# CASE NOTES

## RE FEDERATED STOREMEN AND PACKERS UNION OF AUSTRALIA; EX PARTE WOOLDUMPERS (VICTORIA) LTD[1]

### *(Federal Jurisdiction: The Interstate Character of Disputes Over the Reinstatement of a Dismissed Employee)*

An award imposing an obligation on an employer to reinstate a dismissed employee can be a powerful means of promoting harmonious industrial relations. Therefore, the recent case *Re Federated Storemen and Packers Union of Australia; ex parte Wooldumpers (Victoria) Ltd* deserves close scrutiny.[2] All seven members of the High Court decided that an employer was entitled to an order prohibiting the Conciliation and Arbitration Commission from dealing with a dispute arising from a demand for the reinstatement of a dismissed employee. The decision in the *Wooldumpers* case comes little more than twelve months after the unanimous joint judgment of the High Court in the landmark case of *Re Ranger Uranium Mines Pty Ltd; ex parte Federated Miscellaneous Workers Union of Australia*,[3] in which the jurisdiction of the Commission to order reinstatement by an exercise of its arbitral power was recognised for the first time. Furthermore, the High Court acknowledged in that case that a dispute over reinstatement, agitated on behalf of the remaining employees, could be described as one which 'pertains to the relations of employers and employees.'[4]

The *Ranger* case, however, did not raise the third issue which has proved problematical in any attempt to invoke the jurisdiction of the Commission in this area: that of satisfying the constitutional and statutory requirement that the dispute be one 'extending beyond the limits of any one State.' This was not an issue in the *Ranger* case because s. 53 of the Northern Territory (Self Government) Act 1978 (Cth) applied the Conciliation and Arbitration Act 1904 (Cth) to industrial disputes in the Northern Territory, even when they were confined totally within the Territory. In most areas of disputation, 'interstateness' rarely proves an insurmountable jurisdictional hurdle, largely because of the acceptance, and extensive use, of 'paper disputes' and the existence of national organisations of both employers and employees. However, it was the interstate character of the dispute which was the critical issue in the *Wooldumpers* case.

#### *THE FACTS*

The *Wooldumpers* case arose out of a dispute in May 1988 over the termination of the employment of a storeman by Wooldumpers (Vic.) Ltd, with one week's pay in lieu of notice. This action was in accordance with the provisions (clause 9(b)) of the relevant award, in which there was no reinstatement provision. Perceiving the power of the Commission to order reinstatement, on the authority of the *Ranger* case, the employee's Union notified the Commission of an 'impending dispute'. Earlier cases, however, had suggested that a dispute over the reinstatement of a particular employee by an employer whose operations were confined within one State did not extend beyond the limits of any one State.[5] The Union sought to overcome this difficulty by arguing that the '1988 dispute' was within the ambit of an earlier '1986 dispute', the interstate element of which was clearly established and accepted by both the Commission and the parties. The jurisdiction of the Commission to deal with a reinstatement dispute had been successfully invoked in precisely this way several

1 (1989) 84 A.L.R. 80, (1989) 63 A.L.J.R. 286.
2 *Ibid.*
3 (1987) 163 C.L.R. 656.
4 *Ibid.* 661.
5 *R. v. Gough; ex parte Cairns Meat Export Co. Pty Ltd* (1962) 108 C.L.R. 343, 350-2 and *R. v. Portus; ex parte City of Perth* (1973) 129 C.L.R. 319, 316, 330.

months earlier in *Fruehauf Trailers Limited v. The Vehicle Builders Employees Federation.*[6] The Commission accepted jurisdiction on this basis and made no finding of a separate '1988 dispute'.

*REJECTION OF THE AMBIT ARGUMENT*

The attention of the High Court in the *Wooldumpers* case focused on whether the Commission's decision was correct. All judges agreed that it was not. However, in their rejection of the ambit argument there was no apparent unanimity concerning the nature of the concept or its operation in the instant case. Thus, just as previous decisions of the High Court have prompted much academic speculation on the relationship between the concepts of ambit, industrial dispute and arbitration,[7] so too will the *Wooldumpers* case.

