REINSTATEMENT IN EMPLOYMENT JURISDICTION UNDER THE INDUSTRIAL RELATIONS ACT 1975 (TAS.)

by

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In view of the inability of Australian judges in ordinary courts to order reinstatement of an employee who has been lawfully but harshly and unconscionably dismissed, the availability of this remedy in most state industrial conciliation and arbitration systems is a matter of some importance.

In Tasmania, s. 51 (1) of the *Industrial Relations Act* 1975[1] empowers the president of a compulsory conference to order any action to be taken for the purpose of preventing or settling the industrial dispute in respect of which the conference was convened. 'Industrial dispute' is defined in s. 2 (3) to include, 'the engagement, dismissal or reinstatement of any particular employee or class of employees' and in practice this is the only procedure used for ordering reinstatement in employment. It is generally accepted by those operating the system that an industrial board (equal numbers of employer and employee representatives with an independent chairman fixing wage rates and conditions of employment for an industry) has no jurisdiction on questions of reinstatement. Yet there is no specific exclusion of this topic from the industrial matters that a board may deal with by award. On the contrary, s. 29 (2) in defining industrial matters as including 'the privileges, rights and duties of employers and employees'[2] and 'the relations of employers and employees'[3] would seem to be wide enough to cover reinstatement in employment.[4]

The failure of industrial boards (formerly wages boards) to develop a reinstatement jurisdiction based on s. 29 can be largely explained by the judgment of Burbury C.J., of the Tasmanian Supreme Court, in *Austral Bronze Co. Pty. Ltd.* v. *Non-ferrous (Metal Strip) Wages Board and Another*[5] that a wages board could not order reinstatement because it was a subordinate legislative body with no arbitral or judicial powers.

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1 Replacing the *Wages Boards Act* 1920.

2 S. 29 (2) (d).

3 S. 29 (2) (f).

4 See, for example, Burt J. in *Princess Margaret Hospital for Children* v. *Hospital Salaried Officers Association of W.A.* (1975) 55 W.A.I.G. 543 who thought that the jurisdiction was secured by the words: 'The work privileges, rights and duties of employer and workers in any industry' in *Industrial Arbitration Act* 1912, s. 61. See also *Australian Consolidated Press* v. *F.M.W.U.* (No. 1) 1973 A.R. (N.S.W.) 181, at p. 199 in relation to *Industrial Arbitration Act* 1940 (N.S.W.), s. 5. See generally, A. P. Davidson Reinstatement of Employees by State Industrial Tribunals (1980) *A.L.J.* 706.

5 (1959) Tas. S.R. 118.

It is the purpose of this article to examine his Honour's arguments and to assess their relevance in the light of more recent industrial developments, in particular the *Industrial Relations Act* 1975.

THE AUSTRAL BRONZE CASE

Facts

After lawfully dismissing an employee by the name of Dayton, the Austral Bronze Co. Pty. Ltd. found itself in dispute with Dayton's union and was ordered to re-employ him by a meeting of the Non-ferrous (Metal Strip) Wages Board. The board reached its decision on the casting vote of its chairman under s. 22 (5) of the *Wages Boards Act* 1920 which permitted this procedure where the votes for and against any matter were equal, the decision taking the form of a variation of the relevant wages board determination. The company obtained a rule *nisi* from the Supreme Court calling on the board and the chairman to show cause why the determination should not be wholly quashed for illegality and then moved for the rule to be made absolute.

Judgment

Burbury C.J. held that a wages board, as a subordinate legislative body, had no power to order reinstatement of Dayton since this was an arbitral or judicial power.

Reasoning

Since there was no express reference to reinstatement in s. *23* of the *Wages Board Act* 1920 which listed matters capable of determination by the board, the main argument of the respondents centred on s. 23 (1) (xiv) which stated that every board,

> [m]ay, subject to this Act, determine any other matter whether similar to any of the foregoing matters or not, pertaining to or affecting the relations of employers and employees, or their respective rights, privileges, duties or obligations as such, or which the board thinks necessary or expedient to determine for the purpose of preventing or settling disputes between employers and employees.

In refusing to take the wide view indicated by these general words Burbury C.J. sought implied limitations on a board's powers[6] from the subject matter of the Act, the general nature of a wages board under the Act and the general legal characteristics of a wages board determination.

In the first place, the subject matter of the Act undoubtedly concerned the relations between employers and employees and his Honour was of the opinion that the words at the end of para. xiv: 'or which the board thinks necessary or expedient to determine for the purpose of preventing

6 Ibid at pp. 120-122 citing *The Commonwealth and the Postmaster General* v. *Progress Advertising and Press Agency Co. Pty. Ltd.* (1910) 10 C.L.R. 457, at p. 464; *Cody* v. *J. H. Nelson Pty. Ltd.* (1947) 74 C.L.R. 629, at pp. 646-7; *A.-G.* v. *Prince Ernest Augustus of Hanover* [1957] A.C. 436, at p. 461.

or settling disputes between employers and employees' did not permit a board to determine a matter beyond the field of industrial relations. On the other hand, not every industrial issue could be a matter within the board's jurisdiction.[7] A dispute about the reinstatement of a dismissed employee was not a matter directly within the current relations of employers and employees although it could have an indirect or consequential result on that relationship.[8]

Secondly, an order to reinstate an employee lawfully dismissed involved the exercise of an arbitral power which a board did not possess. The only way a board could function was by a determination made by a majority of its members,[9] a subordinate legislative action. The power of the chairman to 'decide the question' if the votes were equal under s. 22 (5) did not amount to arbitration because he could only do this on a resolution before the meeting to which half the members had agreed. It was not therefore possible for him to determine an issue to which none of the members had agreed, i.e. to arbitrate.[10]

Thirdly, s. 23 (2)[11] limited the scope of a determination to prescribing the general terms and conditions of employment applicable to *all* employers and employees in the relevant trade or section of trade with the result that it was not possible to order reinstatement of a single employee by his employer. Moreover, Burbury C.J. dismissed argument based on the *Acts Interpretation Act* 1931 that words in the plural included words in the singular, by holding that a contrary intention was expressed in the *Wages Boards Act*.[12]

Fourthly, it was argued for the respondents that since s. 23 (1) (xiv) authorised a board to determine any matter which it thinks necessary or expedient to determine for the purpose of preventing or settling disputes between employers and employees, the involvment of Dayton's union gave rise to an industrial dispute which in turn constituted an industrial matter authorised by s. 23 (1). The determination was thus made in

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7 Ibid at p. 122, citing *Baxter* v. *N.S.W. Clickers Association* (1909) 10 C.L.R. 115, at p. 147

8 Ibid at pp. 127-128, citing *Clancy* v. *Butchers Shop Employees Union* (1904) 1 C.L.R. 181, at pp. 190, 201, 207; *Australian Tramway Employees Association* v. *Prahran and Malvern Tramway Trust* (1913) 17 C.L.R. 681, at pp. 693, 694; *R.* v. *Kelly; ex. p. State of Victoria* (1950) 81 C.L.R. 64, at p. 84; *Brownell Ltd.* v. *Ironmongers' Wages Board* (1950) 81 C.L.R. 108, at p. 130; *Reg.* v. *Knight; ex. p. Commonwealth Steamship Owners' Association* [1952] A.L.R. 677, at p. 686; *Sheet Metal Working Industrial Union of Australia* v. *Australian National Airways Pty. Ltd.* (1942) 46 C.A.R. 422; *William Holyman & Sons Pty. Ltd.* v. *Federated Marine Stewards and Pantrymen's Association of Australia* (1953) 75 C.A.R. 191; *Bank of N.S.W.* v. *United Bank Officers' Association* (1921) 21 S.R. (N.S.W.) 593, at pp. 611-613.

