system should be able to obtain legal redress. Thus it is sought to give remedies for conduct which Isaacs J. pithily described as amounting to a demand by an employer to an employee of "give up your claim or give up your billet". Dr O'Donovan exhaustively analyses how the legislation of the Commonwealth and each of the States protects employees from victimisation on account of their union or industrial activities. Differences between the protection and redress given by each piece of legislation are detailed, while the Commonwealth provisions and cases concerning them are highlighted. The article concludes by suggesting matters for reform in this important area of industrial law.*

Few employees would be prepared to play an active role in our industrial relations systems if they were thereby exposed to discrimination in their employment. The various industrial arbitration and wages boards statutes operating throughout Australia acknowledge this fact by prohibiting victimisation of employees on grounds of their legitimate trade union or industrial activities.[1] The purpose of this article is to examine the scope of the victimisation provisions and to suggest ways of improving the protection they offer.

## 1. *The Victimisation Provisions*

Section 5 of the Conciliation and Arbitration Act 1904 (Cth) is the most comprehensive of these provisions and it will be convenient to extract the section in full indicating in footnotes where it differs from its State counterparts. It provides:

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[1] State and Commonwealth legislative provisions concerning the victimisation of employees are as follows:

Commonwealth: Conciliation and Arbitration Act 1904 (Cth), s. 5;
New South Wales: Industrial Arbitration Act 1940-1975 (N.S.W.), s. 95;
Queensland: Industrial Conciliation and Arbitration Act 1961-1976 (Qld), s. 101;
South Australia: Industrial Conciliation and Arbitration Act 1972-1975 (S.A.), ss. 156, 157;
Tasmania: Industrial Relations Act 1975 (Tas.), s. 60;
Victoria: Labour and Industry Act 1958 (Vic.), s. 204;
Western Australia: Industrial Arbitration Act 1912-1975 (W.A.), s. 135.

(1) An employer shall not dismiss an employee,[2] or injure him in his employment, or alter his position to his prejudice,[3] by reason of the circumstances[4] that the employee—

(a) is or has been, or proposes, or has at any time proposed, to become, an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization;[5] or

(b) is entitled to the benefit of an industrial agreement or an award;[6] or

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[2] The "victimisation" provisions in all states have similar wording. Only the Queensland section penalises a *refusal to employ* any person on the prohibited grounds.

[3] All states, except South Australia and Victoria, have similar wording in their unlawful dismissal provisions.

In South Australia an employer is prohibited from injuring an employee in his employment by reason only of the fact that the employee is, or is not, an officer or member of an association, or is entitled to the benefit of an award or industrial agreement: Industrial Conciliation and Arbitration Act 1972-1975 (S.A.), s. 157. On the other hand, an employer is not prohibited from altering an employee's position to his prejudice by victimisation on these grounds. Nor is the employer penalised for injuring an employee in his employment or altering an employee's position to his prejudice in consequence of the employee's becoming a member of a Conciliation Committee or being a party to, or giving evidence before, an industrial tribunal. Further, an employer is not prohibited from these lesser forms of victimisation if the employee takes part or becomes involved in any industrial dispute. See Industrial Conciliation and Arbitration Act 1972-1975 (S.A.), s. 156.

In Victoria, victimisation falling short of discharge is not prohibited.

[4] The New South Wales and Queensland provisions are almost identical. In Victoria, Western Australia and Tasmania, the relevant provision reads: "by reason *merely* of the fact . . ." (italics added). Thus if the employer's motives are mixed (some lawful, some unlawful) the dismissal or other act of victimisation will not be penalised. In South Australia, the relevant words in s. 157 are "by reason only of the fact . . .". It does not follow that employees in South Australia face the same hurdle as their Victorian, Western Australian and Tasmanian counterparts, for the defendant in South Australia is obliged to show that the employee was dismissed or injured in his employment "for some substantial reason other" than the prohibited grounds: Industrial Conciliation and Arbitration Act 1972-1975 (S.A.), s. 157.

[5] The relevant provisions in Queensland, New South Wales, South Australia and Western Australia cover union officials and members. Moreover, only the Queensland, Western Australian and, possibly, the South Australian sections protect officials and members of unions which have applied to be registered. But South Australia seems to be the only state where officials in an unregistered union are covered. No state prohibits victimisation against *candidates* for union office or for the position of job delegate. Further, no state penalises discrimination against *former* officers, delegates or members of a trade union.

The New South Wales and South Australian sections protect employees who are officials of Conciliation Committees. Moreover, in South Australia, an employee who acts in the capacity of a member of a Conciliation Committee is protected. There is no similar protection in the New South Wales Act.

The relevant provisions in wages board states, Victoria and Tasmania, safeguard employees who are members of the boards. The Tasmanian section also penalises employers who discriminate against employees who act in the capacity of members of an industrial board.

[6] The unlawful dismissal provisions in the Queensland, South Australian, Western Australian and Tasmanian statutes have almost identical wording. There

(c) has appeared, or proposes to appear, as a witness, or has given, or proposes to give, evidence, in a proceeding under this Act;[7] or

(d) being a member of an organization which is seeking better industrial conditions, is dissatisfied with his conditions;[8] or

(e) has absented himself from work without leave if—

(i) his absence was for the purpose of carrying out his duties or exercising his rights as an officer or delegate of an organization; and

(ii) he applied for leave before he absented himself and leave was unreasonably refused or withheld;[9]

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is no equivalent provision in Victoria.

The Queensland section also prohibits victimisation of an employee who has "claimed the benefit of an industrial agreement or award". This corresponds closely with the New South Wales provision.

[7] The phrasing of the Queensland, New South Wales and Tasmanian sections corresponds with this part of the federal provision; the South Australian section is broadly similar. There is no equivalent provision in Western Australia or Victoria.

In most states, victimisation of an employee who proposes to appear as a witness or to give evidence in a proceeding under the Act is not prohibited. On the other hand, the Industrial Conciliation and Arbitration Act 1961-1976 (Qld), s. 101(2) penalises an employer if he threatens to dismiss an employee, injure him in his employment or alter his position to his prejudice.

The Victorian and Tasmanian sections prohibit the dismissal of an employee who has given an inspector information with regard to matters under the relevant wages board statutes. The Tasmanian provision also confers protection upon an employee who gives information about his working conditions to *an officer* of an organisation or association of employees to which he belongs: Industrial Relations Act 1975 (Tas.), s. 60(1)(c). The phrase "conditions under which he is employed" in this section is quite broad; it encompasses far more than the employee's entitlement under an award or statute.

The New South Wales provision is similar. It protects an employee who "has informed *any person* that a breach or suspected breach of an award or industrial agreement has been committed by" the employer (italics added): Industrial Arbitration Act 1940-1975 (N.S.W.), s. 95(b1). Note an employee giving information about a breach of statutory obligations or discrimination short of an infringement of an award or an industrial agreement is not protected. See generally, *Bowen* v. *Read* 1956 A.R. (N.S.W.) 873.

In the Queensland, South Australian, Western Australian and Commonwealth jurisdictions there are no equivalent provisions. But see: Industrial Conciliation and Arbitration Act 1961-1976 (Qld), s. 101(1)(d) and Conciliation and Arbitration Act 1904 (Cth), s. 5(1)(d).

[8] This provision was inserted in the federal Act by the Commonwealth Conciliation and Arbitration Act 1920 (Cth), no doubt in response to the remarkable decision in *Pearce* v. *W.D. Peacock & Co. Ltd* (1917) 23 C.L.R. 199. Only the Queensland statute contains an equivalent provision. Thus the patent injustice of *Pearce* v. *W.D. Peacock & Co. Ltd* (1917) 23 C.L.R. 199 may recur in the other states.

