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Abstract
There has been some movement in two sectors, which are the principal subject of this article. The first is the federal industrial system, which until very recently has provided a marked contrast to its State counterparts by failing to offer much, if any, relief to those workers covered by federal awards whose employment is unfairly terminated. Recent developments suggest that the High Court and the Australian Industrial Relations Commission may be embarking on the long path towards removing the imbalance between those who have access to State jurisdiction and those who do not. The second area for discussion is the action for wrongful dismissal, which has traditionally been worth pursuing only by a small class of employees. With the decision in Gregory v Philip Morris Ltd the utility of the remedies offered by the common law is (or should be) coming under renewed scrutiny.

Keywords
unfair dismissal, industrial relations law, Australia

NEW DIRECTIONS IN THE LAW OF EMPLOYMENT TERMINATION

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Claims seeking redress against unfair dismissal constitute one of the growth areas of modern employment law. Much of the expansion in the volume of such actions has occurred within the various State industrial systems. South Australia has led the way, particularly since the enactment in 1984 of s 31 of the Industrial Conciliation and Arbitration Act 1972, conferring on the Industrial Commission power to order either re-employment or compensation for those whose dismissal is 'harsh, unjust or unreasonable'.[1] In Victoria progress has been particularly dramatic. In a bare six years since the Victorian Supreme Court denied the existence of any jurisdiction to entertain reinstatement claims,[2] a decision initially circumvented by legislation[3] and then in any event overturned by the High Court,[4] the number of applications before both the Industrial Relations Commission and Conciliation and Arbitration Boards has soared to over 2000 per year.[5] As with South Australia, the recent recognition of a power to award compensation in lieu of reinstatement appears to have contributed to the popularity of the system.[6] In Queensland, where for many years the Industrial Commission has entertained jurisdiction over a small but far from insignificant number of reinstatement claims,[7] the recent Hanger Report has recommended the enactment of a statutory provision substantially modelled on that used in South Australia.[8] Even New South Wales, the State with the oldest but most circumscribed jurisdiction over unfair dismissals, may be moving towards

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1 See generally Stewart A, *Unfair Dismissal in South Australia*, 1988, Adelaide, Corporate & Business Law Centre.

2 *R v Marshall; ex p Plumrose (Australia) Ltd* [1983] 1 VR 469.

3 See *Industrial Relations Act 1979* ss 3(1) (definition of 'industrial dispute'), 34(5)-(7), 44, inserted by *Industrial Relations (Further Amendment) Act 1983* s 4.

4 *Slonim v Fellows* (1984) 154 CLR 505.

5 See Benson J, Griffin G and Soares K, 'The Impact of Unfair Dismissal Legislation in the Victorian Jurisdiction' (1989) 2 AJLL 141 at 145.

6 See *Royal Children's Hospital v President of the Industrial Relations Commission of Victoria* [1989] VR 527; *Coleman v Aluminium Anodisers Pty Ltd* (No 3) (1988) 30 AILR para 474.

7 See Hall D R and Watson K F, *Industrial Laws of Queensland*, 2nd ed, 1988, Brisbane, Queensland Government Printer, pp 32-9.

8 See Committee of Inquiry into the Industrial Conciliation and Arbitration Act 1961-1987 of Queensland (Hanger R I chair), *Report*, 1988, Brisbane, Queensland Government Printer, pp 281-96.

reform. The controversial Niland Report[9] into that State's industrial system has tentatively proposed removing the bars to access by individual workers who cannot persuade a union to pursue their grievance,[10] as well as introducing a compensatory power.[11] Only in Western Australia has there been a reversal of the trend towards broader jurisdiction, with the Industrial Appeal Court's curious decision in 1987 to reverse several well-established precedents supporting the existence of a power on the part of the Industrial Relations Commission to order compensation.[12]

While these developments have been occurring, however, there has also been some movement in two other sectors, and it is these which are the principal subject of this article. The first is the federal industrial system, which until very recently has provided a marked contrast to its State counterparts by failing to offer much, if any, relief to those workers covered by federal awards whose employment is unfairly terminated. Recent developments suggest that the High Court and the Australian Industrial Relations Commission may be embarking on the long path towards removing the imbalance between those who have access to State jurisdiction and those who do not. The second area for discussion is the action for wrongful dismissal, which has traditionally been worth pursuing only by a small class of employees. With the decision in *Gregory v Philip Morris Ltd* [13] the utility of the remedies offered by the common law is (or should be) coming under renewed scrutiny.

UNFAIR DISMISSAL CLAIMS IN THE FEDERAL SYSTEM

The Story to 1984

The question of how the federal conciliation and arbitration system might be used to regulate the fairness of dismissals offers a wonderful illustration of the effect on Australian labour law of the complexities of the Constitution. Until 1984, in a strict legal sense at least, and leaving aside provisions addressing specific forms of discrimination or victimisation,[14] there was no federal law of unfair dismissal at all. While this can, in part, be attributed to a degree of union apathy towards legal (as opposed to industrial) protection for job security, no less important was the difficulty faced by union lawyers in finding a way to raise dismissal issues before the Conciliation and Arbitration Commission, a difficulty compounded in the nineteen sixties and seventies by a High Court prone to adopting technical, legalistic and often downright confusing interpretations of both the Constitution and the Conciliation and

9 Niland J, *Transforming Industrial Relations in New South Wales: A Green Paper*, Vol 1, 1989, Sydney, NSW Government Printer. See generally Rimmer M, 'Transforming Industrial Relations in New South Wales—A Green Paper' (1989) 2 AJLL 188; Shaw J W and Walton M J, 'The Niland Report and Labour Law' (1989) 2 AJLL 197.

10 Niland, ibid, para 413. Cf *Roberts v Mona Vale District Hospital* [1975] 2 NSWLR 132; *Leaves v Mercedes-Benz (NSW) Pty Ltd* (1986) 16 IR 149.

11 Niland, ibid, para 419. Cf *Re Clerks, Insurance (State) Conciliation Committee* [1931] AR (NSW) 354.

12 *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia* (1987) 68 WAIG 11.

13 (1988) 80 ALR 455.

14 See eg *Industrial Relations Act 1988* s 334.

Arbitration Act 1904.[15] The sporadic attempts that were made by unions in this period foundered for two reasons. In the first place, the need to identify an interstate dispute for the purposes of s 51(xxxv) of the Constitution was regarded as precluding any attempt to have a controversy over a single dismissal by a single employer brought before the Commission, since such a dispute would by definition be purely local in character.[16] This ruled out ad hoc or reactive jurisdiction; the obvious alternative was for a union to generate an interstate dispute about the issue of unfair dismissal generally and then to seek an award which would allow the Commission to deal with individual complaints as and when they arose. But here the second problem was encountered. Any attempt by the Commission to determine whether an award prohibition on unfair dismissal had been breached in such a way as to require the employee's reinstatement would constitute an exercise of judicial power,[17] forbidden to the Commission (not being a 'court' within Chapter III of the Constitution) under the *Boilermakers* doctrine.[18]