9 *Wages Boards Act* 1920, s. 22 (4).

10 *Supra* at pp. 123-124, citing *Hayton* v. *Beers* [1943] V.L.R. 132.

11 S. 23 (2): 'A determination of a board under this section may be made so as to apply to any specified part, branch, or section of the trade in respect of which the board is established, or may provide for the exemption from all or any of the provisions of the determination of any specified classes or groups of workers employed in any such trade, or in any part, branch or section thereof.'

12 *Supra* at p. 124 citing *Tudor* v. *Cheverton* (1933) 28 Tas. L.R. 26; and *Re Union Steamship Co.* (Supreme Court of Tasmania) (Unreported).

settlement of an industrial dispute concerning the group of employees represented in their union and was not concerned merely with the rights and duties between a particular employer and a particular employee. This argument was rejected in no uncertain terms by Burbury C.J. who stated emphatically that a wages board was not empowered to settle or determine an industrial dispute as it was not invested with arbitral powers; it was only a subordinate legislative body with the power to make quasi-legislative decisions on industrial matters irrespective of the existence of an industrial dispute. His Honour therefore interpreted s. 23 (1) (xiv) not as creating an industrial matter where a board acted to settle an industrial dispute but as authorising a board to settle an industrial dispute *provided* the board was in other respects acting within its powers on an industrial matter.[13]

Fifthly, his Honour was prepared to accept that the lawfulness of the dismissal of an employee could be described as an industrial matter but since this question could only be resolved by the exercise of a judicial power and a board was not invested with such powers his Honour was of the opinion that a board was unable to determine the lawfulness or otherwise of dismissal.[14]

Sixthly, even if reinstatement was within the powers of a wages board it should only be used to restrict the managerial right of an employer to dismiss his employee in times of industrial strife.[15]

Finally, if the chairman could otherwise have lawfully exercised an arbitral power he clearly failed to exercise it properly. He did not hear both sides and before a vote was taken he announced his decision to order re-employment.[16]

THE RELEVANCE OF THE *AUSTRAL BRONZE* CASE TO MODERN INDUSTRIAL BOARDS AND COMPULSORY CONFERENCES

The *Wages Boards Act* 1920 has been replaced by the *Industrial Relations Act* 1975 which, despite the change in nomenclature to industrial boards, has retained the basic wages boards structure along with important amendments such as the constitution of an Industrial Appeals Tribunal[17] and provision for industrial agreements.[18] The only express reference to reinstatement is contained in the definition of 'industrial dispute'.[19] As will be seen, the effect of this approach on the jurisdiction of a compulsory conference is reasonably clear. But the power of an

13 Ibid at pp. 125-126, citing *Reg.* v. *Knight; ex. p. Commonwealth Steamship Owners' Association* [1952] A.L.R. 677, at p. 695.
14 Ibid at p. 127, citing *A-G (Australia)* v. *The Queen* [1957] A.C. 288, at pp. 310, 319.
15 Ibid at pp. 131-132 citing *National Labor Relations Board* v. *Fansteel Metallurgical Corp.* (1938) 306 U.S. 240, at pp. 255, 267; and *N.L.R.B.* v. *Jones & Laughlin Steel Corp.* (1936) 301 U.S. 1, at pp. 45, 66.
16 Ibid at p. 131.
17 *Industrial Relations Act* 1975, s. 39.
18 Ibid, s. 32.
19 Ibid, s. 2 (3).

industrial board to order reinstatement will depend on whether it is a meeting convened by the chairman at the Minister's instigation under s. 21 (1), or a meeting convened by the Minister himself under s. 21 (5), as well as on the relevance today of Burbury C.J.'s reasoning in the *Austral Bronze* case.

Board Convened by the Chairman with at least 10 days' Notice

Members of a board convened by the chairman in accordance with s. 21 (1) and (2) must be given at least 10 days' notice of the meeting. Although the board may decide matters on a majority vote with the chairman determining the question in the event of a stalemate, an alternative procedure now exists which was not part of the *Wages Boards Act* at the time of the *Austral Bronze* decision. S. 24 (2) provides that, '[I]f at a meeting of the board a majority of the members present request him so to do, the chairman may decide any question before the meeting of the board, and his decision on that matter has the like effect of a decision of the board'. The importance of this section lies in countering the basic recurring objection of Burbury C.J. that no arbitral powers existed at all. It clearly gives arbitral powers to a chairman in a situation where neither the employers' nor the employees' representatives necessarily agree with his decision. For example, he can make a decision involving a compromise between two opposing viewpoints. His Honour's argument, that the casting vote of the chairman could only be used in relation to a question that has been before the meeting of the board and has received half the votes, is of course still relevant to s. 24 (1) of the *Industrial Relations Act* which is similar to s. 22 (5) of the *Wages Boards Act*, but it is not relevant to s. 24 (2). There is no link between s. 24 (1) and (2). It is likely that in most cases there will be a deadlock between the two sides on a question before the meeting which becomes apparent only after a formal vote is taken, making recourse to s. 24 (2) the obvious step for resolving the impasse. But there is no requirement in s. 24 (2) of a formal vote on the question before the chairman can act, since he may realise from informal discussion or from debate on the motion that it will not be resolved by a majority of members. Moreover, even if the chairman thinks that the question might be determined by a majority of members but prefers a different solution he may act under s. 24 (2) so long as it is at the request of a majority of members.

The only prerequisite appears to be the existence of 'any question' before the board. But does this mean that the subject matter on which the chairman makes his decision is not restricted to the industrial matters mentioned in s. 29 limiting the powers of a board to make awards? Or is the chairman restricted to those questions which could be decided by a majority vote of the board? On the assumption that reinstatement is not an industrial matter it is arguable that the chairman, if requested under s. 24 (2), may order reinstatement because this may be a 'question' before the meeting although not capable of being an industrial matter on which a majority vote could be taken. Since the question does not have

to be voted on before the chairman acts at the members' request, the fact that the question is not an industrial matter does not appear to be relevant. The better view however seems to be that the chairman is limited to the subject matter indicated in s. 29. The word 'question' in s. 35 is used to describe issues which, after a decision by the board or by the chairman, become matters under s. 29. But since it will be shown that reinstatement does constitute an industrial matter this conclusion will not affect the validity of an order for reinstatement made by the chairman under s. 24 (2).

