QUEENSLAND'S INDUSTRIAL LEGISLATION AND ITS IMPACT ON AUSTRALIA'S HUMAN RIGHTS OBLIGATIONS TO THE INTERNATIONAL COMMUNITY

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When the Commonwealth Government ratified the International Covenant on Civil and Political Rights (ICCPR) to come into force for Australia on 13th November 1980, it undertook not only to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status but also to take the necessary steps, in accordance with its constitutional processes, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant. (1). In addition the Government undertook three other obligations, to ensure that any person whose rights or freedoms recognized in the Covenant were violated should have an effective remedy, notwithstanding that the violation was committed by persons acting in an official capacity; to ensure that any persons claiming such a remedy should have their rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the nation, to develop the possibilities of judicial remedy; and to ensure that the competent authorities would enforce such remedies when granted.(2) As a matter of international law those obligations were immediate and should have been given effect to without delay.(3) Furthermore the ICCPR operates to require those obligations to be met in a way that ensures, that all the provisions of the Covenant extend to all parts of federal states, like Australia, without any limitations or exceptions. (4)

With the apparent purpose of reducing its obligations under the ICCPR to legislate so as to make the law of the States and the acts and practices of their officials subject to the rights guaranteed in it, Australia entered a general reservation to the Covenant. (5) Although the general reservation was not challenged under the established international law practices, its validity as an acceptable reservation and thus as an interpretation of Australia's obligations under the ICCPR was decidedly doubtful and its effect in domestic law far from clear (6) However, the subsequent decisions of the High Court of Australia in Koowarta v Bjelke-Petersen (7) and Commonwealth v Tasmania (8) put it beyond doubt that in the exercise of its external affairs power the Commonwealth Parliament could enact a law to establish, as part of Australian domestic

law, the rights and freedoms set down in , and other aspects of, the ICCPR. Consequently, any State legislation inconsistent with that law to the extent of the inconsistency would be invalid by operation of section 109 of the Constitution. The effect of those two decisions was to make the general reservation meaningless in its terms and untenable as to its apparent intent. On Human Rights Day, 10th December 1984, the then Attorney-General, Senator Gareth Evans, announced that Australia had filed an Instrument of Withdrawal with the Secretary-General of the United Nations withdrawing the general reservations and all but three of Australia's other reservations to the ICCPR. (9) However when notifying its withdrawal of its reservations and declaration, Australia made the following statement;

> Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

It is submitted that that statement has no effect in international law capable of reducing Australia's obligations under Articles 2 and 50 of the ICCPR. Further the statement is vague and capable of many interpretations Its first sentence states the obvious; but its second sentence can be read as meaning as little as that the Commonwealth will use its undoubted constitutional power to implement the Covenant and enter into co-operative arrangements with willing States in relation to the institutions which will exercise those powers granted under Commonwealth legislation or as much as that the Commonwealth will not enter into legislative areas where the States and the Northern Territory are also competent to legislate Whatever shade of meaning is attributed to the statement it is ineffective in international law; consequently Australia's international obligations in relation to the ICCPR stand as stated in Articles 2 & 50 of the Covenant

So far the Commonwealth has taken two small, but important steps towards meeting its obligations under the ICCPR. In 1981 the Human Rights Commission Act was enacted to establish the Human Rights Commission and empower it to report to the Attorney-General and to Parliament on whether Commonwealth laws or the acts and practices of any Commonwealth instrumentality were inconsistent with or contrary to any rights in the ICCPR.(10)

In October 1985 the Hawke Labor Government introduced into the Parliament the Human Rights & Equal Opportunity Bill to replace the Human Rights Commission with a revamped Human Rights & Equal Opportunity Commission, and the Australian Bill of Rights Bill. That Bill, if enacted, will establish as part of this domestic law of Australia a Bill of Rights based closely on the rights set out in the ICCPR. (11) It would operate, but only after a period of five years, to repeal any Commonwealth legislation, enacted before it, that could not be interpreted in a manner consistent with the Bill of Rights. (12) It would also render inoperative any Commonwealth legislation enacted after the Bill came into force which was in conflict with the Bill of Rights, unless that legislation expressly stated that it was to apply regardless of the Bill of Rights. (13) The new Human Rights and Equal Opportunity Commission will be empowered to enquire into whether or not the acts and practices of Commonwealth instrumentalities are inconsistent with the Australian Bill of Rights and to recommend certain actions be taken, including the payment of damages, to remedy the situation if inconsistency is demonstrated. (14)

In relation to its application to the States and the Northern Territory the Bill is rather more complicated. It will not apply so as to render any State or Northern Territory legislation inoperative to the extent that it is inconsistent with the Australian Bill of Rights, nor will it effect the common law of those jurisdictions Further whilst the Human Rights and Equal Opportunity Commission will be empowered to examine State and Northern Territory legislation and report as to whether or not it is consistent will the Bill of Rights (the findings of the Commission will not, of course, affect the status of that legislation), it will not be able to do so without the consent of the Commonwealth Attorney-General.(15)

Under Part V of the Bill the acts and practices of State government instrumentalities, including local government bodies, and Northern Territory government instrumentalities may be inquired into by the Human Rights and Equal Opportunity Commission, but only with the consent of the Commonwealth Attorney-General, to determine whether they infringe rights s t out in the Australian Bill of Rights and if they do, to recommend to the Attorney-General

and the relevant State or Territory Minister that certain actions be taken in relation to those matters and, if appropriate action is not taken within 60 days, to make a further report incorporating the original report and the response from the relevant Minister, which will be laid before both Houses of the Commonwealth Parliament. (16)

This power in the Commission raises the question as to whether it is entitled to inquire into acts and practices which State and Northern Territory governmental instrumentalities are clearly empowered to undertake under legislation and to report on whether those legislatively authorized acts or practices infringe to Bill of Rights, or whether the Commission's power is confined to inquiring into and reporting on those acts and practices of State and Northern Territory government instrumentalities which it considers to be beyond what is permitted by State or Northern Territory legislation or common law and which may infringe the Australian Bill of Rights. The role given to the Commission is far greater under the former interpretation than under the latter, and whilst the question is not without doubt, the wording of clause 9 (2) of the Bill indicates a preference of the legislature for the former interpretation. (17)

Even if the Human Rights and Equal Opportunity Commission were to report that the acts and practices of a State or Northern Territory government instrumentalities infringed the Australian Bill of Rights and recommend certain courses of action including the payment of damages, the State or Northern Territory government instrumentalities infringing the Australian Bill of Rights could ignore those recommendations risking only some political odium for refusing to right a wrong identified by the Commission. The Commonwealth, on the other hand, has an obligation under the ICCPR to ensure that remedies recommended in relation to individuals are complied with. (18)

The Australian Bill of Rights Bill will be justiciable at the instance of individuals only if they are able to show a court dealing with criminal proceedings taken against them under Commonwealth and Territory (other than Northern Territory) laws that their rights under certain parts of the Australian Bill of Rights were infringed in relation to incidents related to those proceedings. (19) The Bill specifically denies individuals any right of action with respect to any other infringement of the Australian Bill of Rights and precludes criminal proceedings in relation to infringements of the Australian Bill of Rights (20)

Because the Bill gives only limited powers to the Human Rights and Equal Opportunity Commission and because the powers of the courts to grant remedies und r the Bill are severely restricted, it falls significantly short of

what the Commonwealth Parliament needs to enact to ensure that Australia meets its obligations under the ICCPR and provide for of the effective establishment and protection of civil and political rights and for effective remedies in relation to those rights throughout the whole of Australia. Recent events and recent enactments in Queensland indicate that such action is urgent.

Discussion of the state of emergency declared in Queensland in February 1985, the Order in Council made under it and the legislation which followed it forms the major part of this article. But before embarking on that discussion it is necessary to state the thesis of this article which is that because the Commonwealth Parliament has the power to enact a law implementing its obligations under the ICCPR and to make that law apply throughout Australia so that any other law, Commonwealth, State or Territorian which is inconsistent with it is impliedly repealed, rendered inoperative or rendered invalid to the extent of the inconsistency, the failure of the Commonwealth Parliament to enact such a law places Australia in breach of its international obligations under the ICCPR. This is because such a failure to legislate allows both the continuation in force of inconsistent State and Northern Territory legislation and the enactment of further such inconsistent legislation. It also allows, because of this restriction on the capacity of the powers of the Human Rights and Equal Opportunity Commission to exercise its powers, the likelihood that many of the acts and practices of State and Northern Territory government agencies which are inconsistent with the Bill of Rights will continue without persons whose rights under the ICCPR are being violated thereby having any, let alone any effective, remedy in relation to those violations.

