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EMPLOYMENT

The Honourable Mr. Justice M.D. Kirby

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INTRODUCTION

I propose to deal with the law of employment in New South Wales. I am afraid it will appear a somewhat technical and legalistic subject. In New South Wales, indeed in Australia, we have adopted a rather unusual method of resolving industrial disputes and organising industrial relations. More than probably any other country in the Western World, we use the techniques of the law and the venue of courtrooms. Attempts to export this system to other countries have not generally succeeded. In the United Kingdom, the Heath Government recently endeavoured to introduce a system of court disciplined industrial relations. It was rejected by the union movement. Following the change of Government the law was repealed. It is no longer part of the law of the United Kingdom. In Australia, the system was introduced at the turn of the Century. It is one that the unions have gradually grown used to. They have been able to secure significant industrial gains over the years from it. It is therefore important that its organisation and techniques should be understood when dealing with the subject of employment in its context.

The best that can be done in the space available is to give a brief outline of some of the law of employment that would be of practical use to social workers. Nothing more can be aimed at . . The common law works hand-in-hand with legislation in the area of industrial law. This means that some of the questions which will be dealt with are resolved by reference to Acts passed by Parliament. Others are dealt with by decisions of industrial tribunals set up pursuant to those Acts. Still others are dealt with by general legal principles not found in Acts of Parliament at all. These are the principles of the common law and are declared by decisions made in cases by the judges.

Those areas covered by legislation will be first discussed. I will then turn to deal briefly with the law relating to employees and their relationship with organisations such as trade unions. Finally the common law rules relating to the contract of employment and the duties placed on the parties to that contract will be described. The topic is an ambitious one. The most I can do is give you a broad outline of it.

FEDERAL CONCILIATION AND ARBITRATION

Importance : It would be wrong to think that all workers in New South Wales are governed by N.S.W. Awards in respect of their employment conditions. The N.S.W. Awards, i.e. the Awards handed down by decisions made in the Industrial Commission of New South Wales, cover something more than half of the workers in New South Wales. Their provisions include terms as to hours of work, days for public holidays, salary rates and so on. Awards are never so detailed that they contain all of the legal rights, duties and responsibilites of employer and employee. They contain the main rights and duties. In New South Wales, some workers are entitled to the benefits of State Awards. Some, however, are entitled to the benefits laid down in Federal Awards. Whether a worker's employment rights are governed by a State Award, a Federal Award or no Award at all is often a difficult question to determine. Generally speaking, certain national industries have been able to secure Federal Awards. Wherever a Federal Award is obtained, it takes precedence over competing State Awards. This is by reason of the Australian Constitution. However, the position is complicated by the fact that some employers are bound, in respect of certain workers, by the provision of Federal Awards. Others of their workers may be entitled to no Federal benefits but only to the protection of a State Award, if there is one. The explanation of whether a Federal Award is relevant, can normally be found either in the Constitution or in historical facts. For example, some activities have been held not to be "industrial". In such a case, no Federal Award can be made. Applications are frequently made to expand the area of Federal coverage. Basically, it is up to the Arbitration Commission to decide whether, within certain principles, it should grant a Federal Award where none previously existed. Sometimes a Federal Award is made, often it is decided to leave the regulation of industrial relations to State Industrial Tribunals. The point

of this is that the essential first step is to discover whether a person is an employee and if so, whether his basic employment conditions are governed by an Award - Federal or State. When this is discovered, it is necessary to look to the terms of the Award, if any, to see the fundamental employment rights of the worker and the duties and rights of the employer.

The System : The Federal system of conciliation and arbitration began in 1904. Its origins can be traced to the nationwide industrial unrest at the end of the last Century. Because of this unrest, the Constitution contained provisions which empowered the Commonwealth to make laws in respect of conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. The Conciliation and Arbitration Act 1904 was one of the first Acts of the first Federal Parliament. Although it has been amended many times since, it is the 1904 Act which is still central to industrial and employment law in Australia. The Act sets up a system of resolving industrial disputes, not in the workshop or factory but by an independent tribunal which can impartially hear both sides and arbitrate, if it cannot settle the dispute by agreement. Because of the constitutional limitations, the federal system can only be used to resolve "interstate" "industrial" disputes and other areas of employment law committed by the Constitution to the Commonwealth. However, this limitation has not proved as awkward as it might seem. The scope of the Federal discipline of industrial relations has been extended by a device called a "log of claims". This represents a demand for certain industrial conditions. It has been held that demands made in more than one State can create an interstate industrial dispute sufficient to give the federal tribunals jurisdiction. This is the so-called "paper log" or "paper dispute". It is the normal way that industrial organisations such as trade unions get matters before the Arbitration Commission. They make a demand for certain industrial conditions or higher wages by a log of claims served on employers and employers' organisations in a number of States. By this means they create an interstate industrial dispute. The matter is notified to the Arbitration Commission. It is then listed for argument and determination before a Member of that Commission. The resulting decision is formalised in an "Award". This Award sets out in terms the employment conditions that must be observed by parties to it, employer and employee alike. It is part of the law of the land.