Prior to 1984, then, the Commission appeared to be excluded from any formal role in resolving dismissal disputes. It is true that during this period the Commission took (and continues to take) de facto jurisdiction over cases voluntarily submitted to it.[19] The number of such cases was and is relatively small, however, and the parties are by definition free to accept or reject the Commission's recommendations, which have no binding force. Nor can workers covered by federal awards turn to the State systems, for State reinstatement laws are considered to be overridden, under s 109 of the Constitution, by the provisions on termination of employment typically found in federal awards, even if those provisions do not deal explicitly with the issue of reinstatement.[20] The Commission has occasionally been prepared to insert 'saving clauses' into federal awards, thereby ensuring that the workers covered are free to take reinstatement claims to the relevant State tribunal.[21] Unfortunately, it has refused to make a general policy of this practice, for reasons which do not, with all respect, stand up to close scrutiny.[22]

The Termination Change and Redundancy Case and the 1987 Bill

The only remaining course that appeared to be open was for a dispute to be generated about unfair dismissals, producing an award prohibition

15 See generally Maher L W and Sexton M G, 'The High Court and Industrial Relations' (1972) 46 ALJ 109.

16 See eg *R v Gough; ex p Cairns Meat Export Co* (1962) 108 CLR 343.

17 See eg *R v Gough; ex p Meat & Allied Trades Federation* (1969) 122 CLR 237; *R v Portus; ex p City of Perth* (1973) 129 CLR 312.

18 *R v Kirby; ex p Boilermakers Society of Australia* (1956) 94 CLR 254.

19 See O'Donovan J, 'Reinstatement of Dismissed Employees by the Australian Conciliation and Arbitration Commission: Jurisdiction and Practice' (1976) 50 ALJ 636 at 639-40.

20 See eg *R v Industrial Court of South Australia; ex p General Motors-Holden Pty Ltd* (1975) 10 SASR 582; but cf *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237. See generally Stewart A, *Unfair Dismissal in South Australia*, 1988, Adelaide, Corporate & Business Law Centre, pp 24-8.

21 See *R v Clarkson; ex p General Motors-Holden Ltd* (1976) 134 CLR 56; *Re Municipal Officers (SA) Award 1973* (1978) 20 AILR para 8.

22 See *Re Plastics, Resins, Synthetic Rubbers and Rubbers (Uniroyal) Award 1975* (1979) 21 AILR 384; *Termination, Change and Redundancy Case* (1984) 8 IR 34 at 42-3.

which would then be enforceable through the Federal Court. Even this seemed at one stage to be a doubtful starter, for certain High Court dicta appeared to suggest that any dispute about reinstatement would not be 'industrial' in character, not 'pertaining to the relations of employers and employees' but rather to those of ex-employers and ex-employees![23] Fortunately, this peculiar reasoning was effectively ignored by the Commission when, as part of its acceptance of the bulk of the ACTU's job security claims, it went ahead in the *Termination Change and Redundancy Case (TCR)*[24] and included such a prohibition in the Metal Industry Award 1984, indicating at the same time that it would be prepared to flow on this type of provision to other federal awards. In any event, more recent High Court decisions appear to have established beyond any doubt that a dispute as to unfair discharge is industrial in character, given the substantial interest in such a matter of others who are still employed.[25]

The problems, however, did not end with the *TCR* decision. As the Conciliation and Arbitration Act stood, workers dismissed in breach of a prohibition on unfair dismissal would be able merely to secure the exaction of a monetary penalty from the defaulting employer, and then only if they belonged to a union party to the award. No power existed to order reinstatement or the payment of compensation. The obvious solution was for the legislation to be amended to provide explicit statutory remedies and this indeed was one of the key proposals of the Industrial Relations Bill 1987. Under Division 8 of Part VI, a complaint by either an individual worker or a union that an unfair dismissal term had been breached would go first to the Commission for conciliation and then, if a settlement could not be achieved, to a proposed Labour Court for a judicial determination. If the complaint were proven, the Court would be empowered to order either reinstatement or compensation. Unlike the existing Federal Court, where the judges who hear industrial cases sometimes have no background in industrial relations, this new Court would be composed predominantly of the legally qualified members of the Commission, who would thus hold dual appointments.

Ranger Uranium and the ACTU strategy

This scheme never saw the light of day. When the Industrial Relations Act 1988 was enacted, it contained no mention of unfair dismissal or even of the Labour Court. These omissions can be traced to a key development occurring prior to the Act's eventual passage through Parliament. Union lawyers, particularly at the ACTU, had persisted in the belief that it was possible to find a way to confer on the Commission itself power to order reinstatement of dismissed workers, by first generating a dispute about dismissals and then having individual complaints determined as and when they arose. Their confidence received a boost in late 1987 when the High Court handed down its decision in the

23 *R v Portus; ex p City of Perth* (1973) 129 CLR 312 at 329; but cf *Australian Iron & Steel Ltd v Dobb* (1958) 98 CLR 586.

24 (1984) 8 IR 34; 9 IR 115.

25 See *Slonim v Fellows* (1984) 154 CLR 505; *Re Ranger Uranium Mines Pty Ltd; ex p Federated Miscellaneous Workers Union of Australia* (1987) 163 CLR 656.

Ranger Uranium case.[26] The Court held that the Commission could order the reinstatement of dismissed workers without exercising judicial power, provided it was in each case reaching a conclusion about what was 'industrially right and fair' and creating for those workers alone a new right, rather than enforcing a pre-existing entitlement not to be unfairly dismissed.[27] On the basis of this decision, the ACTU persuaded the Government that the unfair dismissal package was no longer necessary and that the same was true of the Labour Court.[28] Two factors appear to have been prominent in the ACTU's thinking. The first is the very strong preference that unions have for dealing directly with the Commission, with its informality and sensitivity to labour relations, rather than with the courts. This preference appears to be directed specifically to the lay members of the Commission: hence the resistance even to the proposed Labour Court, staffed as it would have been by those who were legally qualified. The second factor is a policy which, at State level, only the New South Wales unions assert with any vigour—the desire to control access to industrial tribunals in reinstatement cases. Under the 1987 Bill, individual workers would have been able to institute complaints of unfair dismissal; under the jurisdiction envisaged in the aftermath of *Ranger Uranium*, access would be confined to unions for reasons to be explained shortly.

For a time, it seemed as if the ACTU's attitude might rob federal award employees of any meaningful protection at all. *Ranger Uranium* had left one key constitutional problem unaddressed, that of interstateness. The matter before the High Court had originated in a dispute which was confined to the Northern Territory. The Commission is empowered to deal with these disputes despite their local character,[29] its jurisdiction being founded not on s 51(xxxv) but on the Commonwealth's plenary power over its territories under s 122 of the Constitution. What then of disputes arising elsewhere? The Court's answer was ambiguous:

> disputes as to the duty to reinstate may be generated in advance of actual termination of employment, and in circumstances in which interstateness is necessary *it may be expected* that they will be generated as interstate disputes.[30]

Many chose to interpret the italicised words as indicating that the interstate element could be easily supplied, though they seemed equally susceptible of a more neutral construction, namely that this was an issue which would need to be addressed when the time arose. The ACTU, responding to what it considered to be an open invitation from the

26 *Re Ranger Uranium Mines Pty Ltd; ex p Federated Miscellaneous Workers Union of Australia* (1987) 163 CLR 656. See McCusker P, 'Federal Jurisdiction: The Power to Order Reinstatement of Dismissed Workers' (1988) 1 AJLL 173; Boulle L, 'Employment Law: Extending the Commission's Reinstatement Jurisdiction' (1988) 1 Corporate and Business Law Journal 82.

