LEGAL CONTROLS OVER STRIKES IN QUEENSLAND

Ever since the introduction of the compulsory arbitration system in Australia, the relevant statutes in those jurisdictions which have set up arbitration courts in the strict sense have contained some measure of penal restriction on the use of the strike weapon. In the case of the two States which followed the model of the English wages boards for dealing with industrial matters, viz. Victoria and Tasmania, the latter State has made certain strikes illegal but Victoria has legislated for emergency situations only.[1] The first *Commonwealth Conciliation and Arbitration Act* also contained restrictions on strikes but these were taken out of the Act in 1930. It may be remarked however that an injunction section in the Commonwealth Act was retained and the use of this has gone far to neutralise the repeal of the direct statutory anti-strike provisions. Victoria, admittedly, does remain exceptional.

Apart from the case of the Commonwealth, there has been remarkably little modification or, indeed attempt at modification, of the statutory provisions. New South Wales relaxed the rigours of its anti-strike provisions somewhat in 1959 but in South Australia and Western Australia, which possess the most severe restrictions[2], there has been no amendment, whilst Queensland has retained the basic section unaltered, save as to administrative details, for many years.

Undoubtedly the retention of strike restrictions has corresponded closely to a deep-felt conviction that basically the existence of a right to strike is inconsistent with the existence of a compulsory arbitration system. Convincing though this view seems at first glance, when one attempts to apply it in detail one comes up against certain difficulties. The existence of the arbitration system certainly implies that there be no flouting of the awards made by the tribunals which participate in it but as most awards deal with employee *minimum* rights and corresponding employer obligations, it is somewhat difficult legally to spell out of them an employee obligation to work or to continue working, unless specific provision be made to that effect. Moreover, whilst it is difficult from the viewpoint of strict logic to see how a compulsory arbitration system can function side by side with a legal right to strike, it is also an undeniable fact that trade unions, to whom generally the right to strike is regarded on emotional grounds as sacrosanct,

1. This is under the *Essential Services Act* 1948. There have been no prosecutions under this Act.
2. The doing of any act or thing in the nature of a strike or the taking part in a strike (respectively) is prohibited without any qualification—*Industrial Code* 1920-1963 s. 100 (S.A.), *Industrial Arbitration Act* 1912-1963 s. 132 (W.A.).

manage to secure the benefits of the arbitration system and at the same time to indulge in a good deal of strike action. It cannot be maintained that strike statistics in Australia are consistently over a long period of years any "better" than those in the United Kingdom or the United States.

In Queensland, as in the Commonwealth and New South Wales, there has been considerable resort to penal action against strikes through the arbitration tribunals and this trend has intensified in recent years, especially in 1964. In this State however there is considerable legal complexity, due to the presence in the one Act firstly of what appears to be a somewhat restricted description of illegal strikes, secondly of a somewhat restricted injunction power and thirdly of other provisions which appear to confer unlimited powers on the State arbitral body.

Let us refer briefly to the Commonwealth position which offers a contrast by reason of its simplicity. The original provisions of the Commonwealth Arbitration Act made the act of striking a statutory offence. An act of 1930 however repealed such sections. It was later held by the High Court that this repeal did not affect the power of the arbitrator in making an award to include therein a provision restrictive of strike action.[3] Such restrictive clauses, known as "bans clauses", now appear in many Federal awards.[4] The Federal Act by section 109 allows the Industrial Court to make mandatory and injunctive orders, disobedience of which carry heavy penalties, in the case *inter alia* of a breach of an award, and of course breach of a "bans clause" is such a breach. Consequently the Federal technique, operating through the insertion of specific clauses in awards, is clear and removed beyond legal doubt.

In Queensland the position is complicated by the existence of the provisions to which general attention has been drawn above.

Firstly there is the direct anti-strike penal provision. Section 98 of the present 1961 statute provides that no person (a word that includes an industrial union) shall take part in, or do or be concerned in or instigate or aid in doing any matter or thing in the nature of a strike unless or until a strike has been "authorised" by the members of the industrial union in the calling concerned; a strike is not deemed to have been so authorised unless the members of such industrial union in the calling concerned and in the district affected shall have had an opportunity of participating in a secret ballot taken at a meeting of such members, and a majority

3. *Seamen's Union of Australasia v. Commonwealth Steamship Owners' Association* (1936) 54 C.L.R. 626.
4. In the most significant awards, e.g. the Metal Trades Award, Seamen's Award, Waterside Workers Award.

