THE BRITISH ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS 1965-1968

By Royal Warrant dated 8th April 1965 a Royal Commission was appointed 'to consider relations between managements and employees and the role of trade unions and employers' associations in promoting the interests of their members and in accelerating the social and economic advance of the nation, with particular reference to the law affecting the activities of these bodies'.[1]

The Commission's Report was presented to Parliament in June 1968. The British Parliament has shown a remarkable attachment to the Royal Commission as a method of investigation and recommendation in the field of industrial relations. The earlier Royal Commissions were all appointed during periods of dramatic confrontation between labour and management, and the Reports which they issued were the basis of far-reaching changes in the law: those of 1867 and 1874 led to the enactment of basic trade union laws which removed trade unions from the cloak of repressive common law doctrines which were inhibiting their development and day-to-day operation,[2] that of 1903 was the basis of legislation which conferred important immunities from civil suit on trade unions in the field of industrial disputes.[3] During this period one other major development, the establishment of the Whitley Joint Industrial Councils, followed five reports issued, not by a Royal Commission but by a Committee of Inquiry appointed in 1916. By 1965, technological and social change, the stresses engendered during the continuing period of full employment since the last war and the apparent resurgence of some common law doctrines inimical to the pursuit of self-interest by trade unions had produced grave new problems. That these were seen to be crucial is attested by the establishment of this Royal Commission. The purpose of this paper is to survey its findings and recommendations. This is of interest to Australians because, although Australian industrial relations took a different course almost seventy years ago with the beginnings of compulsory arbitration, comparisons of the two systems have always

1 H.M.S.O., June 1968, Cmnd. 3623.

2 Trade Union Act 1871, Criminal Law Amendment Act 1871, and Conspiracy and Protection of Property Act 1875.

3 Trade Disputes Act 1906.

been of interest. No doubt this stems in part from the fundamental similarity of some of the problems facing all industrial nations. Some of these issues and other aspects of our arbitration systems have been the subject of comment in this and other journals.

THE BRITISH INDUSTRIAL RELATIONS SYSTEM

The first part of the Report reflects the vast changes which have taken place in British industry and society since the last Royal Commission around the turn of the century. Although much of it is commonplace—trade union organisation has increased, the number of individual unions has shown a steady decline and white-collar employment and unions occupy a central place in changing industrial relations—the significant changes have been in the structure of bargaining units and the attitude of the State. A system which had previously been founded almost entirely on industry-wide negotiations and agreements between employer associations and trade unions has changed radically. There is now great diversity in the size of bargaining units and in the scope of collective agreements and the Commission was impressed by the extent to which industry-wide agreements have been supplemented by work-place bargaining (negotiations between managers and small groups of employees with the shop steward playing a critical role), and by the variety of ways, formal and informal, in which these agreements are recorded. Thus, the pay and conditions of the individual worker may be the result of collective agreements entered into at one or more levels.

It needs to be said, however, that the significance of these changes had not escaped observers during this period.[4] It was, moreover, until recently, a distinctive feature of the British system of industrial relations that, with the exception of Wages Councils in industries in which collective bargaining was not sufficiently established to stand on its own feet, the State adopted a non-interventionist attitude towards the processes of collective bargaining. In contrast to the United States it has generally not legislated to compel employers and trade unions to bargain collectively or to change the common law view that the collective agreement is binding in honour only, nor has it attempted to prescribe detailed conditions of employment other than in such broad areas as health, safety and compensation for industrial injuries. The Commission was convinced that there are some signs of departure from this general principle. To take two examples, the Contracts of

[4] For example, O. KAHN-FREUND (editor), LABOUR RELATIONS AND THE LAW, (1965) 22.

Employment Act 1963 requires that all individual employment contracts include such matters as the period of notice necessary to determine the employment and the Redundancy Payments Act 1965 prescribes a scheme of severance pay. Again, the Prices and Incomes Acts of recent years have directly influenced the outcome of collective bargaining by compelling parties to notify pay claims and awards to the government and empowering the government to delay pay increases. In short, as the Commission itself observed, 'we have been sitting at a time when the basic principles of our system of industrial relations are in question. Should they be restored, revised or replaced?'[5] It needs to be said at the outset that the Commission does not clearly answer this question, although it leans towards retention of many of its basic features.

In the Commission's view, 'the central defect in British industrial relations is the disorder in factory and workshop relations and pay structures promoted by the conflict between the formal and informal systems'.[6] The formal system to which the Commission refers is that embodied in the official institutions—in essence, industry-wide collective bargaining which, in theory, settles wage rates, hours of work and other conditions of employment. The informal system comprises the relationships which develop in individual establishments at various levels—between trade unions and employer but more importantly between managers, shop stewards and workers. That the informal system frequently conflicts with the formal system, in the Commission's view, is indicated by the fact that there is a wide and growing gap beween actual earnings and those prescribed in industry-wide agreements.[7] This is fashionably known as "earnings drift", a phenomenon of the Australian system also and frequently associated with over-award payments. It is arguable that it has been less important in the Australian context because of the policies pursued by the highly centralised arbitration tribunals.

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5 H.M.S.O., June 1968, Cmnd. 3623, 11.

6 Id. at 262.

7 The view is expressed in Appendix 5 of the Report 'that on the basis of the evidence available, about half the workers covered by industry-wide agreements or statutory wage regulations are employed in industries where the rates specified are generally exceeded and most of the rest work in jobs not covered by any form of wage fixing at industry level. Even where rates fixed at industry level are fairly closely followed, more often than not they are supplemented by high levels of overtime earnings. On any reasonable estimate the effective regulation of pay levels by industry-wide agreement is now very much the exception rather than the rule in Britain and is largely confined to the public sector'. (Id. at 338.)

Further, the industry-wide agreement in Britain usually provides a method of settling day-to-day grievances as well as settling the substantive issues of pay and other conditions of work. This corresponds to the rights/interests dichotomy in United States collective agreements. Again, practice in the work-place often diverges sharply from that provided in the broader agreement. The nub of the matter seems to be that because the assumptions of the formal system still strongly influence both parties, the informal system has not been able to develop to the extent necessary to be an effective method of regulation in itself. Bargaining within individual establishments is usually piecemeal and outside the control of trade unions and employers' associations and has led to chaotic pay structures. These developments are also held to explain the increasing resort to unofficial strikes and other forms of work-place industrial pressure (overtime bans, work-to-rule, go-slows, etc.). At the same time it has to be accepted that many are content with the *status quo*; it is, as the Commission so aptly put it, relatively comfortable and it does provide a high degree of autonomy. But the advantages are quite clearly outweighed by the disadvantages: 'the tendency of extreme centralisation and self-government to degenerate into indecision and anarchy; the propensity to breed inefficiency; and the reluctance to change. All these characteristics become more damaging as they develop, as the rate of technical progress increases and as the need for economic growth becomes more urgent'.[8]

What solution does the Commission offer to this crucial problem which lies at the heart of the present malaise in British industrial relations? It appears to eschew any suggestion that the informal system can be forced into conformity with the formal—'reality cannot be forced to comply with pretences'.[9]

REMEDIES

(1) *The Collective Institutions of Industrial Relations*

The Commission's attitude to reform was undoubtedly conditioned by the interpretation which it placed on a number of recent changes, some legislative, some judicial—the development, even if erratic, of a prices and incomes policy, and a tendency on the part of the courts to interpret more narrowly the provisions of the Trade Disputes Act 1906 which protect trade unions and individuals from civil actions when acting in contemplation or furtherance of trade disputes. The

8 Ibid., 262.
9 Ibid., 36.

Commission was of the view that both changes may reflect a swing in public opinion and could indicate the direction which reform might take. Given that the central problem is a growing fragmentation in work-place relationships, in pay structures and other conditions of employment brought about by the conflict between the two systems, the Commission, however, saw the remedy as the drastic one of making the factory agreement the basis of British industrial relations. Industry-wide agreements would continue to be effective in regulating such broad matters as the length of the standard working week, duration of annual holidays and, in a few instances, effective pay structures. (Some analogy might be drawn to the matters reserved to the Commonwealth Conciliation and Arbitration Commission in Presidential Session.) But, in general, industry-wide agreements can no longer do more than set minimum rates of pay and have no effective influence over such matters as control of incentive schemes, the regulation of hours actually worked, the use of job evaluation procedures, work practices and the linking of changes in pay to changes in performance, facilities for shop stewards and disciplinary rules and appeals. The basic reason is that in the majority of industries such detailed control is impossible because of variations in firm size, the structure and policies of management, and technological and market factors. On the other hand, the factory agreement (limited to a single establishment or even the plants of an individual company) can accommodate these and other issues.

How are these changes to be brought about? A factory agreement of itself cannot do so. It may provide the necessary framework for change if appropriately drafted but its provisions may still be bypassed. For example, wage increases can masquerade as merit payments, incentive schemes can be abused by both parties, procedure agreements may be ignored. Who then is in a position to make factory agreements the effective basis of industrial relations? Trade unions or employers' associations cannot do so; trade unions can negotiate only at levels acceptable to the other side, employers' associations are never likely to have the necessary support from their constituents. Individual factory managers can, so the theorem runs, do so only if authorised by their Boards of Directors. And so on this issue, central to the whole of the Commission's recommendations, all that could be suggested was: 'if the basis of British industrial relations is to become the factory agreement, the change must be accomplished by boards of directors of companies'.[10]

[10] H.M.S.O., June 1968, Cmnd. 3623, 263.

Should this change come about, however, directors would lose the "protection" which the existing system affords them; henceforth they would be responsible for their own personnel policies. At present, boards are able to leave industry agreements to their employer associations and negotiations with workers arising under the agreements to their subordinates. The Commission recognized that boards of multi-plant companies may prefer company agreements rather than give the necessary freedom to plant managers to enter series of factory agreements. In this sort of situation the wider agreement would be more effective than a number of factory agreements to carry forward the company's overall policies. These changes cannot be brought about by boards of directors alone, they will need the cooperation of the trade unions and this in turn will demand reforms within the unions: more qualified full-time union officials to negotiate and service the necessary agreements and more contact with shop stewards. Such developments may then require changes in union constitutions.

Employers' associations, it was said, would continue to have an important role in the new system. They could advise those of their members who are poorly equipped to negotiate their own agreements, might represent their members in dealings with government and provide information services.

If companies could be persuaded to pursue effective company/factory bargaining they ought to welcome a high degree of union organisation; by the same token, it should be in the interest of unions to respond positively to proposals emanating from managerial reviews. Employers' associations might be expected to be equally cooperative; joining with trade unions to review industry-wide agreements to make them effective in terms of the Commission's own rationale of their function, and setting guidelines for company and factory agreements. Indeed, if all these reforms were brought about, the authority of employers' associations and industry-wide agreements would, in a sense, be strengthened for they would have greater influence over industrial relations at the factory level.

