AUSTRALIAN LONG SERVICE LEAVE LEGISLATION

SOME P.I.L. AND RELATED PROBLEMS

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I. INTRODUCTION

Recent years have seen the enactment of long service leave legislation by all Australian States. The general purpose of this legislation is to grant leave with pay to employees who have rendered long unbroken service with an employer. Prior to this legislation Federal and State industrial tribunals had awarded long service leave, but such awards were comparatively rare.[1]

In 1951 the Industrial Arbitration Act (N.S.W.) was amended, and new provisions became law which required New South Wales industrial tribunals to insert long service leave clauses in State awards or industrial agreements.[2] In 1955 this legislation was repealed by the Long Service Leave Act (N.S.W.) which imposed a direct statutory obligation to provide long service leave.[3] The Act therefore included within its scope workers under federal awards and workers in award-free employment who had not previously been entitled to long service leave under State law.[3a]

In 1953 the State of Victoria enacted the first long service leave legislation which imposed direct statutory obligations independent of State awards.[4] In 1952 Queensland enacted provisions similar to the New South Wales legislation of 1951,[5] and in 1955 supplementary legislation was passed covering all employees outside the scope of State awards and imposing direct statutory obligations.[6] At the same time additional amendments were made to the 1952

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[1] For federal awards see *Flour Millers Award* (1950) 66 C.A.R. 262; *Re Gas Industry (N.S.W.) Award* (1942) 48 C.A.R. 85, 98-99; *Re Rubber Workers Award* (1950) 68 C.A.R. 599; and *Re Storemen and Packers (Wool Stores) Award* (1950) 68 C.A.R. 551. In the case of N.S.W. awards see *Re Fire Brigade Employees Committee* (No. 2) (1945) A.R. 375, 379; *Re Undertakers (State) Committee* (1948) A.R. 847, 857; *id.* (1950) A.R. 342, 345; *Re Butchers Wholesale Award* (1953) A.R. 738, 748-751. See also decisions of the Commonwealth Conciliation and Arbitration Commission in *Re Graphic Arts (Interior) Award* (No. 1) (30.10.58) Law Book Co.'s Current Review (1958) No. 12, 178; (1958) 11B, Vol. 13, No. 10, 811.

[2] Act No. 50 of 1951.

[3] Act No. 38 of 1955.

[3a] See generally as to the N.S.W. Act, J. C. Moore and V. Watson, *Long Service Leave in N.S.W.* (1958).

[4] Labour and Industry Act (Act No. 5771).

[5] Industrial Conciliation and Arbitration Acts (1932-1955) (23 Geo. 5, No. 36-4 Eliz. 2, No. 32), s.10B.

[6] *Id.*, s.10C.

legislation requiring the State Industrial Court to insert long service leave clauses in State awards covering seasonal employees in the sugar and meat industries.[7] The Tasmanian Act of 1956[8] closely follows the Victorian legislation, as does the Western Australian Act of 1958.[9] However, the South Australian Act of 1957 differs significantly from the other State legislation.[10]

The qualifying periods of service prescribed by this legislation[11] are not uniform. The minimum period of continuous service is seven years in South Australia[12] and twenty years in the other States.[13] Proportionate entitlement arises in certain circumstances in States other than South Australia and Tasmania on termination of employment after a minimum of ten years service has been completed.[14] In Tasmania proportionate entitlement arises after fifteen years service.[15] Where a business has been transmitted by contract or by operation of law, service with the previous employer is deemed to be service with the transmittee.[16] Interruptions to continuity of employment caused by industrial disputes, slackness of trade, service with the armed forces and by other specified events do not prevent a worker's service before and after such events from being continuous for the purposes of the legislation.[17]

All service prior to the enactment of the legislation does not qualify an employee for long service leave benefits. Here again there is a notable lack of uniformity. The South Australian Act operates on past service up to a maximum of seven years,[18] the Victorian,[19] Western Australian[20] and Queensland Acts[21] to a maximum of twenty years, and the Tasmanian Act to a maximum of twenty-four years,[22] while there is no statutory limit under the New South Wales Act to the number of years of past service for which long service leave benefits can be claimed.[23] The general basis of entitlement is thirteen weeks for twenty years' service in all States except South Australia,[24] where the entitlement is a week for every year's service after the first seven years.[25]

The legislation contains exemption provisions for the benefit of employers who conduct superannuation and other schemes which provide benefits in the nature of long service leave, and also where employees are entitled to long

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[7] *Id.*, s.10D. By s.10E the Governor-in-Council may by proclamation extend the provisions of s.10D to other seasonal workers.

[8] Act No. 8 of 1956.

[9] Act No. 44 of 1958. This Act only applies to workers outside the scope of State awards and State public service legislation (s.4(1)).

[10] Act No. 47 of 1957.

[11] Long Service Leave Act (N.S.W.) (No. 38 of 1955). Labour and Industry Act (Vic.) 1953-1957 (No. 5771-No. 6130), now Labour and Industry Act, 1958 (No. 6283). Industrial Conciliation and Arbitration Acts, (Qld.), 1932-1955 (23 Geo. 5, No. 36-4 Eliz. 2, No. 32). Long Service Leave Act (Tas.) (No. 8 of 1956). Long Service Leave Act (S.A.) (No. 47 of 1957). Long Service Leave Act (W.A.) (No. 44 of 1958).

[12] *Supra*, s.6(2).

[13] N.S.W., s.4(2)(a)(i); Vic., s.154(2)(a); Qld., s.10B(2)(a); Tas., s.8(2)(a); W.A., s.8(2)(a).

[14] N.S.W., s.4(2)(a)(ii); Vic., s.154(2)(c); Qld., s.10B(2)(b); W.A., s.8(2)(c). The W.A. Act, unlike those of the other States provides that the termination of employment by the worker on certain grounds shall not disentitle the worker to leave if not less than 10 nor more than 15 years service has been completed. Once 15 years service has been completed, termination by the worker on any ground does not disentitle him to leave. *Id.*, s.8(2)(b).

[15] Tas., s.8(2)(c), s.9(3).

[16] N.S.W., s.4(11)(c); Vic., s.151(3)(a); Qld., s.10B(13); Tas., s.5(3); S.A., s.4(3); W.A., s.6(4).

[17] N.S.W., s.4(11); Vic., s.151(1); Qld., s.10B(2a),(2b); Tas., s.5(1); S.A., s.4(1); W.A., s.6(1),(2),(3).

[18] *Supra*, s.6(3).

[19] *Supra*, s.152(1)(a).

[20] *Supra*, s.7(1).

[21] *Supra*, s.10B(3),(4).

[22] *Supra*, s.6(2)(a).

[23] *Supra*, s.4(1).

[24] N.S.W., s.4(2); Vic., s.154(2); Qld., s.10B(2)(a); Tas., s.8(2)(a); W.A., s.8(2)(a).

[25] *Supra*, s.6(2).

service leave under awards or other statutes.[26] The question of exemptions is considered more fully in a later section of this article.

II. LONG SERVICE LEAVE UNDER FEDERAL LAW

It has been established by the High Court judgments in *Collins* v. *Charles Marshall Pty. Ltd.*[27] and *Robinson & Sons Pty. Ltd.* v. *Haylor*[28] that federal awards will only be inconsistent with, and hence will only override,[29] State long service leave legislation, where the awards contain specific provisions granting or denying long service leave.

Under the Commonwealth Conciliation and Arbitration Act[30] only the Conciliation and Arbitration Commission in Presidential Session[31] can insert long service leave provisions in federal awards.[31a] Section 58(1) of the Act provides that an award shall continue in force for the period, not exceeding five years, specified therein and subsection (2) extends the life of an award thereafter until a new award is made.[32] By its very nature long service leave will almost invariably span the life of more than one award and for this reason some doubt has always been felt about award provisions for long service leave. To remove these doubts, subsection (3) was added in 1951 to authorise long service leave provisions in federal awards notwithstanding that they are not capable of operating or operating fully during the period specified in the award.