The State Systems : The fact that the federal tribunals only have jurisdiction in interstate disputes, disputes in the Territories and certain others, leads to some confusion. However, this is also more apparent than real because like systems operate in four of the six States. In Victoria and Tasmania Wages Boards operate instead of a Conciliation and Arbitration tribunal. However, recently the Victorian Government announced an intention to create an Industrial Commission. The State tribunals follow roughly similar principles to those applied in the national Commission. In this way a fair degree of uniformity is achieved in employment and industrial standards throughout the country. To some extent the existence of differing State systems has allowed for experimentation and progress in industrial conditions. The problems of diversity are also reduced because Awards of the Federal Commission now cover more than 40% of Australian employees. The State Tribunals, either because of provisions in their statutes or out of a desire to promote uniform employment conditions necessary for the national economy, tend to take into account when making their own Awards and Orders, the relevant decisions of Federal Tribunals.

The Arbitration Commission : The principal institutions which implement the Federal conciliation and arbitration system are the Australian Conciliation and Arbitration Commission and the Australian Industrial Court. The Commission consists of a President, the Hon. Sir John Moore, nine Deputy Presidents and nearly twenty Commissioners. Usually, the people appointed to these positions enjoy a wide range of experience in matters relating to the law of employment and industrial relations. Within the Commission, particular Deputy Presidents (most of whom are judges) and Commissioners are assigned by the President to deal with disputes as they arise in particular industries. When a dispute arises either by a paper log or on the factory floor, hearings are arranged within a very short time of notification of the dispute to the Arbitration Commission. Members of the Commission travel to all parts of Australia to hear the facts surrounding disputes, to attempt to settle them by agreement between the parties and, if necessary, to arbitrate and determine the matter by an Award. Generally speaking, the Commissioners carry out the functions of preventing and settling industrial disputes at the grass roots level. The Deputy Presidents also do this from time to time. They are frequently called upon to sit in a Bench of three (one of whom may be a Commissioner) to hear appeals and determine references made to a "Full Bench". It is through the Full Benches that the more

important industrial principles are determined. In very important matters, such as the National Wage Case, the Full Bench may comprise the President, three Deputy Presidents and two Commissioners. Although proceedings before the Arbitration Commission may be informal, for example, no robes are worn, basically the procedures adopted are similar to court procedures. The parties outline their case. Evidence may be called. Inspections of relevant industrial premises may be had. The representatives of the employer and employee organisations then address the Bench. A decision is handed down which becomes an Award.

The Australian Industrial Court : The Court comprises a Chief Judge, the Hon. Sir John Spicer and other judges, at present eleven. It is a court with many functions. In the present context, its chief industrial functions include the enforcement of the Act and Awards made under the Act by the Arbitration Commission. The court also interprets Awards and the rules of organisations registered under the Act, such as industrial unions. It has powers to ensure that the rules of unions are basically fair to the members and that union officials act justly and are democratically elected. The court also decides application for deregistration of organisations under the Act. Such de-registration may occur where an organisation fails to comply with the Awards made by the Arbitration Commission.

Other Tribunals : There are many other individuals and special bodies set up under the Act. These include Registries and Registrars, Boards of Reference, Local Industrial Boards, Inspectorates and special tribunals such as the Flight Crew Officers' Industrial Tribunal set up to deal with air pilots.

Awards : Following the resolution of an industrial dispute it is normal for an Award to be made by the Commission. A sample page of an Award is attached at the end of this chapter. It will be seen that Awards contain rules that govern the employment conditions of those who are parties to it or bound by it. The terms of an Award will often follow past precedents. The previous Award conditions may have been settled many years ago, by agreement between the parties or, where there is no such agreement, the decision of the Commission. The Award is normally made for a specified period of time. However, this does not prevent a new Award being made, even on the basis of a previous log of claims, so long as the second or

subsequent Award made is within the "ambit" of the original log of claims or paper demand. Unless it is within the scope of the previous demand, the parties will have to commence again. Fresh demands will have to be lodge with disputants in more than one State. It is to avoid the delays inherent in this procedure and to lay the ground for future Awards that unions often demand very much more in their logs of claims than they expect to receive immediately. In other words, they are establishing a wide "ambit". This will allow them, without the formality of fresh service of claims on interstate employers, to come back to the Arbitration Commission from time to time, within the "ambit" of the original claim. The explanation of this procedure, which may seem odd and which sometimes results in exaggerated newspaper stories that may fan the inflationary pressures in society, is to be found in decisions of the High Court of Australia upon the requirements of the Constitution. It explains why claims are often exaggerated and demands are sometimes made for much more than the parties would realistically expect.