The Commission was not so naive as to believe changes of this magnitude could be achieved by voluntary action alone. On the other hand, if the British tradition of keeping industrial relations out of the Courts was to be preserved, little could be gleaned from United States or other legislation. The Commission, therefore, proposed an Industrial Relations Act, provisions of which would oblige companies of a certain size—initially those with at least 5,000 employees but later of smaller size—to register their collective agreements with the

Department of Employment and Productivity. The initial concentration on larger companies was based on the premise that they are in the best position to institute effective factory level bargaining and suffer most from the existing fragmentation of collective bargaining. Such a step would emphasise the primary responsibility of boards of directors and the public interest in achieving authoritative collective agreements at company and factory level. The Act should also apply to nationalised industries and public services other than the civil service. Should a company have no company and/or factory agreement it would be required to report this fact to the Department together with reasons to account for its absence and, unless it could show that its employees do not wish to be represented by trade unions, will be adjudged in breach of its public duty. The consequences of such a breach are not made clear.

Further, the Act should provide for the creation of an Industrial Relations Commission, having a full-time chairman and an unspecified number of full and part-time members and a secretariat. The Department of Employment and Productivity would refer to this Commission for investigation and report cases and problems arising out of the registration of agreements, as well as references in relation to companies not large enough to fall within the registration requirement. The I.R.C. would also be required to carry out inquiries into industrial relations at both industry and factory level. Whilst maintaining that the novel task to be entrusted to the I.R.C. precluded the prescription of detailed working rules, the Commission essayed a number of suggested principles.

On the question of enforcement the recommendation was that failure by a company to register its agreements or to explain why it has none should subject it to a monetary penalty. However, failure to comply with recommendations of the I.R.C., whether the reason lies with union or company, would attract no penalty; nor, at least during the early period, should refusal by a company to recognize trade unions. The manifest defects in the existing system cannot be ascribed to either malice or weakness on either side but are 'primarily due to widespread ignorance about the most sensible and effective methods of conducting industrial relations, and to the very considerable obstacles to the use of sensible and effective methods contained in our present system of industrial relations'.[11] If the reforms were successful in rationalising bargaining and yet work stoppages in breach

[11] Id. at 51.

of agreements remained common it might be necessary to provide penalties for "guilty" parties.

In the Commission's view the work of the I.R.C. would differ from and would not conflict with that of the Prices and Incomes Board, indeed, it was seen as reinforcing incomes policy by exposing the whole process of pay settlement to the influence of policy. 'So long as work-place bargaining remains informal autonomous and fragmented the drift of earnings away from rates of pay cannot be brought under control'.[12]

If comprehensive factory agreements are to be the future basis of industrial relations it follows that such bargaining and the trade union organisation on which it depends must have the greatest possible coverage. In contrast to provisions in Australian arbitration acts[13] the British Parliament has done little to encourage union organisation in the private sector, or to protect trade unions from discriminatory employer policies: the basic trade union legislation simply makes it possible for unions to operate within the law. Trends in the composition of the work-force in Britain, as in other countries, indicate that the overall strength of trade unionism will be increasingly dependent on the organisation of white-collar workers. But in Britain, unlike Australia, traditional attitudes have, in general, strongly retarded the organisation of these groups. Problems of trade union organisation are therefore central to any extension of collective bargaining. The intractability of many of these is demonstrated by the continued existence of devices designed as expedients pending the development of effective employee organisation and collective bargaining—wages councils in certain trades and limited compulsory arbitration, to take two examples. Bold measures will be required and the Commission recommends as a partial solution to the problem of discrimination, the enactment of legislation making any term in an employment contract requiring a worker to refrain from joining a union void as being contrary to the public interest.

Questions of trade union recognition would be referred to the I.R.C. although the Commission gave no indication of the principles to be adopted nor did it propose any penalties for non-compliance with the I.R.C.'s recommendations. It was, however, recognized that this might require future review. Wages Councils and compulsory arbitration should be used, on the advice of the I.R.C., in ways which

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12 Id. at 53.

13 For example, Commonwealth Conciliation and Arbitration Act 1904-1968.

would ensure their replacement by voluntary collective bargaining of the type advocated by the Commission.

(2) *The Utilisation of Manpower*

British industry has been bedevilled by labour market practices, local and national, customary and imposed, many of very long standing and nearly all making for the inefficient use of labour. The Commission rejected the possibility of establishing a restrictive labour practices tribunal, although a number of suggestions to this end have been made and one member of the Royal Commission expressly dissented on this point.[14] The major difficulty seemed to be one of definition—what would constitute a reasonable bargain? A system based squarely on factory agreements should offer more scope for negotiating relaxation of restrictive practices than the existing arrangements which provide a climate in which such practices flourish and efficiency languishes. In the words of the Commission the proposals made 'for the reform of the collective bargaining system are therefore fundamental to the improved use of manpower'.[15]

One area singled out by the Commission in which restrictive practices have been particularly damaging is that of training. They are deep-seated and resistant, yet technological advance, which makes ever-increasing demands for the effective training and retraining of workers, requires radical change if it is not to be impeded. Responsibility for instituting change rests initially with industrial training boards, but once objective standards for the evaluation of qualifications have been evolved, revision of trade union rules would be necessary to ensure that qualified workers are not precluded from membership and thus, in many instances, from exercising their skills. In the expectation that unions may not cooperate to the extent necessary, an independent review body is foreshadowed which would hear and determine appeals by those excluded by union rules.

(3) *Industrial Action*

The Commission traversed some well-worn ground—the need to use strike statistics with caution and the fact that official strikes, although of longer duration, are far less common than the unofficial variety. (Some 95% of stoppages are unofficial.) The incidence of unofficial strikes is symptomatic of the overall failure to adapt institutional

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14 H.M.S.O., June 1968, Cmnd. 3623, 290.
15 Id. at 85.

arrangements to the pace of change. Naturally, the Commission believed that the adoption of its recommendations for the reform of collective bargaining would greatly reduce the incidence of strikes by removing many of the basic causes of industrial unrest. However, it rejected, as being on balance undesirable, suggestions that legislative provision be made, on the lines of the Taft-Hartley Act in the United States, for injunctions to restrain for a period a stoppage 'creating grave national loss or widespread hindrance to public health and safety'.[16] The government already has adequate and more flexible means of dealing with such major strikes including the timing of its intervention, the conciliation machinery of the Department of Employment and Productivity and the use of conciliation and arbitration or the establishment of inquiries of various forms.

The Commission also heard evidence proposing that a secret ballot be required before a major strike could lawfully be called. But this suggestion did not find favour. Clearly such a proposal would not be appropriate in respect of unofficial stoppages which, accounting as they do for the majority of the total number of strikes, pose a much greater threat to industrial relations. A central theme here was that industrial relations would not be improved by measures which had the effect of reducing unofficial stoppages only by causing unions to convert them to the official variety. Instead, inquiries of various types found favour as the best solution. A distinction was drawn between inquiries to resolve particular disputes and those designed to gather information which would assist the avoidance of future disputes —unofficial disputes end quickly and experience has shown that formal inquiries at this stage often delay settlement. With this in mind, the most fruitful type of inquiry would be one conducted by industrial relations officers of the Ministry of Labour. Information collected by them might indicate to the I.R.C. the need for a full-scale inquiry by that body.

It needs to be emphasized that these approaches were all seen as subsidiary to the reform of collective bargaining as a means of dealing with stoppages. If this fundamental change were achieved, arbitration, which is now fairly commonly used in attempts to settle disputes of interests, would still be important but rather in the settlement of disputes of rights (i.e. disputes about the interpretation of existing agreements). Given the present fragmented state of collective bargaining the rights/interests distinction is blurred.

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[16] Id. at 113.

(4) *Enforcement of Collective Agreements*

Traditionally, one of the cornerstones of the English system of industrial relations has been the legal non-enforceability of the collective agreement—it is characterized not as a legal contract but as an agreement binding in honour only. This is seen as according with the wishes of the parties and, in spite of occasional unease, the common law has not questioned this basic assumption. Is it time for change? This question can only be answered by asking in turn, as did the Commission—'What can the law do to help to improve our industrial relations?'[17] Legislative proposals should stand or fall by this yardstick. Official strikes in breach of collective agreements are rare; if collective agreements were henceforth enforceable in the Courts, the change would have to be judged in terms of its effect on unofficial action—by definition, the central problem. The Commission saw such a change as irrelevant and as hindering action to remedy the real causes.[18] Moreover, there already exist in the law means of dealing with trade union members who take part in unofficial strikes—as strike notice is seldom given in these situations, the strike is unlawful and remedies are available to the employer at his initiative. They are seldom used because their deterrent effect is seen as being outweighed by the harm they would do to the employer/employee relationship.

Further support for this attitude towards the legal enforceability of collective agreements may be found in an examination of the problems which would be posed by the use of sanctions. If collective agreements in general and procedure agreements in particular (those agreements dealing with procedures for reaching substantive agreements and for dealing with grievance disputes) were to be enforceable, the parties to these "contracts" would need to be determined. Clearly, they can only be trade unions and employer or employers' associations, at least for the reason that any other view would have to accommodate the problems posed by trade union members who vote against the agreement or who join after its conclusion. But in any event, given that the major problem is unofficial action, this change would make no impact at all—those who would be legally bound are not apt to breach such agreements; individuals such as shop stewards who would not be bound could continue to do so.

Any attempt to place on unions a legal obligation to ensure compliance with agreements by their membership would probably result

[17] Id. at 122.
[18] Id. at 128.

in a disruption of their internal affairs rather than in curbing unofficial action. Would the imposition of sanctions against individuals be more effective? This too was rejected as being impracticable because the imposition of sanctions on individuals acting in breach of agreements would rest on the employer. Nor would the use of the criminal law or an automatic sanction, such as loss of rights to redundancy pay, be any more effective. Experience with the use of the criminal law to deal with unofficial strikes during war-time was hardly encouraging but, more importantly, criminal proceedings, which could be lengthy, would have to be instituted after work had been resumed. And the automatic sanction would again depend on employer enforcement.

This is not to say the Commission was opposed in principle to the use of sanctions, it simply saw them as unworkable until its cherished reform of bargaining is brought about. Initially the reform of collective bargaining, including the persuasive influence of the I.R.C., would make sanctions unnecessary. However, it was recognized that their limited use may be required and the I.R.C. could keep this question under review. A dissent relating to the enforceability of procedure agreements was recorded by two members of the Royal Commission.[19]

RIGHTS OF THE INDIVIDUAL IN INDUSTRY

In turning from the reform of the collective institutions of industrial relations to the provision of safeguards for individuals in industry the Commission moved to surer and safer ground. There has been fairly general agreement that many of the assumptions which the common law makes about the employment relationship no longer accord with contemporary needs.

(1) *Unfair Dismissal*

The contract of employment has no special place in the law of contract, a basic tenet of which is the principle of freedom of contract. Conceptually, employer and employee negotiate on an equal footing and each may terminate the agreement in accordance with its terms. It follows that an employer may dismiss an employee at will and for any reason, good or bad, provided he gives the period of notice required under the contract. In industrial employment this

19 Lord Robens and Sir George Pollock were of the view that the I.R.C. should draft a procedure agreement for parties who cannot agree on terms and this agreement should be enforceable as otherwise it would be ineffective (Id. at 140).

period is typically short, often ranging from an hour to a week. Nor need the employer who acts in this way justify his conduct. Admittedly, the individual does have some limited protection against wrongful dismissal. He may claim the wages he would have earned during the period of notice but because the law does not differentiate employment contracts from other contracts he must mitigate his loss. If the manner of his dismissal makes it more difficult for him to find other employment he will, in general, have no action.

