THE DEMISE OF COMPENSATION AS A REMEDY FOR UNFAIR DISMISSAL IN WESTERN AUSTRALIA: A CASUALTY OF THE ROBE RIVER DISPUTE

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In December 1987 the Western Australian Industrial Appeal Court handed down a decision which was a body blow to the unfair dismissal jurisdiction in the Western Australia Industrial Relations Commission ("the Commission"). It was unanimously decided in *Robe River Iron Associates v Association of Draughting, Supervisory and Technical Employees of Western Australia*[1] ("*Pepler's* case") that the Commission does not have the power to order compensation in lieu of re-employment where a dismissal has been found to be unfair. The decision was made after the Commission had been exercising such a power for nearly ten years, and at a time when the concept of compensation as an alternative remedy to reinstatement for unfair dismissal was gaining currency in other jurisdictions in Australia.

This article reviews the remedies available for dismissal, explores the history of the reinstatement power and the now outlawed practice of awarding compensation in lieu of reinstatement, and discusses courses open to the legislature to give more assistance to the Commission when dealing with unfair dismissals.

Powers in relation to dismissal under the Act

There are four main sources of jurisdiction concerning or related

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1. (1987) 68 WAIG 11.

to dismissal under the Western Australian Industrial Relations Act 1979[2] ("the Act").

The first arises out of the resolution of an industrial dispute between an industrial organisation and an employer, centred around the alleged unfair dismissal of a member of that organisation (*Pepler's* case[3] was in this category.) The matter may be brought to the Commission by way of an application under section 29(a), leading to a conference under section 32, or it may arise out of a compulsory conference summoned under the provisions of section 44.

The second source of dismissal jurisdiction is an application brought before the Commission by an individual employee pursuant to section 29(b)(i). Although access to the Commission is generally limited to industrial organisations, an individual employee may make an application pursuant to section 29(b) where the industrial matter is a claim that the employee has either been:

(i) unfairly dismissed, or
(ii) denied a benefit under a contract of service, other than a benefit under an award or order of the Commission.

This jurisdiction was introduced in 1979 in response to one of the recommendations in the Kelly Report.[4] Applications under section 29(b)(ii) for contractual benefits have been made successfully in cases of wrongful termination of a fixed-term contract, the denied benefit being the expectation of employment for the unexpired term.[5] Unpaid commission and leave entitlements on termination, and pay in lieu of notice, are examples of other claims made under section 29(b)(ii).[6]

2. Formerly the (WA) Industrial Arbitration Act, 1979.
3. Supra n 1.
4. *Report to the Honourable R J O'Connor, Minister for Labour and Industry, with recommendations for an Industrial Relations Act to replace the Industrial Arbitration Act*, August 1978, Department of Industrial Relations, Perth (Perth: WA Government Printer, 1979).
5. *Welsh v Hills* (1982) 62 WAIG 2708, *Waroona Contracting v Usher* (1984) 64 WAIG 1500. The matter is not settled. In *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 787 the President granted a stay pending an appeal to the Full Bench of the Commission of that part of an order by Beech C in *Watts v Perth Finishing College Pty Ltd* (1989) 69 WAIG 709, 712 which related to unpaid salary and holiday entitlements for the balance of a fixed term contract which had been terminated. The President granted the stay on the basis that the effect of *Pepler's* case, raised a serious question of law to be determined upon appeal.
6. S 29(b)(ii) is discussed in M V Brown *Western Australian Industrial Relations Law* (Nedlands: University of Western Australia Press, 1987) Ch 10.

The third source of dismissal jurisdiction is where an offence is committed under Part VIA of the Act. This was inserted in 1982[7] and replaced the former section 100. Among other things, section 96B prevents the victimisation of employees by dismissal for reasons connected with the employee's membership or non-membership of an industrial organisation or entitlement to the benefit of an award. Section 96F creates offences in respect to discriminatory and other action against other persons where the reason is non- membership of an employee organisation. Section 96I provides that where a person has been convicted of an offence under section 96B or 96F, the Industrial Magistrate "before whom the proceedings were brought"[8] must, after imposing such penalty for the offence as the Magistrate considers just, transmit the case to the Commission. If the convicted person is an employer, the Commission may, after giving the employer an opportunity to be heard, order the employer to do one of the following:

(i) reinstate the employee;
(ii) pay the employee such sum of money as the Commission considers adequate as compensation for loss of employment or loss of earnings; or
(iii) both reinstate the employee and pay compensation.

This is the only express power of reinstatement or compensation for dismissal in the Act and is applicable where there have been contraventions of section 96B or 96F only.[9]

The fourth source is in the case of a dismissal which is in breach of an award. Most awards provide for a period of notice before termination of employment and some provide for procedures to be undergone before dismissal. A job protection clause similar to the standard set by the Australian Conciliation and Arbitration Commission ("the Australian Commission") in the *Termination, Change*

7. (WA) Industrial Arbitration Amendment Act (No 2) 1982 s 30.
8. The reference is without meaning because provisions for an Industrial Magistrate to hear complaints regarding offences under the Act were removed by the Acts Amendment and Repeal (Industrial Relations) Act (No 2) 1984 s 50.
9. Complaints are made to a Court of Petty Sessions, but these provisions have been little used and no successful prosecution has resulted from them since s 100 was repealed.

and Redundancy Case[10] was introduced in Western Australia in *Amalgamated Metal Workers' and Shipwrights' Union of Western Australia v Anchorage Butchers Pty Limited & Others*[11] and has been inserted into a few awards. In February 1989 a General Order was inserted into awards covering employees in the public sector under the provisions of section 50.[12]

The Industrial Magistrate hears applications for enforcement of awards under sections 82 and 83 of the Act and has the power to issue a caution or impose a penalty if the failure to comply with the award is proved. Section 82(2) provides that an application for the enforcement of an award, industrial agreement or order (other than certain orders which are immaterial to this discussion) shall not be made otherwise than to an Industrial Magistrate.[13] It follows that the Commission has no jurisdiction where an alleged unfair dismissal is based upon a breach of the termination clauses in an award. If this conclusion is correct, the only remedy under the Act for dismissal in breach of an award is an order for underpayments, since the primary object of section 83 is to caution or punish the employer by imposing a penalty.

Section 83(4) allows the Industrial Magistrate to order the employer to pay the employee any sum of money which was due under the award but was underpaid. If the termination clause requires a certain period of notice or the payment of wages in lieu of notice, a failure to give the prescribed period of notice could be equated to an unpaid amount of money due under the award. However, where the complaint concerns a failure to observe some procedural requirement of the award, the Industrial Magistrate appears to have no power but to impose a penalty. There is certainly no power in section 83 equivalent to the power in section 96I to remit the matter to the Commission for reinstatement of the employee.

