tion. In some jurisdictions, liability has been restricted by legislation. In England, a degree of immunity from action in tort was provided for as early as 1906. Legislation renders immune any act done in contemplation or furtherance of a trade dispute which would be otherwise actionable on the ground only that it induces another person to break a contract of employment or that it consists in threatening that a contract of employment will be broken. Limits on the damages that can be awarded against a trade union, related to the membership of the union, are also provided for. In Australia, there is no counterpart to the English legislation since the repeal of Queensland legislation 1976. In South Australia, however, legislation has the effect of delaying the institution of tort proceedings until after the dispute has been resolved or until after it has been determined that all means of resolving it by conciliation and arbitration have failed and there is no immediate prospect of resolution.

significance of the two cases. It is clear that the decisions in *Mudginberri* and *Dollar Sweets* are of considerable significance to industrial relations law in Australia. The granting of an injunction, even an interim injunction, under s 45D, or in a common law action, immediately exposes the union, its office-bearers and members to contempt penalties. These include imprisonment, fines, both one-off and accruing, and sequestration of union assets. Further, the union may be liable for considerable damages. More broadly, the decisions may be said to have significantly altered the industrial and political climate. While the number of actions instituted under s 45D or in tort are likely to remain small, the decisions will no doubt act as a powerful deterrent to certain types of industrial action, especially picketing. On the other hand, it remains true that the established processes of conciliation and arbitration remains the cheapest, quickest and most effective way to settle industrial disputes.

dying with dignity

> Any man's death diminishes me, because I am involved in Mankind;
> And therefore never send to know for whom the bell tolls;
> it tolls for thee.
>
> John Donne, Devotions XII c. 1600

parliamentary report. The final report of the Victorian Parliamentary Social Development Committee on 'Dying with Dignity' is expected to be tabled in the Victorian Parliament soon.

In December 1985 the all-party committee of 12 M.P.'s received terms of reference asking:

- Is it desirable or practicable for the government to take legislative or other action establishing a right to die?
- Whether and under what circumstances, if any, should a person have a right to die?
- What is an acceptable definition of 'death'?
- Whether, in certain circumstances, an individual should have the right to direct that he or she be allowed to die, or be assisted in dying?
- Should an individual who is incapable of giving such a direction have a right to die or be assisted in dying?
- Should protection be given to professionals who allow an individual to die or assist an individual in dying and is there a need for guidelines in such procedures?

discussion paper. The Committee initially sought the views of consultants drawn from a variety of backgrounds including theological, philosopical, legal, medical, scientific and administrative. These views were published in March this year in the form of a Discussion Paper entitled 'A Range of Views on Options for Dying with Dignity'. That Discussion Paper stimulated considerable public debate and at public hearings held by the Committee over 1 000 submissions were received from a wide cross-section of the community.

recent cases. Two recent cases make the Committee's forthcoming report extremely timely. The first is the case of John McEwan, a 28 year old champion water skier who, in January 1985, having suffered an accident which made him a quadraplegic, asked repeatedly to be allowed to die – even after the administration of anti-depressant drugs. In April 1986 he was found dead in his home.

The second case involved an interim order by Vincent J in the Victorian Supreme Court on 2 July that the Queen Victoria Hospital in Melbourne take all reasonable steps to preserve the life of a nine day old baby suffering spina bifida. The ruling was made on the application of the infant's maternal grandfather who told the court that the baby had been sedated and denied nourishment for two or three days. Although the baby was taken under the temporary care of the Court, no order was made depriving the mother of custody. It has since been reported that the baby has been released from hospital in the mother's custody.

In granting the interim order, His Honour is reported to have said that the law is that no parent, doctor or court has the power to determine that the life of any child, however disabled, should be deliberately taken away from it.

> The law does not permit decisions to be made concerning the quality of life nor any assessment of the value of any human being. (*The Age*, 3 July 1986).

community debate. This case, which seems to be the first of its kind in Australia, has drawn a variety of responses from the community. Monash University's Centre for Human Bioethics said the 'rigid and inflexible nature of the law' was 'a clear demonstration of the need for change'. (Bioethics News). Justice Michael Kirby, commenting generally on the law in this area, is reported to have said that where human life was at stake, where criminal prosecution of health-care workers might follow, and where great cost to society were issues, it was desirable that the law should be more clear. (*Sydney Morning Herald*, 7 July 1986).

To a large extent debate has focused on the issue of the treatment of severely handicapped newborns. Few doctors, who have expressed their view publicly, deny that life-preserving medical treatment is withheld in extreme cases where the condition cannot effectively be treated and where the treatment would be merely a palliative to relieve distressing systems. The doctors usually distinguish these cases from those where burdensome or costly measures could provide curative treatment – treatment should be continued in those cases.