The need for change is reflected in some recent English legislation. The Contracts of Employment Act 1963, *inter alia*, provides statutory periods of notice and requires employers to direct employees to written particulars of the terms of engagement. The rationale of the Redundancy Payments Act 1965, which requires an employer to make payments varying with length of service to employees dismissed through redundancy, is the acquisition of "property" rights in jobs by employees. The difficulties in the way of such legislation may be gathered from the current spate of cases in the courts in which employers have attempted to establish that employees have been dismissed for reasons other than redundancy.[20] The harshness of the common law is often mitigated in practice—through trade union pressure, out of self-interest or even genuine dislike by employers for the type of relationship the law seems to imply. Beyond this the Commission found evidence of a wide-spread belief that the basic premises of this area of the common law no longer accord with contemporary attitudes.

These issues are a fertile source of industrial unrest and it is often maintained that legislation might not be the answer. It might stifle the incentive to develop voluntary procedures and could import a legalistic atmosphere into work-place relationships. Nevertheless, far from accepting these views, the majority of the Commission, in recommending legislation to establish statutory machinery, believed this could encourage the establishment of satisfactory voluntary joint procedures. Undertakings which follow this course could then be exempted from the coverage of the legislation on the advice of the I.R.C. Of course, any legislative approach would require a definition of the expression "unfair dismissal". The Commission thought 'it should be possible to state that dismissal is justified only if there is a valid reason for it connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service; and that in the absence of such valid reason it is

20 N. Riding Garages Ltd. v. Butterwick, [1967] 2 W.L.R. 571.

unfair'.[21] It recognized that it would be impracticable to provide an exhaustive list of reasons for dismissal which should be considered invalid other than 'dismissal by reason of trade union membership or activity or by reason of race, colour, sex, marital status, religious or political opinion, national extraction or social origin'.[22] This approach would oblige an employer to establish the grounds of dismissal and for an employee to prove some special ground which could be held to be unfair. Any employee claiming unfair dismissal would need to lodge a complaint with a tribunal within a specified period seeking either compensation or, if the parties agree, reinstatement. The Commission thus seemed to recognize explicitly that a body of case law would grow up around the definition.

These suggestions provide some interesting parallels and differences with the Australian position. Australian arbitration legislation commonly makes it an offence to discriminate against individuals but on narrower grounds, for these are largely confined to trade union activities. (Reciprocally, employees must not discriminate against an employer, by ceasing work, by reason of that employer's activities connected with an employers' organisation.)[23] On the other hand Australian legislation leaves virtually untouched the managerial prerogatives of hiring and firing. Nevertheless, arbitration has such a pervasive influence that instances of unfair dismissal often attract the attention of a tribunal which may prevail upon the parties to accept reinstatement as part of the settlement of the dispute. Australian experience might also be relevant in assessing the likelihood of success of the Commission's recommendation that it should be the duty of a tribunal concerned with these cases of unfair dismissal to first attempt conciliation. The conciliatory steps might often be unproductive because, as Australian experience shows, the parties' behaviour tends to be conditioned by the prospect of the determination being left for the tribunal.

The closed shop presents particular problems. If a closed shop is provided for in a collective agreement and an employee either resigns from or is expelled by his union, in what circumstances ought a resulting dismissal be deemed unfair? A majority of the Commission recommended that in the case of expulsion the employee should have a right of appeal to a labour tribunal. Where the dismissal follows resignation from union membership with the knowledge that a closed

21 H.M.S.O., June 1968, Cmnd. 3623, 146-147.
22 Ibid.
23 Commonwealth Conciliation and Arbitration Act 1904-1968, s. 5.

shop exists, the Commission thought that the tribunal would not normally characterize that dismissal as unfair. But a more difficult problem is posed by the dismissal of an existing employee who refuses to join a union after introduction of the closed shop. Such an employee should succeed if he is able to show reasonable grounds for his refusal to join the union—the Commission believing that it is up to the employer when making the closed shop agreement to safeguard the interests of his existing employees. Even where dismissal results from shop floor pressure, which is the most likely case, the employer would nevertheless bear responsibility for the dismissal. Compensation could conceivably be awarded where he has acquiesced in the development of an informal closed shop.

The tenor of the Commission's thinking may also be gauged from its recommendations relating to dismissal for disciplinary reasons. 'Where an employee is dismissed for breach of rule made by the employer, the labour tribunal should in reaching its decision be able to consider not only the seriousness of the breach but also the reasonableness of the rule'.[24] Apart from the substitution of a labour tribunal for a Court the possibility of reinstatement is the real addition to the existing common law remedies.

(2) *Labour Tribunals*

Means should exist for the quick and informal settlement of disputes between employers and employees; the royal road to this end being the reform of collective bargaining. But large numbers of employees are not covered by voluntary machinery and there are also some disputes which do not lend themselves to settlement through such means. At present jurisdiction is divided between a few special tribunals and the common law courts, the latter having the lion's share. The Commission proposed that the existing industrial tribunals should be renamed "labour tribunals" and enlarged to encompass 'all disputes arising between employers and employees from their contracts of employment or from any statutory claims they may have against each other in their capacity as employer and employee'.[25] It is clear the Commission envisaged that extensive jurisdiction now vested in the common law courts should be transferred to these tribunals as their jurisdiction would include actions for wrongful dismissal and other breaches of contract. Actions for damages arising from work-caused accidents, whether from breach of contract, negligence

[24] H.M.S.O., June 1968, Cmnd. 3623, 153.
[25] Id. at 156.

or breach of statutory duty, would continue to be heard exclusively in the common law courts.

A basic point of difference to the Australian industrial tribunals is that the proposals relate only to disputes between individuals; those between groups are seen as appropriate only to the processes of free collective bargaining. Nor would the labour tribunals have jurisdiction over matters arising between unions and their members or applicants for membership. (A special review body is proposed for this purpose and is discussed below.) Actions for damages arising out of strikes and labour disputes would continue to be heard in the ordinary courts. Moreover, the tribunals would not handle issues arising between unions and employers (or employers' associations) in the course of negotiating or interpreting collective agreements except to the extent that interpretation may be required where the terms of the collective agreement have become incorporated in individual employment contracts. In short, it is 'desirable to concentrate in one tribunal all cases arising from the contract of employment and from statutory rights arising from the employment relationship'.[26] Statutory rights would be those arising under legislation such as the Redundancy Payments Act. The labour tribunals should, in general, have exclusive jurisdiction in relation to statutory rights and a jurisdiction concurrent with that of the ordinary courts in other matters arising out of the employment relationship.

(3) *Safeguards for individuals in relation to Trade Unions*

(i) The Closed Shop

Trade unions are today an integral part of society, possessing great power and influence, both at large and over their members, yet the statutory safeguards accorded members have not changed since the enactment of the first comprehensive trade union legislation in 1871. One manifestation of union power is the closed shop which, in 1964, embraced more than a third of English trade unionists. It needs to be said, however, that the term "closed shop" is used as inclusive of the union shop in American terms (individuals need not be union members on engagement but must join within a specified period thereafter) and this is the predominant form.

Trade unionists commonly justify the closed shop on the "free rider" argument; the Commission found that its presence rests essentially on other considerations—if it is likely to add significantly to bargaining strength it will be imposed, if non-unionists do not weaken the

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26 Id. at 157.

union's bargaining position, they will be tolerated. The closed shop can be justified on the grounds that in some industries union stability is impossible in its absence and that it enables employers to meet an organisation representative of all workers in the industry. By the same token it helps secure observance of agreements through the tighter rein over members which it gives to union officials. On the other hand it can be argued that the closed shop reduces an individual's freedom—he must join a union to work in his vocation, cannot go too far in challenging union authority, may not be able to work at all if denied membership and is denied the privilege given other members of voluntary associations of making resignation an effective protest. That unions may use this authority arbitrarily and harshly has been amply demonstrated in a number of cases.[27] Moreover, as it may be used to reduce the number of entrants to skilled trades the closed shop can be economically damaging.

Whilst recognizing the force of many of these arguments, the Commission was unwilling to recommend its prohibition. Prohibition would raise awkward problems of enforcement and informal arrangements could easily replace express stipulations. It is more realistic to accept that with appropriate safeguards, a closed shop is useful not only for the reasons already discussed but also because it could further collective bargaining by promoting union organisation. The safeguards would be at two levels: at the stage of entry to a union and on expulsion from membership. Thus trade union rules should ideally make provision for complaint to the committee against arbitrary refusal of membership with a further right of complaint to an independent body of review. This body should have the power to issue a declaratory judgment. Additionally, it will be recalled, that with respect to entry a majority of the Commission recommended that if a worker is dismissed because he *declines* union membership on introduction of the closed shop he should have a right of complaint to a labour tribunal.

As the right to work is dependent on membership, the individual should have a right of complaint to the independent review body against unjustifiable expulsion which causes loss or against the infliction of any penalty which amounts to a substantial injustice. In these cases the ordinary law applicable to all voluntary associations was seen to be inadequate—i.e. if the union's rules are lawful and the union body which adjudicates on offences acts within the rules, the

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27 For example, Lee v. Showman's Guild of Great Britain, [1952] 2 Q.B. 329.

ordinary courts will only interfere if there has been a denial of natural justice.

(ii) Trade Union Elections

The very low average level of participation in union elections carries with it the risk of minority control but the Commission made no suggestion beyond saying that work-place voting ought to be encouraged through appropriate provisions in factory agreements. Its main concern lay with election malpractices, there being enough evidence that these occur. Although proceedings may be brought in the courts they are, by nature, likely to be difficult and protracted. The Registrar of Friendly Societies has power to insist that union rules contain certain provisions when registered but, unlike the Australian position, these provisions do not include electoral procedure. At present he has power to hear complaints from union members relating only to infringement of the rules for control of the union's political fund and about irregularities committed in the case of trade union amalgamations.

The Commission recommended that jurisdiction in these two areas be transferred to the independent review body. Union members should have a statutory right to complain about alleged election malpractices, in the first instance to the Registrar. He should be empowered to appoint an inspector who would be able to hold an inquiry which might lead to his obtaining a satisfactory voluntary settlement. But, recognizing that such settlements are unlikely, the Commission envisaged the possibility of trial before the independent review body. The inspector's report, although open to challenge, would be the starting point. Should the review body sustain the allegation on which the complaint was founded, it would have power to make declaratory orders as to the person or persons elected, to order a fresh election together with the prescription of appropriate rules for its conduct or, if the allegation is unfounded or the irregularity merely technical, to dismiss the complaint. The review body would be required to give reasons for its decisions.