Conciliation : Normally, when the Commission is notified of a dispute, an attempt is made to achieve conciliation, i.e. a compromise agreement between the disputing parties. This may be done either by a compulsory conference or in informal proceedings to which the parties come voluntarily. The conciliation procedures are carried out most informally. The parties (usually union and employer representatives) simply sit around a table and talk about the problem with a Member of the Arbitration Commission. On occasions the Commissioner will see the parties together or separately. Sometimes they are left to discuss the matter by themselves. It is only when this procedure is unsuccessful that the Commission proceeds to arbitrate the matter, i.e. to decide it by a binding Award. The process of conciliation and arbitration is the principal way in which employment conditions in Australia have been determined during the whole of this century. Surprisingly large numbers of issues can be resolved by conciliation, using the techniques of "give and take". If, following the completion of conciliation, issues remain to be arbitrated, the parties are entitled to object to the Member of the Arbitration Commission who assisted in the conciliation, proceeding to arbitrate the dispute. The matter must then be arbitrated by another Member of the Commission. Normally, no such objection is raised. If however it is, a new Member of the Commission will take over t Arbitration on the dispute.

Agreements : It must be mentioned at this stage that many agreements are reached between employers and employees without any intervention at all by the system of conciliation and arbitration. One author has estimated that up to 50% of provisions relating to employment are achieved in this manner. The process has often been referred to as "collective bargaining". In the United States and the United Kingdom, where there is no compulsory conciliation and arbitration machinery, the processes of collective bargaining have been institutionalised. Here, it is possible to register agreements reached under the Conciliation and Arbitration Act. It is also possible to create a formal interstate dispute so that a consent Award can be entered by the Commission. Normally this will be done automatically, although there are some terms that require specific approval. Some employers pay particular workers or classes of workers well over the minimum amount fixed by an award. These "over-award payments" represent nothing more than the agreement to which freely contracting parties may come in our society. In other words, you may pay more than the Award, but you may not pay less. In some industries, the "over-award" component of the wage has itself become almost institutionalised. There is a "going rate" for particular employees which takes into account the fairly uniform "over-award" component. Of late, more and more disputes are about "over-award" levels and this has led to a demand for the Arbitration Commission to fix "going rate" Awards. The system we have lived with for seventy years and more is now so much part of our industrial scene that payments made over and beyond the Award levels themselves tend to become fixed and institutionalised, imitating the basic Award system.

Interpretation of Awards : Because an Award is like a small Act of Parliament, disputes can sometimes arise over what is meant by Award provisions and what the parties intended when they agreed upon certain terms. Because of constitutional limitations, the Arbitration Commission does not have the power to interpret Awards. Interpretations can be sought in the Industrial Court. This facility is rarely used. A dispute may suddenly arise. There is not time to wait for a full scale interpretation case. Frequently the parties agree to accept the informal interpretation given by a Member of the Arbitration Commission. Alternatively, a new dispute is created and the Arbitration Commission, without interpreting the old Award, may proceed to make a new Award which clarifies the matter.

Enforcement : Generally, people obey Awards simply because they are part of the law of the land. Like most laws, they are obeyed because men prefer to live in an orderly, peaceful system than in one which is constantly under challenge. Awards made under the Conciliation and Arbitration Act are no exception. However, occasionally breaches occur. Procedures have therefore been laid down to enforce Award provisions both against employers and employees. Sometimes penalties are included in or inserted into an Award fixing the amount of fines that must be paid by an offending union. The experience of recent years has tended to suggest that these "penal clauses" may sometimes have a contrary effect causing more industrial unrest. Other means of disciplining the parties exist. These include suspending hearings by which industrial improvements may be sought, suspending Awards, cancelling the registration of the industrial organisations and so on. Normally, persuasion by the Arbitration Commission and the passage of time in which tempers can cool, are sufficient to settle industrial unrest and breach of Award conditions. Basically, unions and employers have lived so long with the arbitration system in Australia and the alternatives are so uncertain, that they are prepared to accept the obligations of the system as the price for its benefits.

INDUSTRIAL ARBITRATION IN N.S.W.

N.S.W. Industrial Commission : The system of industrial arbitration in New South Wales is substantially similar to the Federal system. It is administered in different, State tribunals. An Industrial Arbitration Act was passed in 1901. It provided for the establishment of a court. In 1908 Industrial Boards were established to supplement, more informally, the work of that court. It was not until 1926 that the system began to take on its present form, with the establishment of the Industrial Commission and Conciliation Committees. These replaced the Court and the Boards. The overall control of arbitration is exercised by the Commission. This is comprised of a President, the Hon. Sir Alexander Beattie and eight Members, all of them judges. The Commission has a very wide jurisdiction in relation to "industrial matters". It is not limited in the same way as are the Federal tribunals, by provisions of the Constitution. It can therefore deal with a whole range of matters relevant to employment in New South Wales, so long as these are within the Act and do not infringe the overriding powers of the Commonwealth. Under the Australian Constitution, a law of the Commonwealth (including an Award) takes priority over a law of a State (including a State Award), but only where there is a real conflict between the two.