of all such members and a majority of such members as are engaged in the project, establishment or undertaking in which such strike is to take place, have voted in favour of such strike and such result has been reported to the Industrial Registrar. There follow certain machinery provisions as to which no comment will be made here save to point out that the 1961 Act for the first time included provisions designed to clarify the obscure point as to what was to be regarded as a "district" for the purposes of the section. Contravention of the provisions of the section constitutes an offence for which a penalty is prescribed. Attention is drawn to the fact that although a strike carried out without the secret ballot authorisation prescribed can be regarded as illegal in the sense that participation in it carries liability to penalties, the section in no wise states that a strike carried out after such authorisation is "legal". A strike carried out after a secret ballot authorisation has been obtained will be hereafter referred to as a 'ballot strike"; one carried out without such authorisation will be referred to as a "non-ballot strike."

The second relevant provision is the injunction section—section 102. This section gives power to the Industrial Commission to make any such order as it deems just and necessary in the nature of a mandatory or restrictive injunction or otherwise to compel compliance with an industrial agreement or award or to restrain a breach thereof or the continuance of any breach. The Commission is by sub-section (2) given power to make an order of the same nature which it deems just and necessary to restrain any breach of the *Act*.

Thirdly there are the provisions which in broad general terms purport to give jurisdiction to the Industrial Commission to deal with "industrial matters". Details of these will be deferred for the moment.

Let us take up firstly the direct anti-strike provision in the statute, viz. s.98. It is clear that a non-ballot strike is illegal and involves penalties. A ballot strike is not so subjected but we cannot without more say it is not unlawful; it is not a breach of secion 98 nor does it seem to be a breach of any other section of the Act. Possibly however it may be a breach of an award and this high-lights the injunction section—section 102.

In a strike situation when penal action is sought it is traditional both in the Federal sphere and in Queensland not to proceed by direct prosecution under s.98 but to ask for an injunction under s.102 and if this is disobeyed to seek the penalties prescribed for disobedience of an injunction. Section 102 allows a negative injunction if there be a breach of *the Act* and it clear that a non-ballot strike would justify such an injunction. It would not on this

basis however justify it in the case of a ballot strike as here the Act has been observed. Hence in such situation we have to go to the other provision which allows either a mandatory or negative injunction where there is a breach of or non-compliance with an award. The issue is whether a strike which is not an offence against the Act is *per se* a breach of the award. We assume that the award, like most Queensland awards, contains no explicit anti-strike provision.

The issue can be posed in slightly different language by asking whether the usual award, that is to say one containing provisions as to workers' remuneration and hours and topics ancillary to these, implies an obligation on the part of the workman to continue to work.

Such an issue arose for decision by the Supreme Court of Queensland in the recent case of *Boilermakers Society & Ors. v. Brisbane Welding Works Pty. Ltd.*[5]. The case involved three appeals against the convictions of certain unions for breaches of two orders made by the State Industrial Court, the first one of which concerns wholly, and the second partly, the present point. The first appeal was that of the Boilermakers' Society which was convicted on a charge that it contravened an order of the Industrial Court which in substance directed the members of the Union "to work according to the provisions of the Industrial Conciliation and Arbitration Acts . . . and in accordance with the provisions of [certain enumerated awards]" and went on to order that the officers of the unions direct their members employed by the employer to work in terms of similar phraseology. The order also ordered that the unions be restrained from authorising, counselling, etc. any member of such unions not to work in accordance with the said Acts and awards. A stoppage of work occurred but it was proved that before the stoppage a ballot was held in accord with section 98 of the Act and that at such ballot a favourable strike vote was obtained. This had the effect of making the strike an authorised one so far as section 98 was concerned. It was conceded by the appellant union that the effect of section 8(4) of the Act was to oblige the Supreme Court to treat the order as validly made. Gibbs J., with whose view the other two members of the court agreed, was of the view that the order with its use of the words "according to" was to be interpreted as having the effect of requiring employees to work only in so far as the Act or the provisions of the award obliged them to do so. It was clear that in view of the strike ballot the Act imposed no duty to work and the question was whether the provisions of the relevant award

5. Unreported But see 19 Industrial Information Bulletin p. 1567 (December 1964).

(the Mechanical Engineering Award—State) imposed such an obligation. The award was in the form common to Queensland awards, that is to say it was in the main a charter of employees' rights and whilst it regulated the maximum working hours of employees and provided for overtime, did not say that employees must work. Gibbs J., the lucidity of whose reasoning dispelled many of the obscurities which had attended this branch of the law, was of the view that no such duty to work could be implied from an award in such a form. A duty to work could very well flow from the contract of service between employer and employee but not from the award itself.

