Zealand model and the State of New South Wales has a comparable system. But Tasmania and Victoria use the Wages Board system.

A similar lack of uniformity characterises the approach to such central matters as the legal status of registered trade unions and the legality of, and consequences for, strike action. In N.S.W. the legal status of a registered union is obscure. Neither the Trade Union Act nor the Industrial Arbitration Act expresses an incorporation of the registered union. Registration under the Commonwealth Conciliation and Arbitration Act expressly incorporates the union. Little imagination is needed to envisage the quite astonishing complexities which can therefore revolve around the one group of workers who are registered under three Acts in two different jurisdictions.

Enormous problems are created for the internal administration of such a group and its external relations are equally vexed. Take for instance the growing trend for employers to seek common law claims for damages as the result of direct industrial action by a union. If the defendant union is a Queensland union, or has a Queensland branch, then complications immediately arise as that State is the only State to have enacted legislation based on the Trade Disputes Acts in the United Kingdom, the effect of which is to immobilise a trade union from tort actions committed in the course of a trade dispute.

Extraordinary difficulties also arise when an internal quarrel erupts within a union. The rules of the State branch may not parallel the rules of the federal organisation to which it is affiliated. What if the membership qualification is wider in the branch than the central body? In these circumstances who is entitled to vote, or stand for office, in the central body? Who can challenge allegedly improper expenditure of funds? Which body does an employer move against if he seeks, say, the de-registration of the union? Does he name the federal body or the State body? And so the questions go on and on.

What should be noted is that these and similar questions are being aired and they are being raised in legal actions. And what emerges from the litigation is this: the various tribunals are actively and openly asserting their pre-eminence in the industrial relations arena. Put another way it is fair to say that trends towards collective bargaining and a de-centralisation of the industrial relations systems have been strongly resisted by the traditional tribunals and by the new Federal Government.

Repeatedly whilst in Opposition and again now in Government the Liberal-Country Party coalition has emphasised that rules must be established that carry consequences” and that “the authority of the Conciliation and Arbitration Commission must be re-established.” Legislation is pending which it is anticipated will translate these beliefs into law. Already there are hints that the “consequences” may well include sequestration of union funds, fines imposed on unions, the exclusion from office of industrial officers of employer associations, the officials of workers associations, and the recovery of damages by an individual who has suffered damage as the result of an unfair industrial practice. It will be interesting to see how unfair industrial practices are defined. Obviously the so-called “political strike” will be high on the list.

* J. A. FARMER

Members of the Industrial Relations Society will know that submissions were last year presented on its behalf to the Parliamentary Committee Inquiry into the Labour Government’s Severance and Re-employment Bill. Those submissions appeared to be well received and therefore the Hon. J. B. Gordon, the present Minister of Labour and a member of the Committee, had no hesitation in accepting an invitation to address the society on the question of redundancy. This he did in Auckland on 11 May of this year in a prepared address, subsequently answering questions and taking part in what was at times a spirited discussion from the floor.

The Minister began by making it clear that the proposals for the National Government’s legislation on redundancy which he intended outlining were tentative only, though based on Cabinet discussion. He further invited the audience to comment and suggestions as to the form that such legislation should take. By way of comment, it may be noted that neither the Labour nor the National Government appear to have publicly considered whether any legislation was desirable or whether, on the other hand, other more informal measures for dealing with the problem could be explored. There had of course in the past year or two been increasing negotiation of redundancy deals in many industries. These had however not necessarily been welcomed by either Government, in their mutual concern to control increases in remuneration. Consequently, a few weeks ago the Government will have given consideration to the fact extended its wage controls to cover the quantum of redundancy benefits agreed between employers and unions. (See Amendment No. 8 to the Wage Adjustment Regulations 1974).

That the Government did not entirely favour bargaining over redundancy was emphasised by Mr Gordon when he said that this had led employers in the private sector “being picked off deliberately by some unions.” The Government was also concerned, he said, at the inclusion in a recent collective instrument in the building industry of both severance pay and a completion payment, to be made to tradesmen who commenced a job at its inception and saw it through to completion.

Additionally, again in the building industry, agreement to allow tradesmen to "cash-in" accumulated sick pay and the ability to carry this right from one employer to another were thought to compound the problem.

The Minister thereafter sought to provide three basic definitions which he said would be required in any new legislation. These were:

1. Redundancy — would cover permanent workers on long-term employment.

2. Severance pay — applicable basically to workers whose employment would be terminated when a particular job or site work had been completed.

3. Completion pay — payable to a man who accepts responsibility for finding replacement employment but who serves right through the job, not abandoning it in the last stages.

So far so good. However, Mr Gordon then outlined tentative legislative definitions of redundancy and severance which did not appear to accord fully with his concepts described above. Redundancy, he said, "is where an employee who has achieved or worked continuously and/or permanently for 104 weeks for the same employer or agency is superfluous to the

* J. A. FARMER is President of the New Zealand Industrial Relations Society.
needs of that employer and he cannot find a job of equal remuneration and no less job satisfaction, or on the other hand, could come about by mutual consent, by dismissal for cause, by unilateral termination on either side, by operation of law or by performance.

Even lawyers in his audience found these concepts puzzling but Mr Gordon then compounded the confusion when he then said:

"Where the employer terminates the contract of employment because the employee’s position has become superfluous, severance is caused by redundancy.

But surely, some were seen to be murmuring, that’s where we started?"