Conciliation Committees : In New South Wales, as in South Australia, there has been developed a system of Conciliation Committees. These Committees share with the Commission many of its Award-making activities. There are over 400 such Committees. They are established for particular industries or callings. In some cases they are specifically established to deal with the industrial disputes and issues arising with a particular large employer. The Committee normally consists of a representative of the employers, a Union representative and a Chairman who is a Conciliation Commissioner, independent of both parties. They sit down together to discuss disputes and particular issues that have arisen. In the nature of things, employers' representatives generally favour the view advanced by the employers. Employees' representatives generally favour the view advanced by the Union. Therefore the casting vote of the Conciliation Commissioner becomes the important determinant. Nevertheless, the simple fact of sitting down together, sometimes apart from the disputing parties, has a healthy effect on industrial relations. It encourages an understanding of the point of view of each side. The tendency has emerged of late to dispense with Committees constituted as above and to repose the decision in industrial disputes to a single judgment of the Conciliation Commissioner. Conciliation Commissioners therefore share some Committees, determine some disputes on their own and may have particular industrial matters referred to them by the judges of the Industrial Commission. They are empowered to call compulsory conferences by which parties to an industrial dispute involving employment issues can be summoned before them to outline what the dispute is about. There is a very helpful provision in the New South Wales Act which empowers the judges and Conciliation Commissioners to make an interim order to restore the status quo, during the hearing of a disputed claim.

Awards : The procedure for making Awards in New South Wales is basically the same as in the Commonwealth system. If the proceedings take place before the Industrial Commission, they tend to be more formal than the more relaxed procedures followed before the Commissioners and Conciliation Committees. The judges normally wear robes for hearings, especially when they are sitting "in Court Session" i.e. as a Bench of three or more. Robes and wigs are not worn before the Conciliation Committees or Commissioners. They are frequently not worn during compulsory conferences even before the judges. As in the Commonwealth system, Awards can be made either by arbitration or by consent. There are fewer constitutional limitations on the matters that can be contained within an Award in New South Wales.

Accordingly, Awards of the N.S.W. Commission tend to cover a wider range of matters concerning employment than do Commonwealth Awards.

Enforcement : The enforcement of Awards and Agreements is ensured by a number of provisions. These include provisions akin to those in the Commonwealth sphere. Inspectors are appointed to make sure that Awards are being observed. They are empowered to examine records, enter premises and scrutinise general working conditions. Persons breaching an Award are liable to a fine. Proceedings to recover fines may be brought before an Industrial Magistrate.

Summary : The position emerges, therefore, that in Australia we have taken a rather unusual course in industrial relations. Basically, it is up to employers and employees to agree upon their terms of employment. However, there are overriding rules which have been devised to ensure minimum proper standards. These rules are devised and implemented by the Conciliation and Arbitration system. In New South Wales, this system works on two levels. There are Federal Awards and State Awards. Whether a person is entitled to the benefit of one Award or another depends upon a multitude of factors. Principally it depends upon the Union he belongs to or is entitled to belong to in the work he is doing. Historical reasons often explain why that Union has sought to obtain a Federal Award or has been content to remain under State regulations. Sometimes, although nominally under State regulation, the Award is basically just a copy of a Federal counterpart. Sometimes, there is no constitutional power for a Federal Award to be made. The Awards set out in summary form the main terms governing the employment of a worker. They are provisions that can be enforced by court proceedings and fines will be imposed upon those who disobey them. Generally, Awards are obeyed out of a desire for industrial peace and harmony. Normally disputes can be resolved by discussion. The Conciliation and Arbitration machinery in Australia provides the means of bringing disputing parties together in the name of industrial peace. The result has been steady significant progress in industrial conditions and this has tended to encourage improvement in industrial relations.

EMPLOYEES AND TRADE UNIONS

Registration : The State and Federal Acts provide for the registration of trade unions and employers' organisations. Registration gives the industrial tribunals a measure of legal control over the internal affairs of these

organisations. They are now very powerful units in our society. It is therefore important that they should be fairly run and that their officers should be democratically elected. It is also said many times that those who seek to take the benefit of industrial Awards, legally binding and enforceable, must be prepared to join in the system and accept its disciplines.

Union Rules : Some of the controls which give certain power over the internal affairs and rules of these organisations are as follows:

1. The necessity for certain rules to be included before registration will be granted.
2. The enforcement of rules by court orders, including orders against the officers of an organisation.
3. Ensuring the consistency of the rules with the provisions of the Act.
4. Power of deregistration if the rules do not operate as above.
5. Power to enforce admission to membership of the organisation; and
6. Certain controls over the conduct of election ballots.