27 Cf *Re Cram; ex p Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140. The artificiality of this distinction is highlighted by the fact that in Ranger the relevant award contained a TCR unfair dismissal provision. The Commission's reinstatement order had therefore to be clearly worded so as to make it clear that it was not enforcing that award term but creating a new one!

28 The Labour Court had also been envisaged as playing a key role in a series of new sanctions and compliance provisions. When these too were dropped it was felt that the Court itself was no longer warranted: but cf Stewart A, 'The Industrial Relations Act 1988: The More Things Change . . .' (1989) 17 ABLR 103 at 123-4.

29 *Northern Territory (Self Government) Act 1978* s 53.

30 (1987) 163 CLR 656 at 661 (emphasis supplied).

Court, drew up for its member unions a careful strategy for establishing jurisdiction outside the Territory. This involved generating an interstate dispute by serving on employers a log of claims expressing disquiet about the issue of unfair dismissal generally; but then, rather than seeking any immediate resolution of this dispute, requesting that it be settled by the Commission dealing on an ad hoc basis with each dismissal as it occurred. The Commission would not be exercising judicial power, so long as it did not first lay down a standard and then seek to apply it to each subsequent dismissal.[31] Nor would interstateness be a problem, for it is clear that for the purposes of s 51(xxxv) it is only the original dispute establishing the Commission's jurisdiction that must extend interstate: the Commission is free to opt to settle that dispute in a local and/or piecemeal fashion.[32] The nature of the process would also preclude individual applications, since only the union or unions who were party to the original dispute would have standing to seek what would technically constitute, in each instance, a variation of the original settlement.

Wooldumpers and the prevention power

The objection to this strategy was never that it lacked plausibility,[33] but that it placed all the unions' eggs in one basket. With the decision to do without the statutory proposals, which could in theory have co-existed with the system envisaged, the unions left themselves at the mercy of the High Court's decision on the challenge that employers were bound to mount on the interstateness issue. When that challenge arose in the *Wooldumpers* case[34] the initial impression of many observers was that the ACTU's plans had suffered a stunning reversal. The Court overturned a finding by the Commission that jurisdiction existed to deal with a union claim for reinstatement of a worker dismissed in 1988. The union had argued that the claim fell within the ambit of an interstate dispute created in 1986 by the service of a log demanding, inter alia, that all employment be permanent and that no employee be dismissed without prior union consent. The members of the Court, though adopting different approaches, were unanimous in treating the 1988 claim as being unrelated to the subject matter of the 1986 dispute.[35] The log was interpreted as comprehending a demand for a general regime of employer obligations as to termination of employment rather than a claim for the reinstatement of specific workers based on ad hoc considerations.[36]

31 This is the element distinguishing this strategy from the unsuccessful attempts in *R v Gough; ex p Meat & Allied Trades Federation* (1969) 122 CLR 237 and *R v Portus; ex p City of Perth* (1973) 129 CLR 312.

32 See *R v Isaac; ex p State Electricity Commission of Victoria* (1978) 140 CLR 615; *R v Hegarty; ex p City of Salisbury* (1981) 147 CLR 617.

33 See eg *Fruehauf Trailers Pty Ltd v Vehicle Builders Employees Federation of Australia* (1988) 30 AILR para 426 (reversed by a Full Bench on other grounds: (1989) 31 AILR para 153).

34 Re *Federated Storemen & Packers Union; ex p Wooldumpers (Victoria) Ltd* (1989) 63 ALJR 286.

35 See further Owens R, 'Federal Jurisdiction: The Interstate Character of Disputes Over the Reinstatement of a Dismissed Employee' (1989) 17 MULR (forthcoming); Boulle L, 'Reinstatement in the Commission: Conserving Progress' (1989) 2 AJLL 163.

36 Cf *United Rubber (Australia) Pty Ltd v National Union of Storeworkers, Packers, Rubber and Allied Workers* (Australian Industrial Relations Commission, Print no H9091, 9 August 1989).

The reaction to the decision in some quarters was to revive interest in the 1987 Bill's provisions. Careful scrutiny of the *Wooldumpers* judgments, however, showed that reports of the death (or perhaps more accurately the still-birth) of the Commission's reinstatement jurisdiction had been greatly exaggerated. In the first place, it should be noted that the 1986 log, which of course predated *Ranger Uranium*, was served at a time when it was generally believed that the Commission could not under any circumstances reinstate workers. Gaudron J, with whose reasoning Brennan J concurred, stressed the importance of this factor in concluding that treatment of individual cases was not contemplated by the 1986 demands.[37] It is conceivable then that a claim made since *Ranger Uranium* for the explicit purpose of establishing a mechanism for reviewing individual cases might be upheld where this one was not. This is supported by the following optimistic (if somewhat vague) comment by Mason CJ:[38]

> No doubt there are circumstances in which the making of an award for the reinstatement of employees may become reasonably incidental to the settlement of an antecedent inter-State dispute embracing a claim for the imposition on employers of an obligation to reinstate employees dismissed otherwise than in accordance with the terms of a proposed award.

Far more important, however, are passages in some of the judgments of Mason CJ, Deane and Gaudron JJ which challenge the generally held assumption that a dismissal of a single employee can only in the rarest case generate an interstate dispute in itself. These judgments focus on the fact that 'industrial dispute' is statutorily defined to include a 'threatened, impending or probable dispute' or a 'situation that is likely to give rise' to such a dispute.[39] As Gaudron J put it, '[i]t is not difficult to envisage situations in which the dismissal of an employee or employees might properly be viewed as likely to give rise to an interstate industrial dispute'.[40] It must be remembered that both the Constitution and the Act envisage the 'prevention' of disputes and not merely their settlement. In the past the possibilities of preventive arbitration have gone largely unexplored,[41] but in *Wooldumpers* Mason CJ and Deane J in particular indicated the possibility of the Commission acting to prevent an existing intrastate dispute from extending interstate.[42] Moreover, as Mason CJ observed in discussing the need for any action by the Commission to fall within the ambit of the relevant dispute:[43]

> [T]he award-making power may be subject to fewer restrictions where the Commission is exercising that power for the purpose of preventing a threatened or impending dispute or further disputes. In that context it may be appropriate

37 (1989) 63 ALJR 286 at 296.

38 Ibid at 288.

39 See now *Industrial Relations Act 1988* s 4(1). Mason CJ and Deane J suggested that, if anything, this definition may be narrower than the Constitution would allow: (1989) 63 ALJR 286 at 290, 293.

40 Ibid at 297.

41 See generally Ford W J, 'The Federal Industrial Disputes Power: Comments on Some Constitutional Considerations' in Rawson D and Fisher C (eds), *Changing Industrial Law*, 1984, Sydney, Croom Helm Australia, p 46 at pp 65-78. Cf *Merchant Service Guild of Australia v Newcastle and Hunter River Steamship Co Ltd* (1913) 16 CLR 591 at 633-4, 643-4; *R v Turbet; ex p Australian Building Construction Employees and Builders Labourers Federation* (1980) 144 CLR 335 at 353-6.