On 7 February 1985 the Governor-in-Council of the State of Queensland proclaimed a state of emergency under section 22 of the State Transport Act 1938-1981 which provided for such a proclamation where it appears to the Governor-in-Council that;

> circumstances exist or are likely to come into existence within the State, whether by fire, flood, storm, tempest, Act of God, or by reason of any other cause or circumstance whatsoever whereby the peace,welfare, order, good government or the public safety of the State of any part thereof is or is likely to be imperilled.

The second and third paragraphs of the section also provide;

> When any such Proclamation of emergency is in force in the State or in any part of the State, the Governor in Council may by Order in Council give such directions and prescribe such matters as he shall deem necessary or desirable to secure the peace, welfare order, good government, and/or the public safety of the State or any part of the State according as a state of emergency has been declared under this Act to exist within the State or within such part thereof. And without limiting the generality of such powers the Governor in Council may make provisions for securing the essentials of life to the people generally or, in any particular case, the securing and regulating of the supply and distribution of food, water, fuel, light, and/or other necessities, the provision and maintenance of the means of transit, transport, locomotion, and/or other services, and prescribing such other acts, matters, and things as the Governor in Council shall consider necessary or expedient to give effect to any such Order in Council. And every such order and direction shall be obeyed and have full force and effect accordingly.

Order in Council No. 25D of 8 February 1985 was made pursuant to the proclamation of the state of emergency. It authorized the Electricity Commissioner to take whatever steps he considered were necessary to have work performed to restore and maintain the supply of electricity, including directing any person, whether or not an employee of the Queensland Electricity Commission (QEC) or the South East Queensland Electricity Board (SEQEB), who was, in his opinion,capable of carrying out such work to so restore and maintain that supply

of load-shedding and which caused substantial inconvenience to the public. The proclamation continued in force until 7 March 1985; by then the Electricity (Continuity of Supply) Act 1985 (Electricity Act) had been enacted and brought into force. It was intended to continue the powers given to the Electricity Commissioner under the Order in Council, to vary industrial awards in the electricity supply industry, to reduce the powers of the Queensland Industrial Commission in relation to that industry and strengthen power of the executive arm of government to deal with picketing and other forms of industrial action by workers in the industry. The Act was amended by the Electricity (Continuity of Supply) Act Amendment Act 1985 (Electricity Amendment Act) which ven further enhanced the power of the executive arm of government.

Section 3 of the Electricity Act empowers the Electricity Commissioner to take whatever steps he or she deems necessary to restore and maintain the electricity supply, including the power to direct anyone to restore or maintain that supply. Section 4 renders anyone who fails to comply with a direction of the Commissioner liable to summary dismissal and a penalty of up to $1000. Section 5 creates a series of offences designed to outlaw picketing of any kind and many other of the techniques of pursuasion whether peaceful or not used by workers in industrial disputes. Sections 5A and 5B, added by the Electricity Amendment Act, give police officers new powers of arrest and the right, under threat of a penalty, to ask a wide range of persons for their names, addresses and dates of birth.

Section 7 continues in effect dismissals of employees made by the General Manager of SEQEB under the Order in Council, whilst section 7 authorizes SEQEB to enter into contracts of service inconsistent with the Queensland Electrical Engineering Award in that they provide for longer working hours, delete some benefits from the Award and impose a no strike clause on employees under those contracts. Section 8 precludes to the Queensland Industrial Commission from directing the re-instatement or re-employment of persons dismissed under the Order in Council or from taking any order or doing anything to reduce the impact of sections 3 and 7 of the Act on workers.

Section 9 provides for a method of converting criminal penalties under the Act into civil debts so that they may be recovered by proceedings, including bankruptcy, that are available in relation to civil debts. Section 9A, added by the Electricity Amendment Act, varies the law of evidence so as to make it much easier for the prosecution to prove certain elements of offences cr ated under the Electricity Act

Hard upon the heels of the Electricity Act came the Industrial Conciliation & Arbitration Act Amendment Act 1985 (Industrial Act) which makes a series of amendments to the Industrial Conciliation and Arbitration Act 1961-1983 These amendments have effect not just in the electricity supply industry, but across the whole field of industrial conciliation and arbitration in Queensland. First the definition of strike in section 5 of the Principal Act is broadened to include not only withdrawal of labour but also other weapons used in industrial disputation which are well short of a strike such as working to regulations, overtime bans, "go slows" stop work meetings; indeed any change of work pattern from the normal. In addition sympathy strikes and black bans are now included in the definition. Penalties are increased substantially by sections 3 and 4, whilst resignation from unions is made easier by section 5 Section 6 creates a series of offences for those who incite or even encourage or advise a person to go on strike as it is now widely defined. However the section also creates offences relating to lock-outs. Sections 7 and 8 made it much easier to obtain the deregistration of a union and section 8 places that power effectively in the hands of the Government. Section 9 empowers the Queensland Industrial Commission to direct secret ballots whilst sections 10,11 and 12 protect unionists who seek secret ballots and employees who are not trade unionists. Section 13 limits the capacity of trade unions to recover union dues and levies as well as fees and fines from members. It is to be contrasted with the extensive power to recover penalties against unions given by section 9 of the Electricity Act. Finally section 14 of the Industrial Act introduces a number of presumptions, deeming provisions and other concessions in the kind of evidence required of the prosecution to prove offences under the Act.

On 20th March 1985, the Queensland Government introduced the Bill for the Industrial (Commercial Practices) Act Amendment Act 1985 (Commercial Practices Act) into the Queensland Parliament. The Bill was enacted and brought into force the next day. The Industrial (Commercial Practices) Act 1984 had been enacted to ensure that if the Hawke Labor Government had succeeded in having sections 45D and 45E of the Trade Practices Act 1974 (Commonwealth) repealed, as was its policy, then similiar provisions to deal in harsh terms with secondary boycotts would remain in force in Queensland. That Act was used as the vehicle with which to introduce provisions prohibiting and severely punishing primary boycotts namely, demarcation disputes, strikes called without reasonable notice and strikes called to enforce preferences to members of a union. These provisions like those of that Industrial Act apply not only to strikes in the electricity supply industry, but also tostrikes in any industry and within the public service in Queensland

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The fifth and last piece of legislation in this series Electricity Authorities Industrial Causes Act 1985 (Electricity Authorities Act) came into force on or about the 30th April 1985. By operation of section 10 of the Act the jurisdiction of the Industrial Commission to deal with industrial causes in the electricity authorities is removed and, by section 11, invested in the Electricial Authorities Industrial Causes Tribunal. The jurisdiction of the Industrial Court in relation to the electricity authorities is also removed, by section 18, with the result that the new Tribunal's decisions are final. That fact is confirmed by section 21 which states the Tribunal's decisions are"final and conclusive and shall not be impeachable for informality or want of form". In discharging its functions under the Act, the Tribunal is to have regard, under section 19, to the following considerations;

(a) the prosperity of the economy of Queensland;

(b) the economics of the operation of Electricity Authorities in Queensland in general and, in particular, the Electricity Authority concerned in the proceeding in question, and the consumers' interests therein;

(c) the likely results on the other sectors of industry within Queensland of the decision to be made or of compliance with the recommendation or indication to be given;

(d) the role and responsibilities of management of Electricity Authorities.

It is to be noted that none of those considerations involves questions of the interests of the employees whether they be issues relating to industrial health and safety, or wages and conditions or any other matter of justifiable concern to employees. Section 19 precludes the Tribunal from taking those matters into account. By operation of section 15, the Crown may intervene at any time in proceedings before the Tribunal and become a party to them.

Under section 22, any grant made of a preference to trade union members in an electricity calling, by an Act or award, is removed. Participating in or inciting, counselling or abetting a strike in an electricity calling is made an illegal act by section 23. If an employee in an electricity calling participates in a strike, under section 24, that constitutes a fundamental breach of his or her contract of employment which entitles an employer to treat that contract as discharged. But further, under section 25, if that striking employee was receiving a benefit under an agreement which has the effect of an award of the Industrial Commission, by operation of section 40(2) of the Industrial Conciliation and Arbitration Act 1961-1985, then that agreement is discharged in relation to that employee. It must be remembered that the definition of the term "strike" for the purposes of the Act is the very broad definition in the Industrial Act already referred to.