[9] The Queensland provision is identical with the Commonwealth section, while the New South Wales provision is broadly similar. There is no equivalent clause in the Western Australian or South Australian statutes. But see Industrial Conciliation and Arbitration Act 1972-1975 (S.A.), s. 156(1)(b). In Tasmania and

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(f) being an officer, delegate or member of an organization, has done, or proposes to do, an act or thing which is lawful for the purpose of furthering or protecting the industrial interests of the organization or its members, being an act or thing done within the limits of authority expressly conferred on him by the organization in accordance with the rules of the organization.[10]

Penalty: Four hundred dollars.[11]

(1A) An employer shall not threaten to dismiss an employee, or to injure him in his employment, or to alter his position to his prejudice—

(a) by reason of the circumstance that the employee is, or proposes to become, an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization, or that the employee proposes to appear as a witness or to give evidence in a proceeding under this Act; or

(b) with the intent to dissuade or prevent the employee from becoming such officer, delegate or member or from so appearing or giving evidence;[12] or

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Victoria, an employee who absents himself from work through being engaged in duties as a member of a wages board or an industrial board will be protected even if he does not apply for leave, provided he gives his employer reasonable notice of his intention.

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[10] This provision was inserted in the federal statute by the Conciliation and Arbitration Act 1973 (Cth), s. 6. It arose out of the Federal Government's concern to protect shop stewards from victimisation in pursuit of legitimate activities on the shop floor. There are three major qualifications in this provision: first, the officer or delegate must act lawfully; second, his actions must be for the purpose of promoting or safeguarding the interests of the organisation or its members (probably an objective test); third, the actions must be within the scope of his express authority properly conferred by the organisation of which he is an official or delegate. There is no equivalent provision in State statutes.

[11] In Queensland, the penalty for any of the prohibited forms of victimisation is $200. In New South Wales, South Australia and Western Australia, it is $100. The Victorian penalty is $50 (originally introduced by the Factories and Shops Act 1910 (Vic.), s. 4). It has not subsequently been increased. The Tasmanian provision has recently increased the penalty from $40 to $200, see Industrial Relations Act 1975 (Tas.), s. 60(1).

[12] The Queensland provision is identical. Thus in Queensland a candidate for union office is protected from threats to dismiss but not the actual discharge! And a former union official is protected neither from the threat to dismiss nor the dismissal itself.

In Tasmania, employees are, in certain circumstances, protected from a threatened dismissal but, once again, candidates for union office and former union officials are not safeguarded. Further the Tasmanian provision does not penalise the dismissal of an employee who *proposes to appear* as a witness or *proposes to give any evidence* in a proceeding under the Act.

This form of intimidation short of discharge is *not* penalised in New South Wales, Victoria, South Australia or Western Australia.

(c) with intent to dissuade the employee, being an officer, delegate or member of an organization from doing an act or thing of the kind in relation to which paragraph (f) of sub-section (1) applies.[13]

Penalty: Four hundred dollars.

(2) . . .

(3) A reference in this section to an organization shall be read as including a reference to a branch of an organization.

(4) In any proceeding for an offence against this section, if all the facts and circumstances constituting the offence, other than the reason for the defendant's action, are proved it shall lie upon the defendant to prove that he was not actuated by the reason alleged in the charge.[14]

(5) Where an employer has been convicted of an offence against this section the court by which the employer is convicted may order that the employee be reimbursed any wages lost by him and may also direct that the employee be reinstated in his old position or in a similar position.[15]

2. *Lack of Uniformity*

A comparison of the above section with the corresponding State provisions produces a mosaic of distinguishing features and in many cases the differences relate to substantive, rather than procedural, issues. It may be useful to highlight a few of the gaps which appear from this analysis.

Only the Queensland section penalises a refusal to employ a person on the prohibited grounds of victimisation.[16] Thus, in most jurisdictions, an employer recruiting labour after a temporary lay-off may refuse to re-engage employees who have been active in legitimate trade union affairs.[17] No State prohibits discrimination against candidates for

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[13] There is no equivalent provision in any of the state statutes dealing with unlawful dismissals.

[14] In Queensland and New South Wales, the provision is identical with the Conciliation and Arbitration Act 1904 (Cth), s. 5(4).

The Western Australian and Tasmanian sections carry a stricter onus since the defendant is obliged to show that the victimisation was for some reason *other* than that mentioned in the section.

In Victoria, the Crown apparently has the onus of establishing all the elements of the offence including the employer's improper motive, see Alley, *Industrial Law in Victoria* (1973) 213.

The South Australian provision is broadly similar to its counterparts in the Queensland, New South Wales and federal jurisdictions.

[15] The reinstatement remedy is discussed in detail, *infra*, 155-159.

[16] Industrial Conciliation and Arbitration Act 1961-1976 (Qld), s. 101(1).

[17] See *Derrick* v. *Dangar* [1921] A.R. (N.S.W.) 40, where the Industrial Commission of New South Wales held that the words "dismisses from his employment" in a predecessor of s. 95 of the Industrial Arbitration Act 1940-1975 (N.S.W.) do not include a refusal to employ a casual employee after a temporary lay-off.

union office or for the position of job delegate. Further, no State penalises the discrimination against former officers, delegates or members of a trade union, and, in those jurisdictions where boards of reference operate, the union representative on these bodies is not protected against victimisation. Only in New South Wales are employees who complain to their union officials about their working conditions shielded from discrimination.[18] Again, in most jurisdictions, employees who are simply dissatisfied with their working conditions are given no redress against victimisation.[19] Only the Queensland[20] and the federal statutes[21] have made any attempt to prohibit intimidation which falls short of discharge, and the Queensland provision itself is defective.[22] No State protects shop stewards from discrimination even where the steward's actions are lawful, legitimate, and authorised by the union. This is a serious omission for as Smithers and Evatt JJ. observed in *Bowling* v. *General Motors-Holdens Pty Ltd*:[23] "if it is thought that being a shop steward involves an added risk of dismissal, shop stewards will be hard to find".[24]

Taken overall, the Victorian and Western Australian sections provide the least protection for employees. Perhaps the law's failure to remodel the Victorian provision can be attributed to the fact that less than one third of the employees in that State fall within the jurisdiction of the local statute.[25] This excuse cannot be pleaded for Western Australia for there the overwhelming majority of employees are within the jurisdiction of local tribunals.[26]

In many cases, the lack of uniformity in the victimisation provisions throughout Australia deprives employees of protection which the law could quite easily provide. If the industrial arbitration systems are to function effectively a total prohibition against all forms of victimisation on grounds of legitimate trade union or industrial activity is vital. Evatt J. expressed similar concern in *Grayndler* v. *Cunich*[27]

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[18] See Industrial Arbitration Act 1940-1975 (N.S.W.), s. 95(b1).

[19] The only exceptions are the federal and Queensland jurisdictions. See: Conciliation and Arbitration Act 1904 (Cth), s. 5(1)(d) and Industrial Conciliation and Arbitration Act 1961-1976 (Qld), s. 101(1)(d).

[20] Industrial Conciliation and Arbitration Act 1961-1976 (Qld), s. 101(2).

[21] Conciliation and Arbitration Act 1904 (Cth), s. 5(1A).

[22] The Queensland provision prohibits a *threatened dismissal* of a candidate for union office or a person who proposes to give evidence in an industrial proceeding, but it does not penalise the *dismissal* of these persons.

[23] (1975) 8 A.L.R. 197.

[24] (1975) 8 A.L.R. 197, 208.

[25] In May 1968, 33% of Victorian workers were covered by State awards and 52% by federal awards: Australian Bureau of Statistics *Labour Report No. 58 1973* (1974) 122.