10. (1984) 8 IR 34. See also the supplementary decision in the same case: (1984) 9 IR 115.
11. (1986) 66 WAIG 580.
12. (WA) Government Employees Redeployment, Retraining and Redundancy General Order (1989) 69 WAIG 517.
13. See *Cliffs Robe River Iron Associates v Electrical Trades Union (Western Australian Branch)* (1982) 62 WAIG 2696; *Minister for Works and Water Resources v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1983) 63 WAIG 1389.

In spite of the emphatic language of section 82 which makes award enforcement the sole prerogative of the Industrial Magistrate, the Commission may find itself dealing with a termination which is in breach of an award. For instance where a Termination, Change and Redundancy clause expressly provides that a person may not be unfairly dismissed, the question arises whether the Commission has the jurisdiction to hear an allegation that an employee has been unfairly dismissed, quite apart from the question of whether it has the power to reinstate the employee. In *Re Ranger Uranium Mines Pty Ltd; Ex parte the Federated Miscellaneous Workers' Union of Australia*[14] ("the *Ranger Uranium* case") the High Court allowed the then Commonwealth Conciliation and Arbitration Commission ("the Commonwealth Commission") to order reinstatement on the basis of their broad arbitral powers to settle disputes even though it held that the Commonwealth Commission did not have the power to enforce the terms of the award as such. The High Court distinguished the arbitral powers of the Commonwealth Commission exercised in settling industrial disputes and the judicial power of a court exercised in enforcing a contractual term. The first involved creating future rights whilst the second involved enforcing existing rights. In Western Australia there is no strict separation of arbitral and judicial powers similar to that imposed on the Commonwealth Commission by the Constitution. However, where there is an obvious intention to separate enforcement of awards and most other orders of the Commission from the other work of the Commission, as there is in section 82 of the Act, and where specific power to enforce certain other orders of the Commission is given exclusively to the Full Bench of the Commission pursuant to section 84A of the Act, the status of a single Commissioner to reinstate an employee who is covered by such an award provision and who alleges unfair dismissal is debatable. The solution in *Ranger Uranium* case may well be the answer.

14. (1987) 62 ALJR 47; discussed by R C McCallum "The Ranger Uranium Case: Reinstatement, the High Court and the Commission" (1988) 16 ABLR 149; J W Shaw, M J Walton and R B Clelland "New Dimensions in the Law Governing Termination of Employment" (1988) 1 AJLL 195. The recent decision of the High Court in *Re Federated Storemen And Packers Union of Australia, Ex parte Wooldumpers (Victoria) Ltd* (1989) 63 ALJR 286 reinforced this decision.

Another way in which dismissals in breach of awards or orders may come before the Commission is through declarations. The Act gives the Commission jurisdiction to interpret awards pursuant to section 46, and to issue a declaration under section 34 which provides that all decisions of the Commission are to be in the form of an award, order or declaration. In *Robe River Iron Associates v Australian Workers' Union, Western Australian Branch, Industrial Union of Workers*[15] ("*Acosta's* case") the Industrial Appeal Court upheld the right of the Commission to make a declaration other than a declaration under section 46. In *Acosta's* case a declaration was granted that the employer had the right, under the circumstances, to dismiss an employee, notwithstanding an earlier order of the Commission that, following their reinstatement, the employer should continue to employ the relevant employees.

The exclusive jurisdiction of the Industrial Magistrate is also diluted by section 114(2) which provides that where an employee has not been paid in accordance with any award or order of the Commission, that employee may recover as wages the amount to which the employee is entitled in any court of competent jurisdiction. The payment may be recovered as wages due under the contract of employment, which is separate from the statutory right to wages under the award.[16]

The Full Court of the Federal Court in *Gregory v Philip Morris Limited*[17] ("*Gregory's* case") extended the power of the Court under an equivalent section of the (Commonwealth) Conciliation and Arbitration Act 1904[18] to encompass a right of recovery for damages for any injury caused to a person bound by an award as a result of a breach of an award. The reasoning on which this is based is that the terms of an award are incorporated in the contract of employment as implied terms in the contract. A breach of an award is therefore also a breach of the employer's contract with the employee

15. (1987) 67 WAIG 320.
16. *Mallinson v The Scottish Australian Investment Company Limited* (1920) 28 CLR 66; *Amalgamated Collieries of WA Ltd v True* (1938) 59 CLR 417.
17. (1988) 80 ALR 455; discussed by M J Pittard "Developments in the Law of Wrongful Dismissal" (1988) 16 ABLR 394; R Naughton and A Stewart "Breach of Contract Through Unfair Termination: The Law of Wrongful Dismissal" (1988) 1 AJLL 247; see also R C McCallum Case Note (1987) 15 ABLR 368.
18. S 119; now s 178 (Cth) Industrial Relations Act, 1988.

and would lead to a claim in damages. In *Gregory's* case the breach of contract was a dismissal in breach of clause 6(d)(vi) of the Metal Industry Award 1984 which provided that "Termination of employment by an employer shall not be harsh, unjust or unreasonable ..." A penalty of $400 was imposed and damages were assessed at $30,000.

It would be tempting to carry the reasoning in *Gregory's* case a little further and suggest that the Commission could extend its jurisdiction to award compensation for dismissal in breach of an award under the provision of section 29(b)(ii) of the Act which allows an individual employee to claim that an employer has denied an employee a benefit under a contract of service, but the provision expressly exempts benefits which are under awards or orders of the Commission.

The reinstatement power in Western Australia

The existence of the power of the Commission to order reinstatement of an employee was assumed by the Industrial Appeal Court in *Pepler's* case, as was the power to order the payment of compensation for lost wages between the dismissal and re-employment, although Rowland J reminded the parties that the reinstatement power under the Act had not been challenged in the Industrial Appeal Court.[19] Olney J entirely agreed with the view of Rowland J on the broader question of whether the Commission had jurisdiction to make an order in the nature of reinstatement or re-employment under the Act. That question, he said, was not in issue at first instance and was not raised in the grounds of appeal. His Honour thought that the appeal ought to be determined on the basis that it is assumed (without being decided) that in a proper case the Commission has jurisdiction to make such an order.[20] Kennedy J said that the conclusion that the power of reinstatement or re-employment has been continued by the Act, appeared to be "inescapable".[21] These statements are a startling reminder that any general assumption that the reinstatement power is now incontrover-

19. Supra n 1, 21.
20. Ibid, 19.
21. Ibid, 15.

tible is not based upon any indisputable authority which could lead to such a conclusion. Nevertheless, it would be a hard task to shake the assumption in the light of the number of decisions in the Industrial Appeal Court which have relied on it.