In addition to these matters, under section 27 of the Electricity Authorities Act, the employer of striking employees in an electrical calling may dismiss or suspend without pay any of them. An employer who invokes or takes advantage of the provisions of sections 24,25 and 27 must give notice to the affected employees within 7 days. They then have 21 days to apply to the "proscribed authority" to review the employer's invocation or taking advantage of those sections. In relation to employees of the QEC, the prescribed authority is the Minister for Mines and Energy and, in relation to employees of other Authorities, it is the Electricity Commissioner. But, under section 29, an application for review may be made only on the ground that the employee did not participate in the strike, and the application for review does not stay the operation of the d triment suffered by the employee. The application for r view, under the circumstances and conditions set out, is

the only way the actions of the employer under sections 24,25 and 27 may be reviewed. No other court or tribunal may test them, not even the new Electricity Authorities Industrial Tribunal. If it does do anything to relieve an employee of any penalty imposed persuant to sections 25 and 27, then under section 30, that action has no force or effect. Similarly, under section 39, any arrangement entered into between any employer and employee to avoid the operations of sections 25 and 27 or to protect an employee from the effect of those sections shall have no force or effect.

In other words the Act introduces a new system to deal with industrial disputes in the electricity supply industry which is required to disregard the interests of employees, which removes the right to strike as widely defined and which imposes draconian penalties on those who take part in strikes with no right to have those penalties reviewed save by a Minister or by one of the industry's leading employers, the Electricity Commissioner.

Having given an overview of the Order in Council and the subsequent legislation, it is now necessary to consider in detail how they cause Australia to be in breach of its international obligations under the ICCPR. It will be noted in the course of that consideration that certain elements of the Order in Council and the subsequent legislation are inconsistent with the terms of International Labour Organisation Convention 87 Freedom of Association and Protection of the Right to Organize (1948) (ILO Convention 87) and International Labour Organization Convention 98 Right to Organize and Collective Bargaining Convention (1949) (ILO Convention 98) which Australia has ratified without reservations or declarations. Whether those inconsistencies cause Australia to be in breach of its international obligations under those Conventions is difficult to determine. Both of them intend that ratifying nations will give immediate effect to them. Article 1 of ILO Convention 67 implies this (21) as does the whole of the tenor of ILO Convention 98. On this point the wording of those Conventions should be contrasted with the wording of Article 1 of the Convention concerning Forced or Compulsory Labour (1930) (ILO Convention 20) which assumes that there will be a transitional period between the time a nation ratifies the Convention and the time when compulsory labour is totally suppressed.(22) These matters will be dealt with under a series of headings.

The constitutional difficulties of federal nations are recognised and are specifically addressed in Article 19(7) of the International Labour Organization Constitution.(23) The Australian constitutional system allows the Australian Conciliation and Arbitration Commission to deal with industrial disputes which go beyond

the boundaries of one State. Consequently if an industrial dispute which begins as one confined within the boundaries of one State and then subsequently takes on the character of an interstate dispute it can be determined by the Australian Conciliation and Arbitration Commission which may make an award which will prevail over the State legislation. (24) The right of the Electrical Trades Union to bring such a dispute, which arose out of the events which gave rise to the Order in Council and to the legislation discussed in this article, to the Australian Conciliation and Arbitration Commission was upheld by the High Court of Australia in R. v Ludeke; Ex parte Queensland Electricity Commission.(25) But an attempt by the Commonwealth Parliament to take the dispute out of the reach of Queensland State law by legislative means was held by the High Court to be unconstitutional. The Court held the Conciliation and Arbitration (Electricity Industry) Act 1985 (Commonwealth) to be invalid because it discriminated against the State of Queensland by subjecting a Queensland State instrumentality to a burden or disability not imposed on persons generally and which was imposed under a law the object of which was to restrict, burden or control an activity of the State.(26)

These two decisions, handed down on the same day, indicate the subtlety and complexity of the Commonwealth constitutional powers to legislate for and operate in the field of industrial relations. The Commonwealth Parliament may use its external affairs power to legislate to give effect to the ILO Conventions, but statements made by all the judges in Queensland Electricity Commission v Commonwealth in relation to obligation to preserve the federal nature of the Constitution serve as warnings that there are limits to the exercise of this power.(27) Nevertheless it is submitted that a law enacted by the Commonwealth Parliament to give effect to Australia's international obligations under ILO Conventions 87 and 98 and to establish, throughout the Commonwealth, a general legal regime that State Parliaments had to comply with which would prevent them from legislating in a manner inconsistent with industrial rights established under those Conventions, would be a valid law of the Commonwealth.

Civil Conscription

Did the Order in Council introduce a system of civil conscription or forced or compulsory labour inconsistent with the ICCPR? Article 8 paragraph 3 of the ICCPR provides, in part, as follows;

> 3(a) No one shall be required to perform forced or compulsory labour;

(b) For the purpose of this paragraph the term 'forced or compulsory labour' shall not include;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

The provision is identical with Article 4 paragraphs 2 and 3 of the European Convention on Human Rights, a document upon which the ICCPR is based, and much of which is reproduced in the ICCPR.

It is useful to consider how that has been interpreted by the European Commission and Court of Human Rights. In a series of cases, none of which it determined on its merits, the Commission developed the notion that for there to be forced or compulsory labour in breach of the European Convention, two cumulative conditions have to be satisfied;(28)

> not only must the labour be performed by the person against his or her will, but either the obligation to carry it out must be 'unjust' or 'oppressive' or its performance must constitute 'an avoidable hardship', in other words be 'needlessly distressing' or 'somewhat harassing'

However the European Court of Human Rights, in its most recent decision on this question, rejected this test preferring instead to adopt as the starting point for interpreting this provision the definition in ILO Convention 29 which states that forced or compulsory labour shall mean; (29)

> all work or service which is exacted from any person under menace or any penalty and for which the second person has not offered himself voluntarily.

The next step is then to have regard to all the circumstances of the case in the light of the underlying objectives of Article 4 of the European Convention before deciding whether particular service required fell within the definition of forced or compulsory labour. (30)

The opinions and decisions of the European Court of Human Rights (and the Commission) are treated with considerable respect in Europe and elsewhere The application of the approach of the Court in the Van der Mussele case (31) to this country would result in Australia being in breach of its international obligations under the

ICCPR The process by which that conclusion is reached at must be explained. First, Order in Council 25 D empowered the Queensland Electricity Commissioner to direct any person whether or not an employee of th QEB or SEQEB who, in his opinion, was capable of carrying out such work to restore and maintain supply. Such a direction could be given at any time to anyone in Queensland regardless of whether that person was self-employed, an employee in private enterprise, someone who was not a qualified electrician, a person who had just been sacked by SEQEB or an employee of SEQEB who was on strike. The Order in Council did not require the Electricity Commissioner either to pay or compensate the person directed to work. Even though Article 8 paragraph 3 of the ICCPR states that forced or compulsory labour shall not include any work exacted in cases of emergency (or calamity) threatening the well-being of the community, the Order in Council is too widely drawn to fit within that exception.

Secondly, it may be possible to categorize the Order in Council as either a legislative or an administrative act. (32) If it is categorized as legislation then for the reasons already outlined it would cause Australia to be in breach of its obligations under the ICCPR If it was categorized as an administrative act, then much would depend on the extent of the power of the Human Rights and Equal Opportunity inquire into Commission the acts or practices of State government instrumentalities for consistency with the provisions of the ICCPR . If the broad interpretation of the Commission's power were adopted, then some remedy would be available, but it would not be available if the narrower interpretation were adopted. However, it should be noted that from the time of proclamation of the Order in council until the Australian Bill of Rights Bill and its associated legislation come into force Australia will be in breach of its international obligations under the ICCPR for failure to provide a remedy in relation to these administrative breaches of the provisions of the ICCPR.

This question of civil conscription arises again in at least three ways under the Electricity Act. First under section 3 of the Act the Electricity Commissioner is authorized;

> to direct any person whatever who, in his opinion, is capable of carrying out the necessary work to provide, to maintain or to restore a supply of electricity.