These procedures would be available in case of complaints about trade union elections above branch level, but the Commission did not make clear what it had in mind for the control of election malpractice at branch level. Here, apparently, individuals could address complaints to the Registrar who would have the duty of advising and attempting to bring about an amicable settlement. Should this fail then presumably the individual would have to look to the courts for redress—a course which the Commission itself characterized as undesirable

above branch level as being 'difficult, expensive and, on occasion, protracted'.[28]

(iii) Trade Union Rules

Trade union rule books usually fail to meet desirable standards of clarity. The existing trade union legislation makes only rudimentary provision for the content of the rule book apart from those rules concerned with the union's political fund. The matters to be provided for should be expanded to ensure greater individual safeguards in relation to admission, discipline, disputes between a union and a member, election procedures, including the election of shop stewards, their term of office and authority, and the employment of auditors by larger unions. However, in some way, this is to be done 'without impairing the freedom which trade unions ought to enjoy to frame rules to meet their own circumstances'.[29]

These requirements, although sound, are not far-reaching; in the Commission's words they will be 'rather more extensive, and will call for more supervision on the part of the Registrar than in the past'.[30] The Registrar would continue his 'beneficial practice'[31] of informally advising unions on the drafting of rules but as the widened scope of the matters to be provided for may be the source of disagreement between Registrar and union the independent review body should take such issues on reference.

The independent review body, the Commission's key to protection of individual rights, would be attached to the office of the Registrar and would comprise three members—a lawyer chairman, and two trade unionists. In summary, this body would have jurisdiction in the following matters:—

(a) cases of alleged unfair imposition of penalties resulting in substantial injustice; and cases of alleged arbitrary rejection of an application for admission to a trade union;
(b) cases based on alleged breach of the rules of the union or violation of natural justice; this jurisdiction would be concurrent with that of the High Court of Justice and a plaintiff would normally have a right of election;
(c) complaints of election malpractice and of non-compliance with the existing requirements of the law concerning union political funds and trade union amalgamations;
(d) disagreements between a union and the Registrar over rule requirements.

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28 H.M.S.O., June 1968, Cmnd. 3623, 173.
29 Id. at 175.
30 Id. at 176.
31 Ibid.

Appellants should exhaust remedies available under union rules before complaining to the review body unless it is established that this course would involve undue delay or damage. With leave of the High Court, there should be a right of appeal from the review body on a point of law. Contracting out of the right to invoke the jurisdiction of the review body should be prohibited and that body should have power to award costs in its discretion.

TRADE UNIONS AND EMPLOYERS' ASSOCIATIONS

The Commission absolved trade unions from primary responsibility for the declining importance of industry-wide bargaining and its divorce from the realities of industrial relations. Nevertheless, some aspects of union structure and government have contributed to the central problem by fostering the autonomy of work groups and a separation of union members from their leaders. It should go without saying that the Commission saw changes in union structure to be essential if the type of reconstruction of industrial relations it advocates is to be achieved.

In general, it was opposed to multi-unionism, i.e. two or more unions in the one plant, whether or not they are competing for members. Nor did it see industrial unionism as generally either a practicable or desirable way of avoiding this situation. However, some further worthwhile amalgamations should be possible in areas such as engineering and construction which are plagued by a multiplicity of small craft unions. Where the problem is one of competition between unions for members the major responsibility for reform was laid at the door of the individual unions involved. The need for greater inter-union cooperation at plant level is evidenced by the growth of informal "combine committees" made up of shop stewards drawn from different unions. It would be preferable that these unofficial groups be replaced by the unions with official and constitutionally recognized Committees. Quite apart from problems arising from multi-unionism within a plant, the processes of union government should be altered to make more adequate provision for shop stewards and other work groups. This might be achieved by making the basic unit of union government (the branch) factory-based instead of geographically based.

These changes, which stem from the fundamental reconstruction of collective bargaining advocated by the Commission, will make new demands on unions and their officials—more and better qualified full-time union officials, with subsequent development of training at junior levels, higher salaries and consequently higher trade union fees.

These substantial trade union reforms, which implicitly require the modification of traditional patterns of thought and behaviour, will depend on the initiative of trade union leaders. In turn, the effort to generate and sustain these changes would devolve, in the Commission's view, on the leadership of the T.U.C.—a body which has not been notable for its receptiveness to change, particularly when this could challenge its own power and influence.

It will be recalled that employers' associations have been concerned primarily with industry-wide bargaining. The proposed reconstruction of bargaining to focus at the factory level will necessarily involve changes in these associations. Henceforth, their role should be to join with unions in promoting company and factory bargaining, and industry-wide agreements would be confined to matters which they can effectively regulate such as the length of the standard working week. This transition would require more than changes in the rules of associations. In particular there would have to be a change in attitude towards the recognition of white-collar unions.

The Commission made no proposals relating to elections in employers' associations or for the protection of members' rights comparable to those in respect of unions. It found no evidence of malpractice in the internal affairs of these associations nor of a closed shop or anything which would suggest that a company might be disadvantaged if expelled from an association. Under the Commonwealth Conciliation and Arbitration Act, of course, the provisions relating to the rules of registered organisations and to disputed elections in organisations apply equally to employers' organisations. If, however, employers' associations are to support effectively company and factory level bargaining, changes will be required in their structure, and in the number and training of officials. It might be helpful, in the Commission's view, for the Confederation of British Industry to recommend to its constituents that they review the quality and training of their staffs and the C.B.I. itself should consider broadening its membership.

CHANGES IN THE LAW

There is probably no country in which collective bargaining has a greater significance than in Great Britain where it determines the livelihood of the majority of the people. It is, moreover, a relatively old institution in Britain; large-scale industrialization which originated in that country led to the development of trade unions and collective bargaining at a time when they were almost unknown elsewhere. As one member of the Royal Commission has said elsewhere, it is at first

sight an 'astonishing fact that in a country in which collective bargaining is so highly developed and of such comparatively ancient origin, the bulk of collective bargaining and collective agreements continues to exist outside the law and without any development of a "collective labour law" of any major proportions'.[32] An explanation for this fact has been found in the time sequence of the industrial revolution and the achievement by the British working class of the Parliamentary franchise. It was not until 1867 that the urban working class attained the franchise, rural workers and miners waiting until 1884. As industrial development on a considerable scale came earlier, trade unions had already acquired a significant power in industry before their members were entitled to the vote. Thus, by the time the unions acquired the political power to influence legislation they had for a long period exercised a significant economic power. It may well be 'that this time sequence of events in the nineteenth century has given a permanent imprint to the attitude of trade unions towards legislation, and towards the law in general'.[33]

Certainly the outstanding characteristic of the British system of industrial relations is that it is based upon voluntarily agreed rules which are not, as a matter of principle, enforced by law. Neither trade unions, employers in the private sector of industry or employers' associations are placed under legal obligation to bargain collectively and, in general, the law does not attempt to enforce collective agreements or any of their individual terms. And it has done little to impede or regulate the deployment of industrial sanctions of which the strike is the most notable form. The right to strike has never been expressly formulated but a number of statutes have been enacted to overcome obstacles which the common law put in the way of the use of various forms of industrial pressure. The law generally does not prevent anyone from joining a union nor does it give protection against others who attempt to impede freedom of association. And it has never gone very far in protecting workers against the exercise by employers of their powers of dismissal or against the exercise by trade unions of their power to expel individual members. The present role of the law in industrial relations has been characterized, in short, as one of abstention.[34]

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32 O. KAHN-FREUND, LABOUR RELATIONS AND THE LAW, (1965), 21.

33 Id. at 24.

34 O. Kahn-Freund, *The Illegality of a Trade Union*, MODERN LAW REVIEW, Vol. 7.

Although a majority of the Commission agreed that this non-intervention should be taken as the normal assumption against which to frame proposals for change, there is by no means general agreement on this score. A good deal of the comment on the Commission's report has been to the effect that worthwhile change would necessarily involve the repudiation of this basic assumption. The Commission did, of course, recommend a number of legislative measures, but these are designed to remedy specific weaknesses rather than to take a drastically new approach to industrial relations. Legislation is proposed 'only where we are convinced that new institutions need to be created in order to strengthen and to improve our system of voluntary collective bargaining or to improve the enforcement of individual rights; or where a clear enunciation of legal principles is required in the public interest; or where some machinery has to be set up for imposing legal sanctions in circumstances in which voluntary action is likely to be insufficient for the solution of urgent social or economic problems'.[35] Many critics would, of course, maintain that intervention is justified on these very grounds.

The 'law affecting the activities of trade unions and employers' associations' is now scattered over a large number of statutes and decisions of the courts. The statutes, of which the principal enactments are nearly a century old, were never part of any coherent "code" of labour law. They were all passed in response to specific problems, almost invariably arising from judicial decisions inimical to the trade unions. In the use of civil and criminal sanctions, the conspiracy doctrine was used throughout the 19th century and the early part of the present century in a manner which has been variously characterized as baldly partisan[36] and as involving a double standard in trade disputes—one for unions, the other for employers.[37] In this context, the bewilderment felt at the time by the trade union movement over the decisions of the House of Lords in *Mogul Steamship Co. v. M'Gregor Gow & Co.*[38] on the one hand and *Quinn v. Leathem*[39] on the other is readily understandable. The result was that the law developed in a wholly piecemeal fashion; judicial decision followed by remedial statute, the statutes themselves being designed to remove common law disabilities rather than to enact positive rights.

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35 H.M.S.O., June 1968, Cmnd. 3623, 203.
36 J. G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS, (1967), 225.
37 C. O. GREGORY, LABOUR AND THE LAW, (1958), Ch. II.
38 [1892] A.C. 25.
39 [1901] A.C. 495.

That 'the process of adjustment to modern values is still far from complete'[40] may be gauged from the recent history of the tort of intimidation. The experience of the unions with the law, particularly in the earlier part of this period, has deeply coloured their attitude to legal controls in the field of industrial relations. English trade unions have, in general, wanted nothing more of the law than that it should leave them alone. The law concerned with industrial disputes and the rights and obligations of individuals in industry thus presents a sharp contrast to the Australian scene where the conciliation and arbitration systems have virtually eliminated the law of torts from this sphere and have created 'an entirely new code of rules, substantive and procedural, for the settlement of industrial disputes'.[41]

In the Commission's view, the ideal for the reform of the law ought to be the codification in the one Act of the principles relating to collective bargaining, to industrial relations in general (including the new legislations recommended by the Commission) and to trade unions and employers' associations. An Industrial Law Committee should be attached to the I.R.C. to keep this code under constant review. If this ideal proves unattainable as being too ambitious, a comprehensive consolidation should be enacted quickly after the passage of the new legislation required to give effect to those of its recommendations which find acceptance. The following are the most important of the specific changes in the existing law recommended by the Commission.

(i) *The definition of a trade union*

A trade union was first defined in the Trade Union Act 1871 (the first of the remedial statutes) and the definition is now spread over three Acts, the last being enacted in 1913. It is cumbrous, wide and archaic, its terms being very much a reflection of earlier struggles; thus it has to ensure that it cannot be interpreted to deny unions political objectives, it is made to apply to those combinations which would have been regarded as unlawful bodies at common law as having objects in restraint of trade, it emphasises the friendly society aspect of unionism, applies equally to employers' associations and finally smacks of a less egalitarian age in its rather ominous use of the words 'workmen and masters'. Moreover, in terms of the present wide definition, a combination of, say, two shop stewards to conduct a particular trade dispute could be considered a "trade union" and

40 J. G. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS, (1967), 223.
41 Id. at 221.

thus would share the general immunity from actions for tort conferred on unions. For all these reasons the Commission recommends a much shorter and simpler definition in terms that would also cover employers' associations.