The first recorded judicial approval of the use of the remedy of reinstatement to settle a dispute involving a dismissal which was found to be unfair was in *Kwinana Construction Group Pty Ltd v Electrical Trades Union (Western Australian Branch),*[22] ("the *Kwinana* case"). Employees of the Kwinana Construction Group Pty Ltd had refused to work overtime, as requested, on a Saturday and Sunday of a long weekend. On returning to their employment on the Tuesday, each employee was handed a notice advising that he had been dismissed on the grounds of misconduct. This brought the remaining electricians out on strike although they were persuaded to go back the next day. The Conciliation Commissioner, in an attempt to settle the dispute, ordered the company to reinstate the dismissed workers in their previous positions and to pay them their ordinary wages from the Monday of the weekend to the date of the order.[23] The company appealed to the Court of Arbitration, which existed until 1963 under the Western Australian Industrial Arbitration Act 1912 ("the 1912 Act"), on the ground that the Commissioner did not have the jurisdiction to order an employer to employ or reinstate a worker. The Court of Arbitration held that a claim for reinstatement was a matter relating to dismissal and it followed that in determining a dispute the Court had power to make an order for reinstatement and such other incidental matters, including payment of wages from the time of the dismissal, as the Court considered just and equitable. Jackson J said:

> To hold otherwise would be to imply some restriction on the Court's powers of settling and determining a dispute for which there is no warrant in the Act. I do not accede to the submission that because in comparable definitions in the Commonwealth and New South Wales legislation on industrial arbitration reinstatement is expressly mentioned, it is to be implied that no such power exists under the Act.[24]

The power was drawn from the definition of "industrial dispute"

22. (1954) 34 WAIG 51.
23. *Electrical Trades Union (Western Australia Branch), v Kwinana Construction Group Pty Ltd* (1954) 34 WAIG 54.
24. Supra n 22.

in section 6 of the 1912 Act.[25] The definition included "all matters affecting or relating to the work, privileges, rights and duties of employers or workers in any industry". It also included "the dismissal of or refusal to employ any person or class of persons" in any industry.

In 1963 legislative recognition was given to the reinstatement jurisdiction when an amendment to section 61 of the 1912 Act sought to limit its use. Section 61(2) was inserted in that Act to provide as follows:

> (2) The Commission in the exercise of the jurisdiction conferred on it by this Act shall not by any order or award —
> (d) require any employer to employ or to continue to employ or to re-employ a worker unless in the opinion of the Commission —
> (i) the employer is taking part in a lock-out; or
> (ii) the employer has dismissed or failed or refused to employ or to continue to employ or re-employ a worker because the worker is an officer or member of a union or association, or because the worker has claimed any benefit to which he is entitled under any award or industrial agreement.[26]

In 1973 the amendment was repealed, leaving the power to reinstate without legislative restrictions.[27] Any doubt on the matter was dispelled by the Industrial Appeal Court in *The Board of Management, Princess Margaret Hospital for Children v Hospital Salaried Officers Association of Western Australia*[28] ("the *Princess Margaret Hospital* case"). A person who had been appointed as Senior Radiographer had his appointment rescinded by the Board before he had commenced his duties. The Hospital Salaried Officers Association sought reinstatement of the radiographer. The Commission in Court Session made such an order. The Board appealed to the Industrial Appeal Court on the grounds of excess of jurisdiction. Burt J, delivering the Court's unanimous decision, described the history of the reinstatement power in Western Australia and concluded that such a claim was clearly within the definition of "industrial matter" under the Act in force at that time.[29]

On the second ground of appeal, that the order itself was invalid,

25. Now in the definition of "industrial matter" in s 7(1) of the Act.
26. (WA) Industrial Arbitration Amendment Act (No 2) 1963 s 55.
27. (WA) Industrial Arbitration Amendment Act 1973 s 36(b).
28. (1975) 55 WAIG 543.
29. Ibid, 544-545.

Burt J said that the Commission had no jurisdiction to reinstate the contract of employment. The meaning of such an order and its effect on an employee who was not a party to the proceeding was unclear:

> The order should...be an order directed to the employer, in this case to the appellant, requiring it upon the worker presenting himself for work at a particular place and time, to engage and so to employ the worker on the agreed terms and in the agreed vocation.[30]

The power to reinstate as an "industrial matter" was again upheld under the 1912 Act by the Industrial Appeal Court in *Cliffs Western Australian Mining Co Pty Ltd v Association of Architects, Engineers, Surveyors and Draughtsmen of Australia, Western Australia Division*[31] ("the *Cliffs* case") which is discussed below in the context of compensation.

The first time a question of reinstatement was raised under the present Act was in relation to individual claims under section 29(2)(a) (now section 29(b)(i)) in *Metropolitan (Perth) Passenger Transport Trust v Gersdorf*.[32] The appeal arose out of a three-fold question referred to the Full Bench of the Commission under section 27(1)(u) of the Act namely: (i) whether the Commission had jurisdiction under the Act to order the employer to reinstate or re-employ an employee who was employed under a Federal award and who had been dismissed; (ii) whether it had power to make a declaration that the employee had been unfairly dismissed; and (iii) whether it could make an order in the nature of damages in favour of the employee. The Industrial Appeal Court held that the Commission could not do any of these things in the particular circumstances. It was essentially a question based on a conflict between the jurisdiction of the Commonwealth and State Commissions and the decision was made in that context. Brinsden J referred to previous decisions which upheld the right to order re-employment as distinct from reinstatement and to make a supplementary order[33] and said:

> The present Act is silent as to what orders the Commission may make if it finds that an employee had been unfairly dismissed but it seems that it may make an order for an amount to be paid to the employee representing

30. Ibid, 545.
31. (1978) 58 WAIG 486.
32. (1981) 61 WAIG 611.
33. Ibid, 613.

> the wages lost during the period of unemployment less whatever the employee may have earned from employment with another employer during the same period, by reason of the definition of "industrial matter" in the Act. Such an order may be likened to an order in the nature of damages. The Commission may also make a declaration as that is clearly within the power by reason of the provisions of s. 23(1).[34]

In *Miles & Others v Federated Miscellaneous Workers' Union of Australia, Hospital Service and Miscellaneous, WA Branch*[35] the Industrial Appeal Court again assumed the existence of the power of reinstatement and gave guidelines as to how and when it should be used. Brinsden J said:

