DISMISSALS AND THE FEDERAL CONCILIATION AND ARBITRATION SYSTEM

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1 INTRODUCTION

One area in which the rights of Australian workers have lagged behind their counterparts in other western democracies is that of protection against unfair dismissal. The common law action for breach of the contract of employment has, of course, been open to employees in common law countries including Australia but recognition of the inadequacy of this procedure has led to the introduction of statutory protection against dismissal in a number of common law jurisdictions including the United Kingdom. While some of the Australian States have sought to legislate in this area the protection available at federal level has, at least until recently, been inadequate.

This paper will explore the background to the federal dismissals jurisdiction in Australia and the recent developments which have extended the protection against unfair dismissal available within the Australian Conciliation and Arbitration system. At federal level, a dual system of redress for unfair dismissal has developed. Dismissals can be dealt with both by the Commonwealth Conciliation and Arbitration Commission by virtue of it's role in the resolution of industrial disputes, and by the Federal Court in the enforcement of award provisions relating to unfair dismissals. The development of these two systems of redress will be examined and they will be compared in terms of their availability to dismissed employees and the scope of the remedies they afford.

2 DISMISSALS AND THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION

The jurisdiction of the Commonwealth Conciliation and Arbitration Commission to deal with dismissal cases has been challenged many times on constitutional grounds. The controversy has focused on the power of the Commission to order reinstatement of unfairly dismissed employees. Three main barriers to this jurisdiction emerged over the years. The first concerned the question whether a dispute relating to reinstatement of a worker would be an industrial dispute for the purposes of s 51(35) of the Constitution and would come within the jurisdiction of the Commission to deal with disputes "as to industrial matters" as provided for in s 4 of the Conciliation and Arbitration Act 1904 (Cth). Industrial matters are defined as "all matters pertaining to the relations of employers and employees" and these are expressed to include "the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons".

In *R v Portus; ex parte City of Perth*[1] it was held that a dispute relating to the reinstatement of a worker merely pertains to the relationship between a former employer and a former employee and therefore would not fall within

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[1] (1973) 129 CLR 312.

the statutory definition. This conclusion was based on the decision in the *Hamilton Knight*[2] case which related to a demand for pensions.

There was also the suggestion in the judgment of Gibbs J in the *Portus* case that a demand for reinstatement of a dismissed worker could not give rise to an industrial dispute since it would involve an extension of the powers of the Commission. He said:

> Looked at from one point of view, the dispute may appear to be as to the employer's power to dismiss or duty to reinstate in employment, but since it is intended that no criteria should be laid down by which the extent of the power or nature of the duty could be ascertained, it seems to me that what is in truth sought is an extension of the powers of the Commission . . . the Commission cannot, by making an award, increase its own powers or jurisdiction and a demand that it should do so would not give rise to an industrial dispute.[3]

The second barrier to the exercise of the reinstatement jurisdiction is the requirement that the industrial dispute be a dispute "as to industrial matters which extends beyond the limits of any one state". In *R v Gough; ex parte Cairns Meat Export Co Pty Ltd*[4] and the *Portus* case the lack of interstateness defeated the Commission's jurisdiction to hear the claim. Most dismissal disputes would of course be local in nature and might be expected to find it difficult to satisfy the interstateness requirement.

In *R v Gough; ex parte Meat and Allied Traders Federation of Australia*[5] the third barrier emerged. Here it was held that a proposal to include in an award a power exercisable by the Commission to order reinstatement of an unfairly dismissed employee was invalid since it purported to confer judicial power upon the Commission and therefore offended against the principle established in the *Boilermakers'* case.[6]

On the basis of these decisions it appeared that there were insurmountable obstacles to the jurisdiction of the Commission to deal with dismissals or reinstatement. Notwithstanding these obstacles the Commission has exercised a de facto jurisdiction in the area of reinstatement by virtue of which it recommends the reinstatement or re-engagement of unfairly dismissed workers if the circumstances so justify. This means of settling dismissal disputes does not lead to an order by the Commission but depends upon the parties agreeing to accept the Commission's recommendation. It is often referred to as the Commission's 'unofficial' reinstatement jurisdiction.

There is also the power of the Federal Court to order the reinstatement of workers dismissed on account of their union membership or activities. Section 5 of the Conciliation and Arbitration Act makes it an offence for an employer to dismiss or otherwise prejudice his employee by reason of the latter's involvement in union activities. Where an employer is convicted of an offence under this section the court may order the reimbursement of any wages lost and may direct "that the employee be reinstated in his old position or in a similar position".[7] In victimisation cases there is a strong presumption in favour of reinstatement. In *Bowling v General Motors Holden's*

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[2] *R v Hamilton Knight; ex parte Commonwealth Steamship Owners Association* (1952) 86 CLR 283.
[3] (1973) 129 CLR 312, 325.
[4] (1962) 108 CLR 343.
[5] (1969) 122 CLR 237.
[6] *R v Kirby, ex parte Boilermakers Society of Australia* (1957) 95 CLR 529.
[7] Conciliation and Arbitration Act 1904 (Cth) s 5(5).

Limited[8] the Full Federal Court, in overturning a decision not to reinstate a shop steward who had been dismissed on account of his position, said that while the Court had a discretion in the matter that discretion should only be exercised if such an order would be futile. This would be so, for example, if the employee did not seek reinstatement, if he were dead, or if the employer had gone out of business.

A Development of the Commission's Reinstatement Jurisdiction

In the early 1980's the approach of the High Court to the interpretation of "industrial disputes" underwent a radical change. The 1983 *Social Welfare Union* case[9] was a landmark decision in this regard. It involved a broadening in interpretation of the term "industrial disputes" in s 51(35) of the Constitution. The Court said:

> The words are not a technical or legal expression. They have to be given their popular meaning — what they convey to the man in the street. And that is essentially a question of fact.[10]

The first application of this broader approach in the context of dismissals took place in an appeal from a decision of the Victorian Supreme Court in *Slonim v Fellows*.[11] Ms Slonim, who had been employed by the General Committee of the Victorian Autistic Children's Association, Southern Centre, was dismissed from her job without notice. Her union complained to the relevant State Conciliation and Arbitration Board claiming that her dismissal was unfair. The Victorian Act provided that where the Board failed to settle an "industrial dispute" by conciliation, it should determine the matter by arbitration. It also gave the Board the power to make awards relating to *inter alia* "industrial disputes". Industrial dispute was defined in s 3(1) as including a dispute arising between an employer and one or more of his employees and also as including a threatened or pending or probable dispute. The Board, persuaded presumably by previous High Court decisions on the interpretation of "industrial dispute", refused to deal with her claim for reinstatement on the basis that it lacked jurisdiction so to do. Ms Slonim applied for an order of mandamus directing the Board to deal with the dispute but the Victorian Supreme Court refused to grant it. She then appealed to the High Court. It was held unanimously that the Board had power to settle the dispute by arbitration. Justice Wilson overruled the decision in *R v Marshall; ex parte Plumrose (Aust) Ltd*[12] and referred to the remedy of reinstatement as "forming part of the recognised armoury of available remedies in the modern pursuit of harmonious industrial relations."[13] He placed reliance upon the fact that the dispute was a dispute between the Union and the employer not one between the appellant and the employer. He said:

> In considering the present problem, it may be important to remember that the dispute in question is a dispute between the Union and the Committee. It is not a dispute between the appellant and the Committee. The definition of industrial

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[8] (1981) AILR para 9.
[9] *R v Coldham; ex parte Australian Social Welfare Union* (1983) 157 CLR 297.
[10] *Ibid* 312.
[11] (1984) 154 CLR 505.
[12] (1983) 1 VR 469.
[13] (1984) 154 CLR 505, 515.

> dispute contemplates that a dispute may arise between one employee and his employer but it may be doubted whether such a dispute could arise over the dismissal of the employee after the employment was terminated, for the reason that the disputant would no longer be an employee.[14]

This had the effect of getting around the difficulty of finding a dispute between former employer and former employee without expressly overruling *Hamilton Knight*.[15] However it leaves open the question as to what happens when a dismissal claim of an employee is not supported by a union.