At the present time few federal awards contain long service leave provisions[33] and to date there appears to have been no pressure from the unions to alter this position. Employers in certain industries have, however, sought to achieve a uniform code on a federal basis by having long service leave clauses inserted in federal awards. Such a course is, however, beset with many difficulties, not the least of which is the principle that only parties to an industrial dispute can be bound by a federal award.[34] It is now settled that employers cannot create an industrial dispute with respect to the wages and conditions of non-unionists by serving a log of claims on the appropriate union, if the union refrains from making counter-demands on the employers in respect of the non-members.[35] Any federal award made in such circumstances cannot include non-unionists within its scope. Hence if unions are opposed to long

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[26] N.S.W., s.5; Vic., s.153; Qld., s.10B(6); Tas., s.7; S.A., ss.13,15,16; W.A., s.5.

[27] (1955) 92 C.L.R. 529. Aff. by P.C. (1957) A.C. 274, 96 C.L.R.I.

[28] (1957) 97 C.L.R. 177. See also *Lamb* v. *Cockatoo Dock Pty. Ltd.* (21.9.59) *Cor.* Stephen, J., District Court, Sydney (as yet unreported). An appeal is pending from this decision.

[29] Under s.109 of the Commonwealth Constitution.

[30] Conciliation and Arbitration Act 1904-1959, s.33(1)(c), (No. 13 of 1904-No. 40 of 1959).

[31] See s.4(1).

[31a] As to the validity of award provisions for long service leave prior to the enactment of this subsection, *cf. In re Engine Drivers (South Maitland Rlys. Ltd.) Award* (1939) A.R. 705, 709, and *In re Butchers Wholesale (Cumberland) Award* (1953) A.R. 738, 750. As to the position under the federal Act see *Reg.* v. *Hamilton Knight, ex p. C'wealth SS. Owners Assn.* (1952) 86 C.L.R. 283, 294-95, 309-310, 322-23.

[32] As to the validity of these provisions, see *Waterside Workers Fedn.* v. *C'wealth SS. Owners Assn.* (1920) 28 C.L.R. 209, and *Reg.* v. *Kelly, ex p. Waterside Workers Fedn.* (1952) 85 C.L.R. 601.

[33] See *Re Graphic Arts (Interim) Award No. 1, supra* n. 1.

[34] *Australian Boot Trade Employees' Fedn.* v. *Whybrow & Co.* (1910) 11 C.L.R. 311; *R.* v. *Kelly, ex p. Victoria* (1950) 81 C.L.R. 64. However, the Federal Commission may make a common rule for the Federal Territories. *Supra*, s.49.

[35] *Reg.* v. *Graziers Assn., ex p. A.W.U.* (1956) 96 C.L.R. 317.

service leave being regulated by federal awards, a most unsatisfactory position will result as far as employers are concerned. The federal award will determine their obligations to union members and the State legislation their obligations to non-members. The legal position is further complicated, despite s.58(3) of the Act, by the periodical rescission of awards.[36] Further difficulties may arise owing to the resignation of employers or employees from organisations which are parties to or bound by federal awards. On the resignation of an employee from a union bound by an award he will cease to be entitled to long service leave under the federal award and will become entitled under the State legislation.[37] On the other hand an employee who for many years has not been a union member may discover that because he has been employed in more than one State he cannot obtain benefits under the State legislation, but by joining his union he may become entitled under a federal award.[38] If, as in the State legislation provision is made in any federal award regulation of long service leave for exemption of employers who conduct superannuation schemes and the like for their employees, difficulties are likely to occur because of the periodic rescission of awards and fluctuations in their coverage. This is apart from the question whether an exemption would result in the relevant State legislation becoming operative over the field of the exemption.

Since the decision of the Privy Council in *Collins* v. *Charles Marshall*,[38a] several consent awards have been made inserting long service leave clauses in federal awards. A model long service leave clause for insertion in federal awards, known as the Federal Code,[38b] was prepared after consultation between the Australian Council of Trade Unions and certain employers' organizations. Until recently the question of overriding the State legislation by federal awards had not been determined in contested proceedings. However, in September 1959 the Commonwealth Conciliation and Arbitration Commission delivered judgment in the *Graphic Arts Award Case*[38c] refusing an employers' application that long service leave provisions be inserted in the award. The employers had stressed the desirability of a uniform national long service leave code in the industry, especially in relation to employers with establishments in more than one State. However, it was clear that a federal award could not cover all employees in a given establishment. Non-unionists might not be covered by the award, and other employees might be outside the classifications of the award altogether. The Commission said: "It is apparent that an award of this Commission in the present case would create disparities within employers' establishments where uniformity now exists under State law."

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[36] *Cf. Re Paint & Varnish Makers Award* (1958) A.R. 183. See also *Reg.* v. *Hamilton Knight, ex p. C'wealth SS. Owners Assn.* (1952) 86 C.L.R. 283, 294-95, 309-310, 322-23.

[37] Conciliation and Arbitration Act, s.61(f). See *Re Special Steels Manufacture (C'wealth Steel Co. Ltd.) Award* (1956) A.R. 272. This would not be the case where the Union's log of claims had sought federal award provisions for non-unionists, and the federal award was made in settlement of the resulting dispute, and bound employers in respect of non-unionists. As to the position in such a case, see *Metal Trades Case* (1935) 54 C.L.R. 387 at 406, *per* Latham, C.J., *White* v. *A.E.U.* (1954) 78 C.A.R. 249, *Timber Merchants Assn.* v. *Austn. Timber Workers Union* (1937) 37 C.A.R. 273, 276-77. See also (1937) 11 *A.L.J.* 283. *Cf. Queen* v. *Graziers Assn., ex p. A.W.U.* (1956) 96 C.L.R. 317 at 331, *per* Fullagar, J.

[38] Conciliation and Arbitration Act *supra*, s.61(f). *Burwood Cinema Ltd.* v. *Austn. Theatrical Employees Assn.* (1925) 35 C.L.R. 528.

[38a] (1957) A.C. 274, 96 C.L.R. 1.

[38b] See D. C. Thomson, "The Federal Long Service Leave Code" (1959) 1 *Jo. of Industrial Relations* 51.

[38c] *The Graphic Arts (Interim) Award (No. 2), Cor.* Kirby, C.J., Wright and Gallagher, JJ. (16.9.59) as yet unreported. In earlier proceedings the Commission disposed of objections to jurisdiction which had been taken by the respondent unions. *The Graphic Arts*

The employers' application was therefore refused.[38d] The Commission, however, indicated that a renewed application might be favourably considered if the present substantial uniformity in the State legislation were to be disrupted in the future. It is clear that for the time being the Commission will only be prepared to make a long service leave award in contested proceedings where exceptional circumstances exist in the particular industry. In general, therefore, multi-State employers seeking uniform long service leave benefits for all their employees will be obliged to exploit the opportunities of obtaining such uniformity available under the exemption provisions of the State legislation. This subject will be considered more fully in a later section of this article.

There is also the possibility of direct federal legislation, but because of constitutional limitations, its scope would be limited. The authority for such legislation could be found in the commerce power,[39] and the powers to legislate with respect to Territories[40] and Commonwealth employees.[40a] It is now settled that the power of the federal parliament to legislate with respect to interstate and overseas trade authorises legislation regulating the terms and conditions of employment of persons engaged in such trade.[41] Moreover, interstate and overseas trade now includes, at least for some purposes, production for the purpose of such trade,[42] and it may be that federal legislation regulating the terms and conditions of employment of persons engaged in such production would be valid. However, the maritime and stevedoring industries where there has been a certain amount of direct federal industrial legislation under the commerce power are industries where long service leave may not be of major significance[43] and the practical difficulties involved in long service leave legislation for employees in industries not exclusively engaged in production for interstate or overseas trade would be very great.[44]

In the meantime the division of the Commonwealth into six States and two federal territories, and the regulation of many industries by federal awards, are bound to create difficulties in relation to long service leave. Employment is a relationship which does not necessarily have an exact single territorial location, and which need not recognize State frontiers. Furthermore, even if the long service leave legislation were uniform, problems would arise because of the interstate movement of employees. The significant differences in the legislation will certainly increase and aggravate these problems.