> The appellant did not argue before any of the Tribunals below this Court nor did it so argue to this Court that there was no power in Commissioner Johnson to enquire into the dispute by reason of it not being an industrial matter within the meaning of that phrase in the Act. Such an argument would not have succeeded in view of the decision of this Court in [the *Princess Margaret Hospital* case]. That decision was made under the 1912 Act but the reasoning still applies to the Act. In any event, the provisions of section 23(a) and (b) of the Act by implication recognise that termination of employment may be an industrial matter provided it does not fall within the exclusions covered by those two subsections. Furthermore, the opening words of "industrial matter" are wide enough to cover termination of a contract of service by an employer though done in accordance with the award as being a matter "relating to the ... rights" of an employer.[36]

Brinsden J did not mention the reinstatement power specifically, but it seems to have been implied by the Court. Kennedy J said:

> ... it has long been acknowledged that the power to order reinstatement is one to be exercised only where the employer's action is harsh or unjust in relation to that employee.[37]

In the first of many appeals to the Industrial Appeal Court during, or stemming from, the Robe River dispute, *Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights' Union of Western Australia and Others*[38] the reinstatement power was not only accepted in so far as final orders were concerned but was also held to exist in respect to interim orders issued by the Commission while matters were still in conference. The employer had appealed against the whole of an interim order issued by the Commission in rela-

34. Ibid, 614.
35. (1985) 65 WAIG 385.
36. Ibid, 386.
37. Ibid, 387.
38. (1986) 66 WAIG 1553; also reported at (1986) 19 IR 91.

tion to a dispute about work practices, following dismissals by the employer. The Commission had included in this order a requirement that the employer should reinstate each dismissed employee who presented himself for work on a specified day and that there should be no break in these employees' employment for the purpose of any rights or entitlements. Brinsden J, with whose reasons Kennedy and Olney JJ concurred, cited the earlier authorities which supported orders for reinstatement made by the Commission and said that provided the Commission is of the opinion that it is right and proper to assist the parties to reach an agreement as provided by section 32(2) of the Act, it may give any direction or make any order or declaration it is otherwise authorised to do under the Act. This included the power to make a re-employment order during conciliation proceedings pending resolution of the dispute.[39]

Brinsden J again referred to the reinstatement power in the appeal to the Industrial Appeal Court in *Acosta's* case, where he said:

> Of course, the issue in this case was not simply whether there should be a reinstatement following an actual dismissal, but had that been the nature of the case I think it open to argument that the only remedy the Full Bench had would be to order reinstatement and not reinstatement plus some other form of punishment. But that is a matter that I would prefer not to express a concluded opinion in the absence of argument.[40]

An argument that an unfair dismissal cannot be an industrial matter because at the time of dismissal the employment relationship has come to an end has had more success in the Australian Commission than in Western Australia. It would appear that it has finally been put to rest by the High Court in *Slonim v Fellows*.[41] Gibbs CJ responded to such an argument in the context of a harsh, unreasonable and unjust dismissal of a teacher in Victoria under the Victorian Industrial Relations Act 1979 ("the Victorian Act") which, like the Western Australian legislation, had at that time no specific provision for reinstatement. He said:

> In my opinion such a dispute (provided it is sufficiently proximate in point of time) arises out of the relationship between employer and employee as such. I do not mean to say that a claim that an employer should employ a particular person, not being a recently dismissed employee, would be an industrial dispute, but that the fact that a dismissal has taken effect does

39. Ibid, 1561.
40. Supra n 15, 322.
41. (1984) 154 CLR 505.

> not necessarily mean that a dispute as to the fairness of the dismissal cannot be an industrial dispute. It is true that the power to order the reinstatement of a dismissed employee can be regarded as an interference with an employer's ordinary rights, but it is apparent that the purpose of the Act is to give the Boards and the Commission established under the Act wide powers to affect the common law rights of employers in cases where an industrial dispute has arisen or an industrial matter exists. I can see no reason in principle why the conception of industrial dispute in its ordinary sense should be so narrow as to exclude a dispute as to the fairness of the dismissal of an employee. The legislature of Victoria is not subject to the constitutional constraints that might lead to a different conclusion in cases arising under Commonwealth legislation, and the Act itself is widely drawn, and contains no indication that a more limited construction was intended... In the present case, the applicant was no longer an employee, since her employment had been terminated. The dispute was, however, between an association of employees and an employer, and for the reasons that I have given I consider that it arose directly out of the relationship which had existed between a member of the association, as employee, and the employer, as employer.[42]

Compensation in lieu of reinstatement

Western Australia appears to have created a precedent in Australia when the Commission in Court Session without express statutory authority under the 1912 Act first awarded compensation in lieu of reinstatement in 1978.[43] The union had sought to have a dismissed member reinstated in his employment. On a preliminary point of jurisdiction, both the Commission at first instance and the Commission in Court Session held that the Commission did have the power to reinstate.[44] An appeal against this ruling went to the Industrial Appeal Court in the *Cliffs* case.[45] A challenge was made on a new line of argument, which if successful would have overturned the decisions in the *Kwinana*[46] and *Princess Margaret Hospital*[47] cases. In dismissing the appeal and upholding the right

42. Ibid, 510-511.
43. *Cliffs Western Australian Mining Co Pty Ltd v Association of Architects, Engineers, Surveyors and Draughtsmen of Australia, Western Australian Division* (1978) 58 WAIG 1067.
44. *Association of Architects, Engineers, Surveyors and Draughtsmen of Australia, Western Australia v Cliffs Western Mining Co Pty Ltd* (1977) 58 WAIG 202; *Cliffs Western Mining Co Pty Ltd v Association of Architects, Engineers, Surveyors and Draughtsmen of Australia, Western Australian Division* (1978) 58 WAIG 307.
45. Supra n 31.
46. Supra n 22.
47. Supra n 28.

of the Commission to order reinstatement in appropriate cases, the matter was returned to the Commission for a continuation of the hearing.[48]

The Commission found for the applicant and made an order for the reinstatement of the employee without loss of rights.[49] The employer then appealed to the Commission in Court Session against the findings of the Commission on the facts.[50] Although the Commission in Court Session found nothing fallacious in the Commission's inferences drawn from the facts, and although the employee thought it would be possible to work for the employer again, the Commission in Court Session was concerned about the effect of the order as the employer considered that mutual trust and confidence no longer existed and could not be reinstated. In expressing the Commission's concern, Collier C (as he then was) said:

> This Commission is charged with the responsibility of acting according to equity, good conscience and the substantial merits of the case when exercising its jurisdiction under the Act. In my view it would be an inequitable decision and one devoid of good conscience if the Commission found that the termination of a worker's service was harsh and unjust yet took no action to reinstate the worker or provide some alternative remedy. Where the employer has been found to have acted harshly or unjustly in a termination he should not be able to maintain his decision simply on the assertion of irretrievable breakdown of relationship unless he is prepared to fairly compensate the worker for the loss of his job. What the compensation should be would depend on the circumstances of the individual case but the nature and salary of the position together with the likelihood of gaining similar employment elsewhere, housing and related matters, disruption to family life are factors which come readily to mind.[51]

The Commission in Court Session ordered the employer to pay the dismissed employee a sum of money instead of ordering reemployment. There was no further appeal against the decision.