For the reasons outlined in relation to the Order in Council that legislative provision is too widely drawn; it would be inconsistent with any legislative enactment of Article 8 paragraph 3 of the ICCPR by the Commonwealth Parliament. Because of the operation of section 109 of the Constitution it would be invalid to the extent of its inconsistency with such Commonwealth legislation. Because the Commonwealth Parliament has failed to enact legislation of the kind, Australia is in breach of its absolute and immediate obligation under Article 2 paragraph 2 of the ICCPR to adopt such legislative or other measures as may be necessary to give effect to the rights recognized under the Covenant.

Secondly, under section 3(b) of the Act, the Electricity Commissioner may give directions to any person he considers to be capable of carrying out the necessary work. Section 4 provides for the penalty of employees of the QEC or of any Electricity Board, but since there is no penalty imposed in the Act on others who fail to comply with a direction, sections 204 and 205 of the Criminal Code come into play. Those sections provide as follows;

> 204. Disobedience to statute law. Any person who without lawful excuse, the proof of which lies on him, does any act which he is, by the provisions of any Public Statute in force in Queensland, forbidden to do, or omits to do any act which he is, by provisions of any such Statute, required to do, is guilty of a misdemeanor, unless some mode of proceeding against him for such disobedience is expressly provided by Statute, and is intended to be exclusive of all other punishment. The offender is liable to imprisonment for one year.
> 205. Disobedience to lawful order issued by Statutory authority. Any person who without lawful excuse, the proof of which lies on him, disobeys any lawful order issued by any court of justice, or by any person authorized by any Public Statute in force in Queensland to make the order, is guilty of a misdemeanor, unless some mode of proceeding against him for such disobedience is expressly

> provided by Statute, and is intended to be exclusive of all other punishment. The offender is liable to imprisonment for one year.

In those circumstances it is clear that work exacted from a person who is not an employee of one of the named public utilities is work exacted under menace of a heavy penalty, namely imprisonment for one year. Further, it can be asserted with considerable confidence that it is inconsistent with the underlying objectives of Article 8 of the ICCPR to require a person, not an employee of a relevant public utility, to work to restore and maintain the electricity supply. Because of that, section 3 (b) of the Electricity Act is inconsistent with Article 8 of the ICCPR

The third way is under section 4 which provides;

> Any employee of the Queensland Electricity Commission or of any Electricity Board who feels to comply forthwith with a direction of the Electricity Commissioner given to him or her pursuant to section 3 is liable -
>
> (a) to summary dismissal, notwithstanding the provisions of any Award;
>
> and
>
> (b) to a penalty not exceeding $1,000

In other words such an employee is directed to work under threat of a substantial penalty. But do the underlying objectives of Article 8 of the ICCPR operate to allow forced labour in these circumstances or do they support the right of employees in key industries, like the electricity industry, to withdraw their labour and not be forced back to work by directions of the kind that can be given under section 3 of the Act? The impact of sections 3 and 4 of the Act is so broad and so draconian that it cannot be said that the underlying objectives of Article 8 of the ICCPR would either support or condone them. This is particularly so when it is appreciated that although Article 22 of the ICCPR, ILO Convention 87 and ILO Convention 98 do not create a right to strike, they all imply the legitimacy of the strike as a weapon to be used during industrial organization and negotiation Furthermore the use of the strike has long been one of industrial bargaining techniques in Australian industrial relations All these circumstances combine to render sections 3 and 4

of the Electricity Act inconsistent with Article 8 paragraph 3 of the ICCPR.

Civil conscription is just the first of a long list of ways these pieces of legislation actually or arguably breach the ICCPR. Freedom of assembly is the next issue.

Freedom of Assembly

Section 5 of the Electricity Act provides;

(1) A person shall not either alone or in concert with any other person -

(a) do any act that is calculated to obstruct or interfere with the proper performance by any person of duties ordinarily performed by him or her in the course of his or her employment in connection with a supply of electricity;

(b) do any act that is calculated to obstruct or interfere with the proper provisions of services by any person who is voluntarily providing his or her services in connection with a supply of electricity for the purpose of preserving life, health, welfare or safety of any person or persons or who in performing work in compliance with a direction given by the Electricity Commissioner;

(c) do or omit to do any act, which act or omission is calculated to harass, annoy or cause harm or distress to any person on account of -

(i) his or her performance of duties ordinarily performed by him or her in the course of his or her employment in connection with a supply of electricity; or

(ii) his or her voluntarily providing services in connection with a supply or electricity for the purpose of preserving life, health, welfare or safety of any person or persons or

> his or her performing work in compliance with a direction given by the Electricity Commissioner.

Section 5A empowers the police to arrest persons found committing, or persons they reasonably believe have committed, offences against section 5. Section 5 is expressed in extremely broad terms and it is understood that it has been used as the basis for police arresting persons who have been present when others have demonstrated peacefully concerning industrial issues. The section has also been relied upon to arrest those actively involved in such peaceful demonstrations.

Article 21 of the ICCPR provides;

> The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of his right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedom of others.

The right of peaceful assembly is seen as fundamental in any democratic society and restrictions on that right may not be lightly imposed. If section 5 makes it an offence merely to be present near a demonstration and to be apparently sympathetic to it, then the section is clearly inconsistent with Article 21 of the ICCPR. Similarly any police action in arresting such persons under powers granted by section 5A of the Act would be inconsistent with the Article. Also, if section 5 makes it an offence for anyone peacefully to demonstrate and section 5A empowers the police to arrest for such peaceful demonstration, then on that ground as well, those sections of the Act and the police action under them are inconsistent with Article 21 of the ICCPR.

Section 5B empowers a police officer who finds a person in the company of another person who the police officer finds committing or believes on reasonable grounds and has committed an offence against section 5, to demand the name, address and date of birth of that person. That person must provide the information demanded under threat of being arrested and charged for failing to provide it. (33)

It should be noted that the person in the company of another is not being charged with an offence but is being required to give a police officer, an agent of the state,

information which could be recorded. This requirement represents a form of harrassment by agents of the state of persons exercising their right to assemble and as such it represents an injustified infringement of that right and so is inconsistent with Article 21 of the ICCPR.

Freedom of Speech

Freedom of speech is another right infringed by the Elecricity Act. It is understood that persons taking part in peaceful assemblies in the form of picketing outside SEQEB properties have been arrested and charged under section 5 (c) of the Electricity Act for shouting "scab" at non-striking workers who were going onto those properties. If persons were convicted of offences under section 5 (c) for such activity, then that section and the actions of police arresting for offences under it would be inconsistent with the right to freedom of expression in Article 19 paragraph 2 of the ICCPR. If section 5 (c) had this effect it would be too broad in its impact to be an allowable restriction under paragraph 3 of that Article. Article 19 of the ICCPR provides;

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (order public), or of public health or morals.

Apparently some members of the media have expressed concern that they may be liable by operation of section 7 of the Criminal Code to be treated as parties to offences under section 5 (c) of the Act if they reported, broadcast or

published any words that were critical of non-striking workers. If such a construction were placed on the section that would constitute another and very serious ground for it being inconsistent with Article 19 of the ICCPR.

Continuing effectiveness of Dismissals under section 6 of the Electricity Act

The General Manager of SEQEB exercising powers granted him by the Order in Council dismissed some of employees of SEQEB for remaining on strike. Section 6 of the Electricity Act continues those dismissals in force after the state of emergency has been lifted. Under Article 3 paragraph 1 of ILO Convention 87 organizations of both workers and employers have the right "to organize their administration and activities". Paragraph 2 of the Article requires public authorities to refrain from interference which would restrict these rights or impede their lawful exercise. The Freedom of Association Committee of the ILO recognizes the right to strike as a legitimate means of organizing the activities of trade unions and of futhering and defending the interest of workers. Even though that Committee acknowledges that the right to strike may be properly restricted or even prohibited in essential services, where this is done, the Committee requires that adequate, impartial and speedy conciliation and arbitration procedures be available. The power given the General Manager to dismiss employees of SEQEB under the Order in Council was inconsistent with the industrial relations procedures established in Queensland. The statutory continuation of those dismissals under section 6, particularly when linked with section 8 (a) (1) of the Act which prevents the Industrial Commission of Queensland from directing the re-instatement or re-employment of persons suffering those dismissals operates so as to prevent the conducting of any adequate, impartial and speedy conciliation and arbitration procedures. Consequently the section is inconsistent with Article 3 of ILO Convention 87.