(Interim) Award No. 1, Cor. Kirby, C.J., Wright, Gallagher, JJ. (31.10.58) as yet only reported in Law Book Co.'s Current Review (1958) No. 12, 178; (1958) 11B, Vol. 13, No. 10, 811.

[38d] Under s.41(d)(iii) of the Conciliation and Arbitration Act (*supra*) which provides that Federal Industrial Tribunals may decline to make an award where it is not necessary or desirable to do so in the public interest.

[39] Commonwealth Constitution, s.51(i).

[40] *Id.*, s.122.

[40a] Commonwealth Constitution, s.52(ii). See Public Service Act (C'wealth.) 1922-1958 (No. 21 of 1922-No. 11 of 1958), ss.73,74.

[41] *Australian Steamships Ltd.* v. *Malcolm* (1914) 19 C.L.R. 298; *Huddart Parker Ltd.* v. *C'wealth.* (1931) 44 C.L.R. 492, 514-16; *Dignan* v. *Australian Steamships Pty. Ltd.* (1931) 45 C.L.R. 188; *Victorian Stevedoring Co. Pty. Ltd.* v. *Dignan* (1931) 46 C.L.R. 73; *Joyce* v. *Australian United Steam Nav'gn. Co. Ltd.* (1939) 62 C.L.R. 160; *Reg.* v. *Wright, ex p. Waterside Workers Fedn.* (1955) 93 C.L.R. 528. *Reg.* v. *Foster, ex p. Eastern and Australian Steamship Co. Ltd.* (1959) 32 A.L.J.R. 446.

[42] *O'Sullivan* v. *Noarlunga Meat Ltd.* (1955) 92 C.L.R. 565, 596-98.

[43] Because of the nature of the employment in these industries.

[44] These difficulties would be reduced if the doctrine of "commingling" in inter-State trade received acceptance in the High Court. See *R.* v. *Burgess, ex p. Henry* (1936) 55 C.L.R. 608, 628-29, 671-72, 677.

III. THE TERRITORIAL OPERATION OF THE STATE LEGISLATION

Section 4(1) of the New South Wales Act[45] provides that "every worker shall be entitled to long service leave on ordinary pay in respect of his service with an employer". Section 4(11)(a) provides: "the service of a worker with an employer means the period during which the worker has served his employer under an unbroken contract of employment". What territorial operation is to be given to these words? Since the Act contains no provisions which define its territorial operation, the question must be determined by common law principles of statutory construction. The other State legislation is fundamentally similar and the same problem arises as to its territorial operation. Section 4 is drafted in general terms and in the absence of a limiting construction would apply to all workers everywhere. It is well settled, however, that general words in a statute are not to be construed literally but must be read down so as not to exceed the limits of State legislative competence.[46] It therefore becomes necessary to search for limitations to be placed on the words of the section.[47]

It is convenient at this point to recall the extent of State legislative power. The grant of legislative power in the State Constitutions generally takes the form of a grant of power to legislate "for the peace, order and good government of" the State, although the precise words of the grant vary. Provided a statute has sufficient territorial nexus with a State to answer the description of being such a law it is valid. The subject of the statute must be a person, circumstance or thing within the State.[48] Provided such a nexus exists there is nothing to prevent a State legislature from attaching rights and duties within the State to acts committed outside it. Thus a long service leave statute of a State which conferred benefits on workers who, in that State, completed twenty years service with an employer, whether or not all such service was rendered in that State would in the present submission be *intra vires*. General words in statutes are also read down because of the principle of international comity.[49] Thus, despite the absence of any limitations on the legislative competence of the Imperial Parliament, English courts have frequently confined the operation of general words in Imperial statutes to the United Kingdom. "If there be nothing which points to a contrary intention, the Statute will be taken to apply only to the United Kingdom".[50]

The nature and extent of the limitations which are to be read into general words in State statutes were considered by the High Court in *Barcelo* v. *Elec-*

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[45] No. 38 of 1955.

[46] *Macleod* v. *A.-G. for N.S.W.* (1891) A.C. 455 (P.C.) 456-57.

[47] *Id.*; *Barcelo* v. *Electrolytic Zinc* (1932) 48 C.L.R. 391, 410.

[48] *Ashbury* v. *Ellis* (1893) A.C. 339 (P.C.); *Commissioner for Stamps* v. *Weinholt* (1915) 20 C.L.R. 531, 539-541; *Delaney* v. *Great Western Flour . . .* (1916) 22 C.L.R. 150; *Commr. of Stamp Duties* v. *Millar* (1932) 48 C.L.R. 618, 628, 631-32; *Trustees Execrs. & Agency Co. Ltd.* v. *F.C.T.* (1933) 49 C.L.R. 220, 232ff.; *Broken Hill South Ltd.* v. *Commr. of Taxn. (N.S.W.)* (1936) 56 C.L.R. 337; *Commr. of Stamps* v. *Counsell* (1937) 57 C.L.R. 248; *Johnson* v. *Commr. of Stamp Duties* (1956) A.C. 331 (P.C.). See also D. P. O'Connell, "The Doctrine of Colonial Extra-Territorial Legislative Incompetence" (1959) 75 *L.Q.R.* 318.

[49] *Jeffreys* v. *Boosey* (1854) 4 H.L.C. 815; *Cope* v. *Doherty* (1858) 2 De G. & J. 614; *Niboyet* v. *Niboyet* (1878) 4 P.D. 1, 19-20, the dissenting judgment of Brett, L.J. has since prevailed; *Ex p. Blain* (1879) 12 Ch. D. 522; *Cooke* v. *Chas. A. Vogeler* (1901) A.C. 103; *Tomalin* v. *Pearson* (1909) 2 K.B. 61 (C.A.); *In re Debtors* (1936) Ch. 622 (C.A.); *Theophile* v. *Solicitor-General* (1950) A.C. 186.

[50] *R.* v. *Jameson* (1896) 2 Q.B. 425, 430. See also *Reg.* v. *Foster, ex p. Eastern & Austn. S.S. Co.* (1959) 32 A.L.J.R. 446, 464, *per* Windeyer, J.

trolytic Zinc Co. Ltd.;[51] *Wanganui-Rangitikei Electric Power Board* v. *A.M.P.*,[52] and *Mynott* v. *Barnard*.[53] These cases concerned the construction of different types of legislation, but they have served to establish principles which are of general application.

It might be argued that when faced with the problem of reading down general words in a State statute, the courts should do so only to the extent necessary to render them *intra vires*. In other words, the legislature, by employing general words in a statute should be presumed to intend those words to receive the widest possible territorial operation consistent with the territorial limitations on State legislative competence. Thus in the present case "service" could be read down to include all service which was sufficiently connected with New South Wales to be validly the subject of New South Wales legislation. Such a principle of construction has the merit of apparent simplicity, and might be thought to accord with the intention of the legislature. However, such a principle is different from the rules of construction applied by the English courts when Imperial statutes are read down.[54] There could be no question of reading down Imperial statutes for constitutional reasons. It is clear that the rule of construction which presumes that a statute is consistent with private international law is the means whereby English courts have endeavoured to harmonise as far as possible the application of private international law rules to common law and statute, and to minimise conflicts of statute law on the international level. It is clear that such reasoning is *a fortiori* applicable to the construction of State legislation in a federation.

Nevertheless the principle of reading down State statutes no further than necessary to render them *intra vires* was accepted by Starke, J. in *Barcelo's Case*.[55] In that case the High Court had to consider the limitations to be read into the words "every mortgage" in the Victorian moratorium legislation.[56] Dixon, J., however, rejected the principle. He said:[57]

> Where the enactment . . . deals with no matter involving a connection with Victoria and indicates no intention of conditioning its operation on any fact, . . . connected with Victoria, but is expressed in general terms, . . . independent of locality, . . . the constitutional restriction, while it reinforces the need for a restrictive interpretation, gives no further assistance in determining upon what connection with Victoria the operation of the enactment must be understood to depend. To ascribe to it an operation defined as co-extensive with the power of the legislature may appear a possible, even an attractive, alternative to applying the rule of construction which presumes consistency with the principles of private international law. But the extent of the power to legislate in and for Victoria cannot provide a definition of the extent of the operation of a general enactment . . . because the power includes authority to adopt any fact . . . concerning Victoria as the ground of exercising legislative jurisdiction . . . and that is precisely what the legislature has not done.