The Full Bench of the Commission referred to the approach taken by the Commission in Court Session under the 1912 Act in *O'Dwyer v Karratha Recreation Council (Inc.).*[52] It held that the power to order

48. The Industrial Appeal Court order did not expressly order that the matter be returned to the Commission: supra n 31, 487. That was however the practical effect of the appeal being dismissed.
49. *Association of Architects, Engineers, Surveyors and Draughtsmen of Australia, Western Australian Division v Cliffs Western Australian Mining Co Pty Ltd* (1978) 58 WAIG 747.
50. Supra n 43.
51. Ibid, 1070.
52. (1981) 61 WAIG 850.

payment of compensation in individual applications under the Act was a power incidental to the power to deal with the unfair dismissal of the employee. The applicant's contract was for a fixed term of one year and the Full Bench increased the sum awarded to the applicant from $500 to $5,500, which was equivalent to three months' pay, because the Full Bench considered that the Commission at first instance had not considered all the relevant factors.

Individual claims flourished in the Commission until they occupied a large proportion of the Commission's work. Some applicants sought compensation for unfair dismissal, expressly denying any desire to be re-employed. The Twenty-Fourth Annual Report of the Chief Commissioner of the Western Australian Industrial Relations Commission made special reference to section 29(b). The Chief Commissioner reported on the enormous growth of these claims which had increased in number from 79 applications in 1980/81 to 413 in 1986/87.[53]

It was not until 1986 that qualms about the extent of the Commission's powers to order compensation at large were reflected in Full Bench decisions. In *Max Winkless Pty Ltd v Bell*,[54] a mechanic had been dismissed for disobedience but was found to have been dismissed unfairly. The President in the Full Bench made it clear, for the first time, that where a dismissal is unfair the Commission should look to the primary remedy of reinstatement and the section should not be used principally as a means of recovering a financial reward in preference to re-employment.[55] At the same time the Full Bench expressed its view that it had long been recognised that reinstatement should not be ordered where it is impractical, where management has a genuine distrust and lack of confidence in the employee, or where reinstatement would adversely affect staff morale or general discipline.

Indeed, there was no serious challenge to compensation orders until *Pepler's* case,[56] as the assumption that this was part of the armoury of the Commission for settling claims in appropriate cases had become well grounded by practice. The Robe River dispute

53. (1987) 67 WAIG 2205, 2219-2220.
54. (1986) 66 WAIG 847.
55. Ibid, 848.
56. Supra n 1.

was the turning point. In the course of leaving no stone unturned to challenge the authority of the Commission, Robe River Iron Associates eventually brought the matter to a head.

An indication of the stance that the Industrial Appeal Court might take on this issue was signalled in an earlier case concerning a dismissal arising out of the Robe River dispute: *Association of Draughting, Supervisory and Technical Employees, Western Australian Branch v Robe River Iron Associates*[57] ("the *ADSTE* case"). Here Brinsden J said, obiter, that he knew of no case which supported the proposition that the Commission in an application for reinstatement has power to award compensation in the nature of common law damages.[58] Olney J said specifically that the decision of the Commission in Court Session in *Cliffs (Western Australia) Mining Co Pty Ltd v Association of Architects, Engineers, Surveyors and Draftsmen*[59] should not be regarded as authority for the proposition that an award in the nature of compensation or damages may be made in the absence of an order for re-employment.[59a]

The dicta in the *ADSTE* case was the catalyst for *Pepler's* case, a test case on the question of compensation powers. The case concerned the summary dismissal of an employee for alleged gross misconduct in circulating information from the employer's office to other employees. Even though it found on the facts that the dismissal had been unfair, the Commission was not convinced that reinstatement was the appropriate course to take because it would be difficult to re-establish the trust fundamental to the working relationship. After inviting submissions from counsel, and after deliberation, the Commission ordered the employer to pay the employee compensation of $48,000 and supplementary reasons were published, showing how the amount was assessed.[60]

The employer appealed to the Full Bench of the Commission against the decision on grounds of fact and law, including a ground that the Commission erred in law in ordering the employer to pay

57. (1987) 67 WAIG 740.
58. Ibid, 741.
59. Supra n 43.
59a. Supra n 57, 744.
60. *Association of Draughting Supervisory and Technical Employees of Western Australia v Robe River Iron Associates* (1986) 67 WAIG 648.

compensation when it lacked jurisdiction to do so under the Act. The President, delivering the unanimous decision of the Full Bench,[61] examined the words of the Industrial Appeal Court in the *ADSTE* case. He acknowledged that the decision was binding on the Full Bench and that full weight was to be accorded to the dicta of the Industrial Appeal Court where it was in point. However, he distinguished the *ADSTE* case, which was based on the compensation to be awarded in addition to a re-employment order, whereas in *Pepler's* case the question concerned the jurisdiction to make an order to pay a sum of money instead of a re-employment order.[62] The Full Bench dismissed the appeal, expressing its view that the Commission did have the power to make such orders on the basis of its jurisdiction to deal with dismissals, which had already been established, and the legislative command in section 26(1) to act according to equity, good conscience and the substantial merits of the case in exercising its jurisdiction.[63]

When it came to the final test on a further appeal, the decision of the Industrial Appeal Court in *Pepler's* case should have come as no great surprise to the Commission in the light of the opinions expressed by Brinsden and Olney JJ in the *ADSTE* case.

