representation was not a term of the contract, was extinguished. The defendant relied on the well known case of *Leaf v. International Galleries*[42] to support his contention. Gillard J, however, was still able to give judgment for the plaintiff for rescission for there was no alternative remedy against the credit company and His Honour did 'not believe that the discretionary nature of the equitable remedy can be invoked to defeat the patent legislative intent of conferring cumulative remedies on the hirer'.[43] Furthermore, 'since the section was intended to confer a dual right upon the hirer beneficial to the hirer, it should be interpreted liberally in the hirer's favour'[44] Accordingly, Gillard J gave judgment for the plaintiff against the second defendants for rescission and against the first defendants for damages. Thus, French's statement was classified both as a representation inducing the hire purchase contract, and as an actual term of the notional contract with the first defendants. This dual classification provided the plaintiff with both the rights of recission and damages, whereas if the statement had been classified the same way with respect to both contracts, only one of these remedies would have been available.

There is little doubt that the decision of the court was a just one. The plaintiff, handicapped by lack of English, had obviously suffered substantial loss at the hands of the defendants who, in the witness box, impressed Gillard J. as 'completely indifferent to the accuracy of their statements'.[45] It is submitted, further, with respect, that the approach of Gillard J. was commendable. Confronted with a section, clumsily drafted and of uncertain scope, His Honour was prepared to adopt a robust approach to overcome interpretation difficulties inherent in the section and substantially give effect to the legislative intent, so far as a fair reading of the section allowed.

P. R. FRANCIS

BICKNELL v. AMALGAMATED ENGINEERING UNION[1]

Conciliation and Arbitration—Registered Association—Election of Officers.

THE FACTS

The Amalgamated Engineering Union was originally constituted in Australia as a Section of an international union with its head office in England.

Its organs consisted of a Commonwealth Council, 17 district committees and over 200 branches. In Victoria there were five districts, in New South Wales there were four, and in South Australia one. The district secretaries in Melbourne, Sydney and Adelaide were full time officials but they did not have the right to vote at district committee meetings. The district committees in the state capitals had power to direct the other district committees in the same state in matters of policy, subject to the Commonwealth Council, and also had authority to act to protect the interests of the union in their states in matters of extreme urgency where the other district committees could not be consulted in time. This latter power had to be exercised having regard to the powers of the

[42] [1950] 2 K.B. 86; [1950] 1 All E.R. 693.
[43] [1973] V.R. 545, 568.
[44] [1973] V.R. 545, 561.
[45] [1973] V.R. 545, 552.

[1] (1969) 15 F.L.R. 215. Commonwealth Industrial Court; Spicer C.J., Smithers and Kerr JJ.

other district committees, and was again subject to the control of the Commonwealth Council.

In 1968 the Australian section became autonomous. The associated reconstruction involved the retention of the Commonwealth Council but instead of multiple districts within states there were to be a series of State Councils to which the Branches, now grouped in zones, would be responsible. Each State Council was to have a full time state secretary elected by the members in that state.

A set of amended rules was devised to govern the transition to autonomy. At the time at which they came into effect the district secretary in Melbourne had 14 months of his elective term to run, the Sydney secretary 21 months, and the Adelaide secretary 31 months. The amended rules provided for these men to become state secretaries for the unexpired periods of their terms of office as district secretaries and only then were they to face election. They were now to have the right to vote at State Council and State Executive.

The rule which provided for this appointment to office was challenged by a union member on the ground that it offended section 140 of the Conciliation and Arbitration Act 1904-68. The relevant parts of the section were[2] in the following terms:

(1) A rule of an organisation—

(a) shall not be contrary to a provision of this Act, the regulations or an award or otherwise be contrary to law . . .

(c) shall not impose upon . . . members, of the organisation, conditions, obligations or restrictions which, having regard to the objects of this Act and the purposes of the registration of organisations under this Act, are oppressive, unreasonable or unjust.

Sub-section (5) goes on to provide that a rule which the Commonwealth Industrial Court declares to contravene sub-section (1) 'may'[3] be declared void by the Court.