What effect does the existence of the arbitral power in s. 24 (2) have on the argument that an industrial board is a quasi-legislative body unable to deal with industrial disputes? The answer so far as a '10 day' board is concerned is that it still retains its quasi-legislative character, there being nothing in the *Industrial Relations Act* empowering such a board to deal with industrial disputes, where it makes an award by majority decision. What s. 24 (2) does is to grant arbitral powers not to the board but to the chairman, permitting him with the consent of a majority of members to hear the parties in dispute and to order its settlement. Although the subject matter of the chairman's decision is limited by what constitutes an industrial matter under s. 29, in the same way as a '10 day' board, the way in which he reaches that decision, that is, the arbitration of a dispute between parties, is significantly different to the quasi-legislative process adopted by the board. And it is submitted that this difference is acknowledged by the section which states not that his decision is, or is deemed to be, a decision of the board but that his decision 'has a like effect as a decision of the board'. Consequently, provided that reinstatement constitutes an industrial matter it may be ordered under s. 24 (2) by a chairman exercising an arbitral function in settling an industrial dispute. The position of a board convened by the Minister at 48 hours' notice in relation to the prevention and settlement of industrial disputes will be discussed *infra.*

Burbury C.J. also held that the question of reinstatement of a dismissed employee was not a matter within the direct *current* mutual relations of employers and employees, although it could have an indirect effect on those relations. Consequently, that question could not be decided by a wages board. His Honour, in reaching this conclusion, relied heavily on a number of High Court decisions[20] on federal and state

20 Burbury C.J. also stressed the importance of *dicta* by Cullen C.J. in a N.S.W. Supreme Court decision: *Bank of N.S.W.* v. *United Bank Officers Association* (1921) 21 S.R. (N.S.W.) 593, at pp. 611-613, that an order for reinstatement would lead to 'pernicious' results and would be refused as not capable of coming within the definition of 'industrial matters'. This approach was refuted in *Australian Consolidated Press* v. *Federated Miscellaneous Workers Union* 1973 A.R. (N.S.W.) 181, at pp. 194-5 (N.S.W. Industrial Commission in Court Session) but was impliedly accepted by the High Court in *North West County Council* v. *Dunn* (1971) 126 C.L.R. 247. Any doubts have now been resolved by an amendment to the *Industrial Arbitration Act* 1912 (N.S.W.), s. 20A.

arbitration Acts which have been recognised[21] as protecting managerial rights such as the right to hire and fire, the right to determine trading hours of a shop[22] and the right to provide for pensions for retired employees.[23] In all these cases the question at issue was whether these aspects of the employment relationship could be brought within the definition of 'industrial matters' in the relevant federal or state industrial conciliation and arbitration legislation. The High Court held that these were matters only indirectly affecting the relationship and should not be the subject of an industrial award as, in the words of O'Connor J. in *Clancy's* case,

> once we begin to introduce and include in its scope matters indirectly affecting work in the industry, it becomes very difficult to draw any line so as to prevent the power of the Arbitration Court from being extended to the regulation and control of businesses and industries in every part.[24]

Today, although still fundamentally entrenched in state and federal arbitration systems, the right of management to 'run its own business' is not as untrammelled or clear cut as it was twenty years ago.[25] The basic managerial prerogatives remain but the arbitration tribunals are more concerned to investigate circumstances surrounding the exercise of the right to see whether an employee is thereby prejudiced.

However, the High Court's general approach to managerial rights in the context of 'industrial matters' in s. 4 of the *Conciliation and Arbitration Act* 1904 (C'th) does not appear to have changed and has been critised as out of touch with the realities of modern industrial relations.[26] More specifically, on the question of reinstatement, the High Court has held in *R. v. Portus ex. p. The City of Perth*[27] that a claim for reinstatement did not come within the opening words of s. 4: 'matters relating to the relations of employers and employees', because the claim did not pertain to an existing employer-employee relationship, but rather to the relations of a former employer and an ex-employee.

It has been argued[28] that this reasoning is inconsistent with *Australian Iron and Steel Ltd.* v. *Dobb*,[29] a decision of the High Court on the

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21 See E. I. Sykes and H. J. Glasbeek *Labour Law in Australia* (1972), at pp. 430-433.

22 *Clancy* v. *Butchers Shop Employees Union* (1904) 1 C.L.R. 181; *R.* v. *Kelly ex. p. State of Victoria* (1950) 81 C.L.R. 64; *Brownells Ltd.* v. *Ironmongers Wages Board* (1950) 81 C.L.R. 108.

23 *Reg.* v. *Knight, ex. p. Commonwealth Steamship Owners' Association* [1952] A.L.R. 677.

24 *Supra* at p. 207.

25 *Australian Theatrical and Amusement Employees Association* v. *Dendy Theatre* 1974 A.I.L.R. § 172, per Robinson J.

26 L. W. Maher and M. G. Sexton 'The High Court and Industrial Relations' (1972) 46 *A.L.J.* 109. See also E. I. Sykes and H. J. Glasbeek *supra* at pp. 431-433; and J. Button in *Australian Lawyer and Social Change* (1974, ed. A. D. Hambly and J. Goldring) at p. 362.

27 (1973) 129 C.L.R. 312.

28 J. O'Donovan, 'Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission: Jurisdiction and Practice' (1976) 50 *A.L.J.* 636, at p. 637.

29 (1958) 98 C.L.R. 586.

meaning of a similar phrase in the definition of 'industrial matters' in the *Coal Industry Act* 1946-51 (N.S.W.). The argument accepted by Dixon C.J. (McTiernan and Webb JJ. concurring) in this case was that the only relevant question was whether it was obligatory or incumbent *industrially* upon the employer to reinstate a particular person or class of persons in employment. The non-existence of a contract of employment (because it had been terminated) was not therefore a bar to the exercise of the Commission's jurisdiction in ordering reinstatement of a former employee by his former employer.[30]

Although *Dobb's* case was decided in 1958 it was not mentioned by Burbury C.J. in the *Austral Bronze* case, and was also overlooked by the High Court in *R.* v. *Portus ex. p. The City of Perth.* It would therefore appear that the requirement that a current employment relationship must exist is very doubtful if one is relying on High Court decisions alone.

On the other hand, in all other states except Victoria,[31] an employee who is harshly and unconscionably dismissed may be reinstated by an industrial tribunal.[32] The willingness of the state tribunals to uphold this jurisdiction may be starkly contrasted with the approach of the High Court for these courts have generally accepted that an order for reinstatement is, or may extend to, an order for re-employment after the termination of the contract of employment.[33] In *Orange City Bowling Club Ltd.* v. *Federated Liquor and Allied Industries Employees Union of Australia (N.S.W. Branch),*[34] a fairly recent decision of the N.S.W. Commission in Court Session, it was even held that there is no need for a prior contract of employment to have existed before an employer can be ordered to employ, an incursion into managerial rights which the present High Court would probably find unwarranted. Of course, it must not be forgotten that the states do not suffer from the constitutional

30 See also *R.* v. *Gough, ex. p. Cairns Meat Export Co. Pty. Ltd.* (1962) 108 C.L.R. 345 where Dixon J. (McTiernan and Taylor JJ. concurring) accepted that reinstatement was an industrial matter but struck down the claim on the ground that it lacked the element of interstateness required by s. 51 (xxxv) of the Constitution.

31 The *Industrial Relations Bill* 1979 (Vic.) would seem to permit a Conciliation and Arbitration Board to award reinstatement provided there is an industrial dispute.

32 In South Australia this jurisdiction is vested in the Industrial Court not in the Industrial Commission: *Bridgeway Hotel* v. *F.L.A.I.E.U. (S.A. Branch)* 1980 A.I.L.R. § 231.

33 N.S.W.: *Public Medical Officers' Association* v. *Prince Henry Hospital* 1978 A.I.L.R. § 349.
S.A.: *Australian Broadcasting Commission* v. *Industrial Court of S.A.*
W.A.: *Cliffs Western Mining Co. Pty. Ltd.* v. *Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* 1978 A.I.L.R. § 337.