The appeal was therefore allowed in the case which affected the first order. The second and third appeals however affected an injunctive order of the Industrial Court which was framed in somewhat different terms. This order contained not only a command to work in accordance with the relevant Act and the relevant awards but also a prohibition against being a party to or being concerned in any ban, stoppage, limitation or restriction upon the performance of work. Here there was not a reference merely to a duty to perform such work as an employee was bound to perform by virtue of an award but an obligation to perform work *simpliciter,* i.e. a duty not to take part in a stoppage. Again the award, as in the case of the first appeal, did not have the effect of specifically imposing a duty to work so that a concerted stoppage was neither a breach of the Act nor a breach of the award. The Court finally came to the conclusion that, as a matter of interpretation, the word "stoppage" was to be construed as being limited to stoppages which were unauthorised by section 98.[6] In doing so they considered the possibility that an order forbidding an authorized stoppage (that is, a stoppage complying with s. 98) could be regarded as an order which the commission might within the words of s. 102, "deem just and necessary . . . to compel compliance with . . . an award or to restrain breach thereof" or "just and necessary to restrain any breach of" this Act, but, after the Court adjourned the case for further argument on this point, it was conceded by the respondent that an order prohibiting employees from engaging in a strike which was authorized and which was not a breach of the award could not reasonably be regarded as being made to secure one of the purposes for which orders might be made under section 102. Accordingly the second and third appeals also succeeded.

6. And of course by the relevant award but a basic consideration, essential for the understanding of the Queensland position, is that the typical Queensland award does not speak of an obligation to work or not to engage in a stoppage of work.

This decision seems to justify the proposition that normally an injunctive order under s. 102 will not be read as imposing a duty to return to work in a situation where a valid strike ballot has been held under s. 102 unless the relative award imposes a specific duty to work or to refrain from participation in a strike. The reasoning however depends upon a certain technique of interpretation. By virtue of the Act the *validity* of an injunctive order cannot be attacked but the Court interprets it, at least in the case of the second order, in a sense which keeps it within the scope of the power allowed by the Act rather than in a sense which would cause it to go beyond the limits of that power. But what if the language of the injunction were quite intractible? Suppose it were clearly made applicable to a ballot strike situation. The order here would clearly be *ultra vires* but for the provision in the Act which obliges the Supreme Court to accept its validity. In such a case the Supreme Court, it seems, would be obliged to uphold the apparent effect of the order.

So far we have been assuming that the award itself says nothing about strikes or a specific obligation of employees to work or to continue working. As we have seen, the appeal respecting the first order was disposed of on the relatively simple ground that the order merely referred to whatever work obligation existed in terms of the award and no such obligation in fact did exist. Gibbs J. however expressed himself as being strongly of the view that the Industrial Commission has power to include in an award provisions "whose effect is to oblige employees to work while they remain employed . . . . whether by expressly requiring them to do so or by including an anti-strike or anti-ban clause of the kind that has frequently been held validly included in Commonwealth awards". This is an *obiter dictum* but a very strong one. No reference was made in this part of the judgment of Gibbs J. to the possible effect of a strike ballot under s. 98

As regards the second order this latter aspect came more to the fore. Here the order did purport to forbid a stoppage. As we have seen this was interpreted as referring only to a stoppage which was unauthorised either by the Act or by the award and here the stoppage was not so unauthorised. The appellants however had submitted that the powers of the Commission were limited by the provisions of section 98 and that the Industrial Commission had no power to order that employees should not engage in a strike that is authorised by the latter section. Whilst disclaiming any attempt to question the validity of the order, they submitted that it should be given a construction to make it subordinate to the Act and that for this reason it should be understood as applying only to stoppages that had not been authorised