The principle of construction thus rejected by Dixon, J. was again rejected by the High Court in *Mynott* v. *Barnard*,[58] and it is no longer open to the

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[51] (1932) 48 C.L.R. 391.

[52] (1934) 50 C.L.R. 581. The judgments in *Barcelo's Case* and the *Wanganui Case* were referred to without disapproval by the P.C. in *Mount Albert Council* v. *A'sian T. & G. Society* (1938) A.C. 224 (P.C.) 244-46.

[53] (1939) 62 C.L.R. 68.

[54] *Supra* nn. 49, 50.

[55] (1932) 48 C.L.R. 391 at 406, and *per* Rich, J. at 415.

[56] Financial Emergency Act, 1931 (Vic.) (No. 3961), s.19(1).

[57] *Id.* at 428.

[58] (1939) 62 C.L.R. 68, 77.

courts to solve the problem of construing general words in State statutes by giving them an operation co-extensive with the limits of State legislative power.[59] Both *Barcelo* v. *Electrolytic Zinc Co. Ltd.*[60] and *Wanganui-Rangitikei Electric Power Board* v. *A.M.P.*[61] concerned the construction of State moratorium legislation which operated to reduce the rate of interest payable under mortgages. The vital words in the legislation before the court in *Barcelo's Case* were "every mortgage", while in the *Wanganui Case* they were the words "an obligation to pay interest". In both cases the majority of the High Court held that the statute on its true construction applied only to transactions governed by the law of the enacting State. Dixon, J. in both cases applied the common law rule of construction that "general words should not be understood as extending to cases which according to the rules of private international law administered in our Courts are governed by foreign law".[62] The discharge of contractual obligations is governed by the proper law of the contract;[63] and in *Barcelo's Case*, since this was the law of Victoria, the Victorian statute applied, while in the *Wanganui Case* the proper law of the debentures was that of New Zealand and hence the New South Wales Act did not apply.[64]

Mynott v. *Barnard*[65] brought before the High Court the construction to be given to general words in the Victorian Workers' Compensation Act.[66] The appellant's husband had been employed under a contract of employment which was governed by Victorian law. He died as the result of injuries received by him in New South Wales. Section 5(1) of the Act provided: "If in any employment, personal injury by accident arising out of and in the course of the employment is caused to a worker, his employer shall . . . be liable to pay compensation." What limitations were to be read into those words, Latham, C.J. who delivered the leading judgment held:

(1) The Act did not apply to all workers domiciled or resident in Victoria, because "workers compensation is not one of the class of cases in which some kind of personal law . . . may be assumed to follow the person wherever he may be".[67]

(2) The Act did not apply to all workers employed under contracts of service made in Victoria. Such a construction would give the statute a capricious and inconvenient operation. It would be strange if the statute applied of its own force to a contract of service made in Victoria between two foreigners, which was to be entirely performed outside the State.[68]

(3) The Act did not apply to all workers employed under contracts of

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[59] The rejection of this principle, the territorial limits on State legislative competence, and the application of the rule of construction giving general words an operation consistent with private international law, together with the substantial uniformity in the State systems of private international law, have minimized inter-State conflicts of statute law in Australia. On the other hand, the lack of uniformity in the State systems of private international law in the United States, and the application of less restrictive tests of territorial validity, and less restrictive rules of statutory construction have created widespread inter-State conflicts of statute law in the United States. The full faith and credit clause must therefore constantly be invoked to resolve the conflicts. See *infra*.

[60] (1932) 48 C.L.R. 391.

[61] (1934) 50 C.L.R. 581.

[62] (1934) 50 C.L.R. 581 at 601.

[63] *Re United Railways of Havana Ltd.* (1959) 2 W.L.R. 251 (C.A.).

[64] In *Barcelo's Case* (*supra*) Evatt, J. held that the clause in the mortgage which declared that its proper law was to be the law of Victoria applied present and future Victorian "internal" law, and hence the moratorium legislation was applied contractually to the mortgage. (*Id.* at 435-37.) Hence where a service agreement to be performed outside Australia incorporates the law of one of the States the employee will be entitled contractually to long service leave benefits.

[65] (1939) 62 C.L.R. 68.

[66] Workers Compensation Act, 1928 (Vic.) (No. 3806).

[67] *Supra* at 77.

[68] *Id.* at 77-78.

service governed by Victorian law.[69] In support of his contention that this construction should be adopted counsel for the appellant had relied upon *Barcelo's Case* and the *Wanganui Case*. These cases, however, were distinguished. The moratorium legislation which was there considered, operated to vary contractual rights and duties, whereas workers compensation legislation was of a very different character. It did not purport to regulate contractual relations, and although it attached obligations to the relationship of master and servant created by contracts of employment, those obligations were unmistakably non-contractual in character. In view of the purpose and effect of the moratorium legislation, it was natural to select, as the criterion of its operation, the proper law of the transactions affected. Such a view was, however, inappropriate when dealing with workers compensation legislation.

While no other members of the court expressed disagreement with these views, the court was divided on the question whether the territorial operation of the Act was attracted by the *situs* of the accident, or by the *situs* of the employment. Latham, C.J. and Starke, J. examined the object and character of the Act and concluded that it operated on accidents which occurred within Victoria. Rich and Dixon, JJ. considered that the Act operated on injuries sustained in the course of Victorian employments. Nevertheless the appeal failed since in their view the deceased's employment was located in New South Wales. McTiernan, J. expressed no clear opinion on the question. Dixon, J. said:[70]

> Workers compensation is a liability neither in tort nor in contract. It is a responsibility *positivi juris*, and is annexed by law to a relationship, that of master and servant. The parties may choose whether they will enter into the relationship, but if they do the employer's liability for, and the worker's and his dependants' corresponding right to, compensation are legal consequences which are independent of and cannot be controlled by agreement. It appears to be natural to say that the statute is confined to "employment" within the Territory. The employment is the continual relationship, not the engagement or contracting to employ and to serve. *It is the service . . .*[71]

The learned Judge then referred with approval to certain American authorities where it had been held that work outside a State could be held in certain circumstances to be performed in the course of an employment within the State. In particular he referred to *Tallman* v. *Colonial Air Transport Co.*[72] where the dependants of an airline pilot, killed outside the State of New York, recovered compensation under New York law because the deceased's employment was identified with that State.

In *Carter* v. *Australian Glass Manufacturers Co. Pty. Ltd.*[73] the Full Bench of the New South Wales Industrial Commission had to construe the words "unbroken contract of employment" in the pre-1955 New South Wales legislation.[74] In that case a worker who had been continuously employed for more than ten years, but for less than twenty years, was dismissed. During the course of his employment the worker and his employer had entered into a new contract of service the terms of which were fundamentally different from those of their earlier contract. It was clear that they had not merely varied

[69] *Id.* at 79.
[70] *Id.* at 91.
[71] Italics supplied.
[72] (1932) 259 N.Y. 512.
[73] (1955) A.R. 68.
[74] Industrial Arbitration Act 1940-1954 (N.S.W.), s.88C(7)(a) (No. 2 of 1940- No. 18 of 1954).

their earlier contract but had rescinded it, and substituted a new contract.[75] It was contended that the periods of service under both contracts could not be aggregated because they did not constitute "an unbroken contract of employment". However, the Court held that those words referred to a continuous and unbroken period of service.[76] Hence service under both contracts could be aggregated, and the worker was entitled to long service leave. It seems therefore that both workers compensation and long service leave legislation are concerned with "employments" rather than with contracts,[77] and it is submitted that the reasoning in *Mynott* v. *Barnard* is thus applicable to the construction of the long service leave legislation.[78]

If this is so then three alternative constructions of the words "service with an employer" and "unbroken contract of employment" in s.4 of the New South Wales Act are open. The first is that the words refer to service performed within the State, wherever the worker's "employment" may be located. The second is that the words refer to service anywhere under a New South Wales "employment", and the third is that a worker is entitled to long service leave benefits provided that at the time the right accrues he is rendering service in New South Wales.[79] Under the latter interpretation, the fact that part of the service has been rendered outside New South Wales or under foreign "employments" would not affect the worker's entitlement. The third construction suggested requires the words "service with an employer" to be construed literally and without being read down in any way.[80] Such a construction would not involve any excess of legislative power, because the Act would, on this view, operate on workers employed within New South Wales at the time the right to long service leave benefits accrued, and this would be sufficient to attract the legislative power of the State.[81] Whilst it is submitted that legislation framed in explicit terms which operated on the completion of the necessary service within the jurisdiction, irrespective of where the rest of the service was rendered, would be valid, the question remains whether the general words of s.4 are capable of this construction.