34 1979 A.I.L.R. § 97. The result of the decision was to force an employer of casual employees to employ them in circumstances where his refusal to employ was harsh and unconscionable. The South Australian Industrial Court has refused to extend its reinstatement powers in this way: *Leg Trap Hotel* v. *Jose* 1979 A.I.L.R. § 416, although the indications from the more recent decision in *Bridgeway Hotel* v. *F.L.A.I.E.U. (S.A. Branch)* are that casual employees may sometimes be reinstated. Reinstatement orders in N.S.W. are now governed by s. 20A of the *Industrial Arbitration Act* 1940, inserted by the *Industrial Arbitration (Reinstatement Awards) Amendment Act (No. 2)* 1978.

problems that beset the reinstatement jurisdiction of the Australian conciliation and Arbitration Commission and are free to develop the jurisdiction to the full extent that a liberal and enlightened statutory interpretation will allow. But the point remains that in the states at least the fact that a contract of employment has been terminated does not prevent an order for reinstatement from being made.

The next of Burbury C.J.'s arguments that calls for comment is the assertion that a wages board determination could only prescribe general terms and conditions of employment applicable to *all* employers and employees in a trade or section of a trade and could not deal with single employer-employee aspects. According to his Honour, the Tasmanian Supreme Court cases of *Tudor* v. *Cheverton*[35] and *Re Union Steam Ship Co.*[36] had established that a determination must provide for all employees in the trade in which the board was established. And this position had been modified in 1946 by s. 23 (2) of the *Wages Boards Act* to apply to all employees in a section or part of the trade. Consequently, although s. 23 (1) (xiv) granted jurisdiction to deal with all matters affecting the relations of employers and employees, his Honour thought that s. 23 (2) revealed a contrary intention in the *Wages Boards Act* which ousted the rule of statutory construction in the *Acts Interpretation Act* 1931 that words in the plural include words in the singular.

But it is submitted that Burbury C.J.'s interpretation of s. 23 (2) does not withstand closer scrutiny. The section stated that,

> [a] determination of a board under this section may be made so as to apply only to any specified part, branch, or section of the trade in respect of which the board is established, or may provide for the exemption from all or any of the provisions of the determination of any specified classes or groups of worker employed in any such trade, or in any part, branch, or section thereof.

The intention of the legislature was clearly to rebut the decisions in *Tudor* v. *Cheverton* and *Re Union Steam Ship Co.* so that not all employees in the trade had to be covered by a determination and this is as far as the section went. There is no valid reason for interpreting s. 23 (2) as laying down that all employers and employees in the part or branch of the trade must be affected. The 'specified part' of the trade could be a specified single employer (such as the Austral Bronze Co. Pty. Ltd.), and all other employees except Dayton could have been exempted from the reinstatement provision of the determination as a 'group of workers' employed in a part of the trade.

His Honour's contention was not a novel one. It was argued, for example, in *Bank of New South Wales* v. *United Bank Officers Association and the Court of Industrial Arbitration.*[37] In rejecting the argument, the Supreme Court of New South Wales held that there could be no requirement of a 'general order' covering all employers and employees

35 *Supra*, n. 12.
36 Ibid.
37 (1921) 21 S.R. (N.S.W.) 593.

in the face of the precise wording of s. 5 of the *Industrial Arbitration Act* 1940 (N.S.W.) granting power to the N.S.W. Industrial Court to order the reinstatement of a single individual as an industrial matter. But in *Dobb's* case[38] the High Court went further in holding that the wide introductory words: 'matters relating to the relations of employers and employees' in the definition of industrial matters in the *Coal Industry Act* 1946 (N.S.W.) were sufficient to found a reinstatement jurisdiction, that is, included, 'a matter relating to a single employee where an organisation of employees is disputing about it'.[39] This approach has more recently been confirmed in relation to the N.S.W. *Industrial Arbitration Act* by the Industrial Commission in Court Session.[40]

However, it would seem that in N.S.W. what is important is not so much the involvement of an organisation as the fact of the existence of an industrial dispute.[41] If an individual is supported by a group of fellow employees but not by any union there might well be an industrial dispute capable of triggering reinstatement powers in the Commission. On the other hand, the Commission decided in *Australian Workers Union* v. *Sykes Indoor Plant Services Pty. Ltd.*[42] that a union could not secure a reinstatement order for a dismissed employee not entitled to be a member of the union, since it is limited to 'representing' its members. The conclusion to be drawn from this case however is not that an application for reinstatement can only be made by a union with standing before the Commission, but that no industrial dispute as to reinstatement could be created by a union regarding non-members.

It has also been accepted[43] in Western Australia that reinstatement of a dismissed worker is within the general words of the definition of 'industrial matters' as being a matter 'affecting or relating to the work, privileges, rights and duties of employers or workers'.[44] Moreover, the Industrial Commission may now hear a claim by an employee that he has been unfairly dismissed without the need for that claim to be backed by his union.[45]

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38 *Supra*, n. 29.

39 *Per* Dixon C.J. (McTiernan, Webb and Faullager JJ. concurring) at p. 598.

40 *Australian Consolidated Press Ltd.* v. *F.M.W.U.* 1973 A.R. (N.S.W.) 181 at p 199.

41 *Roberts* v. *Mona Vale District Hospital* [1975] 2 N.S.W.L.R. 132. See also J. W. Shaw 'Reinstatement in Employment: A Note on Developments in the Law' (1977) 19 *Jo. of Ind. Rel.* 187, at p. 191.

42 1978 A.I.L.R. § 218.

43 *Princess Margaret Hospital Board* v. *Hospital Salaried Officers Association* (1975) 55 W.A.I.G. 543, at p. 545, per Burt J.

44 *Industrial Arbitration Act* 1912 s. 6. Now *Industrial Arbitration Act* 1979, s. 7.

45 *Industrial Arbitration Act* 1979, s. 29 (2). However, in South Australia where the Industrial Court exercises reinstatement jurisdiction under s. 15 (1) (e) of the *Industrial Conciliation and Arbitration Act* 1972 an individual employee may also seek his own reinstatement. The power of the court is not limited by the definition of industrial matters or by the requirement of an industrial dispute. But the Industrial Court has indicated that were it not for s. 15 (1) (e) the Industrial Commission would have jurisdiction based on the words, 'the privileges, rights or duties of employers or employees' in the definition of industrial matters: *Bridgeway Hotel* v. *F.L.A.I.E.U. (S.A. Branch)* 1980 A.I.L.R. § 231.

These developments in other states demonstrate that it is possible to base a single reinstatement jurisdiction on very general words in a definition of 'industrial matters'. Even if Burbury C.J. was correct in finding that s. 23 (2) of the *Wages Boards Act* prevented a determination from covering an individual employee, there is no equivalent of that section in the *Industrial Relations Act* 1975 so that his Honour's objection is no longer significant. A reinstatement jurisdiction could therefore now be founded on paras. (d) 'the privileges rights and duties of employers and employees', or (f) 'the relations of employers and employees' in s. 29 (2) defining 'industrial matters'. Further, given the lack of any provisions in the *Industrial Relations Act* for the registration of organisations or for the promotion of the collective interests of individual unions,[46] it would not seem to matter that a dismissed employee did not have the support of a union in Tasmania. The non-existence of an industrial dispute would also be irrelevant since a '10 day' board has no power to deal with an industrial dispute. The inclusion of reinstatement provisions in an award would constitute a quasi-legislative act, as already explained.