Removal of the Right to Strike

Section 7 of the Electricity Act empowers SEQEB to enter into contracts which not only alter the terms of a major award in the industry, but also remove the right to strike as defined in the Industrial Act. The Act was amended to give enormous breadth to the meaning of the term "strike". As already mentioned, "go slows", working to regulations, overtime bans, black bans and many other forms of industrial action short of actual withdrawal of labour are now defined as strikes.

None of the treaties to which Australia is a party establishes, in direct terms, a right to strike. The nearest that any treaty comes to this is the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provides in Article 8, paragraph 1(d) that State Parties to the treaty undertake "to ensure the right to strike,provided that it is exercised in conformity with the laws of the particular country". But, as already mentioned, the Freedom of Association Committee of the ILO recognizes a right to strike which is to be implied from ILO Conventions.

Article 22 paragraph 1 of the ICCPR which states;

> Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

is, in its relevant parts, identical with Article 11 paragraph 1 of the European Convention on Human Rights. The European Court of Human Rights has noted that that provision leaves to each nation a free choice as to the means to be used towards the end of protecting the interests of trade union members, and has gone on to observe; (34)

> The grant of a right to strike represents without any doubt one of the most important of these means, but there are others. Such a right, which is not expressly enshrined in Article 11, may be subject under national law to regulation of a kind that limits its exercise in certain circumstances.

The right to strike has long been a central part of industrial relations in all parts of Australia. The European Court of Human Rights acknowledges that it may by law, be limited in its exercise in certain instances. Limitation in its exercise is very different from removal of the right which is what the Queensland Government has done through the agency of section 7 of the Electricity Act. But the views of the European Court of Human Rights and the Freedom of Association Committee of the ILO referred to earlier were expressed in relation strikes as traditionally understood. The effect of removal of the right to strike is greatly increased by the extension of the definition of strike. The result is that section 7 of the Act is inconsistent Article 22 paragraph 1 of the ICCPR.

Limitation of the Industrial Commission's Jurisdiction.

Under section 8 of the Electricity Act the jurisdiction of the Industrial Commission of Queensland to make any decision or recommendation or give any indication in relation to re-instatement or re-employment of any person whose dismissal was declared to continue to be lawful and effectual under section 6 of the Act or who was summarily dismissed for failure to comply with a direction of the Electricity Commissioner under section 3 of the Act has been removed. So has its jurisdiction which could be used to negate or avoid the broad powers of the Electricity Commissioner under Section 3 of the Act or to vary the terms of employment prescribed in the Order in Council or section 7 (3) of the Act.

ILO Conventions 87 and 98 impose on the State Parties to them, both explicitly and implicitly, obligations to establish and maintain systems which allow for collective bargaining and, where part of the national tradition, mechanisms for conciliation and arbitration. This is dealt with explicitly in Article 11 of ILO Convention 87 which states;

> Each member of the International Labour Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.

and in Articles 3 and 4 of ILO Convention 98 which state;

> Machinery appropriate to national conditions shall be established where necessary, for the purpose of ensuring respect for the right to organize as defined in the preceding articles.
>
> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers of employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

In addition it is to be implied from Article 22 of the ICCPR that appropriate mechanisms which both trade unions and employer organizations may operate to achieve their goals are to be established and maintained by State Parties to that Covenant.

In Australia the machinery appropriate to national conditions in the field of industrial relations is found in the long established Commonwealth and State institutions which conciliate and, where necessary, arbitrate industrial disputes. A government cannot remove significant parts of that machinery unless it has a some substantial reason that would justify it imposing restrictions allowed by the ILO Conventions and the ICCPR on the exercise of the right to form and join trade unions. The removal of jurisdiction from the Industrial Commission of Queensland effected by section 8 of the Act could not be justified in those terms. It should be recalled that when the Freedom of Association Committee of the ILO recognized that the right to strike could be restricted in essential industries in certain circumstances, it required that when that right was restricted, "adequate, impartial and speedy conciliation and arbitration procedures" should be available. By legislation the Queensland Government has sought to remove the right to strike and also to remove essential elements of the conciliation and arbitration procedures. As a consequence section 8 of the Electricity Act is inconsistent with ILO Conventions 87 and 98 and with Article 22 paragraph 1 of the ICCPR.

Creation of a Civil Obligation Without a Hearing.

Under section 9(2) (3) and (4) of the Electricity Act, when a person is ordered to pay a penalty or to pay costs as a result of a conviction for a criminal offence under the Act, which would normally lead to an order of imprisonment or levy and distress for default, the clerk of the court is required to furnish to certain persons a certificate, relating to the order, which may then be registered in a court of civil jurisdiction. Upon registration of the certificate it is deemed to be a judgement of that court, for the amount of the penalty together with any costs ordered and the costs of registration of the certificate, all of which may then be recovered as a judgement debt of that court.

The effect of that provision is to convert a liability arising in a criminal matter into a civil obligation to pay a judgement debt by using the administrative procedures of a court, but without giving the person who thereby incurs the civil obligation the right to make representations to a court before the civil obligation is created or imposed.

Article 14 paragraph 1 of the ICCPR provides that in the determination of a persons "rights and obligations in a suit at law", that person is entitled to "a fair and public hearing by a competent, independent and impartial tribunal established by law". Section 9 (4) of the Act states,

> (4) The registrar of a court to whom a certificate referred to in subsection (3) is duly produced for registration shall, upon payment of the appropriate fee, register the certificate in the court and thereupon the certificate shall be a record of the court in which it is registered and the order to which it refers shall be deemed to be a judgement of that court, duly entered, obtained by the complainant, or other persons to whom the certificate was furnished, as plaintiff against the person in default as defendant for the payment to the plaintiff of money comprising -
>
> (a) the amount of the penalty;
>
> (b) any costs ordered to be paid by the person in default in the proceeding in which the penalty was imposed;
>
> (c) costs of registration of the certificate in the court to the intent that like proceedings (including proceedings in bankruptcy) may be taken to recover the amount of the judgment as if the judgment had been given by the court in favour of the plaintiff.

and by its terms creates a suit at law between the person who registers the certificate, as plaintiff, and the offender, as defendant, for the payment of money, whilst denying the offender, as defendant, the right to contest the extent of the debt or to raise any issues of law or fact relevant to the alleged debt before a court. It is submitted that this amounts to at least an arguable case that section 9(2) (3) and (4) of the Act are inconsistent with Article 14 paragraph 1 of the ICCPR.

The Industrial Act also places Australia in breach of its international obligations under the ICCPR and ILO Conventions 87 and 98. This assertion is justified under a number of headings below

Broadening of the Definition of Term 'Strike'.

Section 2 of the Industrial Act broadens the definition of "strike" to include industrial relations actions not usually perceived as part of the notion of a strike. For reasons already outlined in relation to section 7 the Electricity Act, that renders this section inconsistent with Article 22 of the ICCPR.

Interference With Rules Of Trade Unions.

Section 6 of the Industrial Act makes it an offence for a union or any other person whether or not a union officer, union employee or union member to incite, advise or encourage a person who has either failed or refused to participate in a strike to act to the prejudice of an employee. The use of the strike is a normal and well accepted part of industrial relations activity and in any strike situation it is normal for some employees, for a wide range of reasons, including ideological and financial ones, to be reluctant to go on strike. In these circumstances it is usual for their work colleagues, including union members and sometimes union officials, to encourage them to join the strike. To make this activity criminal, particularly when there is no element of a threat of violence or retribution of any kind, is an unwarranted interference with the right of persons to form and join trade unions for the protection of their interests and is inconsistent with Article 22 of the ICCPR. The section is also inconsistent with the rights expressed or implied in Articles 1 to 11 of ILO Convention 87 and Articles 1 to 4 of ILO Convention 98 . Section 6 creates similar offences in relation to employers. These are also inconsistant with the ICCPR and the ILO Conventions for the reasons already outlined.

Because section 6 of the Industrial Act makes it an offence to speak to a person in such a way is to encourage that person to join a strike it represents an unwarranted infringement of the right to freedom of speech and so renders the section inconsistent with Article 19 paragraph 2 of the ICCPR.

Removal of a Union's Registration by the Government.