In *Pepler's* case Kennedy J considered whether it followed that, because the Commission had jurisdiction to order an employer to re-employ a recently dismissed employee, if it declined to exercise that jurisdiction it had the jurisdiction to order that the employer compensate the employee beyond any amount which the employee could reasonably have recovered at common law. Citing the words of Gibbs CJ in *Slonim v Fellows*[64] he drew attention to the fact that in that statement Gibbs CJ did not suggest an alternative remedy of compensation. Kennedy J compared paragraphs (i) and (ii) of section 29(b), saying that compensation greater than that recoverable at common law would not sit happily with paragraph (ii) which is strictly limited to contractual entitlements. He thought that the preferable view was that the jurisdiction under paragraph (i) is

61. *Robe River Iron Associates v Association of Draughting Supervisory and Technical Employees, Western Australian Branch* (1987) 67 WAIG 1104.
62. Ibid, 1109-1110.
63. Ibid, 1110-1111.
64. Supra n 41.

limited to ordering re-employment whilst the remedy under paragraph (ii) is restricted to the employee's contractual rights.[65]

His Honour thought it significant that the respondent did not cite any authority from any other Australian state in which an order for compensation had been made in similar circumstances, although there were numerous instances, he said, where reinstatement had been ordered.[66] He pointed out that the definition of "industrial matter" in the South Australian Industrial Conciliation and Arbitration Act 1972 ("the South Australian Act") is significantly wider than in the Act. Specifically, it includes not only any matter or thing relating to any industrial matter, but also any matter or thing arising from any such matter. He observed that the South Australian Act, where the powers of the Commission were already extremely wide, was amended in 1984 to confer a power to compensate expressly on the Commission in section 31(3)(c), and he thought that if the Western Australian Parliament desired the Commission to have such a power, it should legislate to that effect, as it had done in section 96I of the Act.[67] (An observer might apply this same argument to the reinstatement power).

His Honour said that his conclusion was not one which he had reached without difficulty and it had been reached in appreciation of the apparent width of the jurisdiction conferred on the Commission by section 23(1) of the Act. He continued:

> It should, however, be observed that the jurisdiction is conferred "subject of this Act". Furthermore, to deny the power to order compensation in this case is not to deny the Commission power to deal with the industrial matter. It is simply to deny that its power to do so is unconstrained in any manner. It may deal with a complaint of unfair dismissal in the most appropriate manner, by ordering re-employment in a proper case. If the respondent's argument were correct, it is not difficult to envisage a vast range of powers which would be available to the Commission which it can never have been thought to have been conferred upon it.[68]

Olney J quoted the words of Collier C cited above[69] and, in relation to the purported use of the jurisdiction in section 26(1) of

65. Supra n 1, 16-17.
66. Ibid, 17; *Pepler's* case pre-dated more recent authorities in other Australian states which might have been persuasive. These cases are discussed below.
67. Ibid.
68. Ibid, 18.
69. Above p 42.

the Act, said that nowhere in the Act could there be found any authority for such a proposition. His Honour continued:

> It is trite but perhaps ought to be repeated that the statutory requirements of section 26(1) directing the Commission in the exercise of its jurisdiction under the Act to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms is a direction as to the manner in which it must exercise its jurisdiction. That section does not confer a general jurisdiction to do whatever is thought to be in accordance with equity, good conscience and the substantial merits of a particular case. There must first be a foundation in the Act itself for the exercise of the jurisdiction before section 26 operates.[70]

The irony is that in making its decision not only was the Industrial Appeal Court swimming against the tide of events in some other state jurisdictions, but it was also bringing to an end a long-standing practice in the Commission which may, in itself, have been a persuasive influence in recognising such a power in those other jurisdictions.

After Pepler

The issue is not dead in Western Australia. The Full Bench of the Commission in *Robe River Iron Associates v Amalgamated Metal Workers' and Shipwrights' Union of Western Australia*[71] ("*Kennedy's* case") heard an appeal by the employer against an order of the Commission which had found a dismissal to be unfair and had in the first instance handed down minutes of an order for re-employment and payment of wages for a specified period following the termination. After the parties had spoken to the minutes, the order was varied and consisted of the payment for lost wages for the specified period only. (It seems that the employee had returned to work and subsequently given notice although no mention was made of this in the amended order).[72] The appeal to the Full Bench was on the ground that, on the authority of *Pepler's* case, compensation could be ordered only in conjunction with a re-employment order and that the Commission was without jurisdiction to order payment for lost wages without such an order.

70. Supra n 1, 20.
71. (1988) 68 WAIG 1396.
72. *Amalgamated Metal Workers' and Shipwrights' Union of Western Australia v Robe River Iron Associates* (1987) 67 WAIG 1867. The amended order is at ibid, 1873.

The Full Bench examined the words of the Industrial Appeal Court in *Pepler's* case and concluded that a payment of compensation could be made only in conjunction with a re-employment order, upheld the appeal and varied the Commission's order by requiring the employer to re-employ Mr Kennedy on a date subsequent to his dismissal without loss of entitlements.

The solution is interesting as are the reasons given for ordering re-employment. But particularly noteworthy are the questions raised by the President and Kennedy C in their joint decision as to the meaning of some of the statements in *Pepler's* case.[73] They are clearly not satisfied that they have been given enough guidance in the exact nature of their jurisdiction in dismissals.

Only six months later Nathan J in *Zappulla v Marshall*[74] ("*Zappulla's* case") in the Supreme Court of Victoria had to decide whether the provisions in section 34 of the Victorian Act constituted an exhaustive code or whether they were wide enough to allow an order for payment of compensation to be made instead of a re-employment order. His Honour decided that the Victorian Commission did have such a power. In coming to his decision he referred to the decision of the Industrial Appeal Court in *Pepler's* case but said that in his view it did not accord with the full effect of *Slonim v Fellows*[75] and pre-dated the decision in *Gregory's* case.[76] He quoted Kennedy J's views as to the remedies available under section 29(b)(i) and (ii) of the Act, but mistakenly set out the provisions of section 96I as being those to which Kennedy J referred. Section 96I provisions apply only in the circumstances of a victimisation offence under section 96B or 96F. Since there are in the Act no express provisions for unfair dismissal, it is respectfully suggested that his Honour's conclusion that the *Pepler* decision turns on the express provisions of the Act is misconceived.