in terms of section 98. Gibbs J. rejected this submission. He pointed out that the Commission's powers under section 102 were not expressed to be subject to section 98 or to any other provision of the Act nor were the general award-making powers of sections 11 and 12 expressed to be so subject.[7] The taking of a ballot in accordance with section 98 merely had the effect of freeing those who participated in such a strike from the penalties set out in section 98. It was only in connection with the consideration of whether a breach of the Act had occurred that section 98 had any effect on section 102. It left the question of award-breach unaffected. The learned judge referred with apparent approval to the case of *Brisbane City Council v. Ryan*[8] where, after a strike ballot had been held which had resulted in a vote in favour of a strike, the Industrial Court (operating under the pre-1961 Act) had made an order directing a resumption of work and later dismissed an appeal from a conviction for a contravention of such order. In that case the Court said that the fact that a strike ballot had been conducted prior to strike action and had resulted in a majority vote in favour of the strike merely relieved the employee concerned from the penalties provided in the Act for taking part in a strike but did not preclude the Court from taking such action as it thought best calculated in the public interest to overcome the continuance of the strike.

Lucas J. preferred to express no opinion on the question of the powers of the Commission in a ballot strike situation where wider award provisions existed, as in his opinion the question did not arise in the situation before the Court. With respect, it is difficult to see how this issue was any more directly involved in connection with the second order than in connection with the first as the award there contained *no* express provision invalidating a stoppage and the order made was interpreted as being applicable only to a strike which was either a breach of the Act or of the award.

We have however a strong assertion by two judges, for Jeffries J. concurred generally with Gibbs J., that the power of the Commission to write anti-strike clauses into awards and to issue injunctions thereunder is not limited to strikes which have taken place without a ballot in terms of section 98. It is necessary however to investigate further, as the question is not without some further difficulties especially in relation to such an order as was made in *Brisbane City Council v. Ryan.*

7. The vital point would appear to be any question of restrictions on the powers of the Commission under sections 11 and 12 because section 102 refers only, in a case where there has been a ballot strike, to something which is a breach of the award.
8. (1949) 43 QJP. 97.

This involves an investigation of the general jurisdiction of the Industrial Commission to make awards and "orders".

By section 11 of the Act, the Industrial Commission is given jurisdiction *inter alia,* to hear and determine any question arising out of an "industrial matter" or involving the determination of the rights and duties of any person or industrial union in respect of any industrial matter and any question which it may deem expedient to hear and determine in respect of an industrial matter. This miracle of bad draftsmanship seems to give a power to hear and determine certain things which arise out of "industrial matters" (a phrase defined very widely in s. 5 of the Act) and there is no doubt that an issue concerning the right to strike would arise out of an industrial matter. It omits however to delineate jurisdictionally in any general kind of way the nature of the decision, order or determination which the Commission may make in reference to or disposal of the industrial question before it. However later verbiage in the section, purporting to confer more particular jurisdiction, empowers the Commission to regulate the conditions of any calling or callings by an "award" [s. 11 (1)(a)] and also to define and declare the relative rights and mutual duties of employers and employees according to a certain standard mentioned—s. 11 (1)(d). Under s. 12 moreover the Commission may make an award with reference to a calling or callings "generally dealing with, determining and regulating any industrial matter." [s. 12 (1)(j)]. Under s. 11 (4) the Commission may by order or direction do anything which it is authorised by this Act to do by an award. The definition of "award" in s. 5 is unilluminating and there is no guide as to what is meant by "order" or what the distinction between an "award" and an "order" is.

It may be conceded that there is abundant warrant in these provisions for the existence of a power in the Commission to include in an "award" an anti-strike clause or a general obligation to work and it could equally do this by an amendment of the award. If this power is not found in section 11 (1)(d) it can be found in section 12 (1)(j). And one may agree generally that such general power could not be read down by reference to section 98 so as to preclude participation in a ballot strike from being a breach of award for the purposes of section 102. Much more doubt however surrounds such an order as that made in the *Ryan* case.[9] This appears to have been a mere *ad hoc* order for resumption of work in one particular situation. The writer has had a look at the original record in this case and the notice of motion certainly suggests an application for an injunction under section 55 of the then Act which corresponds to the present section 102. This, like

