THE LEGAL APPROACH TO DEMOCRATIC CONTROL OF TRADE UNIONS

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[*This article was originally to be submitted for the volume of the M.U.L.R. dedicated to Professor H. A. J. Ford as the author particularly wished to be associated with that issue.*

In his discussion the author examines the extent to which statute and case law have contributed to the level of democratic control which currently exists in federally regulated trade unions, and the form of democracy imposed. The author enumerates three main areas in which the Legislature — especially through the Conciliation and Arbitration Act — has exercised control over the internal affairs of unions: the conduct of elections, the establishment of minimum standards with which rules must comply, (this embraces eligibility for candidature, manner of nomination, canvassing, membership control, filling casual vacancies, suppression of opposition and amendment of union rules), and the enforcement of compliance with the rules. The author concludes with an evaluation of the effectiveness of legislative intervention in this field. He argues that although it is not possible, by legislation, to force individual members to embrace democratic ideals, legislative intervention does *have an effective, though essentially negative, role, namely, the prevention and remedying of undemocratic practices, thus providing a foundation on which unions are free to build.*]

One of the few points on which Federal Government and Opposition industrial relations policies agree is that trade unions should be controlled 'democratically' by their members.[1] While they are, at times, at variance about the best methods of achieving this goal, both Coalition and Labor Governments have contributed to the growing number of statutory measures which are intended to be conducive to union democracy. In doing so they have set Australia apart from other comparable countries in which the degree of external control of the affairs of trade unions has been relatively low.

The original Conciliation and Arbitration Act barely touched on the internal affairs of unions. It reflected the prevailing judicial and public policies which held that the domestic affairs of voluntary associations were not matters for the courts.[2] As unions grew in strength and influence, successive governments perceived the need to take active steps to ensure that democratic practices were

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1 The current A.L.P. platform recognizes 'the rights of unions to regulate their own affairs in a democratic way' and promises to encourage 'participatory democracy:' *Australian Labor Party Platform Constitution and Rules* (1984) 123. The Liberal Party's policy on industrial relations is silent on the point, but there is no reason to doubt that past declarations of policy to this effect remain current. See *e.g.* Hon. A.A. Street, (1977) 104 *Parliamentary Debates (House of Representatives)* 835.

2 *e.g.* Chafee, Z. 'Internal Affairs of Associations Not for Profit' (1930) 43 *Harvard Law Review* 993; Grodin, J. *Union Government and the Law* U.C.L.A. (1961) 2-3.

observed within them.[3] These statutory initiatives fell to be interpreted by succeeding generations of industrial judges. Much has been written about the reality of union democracy as measured by such indices as membership participation levels, the presence within unions of factions or parties and the degree to which opposition is tolerated by the elected officials.[4] The purpose of this study is to examine the extent to which legislation and case law have contributed to the level of democratic control which obtains in federally-registered Australian trade unions. It will also attempt to identify the form of democracy which the law seeks to impose on, or encourage, in these unions.

THE CONCEPT OF UNION DEMOCRACY

Definitions of union democracy abound.[5] Some theorists see democratic systems as no more than decision-making processes which are susceptible to analysis in purely descriptive terms.[6] Others deny that it is possible to approach the subject without, at least sub-consciously, making value judgments.[7] Those who take the former view tend to expound their theories by reference to models and by identification of what they perceive to be the essential elements of democratic systems. Inevitably analogies are drawn with political structures.

Three models have been associated with trade union government. The first was branded by the Webbs as 'primitive democracy'.[8] This was the original form of government which applied in U.K. unions which operated in narrow geographic and industrial areas and which had, by modern standards, a small number of members. All major decisions were reserved for meetings of all the members. Where executive positions were considered necessary, their holders were given strictly limited powers and were rotated regularly to ensure that no one group of members was in a position to dominate the union's affairs.

In the course of the twentieth century these local unions amalgamated to form national bodies whose size, combined with the physical problems of assembling a scattered membership, made the old decision-making processes obsolete. Full-time, paid officials came to be appointed. More and more decision-making was committed to their hands. Various control mechanisms were devised to ensure that the full-time officials remained responsive to the wishes of the members. Policy-making councils, comprising the elected rep-

3 Yerbury, D. 'The Main Characteristics of Trade Union Law in the Australian Compulsory Arbitration Systems' in Isaac, J. and Ford, G. (eds) *Australian Labour Relations Readings* (2nd ed. 1971) 149-154.

4 The literature is so extensive that no attempt can be made to set it out in full. Numerous studies will be referred to in the course of this article. A useful review of the major strands of thought can be found in Jackson, M. *Trade Unions* (1982) chapter 4.

5 *e.g.* Jackson, *op. cit*; Hyman, R. *Industrial Relations — A Marxist Introduction* (1975) 76; Martin, R. 'Union Democracy: An Explanatory Framework' (1968) 2 *Sociology* 205, 206-8; Grodin, J. *op. cit.* 172-4 Lipset, S., Trew, M. and Coleman, J. *Union Democracy,* (1956) 13.

6 *e.g.* Magrath, C., 'Democracy in Overalls: The Futile Quest for Union Democracy' (1959) 12 *Industrial and Labour Relations Review* 503, 505.

7 Hyman, R., *op. cit.* 176.

8 Webb, S. & B. *Industrial Democracy* (1920).

resentatives of the membership, were given power to direct officials. Elections for full-time positions became more common. This was 'representative democracy'.[9]

In many unions the full-time officers tended to become entrenched in their positions. They developed a specialist knowledge of union management. They became skilled in the art of negotiation. They were able to promote themselves through the internal channels of communication in their unions. Members had a natural reluctance to vote against an official who, if displaced, might have difficulty in returning to a trade which he had long since ceased to practise.[10] Large unions bore many of the characteristics of large businesses. They had substantial incomes and employed large staffs.[11] Manpower planning and fiscal controls became part and parcel of the work of the elected official. As a consequence, bureaucratic structures are now commonplace in unions.

These developments are not necessarily inconsistent with representative democracy.[12] However, in some large unions, members who lacked these skills and saw no prospect of obtaining them save by working their way up through the union bureaucracy, saw no scope for active participation. They opted out of the decision-making process except at broad policy levels. 'Career-oriented' officials emerged in these unions and governed more with the passive consent of members than with their informed approval. The new breed of professional union managers were seen by the members as the providers of a specialist service. The right to control the officials remained in theory but in practice it was not meaningful because members were unwilling and/or unable to exercise their rights.[13] This phenomenon may be described as 'passive representative democracy'. In its extreme form it may come perilously close to the border with enlightened despotism.

The extent to which a union's form of government is seen to conform to the second or third models will be determined largely by the range of control devices which are available to members and the extent to which the members actually use those devices. Many factors will be influential. Some of the more important are the union's history, the occupations pursued by the members, the dispersal of the membership, the degree to which participation is actively encouraged by officials, the government structures, and the relative powers of

9 *Ibid.* also *Boland v. Munro* (1980) 37 A.L.R. 263, 276-7.

10 Michels, R., *Political Parties* (1962) 16.

11 Allen, V. *Power in Trade Unions* (1954) 21. The quantitative dimension of the analogy between unions and business corporations can be seen from the financial returns of unions. In England, for example, in 1979, Trade Union Council affiliates had assets of £245 millions. Their income was £193 millions. Eight per cent of this was derived from investment portfolios: *The Times* 1 September 1981.

12 Webb, S. & B., *op. cit.* 41; Lipset, S. *et al, op. cit.*, 413; Clegg, H. *General Unions* (1954) 344.

13 Allen, V., *op. cit.* 26-7.

the organs of government.[14] In Australia statute and case law have been influential in making most union structures conform, on paper at least, to the model of representative democracy. The law ensures that union rules contain mechanisms by which the members may exercise control over officials. However, as has been observed, if members fail to exercise their rights a union may well slip into a state of passive democracy. It is not uncommon in the ebb and flow of union politics for some unions to move between the states of true representative democracy and passive democracy as issues arise which goad members into action and then recede.[15]

By contrast some social scientists have sought to analyse union democracy in terms of essential elements. These elements relate to both the structural and practical aspects of democratic theory. They range in intricacy from the simple requirement that the opponents of those in power should be free to express their dissent,[16] through the necessity for an organized, 'party'-style internal political system,[17] to the demand for a detailed code of protection for minority rights.[18]

These approaches have attracted some judicial support. The High Court has accepted that there are certain indispensable features of a system of representative democracy. However, as one of its former members has cautioned, the term:

> is descriptive of a whole spectrum of political institutions, each different in countless respects yet answering to the same generic description. The spectrum has finite limits and in a particular instance there may be absent some quality which is so essential to representative democracy as to place that instance outside those limits altogether; but at no point within the range of the spectrum does there exist any single requirement so essential as to be determinative of the existence of representative democracy.[19]

The essential elements of a system of representative democracy were said by the Court to include the enfranchisement of electors, an electoral system which gives effect to the electors' choice of representatives and the conferral of decision-making powers on those representatives.[20] To these may be added a requirement that representatives, once elected, 'are unable to prevent opposition factions distributing propaganda and mobilizing electoral support'.[21]

14 Turner, H. *Trade Union Growth, Structure and Policy*, (1962); Perline, M. and Lorenz, Y., 'Factors Influencing Membership Participation in Trade Union Activities' (1970) 29 *American Journal of Economics and Sociology* 425; Kerr Inkson, J., 'Factors Influencing Workers' Involvement in their Unions' (1980) 22 *Journal of Industrial Relations* 442.

15 *e.g.* the changes in the Federated Ironworkers Association discussed in *Byrnes v. F.I.A.* (1957) 3 F.L.R. 309 and the description of similar swings in the A.E.U. by Sheridan, T. in 'Opposition, Factions and Candidates in A.E.U. Election in Australia 1907-72' (1980) 22 *Journal of Industrial Relations* 293.

16 Martin, R., *op. cit.* 205-220.

17 Lipset, S. *et al, op. cit.*

18 Summers, C., 'Democracy in Trade Unions' *New Leader*, 10 February 1959, 7.

19 *Attorney-General ex rel. McKinlay v. Commonwealth* (1975) 135 C.L.R. 1, 57 (Stephen J.). This passage occurred in a judgment concerning Australia's political system. However it was subsequently applied in a trade union context by the Full Court of the Federal Court of Australia in *McLeish v. Kane* (1978) 22 A.L.R. 547.

20 *Ibid.* 56.

21 Martin, R., *op. cit.* 207.

The suggestion that democracy is lacking in a union which does not house a 'party' system [22] merits further attention. The system envisaged is one under which rival policies are developed and 'party' members are endorsed as candidates for election as supporters of a policy platform.[23] This is too sophisticated a requirement to impose upon trade unions, particularly those which have small memberships.[24] It is far from clear that the fundamental issues, like 'free-enterprise v. socialism', which polarize electors in the wider community, necessarily impinge on trade union membership. The point is all the stronger where that membership is voluntary. Furthermore, the pressures faced in advancing union interests in the face of employer resistance and the community of spirit engendered by similar work experiences are more likely to foster a common bond of interest than a party system with divergent policies.[25] Even where two 'parties' do exist within a union this will not necessarily guarantee democracy unless the 'party' structures are themselves democratic: 'To suggest that democracy exists where more than one potential despot is active is to attach a most peculiar meaning to democracy'.[26]

The processes by which the essential principles are put into effect are flexible. Britain is no less a democracy than Australia because it has opted for a system of optional rather than compulsory voting in Parliamentary elections. Similarly Western political systems do not necessarily cease to be entitled to be characterized as 'democratic' by reason of their varying restrictions on the right to vote. It is not uncommon to find exclusions in electoral laws on criteria such as nationality, years of residence and age.