This brings us to a discussion of the meaning of s. 23 (1) (xiv) of the *Wages Boards Act* as expounded by Burbury C.J. in the *Austral Bronze* case. His Honour thought that because a wages board had no arbitral powers the power to determine any matter, 'which the board thinks necessary for the purpose of preventing or settling disputes between employers and employees' could not go beyond the scope of the industrial matters and therefore could not include disputes about reinstatement. Apart from the non-existence of arbitral powers stemming from Burbury C.J.'s interpretation of other sections in the Act the only reason he gave directly relevant to s. 23 (1) was that, 'before para. xiv was inserted in the Act there was nothing to suggest that a board had anything to do with industrial disputes'.[47] This is, of course, quite true. But, to ignore a clear legislative amendment on the ground that it did not conform with the previous law does not make much sense. Para. xiv was inserted in 1928[48] and had apparently operated for more than 30 years to give a wages board jurisdiction over industrial disputes on the basis that an industrial dispute *was* an industrial matter. This is to be contrasted with a period of only 8 years from 1920-1928 when it could be said that a board could not deal with such disputes. The intention behind the legislative amendment introducing para. xiv, it is submitted, was clearly to alter the previous position.

It may therefore be concluded that, apart from the non-existence of judicial powers, the only possible objection of Burbury C.J. to a wages board dealing with a reinstatement industrial dispute as an industrial matter was the absence of arbitral powers. But, on closer examination, it seems that this argument is circular. If para. xiv granted jurisdiction

46 With one or two exceptions such as ss. 10 and 12 (constitution of a board) and s. 31 (common rule awards).

47 *Supra* at p. 125.

48 *Wages Boards Act* 1928, s. 7.

to deal with an industrial dispute as an industrial matter, then it also would implicitly confer arbitral powers on the board, that is, to arbitrate *inter partes* on the dispute. His Honour's contention that, 'the exercise of its powers does not depend upon the existence of an industrial dispute'[49] was no reason for reading down the effect of the section. There was nothing in para. xiv to suggest that there must be an industrial dispute in every case before a board could exercise its normal functions. All it did was to grant arbitral powers to deal with an industrial dispute as an industrial matter in the event of an industrial dispute arising. To that extent it was true to say that the exercise of a board's powers did not in every case depend upon the existence of an industrial dispute.

The impression left by the *Austral Bronze* case in the mind of the draftsman of the *Industrial Relations Act* 1975 resulted in a refusal to provide a normal '10 day' board with power to determine an industrial dispute as an industrial matter. Such a board is therefore still restricted to quasi-legislative functions.[50] But provision was made for an industrial board to be summoned in an emergency at 48 hours' notice to prevent or settle an industrial dispute[51] and, as will be seen *infra*, this board undoubtedly possesses arbitral powers.[52]

Although a '10 day' board is not capable of handling an industrial dispute it may provide by award for the settlement of future disputes by the chairman or Secretary for Labour, and this is also a power of arbitration, first inserted in the *Wages Boards Act* 1960 as a direct result of the *Austral Bronze* decision. S. 29 (7) of the *Industrial Relations Act* reaffirms that an award may provide for 'the settling of disputes as to questions of fact, but not as to questions of law, arising thereunder or arising in respect of matters to which the award relates, by the Secretary of Labour of the Chairman'. If the award so provides, the Secretary of Labour or the chairman may then, 'in respect of any matter to which the award relates, require anything to be done' to his satisfaction 'or prohibit anything being done' without his consent.

At first glance, it would appear from the words 'in respect of any matter to which the award relates' that the power of the chairman or Secretary of Labour to settle disputes is restricted to 'industrial matters' as defined in s. 29 (2), although this limitation is not important if it is accepted that the definition of industrial matters is wide enough to cover reinstatement.

If the narrower view is taken of the definition of industrial matters, that is, as not including reinstatement, it is still possible that the chairman or the Secretary of Labour may validly make such an order under s. 29 (7). Let us assume that an award contains a provision for the settlement of an industrial dispute on a question of reinstatement by the chairman. This provision is valid because an award may provide for the

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49 *Supra* at p. 126.
50 *Industrial Relations Act* 1975, s. 29.
51 Ibid, s. 21 (5).
52 *R.* v. *West; Ex parte Goliath Portland Cement Co.* (1965) Tas. Unrep. 64/1965, a decision of the Full Court of the Supreme Court.

settling of industrial disputes by the chairman (s. 29 (7)) and 'industrial dispute' as defined in s. 2 (3) includes reinstatement. Once this is accepted it follows that the settling of a dispute as to reinstatement is a 'matter to which the award relates' even though the subject matter of the dispute may not be an industrial matter.

This argument is very similar to the one rejected by Burbury C.J. in relation to s. 23 (1) (xiv) of the former *Wages Boards Act*. However, his Honour's contentions, discussed *supra*, are not relevant for two reasons. In the first place, s. 29 (7) is concerned with the powers of the chairman (or Secretary of Labour) and not with those of an industrial board, and consequently his Honour's views of the subordinate legislative nature of the board system did not apply. Secondly, the section undoubtedly grants full arbitral powers to the chairman to require anything to be done to his satisfaction or to prohibit anything from being done without his consent in settling an industrial dispute. He is not limited to varying an award and is therefore not necessarily limited to the 'industrial matters' on which an award can be made. The only restriction is that the 'matter' must be related to an award and, as already indicated, this may include an order for reinstatement even if reinstatement is not an industrial matter.

The fact that arbitral powers do now exist, in the chairman under s. 29 (7) independently of the board and under s. 24 (2) with the board's consent, does not however affect his Honour's argument that the lawfulness or otherwise of the dismissal of an employee cannot be adjudicated upon by a wages board, 'because that would be to arrogate judicial power to itself'.

There is much to be said for the contention that in ordering reinstatement an industrial tribunal ascertains existing contract rights (a judicial function) even though it alters those rights for the future (an arbitral function). Where the contract of employment has not been terminated, for example if the employee refuses to accept a wrongful dismissal, the industrial tribunal may be said to acknowledge the existing contractual rights in ordering the employee's return to his contract. On the other hand, where the contract is at an end the employer has a common law right to refuse to re-employ and it is this right which is impliedly and expressly ascertained as part of the arbitral procedure leading to the order to re-employ.[53]

Although the distinction between arbitral and judicial powers makes sense when applied to the federal system with its separation of judicial and arbitral powers in the Federal Court and Australian Conciliation and Arbitration Commission respectively, there is little point in the distinction in the context of the Tasmanian board system. The arguments on the Australian Constitution considered in the *Boilermakers'* case[54] which led to separate judicial and arbitral industrial tribunals would not

53 *R.* v. *Gough; Ex parte Meat and Allied Trade Federation* (1969) 44 A.L.J.R. 48.

54 *A.-G. (Australia)* v. *The Queen* [1957] A.C. 288; 95 C.L.R. 529.

appear to be relevant here, despite the assumption of Burbury C.J. to the contrary in the *Austral Bronze* case.[55]

The creation in 1975[56] of the Industrial Appeals Tribunal (I.A.T.) with a judicially qualified President[57] to hear appeals from decisions of a board or the chairman does not affect the above contention because its purpose is not to exercise separate judicial functions. As its name implies the I.A.T. acts only in cases on appeal but the appeal is in fact a re-hearing, and the I.A.T. can only give effect to its decision by revoking, varying or making a new award[58] where the appellant satisfies the I.A.T. that the decision of a board or chairman is manifestly inadequate or excessive or is otherwise indefensible.[59] Like the chairman, board or president of a compulsory conference, the I.A.T. cannot enforce its decisions. Proceedings for offences under the *Industrial Relations Act*, including failure to comply with the provisions of an award,[60] must be heard and determined by a magistrate.[61]

It would seem therefore that the I.A.T. may only exercise those judicial powers that might be exercised by a board or chairman in making or varying an award. If a board or chairman may order reinstatement by award, the same result may be achieved by the I.A.T., with the exception that under s. 40 (1) an individual employee cannot appeal and must have the support of a union or the Tasmanian Trades and Labour Council.