9. *Brisbane City Council v. Ryan, supra.*

the present section 102, made reference only to breaches of the Act and breaches of the award. The fact that there had been a pro-strike vote at a strike ballot meant that there had been no breach of the Act and the general award governing the industry contained no anti-strike clause and expressed no obligation to work. It is therefore somewhat difficult to regard the order to resume work as being *itself* an injunction. Moreover the Court itself apparently regarded it as not being an exercise of the injunctive power but as an exercise of the wide power to deal with "industrial matters" by award or order given by what are now sections 11 and 12 of the Act.[10] If one looks at the matter from the viewpoint of the general jurisdiction conferred by sections 11 and 12, an *ad hoc* order to resume work could hardly be regarded as being an award or an amendment of the award and in fact in the *Ryan* case no suggestion appears to have been made that the Court was amending the general award which governed the tramways industry. Such order could then have only the status of an "order" under the Act. It is difficult however to know what the status of an "order" under the Act is. It is true that the Act provides that the Commission may do anything by order or direction which it may do by an award. However it is submitted that the whole purport of sections 11 and 12 in this context is to give power only to regulate by award or *"order"* the general conditions of employment in a calling and that in a situation where the liberties of the subject are involved, such sections should not be interpreted as giving power by an *ad hoc* order directed to a particular strike situation to make illegal what was previously legal. It is conceded that it would be competent for the Industrial Commission to amend the award by the insertion of a general anti-strike clause in the award and then if the strike continued, the way would be open for either an injunction under section 102 or for a simple prosecution as for an offence under section 113. Hence the matter might well seem to involve nothing but procedural niceties. However the Commission might well feel that there were different considerations involved in effecting a general amendment of the award from those involved in making an *ad hoc* "back to work" order so that the matter is more than a mere legal quibble. It is suggested then that the approval given in the *Boilermakers case* to

10. The transcript records the following colloquy between the President of the Industrial Court (Matthews J.) and counsel for the appellant —
"Mr. Hanger: The application was entitled 'In the matter of section 55'. As a matter of fact I have read through the record of the proceedings. It was under section 55
The President: The application may have been made under that Section but the Court has power to make an order under any section".
Later on in the transcript the President referred to the matter as being an "industrial matter".

the *Ryan* decision is given rather to the line drawn in the latter case between the effect of a ballot strike and the general jurisdiction of the Court than to the actual decision in that case.

The *dicta* in the *Boilermakers case* are to the effect that an award may contain not only a specific anti-strike clause but also a clause which in general terms prescribes a duty to work. Obviously a wide clause like the latter would normally be read down to apply only to acts with a strike motive. Our industrial law has always insisted, save in the case of special war-time legislation, on the freedom of a worker to quit his employment on giving such notice of termination as was required by his contract of service or the relevant award. A literal interpretation of a wide "duty to work" clause in an award would in the case of proceedings directed against individual workmen penalize the person who desired to terminate his employment for reasons unassociated with industrial pressure, for example one who at the time of the injunction had given seven days notice of termination of his contract. No doubt interpretative techniques will narrow the wideness of the phraseology of such provisions.

We pass to certain difficulties and obscurities associated with the word "strike" as used in the State *Industrial Conciliation and Arbitration Acts*. The statutory definition in Section 5 (which does not exclude the ordinary meaning of the word) emphasizes the aspect of the existence of a combination of persons and the existence of a motive to secure agreement to terms of employment or compliance with demands. The aspect of combination is well understood and easily applied but there are certain misconceptions associated with the second aspect, viz. that of demands. Union spokesmen frequently assert that anti-strike legislation infringes the natural liberty of the subject to bestow his labour where he wishes. This is true only if a further element be added. As has been mentioned above, industrial law does not restrict the right of the workman, upon giving due notice, to leave his employment either to better himself, for health reasons or merely from personal whim. The same applies to the situation where a number of workmen leave at the same time with the same objective, even where there is some measure of agreement or combination between them, for instance where they share a common disgust with the conditions of employment and decide to leave for that reason. Here there is no element of pressure to secure a demand. Workmen in going on strike do not really intend permanently to sever the employment relationship. On the contrary they desire to return to work but the price of their willingness is the agreement of the employer to the demands and concessions they seek. A reminder of this basic fact

is the decision in *Buchanan v. Registrar of Friendly Societies*[11] where a conviction for a strike was set aside because the evidence showed that the employees were not quitting work to compel the employer to change his attitude on certain points; they were leaving whether he changed it or not. The element of pressure to secure demands or the withdrawal of employer demands was absent.