[26] In May 1968, 72.1% of Western Australian workers were covered by State awards and 16.6% by federal awards: *Labour Report, op. cit.*, 122.

[27] (1939) 62 C.L.R. 573.

> If an employee can be dismissed or prejudiced because, by joining a union, he becomes entitled to better conditions contained in an award of the Federal Court, the whole system of industrial arbitration would be threatened with destruction.[28]

In theory, the unlawful dismissal provisions are a bulwark against discrimination; in reality, many procedural and substantive pitfalls lie in the path of industrial justice. It remains to consider these defects in greater detail. Once again, attention will be focussed on section 5 of the Commonwealth Act.

### 3. *Instituting Proceedings*

In federal jurisdiction, any person[29] may institute proceedings in the Federal Court of Australia challenging an unlawful dismissal. Prior to 1977, proceedings were required to be instituted in the Federal Court's predecessor, the Australian Industrial Court (known before 1973 as

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[28] (1939) 62 C.L.R. 573, 594.

[29] *Pearce* v. *W.D. Peacock & Co. Ltd* (1917) 23 C.L.R. 199; *Ferguson* v. *George Foster & Sons Pty Ltd* (1969) 14 F.L.R. 370.

In Queensland, proceedings may be instituted by "an industrial union, a member or officer thereof, an industrial inspector, an employer, the Minister *or any other person interested in the cause or matter*" (italics added): Industrial Conciliation and Arbitration Act 1961-1976 (Qld), Schedule 1, Clause 1. Thus, in Queensland, an aggrieved party has an individual right of complaint.

In South Australia, proceedings for an offence under s. 157 of the Industrial Conciliation and Arbitration Act 1972-1975 (S.A.) may be initiated and prosecuted by the aggrieved party or by an inspector. S. 157 contains no guidance as to the proper prosecutor in an offence under that section. Likewise the Victorian, Tasmanian and Western Australian provisions make no mention of the proper complainant. Presumably the Crown is the normal prosecutor in these cases: see Labour and Industry Act 1958 (Vic.), s. 204; Industrial Relations Act 1975 (Tas.) s. 60; Industrial Arbitration Act 1912-1975 (W.A.), s. 135.

The procedure in New South Wales is distinctive. A prosecution under s. 95 of the Industrial Arbitration Act 1940-1975 (N.S.W.) may not be instituted without the leave of the Industrial Commission. An applicant must establish a *prima facie* or a reasonable case before leave will be granted. He must have weighed down the scales in his favour on all those facts which he must establish in order to support the charge. In addition, he must point to facts, which, if they were left unexplained, would raise an inference that his dismissal contravened the section: *Re Tailoresses' Union of N.S.W.* (1902) 19 W.N. (N.S.W.) 89; *Anderson* v. *Collibee* 1956 A.R. (N.S.W.) 136; *Campbell* v. *B.H.P. Co. Ltd* 1960 A.R. (N.S.W.) 593; *Halliday* v. *Friendenreich* [1908] A.R. (N.S.W.) 362. Upon such an application the Commission will not go into the merits of the case. But the application must be founded on legal evidence; hearsay will not suffice: *Campbell* v. *B.H.P. Co. Ltd* 1960 A.R. (N.S.W.) 593; *McHenry* v. *Lysaghts Works Pty Ltd* 1950 A.R. (N.S.W.) 412; *Re Tailoresses' Union of N.S.W.* (1902) 19 W.N. (N.S.W.) 89.

Where the applicant is a trade union, leave will be withheld unless the union is registered as an industrial union under the Act: *Watkins* v. *Hanrahan* 1968 A.R. (N.S.W.) 287. A prosecution may be instituted by the secretary of the appropriate union but leave to prosecute will not be granted where it appears that the secretary is acting on his own initiative and in opposition to his union: *Sheridan* v. *Central District Ambulance Committee* [1927] A.R. (N.S.W.) 342.

If the employee dismissed has a strong *prima facie* case of victimisation and he is not a member of a registered union, the Industrial Commission may institute proceedings on its own motion: *Watkins* v. *Hanrahan* 1968 A.R. (N.S.W.) 287.

the Commonwealth Industrial Court);[30] (accordingly, this article refers extensively to cases decided in the Australian, or Commonwealth, Industrial Court). The aggrieved party has an individual right of complaint and an application for leave to prosecute is not necessary.[31] Section 5 creates three separate offences: an employer shall not (a) dismiss an employee, (b) injure him in his employment, or (c) alter his position to his prejudice, on any of the prohibited grounds. A defendant may not be charged with all three offences in a single count. If all these grounds are alleged it is necessary to bring three separate charges; otherwise the information would be bad for duplicity or uncertainty.[32]

4. *Onus of Proof: The Prosecutor's Onus*

The complainant must prove the facts and circumstances constituting the alleged offence beyond reasonable doubt.[33] For example, a party who complains that he was discharged because of his trade union membership must establish, firstly, the fact of dismissal, and, secondly, that he was a trade unionist.[34] The Registrar's certificate[35] confirming that an aggrieved party was a member of a trade union at a certain date is *prima facie* evidence of such membership at the date of dismissal[36] but the issue of membership will be resolved upon the whole of the relevant evidence.[37] *Cuevas* v. *Freeman Motors Ltd*[38] indicates that the evidence necessary to discharge the prosecutor's onus need not be formal. In that case, the Australian Industrial Court accepted oral testimony from the informant himself and from his union's Secretary as proof that the informant was both a union member and a duly-appointed shop steward.

Whether or not an informant is a "delegate" within section 5 does not necessarily depend upon the definition of that term in his union's rules. Rather it falls to be determined by the nature of his duties prescribed by those rules. If he is authorised to represent his work-

[30] The Conciliation and Arbitration Amendment Act (No. 3) 1976 provided for the transfer of jurisdiction under the Conciliation and Arbitration Act 1904 from the Australian Industrial Court to the Federal Court of Australia (see Federal Court of Australia Act 1976) and for the abolition of the first mentioned court. The Conciliation and Arbitration Act 1973 had changed the title of the Commonwealth Industrial Court to that of the Australian Industrial Court.

[31] Such an application is necessary in New South Wales: *supra*, n. 29.

[32] *Bowling's* case (1975) 8 A.L.R. 197.

[33] *Ibid.*

[34] Conciliation and Arbitration Act 1904 (Cth), s. 5(4). However, in the Commonwealth section, the words "or has been, or proposes, or has at any time proposed, to become" a member of an organisation make it easier for the informant to discharge his onus.

[35] Conciliation and Arbitration Act 1904 (Cth), s. 156.

[36] *Ferguson* v. *George Foster & Sons Pty Ltd* (1969) 14 F.L.R. 370, 375.

[37] *Ibid.*

[38] (1975) 8 A.L.R. 321, 325-326, *per* Smithers and Evatt JJ.

mates, he will be a "delegate" within the meaning of the section.[39] On the other hand, if his sole duty is to collect union dues he will have to establish that he was victimised because of his *membership* of the union rather than his position.

Where the complainant alleges that he is discharged because of his award entitlement he must prove that the award was operative at the material time[40] and that he was entitled to the benefits of the award. This will present no problem for employees who are members of a union which is a party to the award. But is a non-unionist "entitled to the benefit" of the award which governs his employment? Certainly he *enjoys* the benefit of the award but he has *no right to enforce* the award.[41]

5. *Onus of Proof: The Defendant's Onus*

Once the informant has discharged his onus under section 5, the defendant must prove on the balance of probability that he was not actuated by the reason alleged in the charge.[42] The purpose of couching his onus in these terms is that "the real reason for a dismissal may well be locked up in the employer's breast and impossible, or nearly impossible, of demonstration through ordinary forensic processes".[43]

If the court can conclude that the reason alleged in the charge was a substantial and operative factor influencing the employer to take the action challenged, this will be sufficient to convict.[44] This is so even though the defendant may also have been influenced by other matters.[45] It is not, therefore, necessary for the Court to establish that the reason alleged is the sole, or even the dominant, motive for the employer's action.