Section 4(2)(a) of the Act provides "the amount of long service leave to which a worker shall be so entitled shall in the case of a worker who has

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[75] See *Morris* v. *Baron* (1918) A.C. 1.

[76] (1955) A.R. 68 at 77.

[77] The corresponding provisions of the Victorian, Tasmanian and W.A. legislation refer to "continuous employment" (Vic., s.154(1), Tas., s.8(1), W.A., s.8(1)), while the Q'land and S.A. legislation refer to "continuous service" (Qld., s.10B(2), S.A., s.6(2)). It is submitted that no distinction is to be drawn between the meaning of these phrases and "unbroken contract of employment" in the N.S.W. legislation as interpreted by *Carter's Case*.

[78] See also *Beazley* v. *Ryan* (1935) V.L.R. 135, *Dykes* v. *Dunn* (1958) V.R. 504, *Awdejew* v. *Walkerden Bros.* (1958) 76 W.N. (N.S.W.) 176, all involving the territorial operation of workers compensation legislation.

[79] The Interpretation Act (N.S.W.), 1897, s.17 (No. 4 of 1897-No. 1 of 1942) provides that in N.S.W. statutes ". . . all references to localities, jurisdictions and other matters and things shall, unless the contrary intention appears, be taken to relate to such localities, jurisdictions and other matters and things in and of N.S.W.". In practice this section has proved to be of little or no assistance in determining the territorial operation of N.S.W. statutes. See the *Wanganui Case* (1934) 50 C.L.R. 581 at 600-601, *per* Dixon, J., *Birmingham Univ.* v. *F.C.T.* (1938) 60 C.L.R. 572, *Vicars* v. *Commr. of Stamp Duties* (1945) 71 C.L.R. 309 at 338, *per* Dixon, J., at 345 *per* Williams, J., *Grannall* v. *Geo. Kellaway* . . . (1955) 93 C.L.R. 36 at 52ff., *Johnson* v. *Commr. of Stamp Duties* (1956) A.C. 331, 352 (P.C.); *cf. Awdejew* v. *Walkerden Bros.* (1958) 76 W.N. (N.S.W.) 176.

[80] *Cf. Koop* v. *Bebb* (1951) 84 C.L.R. 629, where the High Court refused to read down the Vict. Fatal Accidents legislation by interpolating the words "in Victoria", on the ground that the legislation enacted a rule to form part of the Victorian law of torts, and the territorial operation of the statute flowed from Victorian private international law. See esp. 640-41.

[81] See *Broken Hill South* v. *C. of T. (N.S.W.)* (1937) 56 C.L.R. 337 at 375, *per* Dixon, J.

completed twenty years service with an employer be . . .". This section must in some way be confined to New South Wales to be valid. The third construction would achieve the necessary reading-down by requiring the completion of the service to take place in the State, and thus would read the words "in New South Wales" into the section immediately before the word "completed". The phrase "service with an employer" would not, on this view, be read down in any way. Section 4(2)(a) is a quasi-machinery provision, the real substantive right flowing from s.4(1) which provides that "every worker shall be entitled to long service leave . . . in respect of his service with an employer". It would be more natural to read down this subsection rather than s.4(2)(a).[82] This construction would attach rights and duties in New South Wales to service performed abroad, which at the time it was rendered may not have been connected with New South Wales in any way. In our view clear and express words are necessary before a statute would be interpreted in this way.[83] It is therefore submitted that third construction should not be accepted.

It is now necessary to discuss whether the Act operates on service within New South Wales, or service under New South Wales employments. In *Mynott* v. *Barnard*[84] Rich and Dixon, JJ. held that the Victorian Workers Compensation Act operated on injuries received in the course of Victorian "employments". It is submitted with respect that their reasoning is correct, and is to be preferred in the construction of workers compensation legislation.[85] It is further submitted that such reasoning is *a fortiori* applicable to the long service leave legislation, which specifically operates on service with employers.[86] The Act then, in our submission, operates on service under New South Wales "employments".[87] Such a construction will minimize the difficulties which will arise when service is rendered outside New South Wales. So long as the employment remains locally situated in the State, the contract of employment will remain unbroken for the purposes of the Act.[88]

IV. THE PROBLEM OF MULTI-STATE EMPLOYMENT

In many cases a worker who has rendered service to the one employer in more than one State will have done so under "employments" which were locally situated in different States. If the views expressed above are correct,

[82] See *Commr. of S.D.* v. *Oei Tjong Swan* (1933) A.C. 378, 389 (P.C.).

[83] See generally *Blackwood* v. *The Queen* (1882) 8 App. Cas. 82, 93-94 (P.C.), *Commr. of Taxes (Qld.)* v. *Union Trustee Co.* (1931) A.C. 258, 265-68 (P.C.), *Commr. of S.D.* v. *Oei Tjong Swan, supra* n. 82, at 385-88, *Commr. of S.D.* v. *Millar* (1932) 48 C.L.R. 618, 632-33, 636. These cases all involved fiscal legislation, and establish that express words are necessary for foreign property or income to be taxed. See generally *Barcelo* v. *Electrolytic Zinc, supra* n. 47, at 423-28 *per* Dixon, J., *Mynott* v. *Barnard* (1939) 62 C.L.R. 68 at 75-77, *per* Latham, C.J.

[84] (1939) 62 C.L.R. 68.

[85] See *Koop* v. *Bebb* (1951) 84 C.L.R. 629, 640, *Dykes* v. *Dunn* (1958) V.R. 504, esp. at 508-509 *per* Herring, C.J., and *Awdejew* v. *Walkerden Bros.* (1958) 76 W.N. (N.S.W.) 176, esp. 178-79, *per* Manning, J.

[86] It is therefore submitted that the *dictum* of Beattie, J. in *Re Dunlop Rubber (Aust.) Ltd.* (1956) A.R. 841, 848, that the Act operates on service in N.S.W. under a contract of service made under N.S.W. law, does not correctly state the law.

[87] In *F.C.T.* v. *French* (1957) 98 C.L.R. 398, the High Court held that the territorial source of a taxpayer's salary for the purpose of the C'wealth. income tax legislation was the place where he performed his services, and not the place where payment was made. It is submitted that *French's Case* is of no assistance in construing the long service leave legislation.