The application of the word "strike" may also be attended with some difficulties where the workmen do not "down tools" in an existing situation of employment under a contract of service but where they, according to technical legal analysis, are refusing to *enter into* a contract of service. The position of employment on the water-front is in point. The employee is "picked up", that is to say hired for a short-term job. When his shift is finished he is, from the viewpoint of contractual analysis, unemployed until he is engaged for the next job. If therefore waterside workers in pursuance of a combination and under instructions from their union, fail to offer their labour at a "pick-up", it can be argued that there is really no cessation of employment or of work (because none existed) or alternatively that the men are not "employees" within the meaning of the statutory anti-strike provisions. Thus in *Vasey v. Port Adelaide Working Men's Branch of the Waterside Workers' Federation*[12] the South Australian Supreme Court, by a majority, held that no strike was constituted where the workmen had failed to attend for the afternoon pick-up of labour as they were obliged to do by the terms of the applicable Federal award. However other Courts have been more impressed by the fact that the statutes containing anti-strike provisions have defined "employee" not in terms of working under a contract but in terms of being *habitually* employed in a particular industry. Thus the Queensland definition is "Any employee whether on wages or piecework rates . . . .: the term includes any person whose usual occupation is that of employee in a calling . . . .". This definition was applied in the Queensland case of *Graziers Association v. Australian Workers Union*[13] which arose out of the shearing strike of 1956. The work of shearers is far removed from that of waterside workers. An element of similarity however is provided by the fact that the shearer before being put to work has to enter into a contract. Under the relevant award in Queensland this is a written contract so that before the shearer signs it he is not employed under the award. On the occasion of the 1956 dispute the arbitration tribunal had in fact ordered a reduction in the award remuneration for shearing. The union had rebelled against

11. (1904) 6 W.A.I.R. 108. See also *R. v. Bugg* (1919) 3 S.A.I.R. (South Australian Industrial Reports) 83.
12. [1923] S.A.S.R. 235.
13. (1956) 41 Queensland Industrial Gazette 198.

this and those who followed its instructions refused to sign contracts at the new award rate. These were called "old rate shearers" and were opposed to the "new rate shearers" who were prepared to shear at the new award rate. After varying tactics of industrial pressure had been employed, the Graziers Association applied for an injunction against the A.W.U. (the union concerned) and the Queensland Industrial Court, relying heavily on the emphasis placed in the statutory definition of "employee" on habitual working in the industry, held that a strike existed and granted an injunction. Whilst the Queensland case places emphasis on the definition of "employee", the emphasis in the *Vasey* case is on the definition of "strike", particularly in the reference to "employment" and to "work" which the Court in that case thought meant work pursuant to a contract. It is interesting that in New South Wales, where the Act lacks the special extended definition of "employee" which is contained in the South Australian and Queensland Acts, a view regarding the position of waterside workers which is directly contrary to that of the *Vasey* decision, was taken in *Attorney-General v. Whiteman*[14] and *The Minister v. Wilson*[15]. In both cases the view taken was that "work" represented a situation and relationship established by habit rather than by contract.

It is felt that the view taken in the Queensland case which looks on the act of strike as discontinuing an habitual work relationship rather than breaking a contract is the one to be preferred even without any special definition of the word "employee". However in point of practical realities such analysis can hold good only when the overall situation of the industry is to be assessed. Thus in the Queensland case the injunction was sought against the union and the broad question was whether the union should be held answerable for a strike in industry generally. The question hence was whether the industry was in a state of strike, that is to say were a majority of those habitually employed therein departing from and abandoning, as the result of a concerted plan, their customary method of working? In the case of individual prosecutions of workmen the defendant might well succeed on the issue that he was not a person whose usual occupation was that of a shearer because he had just decided not to continue in that employment. Employment in the shearing industry is seasonal and if an employee having worked a number of seasons had decided to transfer to another industry his refusal to report to a station owner or shearing contractor to sign a contract could hardly be regarded as participation in a strike.

14. (1912) 11 A.R. (N.S.W.) 137.
15. (1914) 13 A.R. (N.S.W.) 117.