There was no general agreement amongst the judges about the ambit of the '1986 dispute'. Two of the judges, Deane J. and Gaudron J., with whom Brennan J. concurred, concluded that the '1986 dispute' did not include reinstatement within its ambit. The terms of the log were limited to a concern for permanency of employment and the introduction of a system regulating termination of employment, and did not extend to the consequences of non-compliance with the system demanded therein.[8] Looking beyond the log itself, the fact that it was issued prior to the *Ranger* case, when it was generally assumed that the Commission could not order reinstatement, suggested that no employer would have perceived it as including a demand in those terms.[9]

On the other hand, Mason C.J. considered that implicit in the 1986 log of claims was a demand that an employee dismissed otherwise than in accordance with its demands should be reinstated.[10] Wilson, Dawson and Toohey JJ., in a joint judgment, made no express finding on the ambit of the earlier dispute. Their decision rested on an assumption that the implicit demands of the log of claims were as stated by Mason C.J. This they obviously perceived as the most favourable basis for the Union argument.[11] Despite the differing assessments of the ambit of the '1986 dispute', all judges, with the exception of Gaudron J. and Brennan J., went on to emphasise that the two sets of demands were relevantly different. The log of claims served in 1986 sought the imposition of general conditions governing the future conduct of all employer members of the A.W.S.B.E.F., including Wooldumpers. In contrast, the 1988 demand was very specific: it sought the actual reinstatement of one particular employee by one particular employer. The former claim, in the view of these five judges, did not embrace the latter.[12] The case was indistinguishable from *R. v. Gough; ex parte Cairns Meat Export Co Pty Ltd.*[13]

At this level, the judges' examination of the two demands appears to have been directed solely to determining whether there was a close enough identity between the claims such that they could be seen to be part of the same dispute. This is so, particularly in the judgment of Wilson, Dawson and Toohey JJ. who elaborate no further on this point. If the reasoning is understood in this way, it is unsatisfactory for it fails to attend adequately to the nature of the argument that the claim for an award ordering reinstatement was within the ambit of the antecedent dispute. The concept of ambit does not exist to determine the validity of claims[14] and the issue in the *Wooldumpers* case was not simply whether the later claim fitted within the earlier one. Rather the function of the concept of ambit is to provide a means of assessing whether the action of the Commission in making an arbitral decision is within jurisdiction.[15]

[6] [1988] A.I.L.R. 426.

[7] *E.g.* Ford W. J., 'The Federal Industrial Disputes Power: Comments on Some Constitutional Considerations' in Changing Industrial Law (eds Rawson, D. W. and Fisher, C.) Croom Helm, Sydney 1984, 72 ff.

[8] (1989) 84 A.L.R. 80, 95 (*per* Deane J.).

[9] *Ibid.* 97 (*per* Gaudron J.).

[10] *Ibid.* 82.

[11] *Ibid.* 88.

[12] *Ibid.* 83 (*per* Mason C.J.), 88-90 (*per* Wilson, Dawson and Toohey JJ.), 95 (*per* Deane J.).

[13] *Supra* n. 5. See particularly (1989) 84 A.L.R. 80, 85 (*per* Mason C.J.), 89 (*per* Wilson, Dawson and Toohey JJ.).

[14] *R. v. Holmes; ex parte Victorian Employers' Federation* (1980) 31 A.L.R. 487, 494.

[15] *R. v. Bain; ex parte Cadbury Schweppes Australia Ltd* (1984) 159 C.L.R. 163, 176.