The defendant's onus is negative, not positive: he need not prove why he dismissed his employee;[46] nor is it necessary to show reasonable grounds for the dismissal.[47] On the other hand, if the defendant chooses to submit evidence of the actual reason for the discharge, he will not be constrained in any way by the section.[48] Indeed, it is in his interests to produce the best evidence available to him, and the court will be suspicious if he does not call direct testimony from the person

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[39] See *Parker* v. *Kemp*, unreported N.S.W. decision, 10 May 1949, cited in Mills, *Industrial Laws New South Wales* (1968) 375.

[40] *Klanjscek* v. *Silver* (1961) 4 F.L.R. 182, 187.

[41] *Metal Trades Employers' Association* v. *Amalgamated Engineering Union* (1935) 54 C.L.R. 387.

[42] Conciliation and Arbitration Act 1904 (Cth), s. 5(4).

[43] *Bowling's* case (1975) 8 A.L.R. 197, 204, *per* Smithers and Evatt JJ.

[44] *Cuevas* v. *Freeman Motors Ltd* (1975) 8 A.L.R. 321.

[45] *E.g., Bowling's* case (1975) 8 A.L.R. 197.

[46] *Atkins* v. *Kirkstall-Repco Pty Ltd* (1957) 3 F.L.R. 439, 441.

[47] *Ibid.*

[48] See *McNamara* v. *Board of Fire Commissioners of N.S.W.* [1938] A.R. (N.S.W.) 17 on the equivalent New South Wales provision.

responsible for the dismissal or other act of victimisation.[49] Where the reason advanced by the employer is petty or trivial, the tribunal will be all the more careful is scrutinising his motives,[50] but the defendant is entitled to the benefit of any doubt that remains in the mind of the court after reviewing the whole of the evidence.[51]

This brief account of the defendant's onus hints at the evidentiary obstacle faced by the complainant. *Pearce* v. *W.D. Peacock and Co. Ltd*[52] is a classic example of this problem. The case arose out of the dismissal of a unionist who, the employer alleged, was "dissatisfied". When the employer received a log of claims from the appropriate union, a director of the company asked the unionist to sign a paper stating that he was satisfied with his working conditions. The unionist refused and was dismissed.

The magistrate who first heard the matter accepted the director's evidence that the employee had previously been content with his working conditions. Accordingly, he found that the employer was not motivated by the reason alleged in the complaint, and dismissed the charge.

On appeal, the High Court sustained the magistrate's finding. Isaacs J. dissented. In his view, the facts were clear: the defendant tried to coerce the employee into "doing what might have been thought a disloyal act to the union and might have caused him to leave it—a step injurious both to the man and the union . . .";[53] the employer's demand meant simply "give up your claim or your billet".[54] With respect, this conclusion seems a more realistic appraisal of the evidence. Normally an appellate court will be reluctant to interfere with the lower court's finding of fact but in this case the evidence on which the magistrate relied is, with respect, rather tenuous.

The result of this case was that an employer escaped penalty for a blatant act of victimisation against an employee. More disturbing are the implications of the decision. It seems that an employer may simply assert that a dismissal was caused by his employee's general attitude, and the defendant's subjective assessment of his attitude will determine the matter. While the specific problems raised by *Pearce* v. *W.D. Peacock & Co. Ltd*[55] have been overcome by amendments in the

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[49] *Bowling's* case (1975) 8 A.L.R. 197, 205.

[50] See *Queensland Ambulance Union of Employees* v. *Queensland Ambulance Brigade Hospital, Laidley* (1966) 61 Q.J.P. 27 on the equivalent Queensland provision.

[51] See *Connington* v. *Municipality of Kogarah* [1913] A.R. (N.S.W.) 40 on the equivalent New South Wales provision.

[52] (1917) 23 C.L.R. 199. See too *McVey* v. *Fiesta Togs Pty Ltd* (1964) 19 I.I.B. 912.

[53] *Pearce* v. *W.D. Peacock & Co. Ltd* (1917) 23 C.L.R. 199, 210.

[54] *Ibid.*

[55] (1917) 23 C.L.R. 199.

federal[56] and Queensland[57] spheres, the more general evidentiary problem remains in all jurisdictions.

However, the industrial tribunals which hear complaints of victimisation are familiar with the evidentiary hurdle facing the informant. At times, they have been prepared to ease his burden by inferring that the employer is guilty of the act alleged. Thus, where an employer peremptorily dismissed two experienced, efficient and satisfactory employees with long service records for refusing to carry out duties which the employer did not, in fact, desire them to perform, the employer was penalised.[58] Furthermore, in one case,[59] evidence of the employer's opposition to the spread of unionism in his factory tilted the scales in favour of a dismissed employee who was believed to be promoting union membership. Occasionally the inference from the facts is inescapable. For example, in *O'Gradey* v. *Cunliffe*,[60] an employer was successfully prosecuted for discharging an employee at 5 p.m. on the last day of the employee's testimony in proceedings against the employer for recovery of wages due under an award. This was a predictable conclusion in the light of the close connection in time between the employee's action in testifying and the dismissal. But where there is a long time lapse of, say, three months between the testimony and the discharge, the employer will be in a stronger position to defend his actions.

The defendant's onus under section 5 was recently reviewed by the Australian Industrial Court in *Bowling's* case.[61] Bowling alleged that he was dismissed because of his activities as a shop steward. Smithers and Evatt JJ. examined this charge with the help of several pertinent questions:

> what person or persons made the decision to dismiss the informant, what relevant circumstances were within their knowledge, whether it was known to them that the informant was a shop steward, and if they knew the informant's position of shop steward, what they have to say as to whether or not that matter had any and what degree of influence in the making of the decision.[62]

The critical issue was whether the decision to dismiss the informant was made by the company's South Australian operations manager or certain directors from the company's head office in Melbourne. Their Honours concluded that the decision was made at the head office and that the persons responsible were substantially motivated by the fact

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[56] Conciliation and Arbitration Act 1904 (Cth), s. 5(1)(d).
[57] Industrial Conciliation and Arbitration Act 1961-1976 (Qld), s. 101(1)(d).
[58] *Ferguson* v. *George Foster & Sons Pty Ltd* (1969) 14 F.L.R. 370, 377.
[59] *Re Parnaby & Hanrahan* 1968 A.R. (N.S.W.) 295.
[60] [1927] A.R. (N.S.W.) 127.
[61] (1975) 8 A.L.R. 197.
[62] (1975) 8 A.L.R. 197, 201.

that Bowling was a militant shop steward. In the absence of direct testimony from the Melbourne directors and the relevant telex messages passing between the South Australian plant and the head office, the court found that the defendant had not discharged its onus. This decision was based largely upon an inference from all the available evidence. It represents a departure from the legalistic interpretation of the defendant's onus in *Pearce* v. *W.D. Peacock & Co. Ltd*[63] and it may encourage employees to challenge acts of victimisation with confidence that the proceedings will not be frustrated by evidentiary difficulties.