The only other argument of Burbury C.J. remaining for comment is his Honour's point that if the chairman could theoretically have exercised the arbitral power of reinstatement he failed to use it properly in that he did not in fact hear both sides and announced his decision before a vote was taken by the other members of the board. However, if reinstatement is now accepted as constituting an industrial matter under s. 29 of the *Industrial Relations Act*, the fact that both sides in an industrial dispute have not been heard is not really relevant if a board, acting in a quasi-legislative fashion, stipulates in advance in an award that an employee *must* be reinstated in certain circumstances, for example, as a stop-gap measure until the dispute is heard by the chairman. It is only where arbitral (or judicial) powers are being exercised that it would be necessary for the arbitrator to hear both sides before making a decision.[62]

The failure of the wages board chairman in the *Austral Bronze* case to wait for the tied vote that would have given him jurisdiction under s. 22 (5) of the *Wages Boards Act* was undoubtedly a good reason for deciding that his reinstatement order was invalid. If the exercise of his casting vote was arbitral in nature it was indeed limited by the requirement of

55 *Supra* at pp. 126-127.
56 *Industrial Relations Act* 1975, ss. 38-42.
57 With two industrially qualified lay members, one representing employers and the other employees: s. 39. Decision is by a majority: s. 40.
58 S. 4.
59 *Electrolytic Zinc Industrial Board Appeal*, 5 June 1980, p. 7.
60 S. 48.
61 S. 62.
62 *E.g.* under s. 29 (7), s. 21 (5) or s. 51 (1).

a prior equality of votes by board members. But, as has already been explained, although this limitation is still relevant to s. 24 (1) of the *Industrial Relations Act* it has no application to s. 24 (2) where a chairman acts at the request of a majority of members. Nor would it apply to a dispute concerning reinstatement settled by the chairman (or Secretary for Labour) under s. 29 (7).

Board Convened by the Minister with no more than 48 Hours' Notice

The *Industrial Relations Act* provides by virtue of s. 21 (5) that '[W]here the Minister considers it desirable for the purpose of preventing or settling an industrial dispute he may convene a meeting of a board', with no more than 48 hours' notice.[63] It is clearly the intention of the legislature to enable such a board to deal quickly with industrial disputes. But not all disputes may be disposed of in this way. In s. 29 (7) situations, where an award provides in advance that the chairman or Secretary of Labour shall settle the dispute, there seems little point in the Minister convening the entire board under s. 21 (5). It is therefore only where an award does not contain such a clause that, in the event of an industrial dispute, a meeting of the relevant '48 hour' board may be called.

The provision for a '48 hour' board with the power to prevent or settle an industrial dispute is extremely important when considering its reinstatement jurisdiction. Because the definition of industrial dispute in s. 2 (3) includes, 'the engagement, dismissal, or reinstatement of any particular employee or class of employees' it seems that an industrial board summoned under s. 21 (5) may deal with a dispute raising a reinstatement issue as an exercise of arbitral power.[64] And since the board can only act to prevent or settle a dispute by making or varying an award[65] it follows that the jurisdiction to award reinstatement must exist in a '48 hour' board.

At this point it would be as well to reconsider in the context of a '48 hour' board an argument to the contrary put forward by Burbury C.J. in the *Austral Bronze* case. Section 23 (1) (xiv) of the *Wages Boards Act* empowered a wages board to determine any matter, 'which the board thinks necessary or expedient to determine for the purpose of preventing or settling disputes between employers and employees'. There was also provision in s. 77 (3A) for a board to be convened at no more than 48 hours notice by the Minister for the same purpose. His Honour interpreted both sections as doing no more than declare a legislative intention 'that a board should exercise its powers if it thinks that by such

63 S. 21 (6).

64 But see Crisp J. in *Goliath Portland Cement* case (*supra*) who accepted the *Austral Bronze* case as confirming that a '48 hour' wages board could only conciliate to prevent or settle an industrial dispute under s. 77 (3A) of the *Wages Boards Act*. Although that section is identical to s. 21 (5) of the *Industrial Relations Act* it should be borne in mind that Burbury C.J.'s arguments on the absence of arbitral powers in wages boards are largely unconvincing today.

65 S. 29 (1).

exercise it may prevent or settle an industrial dispute'.[66] In other words, according to Burbury C.J. the purpose which may motivate a wages board could not extend the powers of the board as laid down in the Act. His Honour came to this conclusion without referring to a definition of industrial dispute (for the purposes of s. 77) which covered, 'all matters affecting or relating to the relations of employers and employees in any trade, or their respective rights, privileges, duties or obligations'.[67]

This omission is not, however, of any great importance. It is clear, for reasons which have already been discussed, that Burbury C.J. was not inclined to regard a reinstatement issue as having any connection with the relations of employers and employees, in the absence of a specific reference to reinstatement by the *Wages Boards Act* and would have reached the same decision even if he had considered the definition of industrial dispute in s. 77. But now, with more liberal interpretations in other states of the expression, 'relations of employers and employees' and a definition of 'industrial dispute' in the *Industrial Relations Act* which unquestionably applies to disputes concerning reinstatement, it is difficult to accept his Honour's argument as having any current validity.

Compulsory Conference

As an alternative to convening a '48 hour' board the Minister may summon a compulsory conference for the purpose of preventing or settling an industrial dispute.[68] Although the *Wages Boards Act* contained a similar provision in 1959,[69] the nature of this power was not in issue in the *Austral Bronze* case and was not therefore discussed. However, a thorough analysis of the nature and functions of a compulsory conference summoned by the Minister was undertaken by a Full Court of the Supreme Court of Tasmania in *R.* v. *West; ex parte Goliath Portland Cement Company*[70] where the employer sought to quash or alternatively to prohibit a second compulsory conference from being convened for the settlement of the same industrial dispute on the ground that the principle of estoppel *per rem judicatem* applied to the decision of the first conference. The court was unanimous in holding that the principle did not apply. Burbury C.J. and Crisp J. expressed the view that on the facts there was no judicial or quasi-judicial determination by the president of the compulsory conference of a definitive issue, merely the exercise of an arbitral power. Neasey J., however, was prepared to say that no order made under s. 78 of the *Wages Boards Act* could ever have the qualities of a judicial act so as to create an estoppel *per rem judicatem.*

Section 78 empowered the person presiding at a compulsory conference to order any action for the purpose of preventing or settling an industrial dispute, after considering views expressed at the meeting.

66 *Supra* at p. 125.
67 S. 77 (5).
68 *Industrial Relations Act* 1975, s. 50.
69 *Wages Boards Act* 1920, s. 77.
70 (1965) *Tas. Unrep.* 64/1965.

Failure to comply with the order was made an offence,[71] but no order could be made so as to require any person to contravene a wages board determination or to commit an offence or to protect him from legal proceedings.[72] This section was added in 1960 to provide an effective method of settling industrial disputes in the aftermath of the *Austral Bronze* ruling that a wages board could not concern itself directly in the settlement of such disputes since it possessed neither arbitral nor judicial powers.