The main question whether this practice should be legalised or openly legitimated has been clouded at times by what seem to be semantic distinctions. For instance, Mr Nicholas Tonti-Filippini, Director of the St Vincent's Bioethics Centre, is reported to have denied that the practice of withholding life-preserving medical treatment amounted to a deliberate termination of the life of a newborn. (*The Australian*, 3 June 1986). On the other hand, Dr Helga Kuhse, Research Fellow at Monash University's Centre for Human Bioethics, insisted that 'it doesn't make sense to draw a morally relevant distinction between killing and letting die. There is no distinction'. (*National Times*, 14-20 March 1986). Other doctors seem to agree with Dr Kuhse that there is nothing wrong with helping infants to die if the motive is that it is in the infant's best interests.

But it seems that doctors are reluctant to call this 'euthanasia' and this too, seems to have further confused the debate. Mr Peter Bailey, Deputy Chairman of the Human Rights Commission, is reported to have said that hastening an infant's dying in these circumstances is not 'killing in any morally reprehensible sense'. Later he emphatically denied that he supported euthanasia for severely handicapped newborns. (*The Australian*, 3 June 1986).

legal guidelines. There is no doubt that some doctors are concerned about medical technology developing without clear ethical and legal guidelines. Dr Syd Allen, Medical Director of the Queen Victoria Hospital, is reported to have told the Victorian Committee that, though he was confident that the courts would support such a practice in certain circumstances, some form of legislative protection was needed. (*The Age*, 26 June 1986). Resident Medical Officer at the Royal Melbourne Hospital, Dr Paul Komesaroff, is reported to have told the Committee that legislation should preserve the distinction between 'active' and 'passive' euthanasia. The legislation should, he said, require doctors to justify decisions to withhold or withdraw treatment from patients: these decisions should be made openly, honestly and with full responsibility, free from the threat of legal sanctions. (*The Age*, 24 June 1986).

Professor Victor Yu, Director of Neo-natal Intensive Care at Queen Victoria Hospital and Associate Professor of Paediatrics at Monash University, has generally spoken out against any legislation. Because, he says, it is impossible to give an accurate prognosis of a baby's future at birth, treatment should always be implemented so as to favour the infant's survival. If such legislation were the event, however, it should, he says, uphold a primary prejudice in favour of life but the legislation should also concede that in 'exceptional' cases the withdrawal of curative efforts that are no longer effective or lack compensating benefit are medically appropriate.

According to the Committee's Director of Research, Dr Don Stewart, it is not a foregone conclusion that new legislation is the answer. (*The Age*, 28 June 1986). And indeed, media reports of the debate reveal that there is a considerable body of opinion opposed to legislation. That opposition is based on a number of grounds. Dr Neil Muirden representing the Peter McCallum Cancer Institute, is reported to have told the Committee that legal euthanasia presented the basic difficulty that there would be no way of knowing whether a request for euthanasia by a patient was being made under duress. It would also be open to these dangers:

- the possibility of misdiagnosis;
- the possibility of spontaneous recovery;
- patients may be caused added anxiety if they felt a responsibility to ease the financial and/or emotional burden on their relatives – even though privately they wished to die naturally; and
- legislation may have the effect that doctors suggest the easy option of euthenasia rather than the giving of adequate care. (*The Age*, 3 July 1986).

One opponent to legislative intervention suggested that legalised euthanasia would result in a change from 'should the aged have the right to die?' to 'should the aged have a right to live?' (*The Age*, 30 June 1986). Mr Tonti-Filippini has said it will undermine the community's trust in the medical profession. (*The Age*, 28 June 1986).

Several people have expressed the view that legislation could never cover all the circumstances which would arise. Mr Tonti-Filippini, for instance, argues that it is not possible to legislate more specifically for individual cases than the present requirement that a doctor discharge a duty to exercise reasonable care. More specific legislation, he says, would serve only the pecuniary interests of lawyers paid to argue the conflicting intentions of legislatures when unforeseen difficulties arose. (*The Age*, 10 July 1986). Professor Yu also is pessimistic that any legislation could be devised which adequately recognised the complicated medical issues in a particular case. It is not the proper function of the law, he says, to try to make certain that which must remain uncertain. (*The Age*, 8 July 1986).

parental choice. Some, like Dr Kuhse and Peter Singer in their book *Should the Baby Live?* argue that the choice should be primar ily one for the parents in consultation with their doctor. Dr Margaret Somerville argues, however, that it is inadequate legally to leave the decision solely with the parents without defining the limits of their responsibility. Even those who generally oppose the interference of the law in this area agree that it is dangerous to leave the decision entirely with the parents because there can never be any guarantee that their interests don't become confused with the interests of the infant. It has been suggested that an Infant Bioethics Committee be set up to act on an advisory basis.

litigation. At the heart of the opposition to legislative intervention in this area is the fear that legislation will only encourage litigation – as it has in the US. The insurance premiums of American doctors have dramatically increased, as a result of the plethora of negligence suits, with a concomitant increase in doctors' fees as doctors, in an attempt to shield themselves against possible litigation, order every conceivable test and tend to overtreat patients who should more mercifully be left to die. (*The Australian*, 19 June 1986; *The Age* 22 June 1986).