The interesting question also emerges as to what tactics, falling short of a complete stoppage of work, fall within the statutory definition. Even in New South Wales, where the definition of "strike" is not, as it is in Queensland, stated to include discontinuing an employment "in part", it has been held that a limited refusal to work, made as a result of combination, is a strike.[16] In Queensland there is little doubt that a similar principle would be followed. More interesting is the question of a concerted refusal as to the manner of working. In Queensland the statutory definition of strike specifically includes "wilfully delaying or obstructing the progress of work by what is known as the 'go-slow' method strike . . . ." . In the presently existing Mt. Isa dispute situation, it was held by the Queensland Industrial Court (Hanger J.)[17] that a reversion by the underground miners at Mt. Isa by reason of concerted tactics to work on the day labour system in lieu of contract (i.e. piece work) rates was a strike by "go-slow" methods even though the award allowed the individual worker an option whether to work under the contract or day labour system. The spotlight was on the concerted tactics not on what the individual might choose to do. Logically however the arbitration courts, in view of the nature of the statutory definition of strike, which pays no regard to the question whether the means employed are themselves legal or illegal, would have to condemn the so-called "regulation" strike. This is a "go-slow" technique, usually applied in public utility services, which operates through the employees meticulously observing departmental rules which are not usually observed and which if observed in actual practice would result in an undue slowing down of operations. This technique has occasionally been employed with all too disastrous effects in municipal or government tramway and bus undertakings. Logically there is no reason why the statutory definition of "strike" with its reference to "go-slow" should not include this particular technique as the element of breach of the rules of the contract of service is not an essential element of the concept of strike. However the Queensland Court has preferred not to be strictly logical. It has held the regulation strike to be not a strike within the meaning of the Act.[18] Whether the recent Mt. Isa decision is quite consistent with this is matter of considerable doubt.

In what purports to be a complete sketch of the Queensland position one should probably draw some attention to tort liability in respect of strikes in the ordinary civil courts. This

16. *J. C. Williamson Ltd. v. O'Brien* (1918) 17 A.R. (N.S.W.) 49 (refusal of union members engaged to play in orchestras in theatres to attend rehearsals).
17. (1964) 57 Queensland Industrial Gazette 408, 409.
18. *Brisbane Tramways Case* (1958) 43 Queensland Industrial Gazette 478.

pattern of action is not very frequently employed in Australia due probably to the prevalent tendency to think in terms of the arbitration system and its penal deterrents. It is still less likely of use in Queensland on account of special statutory restrictions based on those of the English *Trade Disputes Act* of 1906, which have not been adopted in the other States. The traditional cause of action was that of conspiracy but even at common law this has been attenuated very much since it was held by the House of Lords in the *Crofter* case[19] in 1942 that it is a defence in an action for damages for conspiracy to show that the motive of the combiners was to protect their trade interests. Translated into the terms of the realities of industrial warfare, this means that concerted action for industrial, as distinct from political or personal, motives is protected. Any inquiry into the morality of such tactics is foreclosed and the question whether they take the form of strike or boycott is immaterial.

In Australia it is true an extended application was given to the doctrine of conspiracy in the case of *Williams v. Hursey*[20] viz. that combination tactics even though initiated for an industrial objective could be conspiracy if the *means* employed were illegal. This gave a much wider practical scope to the conspiracy concept than in England because there are numerous anti-strike provisions in State statutes (e.g. the compulsory arbitration statutes) which can be regarded as making illegal many of the tactics used in strike situations. However even in an illegal means situation in Queensland it is doubtful whether a civil action for conspiracy could succeed. The *Industrial Conciliation and Arbitration Act* of 1961, repeating the words of s. 28 of the *Trade Union Act* 1915 (which in turn copied the English *Trade Disputes Act* 1906) provides that an act done in pursuance of an agreement or combination by two or more persons shall if done in contemplation or furtherance of an industrial dispute (defined very widely) not be actionable unless the act if done *without* any such agreement or combination would be actionable. It is difficult to see why this provision which destroys the significance of combination *per se* applies any less to a combination which employs illegal means than to one than employs means which in themselves are not illegal. It is true that the right to sue in conspiracy remains when the acts of the combiners, considered as if they had been committed without combination, are tortious. It is also true that they would be tortious if they involved intimidation, but the mere fact that they are forbidden under a penal statute is not enough.

Conspiracy however is a tort necessarily dependent upon

19. *Crofter Hand-woven Harris Tweed Co. v. Veitch* [1942] A.C. 435.
20. (1959) 103 C.L.R. 30.

proof of combination. There must be two or more involved. There are however two other tort patterns which are not so dependent. One is the form of action dependent upon *Lumley v. Gye*[21] which is usually referred to as inducement of breach of contract. The action is apt to cover the case of the trade union official who procures workmen to commit breaches of their several contracts of employment or who for industrial pressure reasons procures commercial undertakings to break trade contracts with other undertakings. By a provision, also copied from the English *Trade Disputes Act,* tort proceedings based upon inducement of breach of a contract of *employment* are excluded when the situation is one of an industrial dispute[22] but this does not debar action when the contract breach of which is induced by the defendant, is one of a commercial character.