[88] Most of the State Acts forbid contracting out. N.S.W., s.7; Vic., s.160; Tas., s.15; S.A., s.19. Section 68 of the Qld. Act provides for awards to prevail over inconsistent

the worker cannot, under ordinary principles of construction, aggregate his service under more than one State "employment" to calculate his long service leave entitlement.[89] Moreover, while the long service leave legislation remains in its present form there is every possibility that workers with multi-state employments will be denied long service leave benefits because they will have failed to qualify under any single State Act. Can the full faith and credit provisions be invoked in such circumstances? Although there is little Australian authority on full faith and credit, what authority there is supports the view that the provisions of s.118 of the Constitution and s.18 of the State and Territorial Laws and Records Recognition Act,[90] have a substantive and not a merely evidentiary operation. The provisions are not merely a mandate for judicial notice.[91]

The Australian full faith provisions were taken from s.2 of Article IV of the United States Constitution.[92] The American courts have considered that the full faith and credit clause embodies a clear national policy. As Stone, J. said in *Milwaukee County* v. *White Co.*[93]

> The very purpose of the full faith and credit clause was to alter the status of the several States as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

There appears to be no American long service leave legislation, but the case law that has developed in relation to workers compensation and tort legislation does provide a close parallel. Towards the end of the nineteenth century American State legislatures began to enact legislation similar to Lord Campbell's Act. It was not long before attempts were made to enforce causes of action under this legislation outside the State where the cause of action arose and in States where the common law position still prevailed. It was held

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contracts. In *Mynott* v. *Barnard* (*supra*) Latham, C.J. (at 80) expressed the view that it would not be possible to exclude the application of applicable legislation by a contractual stipulation that a foreign system of law should govern the parties' rights under a contract. See also *Vita Food Products Inc.* v. *Unus Shipping Co.* (1939) A.C. 277, 289-292 (P.C.), *Re Helbert Wagg & Co. Ltd.* (1956) Ch. 323, 341. However, in relation to service contracts to be performed in a country where no long service leave legislation is in force a stipulation applying the law of an Australian State would incorporate the long service leave legislation of that State contractually. See *Barcelo's Case* (1932) 48 C.L.R. 391 at 432-38, *per* Evatt, J.

[89] It is to be noted that the legislation makes no provision for service with subsidiary or related companies to be aggregated. This is bound to produce anomalies.

[90] Section 118 of the C'wealth. Constitution which provides that "Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State." Section 18 of the State and Territorial Laws and Records Recognition Act 1901-1950 (Cwlth.) (No. 5 of 1901-No. 80 of 1950) which provides: "All public Acts, records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken."

[91] See esp. *Merwin Pastoral Co.* . . . v. *Moolpa Pastoral Co.* . . . (1932) 48 C.L.R. 565, and *Harris* v. *Harris* (1947) V.L.R. 44. See generally *Jones* v. *Jones* (1928) 40 C.L.R. 315, 320, *Re Cwlth. Agric'l Engineers Ltd.* (1928) S.A.S.R. 342, *McClelland* v. *Trustees Ex'rs. & Agency* . . . (1936) 55 C.L.R. 483, 497, *Re E. & B. Chemicals* . . . (1939) S.A.S.R. 441, *Posner* v. *Collector for Interstate Destitute Persons* (1946) 74 C.L.R. 461, 479. See also Z. Cowen, "Full Faith & Credit: The Australian Experience" (1952) 6 *Res Judicatae* 27. W. A. Wynes, *Legislative, Executive and Judicial Powers in Australia* (2 ed. 1956) 231-34, Z. Cowen, *Bilateral Studies in American-Australian Private International Law* 19-29. E. I. Sykes, "Full Faith and Credit: Further Reflections" (1954) *6 Res Judicatae* 353.

[92] "Full faith and credit: Further Reflections" (1954) *6 Res Judicatae* 353.
judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which acts records and proceedings shall be proved and the effect thereof." See also s.51(xxv) of the Cwlth. Constitution.

[93] (1935) 296 U.S. 268, 276-77.

that the forum State must enforce the wrongful death statute of the State where the cause of action arose.[94] However, these decisions were reached independently of full faith and credit.[95] Some States attempted to confine actions under their wrongful death statutes to their own courts, but in a series of decisions the Supreme Court held that full faith and credit did not prevent the courts of other States from entertaining actions based on such statutes in disregard of their jurisdictional limitations.[96] Recently the Supreme Court has held that full faith and credit prevents a State statute from validly depriving that State's courts of jurisdiction to hear and determine actions under sister State wrongful death legislation.[97]

The full faith and credit sections speak of faith and credit being given to "public acts, records and judicial proceedings".[98] Space does not permit even a summary of the great mass of American authorities, but it is clear that the clause has not been regarded as a mere judicial notice clause. Its operation has not been confined to matters of evidence. On the contrary it is clear that the clause has been given wide substantive effect. Full faith and credit is required to be extended not just to the "public acts . . . and judicial proceedings" of a sister State, but to the legal rights and duties which have been created or declared by such acts and judicial proceedings.[99]

Under the Commonwealth Service and Execution of Process Act[100] a summons under a State Long Service Leave Act may be served on an employer resident in another State. It would also be possible for a worker to commence proceedings in any State where his employer resides.[101] In these circumstances the forum State would in our submission be obliged by the full faith and credit sections[102] to recognize and enforce a worker's rights under a sister State statute. The State legislation requires proceedings for the recovery of long service leave to be commenced in courts of summary jurisdiction or Industrial Magistrates Courts,[103] but these provisions are so drafted that they only apply to actions arising under the same statute, and cannot extend to actions under sister State statutes. Courts of common law jurisdiction could, however, hear and determine actions under sister State statutes as being proceedings to recover debts under statute.[104]

If full faith and credit is required to be extended to rights claimed under

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[94] *Dennick* v. *Railroad Co.* (1880) 103 U.S. 11, *Stewart* v. *Baltimore & Ohio R.R.* (1891) 168 U.S. 445.

[95] *Cf. Machado* v. *Fontes* (1897) 2 Q.B. 231. See also *Koop* v. *Bebb* (1951) 84 C.L.R. 629 where the American doctrine is discussed.

[96] *Atcheson Topeka & Santa Fe Rly. Co.* v. *Sowers* (1909) 213 U.S. 55, *Tennessee Coal, Iron & Rly. Co.* v. *George* (1913) 233 U.S. 354.

[97] *Hughes* v. *Fetter* (1951) 341 U.S. 609, *First National Bank* v. *United Air Lines* (1952) 342 U.S. 396.

[98] *Supra* n. 92.

[99] See *Bradford Electric Light Co.* v. *Clapper* (1932) 286 U.S. 145 esp. at 154, 159, 160, *per* Brandeis, J., *Alaska Packers Assn.* v. *Industrial Accident Commn. of California* (1934) 294 U.S. 532, esp. at 547, *per* Stone, J., *Pacific Employers' Ins. Co.* v. *Industrial Accident Commn. of California* (1938) 306 U.S. 493 esp. at 502, 504, *per* Stone, J., *Magnolia Petroleum Co.* v. *Hunt* (1943) 320 U.S. 430, *Watson* v. *Employers Liab. Ass. Corpn.* (1954) 348 U.S. 66, *Wells* v. *Simonds Abrasive Co.* (1953) 345 U.S. 514, *Carroll* v. *Lanza* (1955) 349 U.S. 348.

[100] Service and Execution of Process Act 1901-1953 (Cwlth.), (No. 11 of 1901-No. 48 of 1953).

[101] Subject to the application of the doctrine of "*forum non conveniens*".

[102] Section 118 of the Cwlth. Constitution, s.18 of the State & Territorial Laws and Records Recognition Act.

[103] Except S.A. where proceedings to recover long service leave may be brought in any court of competent jurisdiction. (S.18.)

[104] See *Mallinson* v. *Scottish Aust. Investment Co.* (1920) 28 C.L.R. 66, 70. A claim to long service leave, where the full faith and credit provisions were invoked would be "a matter arising under the Constitution, or involving its interpretation" within s.76 of

sister State statutes, then it becomes necessary to consider in what circumstances a worker acquires "rights" under the long service leave legislation. In all States except South Australia it is clear that on completion of twenty years service a worker acquires a vested indefeasible right to long service leave. It is also clear, in our submission, that from the moment he has completed ten years service a worker has a contingent right to long service leave.[105] This right is contingent on completion of twenty years service, or on prior termination for reasons other than his serious misconduct.[106] But a worker who has not yet completed ten years service has no legal rights under the legislation at all, but a mere hope that he will subsequently acquire such rights. Under the South Australian legislation a worker acquires vested rights on completion of seven years service, but until that time he has no rights under the Act at all.

Can the full faith and credit sections be invoked to enable periods of service in different States to be combined in computing a worker's entitlement to long service leave? It is submitted that they cannot. If a worker's continuous service with an employer consists of seven years service under employments successively located in Queensland, New South Wales and Victoria the position is that he has no rights at all under any of the relevant statutes, and there is no foundation on which the full faith and credit sections can operate.

