> Conciliation and Arbitration Commission, can deal with under the terms of the Constitution. These are *industrial disputes* which are interstate in character.
>
> (*Issues Paper: Committee on the Distribution of Powers*, p18)

The 'New Right' has proposed that the various limitations of the power could be overcome by the use of the external affairs, trade and commerce, corporations or incidental powers of the Constitution. For example, the external affairs powers could be used to allow a government to cite international treaties to enforce private employer-employee contracts.

There is some concern as to the propriety of such a course. One person with serious reservations on this score is the Hon Ian McPhee, MP, a former Federal Minister for Employment and Industrial Relations.

Mr McPhee accepted the invitation of the Distribution of Powers Committee to address it on the matter of industrial relations and constitutional reform. He states that the use of powers other than s51(xxxv) for the purpose of industrial relations would establish a dangerous procedent and would distort the Constitution. He notes a common concern that if other heads of power were used to deregulate the labour market, this could establish a precedent for a Labor government to gain control of prices and wages.

In the article in the *Northern Territory News* (6 November 1986) Bill Goff notes:

> The Constitutional Commission's committee on the distribution of powers addressed the industrial relations issue from a quite different angle.
>
> This committee drew attention to the imbalance in powers between the Commonwealth Conciliation and Arbitration Commission and the various State tribunals, most of which have greater direct influence than the federal body because of its limited constitutional power.
>
> But the Commission's discussion paper seriously questioned the efficiency of having both State and Federal regulatory bodies adjudicating in the same industry.
>
> While not saying so, the Constitutional Commission was acknowledging what the High Court, in several recent decisions, and most participants in labor negotiations also have recognised – Australia has a national economy and institutions which stress State-by-State solutions to economic problems are a drag on economic efficiency.

The Distribution of Powers Committee has noted the difficulties which occur on the factory floor because some employees are covered by federal awards made by the Australian Commission and others by a State award made by the appropriate State tribunal, and others by no award. More importantly the powers Committee mentions that if the Commonwealth vacated the field of industrial relations this would not necessarily result in the cessation of awards covering an industry:

> Automatically with the abolition of the Commonwealth system the State systems would operate and people who had been bound by federal award would then be bound by the appropriate State award. Therefore the abolition of the federal system would not create the free market in labour relations which from time to time is proposed for this country. If one were seeking to achieve this result it would be necessary to abolish all institutions, federal and State, before a market uninfluenced by tribunals could be seen to operate in Australia.
>
> (*Issues Paper: Committee on the Distribution of Powers, p 19)*

However, as Bill Goff notes, a final irony has arisen out of the current debate:

> The 'new Right', by proposing its radical solution of keeping Government and judicial regulation right out of industrial relations, has served to concentrate the minds of those who want to streamline and improve that very Government and judicial regulation.

odds and ends

■ ***social security fraud.*** The 1985-6 Annual Report of the Director of Public Prosecutions (Cth) has expressed concern at the investiga-

tion and prosecution of welfare fraud. The Report suggests that persons obtaining social security payments by fraud are not being pursued in an appropriate manner. The principal problems appear to be that insufficient resources are being devoted to the investigation of fraud and that persons responsible for such investigations lack experience or training.

According to the DPP Report a significant group of fraud cases is receiving no attention at all. The Department of Social Security (DSS) takes responsibility for minor cases and refers all serious cases to the Australian Federal Police (AFP). A large number of serious cases are referred to the AFP but the resources they are able to devote to this kind of investigation means that only the more serious cases are properly investigated. Thus a large group of serious welfare fraud cases are simply not being investigated. An attempt is being made to remove this deficiency and to ensure that serious cases deserving of investigation are referred to the AFP. The DSS and AFP are preparing guidelines for DSS officers involved in this referral work. As well the DPP and the AFP have offered to assist in training DSS field officers in investigative techniques and the preparation of briefs of evidence. However, as the DPP Report notes, none of these measures is likely to have significant impact without an increase in investigative resources.

The likely effect of an increase in resources and the significance of the deterrent value of more prosecutions in this area is impossible to predict. However, clearly, no consistent approach is taken to fraud prosecutions in the various Australian jurisdictions. The DPP Report provides the following statistics on prosecutions under the Social Security Act.