On the other hand it does not follow that, simply because a law purports to give effect to one or more of the essential principles, it will thereby guarantee a democratic system of government. The mechanisms adopted in the pursuit of democratic goals must be capable reasonably of achieving their objective and must be adhered to. An electoral system which was subject to manipulation because the ground-rules were secret could hardly be expected to produce a result which was in accord with the wishes of the electorate: 'If a government were able, despite provisions in a constitution, to adopt its own different rules for an election and, indeed, to conduct the election without taking steps to ensure that the electors knew the rules, none would dream of calling that a democratic country.'[27]

[22] The term 'party' in the trade union context must be distinguished from 'faction'. The entities are distinguishable on the basis of function and behaviour. 'Parties' have continuity, rules, an existence separate from the union, consistent policies and a legitimacy within the organization. 'Factions' are less stable, tend to form around *ad hoc* issues, and have minimal, if any, formal structure: Dickenson, M., 'The Effect of Parties and Factions on Trade Unions Elections' (1981) 19 *British Journal of Industrial Relations* 190.

[23] Lipset, S., *et al, op. cit.* 13.

[24] In 1983, 152 of Australia's 319 unions had fewer than 1000 members: Australian Bureau of Statistics, *Trade Union Statistics, Australia, 1983*, A.B.S. Cat. No. 6323.0.

[25] Hughes, J., *Royal Commission on Trade Unions and Employer Associations*, Research Paper, 5 (Part 2), 'Membership Participation and Trade Union Government', H.M.S.O. (1968) para. 161.

[26] Howard, W., 'Democracy in Trade Unions', in Isaac, J. & Ford, G. (eds), *op. cit.* 271. This study has been updated but remains in substantially the same form; Ford, G., Hearn, J., & Lansbury, R., (eds) *Australian Labour Relations Readings* (3rd ed. 1980) 162-178.

[27] *Troja v. A.M.I.E.U.* (1978) 23 A.L.R. 18, 20 (Sweeney J.).

Thus far an attempt has been made to approach the concept of democracy in neutral, value-free terms. It must, however, be acknowledged that when the implementation of the essential principles is influenced by considerations of political advantage an evaluative dimension is added. It has been shown that, in certain British unions, election and administrative systems have been introduced because they have been perceived to be of benefit to their proponents. Their introduction has been resisted by other members who advance an alternative theory of democratic control which would offer them greater scope for controlling the union.[28] The proposition may also be applied at a more fundamental level. If it is accepted that 'democratic practice can do much to inhibit the tactical effectiveness of unions confronting employers',[29] then it is possible to argue that, every time the legislature adds a demand for conformity to democratic practices to the statute books, it thereby weakens the position of unions *vis-a-vis* employers. An appeal for 'democracy' may mask a value judgment that union power is too great.

Some writers have gone even further. Hyman, for example, asserts that democracy means no less than 'popular power' and that 'the existence of positive control by the rank and file is inherent in the language of democracy'.[30] Government by passive consent or under a liberal pluralistic system in which participation is limited to periodic voting in elections lacks this element of positive control and is branded undemocratic. Theorists who assert the contrary are accused of attempting 'to consign legitimacy on power relationships from which popular control [is] clearly absent'.[31] Thus an evaluative element is seen to underlie even the definition of democracy itself. Such assertions may be countered by arguments to the effect that non-participation by members 'can be interpreted as a vote of confidence in the activists and leaders'[32] but it is hard to escape the claim that any form of response is value-laden.

UNION RULES AND THE LAW

The decision-making processes of Australian unions are governed by rules adopted by their members from time to time. The rules form the basis of the relationship between individual members and between members and their union. At common law unions are free to determine the contents of their rule books subject only to the requirement that none of the rules should offend the general law. Members may not, for example, be prohibited by rule from giving evidence in a case in which the union's affairs are involved.[33] However, unions

[28] Bray, M., *Factional Strategies and Union Democracy in the A.U.E.W. (E.S.)*, U.N.S.W. Department of Industrial Relations, 1981; *The Times* 1-3 September 1981.

[29] Howard, W., *op. cit.* 268.

[30] Hyman, R., *op. cit.* 176. See also Macpherson, C., *The Political Theory of Possessive Individualism* (1962).

[31] *Ibid.*

[32] Yerbury, D., 'Participation and Apathy in Trade Unions', in Lansbury, R. (ed.), *Democracy in the Workplace* (1980) 106.

[33] *Roebuck v. N.U.M. (No. 2)* [1978] I.C.R. 676.

which wish to obtain the benefits of the federal system of conciliation and arbitration must be registered.[34] The Parliament has made it a condition of registration that the rules of unions must deal with certain basic subject-matter and, in some cases, has actually prescribed the content of rules. These obligations persist as conditions of continued registration.

Regulation 115(1)(d) of the Conciliation and Arbitration Regulations lays down certain requirements as to the subject-matter of union rules. Insofar as it touches on the question of democratic control it provides that:

> (d) the affairs of the association[35] shall be regulated by rules specifying . . . the conditions of eligibility for membership thereof and providing in relation to the association, for —
> (i) the election of —
> (A) a committee of management of the association and of each branch of the association;
> (B) officers of the association and of each branch of the association; and
> (C) any conference, council, panel or other body (additional to the committee of management), which is empowered to determine policy or to exercise functions of management in the association or branch;
> (ii) the powers and duties of the committees and of officers;
> (iii) the manner of summoning meetings of members and of the committees;
> (iv) the removal of members of the committees and of officers;
> (v) the control of committees of the association and its branches by the members of the association and the members of the branches, respectively . . .

Generally, unions are left free to determine the content of rules which deal with the prescribed subject-matter. Moreover they retain their common law right to have rules on any other subject they wish provided that those rules are not contrary to law.[36]

There is an important proviso. The legislature has determined that a measure of statutory control should be exercised over the contents of union rule books and over the exercise of powers conferred by rule. In the present context three sets of controls are significant. These controls relate to the conduct of elections; the establishment of a minimum standard by which all rules are tested; and the enforcement of compliance with rules.

ELECTIONS

The first set of provisions relates to the conduct of elections. Section 133 of the Act provides that officers must be elected directly by the membership or by a collegiate electoral system.[37] Full-time officers can only be insulated against a direct vote of the members to the extent of a one-tier collegiate system. This involves their election by a body which has itself been directly elected. The section goes on to stipulate qualifications for returning officers, that potential candidates must be given an opportunity to remedy defects in their nominations and that rules must provide for elections to be conducted by secret ballot.

34 Conciliation and Arbitration Act 1904 ('CAA') s. 132.

35 A union seeking registration is described as an 'association': CAA ss 4 and 132. Once registered a union is described as an 'organization': CAA ss 4(1) and 132(3).

36 Conciliation and Arbitration Regulations ('Regulations') reg. 115(1)(g).

37 A collegiate electoral system is one under which a group of members are elected as a committee by the direct vote of the membership and then elect office-holders from among their own number. This process can be multi-tiered if, for example, these office holders become ex-officio members of another committee which elects some of its number to other positions: see CAA s. 4(1).

The period between elections for each office is limited to a maximum of four years.

Section 133AA further tightens the electoral requirements by providing that, in elections in which the general membership is entitled to vote, the secret ballot is to be conducted by postal voting. Ballot papers must be mailed to the home of each member accompanied by a prepaid envelope addressed to the returning officer. Unions can invite the Industrial Registrar to conduct their ballots, in which case the costs involved are met by the Federal Government.[38]

Prior to the enactment of Section 133AA, in 1976, unions were able to conduct balloting at union meetings, at the workplace or at union offices. Where these systems operated, turnout was generally very low.[39] The introduction of secret postal ballots was justified on the ground that it would result in a greater participation of members and, therefore 'more democratic control' of unions. The members, in exercising their franchise would not be subject to intimidation.[40] Taken at face value these assertions tended to indicate that, in requiring secret postal ballots, the then Government was doing no more than giving effect to the democratic ideal of encouraging membership participation. If members were given the opportunity to vote with a minimum of personal inconvenience it was a reasonable assumption that they would do so in increased numbers. However it did emerge from the Parliamentary debates that the Government was particularly concerned at the extremely poor turnout in elections in one of Australia's largest unions, the A.M.W.S.U.[41] The union had a militant leadership which had consistently opposed the Government's industrial policies. This provided some support for the assertion that the Government was doing more than pursuing democratic goals. There is a generally held view, supported by experience in the United Kingdom, that greater membership participation assists less militant or 'moderate' candidates in union elections.[42] The rejection of electoral systems which depended on members making an effort to exercise their franchise, which in practice meant elections dominated by activists, was open to the interpretation that the Government was seeking to undermine the positions of the militant leaders of large unions.

The need for legislative intervention to ensure that union ballots were conducted fairly was emphasized by events in a number of unions in the 1940's. It became clear that ballot-rigging was keeping incumbents in office in some of the country's most powerful unions. In 1949, the Labor Government introduced what is now Part IX of the Act. This Part provides a procedure for enquiries into allegations of malpractice in ballots and for court orders to remedy the effects of irregularities which influence the outcome of polls. Enquiries into

38 CAA s. 170A(4).
39 Martin, R., *Trade Unions in Australia* (1975) 77-9.
40 (1976) 99 *Parliamentary Debates (House of Representatives)* 2325; (1977) 104 *Parliamentary Debates (House of Representatives)* 835.
41 (1976) 99 *Parliamentary Debates (House of Representatives)* 2325; Yerbury, D., *op. cit.* (1980) 104-5.
42 Taylor, R., *The Fifth Estate* (1980) 180; Bray, M., *op. cit.* 8.

elections in the Federated Ironworkers Association and the Victorian Branch of the Federated Clerks Union quickly removed corrupt officials from office.[43] Part IX has been modified and strengthened since those early days. It continues to play an important part in maintaining the integrity of ballots particularly in those unions which use their own appointed returning officers in preference to independent public electoral officials.[44]

Any union member who believes that an 'irregularity' has occurred in the conduct of a ballot may seek an enquiry by a judge of the Federal Court. The term 'irregularity' is widely defined to include any breaches of relevant union rules such as wrongful rejection of nominations or the use of union funds to support incumbents. It also extends to all forms of electoral malpractice. Wide powers of enquiry are available which make it relatively easy to prove that irregularities have occurred, if that be the case. If the judge finds that irregularities have occurred and that they have, or are likely to have, affected the result of the election he has a wide range of remedies available to him. He can declare a particular candidate to have been elected notwithstanding the fact that another candidate has been declared elected; he can order that a fresh election be conducted by an independent returning officer; and he can declare an election or any step in the election to be void. These statutory remedies admit a flexible and appropriate response to irregularities that would otherwise be unavailable.

GENERAL STANDARD FOR ACCEPTABILITY OF RULES

A more general statutory control over union rules is contained in section 140. It provides, *inter alia*, that

> (1) The rules of an organisation —
> (a) shall not be contrary to, or fail to make a provision required by, a provision of this Act, the regulations or an award or otherwise be contrary to law;
> . . . .
> (c) shall not impose upon applicants for membership, or members of the organisation, conditions, obligations or restrictions which, having regard to the objects of this Act and the purposes of registration of organisations under this Act, are oppressive, unreasonable or unjust . . .

