severance pay.

The decision provides that any period during which an employer contributes to a nominated fund for a worker will **not** count as service towards an award benefit. This decision overcomes any potential for "double-dipping" in relation to industry severance funds.

Although the benefits under the award and centralised industry severance funds are not identical, this decision means that it is possible to opt out of the award provisions; payment to one of the central industry schemes will satisfy employers' award obligations. Consequently, this decision is an important one for the industry.

Another aspect of the decision which will interest employers is that the Commissioner decided that service as an apprentice should count towards severance pay benefits, provided the apprentice works in the industry for at least twelve months after finishing the apprenticeship.

- John Tyrril

30. Signature By Fax

In *Molodysky v Vema Australia Pty Ltd*, Supreme Court of NSW, Cohen J., 20 December 1988, Equity Division No. 4189 of 1988, a case which dealt with New South Wales antigazumping legislation, the issue of a signature communicated by fax arose.

The question was whether the delivery of a facsimile copy of the agreement was in fact service of an agreement signed by the vendor, when only a facsimile signature appeared on it.

Cohen J. relied upon the test formulated in *Goodman v Eban Ltd* (1954) 1 QB 550 that the essential requirements of signing is the affixing in some way, whether by the writing with a pen or a pencil or by otherwise impressing upon the document one's name or 'signature' so as personally to authenticate the document.

Cohen J. stated that when a person sends a signature with the intention that it should be produced by fax, then that person is authorising the placing of his/her signature with the intention that it be regarded as his/her signature. In this instance, the facsimile signature of the vendor on the agreement was intended by him to be regarded as his signature. The copy of the agreement could therefore be regarded as a copy properly signed by the vendor.

- John Tyrril

31. Troubleshooters
- Employees Or Independent Contractors?

Odco v Building Workers Industrial Union of Australia and Others, Federal Court, No VG151 of 1988, Woodward J. 24 August 1989 concerned an action against the BWIU on the basis that officers of the Union had alledgedly induced builders to break their contracts with an organisation called Troubleshooters Available, contrary to the common law, and had entered into agreements with the builders that Troubleshooters' men would not be engaged by them, again contrary to the secondary boycott provisions of the Trade Practices Act. The Union's activities were apparently directed to changing Troubleshooters' methods.

Troubleshooters was a labour hire agency which supplied tradespersons and labourers to work on building sites. The workers supplied by Troubleshooters were union members, but were paid all-in hourly payments, rather than receiving award wages and conditions. According to Troubleshooters, these payments were in excess of award rates and conditions, but the unions position was that the use of labour hire rather than traditional employment under industrial awards could undercut award wages and conditions.

Woodward J. found the tradesmen and labourers who obtained their work in the building industry through Troubleshooters Available were not employees of that company. Each time they took a job, they entered into a fresh contract with Troubleshooters to make their services available to the builder whose work they agreed to perform. The chief reasons that they were not employed by Troubleshooters were that the contract between them and Troubleshooters stressed their independent status, and Troubleshooters exercised no control over the way in which they did their work. There were other indicators which also pointed away from an employer-employee relationship.

There was no contract at all between the men working through Troubleshooters and the builders for whom they performed work. They were there because of separate contracts between the builders and Troubleshooters and between Troubleshooters and the workers. Since there was no contract at all between the builders and the men, there could be no relationship of employer and employee.

Even if wrong about the absence of any such contract between the builders and the workers, Woodward J. did not believe that the workers were employees, but rather were independent contractors, as he was satisfied that that was the relationship which all the parties genuinely intended to create. There was a strong argument that because they were paid an hourly rate, with provision for overtime payments, rather than a price for the job, the workers had an appearance of employees. Other indicators pointed the same way, but there were also a number of indicators pointing in the opposite direction. In the final analysis, Woodward J. believed that the men chose to work as independent contractors, that they were not doing so because of any economic pressures, and that they were entitled to have their independent status recognised.

The leaders and officials of the BWIU and VSBTU honestly believed that work through Troubleshooters was contrary to the Victorian Building Industry Agreement which forbade the making of 'all-in payments' to employees. This was a reasonable belief but, in Woodward J.'s view, was mistaken. The workers did receive 'all-in payments', but were not employees.

As a result of the unions' policy and the beliefs of the officers of the unions, a number of unlawful acts had occurred in 1988 at several sites where Troubleshooters men were working. Union officials, by threats of industrial action, directly and deliberately induced builders to break