The arbitral power authorised by s. 51(xxxv) is purposive: it must be exercised either to prevent or to settle industrial disputes which extend beyond the limits of any one State, and so a particular connection between award and dispute must be established. When the Commission is arbitrating to settle a dispute, if that connection is established it is said that the award is within the ambit of the dispute. The nature of that connection was described in wide and general terms by a different majority of judges in the *Wooldumpers* case, who adopted the terminology of previous cases: the award must be 'relevant', 'reasonably incidental' or 'appropriate' to a matter the subject of the dispute or have 'a natural tendency to dispose of the question in issue'.[16] The legislature has used the words 'necessary or expedient'.[17] Therefore, a judgment of cause and effect is required.

In the *Wooldumpers* case, only Mason C.J. and Gaudron J. made explicit that this was the nature of their task. Despite their different characterization of the subject matter of the dispute, and thus the ambit of the dispute, both judges made it clear that the Commission would have had jurisdiction to make an award ordering the reinstatement of the particular employee if in so doing it could be shown that the requisite connection was established and thereby the earlier dispute settled. An award confined to particular parties in a single workplace would be a permissible exercise of the Commission's acknowledged jurisdiction to settle a dispute in a piecemeal fashion.[18] In the instant case, however, there was nothing to demonstrate that the appropriate relationship between award and dispute was established, for the reinstatement had never been demanded by reference to anything related to the ambit of the 1986 dispute.[19]

The decision in the *Wooldumpers* case thus required both a determination of the ambit of the earlier dispute and a judgment as to whether an award ordering reinstatement of a particular employee would be within the ambit of that dispute. Again, only Mason C.J. and Gaudron J. clearly delineate the distinction between these two questions. Their approach acknowledges the breadth and flexibility of the requisite connection between award and dispute, from which it must follow that the concept of ambit and the scope of the award making power are not coterminous.[20] There is no contradiction in saying both that the scope of the award making power of the Commission is wider than the demands of the parties and that the award must be within the ambit of the dispute. If a more rigid approach is taken to the question of ambit, as illustrated by the judgments of Wilson, Dawson and Toohey JJ. and Deane J., then the distinction between the two question narrows, and the inquiry becomes simply whether the demand for reinstatement is literally 'embraced' or 'encompassed' by the earlier demands of the disputants.

If it is accepted that the rationale of the doctrine of ambit is as stated above, then in any particular case the functioning of that concept will depend upon two variables: the end of the arbitral process (viz prevention or settlement) and the precision with which the dispute is identified. Thus, if the Commission is arbitrating to prevent a dispute, there will need to be established a connection between its present action and a dispute the ambit of which, by definition of its futurity, cannot be precisely identified. In those circumstances it would appear, though there is as yet no authority on the point, that the function of the doctrine of ambit must be, as Mason C.J. noted,[21] repeating a view he has expressed earlier in *R.* v. *Gaudron; Ex parte Uniroyal Pty Ltd*,[22] to impose fewer restrictions upon the Commission than if it were settling a present dispute. In the latter situation, of which the *Wooldumpers* case was an illustration, the actual operation of the ambit doctrine will depend on the way the dispute is identified. If the dispute is manifested by more than, or indeed something other than, a neatly defined log of claims, the concept will operate flexibly simply because of the nature of the requisite connection between award and dispute.

16 (1989) 84 A.L.R. 80, 84 (*per* Mason C.J.), 93-4 (*per* Deane J.), 96 (*per* Gaudron J., with whom Brennan J. agreed). See also *R. v. Galvin; ex parte Amalgamated Engineering Union, Australian Section* (1952) 86 C.L.R. 34, 40; *R. v. Holmes; ex parte Victorian Employers Federation supra* n. 14, 487.

17 S. 55 Conciliation and Arbitration Act 1904 (Cth) *cf.* s. 120 Industrial Relations Act 1988 (Cth).

18 (1989) 84 A.L.R. 80, 96 (*per* Gaudron J.) and the cases there cited.

19 *Ibid.* 85 (*per* Mason C.J.), 98 (*per* Gaudron J.).

20 *Ibid.* 84 (*per* Mason C.J.).

21 *Ibid.* 84.

22 (1978) 141 C.L.R. 204, 211.