### 6. *Defences*

The tribunals have recognised that certain dismissals are justified even if the employee makes out a *prima facie* case of victimisation. Thus, where a dismissal can be attributed to misconduct,[64] incompetence,[65] persistent absenteeism[66] or even a general unco-operative attitude,[67] the employer will not be penalised. In addition, the tribunals have repeatedly affirmed that management has the right to reorganise and reduce staff when an award increases operating expenses.[68] The unlawful dismissal provisions are not intended to encroach upon this right. Nor are they designed to prevent an employer dismissing staff because his operations have become unprofitable[69] or because there is no suitable work available for his employees.[70] But if an employer alleges that the dismissal is caused by a need to reduce staff, the fact that the aggrieved party is replaced immediately after his discharge

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[63] (1917) 23 C.L.R. 199.

[64] *E.g. McVey* v. *Fiesta Togs Pty Ltd* (1964) 19 I.I.B. 912; *Federated Ironworkers' Association* v. *B.H.P. Co. Ltd* 1973 A.I.L.R. Rep. 67.

[65] In *United Furniture Trade Society* v. *Anthony Hordern & Sons* [1904] A.R. (N.S.W.) 74, the dismissal of a union member partly because of incompetence was sustained. Under the present Commonwealth, New South Wales and Queensland provisions the dismissal would not be upheld as "mixed motives" are no longer a defence. But in Victoria, Western Australia and Tasmania, a dismissal partly for incompetence and partly for industrial activity could be sustained. A dismissal is penalised in those states if the employer discharges the employee "*by reason merely*" of the employee's legitimate industrial activity. Thus, if the employee's industrial activities are not the sole reason, the dismissal would be upheld. In South Australia, s. 157 of the Industrial Conciliation and Arbitration Act 1972-1975 (S.A.) would produce a similar result. But see s. 156 of the Industrial Conciliation and Arbitration Act 1972-1975 (S.A.).

[66] *E.g. Atkins* v. *Kirkstall-Repco Pty Ltd* (1957) 3 F.L.R. 439.

[67] *E.g. Boilermakers' and Blacksmiths' Society* v. *Cudgen R.Z. Co. Ltd* 1971 A.I.L.R. Rep. 781.

[68] *Connington* v. *Municipality of Kogarah* [1913] A.R. (N.S.W.) 40; *Grayndler* v. *Broun* [1928] A.R. (N.S.W.) 46. See too *Grayndler* v. *Cunich* (1939) 62 C.L.R. 573, 594-596 where Evatt J. criticised the decision in *Grayndler* v. *Broun*. But see now *Klanjscek* v. *Silver* (1961) 4 F.L.R. 182, 187.

[69] *Klanjscek* v. *Silver* (1961) 4 F.L.R. 182.

[70] *Boilermakers' and Blacksmiths' Society of Australia* v. *Frigrite Industries S.A. Ltd* (1972) 142 C.A.R. 934.

may give rise to an inference against the employer.[71] It is not sufficient to claim blandly that the dismissal was motivated by economic reasons: the tribunal will normally expect the employer to provide some evidence of the need for the cut-back.[72]

In one case,[73] a company successfully pleaded the ignorance of one of its officers as a defence. The officer dismissed a union delegate on the grounds that the delegate's involvement in certain union activities seemed to be inconsistent with the delegate's duties as the company's industrial officer. The company was able to establish that the officer was not aware that the informant was a union delegate and the charge was dismissed.

*Vey* v. *Fiesta Togs Pty Ltd*[74] also illustrates how difficult it is to secure a conviction and reinstatement under section 5 and its State counterparts. There, the employee was informed by her union that she was entitled to sick leave pay from her employer even though the company had previously rejected her claim. She persisted with her claim in a conversation with an executive of the company and was dismissed the next day. Dunphy J. found that the dismissal was caused by the employee's impertinence in her exchange with the company executive. His Honour denied the complainant reinstatement because she was not victimised on account of her trade union activity or her entitlement under the relevant award. The fact that the company subsequently paid the amount claimed suggests that the employee had a genuine grievance in the first instance and that the result of the hearing was a travesty of justice.

### 7. *Penalties*

Conduct which defies the victimisation provisions is a matter of grave concern to the legislatures.[75] In a recent decision Smithers J. described it as "quite a serious offence".[76] Yet the penalties imposed upon offenders do not reflect this solicitude. A monetary penalty of $50,[77] $100,[78] $200,[79] or even $400[80] can hardly be expected to deter an unscrupulous employer from discrimination against employees on

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[71] *Re Parnaby and Hanrahan* 1968 A.R. (N.S.W.) 295.
[72] *Eaton* v. *McKenzie* (1916) 12 Tas. L.R. 94, 95.
[73] *Grayndler* v. *Colgate-Palmolive-Peet Company Limited (No. 2)* [1937] A.R. (N.S.W.) 525.
[74] (1964) 19 I.I.B. 912.
[75] *O'Reilly* v. *Blue* [1927] A.R. (N.S.W.) 111, 115.
[76] *King* v. *Hickson's Timber Impregnation Co. (Aust.) Pty Ltd* (1972) 20 F.L.R. 353, 354.
[77] As in the Victorian Act.
[78] As in the New South Wales, South Australian and Western Australian unlawful dismissal provisions.
[79] As in the Queensland and Tasmanian statutes.
[80] As in the federal Act.

grounds of legitimate industrial activity.[81] Even where victimisation is established, some tribunals are reluctant to impose the maximum penalty. In *King* v. *Hickson's Timber Impregnation Co. (Aust.) Pty Ltd*,[82] for example, the Commonwealth Industrial Court levied only half the statutory fine against an employer who dismissed six employees because they proposed to join a trade union. The fact that the employer became tractable in the later stages of the proceedings persuaded Spicer C.J. to impose a moderate penalty. Dunphy J. agreed with his decision. Smithers J. was more sceptical:

> I think that the company went through with a great deal of determination and has only repented at the end because of the inevitability of the position in which it found itself, faced with the prospect of incurring a serious penalty unless it changed its attitude.[83]

Although His Honour was inclined towards a harsher penalty, he ultimately agreed with the figure proposed by the Chief Justice.

In *Joiner* v. *Muir*[84] the Commonwealth Industrial Court declined to impose any penalty even though it convicted the defendants of a breach of section 5. The complainant was employed as a resident nursing manager in the defendants' hospital. The court found that her dismissal was partly actuated by her trade union membership. It attempted to justify its failure to impose a penalty by referring to the fact that the matron had aligned herself with her employers' opponents in an industrial dispute which threatened the smooth functioning of the hospital. In the court's view, this alliance was inconsistent with her role as nursing staff manager and supervisor and her employers could not be expected to tolerate her stand. With respect, the court's reasoning appears to be of dubious merit. A dismissal on the ground that the matron was simply not fit to perform her duties would not offend section 5. On the other hand, if her unfitness resulted from her union membership which in turn precipitated her dismissal, then the court should not have refused to exact a fine.

The gravity of an offence against the victimisation provisions cannot be overstressed. The penalty should fit the crime.

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[81] Clark, *Remedies for Unjust Dismissal: Proposals for Legislation* (1970) 43, n.56 quotes the following comment of an industrial relations manager of a large engineering firm on the unfair dismissal legislation which was being considered in the United Kingdom at the time:

> We can all think of cases where the maximum compensation of £4000 proposed would be regarded as peanuts!

[82] (1972) 20 F.L.R. 353. However, the court's reluctance may be partly attributed to the fact that the prosecutor did not seek the maximum penalty.

[83] (1972) 20 F.L.R. 353, 355.

[84] (1967) 15 F.L.R. 340.

8. *Remedies*

To the informant, the penalty may be a minor matter;[85] his primary concern is his lost wages and his job. Section 5 recognises this by providing remedies of reimbursement of wages and reinstatement.[86] This individual form of redress is no doubt more effective as a deterrent than the existing statutory penalty, but its main function is to restore the complainant to the position he occupied before the victimisation occurred.