The question remained whether the jurisdiction to order reinstatement would be found for the Commonwealth Commission. The government decided to provide for reinstatement of unfairly dismissed workers in the Industrial Relations Bill 1987 (Cth). The power to order the reinstatement of unfairly dismissed workers was to be conferred on the proposed Australian Labour Court. The proposition to establish such a court was the subject of much criticism. Then a High Court decision intervened which might be said to have provided the government with the opportunity to abandon its plans to endow a new court with the power to order reinstatement.

B The Ranger Uranium Decision

This was the decision in the *Ranger Uranium* case.[16] This case concerned the purported summary dismissal of seven employees of Ranger Uranium Mines Pty Ltd in the Northern Territory. The conditions of these employees were regulated in part by the Metal Industry Award which contained the provision relating to dismissal introduced by the *Termination, Change and Redundancy* case.[17] The Union sought a variation of their award or a new award to provide for the reinstatement of the dismissed employees. The Commissioner who heard the dispute held that he had no jurisdiction in the matter. An appeal against that decision to the Full Bench of the Commission was dismissed by the majority, Boulton J dissenting. The Union then brought the matter to the High Court seeking an order of mandamus directed at the Commissioner who had originally dealt with the matter. Because the dispute took place in the Northern Territory there was no requirement of interstateness. In a joint opinion, the full bench of the High Court ordered the Commission to deal with the matter as being an industrial dispute capable of resolution by conciliation or arbitration. In arriving at their decision the Court looked at the question of whether a dispute as to reinstatement is an industrial dispute within the meaning of the statutory definition. It held that such a dispute comes within the definition in para (k) of the definition of "industrial matters" in s 4(1) of the Conciliation and Arbitration Act which covers "the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons . . .". In so holding, the Court, like Wilson J in *Slonim v Fellows*,[18] played down the individual aspect of a reinstatement dispute:

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[14] *Ibid* 514.

[15] *R v Hamilton Knight; ex parte Commonwealth Steamship Owners Association* (1952) 86 CLR 283.

[16] *Re Ranger Uranium Mines Pty Ltd; ex parte Federated Miscellaneous Workers Union of Australia* (1987) 163 CLR 656.

[17] (1984) AILR para 256.

[18] (1984) 154 CLR 505.

> Whilst some reinstatement disputes may not pertain to the relations of employers and employees, it must be accepted that many such reinstatement disputes are agitated, not merely by or on behalf of the former employee, but by and on behalf of the remaining employees who have a direct industrial interest in the security of their own employment. . . . These matters, like questions of manning and recruitment, have a direct and not merely consequential impact on the employer-employee relationship. . . .[19]

The Court also held that no claim was being made to confer a new function on the Commission. They said:

> In the present case there is no claim to confer a new function on the Commission. The claim is simply that the Commission exercise its powers of conciliation and arbitration to settle an industrial dispute as to the duty of the employer to reinstate the dismissed men.[20]

Nor was the Commission being called upon to exercise a judicial power. Instead what was involved was the exercise of an arbitral power since the object of the inquiry was to ascertain what rights and obligations should exist rather than to ascertain legal rights or obligations. The thin line which exists between these two functions is evident from this passage in the judgment:

> The resolution of the dispute does not involve the assumption of judicial power not possessed by the Commission, notwithstanding that in the course of the resolution of the dispute the Commission may undertake similar inquiries and determine similar questions of fact as would be made and determined in proceedings brought for the enforcement of the Award pursuant to s119 of the Act, and notwithstanding that in the course thereof it may form an opinion as to the legal rights and obligations of the parties.[21]

C Interstateness

Although the question of interstateness did not arise in this case, it has been argued[22] that the High Court indicated that this too was not an insurmountable obstacle to the Commission's jurisdiction when it said that "in circumstances in which interstateness is necessary it may be expected that they [reinstatement disputes] will be generated as interstate disputes".[23] The Australian Council of Trade Unions (ACTU) Legal Office acted on this interpretation by instructing unions to serve a log of claims on employers in more than one State including a demand to the effect that "an employer shall not dismiss any employee without the agreement of the union". When this demand is not acceded to the union should notify a dispute to the Commission. Once a dispute is notified and found by the Commission there is no need for further action until someone is actually dismissed. At that stage the Commission should be notified of a dispute over the dismissal and the notification should refer to the original dispute finding.[24]

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[19] (1987) 163 CLR 656, 661.
[20] *Ibid* 662.
[21] *Ibid* 666-667.
[22] R McCallum, "The Ranger Uranium Case: Reinstatement, The High Court And The Commission" (1988) 16 ABLR 149,152.
[23] (1987) 163 CLR 656, 661.
[24] This process is described in B Brooks, "Reinstatement of Employees: Federal Industrial Jurisdiction" (1987) Labour Law Reporter para 61-315.

It has also been argued[25] however, that the *Ranger Uranium* decision does not provide an answer to the interstateness requirement, mainly on the ground that an actual dismissal a year or more after the dispute finding might not be regarded as a manifestation of the original dispute. This assertion is based on the decision in *R v Gough; ex parte Cairns Meat Export Co. Pty Ltd* (the *Cairns Meat* case).[26] In this case there was an award in existence which contained a clause providing for the summary dismissal of workers on certain specified grounds. The Commissioner ordered the re-engagement of workers covered by the award on the basis that the dismissals were not justified. The employer sought an order of prohibition in respect of the orders. The main argument concerned the lack of interstateness. Chief Justice Dixon conceded that the original award was founded on an interstate dispute but went on to hold that the dismissals could not come within the terms of the original dispute. His Honour said that it "would have required great foresight to make a dispute about these events, events which occurred three years later or at least two and one half years later."[27]

But more recent High Court decisions[28] concerning matters other than dismissal have shown a willingness to accept a broad ambit in disputes. Justice Mason in *Heagneys* case said "[t]he court will, as it does in other fields of law, strive to give meaning to the claim and lean against any construction which renders it devoid of meaning or certainty."[29]

It was also clear that the High Court would be willing to lean in favour of finding a reinstatement jurisdiction for the Commission. It is certainly in the Commonwealth Government's interest that the Commission should have such a jurisdiction since a Labor Government would doubtless feel a lot more comfortable having the question of reinstatement dealt with by the Commission on 'broad industrial principles' rather than by a Labour Court which as a division of the Federal Court might be more inclined to emphasise individual rights.

D The Wooldumpers Decision

The question of whether a demand for reinstatement can give rise to an interstate dispute was finally directly considered by the High Court in *Re Federated Storemen and Packers Union of Australia; ex parte Wooldumpers (Victoria) Ltd* (the *Wooldumpers* case).[30] The facts of the case were that an employee of Wooldumpers (Victoria) Ltd, a Mr King, was dismissed with one week's pay in lieu of notice. His contract of employment was governed by the Storemen and Packers (Wool Selling Brokers and Repackers) Award 1973 (Vic), cl 9(b) of which provided, subject to certain exceptions, "employment may be terminated by a week's notice on either side given at any time during the week or by the payment or forfeiture of a week's wages

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25 *Id.*

26 (1962) 108 CLR 343.

27 *Ibid* 351.

28 *Eg Re Heagneys and Others; ex parte ACT Employers Federation and Others* (1976) 137 CLR 86 and *R v Turbet and Metal Trades Industry Association and Another; ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1980) 144 CLR 335.

29 *Re Heagneys and Others; ex parte ACT Employers Federation and Others* (1976) 137 CLR 86, 100.