It should be noted that union members are entitled to a copy of the union rule book. If ever a question arises as to the rights of a member in respect of his union, the answer will normally be found in the rule book. If any difficulty is experienced in obtaining a copy of the rule book, a copy may always be inspected at the local Industrial Registrar's office.

Compulsory Unionism : The Commonwealth Act gives the Arbitration Commission the power to order "preference" in employment to union members. However, it has been held that this power does not extend to a provision for compulsory unionism. In New South Wales, the Industrial Commission may provide for "absolute preference" for union members in an Award or agreement. This is sometimes ordered. Inherent in the arbitration system we have in this country is the important role of the nion. Many employers prefer to have full unionism. In part, this may be for industrial peace. In part it may be because it provides an orderly and regular method of consultation with the staff over grievances. Again, it institutionalises the system of industrial relations. The spirit and legal provisions of the Acts in Australia are all directed towards the encouragement of fair and energetic unionism. It should be noted that conscientious objectors will not be ordered to join unions. If a dispute arises as to whether a person is or is not a conscientious

objector, this will be dealt with by a member of an industrial tribunal.

RIGHTS OF EMPLOYEES

Minimum Wages : Over the years, the system outlined above has led to certain basic standards and conditions being developed. The achievement of adequate wage levels in Australia is undoubtedly the most important of the rights that can be traced to the operation of the arbitration system. In both the Commonwealth and New South Wales systems, there have been adopted minimum wages both for male and female employees. Until recent times, the female wage was less than that payable to male employees. Employees under the age of 21, have always received only a proportion of the adult wage rate. Subject to such exceptions, every employee is entitled to at least the minimum wage. The national minimum wage is fixed from time to time by the Arbitration Commission in a hearing which normally takes place in Melbourne. At this hearing representatives appear for the A.C.T.U., the Government, employers' representatives and often State Governments. Arguments are advanced about productivity, the capacity of industry to pay, the cost of living increases, inflation and so on. At the end of the case, a decision is handed down by a Full Bench of the Arbitration Commission, usually five Members. This decision fixes the minimum wage. This is then incorporated in all of the Awards of the Arbitration Commission and usually flows on to State Awards made by the State Commissions. The minimum wage at the moment is $98.60, for an adult worker.

Equal Pay : In 1972, the Arbitration Commission laid down the principle that equal pay should be paid to men and women for work of equal value. Stages were set by which this principle was to be introduced into all Awards of the Commission so that it would be fully operational by 30 June 1975. The N.S.W. Industrial Arbitration Act also contains certain equal pay provisions. (s.88). However, because of certain provisos in the section, the principle of equal pay for work of equal value was not established in New South Wales until the Industrial Commission adopted it separately as a principle for its Awards following the 1972 decision of the Commonwealth Commission.

Hours : The history of industrial arbitration has been one of the gradual reduction in the standard hours for a working week. At the present time, the standard hours are 40 hours per week. In some industries it has been agreed between employers and employees that a 35 hour week shall now operate.

In rare cases this agreement has been incorporated in industrial Awards. Applications have been made or are being made to reduce the 40 hour week to 35 hours. It is one of the principal trade union aims in Australia at the moment. The current recession and other circumstances may have somewhat postponed the urgency of this endeavour. For the time being, the standard hours throughout the country are almost universally 40. This does not mean that an employee cannot be worked beyond 40 hours. It simply means that if he does work beyond that standard, he shall be paid at "penalty rates", i.e. at overtime rates which are designed to compensate him for working beyond the standard and intruding upon his leisure time. Different "penalty" rates are imposed for working overtime up to certain hours or for working on weekends or public holidays. Precise provisions must be found in the particular Award governing each employee. Provisions differ from Award to Award. The Awards also contain specific provisions in respect of crib times, the spread of hours, shift work and picnic days. In New South Wales, the standard hours of employees under State Awards have normally been fixed by legislation rather than through Awards of the Industrial Commission.

Long Service Leave : Long service leave was introduced in New South Wales by the Long Service Leave Act. Subject to certain exceptions, an employee is entitled to long service leave after ten years' service. Nowadays he is also entitled to such leave after five years' service where he is dismissed other than for serious and wilful misconduct or where he has to leave work because of illness, incapacity or domestic or other pressing necessity. In all of these cases, the leave is calculated on the basis of three months for fifteen years' service. Usually, Commonwealth Awards are silent on the question of long service leave. Accordingly, because there is no Commonwealth provision at all on the question, th State Long Service Leave Act will apply to all workers, including those whose other industrial conditions are regulated by Commonwealth Awards. However, some Federal Awards do contain special long service leave provisions. Where they do, those Award provisions take precedence over the State standard.

Annual Leave : Annual leave is one aspect of working conditions that nowadays usually comes within the ambit of Awards rather than legislation. The State Act in New South Wales provided for a standard three weeks annual leave. However, gradually Federal Awards and later New South Wales Awards adopted provisions for four weeks' annual leave. In 1974 the Industrial

Commission of New South Wales, bearing in mind decisions in the Federal Commission by which the four weeks leave had gradually become accepted as the norm, adopted a general ruling on this subject. It said that it would, on application, grant an increased entitlement of annual leave, extending the three week period to four weeks. This is now fairly uniform throughout Australia. Already, some Awards contain provision for even longer leave.