THE SECTION 140(1)(a) CHALLENGE

One of the central features of the Conciliation and Arbitration Act is that it seeks to ensure that there is democratic control of the organisations registered under it. To this end section 133 provides for secret ballots and democratic election procedures in organisation elections and Regulation 115(1)(d)(i) ensures that all office-bearers and members of policy making bodies of organisations are elected. Moreover Regulation 115(1)(d)(v) directs that rules be constructed so as to ensure membership control of organisations.

But while the Regulations are explicit in requiring that the rules or organisations make provision for election of office bearers they are silent on the manner in which casual vacancies may be filled. It was open to the Court to insist that such vacancies be filled by election. This it did not do.

In *Cameron v. Australian Workers' Union*[4] an attack was made on the validity of union rules which provided that casual vacancies could be filled by appointment made by the union's executive council and be effective for the duration of the term for which the person replaced was elected. Elections in

[2] The section has subsequently been amended but the amendment is not relevant in the present context.

[3] This is a discretion which must be exercised judicially: *R. v. Judges of the Commonwealth Industrial Court; ex parte Amalgamated Engineering Union* (1960) 103 C.L.R. 368.

[4] (1959) 2 F.L.R. 45 (Spicer C.J., Dunphy and Morgan JJ.).

the union were held triennially and it was thus possible for an appointee to hold office for almost three years without facing election. Despite this the Court, by a majority,[5] held that the rules did not contravene section 140(1)(a). The decision required a balancing of the need to preserve democratic control of the organisation and the practicalities of the conduct of union affairs. The majority gave greater weight to the latter. Dunphy J. was at pains to emphasise the economic and administrative difficulties which would be created if a union had to arrange elections to fill all casual vacancies. 'An office might fall vacant within a few weeks of the next election and the time would not permit and the expense would not warrant such a method. Clearly also the swift filling of a vacancy is desirable from an administrative point of view . . .'[6] Spicer C.J. was moved by similar considerations and drew additional comfort from the fact that the appointments would be made by persons, themselves elected representatives of the membership.[7]

Morgan J. dissented, holding that a temporary filling of an office by appointment for a reasonable time pending an extraordinary election or a regular election was in order but that otherwise an election must be held to fill the casual vacancy.

Subsequently, in *Watson v. Australian Workers' Union*,[8] a challenge was made to a union rule which empowered its executive council to supersede all or some of the elected officers of a branch and replace them for periods of up to five years with nonelected union members. The superseding of elected officers created casual vacancies and, since they were to be filled by appointment, the same issue was raised as was involved in *Cameron's* case.[9] Dunphy J. adhered to his previous view that elections were not always necessary to fill casual vacancies and the fact that the period of appointment could now be, not three years, but up to five, did not, in his view, make any difference.[10]

Kerr J. (as he then was), on the other hand, held the rule invalid in that, since it did not provide for elections, it did not comply with the Regulations and thereby contravened section 140(1)(a). His Honour made it quite clear that had he been sitting in *Cameron's* case[11] he would have supported Morgan J.[12] That he attached far less weight than either Spicer C.J. or Dunphy J. to the administrative and economic needs of unions is clear from the following part of His Honour's judgment:

> I appreciate that it may, in some circumstances, be inconvenient to fill such [casual] vacancies by election, but many of the offices in question are very important indeed in the management of the union and if it wishes to have a long tenure of office for these positions then my view, apart from authority, would be that it must . . . tolerate the inconvenience by holding by-elections to fill casual vacancies.[13]

His Honour went on to say that he treated appointments of up to five years as being free from direct authority[14] and held that rules which permitted such appointments were in breach of regulation (15)(1)(d)(i) and thereby invalid under section 140(1)(a).

[5] Spicer C.J. and Dunphy J., Morgan J. dissenting.
[6] (1959) 2 F.L.R. 45, 72.
[7] *Ibid.* 56.
[8] (1967) 10 F.L.R. 347 (Dunphy, Joske and Kerr JJ.).
[9] (1959) 2 F.L.R. 45.
[10] (1967) 10 F.L.R. 347, 351-4.
[11] (1959) 2 F.L.R. 45.
[12] (1967) 10 F.L.R. 347, 366, 367.
[13] *Ibid.* 366.
[14] *Ibid.* 367.