30 (1989) 84 ALR 80.

as the case may be". There was no provision in the award for the reinstatement of a dismissed employee. In 1986 a log of claims had been served by the Union, cl 23 of which contained demands in relation to termination of employment to the effect that notice of termination of employment should not be given without the prior consent of the union and that the employer should then assist the employee in obtaining alternative employment. The clause commenced with the statement that, except in cases of casual employment, "all employment shall be permanent". A dispute was found to exist in relation to the log of claims and it had not been settled at the time of Mr King's dismissal. On 4 May 1988 the Union notified the Industrial Registrar of "an impending industrial dispute" arising out of Wooldumpers' decision to terminate Mr King's employment. It sought an award ordering reinstatement of the employee on the ground that the dismissal was harsh, unfair and unreasonable. The Union answered the employer's objection that the dispute was not an interstate one by claiming that it fell within the ambit of the earlier dispute which had arisen from the non-acceptance of the 1986 log of claims. The Union argued that the Award in its current form had been made in partial settlement of that dispute, leaving the Commission with jurisdiction to settle the fresh dispute. Commissioner Caesar held that he had jurisdiction to deal with the claim on the basis that the matter of the reinstatement of Mr King came within the ambit of the 1986 log of claims. He did not find a separate dispute had arisen in relation to the dismissal and claim for reinstatement. The employer sought and was granted an order *nisi* for prohibition preventing the Commissioner from dealing with the matter and an application to make the order for prohibition absolute brought the matter before the High Court.

Five separate judgments were handed down. The Court was unanimous in finding that the claim for reinstatement of Mr King did not come within the ambit of the dispute arising out of the 1986 log of claims and in ordering that the order for prohibition be made absolute. Opinions differed on the question of whether the dispute notified in May 1988 and relating to the dismissal of Mr King might itself have an interstate character. Chief Justice Mason took the view that this matter did not call for decision since the Commissioner had based his jurisdiction on the 1986 log of claims. Neither Brennan J nor Gaudron J referred to this question. In their joint judgment, Wilson, Dawson, and Toohey JJ found that the dispute as notified in May 1988 was not an interstate dispute. Justice Deane, on the other hand, decided that it was an interstate dispute. His Honour said:

> To view the dispute as merely one between Wooldumpers and Mr King would, however, be to ignore the factual context of the dispute and to distort its scope. Mr King is a member of the Federated Storemen and Packers Union of Australia (the Union) which is a national organization of employees. He had, for some eight years, been the Union's delegate at the work place where he was employed by Wooldumpers as a storeman. For its part, Wooldumpers is a member of the Australian Wool Selling Brokers Employers Federation (the Federation) which is a national organization of employers.[31]

His Honour went on to say that, if in these circumstances the Commissioner had determined that there had arisen

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[31] *Ibid* 94.

> either an interstate industrial dispute between nation-wide disputants or, at the least, "a situation which [was] likely to give rise to" an interstate industrial dispute, the court could not have properly found, on the material in evidence, that the Federation had discharged the onus of clearly establishing that such a determination was wrong.[32]

However Deane J found that instead the Commissioner had mistakenly based his jurisdiction on the 1986 log of claims and therefore he too was prepared to make the order for prohibition absolute.

This decision would seem, on the face of it, to offer scant support to attempts to overcome the barrier of interstateness in disputes relating to reinstatement of dismissed employees. However, while it is true that the possibility of establishing a once off reinstatement dispute as having an interstate character remains rather remote, (notwithstanding Deane J's liberal interpretation of the interstateness requirement), the decision offers valuable support to the validity of generating an interstate reinstatement dispute in advance of a claim for reinstatement of a particular employee. As noted above, this is the approach advocated by the ACTU legal advisors.[33]

Both Mason CJ and Gaudron J provide express support for the proposition that where a claim seeking to impose general obligations on employers relating to dismissal and reinstatement is generated as an interstate dispute, a subsequent claim for reinstatement of a particular employee can be said to fall within the ambit of that interstate dispute. The Chief Justice said:

> No doubt there are circumstances in which the making of an award for the reinstatement of particular employees may become reasonably incidental to the settlement of an antecedent interstate dispute embracing a claim for the imposition on employers of an obligation to reinstate employees dismissed otherwise than in accordance with certain conditions or circumstances in settlement of an interstate dispute arising from the employers' rejection of a claim by a union for an award incorporating a clause restricting the employers' right to terminate in this way. The Commission can validly make an award requiring employers not to terminate the employment of employees otherwise than in accordance with the terms of a proposed award. So much seems to have been assumed in *R v Bain; ex parte Cadbury Schweppes Australia Ltd* (1984) 159 CLR 163; 51 ALR 469. In the context of a claim for permanent employment it is then but a short step to say that the making of an award for reinstatement of employees whose employment has been terminated otherwise than in accordance with the terms of the award or proposed award may in appropriate circumstances be reasonably incidental to the settlement of that interstate dispute.[34]

Justice Gaudron said:

> Thus the dispute created by the rejection of the 1986 log of claims authorises the making of "piecemeal" awards (within the ambit of the claim) adapted to the exigencies of particular situations involving threatened dismissals, notwithstanding that any award so made is confined in its operation to a single workplace in a single State. So too, if, as claimed in the present case, the dispute created in 1986 comprehends a claim for the creation of an obligation to reinstate employees dismissed otherwise than in accordance with the regime postulated by the claim, it will authorise the making of "piecemeal" awards adapted to the situation arising when an employee is so dismissed by an employer party to the dispute.[35]

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[32] *Ibid* 95.
[33] *Supra* text at n 23.
[34] (1989) 84 ALR 80, 83-84.
[35] *Ibid* 96-97.

Justice Deane also hints at the possibility of including a claim for reinstatement of a particular employee in the ambit of a pre-existing industrial dispute. He does this while criticising the artificiality of the ambit requirement when he suggests that in order to meet this requirement it might be necessary to include a demand in a log of claims to the effect that an employer shall not, at any time between the service of the log and the making of an agreement or award disposing of the unions demands, dismiss any employee in respect of whom the award is sought.[36]

These remarks, although obiter, would seem to pave the way for overcoming the barrier of interstateness in establishing a jurisdiction for the Commission to deal with claims for reinstatement. Provided the original log of claims giving rise to the interstate dispute contains a clear demand for reinstatement in cases where the union's demands relating to dismissal are not met, it appears that a subsequent dismissal and claim for reinstatement of a particular employee would come within the ambit of the dispute. Such an interpretation need not be inconsistent with the decision in the *Cairns Meat* case.[37] The Chief Justice, in denying that the present dispute came within the ambit of the 1986 log, stated that the *Wooldumpers* case was "relevantly indistinguishable"[38] from the decision in *Cairns Meat*. This did not however prevent him from asserting that given a suitable set of circumstances the making of an award for the reinstatement of particular employees could come within the ambit of a pre-existing interstate dispute.

3 DISMISSAL AND FEDERAL AWARDS

In the early 1980's unions had become aware of the need to strengthen the position of unfairly dismissed workers and in *Amalgamated Metal Workers' and Shipwrights' Union v BHP Pty Ltd* (the *Job Security Test* case)[39] they sought to establish a jurisdiction for the Commission to include in awards clauses relating to unfair dismissal and reinstatement. While the Commission decided that it did have the power to make awards dealing with the grounds on which employees could or could not be dismissed it declined jurisdiction to order reinstatement. The reason given was that it would involve an extension of the Commission's powers and the decisions in the *Cairns Meat*[40] and *Portus*[41] cases were cited in support. The unions went ahead in seeking an award which would seek to prevent the unfair dismissal of employees and it was granted in the *Termination, Change and Redundancy* decision 1984.[42] It contained a clause providing that termination of employment by an employer shall not be harsh, unjust or unreasonable. It also provided a list of discriminatory reasons for termination which would automatically constitute a harsh, unjust or unreasonable termination. These include termination on the ground of race, colour, sex, marital status, religion

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[36] *Ibid* 93-95.
[37] (1962) 108 CLR 343.
[38] *Wooldumpers* case (1989) 84 ALR 80, 85.
[39] (1982) AILR para 487.
[40] (1962) 108 CLR 343.
[41] (1973) 129 CLR 312.
[42] (1984) AILR para 256. This decision was followed by the *Termination Change and Redundancy Supplementary Decision* (1985) AILR para 1.

and political opinion. This clause has been incorporated into most federal awards and some state awards.