(ii) *Legal Status of Unions*

It is vitally important both to unions and the public that their legal status should be clear. Is their position in this respect the same as that of voluntary unincorporated associations or are they legal entities distinct from their members? The answer involves such issues as the enforcement by unions of claims against third parties and of claims against unions by members and third parties, the extent of a union's vicarious liability for the acts of its officials and the ownership of property. It is one of the most curious features of English trade union law that this question has never been clearly resolved. Until the decision of the House of Lords in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*[42] it was generally accepted that even a registered union was not a legal entity. The decision in that case that such a union could be sued in its registered name and the common fund made liable in execution of an award of damages came as a stunning shock to the trade union movement. The ratio is far from clear. The majority of their Lordships held that a registered union, although neither a corporation nor an individual, was constituted by the 1871 Trade Union Act a legal entity, possessing sufficient of the attributes of corporate personality to enable it to be sued in its registered name for the torts of its servants or agents. In so holding the House of Lords reversed the decision of the Court of Appeal, which had pointed out that certain provisions of the 1871 Act, the vesting of property and the bringing and defending of actions in the names of trustees in limited circumstances, were inconsistent with a legislative intention to incorporate registered unions. The logic of this argument seems inescapable. The truth of the matter is that Parliament had a very restricted object in view in enacting that legislation, it simply intended to confer a limited legality upon trade unions which had previously been forced to operate virtually outside of the law.

More than fifty years later, in *Bonsor v. The Musicians' Union*,[43] the House of Lords had a further opportunity to pronounce upon the legal status of the registered union. Lord Morton was of the view that

42 [1901] A.C. 426.
43 [1956] A.C. 104.

such a union was capable of entering into contracts and of being sued as a legal entity distinct from its individual members and that the contract of membership was between the aggrieved former member, Bonsor, and the Union. Lord Porter was of the same view. Lords McDermott and Somervell, although agreeing in the ultimate decision, thought that a registered trade union was not a distinct legal entity and that it could be sued in is own name simply because Parliament, in enacting the 1871 Act, must be taken to have sanctioned such a course. Lord Keith, although his views appear ambivalent, seemed inclined to support this view. The Commission pointed out that if this is the position then the contract of membership of a trade union is between each member and the other members for the time being and not a contract between member and union regarded as a separate legal entity.[44] However, in *Bonsor's Case* damages were awarded against the Union's common fund and not against the members themselves on the ground that as the Union had ratified Bonsor's wrongful expulsion the Union itself must pay. The position of a registered trade union which did not ratify such an unlawful action by its officials has not been decided.

The difficulties surrounding the position of the unregistered trade union are even greater. Such a union probably cannot sue or be sued in its own name, its position being assimilated to that of other unincorporated associations. Legal proceedings by or against such a union would, therefore, have to depend on the availability of a representative action. But if there were changes in membership between the commission of the act complained of and the time of the action (and, of course, this would usually be the case) such proceedings would be defeated. Moreover, if one member successfully pleaded a defence peculiar to himself, his fellow defendants could also rely on it. These difficulties ensure that the unregistered union is virtually immune from suit in contract and unable itself to sue. In tort, unregistered unions share the general immunity from liability granted to trade unions generally by section 4 of the Trade Disputes Act 1906 (this immunity does not extend to individual officers of a union). Finally, the position of the unregistered union as regards the ownership of property is also obscure.

Considerations of this sort prompted Fullagar J. to observe in *Williams v. Hursey* that the difficulties involved in the English cases 'are formidable'.[45] The Royal Commission thought 'the time has come

[44] H.M.S.O., June 1968, Cmnd. 3623, 208.
[45] (1959) 33 A.L.J.R., 269, 274.

to clear away the uncertainties and obscurities which surround the position of trade unions at law, and that they should be granted corporate personality'.[46] That such a fundamental proposal should have waited so long for authoritative recommendation is indicative of the painful and piecemeal development of English trade union law. It provides, too, a sharp point of contrast with Federal law. An organization registered under the Commonwealth Conciliation and Arbitration Act is unequivocally a corporate entity; such an organization enjoys, in the words of Fullagar J. in *Williams v. Hursey,* 'a corporate character—an independent existence as a legal person. It is given a personality, which is distinct from that of all or any of its members, and which continues to subsist unchanged notwithstanding the changes which are bound to occur from time to time in its membership.'[47]

The Commission found that similar problems exist in respect of employers' associations. In 1966, 81 employers' associations were registered as trade unions (the definition of a trade union in the Trade Union legislation being sufficiently wide to embrace such associations) and at the end of 1965, 118 employers' associations were registered under the Companies Acts. None of these associations can be trade unions. The remaining employers' associations, numbering approximately 1,150, are unincorporated associations of employers. An indeterminate number may be unregistered trade unions. Such an archaic state of affairs cannot accord with present day needs. Correlatively, therefore, the Commission recommended that employers' associations should receive corporate status.

(iii) *The Registration of Trade Unions and Employers' Associations*

Conferring corporate status on unions will entail the keeping of a register so that interested parties may find details of a union's objects, constitution, rules, chief officers and the address of its headquarters. It would also serve to identify those bodies entitled to the various exemptions from the general law granted to trade unions. Those unions which are already registered under the provisions of the 1871 Act account for over 85 per cent of total trade union membership. The advantages gained from registration are not substantial; a taxation concession in respect of interest and dividends applied solely for the purpose of provident benefits and certain administrative advantages—the automatic vesting of property in new trustees and the

[46] H.M.S.O., June 1968, Cmnd. 3623, 209-210.
[47] (1959) 33 A.L.J.R., 269, 273.

summary remedies available to the registered union for the recovery of its property from fraudulent officials. And, of course, by judicial decision a registered union may sue and be sued in its own name. Registration under the 1871 Act is entirely voluntary. The registered union does have some obligations but these are not onerous, for example, it must notify the Registrar of the names of its officers and the rules must make provision for some elementary matters such as the appointment of trustees. The Commission, believing that these requirements do not go beyond what any well-run union would normally do, thought registration would not work any hardship. Accordingly, it recommended that all unions, as from some convenient date, should be registered and receive corporate status. The register now kept by the Registrar of Friendly Societies could be renamed the Register of Trade Unions and Employers' Associations. Unions currently registered would simply remain on the register and unregistered unions should be given a certain period in which to obtain registration. The definition of a trade union in the legislation should be exclusively related to a registered trade union and new unions obliged to register within a certain time of their formation.

These proposals are also fundamental if the outworn crust of the past is ever to be removed from English trade union law. They would of necessity carry with them, as the Commission acknowledged, at least one other inroad on that past. The existing definition of a trade union includes temporary combinations whose principal objects under their constitution (which apparently need not be written) are the statutory ones of regulating relations between workmen and masters or between workmen and workmen, etc.[48] Thus any short-lived combination of even half a dozen workers which had a constitution and was formed with the object of regulating relations with an employer would qualify as a trade union. In turn, no matter how ephemeral the combination, it would during its existence be entitled to immunity, as a trade union, for any tort committed in pursuit of its objects. To meet this situation, the Commission suggested that the definition of a trade union be altered so as to refer exclusively to trade unions on the new register.

This does not, however, exhaust the problems created by the short-lived combination. There are some exemptions from the ordinary law which have been enacted in favour of "persons" acting in contemplation or furtherance of a trade dispute. Section 3 of the Conspiracy

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48 Trade Union Act Amendment Act 1876, Section 16.

and Protection of Property Act 1875 provides that an agreement or combination of two or more persons to do or procure to be done an act in contemplation or furtherance of a trade dispute is not to be *indictable* as a conspiracy if such act, committed by one person, would not be punishable as a crime. Section 1 of the Trade Disputes Act 1906 provides that an act done in pursuance of an agreement or combination by two or more persons is not to be actionable if done in contemplation or furtherance of a trade dispute unless the act if done without any such agreement would be actionable.

The purpose of these two sections is to give protection respectively against prosecution for criminal conspiracy and against actions for civil conspiracy to "persons" who combine to advance their legitimate interests in a trade dispute. The Commission recommended that these two sections should remain as a protection for employees not yet organised in trade unions. They would, of course, also continue to protect officials of trade unions on the new register who act in the course of a trade dispute. A similar recommendation is made in respect of section 2 of the Trade Disputes Act 1906 which makes peaceful picketing, as defined in the Act, lawful not only by trade unions but by any "person" acting on his own behalf. Another major statutory provision which has to be considered in this context is section 3 of the Trade Disputes Act 1906 which has been of immense importance in shielding trade unions from common law liability. The first part of the section, which was enacted in response to the decision in the *Taff Vale Case,* provides that no action may be brought against any *person* who induces another to break his contract of employment if this is done in contemplation or furtherance of a trade dispute. The Commission was adamant that this section should continue to apply for the benefit of trade unions on the new register. It would, therefore, continue to shield officials of such unions who, say, call their members out on strike in breach of their employment contracts. There was, however, a division of opinion within the Commission as to whether it is still necessary for *persons* who, under the new registration provisions, will not be trade unions. The problem could easily arise where an attempt is being made to organise workers who are not members of a trade union. If such an effort is made on behalf of a union on the new register, the section will apply. But if the attempted organisation relates to some *proposed* new union, the organisers might wish to induce workers to withhold labour in order to enforce their demands. Should they be able to do so free from the fear of an action for inducing breaches of contract? A majority

of the Commission thought that such protection is no longer necessary or desirable in these circumstances. The major reasons advanced for this view are simply that to avoid the possibility of such an action employees need only give the appropriate contractual period of notice (typically no more than a week) and if the organisers feel the protection of the section is vital to them they can easily constitute a union and register. Perhaps a more telling reason in favour of the majority view is the fact that the section at present protects unofficial groups in some industries, notably construction and the waterfront, which suffer badly from unofficial strikes.

The Trade Disputes Act 1965 was enacted to offset the effect of the decision of the House of Lords in *Rookes v. Barnard*.[49] This Act provides that the protection of the 1906 Act against actions in tort is not to be lost because a person threatens the breach of an employment contract, or threatens that he will procure another person to breach such a contract—the basic elements of the tort of intimidation being satisfied if the person aimed at suffers loss as a result of such threats. The Commission recommended that this Act should remain in force as it will continue to be necessary for the protection of union officials and probably for individual workers.

A minority of the Commission dissented from the recommendation that the immunity of the first part of section 3 of the Trade Disputes Act 1906 should be confined to registered trade unions and to persons acting on behalf of such unions. Should unofficial strikers be deprived of the protection of the section for inducing breaches of employment contracts they would automatically also lose the protection of section 1. They would, in effect, be exposed to actions for civil conspiracy. The narrow form of the tort of conspiracy is committed when two or more combine so as to inflict damage on a third party by the use of means unlawful in themselves (inducing breaches of contract and, semble, threatening to induce such breaches) whatever the motive of the combiners may have been. Such actions would be a potent weapon against unofficial industrial action. The minority thought such a prospect was incompatible with the main tenor of the Commission's recommendations, i.e. that solution to the problem should be found in the fundamental reform of collective bargaining, not in legal sanctions.

The Commission, in keeping with its recommendations concerning the status of trade unions, recommended that employers' associations

[49] [1964] A.C. 1129.

whose principal activity, or one of whose principal activities, is the regulation of relations between employers and employees should also, in addition to requiring corporate status, be registered.