The importance of the *Goliath Portland Cement* case is therefore that it established the arbitral character of compulsory conference procedures after 1960. In a comprehensive examination of the history and underlying policy decisions of relevant amendments to the *Wages Boards Act* Crisp J. indicated that at the time the *Austral Bronze* case was decided both the powers of the president of a compulsory conference[73] and the powers of the Minister after convening a '48 hour' board for the prevention or settlement of an industrial dispute[74] were limited to conciliation. In his Honour's words:

> It is quite clear that none of these provisions whether considered separately or in the aggregate could be considered as arbitral in character and this view is I think amply confirmed by the *Austral Bronze Co. Pty. Ltd.* v. *Non-Ferrous (Metal Strip) Wages Board* (1959).

So far as '48 hour' boards were concerned Crisp J.'s *dicta* is of course subject to the same criticisms as the judgment in the *Austral Bronze* case, for his Honour did not advance any new reasons and relied entirely on those proposed by Burbury C.J. In so far as Crisp J.'s statement applied to a compulsory conference he was at fault in relying on the *Austral Bronze* case for confirmation since Burbury C.J. in that case was not concerned with, and did not specifically mention, the nature of the powers of a president of a compulsory conference. However, it is true to say that, in 1959, there *was* only a power to conciliate in the absence of any provision for the president to make an order preventing or settling a dispute. There can be little doubt that if Burbury C.J. had been called upon to examine the nature of compulsory conference procedures in 1959 his Honour would almost certainly have held them to be purely conciliatory by analogy with his view of the limited power of a '48 hour board in preventing or settling an industrial dispute. But it is doubtful whether a '48 hour' board and a compulsory conference could be equated in this way.

The jurisdiction of both '48 hour' boards and compulsory conferences was laid down in s. 77 and was limited by the definition of an 'industrial dispute' in that section expressed in terms of a dispute about industrial matters. Because Burbury C.J. took the view that a board was merely

71 S. 78 (3).
72 S. 78 (2).
73 Ss. 77 and 78.
74 S. 77 (3A) and s. 23.

a quasi-legislative body his Honour denied that a '48 hour' board possessed arbitral powers to settle industrial disputes. But it is difficult to see how this argument could be applied to a compulsory conference summoned specifically to deal with industrial disputes and not concerned with the day to day regulation of wage rates and other conditions of employment for an industry. What prevented the compulsory conference from being regarded as possessing powers of arbitration in 1959 was not the fact of its quasi-legislative character, but the fact that no provision existed at that time for any binding order to be made by the president. This could be contrasted with the position of a '48 hour' board which could (and still does) make an award which was (and still is) binding.

Today, the power of a compulsory conference president to order anything to be done to prevent or settle an industrial dispute, which had been held to be arbitral in the *Goliath Portland Cement* case, remains.[75]

So long as there is no direction positively to do anything which would contravene the statute or the provisions of an existing award[76] it is submitted that those powers extend to directing anything that the president thinks ought to be done for the purpose of settling any dispute, *but only in relation to those matters on which an industrial board would have power to make an award.* This submission stems from an interpretation of 'industrial dispute' in the *Industrial Relations Act* on which the jurisdiction of the president depends. Section 2 (3) states:

> [f]or the purposes of this Act an industrial dispute means a dispute in relation to any matter for which provision has been or could be made in an award under this Act (notwithstanding that there is not presently existing a board by which such an award could be made), and includes a dispute relating to —
> (a) the engagement, dismissal, or reinstatement of any particular employee or class of employees; or
> (b) the entering into, execution, or termination of any contract for services in circumstances that affect, or may affect any employee in, or in relation to, his work,
> and for the purposes of this Act, an industrial dispute shall be deemed to have arisen where there has arisen a situation in which an industrial dispute is threatened or impending or seems probable.

At first glance it would appear that reinstatement (and independent contractor) issues are mentioned separately because they cannot form part of an award made by an industrial board, but if this were so it would be impossible for a '48 hour' board to award reinstatement in settling an industrial dispute under s. 21 (5) despite the express reference to reinstatement in the definition of industrial dispute. An interpretation more in line with the wide award making powers of an industrial board under s. 29 (e.g. any topic concerning, 'the relations of employers and employees'), is to regard the word 'includes' as referring to 'a dispute in relation to any matter for which provision has been or could be made in an award' rather than to the words 'industrial dispute', with the result

75 *Industrial Relations Act* 1975, s. 51 (1).
76 Ibid, s. 51 (2).

that reinstatement and independent contractor clauses are intended by the legislature to form part of the award making powers of an industrial board, provided they affect a contract of employment governed by an industrial board.

On the other hand, it may be wondered, if reinstatement and independent contractor clauses can form part of an award, why it was thought necessary to expressly refer to them in the definition of 'industrial dispute' when a definition of industrial dispute in terms of industrial matters would have sufficed. The answer to this objection it is submitted is that, in view of doubts arising from the *Austral Bronze* decision regarding reinstatement and the longstanding reluctance of the High Court to extend industrial matters in the federal arbitration legislation to embrace independent contractors,[77] it was necessary to state explicitly that a dispute on a matter capable of being the subject of an award included a dispute on reinstatement or concerning independent contractors.

As regards independent contractors, the refusal of the High Court to accept that a dispute about the terms of their contracts could be governed by a federal award was based on the notion that industrial matters in the federal Act were restricted to those arising out of the master-servant relationship. However, it is recognised by some legal commentators[78] that because s. 51 (XXXV) of the Australian Constitution requires only the existence of an 'industrial dispute', there is no constitutional reason for denying jurisdiction to the Australian Conciliation and Arbitration Commission where employees are adversely affected by their work being performed by independent contractors. If the definition of 'industrial matters' were to be amended to include such contracts it would seem that the amendment would be constitutionally valid. Moreover, in 1973-1974, at the time the Tasmanian *Industrial Relations Act* was being drafted, amendments were made to the federal Act to permit a registered organisation to enrol, as members, independent contracts in the relevant industry. The constitutional validity of these provisions[79] was confirmed by Sweeney J. of the Australian Industrial Court in a committee report.[80] But it is still not clear whether a dispute involving such contractors can be an 'industrial matter' when that definition is still restricted to the master-servant relationship. Although the constitutional aspects of the problem are not strictly relevant to the Tasmanian system it is reasonable to assume that

77 *E.g. R.* v. *Commonwealth Industrial Court, ex parte Cocks* (1968) 43 A.L.J.R. 32. But see *R.* v. *Moore; ex. p. F.M.W.U.* 1979 A.I.L.R. § 1 where the High Court held that a dispute about the wages and conditions of employees of independent contractors employed by the employer could be an industrial dispute on the authority of the *Metal Trades* case (1935) 54 C.L.R. 387.

78 J. J. Macken, G. J. McCarry and C. Moloney *The Common Law Contract of Employment* (1978) at p. 188; 'Conciliation and Arbitration — Industrial Matter — use of Independent Contractors' 43 *A.L.J.* 153 (P.H.L.).

79 *Conciliation and Arbitration Act* 1904 (Cth.), s. 132.

80 *Report of the Committee of Inquiry on Co-ordinated Industrial Organisations*, Government Printer of Australia, Canberra (1975) P.P. No. 220, p. 19.

the intention of the Tasmanian legislature was to clarify the situation under the industrial boards system.