42 (1989) 63 ALJR 286 at 289-90, 294-5.

43 Ibid at 288-9.

to allow the Commission a considerable degree of latitude in assessing what is necessary or expedient for the purpose of preventing the dispute or disputes.

Deane J went so far as to suggest that the mere intervention of a national union and employer association in the dispute in question constituted evidence that an interstate dispute was 'likely'.[44] Mason CJ also noted the relevance of the involvement of 'a national union with the capacity by means of the co-operative action of its members to bring about industrial action in more than one State in support of its demand' and commented that this was 'one of the realities of current industrial relations which the Commission has to take into account in exercising its wide-ranging powers'.[45] Gaudron J expressed no specific opinion on the matter: in any event, all three judges considered that, since the Commission here had at all times been purporting to settle the antecedent paper dispute rather than a new and separate dispute created by the dismissal itself, jurisdiction could not be established for the reasons already outlined.

Life after Wooldumpers

The observations in *Wooldumpers* on the prevention power may have a radical effect on the scope of federal industrial jurisdiction generally. For the time being, their effect has already been felt in relation to reinstatement claims. On at least two occasions in the months since the High Court handed down its decision the new Australian Industrial Relations Commission has established jurisdiction wholly or in part on a preventive basis. In *Australian Institute of Marine and Power Engineers v Cape Lambert Services Pty Ltd*[46] a dispute had arisen as to manning levels on tugs operated by the respondent out of Port Walcott in Western Australia. Although the question of manning was the subject of conciliation proceedings in the Commission at the time, the respondent insisted that a particular voyage to Darwin be undertaken with a crew complement smaller than that sought by the unions involved, including the Institute. Those who refused to sail until the question was settled through the Commission were dismissed. The Institute subsequently notified a dispute as to the dismissal of one of these workers, McGuirk. In establishing that the dispute fell within the Commission's jurisdiction, Commissioner Fogarty appeared to rely on three separate grounds: that the dispute had an interstate character because of the fact that the voyage was between Western Australia and the Northern Territory; that McGuirk was a 'maritime' employee within the meaning of s 5(1) of the Industrial Relations Act 1988 and thus that no interstate element was needed;[47] and that, relying on the *Wooldumpers* pronouncements, the Commission had the power to act to prevent an industrial dispute occurring.[48]

44 Ibid at 294-5.

45 Ibid at 289.

46 Print no H8528, 6 June 1989.

47 The Commission's jurisdiction under this section derives from the legislative power in s 51(1) of the Constitution over interstate and international trade and commerce: see *R v Wright; ex p Waterside Workers Federation of Australia* (1955) 93 CLR 528.

48 Commissioner Fogarty subsequently ruled that McGuirk had indeed been unfairly dismissed and that he should be reinstated: *Australian Institute of Marine and Power Engineers v Cape Lambert Services Pty Ltd* (Print no H8975, 21 July 1989).

An even clearer instance is provided by *Australian Social Welfare Union v Stones Corner Training Association.*[49] Funding decisions by the federal government were instrumental in two Community Youth Support Scheme organisations in Queensland amalgamating and, in the process, dismissing two project officers. Their union sought reinstatement, the union secretary declaring in an affidavit that 'the dismissals and the manner in which they arose create significant consternation in the ASWU and has given rise to serious consternation amongst the members of the union in various States'.[50] McBean D P considered that this evidence:

> disclosed that the dispute which might have initially been viewed as one of an intrastate nature has developed into one that is likely to give rise to a 'threatened, impending or probable industrial dispute' .... In the circumstances of this case, there is a clear obligation imposed on the Commission to exercise its preventive powers by conciliation and arbitration to prevent a dispute in one State extending beyond its boundaries.[51]

There is no guarantee, naturally, that this way of proceeding will survive yet another High Court challenge. Nevertheless, the fact that at least three of the present judges have, to a greater or lesser extent, indicated their support should give some cause for optimism. It should also be appreciated that if the Commission is satisfied on the basis of even meagre evidence that a dismissal threatens to provoke interstate dislocation, it will be difficult for such a finding to be overturned, since it is the applicant for review in such a case who bears the burden of establishing a lack of jurisdiction.[52] In these circumstances unions will not be forced to utilise the complicated post-*Ranger* strategy involving antecedent paper disputes, but will need only to give evidence about widespread concern in relation to any given dismissal. There are now foundations for the Commission to take formal jurisdiction over reinstatement claims—and also, it is suggested, over claims for compensation to be paid when reinstatement is considered inappropriate.[53] There is, it is true, divided authority on whether the general capacity of a State tribunal to settle disputes implicitly comprehends the power to order compensation. Victorian[54] and Tasmanian[55] tribunals have been held to possess such a power, while those in New South Wales,[56] Queensland[57] and (though only after a recent about-face) Western Australia[58] have not. Since the position in New South Wales and Queensland at least seems to be more of a matter of faith and tradition than of reasoned analysis, it is hard to think of convincing reasons for denying the power, particularly as it is not disputed that the Commission

49 (1989) 31 AILR para 268.
50 Ibid at p 266.
51 Ibid at p 269.
52 A point indeed stressed by Deane J in *Wooldumpers* (1989) 63 ALJR 286 at 295.
53 See eg *Australian Institute of Marine and Power Engineers v Cape Lambert Services Pty Ltd* Print no H8528, 6 June 1989.
54 See *Royal Children's Hospital v President of the Industrial Relations Commission of Victoria* [1989] VR 527; *Coleman v Aluminium Anodisers Pty Ltd (No 3)* (1988) 30 AILR 474.
55 See eg *Application by Federated Clerks Union* (Tasmanian Industrial Commission, T1692 of 1988, 7 December 1988).
56 See *Re Clerks, Insurance (State) Conciliation Committee* [1931] AR (NSW) 354.
57 See *Re Williams* (1983) 114 QGIG 118. Cf *Re Gauld* (1988) 127 QGIG 727.
58 See *Robe River Iron Associates v Amalgamated Metal Workers and Shipwright Union of Western Australia* (1987) 68 WAIG 11.

can order severance payments in favour of those dismissed by reason of redundancy.[59]

There are, however, a number of problems with the current position. Some are more apparent than real. Although there is no mechanism in the 1988 Act for enforcing a reinstatement order as such, employer compliance can effectively be ensured by having the Commission specifically provide as a term of the reinstatement award that a separate penalty (which would be up to $500) is to accrue for each day on which the award is not observed.[60] And although the Commission could theoretically apply any standard of its choosing in determining how best to settle dismissal disputes, it would be surprising if it did not in practice choose (as the New South Wales tribunals currently do) to inquire whether each dismissal was 'harsh, unjust or unreasonable', applying the familiar State tribunal standards of 'industrial justice' or 'industrial fair play':[61] as long as it was careful to remain on the correct side of the arbitral/judicial power line.