If a rule or part of a rule is found to offend against one of these prohibitions the Federal Court has power to make a declaration to this effect.[45] The offending rule is thereupon deemed, from the date of the declaration, to be void.[46]

Paragraph (a) is relatively straightforward. For present purposes its importance lies in the fact that it ensures that rules, taken as a whole, make the provisions which are demanded by Regulation 115 and, in particular, ensures that

[43] *The Federated Ironworkers Association of Australia* (1950) 73 C.A.R. 27; *In the Matter of the Federated Clerks Union of Australia; ex parte Henry* (1950) 66 C.A.R. 231.

[44] *e.g. Troja v. A.M.I.E.U.* (1978) 23 A.L.R. 18; *Wilson v. Devereux* (1980) 40 F.L.R. 223; *Re A.B.C.E. and B.L.F.; ex parte Rix* (1978) 18 A.L.R. 43.

[45] CAA s. 140(5D). *Linehan v. T.W.U.* [1981] I.A.S. 570.

[46] CAA s. 140(5G); *R. v. Dunphy; ex parte Maynes* (1978) 139 C.L.R. 482. It may also be void *inter partes* from an earlier date if it is relied on to justify the actions of officials taken on the earlier date and it then offended section 140: *Egan v. Maher* (1978) 20 A.L.R. 421.

the democratic control contemplated by sub-paragraph (v) is adequately reflected in the scheme of government which is adopted by each union. Paragraph (c), on the other hand, being less certain in import and requiring as it does some delicate balancing of conflicting considerations, has spawned an enormous volume of case law. It has provided wide scope for the expression of judicial views on the practice of democracy in trade unions registered under the Act. These will be examined shortly.

Before doing so it is necessary to comment on two of the objects of the Act which are relevant in determining whether a rule offends paragraph (c). The chief objects of the Act are set out in section 2. Section 2(e) provides that one of those objects is 'to encourage the organisation of representative bodies of employers and employees and their representation under this Act'. In theory it would be possible for individual employees to be in dispute with their employers and for each dispute to be settled separately by conciliation or arbitration. Such a system would, however, be quite unworkable and hence it was recognized from the Act's inception that it was essential to encourage workers to join unions and to clothe those unions with the powers necessary to represent their members in conciliation and arbitration proceedings.[47]

The other relevant object is contained in section 2(f). This object is 'to encourage the democratic control of organisations . . . and the full participation of members of such an organisation in the affairs of the organisation.' It is of more recent origin, having been incorporated in the Act in 1973. The addition was made at a time at which the government was seeking to facilitate easier amalgamation between unions, and the Minister was at pains to stress that as unions became larger it was essential for their proper functioning that members should be fully involved in their affairs.[48]

In interpreting section 140(1)(c), the Federal Court has related these objectives to the particular provisions of the Act which are designed to further them. Thus the objective of democratic control and full participation is to be interpreted in the light of the electoral controls contained in section 133 and will form a touchstone for testing the validity of union rules bearing on union elections.[49] Similarly the objective of encouraging representative organizations is related to the provisions which give powers to officials to conduct the business of the union and to bind the members to conform to the outcome of the conciliation and arbitration process.

The court has also acknowledged that objectives 2(e) and 2(f) can sometimes be in conflict. A viable, efficiently administered trade union will commit many of its important decisions to elected officials: the members will not be consulted because of the enormous administrative difficulties involved and the

[47] Higgins, H. B., 'A New Province for Law and Order' (1915) 29 *Harvard Law Review* 13, 23 ('without unions, it is hard to conceive how arbitration could be worked'). See also: *Jumbunna Coal Mine (N.L.) v. Victorian Coal Miners' Association* (1908) 6 C.L.R. 309.

[48] (1973) 83 *Parliamentary Debates (House of Representatives)* 1431.

[49] *Lovell v. F.L.A.I.E.U.* (1978) 22 A.L.R. 704, 727; *M.O.A. v. Lancaster* (1981) 37 A.L.R. 559, 579-81.

necessity for some decisions to be taken without delay. Indeed a surfeit of democratic procedures in a union may constitute 'a prescription for paralysis'.[50] When confronted with a case which raises this conflict the court sees its duty as being to determine what is practicable in the light of factors such as the history of the union concerned, the dispersal of its membership and the communications problems faced by the union.[51] The ways in which the court[52] has sought to balance these competing objectives in the course of exercising its jurisdiction under section 140 will be examined in the sections which follow. The sections deal with a variety of situations in which democratic principles have been in issue.

1. *Eligibility for Candidature*

The right of a union member to offer himself for election to office in his union is fundamental to the process of representative democracy. Restrictions on this right may produce a situation in which a group of members is deprived of a voice in union councils. On the other hand, restriction *per se* is not alien to democratic principles. All Western democracies place limits on the right to offer oneself for election. A person who was not born in the U.S.A. may not stand for that country's highest office. More commonly nationality, age and period of residence act as bars to candidature.

The restriction on candidature most commonly encountered in union rules is a prerequisite of a number of years of continuous membership. The Commonwealth Industrial Court was prepared to give considerable latitude to unions in framing such rules. In 1958 it dismissed a challenge, brought under section 140(1)(c), to rules of the Australian Workers' Union which prescribed minimum periods of five years' continuous membership and three years of financial membership for candidates. The Court reasoned that these limitations were reasonable because they ensured that candidates had an understanding of the objectives and functioning of the union and enabled members, who did not know any of the candidates personally, to be assured that they all possessed these basic qualifications for office.[53]

Nonetheless it was recognized that a point might be reached at which a rule excluded such a high proportion of members from nominating for election that it would be regarded as unreasonable.[54] At that stage the councils of the union would cease to be representative of the membership. Much will depend on the circumstances of the union in which the rule operates; its *practical* effect will

50 Taylor, R., *op. cit.* 218-9.
51 *McLeish v. Kane* (1978) 22 A.L.R. 547.
52 The Commonwealth Industrial Court (after 1973 styled the Australian Industrial Court) was charged with power to interpret the Act from 1956 to 1977. Since 1977 the Industrial Division of the Federal Court of Australia has had this jurisdiction. The word 'Court' is used to refer to these three bodies unless the context otherwise indicates.
53 *Cameron v. A.W.U.* (1959) 2 F.L.R. 45.
54 *Ibid.* 59.

assume great importance. The same rule, operating in different unions, may produce different results.[55] An example is provided by the decision in *Leveridge v. S.D.A.E.A.*[56] The rules which were impugned imposed a two-year membership condition on candidature for the honorary offices of delegate to the Branch Conference and to the National Council, the union's supreme policy-making bodies at branch and federal levels respectively. A similar prerequisite applied to the full-time offices of Secretary and Assistant Secretary. An examination of the turnover in the union's membership revealed that there was an annual turnover of one-third of the members. As a consequence two-thirds of the membership was precluded from ever holding office, given a continuous turnover of these proportions. The Court held that this effect rendered the rule void under section 140(1)(c)[57] insofar as it applied to the honorary and part-time offices. It undermined object 2(e) by preventing the policy-making councils being representative of the membership. It will be noted that the same rule may well have survived challenge in a union which had a turnover rate half the size of that obtaining in the S.D.A.E.A. Indeed it may have had a different impact on different branches within the same union if there were a similar disparity between them.[58]

The court took a different view of the two-year limitation in relation to the full-time, paid positions of Secretary and Assistant Secretary. Its reasons are not altogether clear but it was influenced by the detailed knowledge of union affairs which it considered was needed for the successful occupation of these offices: an 'apprenticeship' was necessary.[59] Although two-thirds of the members of the union could never aspire to be the Secretary or his assistant because they were not sufficiently well versed in the union's industrial relations practices, they could nonetheless exercise control over those officers and thereby ensure that they acted in accordance with the wishes of the members.

Temporal prerequisites have not, however, been accepted without demur. In a dissenting judgment in *Lovell v. F.L.A.I.E.U.*[60] Northrop J. launched a strong attack on the assumptions which had moved the court over the years to uphold some of these restrictive rules. His Honour accepted that it was desirable for union officials to be familiar with a union's rules, its administration, and the industries in which it operated. However he challenged the assumption that a period of membership would ensure that a candidate possessed this knowledge. He cited the example of a qualified candidate who

55 *Cf. McLeish v. Faure* (1979) 25 A.L.R. 403, 411.
56 (1978) 17 A.L.R. 145.
57 See also *MacDonald v. A.E.U.* (1962) 3 F.L.R. 446 (a rule requiring seven years' continuous adult membership of a section of the union which members over 40 were ineligible to join which rule had the effect of excluding two-thirds of members) and *Lovell v. F.L.A.I.E.U.* (1978) 22 A.L.R. 704 (a two-year membership requirement excluding over 70% of the members).
58 A possibility canvassed in *Lovell v. F.L.A.I.E.U.* (1978) 22 A.L.R. 704, 710-11.
59 (1978) 17 A.L.R. 145, 159.
60 (1978) 22 A.L.R. 704.

> had never attended any ordinary or regular meeting of the Victorian Branch of the Union. He had never seen a copy of the rules of the Union. He had never seen a copy of the journal published by the Union. He had never been to the Union office. He had had no contact with any Union organizer. He had never participated in the affairs of the Union. During the qualifying period he had gained no experience in the wide spectrum of work being done by persons eligible for membership of the Union.[61]

Since the qualifying rule could not be guaranteed to achieve its objective, it was to be regarded as an 'arbitrary provision serving no useful purpose'.[62] Moreover qualifying rules generally were seen as imposing unreasonable restrictions on members having regard to object 2(f):

> The democratic control of organisations includes the right of all financial members constituting the electorate to vote when a ballot is taken for the purpose of electing candidates to an office within the organization as well as when a ballot is taken for other purposes. A basic principle of democratic control is that, if a person has a right to vote in elections . . . he has a right to nominate as a candidate for the office for which he is entitled to vote. Democracy has not been reduced to the stage where the right to nominate for election to an office can be made conditional upon the candidate satisfying standards of eligibility, fitness or experience, let alone dependent on a period of inactive membership of the electorate. Of necessity, democracy permits the electorate to elect to office persons who may not be the most suited to perform the duties of that office. Any candidate for the office must face the electorate and the electorate has the democratic right to choose between candidates.[63]

While issue might be taken with the proposition that simply because a rule is not entirely successful in achieving its objects, it therefore serves no useful purpose, the force of the arguments based on the statutory objects of encouraging democratic control and membership participation must be acknowledged.

The difference between Northrop J. and the judges who have been prepared to uphold some temporal prerequisites for candidature stems from their distinctive approaches to section 140. His brethren have been willing to leave the members of organizations free to decide whether prerequisites are appropriate for their unions.[64] If they opt to have qualifying periods the relevant rules will be impregnable unless their practical operation disqualifies an inordinate number of members from nominating for honorary office[65] or goes further than is necessary to ensure a reasonable level of experience for an aspirant for a full-time position.[66] In so opting the members are not seen as acting capriciously or illogically. While the need for an 'apprenticeship' may not be supported by all unionists and while it may not guarantee that only experienced members stand for office it may, nonetheless, be a reasonable approach to union government. At minimum a temporal restriction ensures that a candidate has some knowledge of working conditions in the industry serviced by the union and of member-union relations. It also prevents 'sudden incursions into the [u]nion

61 *Ibid.* 726-7.