A The Need for Unfair Dismissals Clauses in Awards

Those who take the view that the *Ranger Uranium* case[43] removed all obstacles to a reinstatement jurisdiction for the Federal Commission might be inclined to question the need to include an unfair dismissal clause in awards. McCallum argued in favour of their retention on two grounds. First, that they "enshrine much of the broad industrial relations practice and policy on fairness and non-discriminatory conduct in employment".[44] Secondly, if such a clause were breached by an employer it would be open to the trade union to seek, pursuant to s 119 of the Conciliation and Arbitration Act, a monetary penalty against the employer in the Federal Court, and, pursuant to s 123 of the Act, to institute proceedings in that court for the recovery of the lost wages of the dismissed employee.[45] The decision in *Gregory v Philip Morris*[46] has now added a third reason for retaining the unfair dismissals clause in awards. In that case it was decided that breach of the clause gave rise not only to an action under s 119 but also to an action for breach of contract.

B Gregory v Philip Morris

This was the first case in which the unfair dismissals clause introduced as a result of the *Termination Change and Redundancy* case[47] was considered by the Federal Court. Mr Gregory was dismissed by his employer after having been unlawfully expelled from his union. The Metal Industry Award 1984 which, in part, regulated his conditions of employment, contained the unfair dismissals clause. Mr Gregory claimed that his contract of employment had not been determined and that the purported dismissal was in breach of a local agreement and also of the unfair dismissals clause in his award. His application was dismissed by Gray J,[48] who decided that the dismissal was not harsh, unjust or unreasonable and therefore not in breach of the contract of employment or the award. The Full Federal Court overturned this decision. The court held that it had the power to consider all claims arising out of the dismissal on the basis that once the Federal Court has jurisdiction to determine a particular matter it has accrued jurisdiction to consider all claims arising out of that matter. The Court decided that in this case there were two questions to consider. First, whether there had been a breach of s 119 in respect of which a penalty ought to be imposed, and, secondly, whether there had been a breach of the contract of employment. It held that both actions were tenable since it found a breach of the award and held that the terms of the award had been incorporated into Mr Gregory's contract

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[43] (1987) 163 CLR 656.
[44] R McCallum, *supra* n 22, 152.
[45] *Id.*
[46] (1988) 80 ALR 455.
[47] (1984) AILR para 256.
[48] (1987) 77 ALR 79.

of employment.[49] The court went on to impose a penalty of $400 on the respondent for breaching the award. In dealing with the breach of the contract of employment it followed the traditional common law approach in refusing to order specific performance of the contract and instead ordered the employer to pay Mr Gregory a sum of $30,000 in compensation.

The decision in *Gregory's* case has confirmed the importance of the common law in the system of redress available to the unfairly dismissed. However it will be seen that the common law applied in this case differs in some important respects to the approach traditionally favoured in wrongful dismissal cases.

C *Specific performance*

The courts have always been most reluctant to grant an order of specific performance in respect of a contract of employment. One ground of refusal is that the principle of reciprocity demands that the parties to a contract be treated equally, and since the courts would refuse to allow an employer to compel an employee to continue in his or her service on the grounds that it would "turn contracts of service into contracts of slavery",[50] neither could it compel an employer to keep an employee in service. Other reasons for refusal to order specific performance of a contract of employment are that the courts would be unable to supervise the carrying out of its order on account of the continuing nature of the employment contract, and that the mutual confidence which must exist between employer and employee would have been destroyed by the wrongful repudiation of the contract.

A recent Australian case has however marked a change in judicial approach to the question of specific performance of contracts of employment. In *Turner v Australasian Coal and Shale Employees Federation*[51] the Full Federal Court (Northrop, Keely and Gray JJ), in a joint judgment, cast aside the traditional objections to ordering specific performance of a contract of employment. On the question of loss of confidence it said that such a consideration was not very relevant to present society and supported this by saying:

> It is difficult to say that a relationship of mutual confidence must exist in the case of every person employed by a large corporate enterprise. There are many occupations in such enterprises where the precise identity of the employee performing a particular job is immaterial to the collective management of the corporation. There are some cases in which dismissal occurs but the mutual confidence of employer and employee survives; *Hill v C.A. Parsons*[52] was an example of this type of case.[53]

The court went on to point out that on the question of supervision of contracts the employment area was not the only one in which the problem could arise and continued:

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[49] The basis of this decision is open to question. The idea that the award is incorporated into the contract of employment seems incompatible with the recognised approach to awards which sees them as providing a minimum standard which cannot be undercut but which can be improved upon by agreement. See *Kilminster v Sun Newspapers Ltd* (1931) 46 CLR 284.

[50] *De Francesco v Barnum* (1890) 45 Ch D 430, 438, *per* Fry LJ.

[51] (1984) 55 ALR 635.

[52] (1972) Ch 305.

[53] (1984) 55 ALR 635, 648.

> Such cases are, however, matters of discretion, and not matters of hard and fast rule that specific performance cannot be granted. Contracts of employment should now be viewed in the same light.[54]

On the question of reciprocity the court seemed to downplay its importance in the following passage from the judgment:

> In addition, to say that specific performance of a contract of employment is to be granted is not to say that a court will decree that an employee can never leave the employment, or be dismissed by the employer. Courts of equity have always been capable of tailoring their remedies to suit the circumstances of an individual case.[55]

In the event no order for specific performance was made by the Federal Court. The case was instead remitted to the trial judge to decide what relief should be granted. In *Gregory's* case the majority agreed with the finding in *Turner* that under modern conditions it may be that "the circumstances which gave rise to the general principle [that the courts will not grant specific performance of contracts of personal service] will not apply"[56] and stated that they "would not wish to give any endorsement to the view that there may never be an order in the nature of specific performance of a contract of employment".[57] They nevertheless went on to refuse the order. In their joint judgment, Wilcox and Ryan JJ said:

> But the making of such an order is a matter within the discretion of the court. Where such an order is sought, careful consideration must always be given to the likely consequences of the order. The evidence in the present case suggests that industrial difficulties would occur if [Mr] Gregory were now to be re-employed. Each of the traditional reasons for denial of specific performance — a loss of confidence between the parties and the problem of supervision of the relationship — applies in this case. In the exercise of the court's discretion, an order for specific performance ought to be refused.[58]

The finding that there was a loss of confidence between the parties is at the least surprising in view of the circumstances of the case and particularly in light of their Honours' statement that:

> There was no suggestion of any misbehaviour by [Mr] Gregory, in his capacity as an employee. Neither his competence nor his diligence was in issue. The problem arose because, so it appeared on 17 October, he had been expelled from his union as a result of differences within the union upon a matter of industrial policy. It might fairly be said that [Mr] Gregory had behaved unwisely, even provocatively, in the course of these differences, but the dispute was essentially within the union itself. It did not affect [Mr] Gregory's capacity or willingness to serve his employer.[59]

It is submitted that contrary to the finding of the Court, the circumstances of the *Gregory* case provided very strong grounds for departing from the general rule against specific performance.

The reliance of the Court on the likelihood of industrial difficulties arising out of Mr Gregory's re-employment as a ground for refusing specific performance is interesting. It seems to indicate a more 'collective' approach to dealing with the question of specific performance than is usually adopted in common law claims for specific performance of employment contracts.

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54 *Ibid* 649.
55 *Id.*
56 (1988) 80 ALR 455, 482.
57 *Id.*
58 *Id.*
59 *Ibid* 471.

While its use in this case had the effect of supporting the case for denial of specific performance, there is no reason why such an 'industrial relations' test might not be applied in favour of an order for specific performance in a suitable case. Thus evidence of the likelihood of industrial difficulties arising out of a refusal to grant specific performance might be taken into account in ordering specific performance, in the same way as in *Gregory's* case the likelihood of industrial disharmony arising out of his proposed re-employment was taken into account in denying Mr Gregory the order.