Social Security Act Prosecutions, 1985-6

	Matters dealt with summarily	Matters dealt with on indictment
NSW	900	0
Vic	762	0
Qld	120	3
WA	134	10
SA	264	50
Tas	52	0
ACT	not available	0
NT	17	0

These figures appear to indicate great inconsistency of prosecution policy. In only three jurisdictions during the 1985-6 year were there any social security prosecutions by indictment.

■ ***bankruptcy and social security.*** A recent Working Paper published by the ALRC on its Insolvency Reference considered the relationship between social security payments and bankruptcy. The particular matter dealt with in the paper which covered the general issue of 'Priorities among Creditors', was the right of DSS to recover overpayments from future benefits after a person has been made bankrupt.

The overpayment of benefits to a recipient may occur for a variety of reasons. The simple remedy to this is to deduct the amount of overpayment from future benefits, a power given to the Secretary of the Department by s140(2) of the Social Security Act 1947 (Cth). A potential difficulty arises if the recipient, after receiving the overpayments but before recovery, goes bankrupt. Normally such overpayments would be recoverable in a court as a debt due to the Commonwealth. But after a person has been made bankrupt the Commonwealth, being bound by the Bankruptcy Act 1966 (Cth) (s8), would, it seems, be estopped from instigating such recovery proceedings. The question arises whether the Secretary of the Department is also estopped from exercising his powers under s140(2) to recover the overpayments from future benefits in the situation where the bankrupt person is a welfare recipient.

The Administrative Appeals Tribunal which recently considered the question in *Re Stewart* (1985) 8 ALD515 answered in the negative. It affirmed the right of Secretary to make deductions from future benefits to recover overpayments on the basis that:

- making a deduction from unemployment benefits under s140(2) was not enforcing a remedy within the meaning of s58(3) of the Bankruptcy Act; and
- exercising power under s140(2) was not enforcing a remedy by the Commonwealth as creditor but an administrative adjustment which is appropriate in certain circumstances.

If this is a correct characterisation of the relevant laws it defeats the very purpose of bankruptcy which is to free a person from all past debts. Clearly no recovery would be possible if the bankrupt person was employed and received no social security benefits. But if the person is unemployed and receiving unemployment benefits then a reduction in the proper benefit may be made. The proposal put forward in the Working Paper was that such recovery of overpayments from future benefits in situations of bankruptcy should be prohibited.

■ ***end of the grand jury system.*** In November 1986 a Victorian grand jury was empanelled for the first time in 46 years. After a challenge to the appropriateness of summoning the jury (*McArdle v Cambell* (1986) 2 VJB 180) its 23 members were required to determine whether the accused should stand trial.

In a grand jury hearing the jury sits and deliberates in secret – neither the accused nor the judge is present. The jury must examine the witnesses produced by the prosecution and from their evidence determine whether the accused should stand trial. No evidence is produced for the defence and although the jury can consider only legally admissible evidence, the absence of both the judge and the accused means that there is no possibility of objections to, and rulings upon, the admissibility of evidence. The accused, therefore, may not receive the regular procedural protections that would be guaranteed to her or him in a normal committal hearing.

Grand juries date back to 1166. They were introduced into 3 states, other than Victoria, in the early 19th century. However, each state subsequently abandoned them, apparently because each jury required 23 members and there was a lack of competent jurors in the population of those times. Grand juries were later introduced by legislation in Victoria in 1874. The original provisions were subsequently reproduced in ss351 and 354 of the Crimes Act 1958 (Vic). Until the 1986 case it was thought that the provisions in Victoria were obsolete.

Under s354 of the Victorian Crimes Act the Director of Public Prosecutions or any other person can make an application to the full court for a grand jury to be empanelled. The application must produce an affidavit disclosing an indictable offence and the fact that a justice has refused to commit the alleged offender or that no presentment has been made against him or her. If these, or other specified facts, are established then the full court has no discretion to refuse to order the summoning of the jury.

The use of grand juries has been much criticised and the Crimes (Grand Juries) Bill currently before the Victorian Parliament is designed to abolish the grand jury procedure. In the Bill's second reading speech before the Victorian Council it was argued that grand juries are 'a remnant of another era', 'open to misuse', an 'inappropriate' procedure for many of the complicated cases in which they can be invoked and that the advent of the DPP in Victoria has removed the need for the procedure. If the Bill is passed in the new year the grand jury will be an institution of the past in Australia as well as in Great Britain where it originated.