62 *Ibid.* 726, quoting from the joint judgment of Evatt and Northrop JJ. in *Allen v. Townsend* (1977) 16 A.L.R. 301, 337.

63 *Ibid.* 729.

64 This approach predates the insertion of section 2(f) in the Act: *Cameron v. A.W.U.* (1959) 2 F.L.R. 45, 59. It has however been reasserted since s. 2(f)'s enactment: *Leveridge v. S.D.A.E.A.* (1978) 17 A.L.R. 145, 159-60; *Lovell v. F.L.A.I.E.U.* (1978) 22 A.L.R. 704, 714.

65 *Leveridge v. S.D.A.E.A.* (1978) 17 A.L.R. 145; *Lovell v. F.L.A.I.E.U.* (1978) 22 A.L.R. 704.

66 Five years is too long: *Allen v. Townsend* (1977) 31 F.L.R. 431; (1977) 16 A.L.R. 301. Two years is not: *Leveridge v. S.D.A.E.A.* (1978) 17 A.L.R. 145.

. . . by persons introduced as members in a hurry for the purpose of supporting a particular faction.'[67]

The strength of section 2(f) is thus diluted, by balancing it with policies gleaned from the Act and Regulations. These policies involve a recognition that generally unions should be left free to determine the contents of their rule books and that one of the purposes of registration under the Act is the creation and maintenance of stable and efficient union administrations.[68] Northrop J., on the other hand, makes no such qualifications and treats section 2(f) as being pre-eminent in this area.[69]

These differences of emphasis may also be seen to reflect underlying differences in approach to union democracy. Northrop J. and his brethren are all committed to a concept of representative democracy. They disagree on the question of practical application. The majority position accepts that it is not unreasonable for unions to restrict participation in the interests of administrative efficiency and more effective representation. Northrop J. on the other hand, is willing to countenance a possible loss of quality in representation if this enhances the potential for membership participation in a union's affairs.

Other forms of prerequisites for candidature have been considered by the court. *Cameron*[70] also dealt with a requirement that candidates for office 'must sign a pledge to at all times loyally and conscientiously carry out the constitution and policy of the A.W.U., as laid down by the executive council or annual convention from time to time; and, furthermore, . . . will not join any industrial or political body or organization which is opposed to the policy of the A.W.U.; nor . . . assist in the advocacy of any policy which is in contravention to that of the A.W.U.' The hazards of a pledge of this nature for an opponent of the current policies of a union are obvious. Nonetheless the court held that the rule did not offend section 140. It was interpreted as meaning that aspirants for office were obliged to make the pledge but that it bound them only in the event that they were successful in the election. If the candidate was elected and found that he could not comply with the pledge he would be free to resign his office without prejudice to his membership.[71] The court conceded that the pledge was somewhat vaguely expressed but found that it was basically an affirmation of loyalty to the Union.[72] This would seem to be something of an understatement. An 'opposition' member elected to the executive would be given the choice of supporting the policies of the majority of incumbents or resigning. The option of staying and seeking to persuade the membership to change the policies would be denied to him. The court was prepared to sanction a rule which sought to emphasize the demands of corporate unity at the

67 *Lovell v. F.L.A.I.E.U.* (1978) 22 A.L.R. 704, 715.
68 *Ibid.* 714.
69 *Ibid.* 730.
70 (1959) 2 F.L.R. 45.
71 *Ibid.* 58, 93.
72 *Ibid.* 58, 74, 93.

expense of individual rights and it may not be without significance that the applicant in this case later became the Minister who proposed the insertion of section 2(f) in the Act. It is hard to see the court upholding such a rule today in view of the degree of restriction which the rule places on the active participation of a member in a union's affairs. This is not to assert, however, that the rule was necessarily undemocratic. The burden which it imposed is not dissimilar to that imposed by the doctrine of collective responsibility which binds Ministers in Westminster-style Cabinets.

In *McKay v. A.W.U.*[73] the prerequisite challenged was a requirement that intending candidates for the offices of organiser and district secretary should satisfy their branch executives as to their ability and fitness for the position and as to their good character and repute. In addition, candidates for the office of district secretary had to satisfy the executive that they possessed the qualifications to perform the duties of that office. Somewhat surprisingly the court held that these rules were 'eminently reasonable provisions'[74] and went on to comment that it 'was difficult to think that the attack upon these provisions was made with any real justification.'[75] The proposition that one group of members, albeit elected members of an organization, can veto the nominations of otherwise qualified candidates has only to be stated to provide the justification which the court found to be lacking. It is but a short step from conferring upon the members of an executive the power to pronounce on the fitness of their prospective opponents for positions on the executive.[76] This decision predates section 2(f) and it seems unlikely that it would be followed while that provision remains in the Act.

Prerequisites relating to residence were considered in *Kayne v. A.B.C.S.A.*[77] The rules of a small union provided that the federal president, vice-presidents, secretary and treasurer once elected, had to take up residence in the State in which the union's registered office was located. Other federal councillors (one representing each State branch) had to be resident in the city in which the office was located *before* they could stand for election. These measures were designed to save travelling costs. The registered office was in Sydney. 1,872 members resided in New South Wales; the remaining 2,636 members lived in other States. The practical effect of these rules was to deny the office of federal councillor to almost 60% of the members. Moreover only those among the 60% who were prepared to move interstate after being elected could aspire to the major offices in the organization. The court held that it was not unreasonable to demand that the president, secretary and treasurer should take up residence in N.S.W. because their duties under the rules required regular attendance at the office. This was not the case with the vice-presidents, in respect of whom the rule was held to contravene section

[73] (1968) 12 F.L.R. 182.
[74] *Ibid.* 186.
[75] *Ibid.*
[76] *Cf. Anderson v. A.W.U.* (1936) 36 C.A.R. 592.
[77] (1978) 34 F.L.R. 104.

140(1)(c). The residence prerequisite for councillors was also invalidated as being unreasonable notwithstanding the right of branches to direct and recall their councillors and the financial burdens which inter-state movement would impose on the union.

The combined effect of sections 2(e), 2(f) and 140 has been to deny unions carte blanche in imposing qualifications for candidature. Where there is a high turnover of members no temporal restrictions may be imposed. Oaths which would limit a successful candidate's ability to criticize policies and vetting processes would also seem to be impermissible. So too are residence prerequisites. On the other hand the prevailing judicial view allows unions to demand 'apprenticeships' of those who seek full-time office even where this severely limits the group of members from whom these officers may be drawn. It is open to unions to decide that a period of membership will equip a candidate with some of the skills which are necessary to pursue the union's objectives. The court has not ruled definitively on temporal prerequisites in unions with stable memberships. Northrop J. has yet to receive any support for his total opposition to all forms of qualifying formuli.

2. *Manner of nomination*

It is open to unions to prescribe procedures by which nominations for office may be made, provided that those procedures may easily be complied with.[78] Such procedures may include requirements that nomination papers be signed by at least two members of the organization and that the nominee consent in writing to being nominated. Nominees can be required to produce evidence of their membership and a branch executive may be given power to scrutinize nominations in order to confirm eligibility for candidature.[79] The reasonableness of such rules is enhanced by the statutory requirement that the rules must provide that, in the event of one or more of the prescribed formalities not being observed by a prospective candidate, the returning officer must notify the person concerned of the defect and give him an opportunity to correct it.[80]

3. *Canvassing*

Once an election campaign is under way, candidates may find themselves faced with rules which seek to limit their capacity to canvass for support. Such rules are variously justified on the grounds that propaganda campaigns encourage factionalism and that wealthy candidates would be advantaged *vis-a-vis* their less pecunious opponents.[81] Despite this it remains a fact that unduly tight restrictions on canvassing will disadvantage challengers. Those who have been in office for some time will have acquired a detailed knowledge which will be difficult to match. They will have had the opportunity of addressing meet-

78 *Mawbey v. Thone* (1969) 15 F.L.R. 161.
79 *Ibid. also M.O.A. v. Lancaster* (1981) 37 A.L.R. 559.
80 CAA s. 133(1)(c).
81 *Cf. Marantelli v. A.E.U.* (1963) 4 F.L.R. 335, 338.

ings of members, sometimes turning them into gatherings not dissimilar from campaign meetings. Incumbent officers will be well known to the members who read the union's journal. It is not unknown for these journals to stress the achievements of officials on the eve of elections or for union organizers to campaign for the officials.[82] Cases have also come to light in which union resources have been used to prepare election material for officials and post it to members.[83] If challengers are unable, at least to some extent, to overcome the inbuilt and contrived advantages of incumbent officers then their chances of electoral success will be minimal. The larger the union, the greater is the force or this argument.[84] They must have the opportunity of making both themselves and their policies known to their fellow members particularly in circumstances in which the potential for universal personal canvassing is reduced by the size or geographic dispersal of the electorate.

The court has given scant recognition to the problems of the challenger. While it has rejected total prohibitions on canvassing,[85] it has upheld a variety of extremely restrictive canvassing rules. It has been held that it is not unreasonable to limit candidates to personal canvassing where the electorate numbered between three and five hundred and was concentrated in the one small geographic area.[86] Even where circulation of printed material is allowed, the court has ruled that its distribution can be controlled by the union office, thereby depriving candidates and their supporters of the right personally to distribute propaganda to fellow members.[87] In *Shearer v. A.E.U.*[88] the rule challenged provided that if candidates wanted to circulate any printed material it had to be submitted to the union office. A word limit of 750 was imposed. At that time voting could still be conducted at meetings. The practice of the union was to forward bulk copies of the candidates' policy statements to branches for distribution at the meetings at which the voting took place or to members who had applied for postal votes. Only about seven per cent of the members usually exercised their franchise. Despite all this the court, by majority, upheld the rule. In doing so, it rejected an argument that candidates 'should be able to make a direct appeal to the inarticulate and apathetic majority who do not attend union meetings and who do not vote, so as to be able to arouse in them a desire to do their duty.'[89] The court responded:

82 *Stephenson v. Dowdell* (1980) 22 A.I.L.R. Rep. 220; *Valentine v. Butcher* (1981) 51 F.L.R. 127; Howard, W., *op. cit.* 275.
83 *Re A.P.T.U.; ex parte Wilson* (1979) 28 A.L.R. 330; *Kanan v. Hawkins* (1979) 8 I.R. 371.
84 *Cameron v. A.W.U.* (1959) 2 F.L.R. 45, 60.
85 *Ibid.*
86 *Marantelli v. A.E.U.* (1963) 4 F.L.R. 335.
87 *Shearer v. A.E.U.* (1960) 1 F.L.R. 436; *Marantelli v. A.E.U.* (1963) 4 F.L.R. 335.
88 (1960) 1 F.L.R. 436.
89 *Ibid.* 440.

> While we do not think that the rules necessarily embody any particular theory of trade union organization, we think that they do tend to limit the effective electorate to those who are sufficiently interested in the affairs of the union to take active steps to exercise their vote. Some people might think it would be better to have a wider distribution of election material, but it is at least a reasonable view that the best way to obtain office bearers who will be devoted to the interests of the union is to limit the appeal of the candidates to those who would ordinarily vote, and not allow candidates to exhort those who take no interest in union affairs to vote for reasons which may have no relation to the affairs of the union.[90]

As the court recognized,[91] this reasoning was only tenable while the Act permitted attendance-only voting. Once the legislature moved to a requirement of secret postal balloting, under which all members of the union were to receive a voting paper,[92] it narrowed the range of governmental models available to unions. If all members were to have voting papers candidates had to be free to approach them and free to urge them to exercise their votes for any candidate whether known to the elector or not.[93] This was an important change in statutory policy which saw the encouragement of membership participation through the ballot box as an essential ingredient in union democracy.