On the reinstatement question, it has already been shown that Burbury C.J. in the *Austral Bronze* case was adamant that a wages board did not have the power to determine such an issue. But by 1970 it was clear that the president of a compulsory conference could order reinstatement in the exercise of arbitral powers. In that year s. 77 (5) of the *Wages Boards Act* declared:

> [i]n this section, 'industrial dispute' means a dispute in relation to —
> (a) a matter in respect of which a board is authorised by this Act to make a determination; or
> (b) the engagement, dismissal, or reinstatement of any particular employee or particular class of employees, and includes a threatened, or an impending, or a probable dispute.

The contrast between the wording of the above definition and the one in s. 2 (3) of the *Industrial Relations Act* is obvious. The s. 77 (3) definition clearly distinguished between a reinstatement dispute and a dispute on a matter in respect of which a board was authorised to make a determination. The implication was that a wages board could not determine that an employee be reinstated in employment, and this was confirmed by s. 23 (2) (a) of the 1970 Act which expressly excluded reinstatement matters from the jurisdiction of a wages board. On the other hand, the implication from the s. 2 (3) definition is that reinstatement *is* part of the award-making powers of an industrial board and this is confirmed by the fact that, unlike questions of long service leave, superannuation, bonus payments at the discretion of the employer and the opening and closing hours of an employer's business premises, reinstatement is not excluded from the award-making powers of a board under the *Industrial Relations Act*.[81]

One final point should be mentioned. Crisp J. in the *Goliath Portland Cement* case[82] stated that the powers of the president of a compulsory conference

> extend to directing anything that the President thinks ought to be done for the purpose of settling any dispute in relation to not only the matters on which a Wages Board would have power to make an award, but also matters in relation to which a Wages Board could not so act.

It is important however to place these words in context. In 1960, when the arbitral powers of a president were first introduced, they were expressly directed in scope and purpose to the very matters in respect of which a wages board could have legislated.[83] The powers of the president of a compulsory conference and the chairman of a '48 hour' board were at that time identical in terms of the subject matter of the order or determination respectively. But it was impossible for the chairman of

81 S. 29 (3). See also s. 29 (10) making the provisions of an award subject to any Act dealing with the same matter.
82 *Supra*, n. 52.
83 *Wages Boards Act* 1920, s. 77 (5).

any one board to deal effectively with demarcation disputes cutting across industry or trade groupings, so that, in 1961, demarcation disputes were expressly excluded from the powers of a '48 hour' board chairman and expressly added to the powers of the president. And it was in this context that Crisp J. made his comments in the 1965 *Goliath Portland Cement* case.

In the 1970 Act there was no express reference to demarcation disputes as being within the jurisdiction of the president although these disputes were still within his powers. This was achieved indirectly by defining 'industrial dispute' (the basis of a president's jurisdiction) as including, 'a matter in respect of which a board is authorised by this Act to make a determination'[84] and by inserting, 'the determination or definition of functions of any employee or class of employees' in the list of industrial matters.[85] The effect of the provisions would also have been to give a '48 hour' board jurisdiction to prevent or settle demarcation disputes but it was decided to retain the section inserted in 1961 denying this power to the chairman of a '48 hour' board[86] so that demarcation disputes were the sole province of a compulsory conference. However, because demarcation had become an industrial matter, a '10 day' board could provide for it in its determinations although the board could not concern itself with industrial disputes.

The only relevant amendment made by the *Industrial Relations Act* 1975 was to delete the clause excluding demarcation disputes from consideration by a '48 hour' board. Demarcation disputes may now be handled by both a '48 hour' board and a compulsory conference, and a '10 day' board may determine the functions of any class of employees by award as an industrial matter. Consequently, so far as demarcation issues are concerned, there is now no basis for asserting that the powers of the president of a compulsory conference in dealing with an industrial dispute extend beyond the subject matter of an order or award because industrial dispute is defined as a dispute on an industrial matter and demarcation of functions is expressed to be such a matter. For the same reason, reinstatement and independent contractor issues affecting award employment do not represent an extension of compulsory conference powers in comparison with those of a board. It has previously been shown that such phrases as 'the relations of employers and employees' in s. 29 of the *Industrial Relations Act* are capable of making those issues industrial matters and that the definition of industrial dispute in s. 2 (3) does not infer the opposite.

There are, of course, certain issues which cannot be the subject matter of an award because they are expressly excluded by s. 29 (3), for example, the opening and closing hours of an employer's business premises. Given the way in which an industrial dispute is defined compulsory conferences cannot settle disputes on those issues and there is no

84 Ibid, s. 77 (5).
85 Ibid, s. 23 (1) (i).
86 Ibid, s. 77 (3AB).

discrepancy here between compulsory conference and industrial board jurisdiction.

CONCLUSION

Many of the arguments of Burbury C.J. in the *Austral Bronze* case (1959) to the effect that a board had no jurisdiction to determine reinstatement in employment due to the non-existence of arbitral or judicial powers, lack compelling force when viewed in the context of more recent developments in other states and the Tasmanian *Industrial Relations Act* 1975.

'10 day' Board

The provisions of that statute empower normal '10 day' industrial boards acting through a majority decision to award reinstatement in specific circumstances as a quasi-legislative act regulating the relations between employers and employees in the absence of an industrial dispute.[87] But, because such a '10 day' board has no power to settle an industrial dispute, a dispute about reinstatement must be handled by a '48 hour' board, the chairman, the Secretary for Labour or the president of a compulsory conference.

'48 hour' Board

A '48 hour' board may only exercise its power to settle an industrial dispute by award but it is submitted that in conferring a power to prevent or settle industrial disputes on a '48 hour' board the legislature impliedly granted arbitral powers capable of being exercised by award.[88] An award providing for reinstatement in settlement of an industrial dispute is therefore valid because the definition of industrial dispute in the Act includes a dispute as to reinstatement,[89] and because the general words 'the relations of employers and employees' in the definition of industrial matters[90] is sufficient to support an award of reinstatement.

Chairman or Secretary for Labour

Although a '10 day' board cannot itself prevent or settle an industrial dispute it may provide in an award for one to be settled in the future by the chairman or Secretary for Labour.[91] The provision may be general or may be specifically directed to a reinstatement dispute. The subsequent order of the chairman or Secretary for Labour is an exercise of arbitral powers. A '48 hour' board dealing with a current industrial dispute may also provide by award for future disputes to be prevented or settled in this way. The chairman's powers are also arbitral where

87 *Industrial Relations Act* 1975, s. 29 (1) and (2).
88 Ibid, s. 21 (5).
89 Ibid, s. 2 (3).
90 Ibid, s. 29 (2).
91 Ibid, s. 29 (7).

a majority of members request him to decide any question before the meeting.[92]

Compulsory Conference

The powers of the president of a compulsory conference are undoubtedly arbitral so there is no inherent difficulty in his ordering reinstatement in settlement of an industrial dispute.[93] In addition, the definition of 'industrial dispute' expressly refers to reinstatement. Because the president does not act through the award-making powers in s. 29 it would appear that he is not restricted to the industrial matters mentioned there. But this is not the case. The subject matter of the dispute *is* limited to the industrial matters on which an industrial board can make an award since the definition of 'industrial dispute' is expressed in terms of industrial matters.

92 Ibid, s. 24 (2).
93 Ibid, s. 51 (1).