D Damages

Turning to the remedy of damages, *Gregory* established the power of the Federal Court to order payment of damages for breach of a federal award on the basis that the breach of the award also constituted a breach of the contract of employment. At common law, the wrongfully dismissed employee is entitled to an amount of damages to cover his or her loss as arises naturally in the ordinary course of things from the breach, and also for any loss which was reasonably foreseeable by the parties as being likely to arise from the breach. This is normally the wages the employee would have earned until the date when the contract would lawfully have ended.[60] Because common law contracts of employment are terminable by notice, damages in wrongful dismissal cases are limited to payment in lieu of the amount of notice which the wrongfully dismissed employee ought to have received. In the case of a dismissal where the amount of notice required under the contract has been given, following the traditional line, there can be no damages because there is no breach. Damages are not recoverable for hurt feelings or for the manner of dismissal.[61]

In *Gregory*, a different approach was taken to the calculation of damages. The majority stated that the award of $30,000 was based on "a comparison of [Mr] Gregory's position, as it was after his dismissal, with the position in which he would have been placed if he had not been wrongfully dismissed".[62] He was awarded loss of wages between the date of dismissal and the date of the hearing, "a period of about six months",[63] which was calculated at $12,660 together with six months pay being "damages . . . in respect of such period after his dismissal as was reasonably required for him to find suitable alternative employment".[64] This would have brought the figure of damages to a little over $25,000. The remaining $5,000 damages was for loss of future earnings based on the fact that Mr Gregory was being paid at a rate above that paid to electricians in other factories as well as loss of superannuation rights. A preliminary estimate of damages under this heading amounted to "upwards of $100,000".[65] Having made this estimate their Honours went on to say:

> However, the case cannot be determined upon that basis. Apart from the usual vicissitudes of life and employment, [Mr] Gregory had special problems. If Philip Morris had not dismissed [Mr] Gregory on 17 October, it would not necessarily

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60 B A Hepple and P O'Higgins, *Employment Law* (4th ed 1981) 269.
61 *Addis v Gramaphone Co Ltd* [1909] AC 488.
62 (1988) 80 ALR 455, 473.
63 *Id.*
64 *Id.*
65 *Ibid* 484.

> have followed that he would have remained with the company for the rest of his working life, or for any lengthy period. He was in conflict with the majority of the ETU members on the site. . . . If, ultimately, there had been a valid resolution for his expulsion, Philip Morris would have had little alternative but to terminate [Mr] Gregory's employment.

They concluded that "[a]fter taking into account all of the matters to which we have referred, we select the figure of $30,000 as being an appropriate sum to award by way of damages".[66]

This decision goes against the usual principles applied to the calculation of damages in wrongful dismissal cases. In *Gregory's* case the plaintiff had, on his dismissal, received payment in lieu of the five weeks notice to which he was entitled. Therefore he should not have been entitled to any damages at common law. The awarding of damages for future loss of earnings also goes against the traditional approach to damages for wrongful dismissal.

The reason why the majority in *Gregory* departed from the usual principles of assessing damages in wrongful dismissal cases is not expressed in the decision. It can be argued that the approach adopted by the court is more logical than the traditional common law approach. This is because if we follow the line of argument that Mr Gregory was not entitled to any damages then we must conclude that there was no breach of his contract of employment. There was however a clear breach of the Award and since it was incorporated into the contract of employment there was, as a consequence, a breach of Philip Morris' contract of employment with Mr Gregory. The breach of contract related not to the notice provisions of the award but rather to breach of the 'unfair dismissals clause'. The fact that this clause places a separate obligation on the employer is recognised in its terms as follows: "For the purposes of this clause, termination of employment shall include terminations with or without notice". Thus a breach of this part of the contract of employment can arise even in cases where the required amount of notice has been given.

To deny a remedy to Mr Gregory for this breach would be to find a breach of contract for which there is no remedy. In this case the court took the fairer and more logical approach of awarding damages to Mr Gregory for the breach of his contract of employment. Support for this approach is found in Redmond's *Dismissal Law in the Republic of Ireland* where the author says:

> Since by agreeing to substantive limitations an employer may be found to have limited his prerogative to dismiss, it would be illogical to award an amount of damages to compensate the plaintiff for the time he would have served under the contract if he had been given proper notice. The very giving of notice would impliedly be restricted by the contract. If, e.g., a person is employed for life, subject to restrictions on the employer's power to dismiss for misconduct, there would seem to be no reason in principle why such an employee, if wrongfully dismissed, should not be compensated in respect of the full loss consequent upon the breach.[67]

While it is submitted that the decision in *Gregory* was the correct one it is unfortunate that the court did not choose to elaborate on its reasons for awarding compensation in excess of the usual common law damages. The effect is to leave the precedent value of this decision in doubt.

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[66] *Id.*

[67] M Redmond, *Dismissal Law in the Republic of Ireland* (1982) 94.

E Procedures

One of the most significant parts of the judgment of Wilcox and Ryan JJ in *Gregory* was the indication that the terms of the unfair dismissal clause in the Termination Change and Redundancy Award impose procedural requirements on the employer prior to dismissal. They said:

> We would not wish to propound any universal rule but it seems to us that a provision such as that contained in cl 6(d)(vi) of the Metal Industry Award may often necessitate consultation with the employee before a decision to dismiss.[68]

The importance of procedural requirements is twofold. First, they protect the employee by requiring that all employers treat employees fairly by making him or her aware of any shortcomings in performance, thus giving the employee the chance to make improvements where necessary. Secondly, apart from the immediate practical effect of procedural requirements, the fact that they exist at all may assist the employee in obtaining redress if employment is actually terminated. A dismissal may, for example, be found to be 'harsh, unjust or unreasonable' where it is carried out without giving the employee a second chance.

At common law there is no general right to procedural justice in dismissal situations though some employees are entitled to the benefits of natural justice. Traditionally only office holders were so entitled, but identifying who is an office holder for the purposes of entitlement to natural justice is not a straightforward task. Nevertheless, the proportion of employees found to be entitled to natural justice seems to be expanding, at least in the United Kingdom. Ewing and Grubb argue that in England, following the decisions in *Stevenson v URTU*[69] and *R v BBC; ex parte Lavelle*,[70] employees will have a common law right not to be dismissed in breach of natural justice if there are substantive limits on the power to dismiss them.[71]

Most employees in the United Kingdom are covered by a code of practice[72] setting out the procedures to be followed by employers in dismissal situations. This Code is binding on employers and will be taken into account by industrial tribunals in assessing the fairness of a dismissal. Ewing and Grubb argue that since this Code in itself comprises a substantive limitation on the power of dismissal it means that almost all employees are office holders for the purposes of procedural justice.[73] Although the Code of Practice itself sets out procedures to be followed by employers the protection afforded by natural justice would exceed its requirements.

The position in Australia is quite different. As part of the *Termination, Change and Redundancy* case[74] the ACTU had proposed that comprehensive rules be included in the award relating to procedures to be observed by employers prior to the dismissal of workers. These included a requirement that employees be given an opportunity to defend themselves prior to dismissal, that written and oral warnings be given, that the employee be entitled to

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68 (1988) 80 ALR 455, 473.

69 (1977) ICR 893.

70 (1983) ICR 99.

71 K D Ewing and A Grubb, "The Emergence of a New Labour Injunction?" (1987) 16 Industrial Law Journal 145, 156.

72 Advisory, Conciliation and Arbitration Service (ACAS) Code of Practice on Disciplinary Procedures.

73 K D Ewing and A Grubb, *supra* n 71, 156.

74 (1984) AILR para 256.

the assistance of a union representative in defending himself or herself against allegations, and that the employee be given a written statement of the reason for dismissal. The employers had not objected to the Commission's jurisdiction to make awards relating to these matters.

Indeed the power of the Commission to make such an award was subsequently confirmed by the High Court. In *Slonim v Fellows*,[75] Gibbs CJ said (obiter):

> In the cases which have been decided under the Conciliation and Arbitration Act 1904 (Cth), as amended, a distinction has been drawn between a claim in respect of the reinstatement of a former employee whose employment had been terminated, and a claim that before an employee is dismissed notice should be given or a particular procedure should be followed. It has been held that a claim of the latter kind does, but that one of the former kind does not, give rise to an industrial matter, question or dispute: see *R v Gough; ex parte Meat and Allied Trades Federation of Australia* (1969) 122 CLR 237; *R v Flight Crew Officers' Industrial Tribunal; ex parte Australian Federation of Air Pilots* (1971) 127 CLR11 and *R v Portus; ex parte City of Perth* (1973) 129 CLR 312.[76]

However, the Commission refused to insert the procedural clauses claimed by the ACTU into the Termination, Change and Redundancy Award. While the Commission agreed in principle "that employees should not be dismissed before being given an opportunity to answer allegations against them" and that "employees should be forewarned by an employer, where possible, in cases of unsatisfactory performance or misconduct", it was not prepared to insert the clauses requested by the ACTU. It pointed out that, in practice, the State Tribunals and the Commission take into account the adequacy of the procedural steps taken by employers in coming to a decision to dismiss. It acknowledged that it was attracted to the Tasmanian government's suggestion that a code of practice indicating what are *prima facie* good employment practices, such as that used in the United Kingdom, should be adopted but continued: "we are not prepared, at this stage, to make the complex and detailed provisions in the ACTU's claim for an award prescription and we do not believe it necessary or desirable to specifically refer to the method of dismissal in the provisions we are prepared to award."[77]

Australian employers are therefore not generally required to meet specific procedural requirements prior to dismissal.[78] However if the Australian courts follow the lead of the United Kingdom courts in expanding the availability of natural justice, following the line of argument put forward by Ewing and Grubb, it could be that all employees covered by the Termination Change and Redundancy Award are entitled to natural justice based on the substantive limitations on dismissal contained in the award.