4. *Membership control*

In an attempt, presumably, to place a brake on the oligarchic tendencies of the large organizations contemplated by the Act, the Conciliation and Arbitration Regulations require that the rules of unions must provide for membership control of the committees elected under them both at national and branch level.[94] Regular elections by secret postal ballot are compulsory for all registered unions.[95] Although elections provide one means of membership control the term implies an on-going right to influence policy. Unions have adopted a variety of devices to meet this requirement. Among the most common are plebescites, periodic meetings of members with power to direct officers, special meetings, and votes to recall elected officers. Problems arise when the effectiveness of such devices is reduced by procedural requirements which limit their capacity to ensure meaningful membership control over officials. The adequacy of membership control schemes falls to be determined under both paragraphs (a) and (c) of section 140 (1). Paragraph (a) is of primary importance because membership control is a positive requirement under the Regulations. Paragraph (c) has assumed greater significance since 1973 when the encouragement of democratic control and membership participation became objects of the Act.

In this context the rules which have engaged the attention of the Court most have been those which impose quorum requirements on general meetings of members as a prerequisite to those meetings being able to direct union officials. Similar issues are raised by rules which prescribe a minimum number of

90 *Ibid.* 441.
91 *Ibid.*
92 This change occurred in 1976 when section 133AA was added to the CAA by Act No. 64 of 1976. See *supra* between notes 37 and 38.
93 *Mahoney v. Petie* (1979) 37 F.L.R. 488.
94 Regulation 115(1)(d)(v).
95 CAA ss 133 and 133AA; Regulation 115(1)(d)(i).

members who have power to demand a plebiscite. Such provisions can be justified on the basis that they ensure that a handful of unrepresentative activists cannot dictate union policy simply by attending meetings. On the other hand, rules which are too demanding may have the practical effect of totally insulating officers from the control of the members. The control contemplated by the Regulation is not intended to be illusory or purely theoretical in nature.[96]

How then does the Court test union rules in this area? In *Gordon v. Carroll*[97] the judges identified a number of factors which were relevant to the exercise of their powers under section 140:

> (a) the total numbers of members in each of the various branches of the organization;
>
> (b) the number of members who live or work within convenient travelling distance of the place of meeting;
>
> (c) the ease or difficulty in contacting or canvassing members — this will often depend on their concentration in places of work;
>
> (d) the attendance history of an organization over the years — thus a provision which appears reasonable at the time it is introduced may be shown by experience to be unrealistic and therefore unreasonable; the reverse may also occur — and
>
> (e) the existence of other methods of exercising control over an executive, such as the ability to demand a referendum, will often be important.[98]

Two contrasting cases illustrate the way in which these factors are applied. In *Byrnes v. F.I.A.*[99] the rules of the union provided for three forms of membership control: elections, directives from branch meetings (at which at least 15 per cent of members were present) which were binding on the branch committees of management, and requests for referenda which had to be acceded to if they came from meetings at which no fewer than 5 per cent of the members were present. The court was urged to invalidate the 15 per cent requirement as being contrary to Regulation 115(1)(d)(v) and unreasonable. The Sydney Branch of the union had 12,000 members and therefore 1,800 of them had to attend a meeting before it could direct the branch committee. The members were concentrated in large workshops within reach of the meeting place. This made canvassing for attendance relatively easy. At times of crisis in the past the members had attended meetings in sufficient numbers to allow directions to be given but in the five years since the rule's insertion fifteen per cent of the members had never attended a branch meeting. Nonetheless the validity of the rule was upheld. The court placed emphasis on the ease of canvassing and the alternative method of control by referendum with its lower attendance provision.

In *Gordon v. Carroll*[1] a rule of the Hospital Employees' Federation's Victorian No. 1 Branch was challenged. It imposed a 5% quorum on general meetings of members which could give binding directions to the committee of management. There were 16,500 members of the branch of whom 11,500

96 *Ford v. F.M.W.U.* (1954) 79 C.A.R. 147, 163.
97 (1975) 6 A.L.R. 579.
98 *Ibid.* 618.
99 (1957) 3 F.L.R. 309.
1 (1975) 6 A.L.R. 579.

worked in the Melbourne metropolitan area. 825 were needed to meet the 5% requirement. The members were spread between large and small institutions but there were three hospitals in Melbourne which each had over 1,000 members working at them. Only once in the recent history of the branch had the 5% mark been exceeded at meetings and that had occurred after the attendance of country members had been encouraged by provision of buses and the availability of free 'refreshments' at the meeting had been advertized. The other membership control device contained in the rules, a meeting called on petition of ten per cent of the members, was invalidated as being unreasonable because of the difficulty of obtaining 1,650 signatures. The same fate befell the 5% rule. *Byrnes's Case*[2] was distinguished on the grounds that the membership of the F.I.A. was more concentrated and was more prone to attend meetings in the required numbers because of factional disputes. Moreover there was another valid control device in the F.I.A. which was not present in H.E.F. namely, referenda.

In view of the fact that the F.I.A. attendance requirement had not been met in the five years prior to *Byrnes's Case*, the attendance histories of the two unions immediately before the Court dealt with them were not dissimilar. The availability of an alternative method of control in the F.I.A. appears to be crucial in explaining the differing outcomes. In addition to this the judges in *Gordon v. Carroll*[3] seem to have been troubled considerably by the actual number of members which the attendance requirement produced:

> Another question which may properly be asked is whether business can conveniently be transacted if a meeting is too large. There is, we feel, a point at which the very size of a meeting becomes an obstacle to both democratic processes and coherent management.
>
> If a large number of people wish to attend a meeting of an organization to which they belong, that is their right, and those responsible for the running of the meeting must do the best they can in the circumstances. But to require attendance of very large numbers, allegedly in the interests of good government, appears to us to be quite undesirable. The important thing, in considering the maintenance of control over an executive, is to ensure that enough interested people are present to represent a fair cross-section of the membership. The quorum for such a meeting should not be so small that it can readily be manipulated in some minority interest.
>
> Once the percentage requirement produces the result that, say, 300 people are present, it seems to us that little is gained and much may be lost by a requirement for three times that number.[4]

Although the court was at pains to stress that just because a rule produced a figure above 300 it did not necessarily offend section 140(1)(c), it is difficult to reconcile these views with the *Byrnes* Court's willingness to accept mass meetings of over 1800 members. Before the 15% rule became operative in the F.I.A., an opposition faction had stacked poorly attended branch meetings and had given directives to the executive which conflicted with the policies it had been elected to pursue. Despite the ease of canvassing and concentration of members the rule change had effectively insulated the incumbent officials from control by branch meetings for five years. In opting for a real maximum figure of around 300 members on the ground of protecting 'democratic pro-

2 (1957) 3 F.L.R. 309.
3 (1975) 6 A.L.R. 579.
4 *Ibid.* 617.

cesses and coherent management', the court has done much to reduce the degree of insulation available to the officials of large organizations while at the same time preserving some scope for preventing them falling prey to an activist minority.[5]

Less subtle provisions which circumscribe the membership control requirements of regulation 115(1)(d)(v) have been dealt with by the court. In *Allen v. Townsend*,[6] for example, a rule allowed a branch meeting to demand a poll of all members on matters which might substantially affect their welfare. It qualified this right by making the holding of a poll dependent on the approval of the State executive. The court held that membership control was lacking because of the executive's power of veto. For good measure it also held that the rule offended section 140(1)(c) because purported rights, given to members, could be negatived by the executive.

Most of the unions registered under the Conciliation and Arbitration Act have adopted a federal system of government. Branches, usually formed within State boundaries, have joined to form federal bodies in response to political and industrial pressures and the expanding jurisdiction of the Conciliation and Arbitration Commission.[7] Invariably there are disparities in the size of branches and this leads to concern in the smaller branches that their interests should not be overborne by the numerically larger ones. This problem occupied the framers of the Commonwealth Constitution who were faced with a similar concern on the part of the smaller colonies. Their solution was an equality of State representation in the Senate balancing a House of Representatives which was elected on the basis of population distribution. Australian unions have not been attracted by this model and have opted instead for unicameral policy-making bodies.[8] In many cases branches were accorded equality of voting power on federal councils. The disproportionate voting power thus produced has not always been compatible with the statutory demand for membership control or the provisions of section 140(1)(c).

Provisions for disproportionate branch voting power are rarely offensive to section 140 *per se*.[9] They become so, however, when they are large and are not accompanied by other provisions which ensure that the wishes of the majority of members, as expressed through their branches or directly, will ultimately prevail.[10] A plebiscite of all members on any issue, at the instance of a reasonable number of members who are dissatisfied with a federal council decision

[5] It must be acknowledged that the Court has not been completely consistent on maximum numbers even in recent years. In the same year that *Gordon v. Carroll* was decided a differently constituted court was prepared to contemplate a minimum attendance of 560: *Wood v. Morris* (1975) 8 A.L.R. 335.

[6] (1977) 31 F.L.R. 431; (1977) 16 A.L.R. 301.

[7] *McLeish v. Kane* (1978) 22 A.L.R. 547, 556-7.

[8] *Ibid.* 557.

[9] *Crealy v. Commonwealth Bank Officers' Association* (1957) 1 F.L.R. 153.

[10] *MacKenzie v. A.C.O.A.* (1962) 5 F.L.R. 342; *McLeish v. Kane* (1978) 36 F.L.R. 80; (1978) 22 A.L.R. 547; *Luckman v. A.P.T.U.* (1978) 36 F.L.R. 68; 28 A.L.R. 393; *Sherriff v. Townsend* (1980) 30 A.L.R. 223; *Willingale v. A.F.U.L.E.* (1982) 62 F.L.R. 129.

will normally serve this purpose.[11]

Some elaboration of these general propositions is necessary. First, the existence of imbalances in branch voting power is not determined by application of strict mathematical tests. Branch membership may fluctuate in the same way that the voting population of electoral divisions changes over time. It will be impossible for rules to ensure that these changes are translated precisely into proportionate voting strength unless a card system is used. Such systems have not proved attractive to unions because they are cumbersome and tend to undermine the scope for representatives of branches to take opposing stands on matters of policy. The court has not demanded that card voting should be used[12] and has been prepared to treat as reasonable variations of the order of 5-10 per cent.[13]

Secondly, it is usually the case that rules which produce disproportionate voting strengths will stand or fall under both s. 140(1)(a) and s. 140(1)(c).[14] The imbalance may be within tolerable limits or be counter-balanced by other mechanisms designed to ensure that the wishes to a majority of members will ultimately prevail. In neither case is there a breach of regulation 115(1)(d)(v) and the rules are not unreasonable. Alternatively an unequal distribution of voting power which is not counter-balanced will offend both section 140(1)(a) and section 140(1)(c). However it is possible for a voting imbalance to be so gross that even the provision of other mechanisms which satisfy regulation 115(1)(d)(v) will not save the rules. Section 140(1)(a) will not be breached but section 140(1)(c) will be offended. *McLeish v. Kane*[15] was such a case. The New South Wales branch of the union concerned had 43.1% of the members but only 22.7% of the votes on the national council. The three smallest branches all had approximately the number of votes to which their membership entitled them on a proportional basis. The rules survived an attack under section 140(1)(a) because they contained a plebescite provision which enabled any two State branches, through specially-summoned State councils, to demand a poll of members on an issue. However the disparity in voting power between branches was found to be too uneven and too great and therefore unreasonable having regard to the objective of democratic control.