Sick Leave : Most New South Wales and Commonwealth Awards contain provisions entitling workers under them to an equivalent of one week's sick leave with full pay for each year's service with the employer. Award provisions differ. Some awards provide that sick leave entitlements may be accumulated. Other Awards allow such leave benefits to be carried from one employer to another. As in all cases here, the first thing to do is to find out exactly which Award governs the employment conditions of the particular persons in question. Is it a Federal Award or is it a State Award? This question is answered by reference to the industry or trade or place of work of the employee. Normally it will be known to the employee himself. If it is not, it can generally be discovered by reference to the personnel officer of the employer, the relevant union or the Industrial Registrar.

THE CONTRACT OF EMPLOYMENT

Just Another Contract : It has been pointed out that when a person works for another he does so in a contractual relationship. It may not be a contract in writing. The precise terms of the contract may never really be discussed. However, there is an agreement, if necessary an implied agreement, which the law imputes to the parties and which governs the relationship between them. Until industrial tribunals were established and Awards made, the mutual entitlements of employer and employee were simply found in what they agreed upon or what the law implied was their agreement. Sometimes even today employers and employees reduce some of their contracting conditions to writing. If they do so, it is always of vital importance to find out just what the writing contains. Normally no such formality is observed. However, even if it is observed, if an Award governs the parties, no agreement on their part can override an Award. As said before, an Award is part of the law of the land. It must be obeyed by employer and employee bound by it.

The above material on Awards should not obscure the fact that many employment conditions are simply not mentioned in an Award or industrial

agreement. Furthermore, some people are not even employees but are independe contractors who are substantially carrying on a business of their own. A number of tests exist to determine whether a person is an employee or an independent contractor. One of the questions to be asked is whethe: the alleged employer has the right to control the mode or manner in which the work has to be done. If he has, the relationship is one of employment. If he has not, it is one of independent contract. In applying this test, such factors as control over hours of work, mode of payment of wages, the provision of tools and means of transport and so on are all taken into account.

The situation has changed significantly in Australia because many of the terms and conditions that would in the past have come under the common law contract of employment, are now covered by clauses in particular Awards, as has been shown. Nevertheless, there are many important rights and duties of employer and employee that are never mentioned in Awards and are to be found only in the contract between the parties.

Importance : Conditions Not Governed by Awards : Because the Award will normally be confined to terms and conditions that are the minimum, the "contract of employment" between a particular employer and an employee may be an amalgum of the common law and the rights and duties laid down specifically in the Award.

Dismissal : The performance of a contract of employment must be undertaken by a person who enters into that contract. There is no right of assignment of duties to another. The performance must comply with the terms of the contract. At common law there was some doubt as to the duration and termination of a contract of employment. However, in most cases, these two matters are now covered by specific Award provisions. Normally it is provided in Awards that except in cases of casual employment, employment is to be on a weekly basis. That means that the contract can only be terminated by the employer giving to the employee a week's notice. Likewise an employee must give the employer a week's notice. Alternatively the employer must pay or the employee must forfeit a week's wages. At common law the position with respect to termination of employment was probably that the employer could dismiss an employee summarily on the grounds of misconduct at any time. There were other such grounds at common law sufficient to justify summary dismissal. It is still possible, even under

current Awards, for an employer to dismiss an employee instantly for misconduct. However, many Award provisions now put limitations upon the employer's unfettered right. Proceedings can be brought for reinstatement where an employee is unjustly or harshly dismissed. Reinstatement orders are made by the Industrial Court or the Industrial Commission. Because of the doubts concerning the circumstances warranting instant dismissal, most employers nowadays prefer to give a week's dismissal. However, even this may not be just, depending upon the circumstances and reasons that motivate the dismissal. Specific provisions are contained in the Commonwealth and State Acts to prevent discrimination against union members and penalising workers who engage in lawful union conduct.

Wages : Obviously, under a contract of employment, the employee has a right to wages and may sue to recover them where they are unpaid. At common law this took the form of an action for the amount of money owing. Failure to pay wages is also a breach of the contract of employment and gives rise to an action for damages. Where, however, wages are fixed by an Award, a statutory debt is created. This is independent of any right created by contract. Under the system of arbitration, the wages agreed to or arbitrated become the legal fixed minimum wage. It is then unlawful for a contract of employment to be made which involves the payment of a lower wage. Any such contract will amount to a breach of an Award and will be the basis for proceedings that may result in a fine against those who sought to circumvent the arbitration system. Likewise, proceedings may be brought to recover wages due under an Award or an underpayment of wages. There are time limits in respect of such proceedings and accordingly they should be brought promptly.