In *Ferguson* v. *George Foster & Sons Pty Ltd*[87] the Commonwealth Industrial Court ordered that three employees dismissed in contravention of the section be paid wages lost from the date of dismissal until they found other comparable employment. With respect, this suggests that the court was influenced by considerations relevant to an award of damages, rather than a reimbursement of "any wages lost" as section 5 contemplates. There is no warrant for interpreting the reimbursement provision in the light of the employee's common law duty to mitigate his damages.[88] Indeed, the fact that the informant has obtained new employment prior to the hearing should be irrelevant to the issue of reimbursement of wages lost as a result of the victimisation.

The scope of the reimbursement provision was again misconceived in *Bowling's* case.[89] There, Smithers and Evatt JJ. stated: "it was properly conceded by [counsel for the informant] that a claim for reimbursement with respect to the period prior to the laying of the information . . . could not be sustained".[90] With respect, this interpretation ignores the clear wording of section 5 and is contrary to the views expressed in *Ferguson's* case.[91] One is left with the impression that neither *Ferguson's* case nor *Bowling's* case correctly interpreted the statutory power to award reimbursement of wages.

The Federal Court of Australia is also empowered to direct reinstatement of employees victimised for legitimate trade union or industrial activity.[92] This portion of section 5 is undoubtedly valid since it is incidental to the Commonwealth Parliament's powers to make laws

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[85] A predecessor of s. 5(5) of the Conciliation and Arbitration Act 1904 (Cth) provided that "the Attorney-General may direct that the whole or any part of any penalty recovered under this section may be paid to the person injured by the offence". In that situation the employee would have an interest in the penalty levied.

[86] Conciliation and Arbitration Act 1904 (Cth), s. 5(5).

[87] (1969) 14 F.L.R. 370.

[88] *Cf.* Trade Union and Labour Relations Act 1974 (U.K.) Schedule 1, para. 19(2).

[89] (1975) 8 A.L.R. 197.

[90] (1975) 8 A.L.R. 197, 216 *per* Smithers and Evatt JJ.

[91] (1969) 14 F.L.R. 370.

[92] Conciliation and Arbitration Act 1904 (Cth), s. 5(5).

under section 51(xxxv) of the Constitution.[93] The complainant need not, therefore, establish an interstate industrial dispute in order to invoke the section. In addition, since the jurisdiction is vested in the Federal Court of Australia, section 71 of the Constitution is satisfied.

The power to order reinstatement of employees dismissed or demoted in contravention of section 5 is discretionary[94] and will be exercised only in special circumstances.[95] A delay in instituting proceedings under the section may prejudice an informant's chance of retaining his position.[96] Yet, in *Bowling's* case,[97] the informant did not forfeit his right of reinstatement even though he failed for various technical reasons to institute proceedings under the section until some four-and-a-half months after his dismissal. It was enough that he demonstrated a desire for reinstatement soon after the act of victimisation occurred. On the other hand, the Federal Court of Australia may decline to order reinstatement if, prior to the hearing, the informant obtains another job which is not "materially less beneficial" than his original employment.[98]

In *Ferguson's* case,[99] the Commonwealth Industrial Court observed that the defendant produced no evidence that reinstatement of the victimised employees would cause inconvenience or affect the employment of other persons. This implies that the employer's capacity to reinstate the employees is a material factor. The suggestion is strengthened by one of the reasons the court gave for refusing reinstatement after an unjustifiable delay in instituting the proceedings: "No doubt also employees have been engaged in their stead by the defendant."[1]

In later decisions[2] the Australian Industrial Court has shown a tendency to place little weight upon the employer's submission that it would be difficult to restore the complainant to this former position. In

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[93] The section could be upheld upon the same reasoning which led the High Court in *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (1908) 6 C.L.R. 309 to sustain the provisions of the Commonwealth Conciliation and Arbitration Act 1904 (Cth) relating to the incorporation of associations of employers and employees: unless there was power to safeguard trade unionists in the pursuit of legitimate objectives, the arbitration system could not function effectively.

[94] *Sheetmetal Working Industrial Union of Australia* v. *Australian National Airways Pty Ltd*; *Re Commonwealth Aircraft Corporation Pty Ltd* (1942) 46 C.A.R. 422, 433 *per* O'Mara J.; *Ferguson* v. *George Foster & Sons Pty Ltd* (1969) 14 F.L.R. 370.

[95] *Ibid.*

[96] *Ferguson* v. *George Foster & Sons Pty Ltd* (1969) 14 F.L.R. 370.

[97] (1975) 8 A.L.R. 197.

[98] *Ferguson* v. *George Foster & Sons Pty Ltd* (1969) 14 F.L.R. 370, 381.

[99] (1969) 14 F.L.R. 370.

[1] *Id.* 381.

[2] *E.g. Bowling's* case (1975) 8 A.L.R. 197; *Courtis* v. *Uniroyal Pty Ltd* 1975 A.I.L.R. Rep. 805.

particular, it has rejected an argument that an employee was a security risk because he gave his union's counsel certain information concerning his employer's work process for the purposes of proceedings before the Australian Conciliation and Arbitration Commission.[3] Again, in *Bowling's* case[4] one of the grounds on which the defendant opposed reinstatement was that the informant had evinced an intention to disrupt production at the plant and "could be expected, if reinstated, to take steps accordingly".[5] It was alleged that Bowling confessed to the leading hand some four or five months before his dismissal that he was "only there to disrupt production".[6] However, the leading hand did not mention this incident to anybody for some twelve months. On this aspect of the evidence, Smithers and Evatt JJ. concluded:

> There was a distinct touch of unreality about this. It would, in our opinion, be quite wrong to approach the question of reinstatement on the basis that the expression wrongly attributed to him represented his attitude to his work.[7]

It was also alleged that Bowling had publicly criticised the defendant company and had advocated nationalisation of the vehicle building industry. The Australian Industrial Court dismissed this submission because it was satisfied that neither of the grounds prompted the dismissal.

The most serious obstacle to Bowling's application for reinstatement was the suggestion that he had encouraged dissatisfied employees to commit sabotage and had possibly engaged in acts of sabotage himself. The court declared that if this were true Bowling would certainly not qualify for reinstatement.[8] But after considering the innuendo in some detail, the Court decided Bowling had neither committed nor carried out acts of sabotage and, if reinstated, could be expected to provide reasonable service to his employer.[9] In the result, the Court exercised its discretion in favour of the informant. This is particularly significant when one considers the anger generated between the parties by the Bowling episode.

The Industrial Conciliation and Arbitration Act 1961-1976 (Qld) contains a provision substantially similar to section 5 of the Commonwealth Act.[10] In Queensland, the jurisdiction to order reinstatement in victimisation cases is conferred upon the Industrial Court or an

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[3] *Courtis* v. *Uniroyal Pty Ltd* 1975 A.I.L.R. Rep. 805.
[4] (1975) 8 A.L.R. 197.
[5] (1975) 8 A.L.R. 197, 210.
[6] (1975) 8 A.L.R. 197, 212.
[7] (1975) 8 A.L.R. 197, 212-213.
[8] (1975) 8 A.L.R. 197, 213.
[9] (1975) 8 A.L.R. 197, 216.
[10] See Industrial Conciliation and Arbitration Act 1961-1976 (Qld), s. 101(5). See too, *Federated Clerks' Union of Australia (North Queensland Branch) Union of Employees* v. *Bogiatzis* (1941) 35 Q.J.P. 18.

industrial magistrate. Similarly, in New South Wales, the Industrial Commission or an industrial magistrate may direct reinstatement of employees in breach of section 95 of the Industrial Arbitration Act 1940-1975 (N.S.W.).[11]