The real difficulty is in seeing that the present jurisdiction, such as it is, is going to benefit any more than a handful of workers. Extrapolating from the State statistics, it would not seem unreasonable to suppose that there are up to (and possibly even more than) 5000 dismissals each year of federal award workers which, if they fell within the Victorian or South Australian systems, would be the subject of applications for relief. It is hard to see even a tenth of this number obtaining access to the federal Commission. This pessimism is based partly on the New South Wales experience of union monopoly on access, partly on the trouble which must be taken to establish jurisdiction, partly on the lack of clear and regular procedures: but mostly on the lack of Commission resources for handling such a workload, especially when one considers the inevitably localised character of many dismissals.

Gregory v Philip Morris and the contractual enforcement of awards

Bearing this in mind, the decision of the Full Court of the Federal Court in *Gregory v Philip Morris Ltd*,[62] sanctioning the contractual enforcement of *TCR* clauses in federal awards which prohibit unfair dismissal, assumes particular significance. For those who are not union members, or whose union refuses to notify a dispute to the Commission, or who have no interest in reinstatement (which is likely to be the principal focus of union claims notwithstanding the point made above as to the likely availability of compensation), an action alleging breach of contract and seeking common law damages for wrongful dismissal may well prove to be the best of a poor set of options.

59 See *Clothing and Allied Trades Union of Australia v Dundee Fashions Pty Ltd*, (1987) 23 IR 1.

60 See *Industrial Relations Act* 1988 ss 111(1)(e), 178(4)(a)(i). Compensation would be recoverable as 'a payment . . . due to the employee under [an] award or order' (ss 178(6), 179).

61 See eg *Re Loty and Australian Workers Union* [1971] AR (NSW) 95 at 99; *Minchin and Gorman v St Jude's Child Care Centre* (1973) 40 SAIR 106 at 116-7.

62 (1988) 80 ALR 455.

Gregory concerned an electrician who had been deposed from his position as an Electrical Trades Union shop steward for supporting an Amalgamated Metal Workers Union claim for wage parity for all tradesmen working for the respondent employer, and was then purportedly expelled from the union. He was dismissed pursuant to a closed shop policy operating at the plant, the respondent refusing to reinstate him even when the union conceded that the expulsion was invalid. The Full Court ruled that this dismissal contravened 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'.[63] Besides ordering the payment of a penalty under s 119 of the 1904 Act, the ordinary statutory remedy for breach of award, Wilcox and Ryan JJ also found the employer liable for breach of contract, awarding the plaintiff $30,000 in damages.[64]

The case raises a number of important issues. Those which relate generally to contractual remedies for wrongful dismissal are considered in the second part of the article, as is the 'sequel' decision of Gray J in *Wheeler v Philip Morris Ltd.*[65] For present purposes two questions may be asked. The first is as to the number of workers who may take advantage of the decision. Those covered by the State industrial systems may be discounted: since the unfair dismissal regimes created by the States depend on the ad hoc resolution of individual claims rather than on the creation of general award obligations, there appears to be no way in which it can be said that a right not to be unfairly dismissed is or can be imported into their contracts. *TCR* provisions do now appear to be widespread in federal awards, on the other hand, but can all the workers who are covered by these awards maintain contractual actions if they are breached? This necessitates an examination of the reasons advanced by Wilcox and Ryan JJ in *Gregory* for concluding that clause 6(d)(vi) formed part of the plaintiff's contract. Somewhat curiously, there has only ever been sporadic authority for such a proposition,[66] though in a 1986 Tasmanian case it was held that an award term requiring meal breaks was incorporated into a worker's contract of employment.[67]

Wilcox and Ryan JJ advanced two explanations for their conclusion. One was that the parties had impliedly agreed to the incorporation, in the sense that they would necessarily have agreed to this result had they thought about the matter at the time of entering into the contract.[68] In this instance, the plaintiff's implied acquiescence to the award terms could be taken for granted, given his prominent role in union affairs. What is not clear is why the employer's agreement should have been regarded as inevitable and there is much force in the doubts expressed

63 For criticism of the approach taken by the Full Court to the interpretation of this clause, see Naughton R and Stewart A, 'Breach of Contract Through Unfair Termination: The New Law of Wrongful Dismissal' (1988) 1 AJLL 247 at 253-5.

64 Jenkinson J dissented, both as to the quantum of damages (he would have awarded $15,000) and as to the appropriate cause of action, which he saw as resting in the tort of breach of statutory duty: but cf Naughton and Stewart, ibid at 259.

65 Federal Court of Australia, V 4 of 1988, 23 June 1989.

66 See eg *True v Amalgamated Collieries of WA Ltd* (1938) 59 CLR 417 at 431; *R v Gough; ex p Meat & Allied Trades Federation of Australia* (1969) 122 CLR 237 at 246.

67 *Nunn v Chubb Australia Ltd* [1986] Tas R 183.

68 (1988) 80 ALR 455 at 479-80.

by Jenkinson J as to whether the parties would have unhesitatingly consented to the incorporation.[69] The other rationale advanced by the majority to support incorporation is rather more convincing. Relying on the judgment of Dixon J in *True v Amalgamated Collieries of WA Ltd*,[70] Wilcox and Ryan JJ stated that an award provision 'imports a term into the contract of employment independently of the intention of the parties'.[71] The precise explanation (though the judgment is far from clear on this point) is presumably that the statute pursuant to which the award is made (in this instance, the Conciliation and Arbitration Act 1904) must be construed as requiring that award terms automatically acquire contractual force. If this is correct, a *TCR* clause would be incorporated generally rather than selectively into employment contracts. There would also seem to be no scope for the reasoning employed by the High Court in *Josephson v Walker*,[72] where it was held that civil actions seeking to enforce awards must be taken to be excluded by the presence of effective statutory enforcement procedures. This point was not raised in *Gregory*, but the absence of any procedure in either the 1904 or 1988 Acts for recovering damages for breach of an award would suggest that the *Josephson* principle would be no obstacle to the type of claim mounted in *Gregory*.[73]

The second outstanding question relates to the appropriate forum for contractual actions in relation to federal awards. Actions for breach of contract are normally brought in the relevant State court, but the lengthy court delays now being experienced in several States might well make it advisable to institute proceedings in the Federal Court. In *Gregory* the plaintiff achieved this by seeking the imposition of a penalty and then successfully arguing that the Court had 'accrued' jurisdiction over the associated contractual claim.[74] Where no statutory penalty can be sought—for instance where the plaintiff is a non-unionist—jurisdiction will only be established if it is shown that the action falls within the cross-vesting scheme.[75] If an action to enforce a term imported into a contract by a federal award is considered to be nothing more than an ordinary contractual claim, then the only problem will be the possibility of the Court granting an application to remove the matter to a State court on the ground that it is a more appropriate forum.[76] But if, on the other hand, such a claim were interpreted as arising 'by reason of' the Industrial Relations Act 1988, a quite plausible if yet untested view, then it would not fall within

69 Ibid at 459. The majority also supported their finding by suggesting that, if terms were not implied to incorporate the award terms, the 'contract would lack content' on important matters (ibid at 479). This is clearly incorrect, for in the absence of agreement 'reasonable' terms would be implied as a matter of law.

70 (1938) 59 CLR 417 at 431.

71 (1988) 80 ALR 455 at 478-9.

72 (1914) 18 CLR 691.