(iv) *The Enforceability of Contracts entered into by Trade Unions*

In 1871 the purposes of most trade unions were, as they remain today, in unlawful restraint of trade at common law. Section 3 of the 1871 Act is addressed to this point and provides that the purpose of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. The purpose of this section was to legitimate agreements made by trade unions. If the 1871 legislation had stopped at this point, disputes among union members as to their rights and obligations under the rules (the rules constituting the agreement between them) might have been the subject of legal proceedings, even to the extent of a court being asked to make a strike effective by restraining members from violating a majority decision to stop work. Parliament therefore provided, in section 4 of the 1871 Act, that nothing in the Act should enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of five enumerated types of agreements—for example, an agreement between the members concerning the conditions on which they would accept employment. Nothing in the section, however, was to make any of these agreements unlawful. Since the enactment of the section, the courts have made it plain that it does not deny jurisdiction over a very large part of trade union affairs. The first way in which the courts retained jurisdiction over these agreements was simply to find that not all trade unions had objects in restraint of trade, such a union did not need the 1871 Act to enable it to sue. Again, proceedings instituted with the object of "indirectly" enforcing any of the agreements have been held to be outside the literal words of the section. Finally, the process of interpretation made it clear that certain critical proceedings, notably to prevent expulsion from a union in violation of its rules[50] and the recovery of damages for wrongful expulsion,[51] did not fall within the express prohibitions contained in the section.

A majority of the Commission recommended the complete repeal of the section. Its scope has been greatly narrowed by judicial decisions

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50 Amalgamated Society of Carpenters and Joiners v. Braithwaite, [1922] 2 A.C. 446.

51 Bonsor v. Musicians' Union, [1956] A.C. 104.

and there is no compelling reason why trade union contracts should differ as to enforceability from other contracts.

(v) *Conspiracy and Protection of Property Act*

Section 2 of the Trade Union Act 1871 provided that the purposes of a trade union should not, merely because they were in restraint of trade, render any member of the trade union liable to criminal prosecution. Before the passage of this section a few of the judges were of the view that the mere act of forming a trade union which had purposes in restraint of trade was indictable as a conspiracy.[52] The Criminal Law Amendment Act of 1871 was also designed to further the withdrawal of the criminal law from trade disputes. The effect of this Act was to make a threat to strike no longer a statutory offence. However, a decision the following year showed that the criminal common law had not been entirely abrogated in its effect on trade disputes.[53] A strike or a threat to strike might still be indictable as a conspiracy to coerce. Following a Royal Commission, which was appointed in 1874, the Conspiracy and Protection of Property Act was passed in 1875. The purpose of this Act, and it was achieved, was to substantially remove industrial disputes from the purview of the criminal law. Section 3 provides that an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute shall not be indictable as a conspiracy if such act, committed by one person, would not be punishable as a crime. The effect of this section was to make a strike, or the threat of a strike, no longer a crime. The Act contains two exceptions to this general rule. Section 4 makes it a criminal offence for any person employed by a gas or water undertaking supplying gas or water to the public to wilfully break his contract of service if he knows, or has reasonable cause to believe, that the probable consequence of his doing so, whether alone or in combination will be to deprive the inhabitants of the place concerned of their supply of gas or water. It is to be noted that the section does not make it an offence for an employee to terminate his contract of service by giving the proper period of notice but the section would be contravened if such an employee struck in breach of his contract of service without giving due notice. The section was extended in 1919 to cover employees in electricity undertakings. The Commission heard differing evidence on the question whether the section should now be repealed or extended.

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52 E.g., Crompton J. in Hilton v. Eckersley, (1855) 6 E. & B. 47.
53 R. v. Bunn, (1872) 12 Cox 316.

The National and Local Government Officers' Association, for example, argued for its repeal on the ground that it discriminated unfairly against public utility employees. In the complex industrial society of today, so the argument ran, many other industries and occupations were of equal public importance. In the face of arguments of almost equal weight favouring either repeal or extension of the section a majority of the Commission opted for the *status quo*. They reasoned that the section does not make it an offence to take part in a strike, it simply penalises certain breaches of contract. A strike by such employees can still take place if they give the usually short period of contractual or statutory notice required to terminate their employment contracts. Moreover, the effect of such notice will be to alert the employer, and through him the public, to the possibility of an interruption of supplies essential to every person.

Section 5 of the same Act is cast in wider terms than the preceding section. It applies to any person who wilfully breaks a contract of service or of hiring (prima facie, therefore, the section appears to extend to contracts for the hire of plant and goods), knowing, or having reasonable cause to believe, that the probable consequences of his doing so, either alone or in combination, will be to endanger human life or to cause serious bodily injury or to expose valuable property to destruction or serious injury. The section thus covers a very wide field extending, for example, to railway drivers and signalmen. And unlike section 4, section 5 applies to both parties to a contract of service and not simply to the employee. The Commission was not aware of any prosecution having been instituted under this section. Nevertheless, on balance it thought the section should be retained along with section 4 without amendment. The repeal of either section might be construed as a licence to do that which the criminal law forbids. These sections have been copied in Australia.[54]

(vi) *Liability for Civil Conspiracy and other Torts*

The right to strike has never been expressly proclaimed in English law. It is left to the law of tort to draw the line between the protection of the right to strike and the protection of the rights of those who might be adversely affected by its exercise. The latter interests have always had the strongest appeal for the common law judges. In consequence the borderline between that which is permissible and that which is prohibited is largely drawn by statutes which define the immunity from liability of persons "acting in contemplation or

[54] E.g. ss. 49 and 50 Employers and Employees Act 1958 (Vic.).

furtherance of a trade dispute". The Trade Disputes Act 1906 followed the Report of a Royal Commission which had been appointed to consider the effect of a number of decisions on tort liability around the turn of the century. In *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*[55] the House of Lords held that a trade union could be sued in its registered name and that its common fund could be reached in satisfaction of tort liability incurred by officials acting on its behalf. The liability in question was for inducement of breach of contract. In *Quinn v. Leathem*[56] the House of Lords affirmed that the protection which the Conspiracy and Protection of Property Act of 1875 gave to those acting in contemplation or furtherance of a trade dispute against prosecutions for criminal conspiracy did not extend to actions for civil conspiracy. The element of combination might make tortious, acts, which if done by an individual, would not attract liability.

Section 1 of the first Trade Disputes Act provided that an act done in pursuance of an agreement by two or more persons in contemplation or furtherance of a trade dispute should not be actionable unless the act if done without any such agreement or combination would be actionable. In short, given the touchstone of a trade dispute, the Act removed liability for the general form of the tort of conspiracy—a combination by two or more persons with the purpose of inflicting damage on a third party by the use of means lawful in themselves but with a predominant purpose other than that of advancing the legitimate interests of the combiners. It is to be noted that the section is not addressed to the narrow form of the tort—a combination by two or more to inflict damage on a third party by the use of means unlawful in themselves. In this form of the tort the motives of the combiners are irrelevant. Section 3 provided that an act done by a person in contemplation or furtherance of a trade dispute should not be actionable on the ground only that it induced another person to break a contract of employment. Section 4 laid down that no action in tort should be brought against any trade union—this section does not, of course, preclude actions against officials or individual members of a union.

The protection conferred by the Act in respect of acts done in contemplation or furtherance of a trade dispute is cast in terms which preclude the use of unlawful means; section 1 does not extend to the

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[55] [1901] A.C. 426.
[56] [1901] A.C. 495.

narrow form of the tort of conspiracy. In *Rookes v. Barnard*[57] the House of Lords held that a threat to break a contract of employment unless the employer acceded to certain demands was a threat to do something unlawful and constituted the tort of intimidation. In consequence such persons if sued for damages for civil conspiracy could not rely on the protection afforded by section 1. This decision was nullified by the Trade Disputes Act 1965 and the Commission was of the view that this Statute was necessary for the protection of trade union officials and should remain intact.

Since the enactment of the Trade Disputes Act in 1906 the common law relating to the general form of the tort of conspiracy has come largely into line with section 1 of that Act. It is now established that even though the person aimed at is injured, the tort is not made out if the combiners acted with the predominant object of advancing their own legitimate interests and have not resorted to unlawful means.[58] The Commission nevertheless favoured the retention of section 1. If it can be established that the act complained of was done in contemplation or furtherance of a trade dispute there is no need for any inquiry into the predominant motives of the members of the combination. Moreover, as the definition of a trade dispute covers sympathetic action, the protection of the section can be invoked even if the predominant motive was to promote someone else's legitimate interests.

The decision in *Rookes v. Barnard*[59] has given rise to one other possible head of liability which is not removed by either of the Trade Disputes Acts. Liability for civil conspiracy might arise where a number of persons agreed together, in contemplation or furtherance of a trade dispute, to break their contracts of employment in combination—a strike without the proper contractual period of notice—since they would then be parties to do an unlawful act. If such an act was done by an individual alone it would be actionable and the protection of section 1 of the 1906 Act would not be available. That section gives protection only against the general form of the tort of conspiracy. Nor would the combination be protected by the Trade Disputes Act 1965. The Commission recommended that this possibility should be removed by legislation.

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[57] [1964] A.C. 1129.
[58] Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, [1942] A.C. 435.
[59] [1964] A.C. 1129.

(vii) *Inducement of Breach of Contract*

Trade union officials who induce their members to strike without giving the appropriate contractual period of notice to terminate their contracts of service commit a tort for which they would normally respond in damages. An action could not be brought against the union itself since it is protected by the immunity from suit in tort conferred by section 4 of the 1906 Act. This protection is illusory in one sense since a trade union will not usually stand by and see the burden of damages fall on one of its officials. Before the passage of section 4 of the 1906 Act damages were recovered against a number of unions themselves for inducing breaches of contracts of employment.[60] The law in this respect was altered by the first limb of section 3 of the Trade Disputes Act 1906 which provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment. The section thus protects trade union officials and others only if they induce breaches of employment contracts; the inducement of, say, breaches of commercial contracts would still result in tort liability. The Commission received conflicting proposals as to the future of this part of the section. The Confederation of British Industry argued that if the section were extended to cover commercial contracts an employer engaged in an industrial dispute with his work-force might find his sources of supply or trade outlets severed by union induced breaches of the commercial contracts involved. On the other hand, those arguing for the extension of the section, notably the Trade Union Congress, were of the view that there is no real difference between embarrassing an employer engaged in a trade dispute by strike action or the interruption of his contracts of sale or purchase. The collective bargaining process contemplates the effective use of economic pressures in the process of reaching a settlement. The Commission noted that it is a commonplace aspect of trade disputes today that unions not only call their members out on strike but also attempt to exert additional pressure by sealing off an employer's sources of supply or his sales outlets or both. Indeed, lawful means are available to achieve both objects and it might be argued that union officials have only themselves to blame if they resort to unlawful means. The difficulty is that the law is neither clear nor rational. The method by which the breach is brought

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60 See for example Taff Vale Railway Co. v. Amalgamated Society of Railway Servants, [1901] A.C. 426.

about is the all-important factor. If the officials of the union in dispute simply call their members out on strike in breach of their employment contracts they must rely on section 3 for protection. But if the officials serve notice of the strike on the employer as a warning of what will occur if their demands are not met and that notice corresponds with the typically short period of notice required to terminate the individual employment contracts, no unlawful act is committed and the protection of the section is not required. Breaches of commercial contracts give rise to greater difficulties. In the context of a trade dispute:—

(1) mere advice is not inducement; thus a union official who advises a customer of the employer in dispute that he ought to consider his business relationship with that employer in the light of the dispute does not commit a tort even if the consequence of that advice is that the customer breaks his contract with the employer.