Section 61(2)(d) of the Industrial Arbitration Act 1912-1973 (W.A.) gave the Industrial Commission of Western Australia power to require an employer to re-employ a worker dismissed in contravention of section 135.[12] But, section 61(2)(d) was repealed in 1973[13] and until recently it was doubtful whether the Commission had jurisdiction to order reinstatement or re-employment of employees victimised for legitimate industrial activity.[14] However, *Board of Management, Princess Margaret Hospital for Children* v. *Hospital and Salaried Officers Association of Western Australia*[15] confirms that the Commission does in fact have power to order reinstatement as part of its general jurisdiction to deal with industrial matters. By contrast, there does not appear to be jurisdiction in the wages board States to order reinstatement in unlawful dismissal cases.[16]

South Australia is the only jurisdiction in which damages may be awarded to an aggrieved party.[17] This compensation may be more than

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[11] There are several examples of the exercise of this jurisdiction. See: *Sheridan* v. *Central District Ambulance Committee (No. 2)* [1927] A.R. (N.S.W.) 460; *Grayndler* v. *Colgate-Palmolive-Peet Co. Ltd* [1937] A.R. (N.S.W.) 525; *Re Parnaby and Hanrahan* 1968 A.R. (N.S.W.) 295; *Re Dispute-York Air Conditioning Pty Ltd; Re Retrenchments* 1970 A.R. (N.S.W.) 261.

[12] *Australian Builders' Labourers' Federated Union of Workers, Western Australian Branch* v. *Manx Brick Pty Ltd* (1970) 50 W.A.I.G. 1143. See also *Building Trades Association of Unions of Western Australia, Australian Builders' Labourers Federated Union, Western Australian Branch* v. *N.J. Hurll & Co. (Vic.) Pty Ltd* (1972) 52 W.A.I.G. 892.

[13] Industrial Arbitration Act Amendment Act 1973 (W.A.), s. 36.

[14] In *Building Trades Association of Unions of Western Australia, Australian Builders' Labourers Federated Union, Western Australian Branch* v. *N.J. Hurll & Co. (Vic.) Pty Ltd* (1972) 52 W.A.I.G. 892, the Industrial Commission decided that s. 61(2)(d) specified the sole grounds on which re-instatement could be ordered. When that section was repealed it could have been argued that there was no jurisdiction in Western Australia to award re-instatement to employees unlawfully dismissed. On the other hand, it might have been possible to argue that the legislature, by repealing s. 61(2)(d) soon after the decision in the 1972 case, intended to displace the maxim *expressio unius est exclusio alterius*. With the express reference to re-instatement removed from s. 61 it could be argued that re-instatement was impliedly available under the general jurisdiction to determine disputes over industrial matters.

[15] (1975) 55 W.A.I.G. 543.

[16] Re-instatement is not mentioned in the victimisation provisions in the Industrial Relations Act 1975 (Tas.) or the Labour and Industry Act 1958 (Vic.) and on general principles it would not seem to be available in these States. See *Austral Bronze Co. Pty Ltd* v. *Non Ferrous (Metal Strip) Wages Board* [1959] Tas. S.R. 118 and *R.* v. *Industrial Appeals Court; Ex parte Frieze* [1963] V.R. 709, 721 *per* Scholl J.

[17] Industrial Conciliation and Arbitration Act 1972-1975 (S.A.), s. 156(4). S. 157 of that Act has no similar provision.

simply a reimbursement for lost wages.[18] Moreover, it is expressly provided that monetary remedies afforded to an employee dismissed for taking part in industrial proceedings in or before a Conciliation Committee shall not restrict or limit his right to seek an order directing his re-employment.[19] Presumably, an employee dismissed on these grounds can seek an order for re-employment in pursuance of section 15(1)(e) of the Industrial Conciliation and Arbitration Act 1972-1975 (S.A.). On the other hand, the South Australian provision[20] which prohibits an employer from dismissing or demoting an employee because of industrial activity or because the employee is entitled to the benefit of an award or an industrial agreement does not mention a remedy of re-employment. Once again, the complainant would, it seems, qualify for an order under section 15(1)(e).[21]

9. *Proposals for Reform—Conclusion*

Unless all the loopholes outlined earlier are eliminated, employees who engage in some forms of legitimate trade union and industrial activities will be denied adequate legal protection. Comprehensive safeguards are essential in this area. In most instances, minor amendments to the existing legislation are all that is required. It would also seem important for the victimisation provisions to stipulate the duration of the protection conferred. The Industrial Conciliation and Arbitration Act 1972-1975 (S.A.) specifies a two month period but this seems unnecessarily short.[22] A longer period of at least six months would appear to be more appropriate.[23] Indeed, perhaps the best solution appears in the federal provision which covers an employee who "has been" an officer, delegate or member of an organisation or a witness who "has appeared" or given evidence in proceedings under the Act.[24] These parts of section 5 apparently contemplate an unlimited period of protection.

Union officers and delegates assume vital duties and responsibilities in our arbitration system;[25] they are almost inevitably brought into the

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[18] This is the implication from *Australian Workers' Union of Employees* v. *Ambrose* (1938) 32 Q.J.P. 6, a decision upon a similar provision in the Industrial Conciliation and Arbitration Act 1932-1936 (Qld).

[19] See Industrial Conciliation and Arbitration Act 1972-1975 (S.A.), s. 156(4).

[20] Industrial Conciliation and Arbitration Act 1972-1975 (S.A.), s. 157.

[21] See *Minchin and Gorman* v. *St Jude's Child Care Centre* (1973) 28 I.I.B. 578; *Kilworth* v. *Zweck* 1974 A.I.L.R. Rep. 60.

[22] Industrial Conciliation and Arbitration Act 1972-1975 (S.A.), s. 156(2).

[23] Works Committeemen in France are protected from discriminatory discharge for a period of six months after their term of office expires: Seyfarth, Shore, Fairweather and Geraldson, *Labor Relations and the Law in France and the United States* (1972) 222.

[24] Conciliation and Arbitration Act 1904 (Cth), s. 5(1).

[25] For a complete discussion of the role of the shop steward see Foenander, *Shop Stewards and Shop Committees: A Study in Trade Unionism and Industrial Relations in Australia* (1965).

firing line.[26] Yet, under present law, they may be dismissed in the same manner as ordinary employees. Some countries have recognised the special vulnerability of workers' representatives and have attempted to insulate them from arbitrary dismissals. In West Germany, for example, summary dismissal of work's councillors requires the consent of the works' council or the Labour Court. If the works' council withholds its consent, the employer must apply to the Labour Court for approval.[27] Similarly, in France, an employer must obtain the approval of the factory committee if he wishes to dismiss a personnel delegate or a member of a factory committee. Candidates for these positions and union representatives on the factory committees are guaranteed similar protection. If the committee withholds its consent, approval must be sought from a labour inspector.[28]

British labour law takes a softer line. Paragraph 133(5) of the Code of Practice[29] recommends that "no disciplinary action should be taken against a shop steward until the circumstances of the case have been discussed with a fulltime official of the union". Failure to observe this procedure does not automatically render the dismissal unfair under the Trade Union Labour Relations Act 1974 (U.K.), but the code's recommendation is admissable in evidence in proceedings under that Act.[30]

The main advantage of a special procedure for dismissal of workers' representatives is that it removes the threat of a rash or precipitate dismissal. This is particularly important for shop stewards who "may well incur displeasure of management"[31] in the performance of their duties.

Perhaps the most serious limitation upon the efficacy of the victimisation provisions is the evidentiary obstacle facing the informant. Even if the approach of the Australian Industrial Court in *Bowling's* case[32] were consistently applied, there would still be an element of speculation involved in the proceedings. It might be more useful to redraft the defendant's onus so that he carries the burden of establishing that the act of victimisation was motivated by some substantial reason other than that alleged in the charge, thereby converting the onus into a positive obligation.