73 See *Alexander v Australian National Airlines Commission* (1987) 74 ALR 285.

74 See *Fencott v Muller* (1983) 152 CLR 570.

75 See *Jurisdiction of Courts (Cross-Vesting) Act 1988* (NSW) s 4(1) and similar legislation in other States. Note that cross-vested jurisdiction would require an action to be commenced in the General Division of the Federal Court rather than the Industrial Division: see *Federal Court Act 1976* s 13(2).

76 See *Jurisdiction of Courts (Cross-Vesting) Act 1988* (Cth) s 5.

the scheme[77] and thus, accrued jurisdiction apart, would only be capable of being commenced in a State court.

COMMON LAW REMEDIES FOR WRONGFUL DISMISSAL

Historically, opportunities for wrongful dismissal suits have been limited. For many private sector workers, the sole fetter on their employer's right to terminate relations has traditionally consisted of a procedural requirement of notice. Although the *Termination, Change and Redundancy Case*[78] signalled a substantial increase in notice periods stipulated by awards, those periods being fixed in part according to length of continuous service, this in itself has had little impact at the litigation level. In so far as wrongful dismissal consists of a failure to give notice, the only employers who will be caught out will be those too impatient to give the appropriate notice or who cannot identify conduct on the worker's part which would justify summary dismissal.

Reinstatement and the rule against specific performance

Moreover, even where wrongful dismissal is established, the remedies available to all but a few workers have generally offered such meagre rewards as to make the enormous time and expense of a civil action a worthless gamble. In the first place, it will rarely be practicable for the employee to keep the employment relationship alive.[79] Theoretically, the employer's purported dismissal is no more than a repudiation of the contract which the employee may elect not to accept as determining the contract.[80] In practice, however, this right to affirm the contract may have negligible value. If the employer refuses to allow any work to be done, the employee will typically be unable to assert that wages are payable for any period of enforced idleness, but rather will be left to claim damages.[81] If the employee is to secure reinstatement, therefore, he or she must wait out the substantial period from the time of dismissal to the conclusion of litigation without a regular source of income: for

77 The explanation being that this form of federal jurisdiction is expressly exempted from being cross-vested: *Jurisdiction of Courts (Cross-Vesting) Act 1988* (NSW, etc) s 3(1). The author is grateful to Professor James Crawford for drawing his attention to this point.

78 (1984) 8 IR 34; 9 IR 115.

79 See *Wheeler v Philip Morris Ltd* (Federal Court of Australia, V 4 of 1988, 23 June 1989), pp 67-70 of judgment print; *Ford v Council of the City of Lismore* (1989) 31 AILR para 159 at p 160.

80 *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435; *Gunton v Richmond-upon-Thames London Borough Council* [1980] 3 All ER 577. The same analysis may be used for any action by the employer which, while not a dismissal in itself, constitutes a repudiation of the employment contract: see eg *Rigby v Ferodo Ltd* [1988] ICR 29 (unilaterally imposed pay cut).

81 *Watson* (1946) 72 CLR 435; *Gregory v Philip Morris Ltd* (1988) 80 ALR 455 at 480. See generally McCarry GJ, *Aspects of Public Sector Employment Law*, 1988, Sydney, Law Book, pp 185-202.

acceptance of an alternative position will almost certainly be viewed as an election to treat the contract as terminated.[82]

In any event, even if the employee survives this period, it is unlikely that any order in the nature of specific performance will be granted to compel the employer to restore relations, on the basis that 'trust and confidence' will be lacking between the parties.[83] In *Turner v Australasian Coal & Shale Employees Federation*[84] it was pointed out that this concern is redolent of a different era, when the typical employment relationship (or more accurately the domestic master/servant paradigm which so permeates the common law of employment) was more personal in nature. However in *Gregory v Philip Morris Ltd* Wilcox and Ryan JJ, while conceding that 'it may be that, under modern conditions and in connection with large employers, the general principle will not apply',[85] nevertheless reiterated the importance of trust and confidence. As they pointed out, most of the cases regarded as challenging the orthodoxy, where an injunction has been granted to restrain a dismissal or a declaration recognising the employment contract's subsistence has been made, may be explained on the basis that trust and confidence remained between the parties[86] and/or that the employee was seeking to keep the contract alive for a specific and temporary reason such as the accrual of rights through length of service,[87] or to allow for a contractually required procedure to be completed.[88]

A good illustration of this sort of exceptional case is provided by *Powell v Brent London Borough Council*,[89] where the plaintiff, who was appointed to a post but then asked to relinquish it when one of the unsuccessful candidates challenged the appointment process, obtained an interlocutory injunction to restrain any action being taken against her pending a trial of her action to establish that her appointment was indeed valid. She had already been working satisfactorily in the post for some months, the employer had no personal quarrel with her, and the Court of Appeal saw no difficulty in resisting the contention that the general rule should be applied. *Gregory*, on the other hand, exemplifies the type of case where specific performance would probably never be ordered on any approach. Considerable antagonism towards the plaintiff existed amongst most ETU members and his reinstatement would undoubtedly have caused unrest. While, however, the decision not to grant the plaintiff injunctive relief was understandable in the particular circumstances, it remains difficult to see why the judiciary has so much difficulty with the concept of ordering reinstatement. There is no evidence to suggest that

82 See *Gunton v Richmond-upon-Thames London Borough Council* [1980] 3 All ER 577 at 589. Cf *Ford v Council of the City of Lismore* (1989) 31 AILR para 159 at p 160 (temporary work may not be fatal, provided employee remains ready and willing to work for original employer).

83 See eg *Lucy v Commonwealth* (1923) 33 CLR 229 at 237; *Thorpe v South Australian National Football League* (1974) 10 SASR 17; *Ali v Southwark London Borough Council* [1988] ICR 567.

84 (1984) 55 ALR 635 at 648-9.

85 (1988) 80 ALR 455 at 481-2.

86 See eg *Hill v C A Parsons & Co Ltd* [1972] Ch 305.

87 See eg *Hill* [1972] Ch 305.

88 See eg *Irani v Southampton & South West Hampshire Health Authority* [1985] ICR 590. See also *Baker v Corporation of the City of Salisbury* (1982) 101 LSJS 272.

89 [1988] ICR 176.

the robust use of the remedy by State industrial tribunals has caused chaos or hardship, probably because in cases where difficulties would genuinely arise the tribunals are capable of recognising reality, either making no order or seeking some compromise such as re-engagement in a different position. There is no reason why, in the light of this experience, the common law could not reverse its presumption and order specific performance unless the evidence disclosed a reason for not doing so.[90]