Thirdly, the devices adopted to overcome a disproportionate distribution of voting power amongst branches must be effective in ensuring that the majority view is ultimately reflected in union policy.[16] It must be possible for the referendum or other mechanisms to be activated by the larger branches which are

11 *MacKenzie v. A.C.O.A.* (1962) 5 F.L.R. 342; *Luckman v. A.P.T.U.* (1978) 36 F.L.R. 68; (1978) 28 A.L.R. 393.

12 *Scott v. Rolfe* (1979) 36 F.L.R. 249.

13 *McLeish v. Faure* (1979) 40 F.L.R. 462; (1979) 25 A.L.R. 403; *Scott v. Rolfe* (1979) 36 F.L.R. 249.

14 *e.g. Mackenzie v. A.C.O.A.* (1962) 5 F.L.R. 342; *Luckman v. A.P.T.U.* (1978) 36 F.L.R. 68; (1978) 28 A.L.R. 393; *Scott v. Rolfe* (1979) 36 F.L.R. 249.

15 (1978) 36 F.L.R. 80; (1978) 22 A.L.R. 547.

16 *Mackenzie v. A.C.O.A.* (1962) 5 F.L.R. 342.

disadvantaged by the rules which establish relative voting strengths. Thus if the only bodies with power to demand a plebescite are the very councils in which the imbalance exists the rules will offend section 140.[17]

Fourthly, the Court has drawn a distinction between union bodies which are primarily concerned with policy-making and those whose major function is administrative or policy-implementing. National executive bodies will often contain an equal number of branch representatives, together with the full-time federal officials. These committees need to be small to work effectively and it is obviously necessary for all branches to be represented even if this results in grossly disproportionate voting power. The court has not been so demanding in respect of such bodies because they remain under the control of a policy-making council which itself is either fairly balanced or is subject to the will of a majority of members.[18] Indeed the executive might be subject to the members directly.[19] Moreover the federal officers, being elected by a direct vote of all members or by a one-tier collegiate system will owe their allegiance to the union as a whole as opposed to any one branch.[20]

5. *Filling casual vacancies*

When a casual vacancy occurs in an elected office a question arises as to the means by which it is to be filled. Until 1983 the Act and Regulations were silent on the point. In *Cameron v. A.W.U.*[21] the court was invited to rule that an election was always necessary to fill a casual vacancy but it declined to do so. As a result, rulemakers have a choice between leaving the position vacant pending a by-election or providing for an appointment by an executive committee. The appointment can be either for the period prior to a by-election or for the remainder of the term of the person vacating the office (which could, in theory, be for a period of up to four years).[22] If they opt for appointments, issues of democratic practice arise. If the office is an important full-time one such as secretary, an appointment for a period of years may impose an unwanted official on the members and undermine the authority and representative character of the office. If provisions for by-elections are included their efficacy will depend in part, on the speed with which the election must follow the creation of the vacancy. Economic and administrative considerations may dictate that by-elections for part-time offices should not be held automatically each time one falls vacant. Some unions' rules provide for by-elections after a defined number of part-time offices are vacated. If appointments are to be made in the meantime some will have an uncertain length. If

17 *Luckman v. A.P.T.U.* (1978) 36 F.L.R. 68; (1978) 28 A.L.R. 393.
18 *McLeish v. Kane* (1978) 36 F.L.R. 80; (1978) 22 A.L.R. 547.
19 *Ibid.* See also *Scott v. Rolfe* (1979) 36 F.L.R. 249 where it was calculated that if strict proportioning of voting strength was enforced a federal conference would have to be expanded from 20 to 56 simply to give the Tasmanian branch one seat.
20 *Kayne v. A.B.C.S.A.* (1978) 34 F.L.R. 104.
21 (1959) 2 F.L.R. 45.
22 This is the maximum term fixed by the CAA: s. 133(1)(db).

the positions are to remain vacant the representativeness of a committee which is short-manned may come into question, particularly if full-time members come into a stronger position as a result of the vacancies.

The Court has examined the casual vacancy problem in terms of the familiar tensions between administrative/economic considerations on the one hand and the importance of democratic controls on the other. Initially, the former carried the greater weight, with a majority of the judges in *Cameron's* case[23] permitting appointments of up to three years. Subsequently one judge expressed the opinion that an appointment of up to five years did not contravene section 140.[24] However, even before the advent of section 2(f), it was evident that some members of the bench were worried that their brethren were paying inadequate attention to the competing demands of democratic theory. In what amounted to judicial legislation they prescribed a period of between twelve and fifteen months as the maximum permissible duration of appointments.[25] The Industrial Registrar, in practice, enforced this limit when certifying rules under section 139 of the Act.

A comparison of the reasoning in the various cases is instructive. The importance given to administrative convenience in the earlier cases is evident in the judgment of Dunphy J. in *Cameron v. A.W.U.*[26] In ruling in favour of appointments of up to three years' duration His Honour said:

> Obviously a provision that all casual vacancies should be filled by election would be fraught with difficulties and could be economically embarrassing. An office might fall vacant within a few weeks of the next election and time would not permit and the expense would not warrant such a method. Clearly also the swift filling of a vacancy is desirable from an administrative point of view . . .[27]

In the same case Spicer C.J. expressed similar concerns:

> A requirement that every casual vacancy should be filled by election could impose an intolerable burden on a large organization with widespread membership . . . It is true that an officer appointed to such a vacancy could hold office for nearly three years without election. He is, however, appointed by those who have been elected to represent members during that period . . .[28]

His Honour did not deal with the possibility that a series of vacancies arising over a three year period might lead to a situation in which an increasing number of appointed officials are party to the making of further appointments.

The judges who have supported a reduction of the permissible period of appointments have not expounded their reasons at such length but in substance they are founded on a value judgment as to who may properly exercise power within a union. This much is evident from the words of Joske J. who, in attacking even a fifteen month period, said that it was 'an unreasonably long period for appointed persons to be carrying out duties which should be carried out by 'elected persons or a whole elected executive'.[29] While other judges have been

23 (1959) 2 F.L.R. 45.
24 *Watson v. A.W.U.* (1967) 10 F.L.R. 347, 351-4 (Dunphy J.).
25 *Ibid.* 368; *Gordon v. Carroll* (1975) 27 F.L.R. 129, 176-7; (1975) 6 A.L.R. 579, 621-2.
26 (1959) 2 F.L.R. 45.
27 *Ibid.* 72.
28 *Ibid.* 56.
29 *Watson v. A.W.U.* (1967) 10 F.L.R. 347, 360.

prepared to temper Joske J.'s extremely restrictive approach by giving some recognition to the administrative difficulties associated with filling irregular vacancies (thereby allowing for appointment pending annual elections or, if annual elections are not provided for, extraordinary elections within a shorter period), they have also been strongly influenced by the notion that ideally, only elected officials should control a union's affairs.[30]

The judicial tendency to reduce the scope for appointments to fill casual vacancies was overtaken ultimately by legislation. In 1983 a new section 133 AB was added to the Act.[31] It was apparently intended to provide that, if casual vacancies were to be filled for periods greater than twelve months or three quarters of the term of office (whichever was the greater), they had to be filled by election.[32] Instead it provided that casual vacancies could be filled by any means for up to three quarters of the term of office but could not be filled at all for a longer period. In 1984 the new section was amended to give effect to the original intention of its authors.[33] The Government believed that the change achieved 'an acceptable balance between the need to prevent undue inconvenience and cost for organizations and the need to maintain the principles of democratic control by members' and also that it prevented 'the possibility of abuse and manipulation of the electoral system'.[34] In striking the balance the legislature demonstrated less sympathy for the ideal of elected representation of members than had the court. In permitting appointments for up to three years it has effectively endorsed and restored the *Cameron* court's determination of where the balance should lie. Despite this it is preferable to have Parliamentary rather than judicial legislation in so sensitive an area of regulation.

6. *Suppression of opposition*

It has already been observed that a key factor in ensuring that elected leaders remain responsive to the wishes of their electors is the tolerance of dissenting opinion. If members are free to express their dissenting views and to communicate them to their fellows this will provide a useful check on entrenched officials. On the other hand discordant voices might give comfort to employers and others whose interests are opposed by the union and thereby undermine the authority of the elected officials as they pursue what they consider to be the interests of the members. Moreover, unions, like companies, have industrial relations strategies. If members who were party to them could make them public, in the course of attacks on the policies of officials, this would obviously advantage the employers with whom the union was conducting negotiations. Some restraint on the freedom of union members to express

[30] *Ibid.* 368 (Kerr J.); *Gordon v. Carroll* (1975) 27 F.L.R. 129, 176-7; (1975) 6 A.L.R. 579, 621-2 (Smithers, Woodward and St. John JJ.).

[31] Act No. 115 of 1983.

[32] *Commonwealth Parliamentary Debates (House of Representatives)*, 9 May 1984, 2150 and 9 November 1983, 2506.

[33] Act No. 162 of 1984.

[34] Willis, R., *Parliamentary Debates (House of Representatives)*, 9 November 1983, 2506.

their opinions can thus be seen to be justified. The difficult problem is to draw a line between rules which impinge unduly on the right to dissent and rules which protect a union's activities from internal sabotage.

In this context the Court has equated unreasonableness and undue restraint[35] thereby implying that some restraint is permissible. The decided cases make it relatively easy to discern the type of rule which is likely to be offensive to section 140. Rules which purport to prohibit totally the expression of opposition opinion within a union are oppressive and unreasonable.[36] In *Wiseman v. P.R.E.I.*,[37] for example, one of the rules considered by the Court prohibited members from circulating or causing to be circulated any report which might be considered by the union's governing council to be detrimental to the well-being of the union or calculated to injure any other members. It was held that the rule offended section 140(1)(c). In reaching this conclusion Evatt and Northrop JJ. relied heavily on section 2(f) and on the vagueness of the rules:

> Members of the Institute are to be encouraged to participate fully in the affairs of the Institute and its democratic control. A member may be opposed to a policy adopted by the Governing Council. He may try to persuade other members that the Governing Council has adopted a policy detrimental to the well-being of the Institute. A member may wish to contest an election for an office on the Governing Council and, for this purpose, may claim that existing office bearers are pursuing policies detrimental to the well-being of the Institute. In either of these circumstances, if the member circulates a report stating his policy and containing criticisms of the policy being enforced by the Governing Council, the Governing Council may consider the report detrimental to the well-being of the Institute and, having formed this opinion, cite the member to appear before it and then sit in judgment of (sic) the member so cited. No objective standards are laid down to describe conduct which may be detrimental to the well-being of the Institute and thus there are no standards by which a member is able to decide whether his proposed activity is contrary to the provisions of [the rule] . . . The proscribed conduct is so vague and uncertain that it is impossible for a member to know in advance whether he is committing an offence or not. In this manner the rule is oppressive . . . Further the rule is unreasonable in the sense that it goes beyond what is fair and equitable.[38]