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[26] See *Bowling's* case (1975) 8 A.L.R. 197, 210.

[27] C.C.H. and Beinhauer (trans.) *Betriebsverfassungsgesetz, German Works Council Act 1972* (1972), s. 103.

[28] Seyfarth *et al., op. cit.* 222-223.

[29] See Hepple and O'Higgins (eds) *Encyclopedia of Labour Relations* (1972), Vol. 1, 2931. The Code of Practice was preserved by the Trade Union and Labour Relations Act 1974 (U.K.) Schedule 1, para. 1(1). It will continue to survive until new Codes of Practice are introduced in pursuance of s. 6 and Sch. 17, para. 4 of the Employment Protection Act 1975 (U.K.).

[30] Trade Union and Labour Relations Act 1974 (U.K.), Sch. 1, para. 3.

[31] *Bowling's* case (1975) 8 A.L.R. 197, 210 *per* Smithers and Evatt JJ.

[32] (1975) 8 A.L.R. 197.

An employee dismissed in breach of the victimisation provisions of the industrial arbitration statutes is already entitled to reinstatement. In the wages board States, the provisions make no mention of reinstatement. This remedy should be available in *all* jurisdictions to employees dismissed for *any form* of legitimate industrial activity.

However, a recent study[33] of the reinstatement remedy under the National Labour Relations Act (U.S.) casts doubt on the desirability of this form of relief in victimisation cases. Of the 70 subjects reinstated in pursuance of the American Act, 60 had subsequently left their employment and over 66% of the workers in this category gave "unsatisfactory company treatment" as their reason for resigning. Of greater significance was the finding that 69% of those who were granted reinstatement refused to return to their positions and over 88% of the employees in this group declined reinstatement on the ground of "fear of company backlash".[34]

Although 40% of America's workforce in the private sector is organised, employers staunchly resist the spread of unionism. There is a tendency among employers, particularly in the unorganised sector, to victimise union activists even after reinstatement,[35] and this may explain why the remedy has met with such limited success. Another reason for the failure of the remedy in many cases may be the delays involved in obtaining an order.[36] While his dismissal is being challenged, an employee will find it necessary to seek other work. When the reinstatement order ultimately issues, he may prefer to stay in his new job rather than risk further victimisation in his former position.[37]

The American study is instructive for two reasons. Firstly, it shows that protection against victimisation should continue for a period after reinstatement. Secondly, it suggests that reinstatement may not be appropriate in all cases. If an employee does not wish to return to his job he should not be denied adequate compensation. True, he will be entitled to his lost wages but these can scarcely be regarded as sufficient compensation for his dismissal. The industrial tribunals which hear complaints of victimisation in State jurisdictions could easily be

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[33] Stevens and Chaney, "A Study of the Reinstatement Remedy under the National Labor Relations Act" (1974) 25 Labor Law Journal 31.

[34] *Id.* 33-36.

[35] See Clark, "Unfair Dismissal and Reinstatement" (1969) 32 Modern Law Review 532, 544.

[36] Levy, "The Role of Law in United States and England in Protecting the Worker from Discharge and Discrimination" (1969) 18 International and Comparative Law Quarterly 558, 568 reports that in "an ordinary discharge case about two years may elapse from the time the worker files his charge until . . . the time the Court of Appeal enters a decree" enforcing the National Labour Relations Board's order.

[37] In the Stevens and Chaney survey, nearly 40% of the workers who refused reinstatement stated that they had obtained a better job before reinstatement was offered: Stevens and Chaney, *op. cit.* 34.

given statutory power to award compensation. The same is true of the Federal Court of Australia in the federal sphere. In *Redfern* v. *Dunlop Rubber Australia Ltd*[38] the High Court upheld the validity of section 11(1) of the Australian Industries Preservation Act 1906 (Cth) which allowed a person injured by a breach of certain provisions of that Act to recover treble damages. The High Court stated that the section served two main purposes: firstly, it encouraged those injured by a breach of the Act to sue the offender, and secondly, it acted as a deterrent to persons contemplating a breach of the Act. Both these objects were incidental to the purposes of the legislation in question.[39] It is submitted that this reasoning is equally relevant to the Conciliation and Arbitration Act 1904 (Cth).

Assuming that compensation should be available to the employee dismissed in breach of the victimisation provision, it remains to consider what form of damages is appropriate. The Trade Union and Labour Relations Act 1974 (U.K.) provides a useful precedent. It empowers an industrial tribunal hearing a complaint of unfair dismissal to award such amount as it considers "just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complaint relates . . .".[40] It also provides that the complainant's loss shall be taken to include:

> (a) any expenses reasonably incurred by the aggrieved party in consequence of the matters to which the complaint relates, and
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> (b) loss of any benefit which he might reasonably be expected to have had but for those matters. . . .[41]

The Tribunal is, however, directed to take the employee's common law duty to mitigate his damages into account when assessing the compensation payable.[42] And where the complainant contributed to his own dismissal the Tribunal must reduce its assessment of his loss to such extent as it considers just and equitable.[43]

It is a relatively easy matter to determine what expenses the complainant has reasonably incurred as a result of the unfair dismissal. But to calculate compensation for the "loss of any benefit which the aggrieved party might reasonably be expected to have had but for the dismissal" is often a difficult exercise. Nevertheless there is already a wealth of case law dealing with the assessment of this form of com-

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[38] (1964) 110 C.L.R. 194.
[39] (1964) 110 C.L.R. 194, 209.
[40] Trade Union and Labour Relations Act 1974 (U.K.) Sch. 1, para. 19(1).
[41] Trade Union and Labour Relations Act 1974 (U.K.) Sch. 1, para. 19(2).
[42] *Ibid.*
[43] Trade Union and Labour Relations Act 1974 (U.K.) Sch. 1, para. 19(3).

pensation.[44] Items such as future loss of wages, loss of pension rights and fringe benefits and loss of certain statutory rights which depend upon continuous service with one employer are commonly included in the calculation.[45]

A compensation order should be readily available to a victimised worker who does not wish to be reinstated. There is, however, no reason why the remedy should be restricted to this situation. In an appropriate case it may even be desirable to award reinstatement, reimbursement of wages lost *and* compensation. Certainly the tribunals dealing with complaints of victimisation should be given the *power* to grant compensation in lieu of, or in addition to, the other remedies.

Whether compensation should be awarded to an employee who suffers victimisation short of discharge is a moot point. Certainly, the statutory penalty will not be a sufficient deterrent to an employer who engages in this form of discrimination. Disciplinary action such as withholding of bonus payments or gratuitous pension benefits, transfers to undesirable work or unreasonable rostering of shift work may be just as effective as an outright dismissal in discouraging employees from claiming the benefits provided by our industrial arbitration systems. Such action may also cause a trade union officer or delegate to doubt his vocation. It is not sufficient to outlaw this kind of victimisation; aggrieved parties should also be given an individual right to compensation. The difficulty, once again, is the assessment of the damages. But this factor has not deterred the British Parliament from providing such a remedy in the Employment Protection Act 1975.[46]

The legislatures and the courts have already recognised that trade unionists should be protected against discrimination on grounds of their lawful industrial activities. It remains to strengthen and extend the protection afforded and to improve the remedies available to an aggrieved party. This article has given some indication of the range of measures that could be adopted in the necessary reforms.

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[44] Jackson, *Unfair Dismissal: How and Why the Law Works* (1975) Ch. 3.
[45] *Id.* 27.
[46] See Employment Protection Act 1975 (U.K.), ss. 53, 54 and 56.