The State Acts other than in South Australia prescribe special periods of limitation for civil proceedings to recover long service leave. The period is one year in Tasmania and Western Australia, two years in New South Wales, three years in Queensland and five in Victoria.[107] Under the legislation rights to leave or payment in lieu arise on death, termination of employment, or on completion of the minimum period of service. The legislation provides that on termination of employment a worker who has not forfeited his rights to leave shall immediately receive payment in lieu of leave and similar provisions apply where a worker dies.[108] However, there is no mandatory requirement that leave shall be taken immediately on completion of the minimum period of service. The legislation requires that leave accruing in such circumstances shall be taken as soon as practicable having regard to the needs of the employer's establishment or at such time as the employer and worker shall agree. However, if the worker does not take his leave and later his employment is terminated, his rights to leave immediately accrue. Hence the relevant date from which time will run will be the date of termination of employment or death.

Section 4(2)(a)(ii) of the New South Wales Act provides that propor-

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the Constitution, and s.39(2) of the Judiciary Act 1903-1955 (Cwlth.), (No. 6 of 1903-No. 35 of 1955). Hence an appeal would lie to the High Court from any decision of a State court. It is submitted that a claim under the full faith provisions would give rise to a "matter". See *Hooper* v. *Hooper* (1955) 91 C.L.R. 529, 535-38.

[105] In Tas. the period would be 15 years. See n. 15 *supra*.

[106] Once again the State legislation varies considerably. The N.S.W. Act (s.4(2)(a)(ii)) refers to "serious misconduct", and dismissal on such a ground only debars a worker if less than twenty years service has been completed. The Victorian Act (s.154(2)) refers to "serious and wilful misconduct", and dismissal on such a ground debars a worker from entitlement if less than twenty years service has been completed, or if more than twenty years service has been completed, destroys his rights to leave for additional service in some circumstances. The Qld. Act (s.10B(2)(b),(d)) refers to "misconduct", and dismissal on this ground destroys a worker's long service leave rights except in respect of one or more completed periods of twenty years service. The S.A. Act (s.12(1)) destroys a worker's right to leave if he has been dismissed because of "dishonesty, misconduct, or neglect of duty". The W.A. Act provides (s.8(2)(b),(c)) that dismissal for serious misconduct destroys a worker's rights to leave until twenty years service has been completed. The Tas. Act (s.8(2)(b)(i),(c)(i)) refers to "serious negligence or wilful misconduct". See also *Reg.* v. *Hall, ex p. Commr. for Rlys. (N.S.W.)* (1958) 32 A.L.J.R. 210.

[107] N.S.W., s.12; Vic., s.157(2), s.164; Qld., s.10B(10); Tas., s.13; W.A., s.20(2).

[108] N.S.W., s.4(3),(5); Vic., s.155, s.156; Qld., s.10B(7),(12); Tas., ss.8(2),9,10(1),(2); S.A., ss. 7,12; W.A. s.9.

tionate entitlement to leave arises "in the case of a worker who has completed at least ten years service, but less than twenty years service . . . and whose services . . . are terminated by the employer for any cause other than serious misconduct." If the view previously expressed that the Act operates on New South Wales "employments" is correct, then it is submitted that when an employer transfers a worker outside the State so as to alter the *situs* of his employment, his services with the employer have been terminated within the meaning of the section.[109] The worker's New South Wales services have been terminated, and the right to proportionate leave arises. The other State legislation provides that the absence of a worker by leave of his employer shall not interrupt the continuity of his employment. It is therefore submitted that under this legislation an inter-State transfer will not amount to a termination.[110] However, if the services of a worker who has been so transferred are subsequently terminated, his rights to leave in respect of his pre-transfer service will accrue, because he will have ceased to be absent with the leave of his employer. Excluding for the moment the position under the New South Wales Act, it is clear that where a worker has qualified for leave under more than one State Act and his services are terminated, his rights will simultaneously accrue under each Act.

Hence, where after fifteen years service in Tasmania and a further ten years service in Victoria an employee is dismissed, he would in our view be entitled to sue his employer in the Victorian courts for payment in lieu of leave under the Tasmanian Act in respect of his Tasmanian service as well as under the Victorian Act for Victorian service. Time will commence to run under both statutes simultaneously. However, if the employee's first ten years service had been rendered in New South Wales instead of Tasmania, he might be met with a plea that his inter-State transfer terminated his New South Wales employment, and that his claim under the New South Wales Act was now statute-barred.

The various limitation provisions in the legislation only apply to actions under the same statute, and are not apt to cover actions on sister State statutes. The normal private international law rule is that foreign causes of action need only satisfy the limitation prescribed by the forum in order to be enforceable there.[111] If this rule applies the limitation period which will be applicable to a claim under a sister State long service leave Act will be that relating to debts

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[109] The position in other States is probably different. Section 151(1)(g) of the Victorian Act provides that a worker's employment shall be continuous despite "any other absence of the worker by leave of the employer". Section 5(1)(g) of the Tas. Act is in the same terms. Section 10B(2a)(a) of the Qld. Act refers to absence of the employee "from work on leave granted by the employer". Section 4(1)(a) of the S.A. Act is in the same terms. Section 6(2)(c) of the W.A. Act refers to "any absence of the employee from his employment if the absence is authorized by the employer". See also s.6(2)(i). Given the principle that the Acts operate on local employments, it is submitted, not without doubt, that inter-State transfers do not terminate a worker's employment under these Acts. In *Re Storemen and Packers Award* (1952) A.R. 622 it was held that on termination of employment on the ground of slackness of trade after more than 10 years service, proportionate entitlement arose, notwithstanding that the award provided that termination on such a ground should not break the contract of employment for long service leave purposes. However, if leave was not taken on such a termination, and the worker was later re-employed both periods of service could be aggregated. It is submitted that this decision is distinguishable in relation to inter-State transfers under this legislation, as the local employment is suspended rather than terminated. Dismissal for slackness of trade is, it is submitted, in a different category. See N.S.W. Act, s.4(2)(b)(ii)(b).

[110] *Supra* n. 109.

[111] A. V. Dicey, *Conflict of Laws* (7 ed. 1958 by J. H. C. Morris) 1092-1094, G. C. Cheshire, *Private International Law* (4 ed. 1952) 641-45.

under statute.[112] Does the ordinary rule apply or is there to be a special full faith and credit rule? Before considering this question it is necessary to note that there is an exception to the ordinary rule where the foreign limitation is prescriptive in operation, destroying the foreign cause of action.[113] It was held in *Carter's Case*[114] under the pre-1955 New South Wales legislation that failure to pay long service leave was a continuing offence. *Carter's Case* has since been followed in relation to the 1955 Act.[115] If these decisions are correct it follows that an employer's statutory duty to pay long service leave continues although the civil remedy may be statute-barred. If the duty remains alive it is submitted that the worker's correlative right must also do so, and hence the New South Wales limitation bars the remedy only and is not prescriptive.

Must the New South Wales limitation be recognized and enforced in other States? In the United States the general full faith rule is that the limitation period of the forum alone applies unless the foreign limitation is prescriptive in operation, in which case both limitation provisions must be complied with.[116] This is the same as the common law rule. In the face of such unanimity it would perhaps have been doubtful whether a local full faith rule would have been established requiring sister-State limitation provisions to be enforced whether prescriptive or not. However, in our submission this question is concluded by the precise terms of s.18 of the State and Territorial Laws and Records Recognition Act.[117] This section requires Public Acts of a State or Territory if properly proved, to have "such faith and credit given to them in every Court . . . as they have by law or usage in the Courts . . . of the State or Territory from whence they come". Given the principle that the full faith and credit sections have a substantive operation, it is submitted that s.18 requires sister State limitation provisions to be recognized and enforced.[118]

If the view previously expressed is correct, an inter-State transfer is a termination of service under the New South Wales Act. In addition there is nothing in the Act which would enable periods of New South Wales service to be aggregated if they were separated by periods of extra-State service with the same employer. However, under the other State legislation the periods of extra-State service would, it is submitted, be absences of the worker by leave of the employer, and separate periods of intra-State service could be aggre-

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[112] See *Lamb* v. *Cockatoo Dock Pty. Ltd.* (21.9.59) *Cor.* Stephen, J., District Court, Sydney (as yet unreported). An appeal is pending from this decision.