In situations where there is no express provision made either in legislation (an Act of Parliament) or an Award, the common law rules still apply. Many of the rights and duties of employers and employees are not covered by Awards. The first step in any dispute about the rights of an employer and an employee is to discover the Award provision, if any, governing the matter. If the Award is silent, it is then necessary to go back to the general law of contract. If a specific agreement was reached between the parties, this agreement will govern their relationships. If no specific agreement was arrived at, the common law will step in and imply the terms which ought reasonably to be implied having regard to all the circumstances and to like contracts generally.

DUTIES OF EMPLOYERS

An employer must pay his employee the wages fixed by Award or any wages in excess that are agreed upon. At common law, the employer was under a duty to summon medical aid for an employee who fell ill or was injured. Nowadays, these matters are normally dealt with by workers' compensation legislation and sick leave provision in Awards.

At common law there was no duty to pay for an employee's accommodation or food. However, this rule has been changed by statute and by certain awards, especially in cases where employees have to perform particularly dirty or specialised work requiring specific clothing or where they have to live away from home and require accommodation. Special allowance are often provided for in Awards for these purposes.

At common law there was no duty on the part of an employer to give an employee a character reference. However, if the employer does give a reference, either in writing or by telephone, certain special protections exist against what would otherwise be defamatory. An employee is entitled to express his honest view, so long as he does not show malice or negligence in doing so.

There was no duty at common law requiring an employer to protect his servant's property. There is, however, a duty to reimburse an employee for all expenses properly incurred within the scope of his employment. There is also an obligation to indemnify the employee against liabilities and losses occurring within the scope of that employment.

The employer also has a duty at common law to use reasonable care in relation to the safety of his employees. It has been held that this duty has not been carried out where the employer has failed to provide competent fellow employees, a safe place of work, safe plant and appliances and a safe system of work. If an employee is injured in the course of his employment because of the failure of the employer to comply with these duties, he will be entitled to sue his employer by claiming damages for negligence. If the employee contributes in any way to the happening of his own accident, this is called contributory negligence. It may justify a reduction of damages to the extent of the employee's own responsibility for his injuries.

Quite often, legislation imposes specific duties on employers. The Factories and Shops Act lays down a number of rules governing the way in which machines must be fenced and factories run for the safety of employees. If these provisions are not complied with, and the employee suffers injury as a result, he may claim damages against the employer based upon the breach. There is an absolute duty in New South Wales to fence and guard dangerous machinery so that a worker will not come into contact with moving parts. If he does, and is injured, the employer will be liable for the failure to provide adequate fencing. There are many like provisions in respect of scaffolding and particular protections are given to particular classes of employees such as excavators, coal miners, crane drivers and so on. Whether an entitlement to sue for damages(based either upon the common law duty of care mentioned above or breach of a specific statutory duty)exists, depends upon and evaluation of the facts measured against the legal responsibilities cast upon employer and employee alike. Where an employee is injured at work, it is always appropriate in a serious case to seek advice from a solicitor concerning the employee's entitlement to damages. Such entitlement, if a settlement cannot be reached with the employer's insurer, is normally determined in a trial conducted before a judge and, often, a jury of four persons. The N.S.W. Labor Council has a special compensation department which handles thousands of cases of this kind every year. Any questions concerning a person's entitlements following injury at work should be referred either to a solicitor or to an officer of the Labor Council.

Workers' Compensation : It might be appropriate briefly to mention in this context that all States have workers' compensation legislation. This ensures that employees recover compensation when they suffer injury arising in connection with their employment either at work or on a journey to work. The right of an employee to claim under such legislation does not depend upon any finding of fault on the part of the employer. Nor is contributory negligence on the part of the employee relevant. The N.S.W. legislation is to be found in the Workers' Compensation Act 1926. Most employees in Federal unions are also covered by the provisions of this Act, although employees of the Commonwealth Government have their own legislation to protect them in like circumstances. The Act provides compensation for injuries arising out of or in the course of the employment and for injuries arising when journeying to and from work. The Act also provides for compensation during periods when an employee, by reason of such an injury, is

fit only for light work. The first advice that must be given to a person certified fit for light work is to apply for such work from his employer. If, following application, light work is not supplied, the injured worker must be paid full compensation. The Act also provides for lump sum payments in the event of certain specific injuries. Provision is also made so that when damages are recovered, compensation received is deducted from the damages to prevent double payments. Certain defences exist under the Act, including a defence which restricts the right to recover compensation where injury is self inflicted or arises from serious and wilful misconduct.

DUTIES OF EMPLOYEES

The duties of employees under a contract of employment may also arise from common law rules. The basic duty is one of faithful service. This wide principle has been reduced to certain specifics. The use of materials and/or information hostile to the employer's interests is forbidden. The giving of wrongful aid to the employer's competitors is prohibited. Making secret profits from employment is proscribed.