The dictum in *Gregory*[79] is important in that it supports the carrying out of at least some pre-dismissal procedures by employers but it has not gone so far as to impose a requirement of adherence to natural justice on the part of the employer. However the fact that there is any reference at all

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[75] (1984) 154 CLR 505. This was a case dealing with the Victorian Industrial Relations Act 1979.

[76] *Ibid* 508-509.

[77] *Termination, Change and Redundancy* case (1984) AILR paras 256, 232-233.

[78] There are, however, pre dismissal procedures in some awards such as the Municipal Officers (South Australia) General Conditions Award.

[79] (1988) 80 ALR 455.

to procedural requirements is to be welcomed in view of the fact that there is no binding code of practice on dismissals in Australia.

In exercising its de facto reinstatement jurisdiction the Commission has in fact taken questions of procedural justice into account in arriving at its decisions.[80] However the absence of any specific requirements in this area means that the standard of procedural justice applied from case to case can vary enormously. In one case the Commission recommended reinstatement on the ground that the employer had not met its responsibility "of acting fairly and reasonably to explain to each [employee] the nature of the inquiry and the consequences which confronted [each of] them if satisfactory explanation of their situation was not forthcoming",[81] while in another the Commission seemed to apply a less stringent standard in refusing to recommend reinstatement on the ground that "although it was not said directly to him that he would be sacked if he did not pull up his socks it is my view that the Company was entitled to think that [the employee] had warning enough".[82]

4 A DUAL SYSYEM

A Availability of Redress

The decisions in the *Re Ranger Uranium Mines Pty Ltd; ex parte Federated Miscellaneous Workers Union of Australia*[83] (*Ranger Uranium*) and *Gregory v Philip Morris*[84] have highlighted the existence of a dual system for redress for unfair dismissal at the level of the federal Conciliation and Arbitration system. However not all employees will have a choice of forum. The decision in *Ranger Uranium* confirmed that the Commission will only exercise it's jurisdiction to order reinstatement in cases where the dispute is supported by the existing employees and/or the union. An individual dismissed employee will have no standing to apply to the Commission for reinstatement. It is not altogether surprising that the High Court has adopted this approach, for it can be argued that this is the only course open to it in view of the constitutional constraints imposed upon the Commission. A number of decisions have emphasised the collective elements of the term industrial dispute. In *Metal Trades Employers Association v Amalgamated Engineering Union*, for example, Latham CJ stated:

> Industrial disputes are essentially group contests — there is always an industrial group on at least one side. A claim of an individual employee against his employer is not in itself an industrial dispute. If it professes to be based upon an existing right (as, for example, a contract of employment, or an award (see *Mallinson v Scottish Australian Investment Co. Ltd* [(1920) 28 CLR 66])) such a claim may give rise to litigation in the civil Courts — but it is not an industrial dispute. If a claim is made by an individual employee for some improvement in his pay or conditions of employment, the refusal of the claim by his employer may result in a personal dispute, but this in itself would not be an industrial dispute.[85]

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[80] *Eg Selzer Lingerie Pty Ltd v Clothing & Allied Trades Union of Australia* (1982) 285 CAR 128, *Flight Stewards Association of Australia v Qantas Airways Ltd* (1982) 281 CAR 117.

[81] *Flight Stewards Association of Australia v Qantas Airways Ltd* (1982) 281 CAR 117.

[82] *Australian Shipping Officers Association v Dalgety Australia Ltd* (1982) 285 CAR 451.

[83] (1987) 163 CLR 656.

[84] (1988) 80 ALR 455.

[85] (1935) 54 CLR 387, 403-404.

In *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* Isaacs J pointed out:

> The Constitution and the Act alike look to a dispute that dislocates or may dislocate a particular industry — the extent of dislocation being immaterial; but the governing idea is primarily the preservation of peace in the industry generally, and its uninterrupted progress, and not the settlement of individual quarrels as such.[86]

The effect of these dicta and their confirmation in *Ranger Uranium* is that it is up to the union to refer disputes to the Commission. An employee who does not have the support of his or her union will not be able to pursue a complaint of unfair dismissal before the Commission.

This is not the case where a complaint of breach of an award is made to the Federal Court under s 119 of the Conciliation and Arbitration Act. Section 119 allows an action for breach of an award to be taken by *inter alia* any member of any organisation who is affected by the breach. Therefore an individual can pursue a breach of an award even if he or she is not supported by a union. Such was of course the case in *Gregory v Philip Morris*. Since it was held that the terms of the award became part of the individual's contract of employment it is also open to the individual employee to take an action for breach of contract based on the breach of the award provisions. But must the individual be a union member in order to be able to bring an action under s 119? The decision in the *Metal Trades* case[87] is relevant to this question. Here it was established that the Commonwealth Court of Conciliation and Arbitration has jurisdiction to make an award as to the terms of employment of non unionists by employers between whom and a union a dispute relating to that subject in fact exists, whether or not those employers employ any unionists. However it appears that a non unionist cannot enforce his or her rights under an award. Rich and Evatt JJ stated:

> The award, when made, will only bind parties to the dispute. It will neither bind, nor have any relation whatever to, employers not party to the dispute. Nor will it bind in any way those employees who are not members of the organization, but who are employed by employers who are parties to the dispute. Indirectly, and as a result of the employers complying with the award, non unionist employees will, or may be benefited, but they will be quite unable to enforce the award, the organization of employees being the only party able to do so.[88]

It thus appears that individual union members will have the necessary standing to initiate a complaint under s 119 but non union members will not. Had Mr Gregory been lawfully expelled from his union and then dismissed it seems that he would not have had the necessary standing.

The Conciliation and Arbitration Act also allows however the Registrar of the Federal Court to sue for breach of an award[89] so presumably the Registrar could do so on behalf of a non-union member. But the Registrar would be unable to sue for breach of the employee's contract since he would not be a party to the contract.

It is possible, however, that a non-unionist could bring an action for wrongful dismissal in the ordinary courts based on breach of the dismissal clause in

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[86] (1908) 6 CLR 309.

[87] *Metal Trades Employers Association v Amalgamated Engineering Union* (1935) 54 CLR 387.

[88] *Ibid* 422.

[89] Section 119(2)(a).

the award. This would, of course, depend on the willingness of the court to follow the Federal Court's incorporation of the terms of the award into the contract.

In summary, it appears that in the case of some dismissals, complaints of unfair dismissal can be brought to two different forums. These are cases involving the dismissal of an employee who is a union member and who has the backing of his or her union in the search for redress. Employees who are union members but do not have union backing will be limited to using s 119, assuming their award forbids unfair dismissal. It seems that non-union members will not have access to either means of redress. They will, of course, have available to them the usual common law action for wrongful dismissal with all its limitations.