The other type of action is the somewhat recently discovered cause of action in intimidation which is not touched directly by the restrictive provisions based on the English Act of 1906. This covers the position where the defendant secures some advantage by using a threat to do something illegal. The House of Lords has recently held that a threat by workmen to break their contracts of employment is a threat to do an illegal act.[23] It is understood that legislation is to be passed by the British Parliament to annul the effect of this decision. If followed in Australia the decision could have rather unpredictable consequences. Even without its aid it seems the general notion of intimidation could have a wide application in Australia in view of the much greater number of industrial acts, as compared with the English industrial situation, which may be statutorily illegal in this country. Many of these depend on the particular climate of the compulsory arbitration system.

It may be doubted however whether such modern revivals of obsolescent forms of action will impress a community accustomed to dealing with strikes through the processes of the arbitration system. Most proceedings in tort in Australian Courts which have challenged the employment of industrial combination tactics have not been brought by employers but by minority group employees who have been injured as the result of employer-employee pressures. Thus in *McKernan v. Fraser*[24] the action was brought by members of a breakaway union group whom the shipping company had refused to "sign on" because the secretary of the established union had threatened a strike. *Williams v. Hursey*[25]

21. (1853) 2 El. & Bl. 216; 118 E.R. 749.
22. *Industrial Conciliation & Arbitration Acts* 1961-1964 (Q.) s. 72 (2)
23. *Rookes v. Barnard* [1964] A.C. 1129.
24. (1931) 46 C.L.R. 343.
25. *Supra.*

was the case of extra-legal action taken by the general body of waterside workers against two members who had refused to pay a political levy resolved on by a general meeting, resulting in action being brought on the conspiracy basis by such two members. *True v. Coal Miners' Industrial Union*[26] was an action brought by a dissident member of a coalmining union in Western Australia because the union had procured his dismissal from employment by virtue of a threat to indulge in a strike if he were retained in employment.

What has been stated in this article is the normal law on the matter. Queenslanders however on the occasion of the present Mt. Isa dispute have become aware that the Government is empowered to declare a "state of emergency" under which the most drastic Orders in Council restrictive not only of any right to strike but also of many normally existing individual liberties may be promulgated. Strangely enough the Act which gives the umbrella of legal authority to this power to declare a state of emergency is the *State Transport Act* of 1938 and the section in point, viz. section 22, although it refers to circumstances whereby the peace, welfare, order, good government or the public safety is likely to be imperilled, qualifies the word "circumstances" by the phrase "whether by fire, flood, storm, tempest, act of God". Although this is followed by a passage "or by reason of any other cause or circumstance whatsoever" it would appear that in view of the *ejusdem generis* rule of interpretation, there is strong ground for contending that the legislature had in mind some emergency arising from natural causes and not from human agency. This is somewhat strengthened by the later provisions of the section which in outlining what the Governor in Council may do by Order in Council when once a state of emergency has been declared, refer to provisions for securing the essentials of life, the securing and regulating of the supply and distribution of food, water, fuel, light and other necessities and the provision and maintenance of the means of transit, transport, locomotion and other services. The Order in Council issued in connection with the Mt. Isa situation on 27th January 1965 dealt with a situation involving the closure of an enterprise due to alleged tactics of go-slow and involving the refusal of men to work unless certain demands were met, in other words a man-made emergency situation, and with the object of ensuring a resumption of work placed stringent restrictions on the ordinary liberties of speech communication and free movement. There is some ground for arguing either that the proclamation of a "state of emergency" or the provisions of the Orders in Council made thereunder or both were *ultra vires*.

26. (1959) 33 A.L.J.R. 224.

However section 26 includes a clause of the type which was so popular with Parliament in the thirties strongly restrictive of judicial review. Whilst clauses of this type are not conclusive in the event of some inconsistency between the Act on the one hand and the proclamation or Orders in Council on the other it does not seem that any case of inconsistency was raised by this situation.[27] Admittedly this topic needs more attention than is here given but further exploration of it would take us too far away from the subject matter of this article.

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27. It is rather interesting to note however that the very recently passed *Industrial Law Amendment Act* 1965 which confers special powers in relation to the present Mt. Isa situation of a generally similar type to those contained in the January 1965 Order in Council made pursuant to the state of emergency declared under the *State Transport Act* specially ratifies and confirms the Proclamations and Orders in Council purporting to have been made under the authority of those Acts which dealt with the Mt. Isa situation.

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