■ ***planning legal research.*** The Victoria Law Foundation has issued a booklet entitled *Planning Legal Research* which is concerned with designing, planning, managing and executing legal research projects. The booklet recommends the initial preparation of a comprehensive project outline and examines the

following factors which typically form part of a project outline for legal research.

- Goals and objectives of the project should be formulated. The goals are broad aspirations whereas the objectives are specific targets attainable by a particular project. The proposed methodology, resources and outcomes of the project are assessed by reference to its objectives.
- Three phases which usually characterise the methodology of legal research which is concerned with questions of policy are identified. These are:
  - investigation and collection of data (which may comprise both legal and statistical information) together with other information derived from the social sciences;
  - analysis of the data; and
  - formulation of recommendations.
- Projected outcomes should be formulated together with a time frame for achieving them: this assists in monitoring the progress of the project and ultimately evaluating its success.
- The project outline should include a description of the proposed management structure. The booklet devotes a chapter to project management covering such topics as the marshalling of available resources, the monitoring of the progress of the project, the setting up and effective utilisation of management and advisory committees, the importance of determining deadlines and the effective management of the people taking part in the project.
- The resources required to complete the project should be assessed and a budget for the project should be drawn up.

The booklet is a concise distillation of the experience of the Victoria Law Foundation in planning legal research and may prove useful to those who are embarking on a similar enterprise.

■ ***report on loss of consortium.*** The Commission's second report in its Community Law Reform Program for the Australian Capital Territory was tabled in the Parliament by the Attorney-General, the Hon Lionel Bowen, on Thursday 23 October 1986. The Report looks at the common law action for Loss of Consortium and compensation for loss of capacity to do housework. In the Report, the Commission recommends that the common law action for loss of consortium should be abolished. In addition, the Commission recommends that in association with the abolition of the loss of consortium action, legislation should be enacted enabling negligently injured people to claim compensation for the loss of capacity to perform unpaid housework. The Commission in its report said that such a loss was an economic one and should be capable of being a subject of claim in the primary action of the person actually injured.

In the Commission's draft legislation attached to the report which provides for compensation for the loss of capacity to perform unpaid household tasks, the Commission recommends that an assessment of an hourly rate should be based on the gross median weekly earnings. In addition, the Commission recommends that there should be an overriding provision whereby the plaintiff can argue that the fixed rate should not apply in the special circumstances of the case.

■ ***unsworn statements.*** The right of the defendant in criminal proceedings to make an unsworn statement has recently been criticised by the Federal Director of Public Prosecutions. In the Annual Report for the year 1985-86 DPP says:

> retention of the unsworn statement cannot be justified. It is sometimes overlooked that the public has an interest in seeing that the guilty are convicted as well as in ensuring that the innocent go free. If the jury is to properly perform its task, all evidence before it should be in the same form and subject to the same checks and controls. There is no obligation on an accused to give evidence. If he or she chooses to do so, however, it should as

far as possible be given in the same form as other evidence in the proceedings. (p34)

The right to make an unsworn statement has been abolished in Queensland (1975), Western Australia (1976), the Northern Territory (1984) and South Australia (1985. However, an accused may make an unsworn statement in NSW, Victoria, Tasmania and the ACT.

All law reform bodies who have recently reviewed the issue-the NSW Law Reform Commission (1985), the Victorian Law Reform Commission (1985), the Australian Law Reform Commission in its Evidence Report (ALRC 26, 1986), the Victorian Shorter Trials Committee (1985) and the Select Committee of the Legislative Council, South Australia (1981)-have reached the conclusion that retention of the unsworn statement is desirable. This advice was not followed in South Australia.

■ ***trial procedure: NSW reforms.*** The NSW Law Reform Commission has issued a discussion paper (DP 13 1986) in its Criminal Procedure Reference containing proposals for change in relation to pre-trial procedure. The discussion paper makes proposals for reform in relation to the following areas:

- time limits on the prosecution of criminal offences;
- disclosure by the prosecution;
- disclosure by the defence;
- the determination of jurisdiction in cases where an alleged offence is capable of being tried either on indictment or summarily;
- committal proceedings;
- listing for trial;
- pre-trial conferences and hearings;
- the 'no bill' procedure;
- plea bargaining;
- pre-trial publicity in criminal cases; and
- the nature and function of the agency responsible for the prosecution of criminal cases.