state government action. The issue is progressively receiving attention in Australia. South Australia is the first to introduce legislation with its Natural Death Act, 1983. Apart from the review by the Social Development Committee, the Law Reform Commission of Western Australia has also recently undertaken a reference on the subject of 'Medical Treatment for Dying'. It is expected that a discussion paper will be available in the new year.

baby doe. The American experience may well hold some valuable clues for the future of this debate. In America, the 'baby doe' rules set up by the US Supreme Court lasted just three weeks. That decision was later reversed by the same court which ruled that the Federal government had no business interfering with life and death decisions which were properly the province of parents and doctors. (*The Australian* 19 June 1986).

canadian report. In contrast to the American position, the Canadian Law Reform Commission has just tabled its Report 'Some Aspects of Medical Treatment and Criminal Law' which proposes that some form of regulation of medical treatment within the Criminal Code is essential. The Report aims to coordinate several earlier papers produced by the Commission's 'Protection of Life' Project and recommends that certain types of provisions be included in the drafting of a new criminal code. Of major relevance to the present debate in Australia are the following recommendations:

- The criminal law should not be concerned with slight fault or negligence in the administration of medical or surgical treatment.
- Active euthanasia should neither be legalised nor criminalised. It should continue to be treated as culpable homicide – even if the act of homicide is committed for humanitaran reasons.
- A competent person should have a right to refuse medical treatment or to ask for its suspension or termination and no-one shall be required to provide it against the patient's wishes.
- A physician should not be held criminally liable if he or she decides to suspend or not commence treatment which has no further therapeutic value and is not in the patient's best interests.
- There should be a provision in the Criminal Code stating that the administration of palliative care is not subject to any legal penalty when done for the patient's benefit, even if it has the effect of reducing the patient's life expectancy.

The Commission points out that this 'is simply a matter of recognising a humane and accepted medical practice'. And indeed that would seem to be the general position.

american practice. *Bioethics News* recently reported that the ruling body of American doctors the 'Council on Ethical and Judicial Affairs' has given the go ahead to American doctors to withhold life sustaining treatment from terminally ill and comatose patients, provided they have the agreement of the patient or the patient's surrogate decision-maker.

australian opinion. The Australian Medical Association has adopted a similar view. (Submission to the Law Reform Commission of WA, June 1982). That view also would seem to have popular support. In a Morgan Gallop Poll commissioned by the Voluntary Euthanasia Society of Victoria, 74% of those questioned supported active euthanasia. That figure compares with 77% in 1978 and 47% in 1962. 87% of the respondents supported passive euthanasia. 9% were against and 4% undecided.

ministerial decision-making by judges?

> Till the Devil whispered behind the leaves,
> 'It's pretty but is it Art?'
> Rudyard Kipling, *The Conundrum of the Workshops*

On 14 July 1986 Justice Wilcox in the Federal Court ordered the Federal Minister for Immigration and Ethnic Affairs, Mr Hurford to approve an application which would allow the entry into Australia of a group of American entertainers known as 'The Platters'. The tour promoters had brought an action under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) to review an earlier decision of the Minister refusing entry of the singing group into Australia. The decision of Justice Wilcox was initially hailed as breaking new legal ground on the basis that it involved a mandatory court order against a Federal Minister rather than a direction to him to reconsider. The Minister publicly condemned the decision and immediately appealed to the Full Federal Court on 18 July 1986. The Full Court upheld the appeal and asked the Minister to reconsider his decision. The Minister then reversed his earlier decision and the tour by the Platters belatedly took place.

background. On 29 May 1986 Mr Peter Conyngham applied to the Department of Immigration and Ethnic Affairs for approval of the entry into Australia of a group referred to as 'Buck Ram's Platters'. Enclosed with the application was a tour itinerary from 18 July 1986 to 31 July 1986.

In such cases, a statement of policy and procedures applies which covers temporary entry by entertainers. These procedures involve relevant local unions being notified of each application. They then have ten days to object. If there are objections, the Minister may refer the application to the National Disputes Committee for investigation. This Committee consists of a senior officer of the Department, a nominee of the sponsors and a union nominee. If no agreement is reached by the parties after making representations to the National Disputes Committee, the Committee makes a recommendation to the Minister.

On 2 June 1986 the three relevant unions, Musicians Union, the Australian Theatrical and Amusement Employees Association and Actors Equity, were notified. Only Actors Equity objected but on 18 June 1986 — one day beyond the 10 working days permitted for objection. Actors Equity objected on three grounds:

- The artists would not contribute to the continued cultural enrichment of Australian society as required by Departmental policy.
- There are two groups of performers calling themselves the Platters. The other Platters, 'Paul Robi's Platters', previously have been brought to Australia by the same sponsor seeking to bring the second group of Platters.
- The sponsor is not suitable or of good standing as required by Departmental policy.