Under section 8 of the Industrial Act the relevant Minister, the Chief Industrial Inspector or any other person may apply to the Full Bench of the Industrial Commission for a declaration that a trade union has failed to comply a direction or order of the Commission or its Full Bench. If the Full Bench is satisfied that the union has failed to comply with the direction or order, then it must issue a

declaration to that effect. The Governor in Council may, up to six months after the declaration has been made, either suspend the registration of a union for up to six months or cancel it entirely. The effect of that provision is, in the circumstances in which it is activated, absolutely to remove the discretion of the Queensland Industrial Commission and Industrial Court in relation to de-registration of trade unions. It is established practice in Australia that applications for de-registration of unions are granted only in the last resort after a long history of disregard for the conciliation and arbitration procedures on the part of the union has been demonstrated.

Section 8 of the Act effectively places the suspension or deregistration of a union in the hands of the Government of the day. This is because, by consitutional convention, the Governor in Council acts only with and in accordance with the advice of the Cabinet. Consequently section 8 of the Act is directly inconsistant with Article 4 of ILO Convention 87 which provides;

> Worker's and employers organizations shall not be liable to be dissolved or suspended by administrative authority.

The section is also inconsistent with Article 22 of the ICCPR.

Alteration of the Rules of Evidence.

Under section 14 (b)(h) of the Industrial Act when the prosecution is attempting to prove offences of incitement of counselling by speech or statement, it is required to prove no more than "the substance of the speech or statement claimed to consistute the incitement or counselling". The court or tribunal dealing with the matter does not have to be satisfied or informed of the actual words used.

This means that a person may be convicted on the evidence of a government agent who either concocted the substance of the speech or statement or, due a failure to appreciate the real meaning of what was said, wrongly recorded the substance of the speech or statement. This provision is inconsistent with Article 14 paragraph 1 of the ICCPR which requires that a person charged with a criminal offence is given a fair trial. This implies that the person will be tried according to the actual evidence and not some other person's impression of the "substance" of the evidence.

It is also inconsistent with paragraph 2 of Article 14 which provides;

> Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

The implication arising from this paragraph of the ICCPR is that a person will be presumed innocent until proved guilty according to the real and not the assumed evidence.

The same arguments may be made, though perhaps not so strongly, in relation section 14 (b) (i) of the Act, which provides that if a speech or an extract of it is published or broadcast and is attributed by that publisher or broadcaster to a person on behalf of an industrial union then in the absence of evidence to the contrary that is conclusive evidence not only of the substance of the speech, but also that it was made by the person to whom it was attributed and further that the union procured that person to make the speech. That provision relieves the prosecutor of having to prove by direct evidence key elements of an offence and instead placed the burden on the defence to go into evidence to disprove press reports which are notoriously inaccurate in that they usually pick out the sensational aspect of a speech and fail to report the context of those remarks and the general tenor of the speech. In that way the provision flys in the fall of the notion of a fair trial based on accurate and testable evidence brought by the prosecution which is the basis of trial procedure both under the ICCPR and at common law.

Reversal of the Onus of Proof.

Sections 14 (b) (f) and (g) of the Act reverse the onus of proof in criminal proceedings by providing that certain matters shall be presumed against the defendant unless he or she is able to show the contrary "to the satisfaction of the tribunal before which the proceedings are taken". The question arises as to whether this reversal of the onus of proof is inconsistent with Article 14 paragraph 2 which is set out above.

There is little in the jurisprudence of the European Commission and Court of Human Rights to assist in this matter. In application 5124 of 1971, the European Commission dealt with a rebuttable presumption of fact in an offence relating to living off the

immoral earnings of a prostitute in the United Kingdom. It treated this presumption as an exception to Article 6 paragraph 2 of the European Convention which is in the same terms as Article 14 paragraph 2 of the ICCPR and said that the test as to whether the exception was reasonable and thus acceptable was whether the exception "is to be considered reasonable in the interests of an effective maintenance of the legal order and whether the accused has been given an adequate opportunity to furnish evidence of his innocence". (35)

The Supreme Court of Canada considered this question in relation to section 2 (f) of the Canadian Bill of Rights 1961 which is in the same terms as Article 14 paragraph 1 of the ICCPR. In R v Shelly (36) Laskin CJC giving the majority judgement in which three other judges concurred, said; (37)

> This Court held In R v Appleby, (38) that a reverse onus provision, which goes no farther than to require an accused to offer proof on a balance of probabilities, does not necessarily violate the presumption of innocence under s.2(f). It would, of course, be clearly incompatible with s.2 (f) for a statute to put upon an accused a reverse onus of proving a fact in issue beyond a reasonable doubt. Insofar as the onus goes no farther than to require an accused to prove as essential fact upon balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disaprove, as the case may be. If it is one which an accused cannot reasonably be expected to prove, being beyond his knowledge or beyond what he may reasonable be expected to know, it amounts to a requirement that is impossible to meet.

Section 11(d) of the Charter of Rights and Freedoms, which is part of the Constitution of Canada, provides that a person charged with an offence has the right "to be presumed innocent until proved guilty according to law in a fair and public hearing by an independant and impartial tribunal". As presently advised, the Supreme Court of Canada has not passed upon that provision, but many

other courts in Canada have. However it is not possible to distill a preferred or "better" view from that plethora of judgements which range from the Courts of Appeal of the more heavily populated Provinces to those from County Court judges in small, sparsely populated Provinces. Speaking for the Ontario Court of Appeal in R v Oakes (39) Martin J A. said, in a case relating to a reverse onus provision in the Narçotic Control Act 1970; (40)

> The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors, including such factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or by both criteria; (b)the difficulty of the prosecution making proof of the presumed fact; and (c) the relative ease with which the accused may prove or disaprove the presumed fact. Manifestly, a reverse onus provision placing the burden of proof on the assused with respect to a fact which it is not rationally open to him to prove or disprove cannot be justified.

Great weight must be given to Parliament's determination with respect to the to the necessity for a reverse onus clause in relation to some element of a particular offence. Certainly, reverse onus clauses exist in other free and democratic societies; for example, s. 30(2) of the Sexual Offences Act, 1956 (U.K.) c.69; Prevention of Corruption Act, 1916 (6 & 7 Geo. 5, c.64, s.2); R v Carr-Briant. (41) . However, a reverse onus provision, even if otherwise justifiable by the above criteria, cannot be justified as a reasonable limitation of the right to be presumed innocent under s.1 of the Charter in the absence of a rational connection between the proved fact and the presumed fact. In the absence of such a connection the presumption created is purely arbitary
ar ne went on to hold that section 8 of the Act was constitutionally invalid because there was a lack of rational connection between the proved fact (possession) and the presumed fact (trafficking). In R v Schwartz (42)

Barkman Co Ct J., dealing with a charge of carrying a concealed weapon pointed out that persons could not be convicted of that offence if they could prove that they had permits to carry these weapons. But the onus of proving the permit was on them. He applied the reasoning of Martin J.A. and held that there was no rational connection between possession of the concealed weapon and the fact of registration of a permit to carry it and held the relevant provisions constitutionally invalid. However in a case decided just before R v Oakes, R v Conrad (43) the Nova Scotia Court of Appeal came to the opposite conclusion to that of Barkman Co Ct.J. on this onus of proof question in the same legislation. What is clear is that the principles stated demand a separate examination of each onus of proof provision.

Section 14 (b) (f) of the Act creates a presumption that a person who fails to comply with a direction to remain at or return to work has done so because he or she is on strike which may only be rebutted by the court being satisfied by evidence to the contrary. There is an arguable case that this provision is inconsistent with Article 14 paragraph 2 of the ICCPR because there is no rational connection between the failure to comply with a direction and being on strike. Being sick, being entitled to knock off, being on holiday etc.etc. may be alternative and entirely innocent explanations. The same arguable case can be made in relation to the failure to obey a direction under section 14 (b) (5). The reason for failure to comply may not be wilful neglect, but one or more of a range of other things such as illness, exhaustion and the right to knock off having already done a day's work.

As already mentioned section 8A of the Commercial Practices Act operates to outlaw demarcation disputes, strikes to enforce preferences for members of a union and strikes for which seven days notice has not been given. Linked with its principal Act it operates to make any loss or damage caused by such industrial action recoverable against the union or its members and to allow for pecuniary penalties of up to $50,000 in the case of a union member and $250,000 in the case of a union to be imposed and when extracted to be paid into Consolidated Revenue. Section 5A of the Commercial Practices Act applies its provisions to industrial action within the public service of Queensland whilst section 2 makes the definition established of strike in that Act the wide definition in the Industrial Act.