Damages: the major limitations

As for the alternative remedy of damages, the capacity of ordinary workers to recover meaningful sums by way of compensation for the deprivation of their job is severely circumscribed by the cumulative effect of three principles. The first is that the maximum compensable loss consists primarily of the remuneration foregone from the date of dismissal to the earliest date at which the employer could lawfully have terminated the contract.[91] 'Remuneration' here includes not just wages or salary as such, but also the pecuniary value of other benefits (such as the provision of a motor vehicle or of health insurance, for instance) to which the employee has a contractual and not merely moral entitlement.[92] In the case of employees who are entitled only to a few weeks' notice, the maximum recoverable will not be large. However, account will be taken of any entitlements (for example, under a superannuation scheme) to which the employee would have had some claim, or a greater claim, but for the unlawful dismissal.[93] Secondly, the doctrine of mitigation ensures that no account will be taken of any loss that the plaintiff could reasonably have avoided, especially by seeking alternative work of a comparable nature.[94] Unless the employee's skills are in over-supply, or the position formerly occupied is of a kind not readily available elsewhere, the amount of compensation recoverable will shrink further. Thirdly, non-pecuniary loss, such as distress, humiliation or injury to reputation, is rarely compensable:[95] though it is occasionally open to some workers, particularly in the entertainment industries, to claim that, since the opportunity to enhance their reputation is an inherent aspect of their employment, the deprivation of that opportunity through their wrongful dismissal should be the subject of compensation.[96] The net result of these three principles is that the common law has usually been a worthwhile avenue for redress against wrongful discharge only in the case of managerial or other highly paid employees who (a) work on fixed term contracts or contracts

90 Cf Ewing K D and Grubb A, 'The Emergence of a New Labour Injunction?' (1987) 16 Ind LJ 145.

91 See *Gunton v Richmond-upon-Thames London Borough Council* [1980] 3 All ER 577.

92 See *Laverack v Woods of Colchester Ltd* [1967] 1 QB 278.

93 See eg *Ryan v Commonwealth* (1936) 57 CLR 136; *Ford v Council of the City of Lismore* (1989) 31 AILR para 159.

94 See eg *Brace v Calder* [1895] 2 QB 253. Conversely, the employee is not necessarily expected to accept different or inferior work: see *Truth & Sportsman Ltd v Molesworth* [1956] AR (NSW) 924.

95 See *Addis v Gramophone Co* [1909] AC 488; *Tucker v Pipeline Authority* (1981) 3 IR 20; *Bliss v South East Thames Regional Health Authority* [1987] ICR 700. Cf *Cox v Phillips Industries* [1976] ICR 138.

96 See eg *Clayton v Oliver* [1930] AC 209.

terminable only by a lengthy notice period, and (b) cannot readily find comparable employment elsewhere.

This bleak picture assumes, of course, that no requirement is imposed on the employer to establish that a good cause existed to justify the relevant dismissal. Certainly, there is no sign that the Australian common law is capable of matching the dynamism of the modern American courts in utilising notions of good faith, public policy or due process to generate contractual or tortious remedies where just cause is lacking.[97] There are, however, two types of fetter on an employer's power to terminate which may increasingly impact on the quantum of damages recoverable in a wrongful dismissal suit. One is the requirement that a particular procedure be followed before any decision is taken to dismiss an employee; and the other is an award provision prohibiting unfair dismissal.

Damages for breach of procedure

The most common context in which a set procedure must be followed before a dismissal can be effected is in public sector employment. For the most part specific rights of appeal and/or judicial review are available to ensure that these procedures are followed:[98] though it will occasionally happen that a statutory procedure has contractual force alone, the parties having expressly or impliedly agreed to its incorporation.[99] There will also be some instances in the private sector in which a procedure adopted by an employer and formulated, for instance, in an administrative handbook will be capable of being regarded as incorporated by implied agreement into the relevant contracts of employment.[100]

Where an employer fails to comply with a contractually incorporated procedure in dismissing a worker, there is some controversy as to the appropriate assessment of damages. In two English cases, *Gunton v Richmond-upon-Thames London Borough Council*[101] and *Dietman v Brent London Borough Council*,[102] damages were awarded for wages lost from the date of dismissal to the notional date of completion of the disciplinary procedure. This approach has been criticised, on the basis that the court should also have awarded damages for loss of the chance to convince the disciplinary enquiry not to proceed with the dismissal.[103] Arguably, however, a distinction should be drawn between the two cases. In *Gunton*

97 See Gould W B, 'The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework' [1986] Brigham Young ULR 885 at 887-9, 899-904.

98 See generally McCarry G J, *Aspects of Public Sector Employment Law*, 1988, Sydney, Law Book, chs 6-7; Smith G , *Public Employment Law*, 1987, Sydney, Butterworths, chs 4-5.

99 See eg *Tucker v Pipeline Authority* (1981) 3 IR 20; *Burns v Australian National University* (1982) 40 ALR 707; *Irani v Southampton & South West Hampshire Health Authority* [1985] ICR 590.

100 Reported cases are rare, but cf *Australian Trading Co Ltd v Jones* [1925] VLR 273. A further source may be a collective agreement negotiated and operating outside the conciliation and arbitration systems: see generally Mitchell R J and Naughton R B, 'Collective Agreements, Industrial Awards and the Contract of Employment' (1989) 2 AJLL (forthcoming).

101 [1980] 3 All ER 577.

102 [1987] ICR 737. The decision was affirmed by the Court of Appeal without reference to the question of damages: [1988] ICR 842.

103 See McMullen J, 'Summary Dismissal—Legality and Remedies' (1988) 17 Ind LJ 182 at 186-7.

the employer's right to dismiss was fettered only by the need to follow the appropriate procedure: no matter what the outcome, the employer would retain the power to dismiss. The employee's contractual expectation was thus limited to remaining employed for the period of the procedure and to the chance of a favourable outcome. There is certainly force in the suggestion that both expectations warranted recognition, though it may be that the chance of success was too dependent here on the employer's entirely subjective discretion to be compensable.[104] In *Dietman*, on the other hand, the disciplinary procedures were designed to elicit a finding as to whether 'gross misconduct' had occurred so as to justify the dismissal. The difference from *Gunton* is that here the employer's right to terminate was fettered by the need to bring the case within an objective standard. Since the court was satisfied that no gross misconduct had occurred, the plaintiff could not lawfully have been dismissed on this ground. Her damages, therefore, should have been for loss of the chance to remain in employment indefinitely, not to succeed at the hearing. This would have meant compensation for loss of remuneration and other benefits up to her projected date of retirement, discounted to take account both of the possibility of a lawful dismissal for gross misconduct and of her potential earnings from alternative employment.[105]

Damages for unfair dismissal

Much the same sort of questions arise in relation to the damages obtainable where a provision forbidding dismissal in circumstances that are unfair is incorporated into a contract of employment. Following *Gregory v Philip Morris Ltd*,[106] of course, the principal source of such a provision will be a federal award. It should also be noted, however, that in *Gregory* the plaintiff sought to argue that another unfair dismissal provision, similar to that in the relevant award, but contained in a collective agreement operative at the defendant's plant, was also incorporated into his contract. The argument succeeded at first instance,[107] but was rejected by the Full Court on appeal on the basis that the provision was not sufficiently 'individuated' for incorporation. Since the same could just as easily be said of the award term, this aspect of the Full Court's decision seems more than a little suspect. In any event, it would seem open for other employees covered by similar agreements but not by appropriate award terms to use those agreements as a basis for a wrongful dismissal claim, provided the requirements of incorporation are met.[108]

On the face of it, *Gregory* appears to open up the possibility of wrongful dismissal claims to a much wider class of worker than has hitherto been the case. The importation of a requirement of fair treatment has two significant effects. In the first place, it renders all dismissals potentially wrongful: the employer cannot preclude challenge merely by opting to give full notice. Secondly, and just as in procedure cases such as *Dietman*,

104 Cf *Fink v Fink* (1946) 74 CLR 127.

105 See eg Re *English Joint Stock Bank* (1867) LR 4 Eq 350; *Lucy v Commonwealth* (1923) 33 CLR 229 at 255.

106 (1988) 80 ALR 455.