Closely allied to the duty of faithful service is the obligation to make available to the employer inventions made in the course of the employment. The employee is also under a duty to obey all lawful and reasonable commands of his employer. A command to do work for which the employee was not engaged is not considered a lawful command. Similarly, an employee is justified in disobeying a command which might give rise to death or grave personal injuries or to a breach of the law.

Finally, an employee is under a duty to serve his employer with due care. Failure to carry out this duty can give rise to an action in negligence by the employer. However, such an action will not arise where the employee is carrying out a task for which he is not normally employed or which entails skills which he has not professed to have.

SUMMARY

1. The rights and duties of employer and employee in respect of employment stem basically from the contract of employment which is the agreement made made between employer and employee. It may not be in writing. It may not even have been discussed between them. Many principles are implied by the common law to adjust the reciprocal rights and duties of each.

2. On to this "old-fashioned" system has been grafted a modern, thoroughly indigenous, Australian system of conciliation and arbitration.

3. The conciliation and arbitration system works at two levels. There are Federal and State tribunals. These deal with industrial disputes. They seek to promote agreements to solve the disputes. Where these fail, they will make Awards which are legally binding and enforceable.

4. These Awards may contain very specific provisions which govern employment relationships. But they do not contain provisions in such detail as will cover each and every issue which arises in the employment relationshi of employer and employee.

5. It is always a first step, when asked about the employment rights and duties of a person, to discover the Award, if any, under which he is working. In case of doubt, this can normally be discovered from the State or Commonwealth Industrial Registrar. Copy of this Award can be obtained. Up to date copies must always be secured as there are so many changes that frequently Awards are out of date within a short interval.

6. If the Award is silent or if no Award exists for a particular class of persons, it is necessary to go back to the contract between the parties. If there is no specific contract between the parties, the common law provides general principles to guide people about their respective rights and obligations.

7. On top of this system there are special statutes which cover questions such as workers' compensation and industrial safety. Breaches of these statutes can give rise to claims for compensation or damages that are enforceable in the appropriate courts.

8. This review of the law of employment can only be a sketch. The last volume of the standard English text on these subjects was 1300 pages long. It contained nothing about the industrial conciliation and arbitration system which is at the heart of Australian employment law. It can therefore be appreciated that this is a big subject. The most this chapter can do is to call attention to some of the main themes.

SAMPLE PAGE OF AN AWARD OF THE AUSTRALIAN ARBITRATION COMMISSION

VEHICLE INDUSTRY (CONSOLIDATED)

28 - CHANGE OF PLACE OF EMPLOYMENT

Where an employer transfers an employee, after he commences work, from the place which he usually works to another place, fares to and from such altered place shall be paid by the employer to the employee, whether the employee travels by cycle or otherwise, except when he is transported by the employer.

29 - ARTICLES OF CLOTHING

(a) Where an employee is required by law or by his employer to wear any special uniform, cap, overall or other article, it shall be supplied and laundered (excluding shirts) by the employer at no cost to such employee.

(b) Where an employee is required by his employer to work continuously in conditions in which, because of their nature, his clothing would otherwise become saturated, he shall be provided with suitable protective clothing free of cost.

(c) Clothing shall remain the property of the employer, and the employee shall be liable for the cost of replacement of any article of protective clothing which is lost, destroyed or damaged through the negligence of the employee.

30 - CHANGE (MONEY)

Where an employer requires an employee to give change to clients, such change shall be supplied by the employer.

31 - GEAR TO BE PROVIDED

The employer shall provide all gear necessary for:

(a) the securing of any load on a vehicle;

(b) the loading and unloading of vehicles.

32 - HEAVY ARTICLES

An employee unaided by proper auxiliary applicances or by another man, shall not be permitted to life or carry goods over 112 pounds in weight.

33 - AWARD TO BE EXHIBITED

(a) A copy of this award and any variation thereto shall, as soon as the official print is available, be posted by the employer in a prominent place where it is easily accessible to the employees.

(b) After compliance with sub-clause(a) of this clause, the Award and any variations thereto shall be kept posted at least every six months.

BIOGRAPHICAL NOTE ON THE AUTHOR

Mr. Justice Michael Kirby was born in Sydney in 1939. At the age of 35 he was appointed a Deputy President of the Australian Conciliation and Arbitration Commission. Shortly after this appointment he was appointed the first Chairman of the Australian Law Reform Commission. This appointment is for a term of 7 years.

Mr. Justice Kirby was educated at Sydney University where he acquired the degrees of B.A., B.Ec. and LL.M., the last with first class honours. He was for a time a Fellow of the Senate of Sydney University. At the time of his appointment to the Bench he was a Member of the N.S.W. Bar Council.

Any views expressed in this paper should not in any way be attributed to the Australian Conciliation and Arbitration Commission. Mr. Justice Kirby is not at present sitting as a Member of the Commission but is engaged full time as Chairman of the Law Reform Commission.