The possibility that a complaint of unfair dismissal could be made to both forums simultaneously was adverted to in *Ranger Uranium*. The Court played down this danger by saying:

> To some extent that potential will be minimised by reason that considerations other than unfairness will be relevant in determining whether an award should be made creating an obligation upon an employer to reinstate an employee. In some cases the nature of the relationship necessary for the proper performance of the work will render the making of an award for reinstatement undesirable.[90]

The argument here seems to be that the problem of simultaneous jurisdiction will often be averted because the two forums will apply different criteria in arriving at their decisions. However it must be noted that this decision was pre *Gregory v Philip Morris* and at that time different remedies were being provided by each of the two jurisdictions. Since *Gregory*, it is possible for both forums to make an order leading to re-employment and, as will be argued below, there is no good reason why both may not order payment of compensation in lieu of ordering re-employment. Thus a complaint of dismissal could give rise to an order for reinstatement by the Commission, while the Federal Court in examining the same set of facts might refuse to order specific performance of the contract of employment. The opposite could also happen, although the chances of the Federal Court ordering specific performance remain fairly remote. Further, the situation could arise where the Federal Court might hold the dismissal unfair while the Commission might refuse reinstatement. Similarly, if the Commission were to find that it has the power to order the payment of compensation it might make such an order in a case where the Federal Court, in applying common law principles, might find that no or less damages were payable in the circumstances of the case. The other possible scenario is that one forum might order reinstatement while the other orders the payment of compensation. It does not seem particularly useful to have two forums arrive at different decisions on the same set of facts.

The Court in *Ranger Uranium* did go on to say that in a case involving a duplication of jurisdiction the Commission might exercise its power under s 41(1)(d)(iii) of the Conciliation and Arbitration Act to decide to refrain from further hearing or determining a dispute on the ground that further proceedings are not desirable in the public interest. This could get around the problem of having the same case dealt with by both forums simultaneously, if the Commission were prepared to surrender its jurisdiction. However, the

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[90] (1987) 163 CLR 656, 667.

fact that *Ranger Uranium* acknowledges that in considering the matter the Commission could be expected to apply different criteria to the Court might result in a reluctance on the part of the Commission so to do.

B Comparison of Remedies

There are a number of factors which will affect the choice of forum for those who have access to both the Commission and the Federal Court. Practical matters such as the cost and speed of handling the matter will be relevant with the Commission presumably coming out on top in both these respects. A most significant factor will be the type of remedy sought.

C Reinstatement

The *Gregory* decision has shown that the chances of obtaining an order for specific performance of the employment contract in an action before the Federal Court are somewhat remote. What remains to be addressed is the likelihood of obtaining an order for reinstatement from the Commission.

The decision in *Ranger Uranium* established the jurisdiction of the Commission to order reinstatement of unfairly dismissed workers. The making of an order for reinstatement of an employee is at the discretion of the Commission so that even if it is found that the dismissal was unfair, reinstatement will not necessarily follow. Two questions arise here. The first concerns the extent to which the reinstatement jurisdiction will be used. Experience in Britain has shown that the reinstatement jurisdiction conferred on the industrial tribunals there is exercised in only a small percentage of cases. The other question relates to the criteria which will be applied by the Commission in deciding whether or not to order reinstatement of such workers. These are obviously questions which can only be answered after the jurisdiction has been in existence for some time, although, as has already been noted that the Commission has exercised a de facto jurisdiction in this regard. An examination of the operation of this system may be of some assistance in helping to predict what approach the Commission will take.

Since 1966, the year in which notification of disputes concerning dismissals was first separately recorded in the annual report of the Commission, the number of such disputes notified to the Commission has increased from just under 100 to 282 in 1986. The number of these disputes which become the subject of a decision by the Commission is small. Most are resolved by less formal means. However, reinstatement is recommended in a reasonably large proportion of cases in which decisions are issued.[91]

O'Donovan has described the principles applied by the Commission in exercising its de facto jurisdiction in the following terms.

> It [The Commission] scrutinises the circumstances surrounding the dismissal carefully. If it appears that the discharge was justified, the Commission will rarely interfere with the employer's decision. Further, reinstatement will not normally be recommended where the employee resigned from his position. Thus an employee who is forced to resign because of his employer's oppressive conduct towards him may be denied protection. In addition, the remedy of reinstatement is easily lost by delay. Moreover, even if reinstatement is directed, the Commission may stipulate

[91] *Eg* in 1985 reinstatement was ordered in 4 of the 7 cases in which the Commission's decisions are recorded. The figures for 1984 were 33%; 1983: 25%; and 1982: 39%.

> that the arrangement is to lapse if it appears that there is insufficient work available for the employee.[92]

Furthermore,

> [t]he power to direct reinstatement is discretionary and the applicant must establish that the Commission's intervention is justified. It is not enough that the dismissed employee will suffer financial detriment or be disturbed in the normal routine of his life, special circumstances are normally required to establish that the dismissal is harsh and unreasonable.[93]

Clearly the Commission has so far been very cautious in its approach to directing reinstatement. One can only speculate as to whether its attitude may change in the light of its new found 'official' reinstatement jurisdiction. Some of the caution previously encountered may have been attributable to the fact that the parties were volunteers and the Commission may have been unwilling to make any recommendations which might prove controversial for fear of discouraging employers from using this procedure. If this is true we may find the Commission a little less cautious in its approach in the future. On the other hand it may be that the Commission will be less willing to use its official reinstatement jurisdiction than to recommend reinstatement informally. There is a greater likelihood that parties who voluntarily submit to the Commission's jurisdiction will comply with the recommendation than those who are conscripts. However it must be acknowledged that the employee who wishes to return to his or her job would have a much greater chance of success if his or her case were dealt with by the Commission rather than by the Federal Court.

D Compensation

As we have seen, regardless of whether the Commission or Federal Court are handling the matter a finding that a dismissal is unfair does not necessarily lead to re-employment. In some cases the unfairly dismissed employee may not wish to be re-employed. The alternative remedy is compensation or damages. In *Gregory* the Federal Court showed itself willing to grant damages to an unfairly dismissed employee. The question remains whether the Commission also has the power to order the payment of compensation to unfairly dismissed workers in lieu of reinstatement. So far the federal cases concerning the Commission's jurisdiction to deal with dismissals have all concerned the question of whether the Commission has the power to order reinstatement. In arguing against this proposition it can be pointed out that the jurisdiction of the federal Commission to order reinstatement in *Ranger Uranium* was based on paragraph (k) of the definition of "industrial matters" in s 4(1) of the federal legislation which expressly includes the duty to reinstate in employment and there is no express reference to the payment of compensation to unfairly dismissed workers.

It can however be argued that no express reference to a power to order compensation was required in the legislation to enable the Commission to have jurisdiction to make such an order. It would have been sufficient for the matter to fall within the opening words of s 4(1) which refer to "all matters pertaining to the relations of employers and employees". The basis

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[92] J O'Donovan, "Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission; Jurisdiction And Practice" (1976) 50 ALJ 636, 639.

[93] *Ibid* 640.

for such an argument is the decision in *Re Cram; ex parte NSW Colliery Proprietors*.[94] Here "industrial matters" was given a broad interpretation. It was held that in order to come within the definition of "industrial matter", the dispute must be directly connected with the relationship between employer and employee and not merely consequential to it. The fact that the opening words of the definition comprise a general category of their own, independent of the contents of the paragraphs is brought out in the following passage: "[T]he order was valid on the ground that it was made in settlement of a dispute as to 'industrial matters' as defined, the relevant matter falling within the *opening words of the definition* as well as pars (h), (i) and (j)" (emphasis added in original).[95] It is interesting in this context to note that the Victorian Supreme Court in *Royal Childrens Hospital v President of the Industrial Relations Commission and Zappula*[96] (discussed below), found that there was a power to order compensation under the Victorian legislation in spite of the fact that there was no express reference to such a power in the legislation.

Indeed the Industrial Relations Act 1988 (Cth) has adopted the broad approach of *Re Cram* and abandoned the attempt to list what constitutes industrial matters for the purposes of the legislation. Instead the definition of industrial matters is omitted and "industrial dispute" is given a broad definition. It covers "disputes about matters pertaining to the relationship between employers and employees" and there seems no reason why this should not include a dispute relating to the payment of compensation to unfairly dismissed employees.