The really problematical case is that of the 'paper dispute' where the log of claims and its rejection define the totality of the dispute, for then the doctrine of ambit may necessarily operate in a much more rigid fashion: because the log of claims crystallizes the dispute it may appear that only an award in terms which closely resemble those demands can satisfy the necessary connection. The critical issue is whether the dispute can ever be identified rigidly as just the written log of claims. In the *Wooldumpers* case, the judgments of Deane J. on the one hand and Mason C.J. and Gaudron J. on the other exemplify a long-standing division in the approach of High Court judges to the ambit of a 'paper dispute'. Deane J. took a very rigid approach and hence nothing short of an explicit demand in the log of claims, similar to that found by Mason C.J. to be implicit, would, in his view, have enabled the ambit argument to succeed.[23]

The approach of Deane J., as he himself all but acknowledged, is inappropriately and unnecessarily rigid and is conducive to a damaging artificiality and technicality, in which the form of the log of claims becomes the determinant of the Commission's power. The better view is, as exemplified by the approach of both Mason C.J. and Gaudron J., that logs of claims are at the very least always addressed to real people, at a particular period of time and within a particular and real industrial context. They must thus be read broadly.[24] Obviously an award which reflects the specific demands in the log of claims will settle the dispute — but so too might something else.

The reluctance of Deane J. to apply the doctrine of ambit in other than a rigid fashion was an obvious reaction to his perception that 'paper disputes' are a mere artifice to satisfy the unnecessary limitation on the jurisdiction of the Commission that there be a real and defined interstate industrial dispute. In that sense, the facts of the *Wooldumpers* case focused on a wider frustration with, and questioning of, the capacity of the system of conciliation and arbitration as established by the Commonwealth Parliament to deal with the real problems of industrial relations in Australia. It was obvious that the antecedent dispute was, in the words of Mason C.J., nothing but a 'jurisdictional talisman':[25] it was absolutely irrelevant to the real dispute, the question of the reinstatement of an employee, which the Commission was asked to arbitrate. Because of the way in which the issues had been presented before both the Commission and the High Court, the judges were not prepared to accede to any argument that the prosecutor had failed to discharge the onus of proving that the Commission had no jurisdiction to deal with the 1988 dispute considered alone.[26] However, each of the judgments did address in varying measure alternative approaches to the issues presented by the facts of the case before them and it is this aspect of the case which will perhaps be of more interest to those involved in industrial relations.

*REINSTATEMENT — ALTERNATIVE APPROACHES*

If attention is focused on the 1988 dispute then two questions emerge: (1) Did that dispute considered alone satisfy the requirement of interstateness? And if it did not, then (2) did the Commission have jurisdiction to deal with it on some other basis? The answers to these questions are important in determining the jurisdiction of the Commission in the future to deal with reinstatement disputes, for the situation in the *Wooldumpers* case is typical of many such disputes: an employee is sacked, by an employer whose operations are confined to one State, and the issue of reinstatement is taken up by the national union. Certainly the fact of the confinement of the employer's business to one State suggested to Wilson, Dawson and Toohey JJ. that the 1988 dispute did not relevantly extend beyond the limits of one State.[27] The concomitant of this was that in a dispute generated in consequence, rather than in advance, of a particular dismissal, as with most reinstatement disputes, there will rarely be the appropriate degree of control by a union to ensure the satisfaction of the interstate element.[28]

[23] (1989) 84 A.L.R. 80, 95.
[24] *Ibid.* 82 (*per* Mason C.J.), 97 (*per* Gaudron J.). *Cf. R. v. Commonwealth Court of Conciliation and Arbitration; ex parte Kirsch* (1938) 60 C.L.R. 507, 538.
[25] (1989) 84 A.L.R. 80, 85.
[26] *Ibid.* 82 and 98.
[27] *Ibid.* 88.
[28] *Ibid.* 90.