Having so decided he proceeded *obiter* to offer some advice to the drafters of union rules and in so doing despite previous deference to the authority of *Cameron's* case,[15] departed from it. He was prepared to accept appointments of up to fifteen months as being valid but any delay in holding by-elections beyond this led, in His Honour's view, to a breach of regulation 115(1)(d)(i).[16]

Joske J. found for invalidity under section 140(1)(c).[17]

Such was the authority with which the Court which was assembled to decide *Bicknell's* case[18] was faced. In some respects the issues were the same. Appointments were to be made in lieu of elections for periods of up to thirty-one months. But there were differences. The appointments were made by interim rules, not by a union executive, and they were to be made to previously non-existent positions.

It could reasonably have been anticipated that, in view of his previous willingness to recognize the importance of flexible administration of organisations, and his approval of appointments of up to three years, Spicer C.J. would have supported the appointment in issue in *Bicknell's* case. But not so with Kerr J. who, as has been seen, had taken quite the contrary aproach. It is thus surprising to find unanimous support for the validity of the appointment rule.

All three judges denied that there was any analogy to be drawn between appointments to fill casual vacancies and appointments of the kind in issue in *Bicknell's* case.[19] This was because the appointment was to a previously non-existent office. But this distinction led to difficulties. Certainly the offices were previously non-existent but whereas before the reconstruction the offices in question were elected by and secretaries of their local districts they were now to assume secretarial duties for whole states thereby representing large numbers of members of other districts who had no part in the original election of the offices. In other words they were appointed to offices for long periods without previously having been elected by a majority of the people they were now to represent.

This logical difficulty was overcome by holding that the district secretaries in the state capitals had been 'State secretaries in all but name'[20] and that their present responsibilities in many respects differed only in 'degree'[21] from their previous ones. Spicer C.J. and Smithers J. found 'compelling reasons of convenience'[22] to justify the appointments. Kerr J. was equally frank in justifying his decision on the basis of 'convenience'.[23]

As has already been observed it was not surprising to find Spicer C.J. emphasising the convenience of union administration. But for Kerr J. this attitude represents a very considerable change of approach. It will be remembered that in *Watson's* case[24] he had said that despite the inconvenience involved unions had to be prepared to hold by-elections within a fairly short period after a

[15] (1959) 2 F.L.R. 45.
[16] (1967) 10 F.L.R. 347, 368.
[17] *Ibid.* 361.
[18] (1969) 15 F.L.R. 215.
[19] *Ibid.* 222 (Spicer C.J., Smithers J.), 238 (Kerr J.).
[20] *Ibid.* 237 (Kerr J.).
[21] *Ibid.* 225 (Spicer C.J., Smithers J.).
[22] *Ibid.* 225.
[23] *Ibid.* 239. See also pp. 230, 232.
[24] (1967) 10 F.L.R. 347.

casual vacancy occurred particularly where such vacancies occurred in important offices. His Honour advanced a number of reasons for his different approach to appointments as part of a reorganisation. They were:[25]

1. The similarities between the old offices and the new.

2. The rule only affected specific people, was merely transitional, and was not of general application.

3. The proposed reorganisation rules had been widely canvassed in the Union prior to their introduction.

The following comments may be offered in respect of these arguments.

1. There were in fact a number of distinct differences between the powers and duties attaching to the old office of district secretary and the new office of state secretary. Spicer C.J. and Smithers J. acknowledged that the office of State secretary 'carried more authority and responsibility than [that] of district secretary'[26] and Kerr J. himself was prepared to concede that some differences existed.[27] One of the most important differences was that the state secretary had the right to vote at meeting of state conference and state council. But even if the difference was in name only, as Kerr J. suggests, then surely the analogy with previous decisions relating to the filling of casual vacancies in a given office is very close.