107 (1987) 77 ALR 79.

108 See generally Mitchell R J and Naughton R B, 'Collective Agreements, Industrial Awards and the Contract of Employment' (1989) 2 AJLL (forthcoming).

it should logically modify the operation of the first of the restrictive principles quoted above in regard to the recovery of damages. If an employment contract can only be lawfully terminated by the employer giving the appropriate notice *and* in circumstances that are not unfair, it stands to reason that the wrongfully dismissed employee's basic claim is for loss of wages from the date of dismissal to the earliest time at which that employee might *fairly* have been dismissed. Now unless there is positive evidence before the court to suggest a real possibility of this occurring (such as a poor disciplinary record, or an impending plant closure), logically the relevant date ought to be that of the employee's projected retirement. The consequences of that view may well be too unpalatable for most courts, who might be expected to settle for awarding compensation for the loss of the *chance* of indefinite employment, an approach which would produce rather more manageable sums. This indeed is what the court in *Gregory* appears to have done, more or less,[109] in fixing the plaintiff's damages at $30,000, a substantial amount by Australian standards.[110] Indeed the figure could have been even higher had the court not elected to deduct notional income tax before settling on that sum.

It is interesting to compare the approach taken to assessment of damages in *Wheeler v Philip Morris Ltd*,[111] a case which arose in the aftermath of *Gregory*. The plaintiff was an electrician who had been a supporter of the dismissed Gregory, though he himself 'escaped' by being suspended on full pay and then transferred to a different part of the workplace. He was dismissed six months later for alleged negligence in erroneously disconnecting a machine and causing a substantial loss of production. Gray J, after exhaustively reviewing the evidence, found that the plaintiff had to some extent fallen below the standard of skill expected of someone in his position, but that his lapse was more than outweighed by the failure of the relevant managers to investigate the incident properly or to give him a fair chance to put his side of the story before dismissing him. The defendant also asserted that the plaintiff's performance had deteriorated significantly in a general sense since his return to work, but Gray J considered that the more probable view was that the plaintiff's supervisor was 'excessively demanding or critical'. Finding the dismissal 'harsh, unjust or unreasonable' under clause 6(d)(vi) of the Metal Industry Award 1984 and imposing a penalty of $900 for breach of award, the judge turned to consider the question of damages for breach of contract, accepting the *Gregory* reasoning that the provision was incorporated into the plaintiff's contract:[112]

> As is apparent from [*Gregory*], the damages which can be awarded for a breach of a term such as that implied by cl 6(d)(vi) of the Award are to be assessed

109 For criticism of the somewhat vague 'calculations' made by the court, see Naughton R and Stewart A, 'Breach of Contract Through Unfair Termination: The New Law of Wrongful Dismissal' (1988) 1 AJLL 247 at 257-8.

110 Though miniscule, of course, compared to the occasional seven-figure awards by American juries to wrongfully discharged employees who can bring themselves within one of the exceptions to the American common law principle that employment may be terminated at will: see Gould W B, 'Stemming the Wrongful Discharge Tide: A Case for Arbitration' (1987) 13 Employee Relations LJ 404 at 405-6. These figures, however, are usually swollen by a substantial punitive damages component: though cf *Foley v Interactive Data Corp* (1988) 254 Cal Rptr 211.

111 Federal Court of Australia, V 4 of 1988, 23 June 1989.

112 Ibid, p 72 of judgment print.

differently from damages calculated for wrongful dismissal at common law. Those damages were limited to the period of notice which the employer was obliged to give. Where the dismissal is the result of a breach of award, damages will be assessed for loss of the opportunity to continue the employment, discounted appropriately for foreseeable events which might have brought the employment to an end .... In the present case, the applicant's employment with the respondent, if it had continued, would have been protected by cl 6(d)(vi) of the Award, so that the applicant could only have been dismissed validly if the termination of his employment was not harsh, unjust or unreasonable.

This is in line with the approach suggested above, except in so far as it erroneously suggests that something other than the ordinary 'common law' measure for damages is being applied. The only reason why damages for wrongful dismissal have usually been limited to wages lost during the notice period is that in the past most contracts have been terminable by notice alone. The position which Gray J goes on to outline is perfectly consistent with the overriding common law principle that '[w]here a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed'.[113] In any event, Gray J proceeded to calculate the plaintiff's loss. The evidence disclosed no particular reason why the plaintiff would not have been employed by the defendant for a further 13 years until his retirement. During this period he would have received various benefits including wages, allowances, superannuation and leave entitlements and health cover. On the other hand, account had to be taken, albeit imprecisely, of various contingencies, including early retirement, death or disability, or circumstances justifying his dismissal.

Rather than plucking a figure out of the air, as the Full Court appeared to do in *Gregory*, Gray J elected to attempt to assess the plaintiff's foreseeable pecuniary loss. He had been unemployed for a few weeks following the dismissal, then ultimately engaged on a significantly lower salary by the Australian Postal Commission. After allowing for the receipt from the defendant of five weeks' pay in lieu of notice, Gray J awarded the difference between the wages actually received by the plaintiff and those he would have received from the defendant up until the end of the trial; plus a further amount of $12,000, 'this being the future loss, discounted in respect of the possibility of promotion [in his new job], as well as the possibility that other events might have brought about the end of the applicant's employment with the respondent or the reduction of his income from overtime':[114] making $36,822.59 in total (not including a possible interest component). It should be noted that Gray J used gross figures for this purpose, having concluded on an analysis of the relevant authorities that no deduction should be made for notional income tax on the lost wages, the damages award itself being taxable in the hands of the recipient. This appears to be entirely correct,[115] though it is contrary

113 *Robinson v Harman* (1848) 1 Exch 850 at 855.

114 V 4 of 1988, 23 June 1989, p 77 of the judgment print. Note the similarity of this approach to that taken by the South Australian Industrial Commission in awarding compensation for unfair dismissal to employees who have mitigated their loss by finding lower paid jobs: see Stewart A, *Unfair Dismissal in South Australia*, 1988, Adelaide, Corporate & Business Law Centre, pp 60-1.

115 See Stewart, ibid, pp 61-3.

to the approach adopted (albeit without the appearance of careful consideration) by the Full Court in *Gregory*.

Not all wrongfully dismissed workers will benefit as much as Messrs Gregory and Wheeler from this new type of wrongful dismissal claim. The mitigation principle remains intact, so that any worker who can reasonably be expected to find or who does find alternative employment with comparable remuneration will receive compensation only for wages lost up to that point. As a fifty-five year old who was now offside with his union in a major way, Gregory's job prospects were not bright, so that mitigation would only cut in after a substantial period. Wheeler, as was seen, could only get work at a substantially lower wage. Other workers will not tend to be as 'fortunate', so to speak. Moreover, it should be recalled that the other principles of loss assessment also remain intact, so that no account is taken of a plaintiff's loss of accrued job security or of self-esteem. Given these restrictions, as well as the rejection of reinstatement as a primary remedy, a truly viable law of wrongful dismissal still seems a long way off.