The effect of the Commerical Practices Act is that a union may be liable for damages and for substantial monetary penalties for virtually any form of industrial action, unless the union is able to prove under section 8 that its members took that action for a dominant purpose that was substantially related to renumeration, conditions

of employment (not including superannuation benefits which many unions are presently pressing for), hours of work, working conditions or because an employer of union labour had terminated the employment of some of its employees. But under section 4 of the Act disputes concerning conditions of employment arising, for example, under the Electricity Act are not to be within this defence. The defence itself is subject to a reverse onus because it is incumbent on the union to demonstrate that the industrial action was substantially related to one of the grounds of defence. Demonstration of the defence is rendered more difficult by the fact that, under section 6 of the Commercial Practices Act, the purpose of the conduct in which a person is engaged is to be assumed not from proof but from the probable consequences of that conduct unless the person is able to demonstrate the contrary. This provision both replaces proof with inference and imposes a reverse onus on the defendant in the action. Finally under section 10 of the Industrial (Commercial Practices) Act 1984 if two or more union members engage in conduct caught by that Act or its amending Act then the union will be deemed, without any proof, to have been engaged in that conduct, and thus liable for the consequences of such a finding, unless it can satisfy a reverse onus and show that it took all reasonable steps to prevent its members from engaging in that conduct.

It is provided in section 30 of the Industrial (Commercial Practices) Act 1984 that contraventions of the relevant Parts of that Act do not create criminal offences punishable, for example, under section 204 of the Criminal Code, but it should not be overlooked that the operative provisions of that Act and its amending Act are penal in character.

For the reasons already outlined in relation to section 7 of the Electricity Act, the broadening of the definition of strike and the subjecting of primary boycotts as described in section 8A of the Commercial Practices Act which in most cases would be no more than the exercise of industrial action in order to protect the interests of workers, to savage consequences and pecuniary penalties renders that Act inconsistent with Article 22 of the ICCPR.

There is an arguable case that because of the penal nature of the Commercial Practices Act and its parent Act, the reverse onus of proof provisions, the deeming provisions and the dispensation with proof provisions found in both those Acts, they are inconsistent with Article 14 of the ICCPR as they operate to prevent both a union and its members from being treated as equal before the law. A case can be made that when they are being sued by an employer for loss damage arising out of one or more of these "primary boyco s", are subjected to disabilities in relation to proof when they are defending such actions simply because

they are unions or because they are workers and as those disabilities do not apply to other defendants who may be sued by plaintiffs for loss or damage arising out of the same kinds of causes of action, the consequence is that the unions and individual workers are being discriminated against in a way that deprives them of equality before the law. The case is stronger in relation to the pecuniary penalties which may be imposed because they place additional burdens on the union and on the workers sued which are applied only because they are unions or workers. In the process of having these burdens imposed on them, they are subjected to the same disadvantages in relation to proof in defending themselves as they are when defending actions for damages and this is another element of the inequality before the law that this Act imposes on them.

The provisions of the Electricity Authorities Act were outlined at the beginning of this article. The whole scheme of the Act renders it inconsistent with the expressed and implied rights of employees to organize and to negotiate for the achievement of their programmes that are found in Article 1 to 11 of ILO Convention 87, in ILO Convention 98 and Article 22 paragraph 1 of the ICCPR under which persons have the right to form and join trade union for the protection of their interests. But in particular the scheme of the Act is inconsistent with Article 4, of ILO Convention 98 which provides;

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations with a view to the regulation of terms and conditions of employment by means of collective agreements.

The removal of industrial disputes in the electricity supply industry from the established system of industrial conciliation and arbitration for the purpose of outlawing the right to strike of itself is not justifiable under, and is inconsistent with, the Conventions and Covenant referred to above. The exclusion of considerations relevant to employees interests from those considerations to be taken into account by the Tribunal under section 19 is not only inconsistent with the Conventions in general, but it is inconsistent with Article 4 of ILO convention 98 in particular Section 22 which negates a preference negotiated for, section 24 which makes striking a fundamental breach of a contract and section 25 which discharges benefits obtained under agreements, all cut across the undertaking in Article 4 of ILO Convention 98

that machinery for voluntary negotiations between employers and employees with a view to the regulation of terms and conditions of employment by collective bargaining will be encouraged and promoted, because they dismantle substantial parts of that machinery in relation to industrial disputes in the electricity supply industry in Queensland. But the right of the Crown to intervene at any time under section 15 in matters before the Tribunal and the fact that reviews under sections 28 and 29 of the Act are to be undertaken by either the Minister or the Electricity Commissioner are not only inconsistent with Article 4 of ILO Convention 98, but also with Article 11 of ILO Convention 87 which requires all State Parties to the Conventions to take "all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize". The possible interference of the Government in proceedings and the involvement of, the Government through a Minister, and an employer in the review of certain actions is an unjustified interference with that right freely to organize.

Section 23 renders it an illegal act to participate in a strike. As already noted, whilst the Freedom of Association Committee of the ILO has recognized the right to strike as a legitimate means of organizing the activities of employees organizations, it also recognizes that the right strike may be restricted or even prohibited in essential service industries because of hardship to the community, but in those circumstances adequate impartial and speedy conciliation procedures should be available. What has been introduced in the Electricity Authorities Act is a Tribunal which is the sole body to deal with industrial disputes in the electricity supply industry but it is not empowered to take into account considerations relevant to employees' interests when coming to its decisions. This crucial omission renders section 23 of that Act inconsistent with the two ILO Conventions and Article 22 paragraph 1 of the ICCPR.

That section also renders it an unlawful act to incite, counsel or abet a strike of persons in an electricity calling. Given that it is inconsistent with the relevant ILO Conventions and the ICCPR to prohibit strikes in the way in which it has been done in the electricity supply industry in Queensland, it follows that it is inconsistent, with the right of freedom of speech in Article 19 of the ICCPR to make it an illegal act for the persons to incite or counsel others to strike.

For reasons already outlined but subject to the reservations already referred to, these inconsistencies with the ICCPR and the two ILO Conventions render Australia in brea of its international obligations under those three trea es as do all the other inconsistencies with and infringements of those treaties identified above

Now, it is necessary to return to the beginning of this tale to consider the State of Emergency and whether its proclamation required Australia to inform the other State Parties to the ICCPR through the intermediary of the Secretary-General of the United Nations. As has already been mentioned, the ICCPR places an obligation on each State Party to establish a legal order in which the rights and freedoms set out in the Covenant are recognized and which provides an effective remedy to those affected by an breach of those rights. The Covenant also allows that, within that legal order, provision may be made for restricting some of those rights and freedoms but only to a limited extent and on specific grounds. Whilst each Article which allows of such restrictions is differently worded, the restrictions typically must be prescribed by law and be necessary in a democratic society in the interests of national security, public safety, public order, the protection of public morals or the protection of the rights and freedoms of others. Derogration from rights is a different matter. In the context of the ICCPR, derogation means the imposition of restrictions on the exercise of rights and freedoms that goes beyond the limits on such restrictions allowed under the Convention. Such derogations may be imposed only when a public emergency "which threatens the life of the nation" has been publicly proclaimed (44). Even in that case certain rights may not be derogated from, these are the rights in Articles 6,7,8 paragraphs 1 and 2,11,15,16, and 18. If a state of emergency is officially proclaimed, in effect on the ground of a public emergency which threatens the life of the nation, and then a government derogates, in the sense outlined, from the rights in the Covenant, the State Party to the Covenant is obliged to inform all other State Parties through the intermediary of the Secretary-General of the United Nations (45).

However there are various sorts of states of emergency that may be declared, some arising from natural disasters and some for other reasons. These states of emergency, if they are not declared on the ground that the life of the nation is threatened, do not provide any justification for derogation from the rights in the Covenant and but also they are not states of emergency to which the ICCPR is addressed. The European Commission of Human Rights considers that an emergency which threatens the life of the nation has four factors. (46) The public emergency must be actual and imminent, its effects must involve the whole nation, it must threaten the organized life of the community and the crisis or danger must be so exceptional that the normal limitations or restrictions on rights permitted by the ICCPR referred to above are plainly inadequate.

The state of emergency proclaimed in Queensland did not meet these criteria; consequently it did not provide a

justification for any derogation from the rights and freedoms in the Covenant, but,by the same token, it did not provide the basis for requiring Australia to advise other State Parties to the Convention of any governmental action that could be categorized as a derogation from the rights and freedoms contained in the Convention.