(2) advice of this nature will not amount to an inducement to break a contract even though it draws attention to the possible damage to the customer of continuing to deal with the employer.

(3) should a union official, however, threaten a customer of the employer in dispute that unless he ceases to deal with that employer the customer's own employees will be called out on strike, and in consequence that customer breaks his contract with the employer, the union official will be liable for the tort of inducing the breach of that contract.

(4) if the union official ignores the customer and goes directly to the customer's employees, persuading them to strike without giving due notice to terminate their employment contracts, and this is successfully done in order to persuade the customer to cease dealing with the employer in dispute, that employer may proceed against the official for inducing the customer's breach of his commercial contract. This is referred to as indirect inducement or procuring breach of contract and is actionable because unlawful means were employed—breach of their contracts of employment by the customer's employees.

(5) in case (4), however, if the union official had persuaded the customer's employees to first give the notice stipulated in their employment contracts and to come out on strike only on expiration of that notice, the employer in dispute could not sue the official if the customer capitulated and broke his contract with the employer. No unlawful means would have been counselled or used. The strikers are at liberty to cease work on the giving of proper notice and the exercise of a legal right does not give rise to a cause of action to any person injured by its exercise.

A trade union official may bring about a breach of a commercial contract between the employer in dispute and one of his customers without committing any tort by using methods (1), (2), or (5).

The Royal Commission, however, was of the view that this complexity is in itself undesirable. Both union officials and employers commonly misunderstand the law; liability should not be incurred or avoided according to whether this maze is successfully negotiated or not. Accordingly, the Commission recommended that the protection of the first limb of section 3 be extended so as to cover all contracts. A majority, however, considered that the protection of any extension of the section should, in line with the recommendation as to the section as a whole, be confined to those bodies which will be trade unions if the suggested new arrangements for incorporation and registration are acted upon. The section would not, therefore, extend to temporary combinations.

The second limb of section 3, which was enacted following recommendation of the 1903 Royal Commission, has an interesting history. It provides that an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or labour as he will. However, the House of Lords had already decided in 1898 in the case of *Allen v. Flood*[61] that no action lay against an individual for interfering with another's trade, business or employment, whatever his motive might be, unless he did so by means unlawful in themselves. In spite of this decision, judicial opinions were still expressed that mere interference with another's trade, business or employment might be actionable.[62] The second limb of section 3 was intended to head off any such development of some form of residual tort liability. Since that time, however, other decisions of the House of Lords have indicated that mere interference with another's business or employment is not actionable in the absence of unlawful means.[63] There would, therefore, seem to be no need today to retain this part of the section. However, the possibility of some form of liability based on interference by an individual seems to have been resurrected by Lord Devlin in *Rookes v. Barnard*.[64] The House of Lords being no longer bound by its previous decisions could reverse

61 [1898] A.C. 1.
62 See for example Quinn v. Leathem, [1901] A.C. 495.
63 Crofter Hand Woven Harris Tweed v. Veitch, [1942] A.C. 435.
64 [1964] A.C. 1129, 1215-1216.

Allen v. Flood; accordingly, the Royal Commission recommended the retention of the second limb of section 3.

(viii) *Freedom of Trade Unions from Actions for Tort*

Section 4 of the Trade Disputes Act 1906 gave effect to Parliament's decision that the virtual immunity from actions in tort which unions enjoyed prior to the decision of the House of Lords in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*[65] should be restored. Prior to that decision it was assumed that trade unions were akin to other unincorporated bodies and the formidable difficulties of the representative action effectively shielded them. Section 4 does not, of course, sanction the commission of torts, it simply removes a remedy. It is, however, expressed in terms which make it applicable to both registered and unregistered unions and the immunity conferred is not made dependent upon the existence of a trade dispute. On the other hand the trustees of a trade union remain liable to be sued for any tort touching or concerning the property of the union unless the tort was committed in contemplation or furtherance of a trade dispute. Representations were made to the Commission that trade unions no longer need this sweeping and unique exemption from liability. Trade union officials, of course, remain personally liable and where they cannot claim any other statutory protection their unions not uncommonly meet any awards of damages against them. In these circumstances the Commission thought it proper to recommend that the immunity of trade unions should be confined so that it applies only as regards torts committed in contemplation or furtherance of a trade dispute but not as regards any other tort.

There is one further matter concerning section 4 which in the Commission's view, needs clarification. The section confers immunity from action in respect of any tortious act alleged to have been committed by or on behalf of a trade union. It is not beyond doubt that an injunction might be granted against a union to prevent the commission of a tort which is simply threatened or apprehended. The Commission recommended that the section should be amended to make it clear that actions are also precluded in these circumstances, provided the threatened action by the union is in contemplation or furtherance of a trade dispute.

In Australia, the Trade Disputes Act 1906 has been enacted only in Queensland. In the context discussed above the common law is, therefore, still of general application.

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[65] [1901] A.C. 426.

(ix) *Political Action: Trade Union Act 1913*

In *Amalgamated Society of Railway Servants v. Osborne*[66] the House of Lords held that the statutory definition of a trade union in the Trade Union Acts of 1871 and 1876 was exhaustive of the objects which unions could lawfully pursue and as these objects did not include political objects their pursuit by trade was ultra vires. The Trade Union Act 1913 nullified this decision by revising the statutory definition of a trade union to empower unions to pursue any lawful objects including political objects. Before money may be expended on certain political objects—representation in Parliament and on local government—unions must fulfil a number of conditions designed to preserve to individual members the right to refrain from contributing towards such objects. In order to finance the specified objects, a union is required to secure a majority resolution in a ballot held to determine whether the membership wishes to pursue these objects. The union must then make rules, approved by the Registrar, for the management of its political fund; this fund being required to be kept separately from general funds. The Act also gives any member who objects to contributing towards these objects the right to "contract-out". Between 1927 and 1946 "contracting-in" was substituted for "contracting-out" and this change apparently resulted in a considerable diminution of trade union political funds. The Commission heard evidence that "contracting-in" should again become the law but in the absence of any evidence of malpractice recommended that the law should remain unchanged.

(x) *The Right to Strike*

There is no law expressly conferring a right to strike. But every employee has the right to withdraw his labour on giving his employer the notice required under his contract to terminate the employment. The same is true of a number of employees acting in combination. Should an employee cease work without giving the requisite notice, his action, unless there is a legal justification for it, is unlawful as a breach of contract. But it is not a criminal offence except in the circumstances set out in the Conspiracy and Protection of Property Act (interference with gas and water supplies, possible damage to human life and valuable property). Should a number of persons in combination withhold their labour in breach of contract, whilst each will be individually liable for breach of contract, their action is no

[66] [1901] A.C. 87.

longer a criminal conspiracy nor is it, subject to what was said in *Rookes v. Barnard*[67] concerning the use of unlawful means, a civil conspiracy.

These changes are the result of the Statutes passed over the last hundred years which have been discussed above. The right to strike in England therefore derives from the language of statutes passed to protect combinations which act to improve their collective conditions of employment. The Royal Commission noted that it is often urged that an express right to strike should now be granted by statute. At present the right to strike is basically a right to withdraw labour in combination without being subject to the legal consequences of acting in combination which would have followed in the past. The Commission thought that this situation is now so clear and well recognized that no improvement would result from granting the right in express terms.

(xi) *The Effect of Strikes on the Contract of Employment*

Apart from special cases, such as a hiring at will, if no strike notice is given the result will be breaches of employment contracts. This is also true if notice is given, whatever its length, and it is not in its terms notice to terminate employment contracts. If the notice is in terms notice of termination and of the stipulated length then the contract has been fulfilled; there is no question of any breach. The Commission observed that it is now sometimes said this situation does not reflect the real intentions of the parties. Where a stop-work notice is given, and it is not a notice to terminate the contract, the employees in question are in breach. But by ceasing work in these circumstances the employees do not in fact intend to repudiate the contract, rather they simply seek modification of its terms. Nor does the employer usually regard the cessation as repudiation; he wants the contract to continue. It is only when the parties cannot come to terms that questions of repudiation and rescission arise. When the strike notice is in terms effective to terminate the contract on its expiry, neither side wants to end the contract; again it is a question of modifying its terms.

Proposals have been made that this situation should be reflected in the law; if the intention of the parties is simply to suspend the contract, the law of contract should produce this effect. A strike would then merely suspend the contract of employment and would have the effect of creating a new right of unilateral suspension, as

[67] [1964] A.C. 1129.

either side to the employment contract could exercise it without the consent of the other. The Commission saw some formidable difficulties in the way of such a change. To take but a few; would it apply to all strikes, unofficial and unconstitutional as well as official strikes, would it apply to lightning strikes or only to those where at least some notice is given, would strikers be free to take up other employment during the suspension and, if so, would obligations of, say, secrecy in the suspended contract be also suspended? The Commission concluded that such a fundamental change in the law is not called for. Any such proposals should only be entertained after examination by an expert committee.

CONCLUSION

The Commission's proposals concerning the protection of individual rights and the legal status of trade unions and employers' associations have caused little comment. There had been widespread agreement that such measures were overdue. Apart from these areas, the Commission's recommendations leave the basic framework of English trade union law substantially intact; its major proposals relate to a codification of the statutes and to the loss of common law immunities in some circumstances.

Most subsequent discussion has concentrated upon two principal broad conclusions: first, that because 'the central defect of British industrial relations' is the disorder arising from the conflict between the formal and the informal systems, the factory agreement should become the basis of industrial relations; second, that on balance, there are insufficient grounds for making greater use of legal sanctions to deal with unofficial stoppages. The Commission believed that the reform of collective bargaining would be the most constructive first step in resolving this formidable problem.

By accepting as a premise, with no attempt at any real support or defence, that the ideal system of industrial relations was one based on voluntary collective bargaining, the Commission was in a sense advocating the maintenance of the *status quo*. But some aspects of its suggestions for altering the form of bargaining arrangements have been contentious, in terms of both their desirability and feasibility. Some opposition naturally has come from those who are convinced that the suggested changes are aimed at the smoother operation of the present type of incomes policy and who have been opposed to that policy for any of a number of motives. However, it is by no means apparent that the changes would in fact strengthen incomes policy. A greater

part of bargaining would be brought into a formal framework but it is possible that even if this is not replaced by further informal bargaining, the very formalisation and expansion of factory bargaining could create inflationary pressures of their own. Fears have already been expressed by management that the change could result in the competitive bidding up of wages and the formalisation of bargaining might encourage the drawing of comparisons between firms to a much greater extent than would informal bargaining arrangements. Moreover, purely in terms of institutional arrangements and despite the Commission's assurances to the contrary, it appears quite likely that the activities of the Industrial Relations Commission could cut across those of the existing Prices and Incomes Board.