This somewhat pessimistic conclusion was not shared by the other judges. Deane J. was obviously prepared to concede that the Commission would have had jurisdiction in the instant case to deal with the '1988 dispute' which was, as he pointed out, one between nationwide disputants on the side of both the employer and employee and one occurring in the context of a pre-existing dispute.[29] However, if the A.W.S.B.E.F. had not been involved in the presentation of this case the dispute may have been seen as one between an employer in one State and a nationwide union, which, it has been previously suggested, does not amount to an existing interstate dispute.[30]

In s. 4(1) of the Conciliation and Arbitration Act, 1904 (Cth) the definition of 'industrial dispute' does make clear in paragraph (a) that the Commission also has jurisdiction to deal with 'a threatened, impending or probable dispute as to industrial matters extending beyond the limits of any one State'. Hitherto, because of the High Court's insistence on an existing dispute, little attention has been paid to the concept of a 'threatened, impending or probable' dispute.[31] But if there is to be any meaningful distinction, as there must be, between an existing dispute and one which is 'threatened, impending or probable', then there must be a consequent modification in the nature of the requirement of interstateness. It is certainly arguable, even on a strict interpretation of paragraph (a), that a dispute in any of the latter categories may satisfy the statutory demand that it 'extend beyond the limits of any one State' even when only one of the parties is found beyond the confines of any one State. A less strict interpretation would be satisfied, as Mason C.J. suggests, by some evidence that such a dispute would be likely to develop into an interstate industrial dispute. Consequently, neither Mason C.J.[32] nor Gaudron J.[33] saw that the decision in the *Wooldumpers* case precluded an argument in the future that a reinstatement dispute was within the statutory definition of 'industrial dispute'.

Even if the reinstatement dispute did not satisfy the statutory requirement of interstateness in paragraph (a), the definition of industrial dispute extends in paragraph (b) to 'a situation which is likely to give rise to a dispute as to industrial matters which so extends.'[34] Recognition of the jurisdiction of the Commission to exercise its arbitral power for the prevention of interstate disputes would enable it to deal with wholly intrastate disputes which satisfy this part of the definition. However, up until now, with the exception of Murphy J.,[35] there has been very little recognition by the High Court of the preventative power of the Commission. In the *Wooldumpers* case, the central thrust of the judgment of Deane J. is an extraordinarily powerful expression of frustration at any continuing refusal to use and recognise this power.[36] Significantly the judgment of Mason C.J. also foreshadows a greater willingness to attend to arguments that the Commission exercise its preventative powers.[37]

Previous judicial reluctance to embrace the prevention power has stemmed from the High Court's understanding of the nature of arbitral power. Arbitration has persistently been recognised as inherently requiring opposing parties who are in dispute about some subject matter. Though in early cases those requirements may have been based on a mistaken view as to the judicial nature of the arbitration power,[38] that is not the reason for the same insistence today.[39] Thus, the notion that the Commission could act to prevent a dispute by arbitration has seemed far more than an 'amiable

[29] *Ibid.* 95.

[30] *R. v. Turbet; ex parte A.B.C.E. and B.L.F.* (1980) 33 A.L.R. 79, 89 (*per* Mason C.J.), cf 92 (*per* Murphy J.).

[31] See *Merchant Service Guild of Australia v. Newcastle and Hunter River Steamship Company Ltd (No. 1)* (1913) 16 C.L.R. 591 and *R. v. Heagney; ex parte ACT Employers Federation* (1976) 137 C.L.R. 86, 90.

[32] (1989) 84 A.L.R. 80, 86.

[33] *Ibid.* 98.

[34] S. 4(1) Conciliation and Arbitration Act 1904 (Cth) *cf.* s. 4(1) Industrial Relations Act 1988 (Cth).

[35] See *R. v. Isaac; ex parte State Electricity Commission of Victoria* (1978) 140 C.L.R. 615, 631, *R. v. Turbet; ex parte A.B.C.E. and B.L.F. supra* n. 30, 92-4 and *Re Duncan, The Coal Industry Tribunal; ex parte Australian Iron and Steel Pty Ltd* (1983) 49 A.L.R. 19, 41.