The fact that a member's liability was made to depend on the subjective assessment of the Council was another reason for the court's decision but it would have come to the same conclusion in the absence of this element.[39]

As the court implies, the objection of vagueness can be overcome by the inclusion in rules of objective standards which ensure that prohibited conduct can be determined as a matter of fact (as opposed to subjective assessment).[40] Such standards, when present, will be tested for reasonableness having regard, *inter alia*, to the objects of the Act. The court has upheld the validity of rules which proscribed the divulging of union correspondence or business to persons whom the disseminating member knew were not entitled to be so informed and the deliberate (as opposed to innocent or negligent) misrepresentation of the union's affairs.[41] It has also held that a persistent critic of officials can be pen-

35 *Wishart v. A.B.L.F.* (1960) 2 F.L.R. 298.
36 *Ibid.; Wiseman v. P.R.E.I.* (1978) 35 F.L.R. 24; (1978) 20 A.L.R. 545.
37 (1978) 35 F.L.R. 24; (1978) 20 A.L.R. 545.
38 *Ibid.* 555-6.
39 *Ibid.* 556.
40 *Wishart v. A.B.L.F.* (1960) 2 F.L.R. 298.
41 *Ibid.; O'Neill v. P.I.E.U.A.* (1965) 6 F.L.R. 488.

alized if he fails to adduce evidence to support repeated allegations of financial mismanagement when called upon to do so by the union committee of management pursuant to a rule which provided that members who were aware of the existence of a breach of the union's rules should advise the committee of all relevant details.[42] Furthermore the prohibition of acts 'calculated to injure or destroy' a union has been upheld on the basis that this phraseology does not admit a conviction where all that a member has done is to engage in *bona fide* criticism of officials 'since the intention would be to eliminate, not to create, weakness.'[43]

Proscriptions will not be reasonable if they prevent a member from circulating policy statements or otherwise making his views known to other members.[44]

7. *The amendment of union rules*

In *Cook v. Crawford*[45] a Full Court, by majority, held that a rule which allowed the amendment of a union's rules by a council of that union without reference to the branches or the general membership contravened section 140(1)(c). The majority view of Keely and Sheppard JJ. was that it was unreasonable that such a fundamentally important power could be exercised by as few as eight elected members without the membership (which numbered in the thousands) then being aware that a rule change was under consideration.

In *Squires v. Stephenson*[46] Sheppard J. applied and extended the principle which he had enunciated in *Cook v. Crawford*. He held that rules which permitted rule changes to be effected by a council by means of a postal ballot and which allowed a council to amend rules subject to ratification by the members contravened section 140(1)(c).

The Federal Government reacted to these decisions by introducing an amendment to the Act to restore the status quo.[47] Such legislation proved to be unnecessary because, before it came into operation, a Federal Court bench of five members held that rules could be changed by representative councils without the provisions of section 140 necessarily being infringed. That case was *Wright v. McLeod*[48]. Sheppard J. was the lone dissenter. It is instructive to compare the approaches to union democracy which were expressed by Sheppard J. in these three cases with those which formed the basis of the majority judgments in *Wright v. McLeod*.

The 'Sheppard doctrine', as it has been called,[49] centres on object 2(f). This

42 *Troja v. MacDonald* (1981) 23 A.I.L.R. Rep. 408.
43 *Wishart v. A.B.L.F.* (1960) 2 F.L.R. 298, 301.
44 *Wiseman v. P.R.E.I.* (1978) 35 F.L.R. 24; (1978) 20 A.L.R. 545.
45 (1982) 43 A.L.R. 83.
46 (1983) 4 I.R. 1.
47 Conciliation and Arbitration Amendment Act (No. 2) 1983 (Cth) s. 27.
48 (1983) 51 A.L.R. 483.
49 McCallum, R. C., 'Federal Controls Upon Trade Unions: the Australian Enigma' in Rawson, D. and Fischer, C. (eds) *Changing Industrial Law* (1984) 203.

object is seen as demanding more than representative democracy: it was designed to counter the perceived evil of elected representatives in large unions becoming too remote from the membership. In *Cook v. Crawford*[50] His Honour said:

> It is true that delegates, members of council, dissatisfied with a decision to amend rules could take the matter back to their branches and trigger the referendum procedure provided for. But that presupposed that the delegates are reasonably in tune with the views of the membership. The procedure which it was purported to change ensured that at least all the members of one branch received notice of the proposal. At least the committees of management of all other branches also received notice of it. Under the present proposal rules might be amended without notice to any but the members of Council. It is true that they would report to their respective branches the results of the meeting of Council and it is also true that if fundamental amendments to rules were made the word would soon get around. But by then the amendments would be made. The apathy of members of organizations, no less than of other associations in many walks of life in this community, is well known. It is all too easy for people these days to have things done for them. They accept the situation because they prefer it that way, or because they cannot be bothered doing otherwise or because they feel it is useless to attempt to do so.
>
> The linchpin of the respondents' submission that the amendment does not contravene s. 140(1)(c) is the plebiscite provisions of r. 27. But that, like any other rule, is capable of amendment. If the Council were able to amend the rules, an amendment deleting this provision could be passed. Council would then have full and unfettered control over the entire process of rule amendment.
>
> The Act speaks of the encouragement, not only of democratic control, but also of full participation by members in the affairs of an organization. Its use of the word 'encourage' does not suggest that any absolute standard is to be applied. Rather it is concerned to see the progressive attainment of the objects which it mentions. This organization, until the amendment had, in relation to the amendment of rules, a degree of participation by members. That degree of participation has been seriously reduced by what the South Australian amendment purported to achieve. The amendment, in my opinion, discourages full participation by members in an important affair of the organization, namely the amendment of its constitution. I have no hesitation in saying that, in my opinion, the rule as purportedly amended infringes s. 140(1)(c).

His Honour was not unmindful of the need for a union to function efficiently in the interests of the members. However he was concerned to stress that, if section 2(f) was to have any meaning there had to be participation of the members in at least some of a union's decision-making processes. He took the point again in *Wright v. McLeod*:[51]

> What follows from these conclusions? It would be absurd to suggest that the membership should play a direct part in the day to day conduct of the union's affairs or in much of its decision making. It must be able to act through an executive and a council as it does. No one could reasonably suggest that the presence of s. 2(f) in the Act required otherwise. But in my opinion some matters are of such fundamental importance that when decisions are to be made in relation to them, the membership must be involved. I use that expression broadly; the involvement may well vary depending on circumstances and depending upon the nature of the amendments to be made. If that is not so, I fail to see what effect can ever be given to the presence of s. 2(f) in the Act. It is treated as no more than a platitude which may be conveniently ignored. The mischief which I believe s. 2(f) was intended to overcome remains. All the evils which those responsible for the amendment in 1973 perceived continue to exist.

The *Wright v. McLeod* majority [52] did not accord such weight to section 2(f). Although there were differing emphases, they were prepared to regard representative democracy as an acceptable norm for unions provided that the rules, when examined as a whole, provided for sufficient checks and balances against oligarchic control. They found such checks and balances in the rules of the

50 (1982) 43 A.L.R. 83, 147-8.
51 (1983) 51 A.L.R. 483, 537.
52 Bowen C.J., Smithers, Evatt and Northrop JJ.

union concerned. The council with power to make changes to rules was democratically elected and certain procedural safeguards, such as a two-thirds majority requirement for the success of a resolution amending the rules, were present. More importantly, however, any council decision was subject to a plebescite which had to be conducted if requisitioned by fifteen per cent of the membership. In this way a sufficient degree of membership participation was possible.[53]

The need for a balance between organizational efficiency and full participatory democracy was also recognized in this context. Rule changes, although a matter of fundamental importance to any organization, had to be attended to carefully and, sometimes, with expedition. The majority was not prepared to hold that, in the system adopted by the union involved, the balance had been struck in an unreasonable manner. In phrases reminiscent of a bygone era Evatt and Northrop JJ. were at pains to stress that it was not 'for the Court to impose its will to determine the form of the internal structures of the union.'[54]

ORDERS FOR PERFORMANCE OF RULES

It has been convenient to delay discussion of the second of the specific statutory controls until this point. No matter how assiduous a union is in ensuring that its rules are in accord with statutory requirements these efforts will be vitiated if the rules are not observed. Any guarantees of democratic rights to members provided for in rules will be put at nought if members who exercise their rights are proceeded against on trumped-up charges before executives whose sole concern it is to silence them. Similarly, if a member is denied the right to nominate for office, despite an entitlement to do so under the rules, the advances made in this area under section 140 will be of no benefit to him.

Section 141 of the Act is directed to problems of this kind. It grants the Court power to 'give directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules'. A member who believes that the rules of his union have been breached, whether he is affected by the breach or not, may apply to the court for such an order.[55] Thus, if union officials fail to obtain the approval of the required number of branches for an amendment to rules an order can be obtained to the effect that any purported changes are null and void.[56] Similarly, if a returning officer fails to observe a rule which requires him to call nominations for union elections by notice in the union journal he can be ordered to do so.[57] Section 141 will also protect a member against whom

53 (1983) 51 A.L.R. 483, 492-3, 500, 522.
54 *Ibid.* 524.
55 *Wilson v. Devereux* (1980) 40 F.L.R. 223.
56 *e.g. Roots v. Mutton* (1978) 32 F.L.R. 15; (1978) 28 A.L.R. 439.
57 *Wilson v. Devereux* (1980) 40 F.L.R. 223.

prejudicial action is taken by a committee which lacks power under the rules to take such action.[58]

While the enforcement of express provisions in rules plays an important part in protecting democratic rights, section 141 is made all the more valuable by the willingness of the court to have regard not only to the literal meaning of the words used in rules but also to 'what is seen to be implicit in them having regard to relevant circumstances'.[59] Of primary importance has been the implication of the principles of natural justice. These principles provide procedural protections for members who are facing disciplinary proceedings. They ensure that the member is given adequate notice of any hearing, details of the charges he is to face and a proper opportunity to explain his side of the case. In addition, natural justice demands that the committee which hears the charges should not be biassed against the member.[60] In the event that these standards are not met, any finding of guilt or imposition of penalty which follow the impugned proceedings are treated as being of no effect.

The implication of terms has also enabled the court to combat the practices of some incumbents who use the resources of their unions to assist in their campaigns for re-election. The court has held that there is an implied prohibition upon the use of the resources or funds of a union during the conduct of elections to support one candidate when the same resources and funds are not available to other candidates.[61] At times when elections are not in progress a more general principle applies, namely that express powers conferred by rules must be exercised *bona fide* for the purpose for which the power was conferred.[62] Thus powers to communicate information to members may not be abused by the production of propaganda directed for or against persons who may be candidates in future elections. If a member is able to prove a breach of the prohibition or an absence of *bona fides* the court may make orders under section 141 directing the officers to perform and observe the rules of the union by refraining from expending the resources or funds as proposed.[63]

Another important use of the implication principle relates to the protection of union funds. After some initial hesitance [64] the court has been prepared to imply a fiduciary duty which rests on those officials who have charge of a union's funds. In *Gordon v. Carroll*[65] it held that an officer who had charge of funds pursuant to rules was under an implied duty to account for them and repay them if they improperly came into his hands, particularly when they did so at the officer's instigation and where he had no belief in the existence of any right to receive the money.