In Queensland the reinstatement power comes from the defini-

73. Supra n 71, 1397.
74. (1988) AILR 255. See also *Zappulla v The Royal Children's Hospital* (1988) AILR 349(1) in which Marshall P of the Victorian Industrial Relations Commission awarded the applicant $35,290.81 following this appeal.
75. Supra n 41.
76. Supra n 17.

tion of "industrial matter",[77] as in Western Australia. The Queensland Commission decided that it had the power to award lost wages between the dismissal and reinstatement in *Australian Workers' Union of Employees, Queensland v The Council of the Shire of Paroo*[78] and *Re Application by the Australian Workers' Union of Employees, Queensland.*[79] There was no recognised power to make compensation an alternative remedy to reinstatement until 1988 when the Queensland Commission in *Re Gauld*[80] allowed the employer in the special circumstances of the case to pay the equivalent of one month's salary instead of obeying an order to re-employ the dismissed employee. This course of action was not tested on appeal but the Hanger Report[81] has recommended that the Queensland Commission should have jurisdiction to give the employer a choice between reinstating the employee or paying a sum of money. The recommendation was that the sum of money should be limited to one month's pay for each year's employment but stressed that this was simply a limit and not a suggestion that this amount should be the amount ordered to be paid.

In Western Australia successive governments have demonstrated a reluctance to create rights in an employee's continuity of employment according to modern principles, preferring to leave the Commission to grapple with the boundaries of their jurisdiction. The Commission has to assume power to do what is necessary to settle industrial disputes and the Industrial Appeal Court either sanctions the exercise of that power (as it did in respect of orders for re-employment and payment of lost wages) or, alternatively, indicates that the Commission has exceeded its powers (as it has done in respect to compensation for unfair dismissal). Employers are left in a state of uncertainty, recognising that their common law rights to bring a contract of employment to an end by notice are eroded

77. *The Queen v The Industrial Court and The Honourable Mostyn Hanger President of The Industrial Court and Mount Isa Mines Limited* [1966] Qd R 245. For a detailed account see D R Hall and K F Watson *Industrial Laws of Queensland* Second Ed (Brisbane: Government Printer, 1987) 32-39.
78. (1962) 51 QGIG 222.
79. (1968) 69 QGIG 36.
80. (1988) 128 QGIG 727
81. *Report of the Committee of Inquiry into the Industrial Conciliation and Arbitration Act, 1961-1987 of Queensland* (Brisbane: Government Printer, 1988).

by the Commissions powers, but not having a clear indication of the extent of those powers.

If the Government is committed to giving some measure of job security to employees, never has it been a more appropriate time to make specific legislative provisions to give the Commission the jurisdiction it needs to deal with unfair dismissals. A mere reference to unfair dismissals in a section of the Act which purports to describe the parties who may make an application to the Commission, with the rest left to the Court's interpretation of the words "industrial matter", is barely adequate.

The Industrial Appeal Court has the task of construing the legislation but, as there are few relevant provisions in the Act for unfair dismissal, it is bound by the principle enunciated by the High Court in *North West County Council v Dunn and Others* which is seen through the common law perspective. Hence, there has been established in Western Australia the principle from that decision that it is:

> not...a question as to ...[the parties'] respective legal rights, but a question whether the legal right of the employer has been exercised so harshly or oppressively against the employee as to amount to an abuse of that right.[82]

No consideration has been given to job security. As it is not for the courts to make policy, the responsibility for giving a respective legal right to an employee, if that is what it intends, rests squarely with the legislature.

Whether or not it goes to these lengths, the legislature needs to establish the boundaries of the Commission's powers in the exercise of its discretion where it finds that an employee has been unfairly dismissed. Many options are available as a perusal of the legislation of other states will show.

South Australia, which originally had a power of reinstatement, recognised the need for an alternative remedy to reinstatement and now makes provision for it in its Act. Cawthorne in a review of the legislation in that State[83] referred to comments made by

82. (1971) 126 CLR 247, Walsh J, 263. This approach was taken recently in *Amalgamated Metal Workers' and Shipwrights' Union of Western Australia v Robe River Associates* (1989) 69 WAIG 985, Kennedy J, 987-988.

83. F Cawthorne *The Review of the Industrial Conciliation and Arbitration Act 1972-1981* Discussion paper, Adelaide, 1982, 345. In his detailed examination of the issues (as at 1981) the author discusses the origins of statutory re-employment and the recommendations of the International Labour Organisation, as well as the situation in the UK: ibid, 342-373.

Olssen P in *The Crippled Children's Association of SA Inc v Nash*[84] and by Layton J in *Gregory's Superstores v Papakoustantinou, Zervas and Zervas*[85] which in each case reflected their frustration with the lack of alternative remedies. Of all the legislation in the respective states the provisions in the South Australian Industrial Conciliation and Arbitration Act, 1972 are the most comprehensive. They are as follows:

> 31(1) Where an employer dismisses an employee, the employee may, within 21 days after the dismissal takes effect, apply to the Commission for relief under this section.
>
> (2) An application cannot be made under this section where the dismissal of the employee is subject to appeal under this Act or law.
>
> (3) Where in proceedings under this section the Commission is of the opinion that the dismissal was harsh, unjust or unreasonable, the Commission may —
>
> (a) order that the applicant be re-employed by the employer in the applicant's former conditions of employment;
>
> (b) where it would be impracticable for the employer to re-employ the applicant in accordance with an order under paragraph (a), or such re-employment would not, for some other reason, be an appropriate remedy — order that the applicant be re-employed by the employer in some other position (if such a position is available) on conditions (if any) determined by the Commission;
>
> (c) where, after considering whether to make an order under paragraph (a) or (b), the Commission considers that re-employment by the employer of the applicant in any position would not be an appropriate remedy — order the employer to pay to the applicant an amount of compensation determined by the Commission.
>
> (4) Where the Commission makes an order for re-employment under this section, then, subject to any contrary direction of the Commission —
>
> (a) the employee must be remunerated in respect of the period intervening between the date that the dismissal took effect and the date of re-employment as if the employee's employment in the position from which the employee was dismissed had not been terminated;
>
> (b) the employer is entitled to the repayment of any amount paid to the employee on dismissal on account of any accrued entitlement to recreation leave or long service leave.
>
> (c) for the purpose of determining rights to recreation leave, sick leave and long service leave, the interruption to the employee's continuity of service caused by the dismissal will be disregarded.
>
> (5) Where, in the opinion of the Commission, an application under this section is frivolous or vexatious, the Commission may make an order for

84. SA Print 55/1979, 3.
85. SA Print I51/1981, 20.

costs against the applicant (including any costs incurred by the other party to the application in respect of representation by a legal practitioner or agent.)

(6) Before an application is heard by the Commission under this section, a conference of the parties to the application must be held in accordance with the rules of the Commission for the purpose of exploring the possibility of resolving the matters at issue by conciliation and ensuring that the parties are fully informed of the possible consequences of further proceedings upon the application.