[113] See n. 111 *supra*. There is a line of authority which establishes that where a statute which has created new statutory rights, imposes a time limitation for the enforcement of those rights, the limitation provisions are prescriptive. (A. V. Dicey, *op. cit. supra*, 1092.) See also *Maxwell* v. *Murphy* (1957) 96 C.L.R. 261, 274-76, *per* Williams, J., *Wells* v. *Simonds Abrasive Co.* (1953) 345 U.S. 514. However, these cases, together with the cases referred to by Dicey, all deal with wrongful death legislation. At common law a person's executors and dependants had no cause of action in respect of his tortious death. Causes of action which the deceased may have had lapsed on his death. The wrongful death legislation prolonged beyond death certain causes of action of the deceased for the benefit of his dependants. It was natural for the courts to regard limitations on these new rights as operating to destroy the rights themselves, rather than merely barring the remedy. It is submitted that one should not deduce from these cases a general rule that where new statutory rights, e.g. to long service leave, are created, the limitations on those rights are necessarily prescriptive. It should be a question of construction in each case.

[114] *Carter* v. *Austn. Glass Mfrs. Co.* . . . (1955) A.R. 68, 73-74, 75.

[115] *Fletcher* v. *Neill* (1958) A.R. 322.

[116] *Wells* v. *Simonds Abrasive Co.* (1953) 345 U.S. 514, 523-27. There is an exception in relation to disputes between a corporation or association and its members. In such cases the limitation period prescribed or sanctioned by the law of incorporation must be recognised and enforced elsewhere. *Order of Commercial Travellers* v. *Wolfe* (1947) 331 U.S. 586.

[117] *Supra* n. 92.

[118] See *Harris* v. *Harris* (1947) V.L.R. 44, 59, *per* Fullagar, J.

gated.[119] It is expressly provided, however, that the period of any such absence shall not be included in the worker's length of service when calculating his long service leave entitlement.[120]

V. STATUTORY PROVISIONS FOR EXEMPTION

Each of the State Acts contains provisions which enable an employer who conducts his own scheme providing benefits in the nature of long service leave to obtain exemption from the obligation to grant the statutory long service leave entitlement.[121] These provisions provide a means whereby an Australia-wide employer granting benefits in the nature of long service leave to his employees can aspire to uniformity of treatment by substituting those benefits for the varying requirements of the State legislation.

In a number of States exemption from the statutory long service leave provisions can be obtained by entering into an industrial agreement or agreements incorporating the employer's scheme. In Western Australia the statutory long service leave benefits do not apply if the employee is entitled to benefits under an award or industrial agreement.[122] In South Australia the Act does not apply if the employer is bound by an award or industrial agreement which provides for long service leave.[123] In New South Wales the Act does not apply where an award or industrial agreement provides more favourable long service leave benefits.[124] In Queensland a similar result can be achieved by an industrial agreement providing benefits in the nature of long service leave not less favourable than the statutory provisions but the Industrial Court must approve of the agreement.[125] In the Victorian legislation industrial agreements are not specifically referred to but a determination of a Wages Board operates in lieu of the statutory enitlement if the Industrial Appeals Court is satisfied that the basis of entitlement under the determination is more favourable than that under the statute.[126]

In addition to the foregoing provisions relating to awards or agreements, the legislation in each State specifically provides means for the exemption of employers from the statutory obligations where employees are entitled to long service leave or benefits in the nature of long service leave under the employer's own scheme.[127]

In South Australia an exemption from the Act is effected without the need for application where employees are entitled to long service leave, superannuation benefits or any other similar benefits or a combination of them under a scheme paid for wholly or partly by the employer and the scheme is not less favourable to the employees as a whole than the scheme prescribed by the Act.[128] In New South Wales an application by the employer to the Industrial Commission is necessary. Before granting the exemption the Commission must be satisfied that the benefits under the employer's scheme are not less fabourable than the Act benefits, and that it is in the best interests of the employee that the exemption should be granted.[129] Superannuation and

[119] *Supra* n. 109.
[120] See sections referred to n. 109 *supra.*
[121] N.S.W., s.5; Vic., s.153; Qld., s.10B(6) and 10C(3); Tas., s.7; S.A., s.13; W.A., s.5.
[122] W.A., s.4(1).
[123] S.A., s.13(1) and (2).
[124] N.S.W., s.5(1).
[125] Qld., s.10B(5).
[126] Vic., s.153(2).
[127] See *supra* n. 121.
[128] S.A., s.13(3).
[129] N.S.W., s.5(2).

insurance schemes have been approved by the Industrial Commission as benefits in the nature of long service leave and in making the comparison with the statutory benefits the scheme entitlements are viewed as a whole.[130] It is usual for the Commission to require the employer to give an undertaking that on termination of services an employee shall receive not less than the entitlement which would have been due to him if the Act had continued to be applicable. Within prescribed periods an employee may elect to withdraw from the employer's scheme and to continue to enjoy the Act entitlement in lieu of the benefits which would accrue to him under the employer's scheme.[131] The Commission has jurisdiction to grant an exemption which will operate not only in respect of employees presently entitled but also in respect of employees who may become entitled to benefits under the employer's scheme after the date of exemption or who though entitled to benefits under the scheme are employed in another State and are subsequently transferred to New South Wales.[132]

In Victoria applications for exemption are made to the Industrial Appeals Court which, as in New South Wales, may, subject to such conditions as it thinks fit to impose, exempt an employer from the operation of the Act. The court must be satisfied that the employer's scheme provides benefits on a basis not less favourable than the Act and that the entitlements under the scheme would better serve the interests of the employee than the entitlement provided by the Act.[133] Although superannuation benefits are expressly referred to, the Court has applied the relevant provisions most strictly in relation to such schemes and a number of applications for exemption based on superannuation benefit schemes have been refused.[134] In Queensland application must be made to the Industrial Court to obtain exemption from the statutory or award provisions. The scheme benefits must be not less favourable than those of the Act or award and the court must also be satisfied that it is in the best interests of the employees that an exemption should be granted. The scheme must contain provisions ensuring that employees entitled to benefits thereunder may at their election take long service leave under applicable award, agreement or statutory provisions.[135] In Tasmania the Chief Inspector of Factories is empowered to grant exemptions in respect of employers' schemes which provide benefits not less favourable than the Act, and if it is in the best interests of the employees that the exemption should be granted.[136] In Western Australia the Board of Reference may exempt in respect of existing or prospective long service leave schemes which, viewed as a whole, are more favourable than the Act benefits.[137]

Except for South Australia the exemptions may be revoked and in Tasmania a time limit up to five years must be prescribed.[138] Time limits would also apply in respect of awards and industrial agreements from which any exemption may be obtained in that the exemption would come to an end on rescission of the award or agreement and an exemption unless renewed would not necessarily apply in respect of any new award or industrial agreement. The consequences of this being overlooked were recently felt by an employer in

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[130] *In re Wire Fence . . . Makers (State) and other Awards* (1952) A.R. 91.
[131] N.S.W., s.5(2)(c).
[132] *Re Dunlop Rubber Aust. Ltd. and Ors.* (1956) A.R. 841.
[133] Vic., s.153(1).
[134] *R. v. Industrial Appeals Court, ex p. Henry Berry* (1955) V.L.R. 156.
[135] Qld., ss.10B(6) and 10C(3).
[136] Tas., s.7.
[137] W.A., s.5.
[138] Tas., s.7(2).

New South Wales, who found himself unable to rely on the carry-over provisions of the New South Wales Long Service Leave Act with respect to exemptions previously granted, where the exemption in question had expired with the replacement of the relevant industrial agreement.

There is no doubt that, State by State, differing problems both of procedure and substance will arise and varying conditions can be and are imposed in respect of exemptions. However, the exemption provisions of the legislation in each State do enable an employer with his own scheme of benefits in relation to long service leave to achieve a measure of uniformity throughout the Commonwealth to a degree which would not otherwise, for the reasons discussed earlier, be available.