Interestingly, the Commission has recommended the payment of compensation to a dismissed employee in pursuance of its de facto dismissals jurisdiction.[97] The case concerned the dismissal of a personal assistant to the Lord Mayor of Melbourne. The employee did not wish to be reinstated and her union sought the payment of compensation to her on the grounds that she had been made redundant. Commissioner Nolan decided that she had not been made redundant and instead found that she had been poorly treated by the Melbourne City Council in relation to her dismissal. He determined that Mrs Szabolics be paid, in addition to her award rights and entitlements, an amount equal to one month of salary. This decision indicates that the Commission would have no fundamental objection to ordering the payment of compensation to unfairly dismissed workers.

At State level, the only State which expressly legislates for the payment of compensation to unfairly dismissed workers in respect of whom reinstatement is not ordered is South Australia.[98] However in Victoria and Western Australia the question whether the relevant State legislation gives the respective state tribunals the power to order compensation has been examined and with differing results.

The power of the Victorian Industrial Relations Commission to order the payment of compensation was examined in *Zappulla*. On appeal the Victorian Supreme Court found that the Victorian Industrial Relations Commission

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[94] (1987) 163 CLR 117.

[95] *Ibid* 136.

[96] [1989] VR 527.

[97] *Municipal Officers Association of Australia v Melbourne City Council* (1985) 229 CAR 441.

[98] Industrial Conciliation and Arbitration Act 1972 (SA) s 31(3)(c).

had power to order the payment of compensation where reinstatement is not practicable although there was no express power to order compensation in the Victorian Industrial Relations Act 1979. Justice Nathan stated that the power to order recompense in cases where reinstatement is not practicable is concomitant with the power to make an award in respect of an industrial matter. Paraphrasing Wilson J in *Slonim v Fellows*,[99] he went on to say that should the Commission be bereft of such power it would "empty from its armoury of remedies an ability to resolve the dispute between the parties".[100] In the Western Australian case of *Robe River Iron Associates v ADSTE*[101] it was held by the Western Australian Court of Appeal that the Industrial Commission had no power to order payment of compensation to an unfairly dismissed employee. The main basis for the decision was the lack of express power in the relevant act to award compensation. Strangely the Court did not find the absence of an express power in the Act to order reinstatement any obstacle to its approval, in this same case, of the Industrial Commission's jurisdiction to make such an order.

While these are decisions of State courts based on the legislation applying in their respective States, they may be deemed relevant to a future case dealing with the power of the federal Commission to order the payment of compensation in lieu of ordering reinstatement to unfairly dismissed workers. It is submitted that the approach in *Zappulla* is the more correct one and it could be used to support a federal power to order payment of compensation.

There are also questions of policy to be considered here. If the Commission is found to have the power to order the payment of compensation to unfairly dismissed workers there may be a danger that compensation will take over from reinstatement as the main or only remedy for unfairly dismissed employees. This has been the experience in the United Kingdom where reinstatement or re-engagement is awarded in only about 5 per cent of cases as against compensation in approximately 70 per cent of cases although the legislation represents the former as the primary remedy.[102] On the other hand, the amount of compensation which can be awarded under the United Kingdom legislation is small, whereas in *Gregory* and *Zappulla* at least, the awards have been relatively substantial. If compensation is kept at a reasonably high level it means that employers may think twice before dismissing or may agree to a subsequent reinstatement. If the Commission had the power to order compensation it would get around the problem, which has arisen in some State tribunals, of a finding of unfair dismissal resulting in no redress to the worker because reinstatement was found to be inappropriate.[103] It is to be assumed that in almost all cases unions would favour reinstatement of an unfairly dismissed worker over the payment to him or her of compensation. However the remedy of compensation might be preferred in a situation where the unfairly dismissed employee does not wish to be reinstated. In such a situation the making of an order for the payment of compensation would be a welcome addition to Wilson J's "recognised armoury of available remedies".

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[99] (1984) 154 CLR 505.
[100] [1989] VR 527, 536.
[101] (1987) 67 WAIG 1104.
[102] L Dickens et al, *Dismissed* (1985) 109.
[103] *Eg Robe River Iron Associates v ADSTE* (1987) 67 WAIG 110.

E Calculation of Compensation

If the Commission is found to have the power to order the payment of compensation the way in which such compensation is calculated would not, of course, be subject to the same sort of constraints as apply to the calculation of damages for wrongful dismissal at common law. Indeed the common law approach was expressly rejected by Nathan J in *Zappulla* in favour of an approach based on the statutory powers of the Commission, in particular the power under s 34(1)(k) to determine questions of what is fair and right in relation to any industrial matter, having regard to the interests of the persons immediately concerned and of society as a whole. His Honour said:

> in exercising its jurisdiction when making an award, to resolve an industrial matter relating to an industrial dispute, arising out of a wrongful dismissal where reinstatement is not ordered, the Commission should take into account all matters which may affect a resolution of the dispute, and in particular the factors referred to in s34(1)(k). Those considerations are much wider than those which confront a court in adjudicating upon a claim for wrongful dismissal. They could also be much narrower, depending upon the particular facts.[104]

This is an interesting development since awards of compensation have heretofore been based on an attempt to put the injured party in the same position as he or she would have been in had the wrongdoing not taken place. This decision suggests that it is not only the individual circumstances of the injured party which must be taken into account in assessing compensation but also what is necessary to affect a resolution of the dispute. Thus it is conceivable that the Commission might decide, in the interests of settling the dispute, to make a larger award to an unfairly dismissed worker who had the support of his or her union than to a worker who did not enjoy such support. Neither does this approach preclude taking into account such factors as future earnings prospects or injury to feelings which are not covered by common law damages.

A recent South Australian case indicates that the stigma attaching to a harsh, unjust or unreasonable dismissal may be taken into account in determining the amount of compensation to be paid to the employee. In South Australia the power to order payment of compensation is expressly provided for in the legislation.[105] In *Chenery v Klemzig Nursing Home*[106] the Full Industrial Commission stated that one of the criteria to be taken into account in arriving at a figure for compensation was the length of time that would probably elapse before the dismissed employee is likely to obtain suitable alternative employment and in making this assessment the Commission should take into account the likely effect of the perception by prospective employers of the reasons for which the dismissed employee was dismissed. Although in the instant case an extra payment for stigma was disallowed by the Full Commission, because the calculation had already taken into account the difficulty the employee would experience in finding another similar job, it is clear from this decision that the extent to which the stigma of dismissal contributes to the difficulty on finding alternative employment will be relevant.

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[104] [1989] VR 527, 543.
[105] Industrial Conciliation and Arbitration Act 1972 (SA) s 31(3)(c).
[106] Decision No. 119 of 1988, 9 and 26 September 1988.

5 CONCLUSION

Recent years have seen a gradual expansion of the rights of unfairly dismissed employees within the federal Conciliation and Arbitration system. In *Ranger Uranium*[107] the Commission was found to have the power to order reinstatement of unfairly dismissed workers, and the attitude of the High Court as evidenced by the comments of Mason CJ and Gaudron J in the *Wooldumpers* case[108] seems to be leaning in favour of overcoming the question of interstateness, which is probably the last remaining impediment to the Commission's jurisdiction in this area. So far there has been no decision on the power of the Commission to order compensation in lieu of reinstatement and although the Commission might choose not to pursue this course on policy grounds, it would appear that there can be few legal objections to such a jurisdiction.

Dismissed employees have also been able to rely on unfair dismissals clauses in their awards in order to take actions for breach of the award provisions before the Federal Court. In *Gregory*[109] the Federal Court expanded its scope for providing remedies for such breaches by treating them not only as a breach of s 119 of the Conciliation and Arbitration Act but also as a breach of the dismissed employee's contract of employment. So far, while the Court has been prepared to take an imaginative approach to the issue of compensation for unfairly dismissed employees, it remains disappointingly cautious about ordering specific performance of employment contracts.

There is also some evidence of an awakening interest in ensuring that pre-dismissal procedures are established and complied with. However the absence of a standard code of practice in this area leaves the employee in the position of not knowing where he or she stands in this regard. In general it can be said that while the rights of unfairly dismissed workers have come a long way in the past 10 years there is still a need to pull farther away from the old common law approach to dismissal which does not fit in with Australia's system of Conciliation and Arbitration.

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[107] (1987) 163 CLR 656.
[108] (1989) 84 ALR 80.
[109] (1988) 80 ALR 455.