The legislation in Victoria[86] and New South Wales[87] provides for reinstatement of a dismissed employee but does not provide for compensation in lieu of reinstatement. In Queensland and Tasmania there is no express power to reinstate but, as in Western Australia, the power is drawn from the general jurisdiction to settle disputes. Queensland is likely to legislate soon to implement the recommendations in the Hanger Report, which, except for the matter of representation of the parties, are not considered controversial.[88]

Legislative options

Following the decision in *Pepler's* case, the first option is to do nothing and to leave the Commission without power to order compensation and with continuing uncertainty as to the exact nature of its jurisdiction in unfair dismissals. The decision in *Pepler's* case appears to be at odds with the width of powers in state Commissions recognised by the High Court in *Slonim v Fellows*,[89] as well as with the approach in Victoria in *Zappulla's* case[90] and the extended powers to award compensation in another context described in *Gregory's*[91] case. It remains to be seen how this apparent inconsistency will be resolved if nothing further is done.

The second option is to legislate to provide a specific unfair dismissal jurisdiction. This leads to many further options. The provisions may be open and flexible, leaving the Commission with a great amount of discretion or they may be specific and clearly in-

86. (Vic) Industrial Relations Act 1979 s 34.
87. (NSW) Industrial Arbitration Act 1940 s 20A(1).
88. L Bennett and M Quinlan "Report of the Committee of Inquiry into the Industrial Conciliation and Arbitration Act, 1961-1987 of Queensland" 2 AJLL 75, 80, 82.
89. Supra n 41.
90. Supra n 74.
91. Supra n 17.

dicate that all the powers are contained within their parameters. The Victorian Act appeared to be specific, but Nathan J in *Zappulla's* case was prepared to add compensation orders to the express powers because there was no clear indication that they were exclusive.

Another approach would be to rely on present authority for the reinstatement power and include a provision that the Commission may in certain circumstances or, alternatively at the Commission's absolute discretion, make an order for the payment of compensation in lieu of making a reinstatement or re-employment order. In view of the slight doubts raised in *Pepler's* case over the authority for the reinstatement power, a provision such as this would re-assert its existence.

Should provision be made for the Commission to make an order for the payment of compensation under specific circumstances, the circumstances might be the length of the period since termination, or the appointment of another employee to fill the vacancy, or they might relate to the difficulty of re-establishing the employment relationship because of a breakdown of trust or confidence between employer and employee.

The heads of compensation should be considered. There is already an assumption, supported by strong dicta,[92] that an order for lost wages between termination and re-employment is within the powers of the Commission. If the Commission is to be given an alternative remedy to re-employment, how is it to be assessed? Is it to be left to the Commission's discretion or should certain consequences of the termination, such as the likelihood of future employment, be the measure? Should there be a punitive element? Is there room for compensation for hurt feelings or consequential loss from the dismissal, or should these matters be left to the courts?

This brings us to the question of the quantum of compensation. The Commission itself, through the previous Chief Commissioner and individual Commissioners, has expressed its discomfort at having complete discretion to award compensation at large, especially where the Act gives them no guidance in the matter.[93] Bearing in mind that a Magistrate in the Local Court now has a jurisdictional

92. Supra n 1, Olney J, 19-20 for example.
93. Supra n 53, 2219.

limit of $10,000[94] and that a District Court Judge cannot entertain a claim for more than $80,000,[95] except a claim for personal injury, there is logic in putting a limit on a Commissioner's jurisdiction to award compensation. If the legislature sees good reason why a person should obtain a higher remedy in a tribunal, presided over by arbitrators in a hearing which is not bound by rules of procedure and evidence, than could be obtained from a judge in a court of law in the same matter, then a specific power to award such compensation as the Commission considers just should be included. That there could be a good reason is hard to accept. Kennedy J who admitted that he found difficulty in coming to a decision in *Pepler's* case,[96] referred to the anomaly where, as in that case, there was a summary dismissal which was an unlawful dismissal at law as well as being an unfair dismissal in the Commission's opinion.

The quantum of compensation could be limited to a maximum claim or to some measure other than a sum of money. This could be length of service, or pro rata long service leave entitlements. It could be restricted to the normal pay and entitlements which would have been earned or have accrued for a specific period of time following the termination. The Hanger Report suggested that the sum should be limited. The report said:

> We think that an appropriate limit on the jurisdiction of the Commission would be the payment of one month's salary for each year of employment. We do not for a moment suggest that that amount should be the amount ordered to be paid. It is simply the limit of the amount that the Commission may order to be paid. Such a proposal is similar (but less generous) to that found in Clause 26 of the Fourth Schedule of the Local Government Act 1936-1987.[97]

Another matter for consideration in legislative proposals is the time limit for lodging applications for unfair dismissal. In the Commission's Twenty-Fourth Annual Report Chief Commissioner Collier said:

> With respect to claims of unfair dismissal it is significant that only some 42 per cent of applicants filed claims within 28 days of the event. There was an interval of over 4 months between the dismissal and filing of the claim in 12 per cent of the cases. As the remedy for unfair dismissal, ideal-

94. (WA) Local Courts Act 1904 s 30.
95. (WA) District Court of Western Australia Act, s 50(1)(a).
96. Supra n 1, 17-18.
97. Supra n 81, 293.

> ly, is re-employment without loss of rights it is important to both sides that claims be lodged and determined promptly. In those States where the individual may make such a claim there is a time limit on its lodgement. In Victoria, a claim must be lodged within 4 business days after the termination, while 21 days is the prescribed time in South Australia. I consider that the introduction of a time limit would be fair to both employer and employee and it would relieve to some extent the pressure on the Commission.[98]

The Hanger Report was in favour of a time limit and recommended that it should be 21 days after the termination, with the Commission having the power to extend it where special circumstances existed.

These are some of the choices to be made, but there are many other options. The matter is before the Western Australian Tripartite Labour Consultative Council but so far there has been no consensus. Meanwhile the need for legislation is urgent. Without such legislation the Commission will be powerless to act "according to equity, good conscience and the substantial merits of the case"[99] where a dismissal has, in its harshness and unfairness, demonstrably exceeded the employer's prerogative, yet an order for re-employment would be "a recipe for disaster".[100]

98. Supra n 53, 2219. In an endeavour to reduce the problem the Commission amended reg 21(3) of the Industrial Commission Regulations 1985 in 1988 to require an answer within 7 days rather than 21 days where the application was exclusively for reinstatement: WA Government Gazette, 19 August 1988, 2961.
99. S 26(1)(a) of the Act.
100. *Chappell v Times Newspaper Ltd* [1975] 1 WLR 482, Geoffrey Lane LJ, 506.