Finally it must be stated that each time it is asserted in this article that an administrative action or legislative provision in Queensland put Australia in breach of its international obligations under the ICCPR, this was not only because that action or provision infringed or was inconsistent with a right guaranteed in the ICCPR, but also because the infringement of or inconsistency with the right was outside any limitation or restriction allowed by the ICCPR in relation to that right.

Footnotes

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1. ICCPR, Article 2 paragraph 1.

2. Ibid. Article 2 paragraph 3.

3. P. Sieghart, The International Law of Human Rights, Clarendon Press, Oxford, 1983, pp 56-59.

4. ICCPR, Article 50.

5. The general reservation stated;

> Articles 2 and 50
>
> "Australia advises that, the people having united as one people in a Federal Commonwealth under the Crown, it has a federal constitutional system. It accepts that the provisions of the Covenant extent to all parts of Australia as a federal State without any limitations or exceptions. It enters a general reservation that Article 2, paragraphs 2 and 3 and Article 50 shall be given effect consistently with the subject to the provisions in Article 2, paragraph 2.
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> Under Article 2, paragraph 2, steps to adopt measures necessary to give effect to the rights recognised in the Covenant are to be taken in accordance with each State Party's Constitutional processes which, in the case of Australia, are the processes of a federation in which legislative, executive and judicial powers to give effect to the rights recognised in the Covenant are distributed among the federal (Commonwealth) authorities and the authorities of the constituent States.
>
> In particular, in relation to the Australian states, the implementation of those provisions of the Covenant over whose subject matter the federal authorities exercise legislative executive and judicial jurisdiction will be a matter for those authorities; and the implementaion of those provisions of the Covenant over whose subject matter and authorities of the constituent states exercise legislative, executive and judicial jurisdiction will be a matter for those

> authorities; and where a provision has both federal and state aspects, its implementaion will accordingly be a matter for the respective constitutionally appropriate authorities (for the purpose of implementation, the Northern Territory will be regarded as a constituent state).
>
> 3o this end, the Australian Government has been in consultation with the responsible state and territory ministers with the object of developing co-operative arrangements to co-ordinate and facilitate the implementation of the Covenant".

6. Triggs, "Australia's Ratification of the International Covenant on Civil and Political Rights; Endorsement or Repudiation" (1982) 31 ICLQ 278.

7. (1982) 38 ALR 417.

8. (1983) 57 ALJR 450.

9. Australian Foreign Affairs Record, Dec 1984, p.1305.

10. Human Rights Commission Act, s9.

11. Australian Bill of Rights Bill, clause 8.

12. Ibid clauses 2(3) and 11.

13. Ibid clause 12

14. Ibid clauses 25 and 41.

15. Ibid. clause 27(2)

16. Ibid clauses 25 27(2) 41 and 42.

17. Clause 9(2) states;

> For the purposes of Part V, it is hereby declared that the rights and freedoms set out in the Bill of Rights apply in relation to acts and practices

18. ICCPR Article 2 paragraph 3(c)

19. Australian Bill of Rights Bill, clause 16.

20. Ibid. clause 17.

21. Article of ILO Convention 87 states;

1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the useof forced or compulsory labour in all its forms within the shortest possible period.

2. With a view to this complete suppression, recourse to forced or compulsory labour may be had during the transitional period, for public purposes only and as an exceptional measure, subject to the conditions and guarantees hereinafter provided

22. Article 1 of ILO Convention 29 states;

Each member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour -

(a) As means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;

(b) As a method of mobilizing and using labour for purposes of economic development;

(c) As a means of labour discipline;

(d) As a punishment for having participated in strikes;

(e) As a means of radical, social, national or religious discrimination.

23. Article 19(7) of the International Labour Organization Constitution states;

7. In the case of a federal State, the following provisions shall apply:

(a) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system for federal action, the obligations of the federal State shall be the same as those of members which are not federal States,

(b) in respect of Conventions and Recommendations which the federal government regards as appropriate under its constitutional system,

in whole or in part, for action by the constituent states, provinces, or cantons rather than for federal action, the federal government shall -

(i) make, in accordance with its Constitution and the Constitutions of the states, provinces or cantons concerned, effective arrangements for the reference of such Conventions and Recommendations not later than eighteen months from the closing of the session of the Conference to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation or other action;

(ii) arrange, subject to the concurrence of the state, provincial or cantonal governments concerned, for periodical consultations between the federal and the state, provincial or cantonal authorities with a view to promoting within the federal State co-ordinated action to give effect to the provisions of such Conventions and Recommendations;

(iii inform the Director-General of the International Labour Office of the measures taken in accordance with this article to bring such Conventions and Recommendations before the appropriate federal, state, provincial or cantonal authorities with particulars of the authorities regarded as appropriate and of the action taken by them;

(iv) in respect of each such Convention which it has not ratified, report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement, or otherwise;

(v) in respect of each such Recommendation, report to the Director General of the International Labour Office, at

(v) in respect of each such Recommendation, report to the Director General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice of the federation and its constituent states, provinces or cantons in regard to the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as have been found or may be found necessary in adopting or applying them.

24. Ansett Transport Industries (Operations) Pty Ltd v Wardley (1980) 142 CLR 237.

25. (1985) 60 ALR 64.

26 Queensland Electricity Commission v Commonwealth (1985) 59 ALJR 699.

27. Ibid.

28. Van der Mussele v Belgium (1983) 6 EHRR 163, 175

29. ILO Convention 29, Article 2.

30. Van der Mussele v Belgium (1983) 6 EHRR 163, 175

31. (1983) 6 EHRR 163.

32 Commonwealth v Gumseit (1943) 67 CLR 58, 82-83; Tooheys Ltd v Minister for Business & Consumer Affairs (1981) 36 ALR 64, 71-75; Minister for Industry & Commerce v Tooheys Ltd (1982) 42 ALR 260, 265-267.

33. Electricity Act, s.5B(2), (3) and (4).

34. Judgement of 6-2-76 in the Schmidt & Dahlstrom Case. Publications of the European Court of Human Rights, Series A, Vol. 21 (1976) p.16.

35 Collection of Decisions of the European Commission of Human Rights 42 (1973) p.135.

36 (1981) 123 (3d) 748.

37 (1981) 123 DLR (3d) 748, 750-751

38 21 DLR (3d) 325

39. (1983) 145 DLR (3d) 123.

40 (1983) 145 DLR (3d) 123, 146

41. (1983) 2 All ER 156.

42 (1983) 22 Man R (2d) 46.

43. (1983) 4 DLR (4th) 226

IN MEMORY OF JULIUS STONE AO, QC

Julius Stone, one of the most eminent lawyers this country has ever seen, was born in Leeds, Yorkshire, on 7th July 1907, the son of poor Jewish refugees from what was then the Russian Empire. Despite the social, ethnic and financial discrimination which was prevalent in England before the Second World War, his outstanding qualities gained him scholarships, first at Oxford and subsequently at Harvard University. His first teaching position was as assistant Professor of Law at Harvard University from 1933 until 1936. In 1938 he accepted the position of Dean of the Law School at Auckland, from whence he came to occupy the Challis Chair in International Law and Jurisprudence at the University of Sydney in 1942, a position he continued to hold until his retirement in 1972.

It was during this period that he established his enormous international reputation as a scholar in the fields of International Law and Jurisprudence. His first major work: The Province and Function of Law, was published in 1946. This was rightly described by its author as "an act of revolt" for it took the student of that period beyond the then predominant Austinian theory and the various attempts made in the early Twentieth Century to modify or up-date that theory. His work highlighted the uncertainties of the post-war world, away from the abstract analysis of legal rights and duties to the relationship between power and submission to the law as it operates in modern society. To some critics this led to a lack of clarity, but they failed to appreciate that the law is not an abstract entity divorced from reality.

His jurisprudential work was subsequently expanded into the trilogy consisting of: Legal System and Lawyers Reasonings; Human Law and Human Justice,and Social Dimensions of Law and Justice. All of these works struggled with the dilemma which faced jurisprudence since Hitler and Stalin: Is there a middle way between the moral absolutism of medieval natural law theories and the legal amoralism of the Nineteenth Century? Are there some values implicit in our liberal democratic society which the law must protect and maintain?