[36] (1989) 84 A.L.R. 80, 91-3.

[37] *Ibid.* 87.

[38] *E.g. Australian Boottrade Employee's Federation v. Whybrow and Co.* (1910) 11 C.L.R. 311, 317, 324 and 329

[39] *E.g. R. v. Commonwealth Court of Conciliation and Arbitration; ex parte Kirsch supra* n. 24, 524 and *R. v. Kelly; ex parte State of Victoria* (1950) 81 C.L.R. 64, 81-2.

eccentricity':[40] it has been considered a logical impossibility.[41] The nature of arbitral power, therefore, has been thought to demand a presently existing dispute as the basis of the jurisdiction of the Commission.[42] The structure of the Conciliation and Arbitration Act reflects this and thus s. 24 of the Act requires the Commission on the assumption of jurisdiction to identify both the parties to, and the matters which are the subject of, the dispute, as defined in s. 4(1), with which it is dealing. In this sense the legislation does prevent the Commission from dealing with 'situations' likely to give rise to interstate industrial disputes which are not amenable to such classification.

Plainly this presents no problem in terms of a 'situation' such as that in the *Wooldumpers* case for it had already crystallized into a dispute. Of course the precise limitation which the nature of arbitral power places upon the preventative aspect of the Commission's work will undoubtedly have to be addressed in future cases. If the constitutional power of prevention of disputes is to be truly effective it must be able to anticipate industrial disputes in the abstract, the parties and subject matter of which cannot presently be defined, as Deane J. argues.[43] To this extent the legislation may not be as extensive as is constitutionally permissible.

However, it would be a mistake to suppose that s. 24 requires, as Deane J. seems to suggest,[44] the identification by the Commission of the parties and subject matter of an *interstate* industrial dispute. The 'industrial dispute' referred to in s. 24 is that defined in s. 4(1) and as such the requirements of the statute provide no barrier to the Commission dealing with a purely local intrastate dispute or 'situation' as long as it is likely to extend to an interstate dispute. Given the advanced state of modern communications, the proliferation of national organisations, and the interaction and independence of modern industrial relations, as acknowledged by Deane J.,[45] it may well be possible to judge the likelihood of any intrastate 'situation' so extending despite an inability to presently identify with any degree of precision either the parties or subject matter of that interstate dispute — however, such a 'situation' must itself have identifiable parties and subject matter of dispute to enable the Commission to comply with s. 24.

The consequences and advantages of the use of the prevention power are forcefully highlighted by both Mason C.J.[46] and Deane J.[47] in the *Wooldumpers* case. The use of this power would greatly increase the chances of achieving the obvious constitutional and legislative goals by enabling the Commission to look to the realities of modern industrial disputation. Regrettably this did not occur in the *Wooldumpers* case itself. The *Wooldumpers* case can, however, justifiably be seen as the harbinger of new and interesting developments in the future recognition of a wider jurisdiction in the Commission. It is an invitation to bold and creative argument and as such it will be of significance not only for future reinstatement disputes but for all areas of disputation which come before the Commission.

Since the dispute which led to the *Wooldumpers* case, the Industrial Relations Act 1988 (Cth) has come into operation. In terms of the issues raised in the *Wooldumpers* case the new Act makes no significant change from the previous legislation. The definition of 'industrial dispute' has been expressed more simply and clearly, but does not differ in substance from that in the Conciliation and Arbitration Act. An 'industrial dispute' is now so defined in s. 4(1):

> (a) an industrial dispute (including a threatened, impending or probable industrial dispute):
> (i) extending beyond the limits of any one State; and
> (ii) that is about matters pertaining to the relationship between employers and employees; or
> (b) A situation that is likely to give rise to an industrial dispute of the kind referred to in paragraph (a).