58 *Magner v. Fowler* (1979) 26 A.L.R. 671.
59 *Porter v. Dugmore* (1984) 7 I.R. 120, 129 (Smithers J.).
60 Tracey, R., 'The Conduct of Union Disciplinary Hearings' (1982) 24 *Journal of Industrial Relations* 204.
61 *Valentine v. Butcher* (1981) 51 F.L.R. 127; *Kanan v. Hawkins* (1979) 8 I.R. 371; *Scott v. Jess* (1984) 56 A.L.R. 379.
62 *Scott v. Jess* (1984) 56 A.L.R. 379.
63 *Ibid.*
64 *McLure v. Mitchell* (1974) 24 F.L.R. 115; (1974) 6 A.L.R. 471.
65 (1975) 6 A.L.R. 579.

There is the further possibility that the court may be prepared to enforce implied rules (as opposed to implications drawn from express rules). This possibility is raised in the judgment of Smithers J. (with whom Sheppard J. agreed) in *Porter v. Dugmore*.[66] His Honour canvassed the notion that, since union rules constitute a contract, they may be susceptible to the same canons of construction as ordinary contracts. In particular he referred to the rule that a term may be implied in a contract if it is something 'so obvious it goes without saying'. It may be, therefore, that the written rules may be supplemented by implied rules. The difficulty is that section 141 is directed to the enforcement of *registered* rules and probably does not extend to the enforcement of implied rules.[67]

In the normal course of civil litigation costs follow the event. This means that the unsuccessful party pays the costs of the action. Few unionists could afford to take the financial risk of losing proceedings brought under sections 140 or 141 or Part IX. This natural inhibition would stand in the way of the individual member even when he had a strong case. Provision has been made in the Act to overcome this problem. Section 197A prevents the court from awarding costs except where proceedings are instituted vexatiously or without reasonable cause.[68] In practice this means that the member and the union each pay their own costs. The Act then gives the Attorney-General power to pay all or part of the individual's costs in proceedings brought under sections 140 or 141 or Part IX whether or not he is successful.[69] A member can obtain a guarantee of financial aid before a case comes on for hearing. The financial provisions go a long way towards making meaningful the protection of individual democratic rights under the Act.

THE EFFECTIVENESS OF LEGAL REGULATION

Howard has argued that '[t]he British experience makes it possible to doubt that the extensive Australian regulations have in fact succeeded in achieving any form of behaviour [in and by unions] that would not have obtained in their absence'.[70] In fairness it must be said that he first expressed this view in 1971, before the advent of section 2(f) and the secret postal ballot legislation. However, even then his assertion was demonstrably wrong and, in any event, he repeated it in 1980.[71] In the same article he had drawn attention to the election inquiry provisions of Part IX of the Act and commented that they contained 'one of the most valuable safeguards for democratic unionism'.[72] As has

66 (1984) 7 I.R. 120, 129-30.
67 *See Dugmore v. Porter* (1982) 3 I.R. 418, 421-2 (Northrop J.); *Porter v. Dugmore* (1984) 7 I.R. 120, 128 (Smithers J.); *Scott v. Jess* (1984) 56 A.L.R. 379, 400 (Gray J.). Compare *Gordon v. Carroll* (1975) 6 A.L.R. 579, 602-3.
68 *Brophy v. Mapstone* (1984) 56 A.L.R. 135.
69 CAA ss 141A and 168.
70 Howard, W., *op. cit.* 275.
71 In Ford, G., Hearn, J. & Lansbury, R., *op. cit.* 173.
72 Howard, W., *op. cit.* 272.

been observed[73] this Part of the Act has done much to eliminate malpractice in union elections and to discourage its recurrence. Many unions did not counter the evil of rigged ballots themselves. In some cases office-bearers had a vested interest in ensuring that complaints by members were not thoroughly investigated. A Labor Government, with the support of the A.C.T.U., introduced the original inquiry provisions in 1949. A.C.T.U. support would hardly have been forthcoming if the union movement had believed that these problems were remediable by internal means.

The British experience does little to inspire confidence that unions will overcome electoral malpractice without outside intervention. Until 1984 no British equivalent to Part IX existed. The difficulties facing a unionist in Britain who wished to challenge the conduct of a ballot were well illustrated by litigation which led to the ousting of corrupt officials from the Electrical Trades Union in the early 1960's. The challenge had to be mounted as a common law action for conspiracy. The trial lasted forty-two days and cost in the vicinity of £80,000.[74] No public funds were available to support the challenge. Had it not been successful, the legal obligation to pay costs would have fallen on the individual unionists who brought the action. The obvious shortcomings of this cumbersome means of obtaining redress impressed themselves on the Royal Commission on Trade Unions and Employer Associations and led it to recommend the adoption of a system not dissimilar to Australia's.[75] That was in 1968. Nothing was done and complaints of electoral irregularities continued to escape independent scrutiny and remedial action[76] until the passage of the Trade Union Act 1984. Voting members of the principal executive bodies of British Unions must now be elected by secret ballot and may not hold office for more than five years without further election. The Act also provides for redress in the event of proved malpractice.[77]

Other examples may be mentioned briefly. In Britain many union officials hold office for life. Under the 1984 Act they can continue to do so provided that they do not enjoy voting rights. Only statute forced some Australian unions to introduce regular elections. Until the 1984 Act, British unions not

[73] *Supra* p. 184

[74] *Byrne v. Foulkes, The Times*, 29 June 1961, 4 July 1961, 1 February 1962. The full story of the case is told in Ralph, *All Those in Favour? The E.T.U. Trial.*

[75] *Report*, 1968, Cmnd 3623, paras 645-6.

[76] See *e.g. The Times*, 20 October 1981 and 21 October 1981. On the eve of the 1981 election for President of the A.U.E.W. the Union journal, edited by the Union Secretary (who was also the returning officer), carried an article which spoke in glowing terms about the achievements of the incumbent who was seeking re-election. He was subsequently returned with a handsome majority. The election was challenged on the ground that the publication of the article constituted a breach of the union's rules and had affected the result of the poll. This challenge was upheld by the union's court of appeal, but the union's executive council, on which sat the President and the Secretary, refused to act on the findings despite a union rule which required the council 'to give immediate effect to the decisions of the appeal court'. The Court of Appeal's decision was simply dismissed as being politically motivated.

[77] 1984, c. 49 Part I. Kidner, R., 'Trade Union Democracy: Elections of Trade Union Officers' (1984) 13 *Industrial Law Journal* 193.

uncommonly had rules which strictly limited the right to candidature. It was the Federal Court which forced abandonment of similar rules relating to voluntary office in some of Australia's larger unions. Block voting and other undemocratic practices operated in important British unions like the T.G.W.U. until they were outlawed by the 1984 Act. The individual franchise which applies in Australia is also guaranteed by statute.

It must be stressed that the law has a limited role to play in relation to union democracy. Events have, however, shown that without it Australia's unions would be less democratic than they are at present.

CONCLUSIONS

Of necessity, Australia's federally-registered unions have adopted rules which provide for forms of representative democracy. Initially this was dictated by a combination of statutory demand, the wide dispersal of membership, and the realities of a federal system of union government. In the course of the last sixty years these factors were reinforced by a progressive increase in the size of some unions to the point where fourteen of Australia's 319 unions claim memberships in excess of 50,000.[78]

The Federal Parliament has sought to ensure that democratic processes are observed within trade unions. To this end successive governments have added to the statute books measures which are said to enhance and protect democratic rights. In the main these measures have been directed towards regulating the contents of union rule books and ensuring that the rules are observed. The Federal Court of Australia and its predecessors have played an important role in giving effect to the legislature's intentions, particularly in determining whether rules are oppressive, unreasonable or unjust under section 140(1)(c).

The effectiveness of legal intervention in this field has been doubted. It seems to be accepted on both sides in industrial relations that it is not possible to legislate for democracy in organizations like trade unions.[79] If this means that no amount of legislation can force individuals to embrace democratic ideals then it is uncontentious. But the proposition is given wider operation by those who argue that, because it is not possible to legislate for democracy, the Parliament and the courts have no role to play in regulating the internal affairs of trade unions.[80] Australian experience indicates that, on the contrary, the law can operate constructively to prevent some undemocratic practices occurring and to remedy the effects of such practices when they do occur. This is a limited and essentially a negative role, but nevertheless one which has value. It provides no more than a foundation on which unions are free to build. The degree to which a union's practices conform to democratic ideals will depend

[78] Australian Bureau of Statistics, *Trade Union Statistics, Australia, 1983*, A.B.S. Cat. No. 6323.0.

[79] *e.g.* Benn, A., 'Towards a New Constitutional Settlement' in *The Role of the Trade Unions* (1980) 52; Finniston, M., 'Afterword', *ibid.* 63; Howard, W., *op. cit.* 271 Yerbury, D., *op. cit.* (1971) 151.

[80] Benn, A., *op. cit.* 52.

on the level of commitment to those ideals within the membership. In Australia there is a notable variation in that level of commitment as between unions which participate in the federal system[81] but all must conform to the minimum statutory standards.

Legislation has ensured that the drafters of union rules have given attention to basic items of democratic practice.[82] In relation to elections the Parliament has gone further and enacted what amounts to a statutory code for conducting ballots.[83] Irregularities can be investigated and corrected by the court.[84] The essential features of a system of representative democracy, as identified by the High Court, are therefore in place in all Australia's federally-registered unions by reason of statutory intervention.

The Parliament has gone further. It has given the Court a general supervisory jurisdiction over the content of rule books and the observance of rules.[85] In determining the validity of rules under section 140 the court is guided, in part, by the statutory objective of encouraging the democratic control of unions and the full participation of members in their affairs.[86] Since the introduction of this objective in 1973, but not always because of it, the court has improved the scope for membership participation. The permissible range of restrictions on candidature for office has been narrowed, as has the range of restrictions allowed in relation to canvassing. Further limits have been placed on the capacity of officials to insulate themselves from criticism by members and from periodic directions from the rank and file.

Despite all this Australia's unions remain oligarchic in character[87] and it has been observed that their politics are more akin to the politics practised in the Namierite Parliament of the eighteenth century than to the twentieth century form of Parliamentary government.[88] The legal imposition of a form of representative democracy[89] has both contributed to this reality and controlled it. The law has been powerless to prevent unions from slipping into a state of passive democracy. It has, however, provided a framework of union government within which those who want to influence policy decisions can do so unless they are part of a small, unrepresentative minority.[90] Hyman would not accept that this framework was democratic but at least he would have to acknowledge that it comes closer to meeting his requirements than does government by passive consent or under a liberal pluralistic system which insists on periodic elections but does not offer the electorate an opportunity to influence decision-making between elections.

81 Howard, W., *op. cit.* 271.
82 CAA s. 132; Regulations, reg. 115.
83 CAA ss 133, 133AA; Regulations, regs 146AA-146AS.
84 CAA Part IX.
85 *Re. V.B.E.F.A.* (1975) 6 A.L.R. 39, 41.
86 CAA s. 2(f).
87 Yerbury, D., *op. cit.* (1980).
88 Martin, R., *op. cit.* (1968) 217.
89 *R. v. Sweeney; ex parte Northwest Exports Pty. Ltd.* (1981) 35 A.L.R. 135; *Jumbunna Coal Mine (N.L.) v. Victorian Coal Miners' Association* (1908) 6 C.L.R. 309.
90 *Cf.* Howard, W., *op. cit.* 270 where the author advances the wider proposition that a union will be democratic if it is 'influenced by those who wish to influence it'.