2. Certainly the appointments related to specific persons and were not rules of general application. But if appointments to fill casual vacancies in excess of fifteen months contravene regulation 115(1)(d)(i) because of the importance of the offices and the effect of a longer period of appointment on the membership[28] then surely these two considerations should also govern appointments forming part of reorganisations. There can be no doubt of the importance of the office of state secretary and it can be strongly argued that since the state secretary was to exercise authority over and be responsible to a far wider electorate than was responsible for his holding the office of district secretary, then that wider electorate should have been consulted within a reasonably short period of the new office being created.

3. This is probably Mr. Justice Kerr's strongest argument. The membership was consulted in advance of the changes in the rules and knew who would be assuming the offices of state secretaries. In this knowledge the rule change was approved by the members. It is, however, submitted that this is by no means an adequate basis for distinction: it is one thing for a member not to have disapproved of a particular man being appointed state secretary; it is another altogether to say that given a choice between the appointee and some other person he would choose the appointee. Moreover, as was said by Dunphy J. in *Cameron's* case[29] 'union rule books are not *vade mecum* as far as the majority of union members are concerned'.

It is thus submitted that Kerr J., despite his assertions to the contrary, did change his position in dealing with reorganisations and that he did so for the reason he frankly stated—*that this was a convenient course for the union to take.*

It would seem that the Court has moved in respect to appointments made as part of reorganisations, to the position originally advocated by Spicer C.J.

[25] (1969) 15 F.L.R. 215, 237-9.
[26] *Ibid.* 225.
[27] *Ibid.* 238.
[28] See Kerr J.'s view in *Watson's* case quoted *supra* 4.
[29] (1959) 2 F.L.R. 45, 69.

and Dunphy J. in *Cameron's* case[30] in relation to elections: that where cases of appointments of up to three years are concerned considerations of administrative convenience will prevail against the competing need of affording members the right to elect their office bearers. It is certainly arguable that in the process the Court has lost sight of the need to preserve membership control of organisations.

THE SECTION 140(1)(c) CHALLENGE

A secondary ground of challenge was that the appointees would, if they sought election at the end of their period of appointment, be deemed to hold office for a period of five years whereas a successful opponent would only be able to serve for three years, and that these provisions were contrary to section 140(1)(c) in that they were oppressive, unreasonable or unjust. Spicer C.J. and Smithers J. dismissed this claim holding that in view of the similarity of the old and new positions which the appointee held they could be regarded as having been elected as state secretaries. This being so, it was neither oppressive, unreasonable or unjust for them, having proved themselves in the offices to be elected for a longer period than an untried person who defeated them.[31] Kerr J. confined himself to holding that there was nothing oppressive, unreasonable or unjust about the initial appointment provisions.[32]

RICHARD R. S. TRACEY*

DONNINI v. THE QUEEN[1]

Criminal Law—Evidence as to character and previous convictions—Leave of court—What constitutes evidence by accused as to good character—Discretion of court—What constitutes cross-examination as to previous convictions —Proper direction by judge where evidence admitted not directly relevant to guilt.

The High Court in a 3:2 decision, confirmed a decision of the Full Court of the Supreme Court of Victoria that the trial judge's grant of leave to cross-examine the accused as to his prior convictions under section 399(e)(ii) of the Crimes Act 1958, and the evidence given in cross-examination, did not cause the trial to miscarry.

This decision is a disquieting example of the failure of section 399(e) to protect an accused from the possibility of a trial largely influenced by his previous convictions, than the merits of the present charge.

The accused was convicted of armed robbery of a bank and illegal use of a motor car. He denied any participation in the crime, including a confession of such participation allegedly made to police witnesses. Prior to the robbery he had lived in a flat rented from a Mrs. Brading, who was called as a witness by the Crown to prove the circumstances in which the accused left the flat on the day following the robbery. The accused's counsel, during cross-examination of the landlady, asked her:

[30] (1959) 2 F.L.R. 45.
[31] (1969) 15 F.L.R. 215, 226-7.
[32] *Ibid.* 237-8.
* LL.B. (Hons), Senior Tutor in Law in the University of Melbourne.

[1] (1973) 47 A.L.J.R. 69. High Court of Australia; Barwick C.J., McTiernan, Menzies, Walsh and Mason JJ.