The constraints on the Commission to identify the parties and subject matter of the 'industrial dispute' before it, as required by s. 24 of the Conciliation and Arbitration Act, are now embodied in s. 101 of the Industrial Relations Act. There is no statutory reason to hinder the developments presaged by the

[40] *Whybrow's* case *supra* n. 38, 324.
[41] *E.g. R. v. Heagney; ex parte A.C.T. Employers Federation supra* n. 30, 90.
[42] (1989) 89 A.L.R. 80, 87 (*per* Mason C.J.) citing Portus, J.H. 'The Necessity for an Industrial Dispute' (1956) 30 A.L.J. 250.
[43] *Ibid.* 91.
[44] *Ibid.* 94.
[45] *Ibid.* 92.
[46] *Ibid.* 87.
[47] *Ibid.* 91-3.

*Wooldumpers* case. On a subject matter of such importance in present industrial relations, it will not be long before the jurisdiction of the Commission to deal with disputes over reinstatement comes before the High Court again. Parties would be well advised to focus on the future consequences of such disputation rather than looking to the past. Whilst up until now the High Court has avoided questions about the nature of the jurisdiction of the Commission to deal with threatened, impending or probable disputes or to exercise its prevention power, the time is rapidly approaching when this will no longer be possible. The consequences of this for the whole industrial relations system will be immense; for example, it is likely to alter significantly the role of the 'paper disputes'. Just how immense those changes will be, only time will tell.

ROSEMARY J. OWENS*

[Since this note was written the Industrial Relations Commission has held that it had jurisdiction to exercise its preventative powers of conciliation and arbitration to deal with a reinstatement dispute — see *Australian Social Welfare Union v. Stones Corner Training Association* [1989] AILR 268. R.J.O.]

* B.A.(Hons), Dip. Ed., LL.B.(Hons) (Adelaide), Lecturer, Faculty of Law, University of Adelaide.

## PAVEY & MATTHEWS PTY LTD V. PAUL[1] AND THE LAW OF RESTITUTION

It is a well-established rule that where a person has expressly or impliedly requested another to render a service without specifying any remuneration, but the circumstances of the request imply that the service is to be paid for, the law implies a promise to pay *quantum meruit*, that is, the reasonable price of the service provided.[2] Such a promise is inferred from the existing contract between the parties.[3] The action may also lie where services have been rendered in the absence of a genuine agreement or where such agreement is void, frustrated, discharged or unenforceable.[4] In the past, recovery in the latter types of cases was ordered on the basis of an implied contract between the parties.[5] In *Pavey & Matthews Pty Ltd v. Paul* the High Court of Australia sought to apply this principle to a claim which, although on a *quantum meruit*, was based on a building contract made unenforceable against the building owner by the provisions of s. 45 of the Builders Licensing Act 1971 (N.S.W.) (The Act). The problem was that if *quantum meruit* in the latter types of cases was indeed based on an implied promise to pay, then recovery in this case would amount to an indirect enforcement of a contract which the legislature had declared unenforceable and would, on the Court's interpretation of the section, be unavailable. However, on the facts,[6] the plaintiff clearly ought to have recovered in order to prevent the unjust enrichment of the defendant by the receipt of a benefit at

1 (1987) 69 A.L.R. 577. High Court, 4 March, Mason, Wilson, Brennan, Deane and Dawson JJ.

2 Bird, R. (ed.), *Osborn's Concise Law Dictionary* (7th ed. 1983) 273.

3 Although it may well be questioned whether the basis of recovery is indeed contractual or restitutionary. The question was left open in *Pavey & Matthews* (*per* Deane J., 603).

4 Some examples are: *Craven-Ellis v. Canons Ltd* [1936] 2 K.B. 403 (contract void), *White & Carter (Councils) v. McGregor* [1962] A.C. 413 (contract discharged).

5 This was despite the fact that it was accepted that in many cases the real basis of recovery was restitutionary: see for example Lord Atkin's judgement in *United Australia Ltd v. Barclays Bank Ltd* [1941] A.C. 1, 26-9 and Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, 61.

6 Apart from the wider-reaching implications of allowing recovery, *i.e.*, frustration of legislative intent (see *infra*).