Mr Gordon, however, then turned to more solid ground by posing the question as to where responsibility for payment of compensation should rest — with the employer or with the State (or taxpayer)? If, he said, the redundancy was bad management in a firm, then liability should fall on that firm. If, on the other hand, "extraordinary circumstances, economic or otherwise, that may possibly be the dictate of government fiscal policy, or indeed brought about by government action cutting across employment within a specific firm" were the cause, then, said the Minster, "there is logic for the argument that the government should have some responsibility." "All the responsibility?" some were heard to wonder.

Mr Gordon then turned to the Labour Bill, still before the House and suggested that the present Government might extend the powers of the retraining and re-employment Board to include dealing with specific cases of redundancy as they arise. Specifically, if a skilled person made redundant could be found another job before his holiday pay ran out, then he would not receive redundancy pay. If, however, he could not be found a job then he would for a period receive normal unemployment benefit made up by redundancy pay to his previous wage. Some indication of the "period" envisaged was then given when the Minster referred to the recent restriction of a week for every year of employment contained in the Wage Adjustment Regulations.

It was thought that disputed cases should go to a special tribunal rather than to the Industrial Court. The composition of the Board was also spelled out. It would probably have two trade unionists or it (total membership — five), Mr Gordon said. He then considered the all-important question of funding:

“Dare one suggest that a simple way out could be to make it a tripartite paying agreement with the worker, the employer and the Government paying a third each?”

This solution he thought, however, not to be acceptable in many quarters. No further suggestions or alternatives were forthcoming, though mention was made of the fact that employers had agreed with the Labour Government to pay 0.25% of all wages as a levy for re-training and re-employment.

The Minister concluded his address by considering a number of miscellaneous and consequential matters — qualifying periods (2 years in case of redundancy, severance or retraining), seasonal work (non-qualifying), offers of alternative employment, levels of compensation, redundancy in the State Services, the unsatisfactory features of wage and redundancy pay fixing by government regulatory process.

Finally, there came an appeal to all to help the Government by making "a worthwhile contribution to try and find the right answer for the future of the workforce of New Zealand."

What insights did the Minister give? He certainly provided a good guide, as he said he would, to the Government’s thinking on the legislation it wishes to see enacted later this year. As to the basic concepts of redundancy, severance etc., however, we must await the exercise of the legislative draftsmen’s pen before we can know for sure whether or not clear thinking has been taking place at those Cabinet meetings.

INDUSTRIAL LAW CASES

EMPLOYER MAKES COUNTER-APPLICATION TO CONCILIATION COUNCIL


Industrial Court, Wellington, 14 May 1976 (IC 18/76). Jamieson J.

In the previous issue of the Journal, the “News and Views” correspondent from Canterbury advised that the Conciliator based in Christchurch was to “state a case” for the Industrial Court regarding the practice of a party respondent, already before a Conciliation Council, making his own application, himself, becoming an applicant by (1976) 1 N.Z.J.I.R. 16. The significance of such a dual application, with both parties being at once applicant and respondent, is, of course, that the original applicant no longer has the power to withdraw from conciliation. The case, as stated for the Industrial Court, has now been decided, but without a definitive resolution of the central issue.

The question as originally put by the Conciliator, Mr Fortune, concerns perhaps the most fundamental question regarding Industrial conciliation in New Zealand yet to come before the recently reconstituted and newly named Conciliation Court. Both the Federation of Labour and the Employers Federation made appearances, by counsel, at the hearing in Wellington.

Ordinary Industrial practice in New Zealand, at least in recent times, has been for the Industrial Union of workers to create a dispute of interest and make an application for the dispute to be heard by a conciliation council. The workers’ union, as the applicant, or an employer or employers’ union, would ordinarily take the initiative because they, not the employers, would be seeking a change in the status quo. In most cases the employer would, presumably, be happy to be bound by the existing award or agreement for another year.

In this case, the union of workers was, indeed, first off the mark to apply, under s. 68 of the Industrial Relations Act 1973, for a conciliation council to hear a dispute of interest. The Industrial Commission processed this application on 7 January 1976 and appointed a Conciliator for the hearing: he (Mr. T. J. Reid) was appointed 16, 17 and 18 March for the actual hearing of the dispute. Before the hearing commenced, however, the Employers filed their own application under s. 68 of the Act, as well as a statement by respondents, per s. 70 of the Act. When the appointed date for conciliation arrived, an impasse was struck immediately; the union refused to acknowledge the employers’ application, and the union application was conclusively settled or withdrawn, and the employers refused to proceed with the union application until their own application had at least been acknowledged. The employers suggested that a Council be constituted to hear their application, but adjourned sine die.

The significance of the employers’ position resides, of course, in s. 81 of the Act: even if the workers withdrew their application under s. 76, the prohibition on strike action in s. 81 would remain operative because of the employers’ application.

This important question, so crucial to the legality of strikes in New Zealand, was given minimal resolution by the court, as two other objections by the employers proved conclusively fatal to the workers’ position. The court noted that the agreement involved is national in scope (except Westland) and expires on 31 July 1976. Under s. 68 (3) (b) of the Act no application may be made earlier than 6 months before the expiry date of the multi-district award. Apparently through inadvertence, the union application was sent to the Registrar, and processed by his office on 7 January 1976. This over-eagerness to apply resulted in two deficiencies:

(1) The Industrial Commission acted on the application in the 7th day of January, but the application stated that a dispute of interest “had” arisen on the 8th day of January. Therefore, on the face of the union claim, no dispute existed when the application was made.

(2) In any event, the application could not have been made until the 8th day of January, because of s. 68 (3) (b).