By what means and how readily could this fundamental change of emphasis to formal factory bargaining be achieved? As with several central sections of the report there is here considerable vagueness about the proposals. The Commission saw primary responsibility as resting with boards of directors of companies and, as a means of inducing them to assume this responsibility, proposed that companies should be required to register factory agreements and that various forms of "encouragement" should be evolved through the I.R.C.. But it is not clear what the consequences would be if a company did not move to negotiate such an agreement. Similarly, it is not clear how, in the absence of penalties, the I.R.C. could expect compliance, in many instances, with its recommendations. It appears that the I.R.C. would be concerned primarily with investigating problems referred to it and would be completely lacking in "teeth", other than those of exhortation or persuasion through the power of public opinion following its reports. The same criticism can be made of the other proposed statutory body, the so-called "independent review body". For example, the procedure suggested for dealing with election malpractices falls far short of the detailed provisions in this respect of the Commonwealth Conciliation and Arbitration Act.

Even in considering individual rights, the Commission is often vague and leaves a great deal of scope for differences of interpretation; for example, in considering the closed shop no attempt is made to define "substantial injustice".[68] Again, the proposal for legislation on trade union rules applies only to very general matters and no real consideration is given to the future role of the Trades Union Congress. It is true that with respect to the first of these matters the Commission

[68] H.M.S.O., June 1968, Cmnd. 3623, 171.

probably expects a body of case law to develop, but it could have been expected to offer more specific guidance.

To many observers, the proposals for restructuring collective bargaining seemed so feeble and basically impracticable that they must virtually be ignored. Rather they have seen the most important aspect of the report as being the Commission's unwillingness to make the present system more workable by the provision of carefully thought out legal sanctions, especially to cope with unofficial industrial action which is causing immense damage to British industry. However, these sections of the report seem to have done little to reconcile two fundamentally different views: on the one hand there are those who considered it inevitable that the Commission would advocate the continuation of voluntarism as the basis of industrial relations, on the other, some believe that the system will continue to be unworkable so long as trade unions remain largely outside the law. In their view the principal task of the Commission was to devise appropriate means of enforcement of collective agreements. It needs to be emphasised that the Commission saw the conflict between the formal and informal systems as the root cause of unofficial industrial action. But while this dualism is not unique to British industrial relations, existing, for example, in many European countries, the problem of unofficial action has assumed much greater proportions in Britain. In view of this, it may well be that the magnitude of unofficial action is not wholly attributable to the conflict between the two systems. In turn this would lead one to question the effectiveness of the Commission's prescription in this respect.

Indeed, in all sections of the Report there is a striking lack of comparison with the experience of other countries. Particularly in considering the implications of legal intervention in industrial relations, and even the use of legislation to control elections at branch level, it might have been expected that the Commission would refer to the Australian experience. By contrast, the more reecnt report of the Royal Commission Inquiry into Labour Disputes in the Province of Ontario contains evidence of an examination of other systems, including the Australian. The only reference to the Australian experience which was noticed appears in an appendix. Amongst those 'who gave oral evidence in private'[69] was the then Secretary of the Department of Labour and National Service, Sir Henry Bland, C.B.E..

In a nutshell, in tackling an almost impossible task, the Commission has highlighted many of Britain's major industrial problems and this

[69] Id. at 335.

must have an impact on public opinion. Its recommendations taken as a whole have been received skeptically. On the other hand, it must be remembered that many compromises within the Commission itself were necessary and the Government could plug obvious weaknesses in legislation to give effect to the report. A Government White Paper, optimistically entitled, 'In Place of Strife: A Policy for Industrial Relations',[70] was published on January 17th 1969 (shades of Henry Bourne Higgin's New Province for Law and Order). A Commission on Industrial Relations is to be established immediately with the general secretary of the Trades Union Congress, Mr. George Woodcock, as full-time Chairman. The C.I.R. is to be established initially as a Royal Commission to enable it to begin work without delay and will be put on a statutory basis later. It is not to have legal sanctions but it will have authority to obtain information. The White Paper says that the Government looks on it to be a disseminator of good practice and a focus for reform by example. In this context, it is perhaps worth recalling some of the comment on publication of the Royal Commission's Report. At that time, for example, the Director of the Engineering Employers' Federation said he doubted whether the proposed Industrial Relations Commission, without powers of compulsion, would be able to deal with the more contentious issues. He also made it clear that his Federation was apprehensive 'about bodies which are set up without teeth and without powers of enforcement . . . it may be just one more organisation set up to oversee our affairs'.[71] One of the other key proposals in the White Paper is that the Secretary of State for Employment and Productivity will have a discretionary power to require a 28 day conciliation pause in unconstitutional strikes and strikes where adequate joint discussions have not taken place. The Secretary will also have a discretionary power, where a major official strike is threatened, to require a union to hold a strike ballot among its members. The unions, of course, are likely to be bitterly opposed to the latter proposal. In the past such proposals have been regarded as divisive of the principle of trade unionism. Nor was it proposed by the Royal Commission, this being an area in which the Commission found little weakness. Britain does not suffer greatly from national official strikes, and if there is a shift in the size of bargaining units, as proposed by the Commission, they are likely to remain few.

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70 H.M.S.O. Cmnd. 3888.

71 The Times, June 14th, 1968, p. 1.

Another foreshadowed development is the establishment of a new Industrial Board which will have power to impose financial penalties for breaches of orders issued by the Secretary of State for Employment and Productivity.

The White Paper implicitly accepts the Royal Commission's analysis of the present ills of the British system of industrial relations. Reform of collective bargaining, comprehensive and effective company or plant agreements and better procedures are all required to bring about a reduction in the level of strikes. In these areas the C.I.R. would play a central role. The White Paper discloses that the Government also expects to effect a reduction in strikes by implementing the Royal Commission's proposals on trade union recognition and negotiating rights, inter-union disputes and unfair dismissals. The Department of Employment and Productivity will be more active. It will no longer await an invitation to conciliate but will take the initiative by offering its help. The Department would also adopt a "trouble shooting" role by the provision of teams which would include union and employer representatives, to carry out prompt informal investigations which might avert a strike or promote a settlement. On the subject of strikes damaging to the national interests, the White Paper accepts the view that the trouble stems not from official strikes but from the precipitate unofficial variety called before adequate discussion or negotiation has taken place. The Royal Commission had not been opposed in principle to the use of legal sanctions to enforce agreed procedures but it was of the view that until new procedures had been tried any attempt to make procedure agreements legally enforceable would fail. This is accepted in the White Paper; the suggestion by a majority of the Commission that would have removed some of the protection enjoyed by unofficial strike leaders being rejected. It would have allowed employers to sue the unofficial leaders because they had induced the other strikers to break their contracts. The Government opposed the suggestion for two reasons: most employers would not be prepared to sue unofficial leaders, thus making the change ineffective, and where an unofficial strike was justified the men would have no defence if the employer did sue. The White Paper proceeds: 'it is because employers do not, in fact, use what legal powers they have against unofficial strikers that some have suggested a very far reaching role for the Government. They would like to see the Government, or an independent agency such as the C.I.R., with statutory powers, taking from the employers the responsibility for negotiating good procedure agreements, by imposing them if necessary

on both sides and then ensuring that they are enforced'.[72] This approach is expressly rejected in spite of the statement that 95 per cent of all strikes in England are unofficial and of these most are also unconstitutional (called before the disputes procedure has been exhausted). Such strikes are responsible for three quarters of lost working time. Most unions, the White Paper states, are not prepared to support strikes which are in breach of procedure. These stoppages usually occur suddenly and without union authority. Nevertheless, the Government is of the view that it would be intolerable to deny workers the right to strike, officially or unofficially, at least where the disputes procedure has been exhausted and they have no other way of remedying a legitimate grievance. 'It is, however, quite a different matter for the community to require that groups of employees shall not take precipitate strike action, which may seriously damage the economy and their fellow employees, before they have used the machinery of discussion to which they themselves have agreed, or which may be made available by the Government'.[73]

Shortly after publication of the White Paper the Government indicated that it intended to put "teeth" into its proposals for dealing with unconstitutional strikes—those who did not observe the 28 day cooling-off period by continuing to work pending negotiations for a settlement would be fined. This precipitated a head-on clash with the Trades Union Congress which in turn was the cause of severe dissension in the Parliamentary Labour Party. The issue was resolved in June 1969 by the government abandoning its proposals, at least for the time being, for dealing with unconstitutional strikes in return for what the Prime Minister described as a solemn and binding undertaking from the T.U.C.. This undertaking says that when an unconstitutional strike is likely to involve large bodies of workers or, if protracted, have serious consequences, the Council will ascertain and assess the effects. Where they consider it unreasonable to order an unconditional return to work, they will give their considered advice with a view to promoting a settlement. Where they find there should be no stoppage of work before procedure is exhausted, they will place an obligation on the organisations concerned to take energetic steps to obtain an immediate resumption of work, including action within their rules if necessary, so that negotiations can proceed. If a union rejects their decision, the General Council will deal with it under their disciplinary procedure, which includes suspension from membership and eventual

72 The Times, January 18th, 1969, p. 3.
73 Ibid.

expulsion. These proposals have been trenchantly criticised by the Conservative Party and the Government has indicated that it still intends to proceed with a comprehensive industrial relations bill. It is too early to predict what final accommodation this conflicting force will produce.

The recommendation by the Commission that inducement of breach of a commercial contract should be protected is accepted in the White Paper. This will free strikers, who have encouraged others not directly connected with a dispute to take sympathetic action, from legal action. However, those contemplating a sympathetic strike could be required to hold a strike ballot or be subject to the 28 day conciliation pause.

The White Paper says there will be legislation to safeguard unionists and non-unionists against unfair dismissal. The legislation is proposed because voluntary procedures are not developing quickly enough in this area and it is hoped the legislation will encourage the development of clear rules on dismissal and the improvement of voluntary procedures. 'The Industrial Relations Bill will make it clear that dismissal is justified only if there is a valid reason for it connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking, establishment or service; and that in the absence of such valid reasons it is unfair'.[74]

The Royal Commission's proposals concerning the registration of unions also found favour. A Registry of Trade Unions and Employers' Associations will be established. Trade unions will be required to register—failure to do so would make them liable to fines—and have rules governing such matters as admission, discipline, elections and disputes between the union and its members. The present legal requirements relating to trade union rules are described as inadequate. The Registrar will have the power to refuse registration to a union or employers' association on the ground that their rules do not adequately cover the subjects specified. Finally, the protection trade unions enjoy against actions in tort would be removed, except in trade disputes, and the law will be amended to achieve a watertight definition of the expression trade dispute.

West Germany's Finance Minister was recently reported as saying, 'if we had such a suicidal trade union system and such bad management as the British, then the German mark would be just as sick as the pound sterling'.[75] The proposals in the White Paper offer perhaps

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[74] Ibid.

[75] Sydney Morning Herald, February 14th, 1969, p. 2.

the last chance to both sides of British industry to reform industrial relations by constructive cooperation with a minimum of interference from the Government. The tone of the White Paper is that the Government should seek to improve the climate for such cooperation. Voluntarism, in large measure is to remain as the key to the system.

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