■ ***takeover law.*** The judgment of the New South Wales Court of Appeal in *North Sydney Brick and Tile Co Ltd v Darvall* (1986) 4 ACLC 539, has some unexpected consequences for Australian takeover law.

The facts of the case were that Darvall was a shareholder in North Sydney Brick and Tile Co Ltd, holding 16.99% of the company's shares. Darvall together with certain others proposed to acquire all of the company's shares which were not held or had not been acquired by him. For that purpose, he served a Part A statement on the holders of the shares which he proposed to acquire. The purpose of a Part A statement is to give the shareholders information which will be relevant to their decision to sell or not to sell. The company challenged the Part A statement as being defective in not disclosing all necessary material information. It so happened that the Articles of Association of the company contained pre-emption articles giving members of the company the right to purchase shares of the company at a fair value before those shares could be offered to non-members. Darvall successfully argued that such an article relieved him of his obligation under the Takeovers Code (formally known as the Companies (Acquisition of Shares) Code) to serve a Part A statement.

The result in the case arises out of the complexities of the Code. The steps by which the court reached its conclusion are as follows.

- Section 11(1) provides that a person shall not acquire shares in a company if a person will thereby become *entitled* to more than 20% of the voting shares in the company.
- Section 7(3) says that a person is entitled to shares in which that person has a relevant interest.
- Section 9(1)(b) says that a person has a relevant interest if that person has power to dispose of or to exercise control over the disposal of shares.
- Darvall, as a shareholder, could, if the articles were contravened, obtain in-

junctions to enforce observance of the Articles by any member proposing to transfer his shares.

- The Court of Appeal concluded that this was sufficient to give Darvall 'control' over the disposal of shares for the purposes of s9(1)(b).

Some of the consequences of this decision were pointed out by Professor RP Austin of the University of Sydney in a letter to the *Australian Financial Review* (22 October 1986).

- Any existing shareholder of a company with pre-emption articles is exempt from the takeover legislation unless the Commission is able to modify the Code by reference to s58 of the Code. That section permits the Commission to modify the application of the Code to a particular person in a particular case. Professor Austin regards the application of s58 in this context as highly questionable.
- A corollary of the first point is that a person who is not a shareholder may not acquire even a single share without making a takeover bid, since the acquisition of a single share would take that person's relevant interest from zero to 100%. This conclusion was also mentioned by Glass JA in the Court of Appeal judgement.
- If the Commission were prepared to give an exemption from compliance with the Code under s57, such an exemption would enable the buyer to disregard the takeover code in any takeover bid launched after that person lawfully became a shareholder. The Commission should therefore be wary of so doing.
- Section 31A, introduced into the takeovers code by recent amendments, permits a company to adopt a 'shark repellant' article prohibiting registration of transfers pursuant to a partial bid for a company unless the bid has been approved by shareholders of the target. If such an article is adopted, since s31A does not say anything about the effect of such adoption on relevant interests, the article seems likely to authorise an existing shareholder to make a takeover bid without complying with the takeover legislation and would require a non-shareholder acquiring even a single share to make a full takeover bid.

■ ***aboriginal customary law.*** While the ALRC Report: *The Recognition of Aboriginal Customary Laws* may be purchased from Australian Government Bookshops in each capital city, it is not easily obtainable by those persons with the most direct interest in it – traditionally-oriented Aborigines. However the Commission has now organised the preparation of a Kriol/Aboriginal/Simple English cassette tape for distribution among Aboriginal communities. The cassette contains details of the main recommendations contained in the Report in a style that is readily understood by most Aborigines. The tape was prepared by Ms Toni Bauman, a linguist based in Katherine and Mr Eric Roberts, an Aboriginal man from Roper River. Assistance in the production of the tape was provided by the Northern Land Council and the Aboriginal Sacred Sites Protection Authority both based in Darwin. During the course of the Aboriginal Customary Law Reference the Commission prepared tapes both in simple English and in a number of Aboriginal languages (including Pitjantjatjara, Eastern Arrernte, Warlpiri, and Gupapuyngu). These tapes set out the main proposals in the Commission's Discussion Papers and sought views and reactions from Aboriginal communities. This will be the third time the ALRC has distributed pre-recorded audio cassettes to Aborigines in languages other than English.