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The 40-Hours Case and the Change in Standard Hours in Australian Industry

by

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In 1935 the International Labour Conference, at its 19th Session, adopted a Forty-Hour Week Convention, which affirms that "it is desirable that workers should as far as practicable be enabled to share in the benefits of the rapid technical progress which is a characteristic of modern industry", and that "a continuous effort should be made to reduce hours of work in all forms of employment to such extent as is possible". This Convention is not in force; indeed, the movement towards a reduction in hours of work suffered a serious setback through the war, and is now making slow headway in many countries which are struggling with post-war economic difficulties. The decision in September 1947 of the Commonwealth Arbitration Court in Australia to allow a 40-hour week in all the industries that had applied for it is therefore of great interest. The following article gives an account of the case before the Court, the arguments submitted by the workers', employers' and Government representatives, and the reasons given by the Court for its decision.

THE BACKGROUND OF THE 40-HOURS CASE

THE CLAIM for a shorter working week in industry has always been prominent among the demands of Australian trade unions. By the beginning of the present century the 48-hour working week had become customary in Australian factories, and at the outbreak of the war in 1939 the length of the week legally required of employees in the

average Australian industry was 44 hours.[1] The unions had in 1935, however, begun a vigorous campaign for a 40-hour week in industry, but the agitation died down during the war.[2] After the end of the war against Japan the unions again became restive, and the question of a general 40-hour working week became in Australia the most acutely controversial subject of the day. A Labour Government was in office, and the Australasian Council of Trade Unions [3] appealed to the Administration to place before Parliament a measure that would give effect in Australia to any international Convention respecting hours of work to which Australia had assented. The unions believed that in that way a 40-hour week could be made to operate in Australian industry.[4]

The Government, however, refused to take this course. Convinced that legislative enactment of a 40-hour working week in industry was beyond the legal competence of the Commonwealth Parliament, the Government advised the union leaders to abandon hope of Federal political action in that connection and advised an approach to the Commonwealth Arbitration Court as the safer and more appropriate method of obtaining satisfaction. At the same time the Government expressed its unqualified sympathy with the demand for a 40-hour working week throughout industry and promised its aid in any attempt on the part of organised labour to bring the matter before the Court for enquiry.

It happened that at the time when the Ministry's reply to the representations of the Australasian Council of Trade Unions was made, an application of the Printing Industry Employees' Union of Australia was before the Commonwealth Arbitration Court for a reduction of the working hours of its members in commercial printing establishments to 40 per week. In order to enable the Court to deal with the question of the general working week throughout Australian industry, the Attorney General for the Commonwealth exercised his right, under the Commonwealth Conciliation and Arbitration Act, 1904-1934, to intervene in that case on the grounds of public interest. Under the same Act, the Court granted a request from the Australasian Council of Trade Unions and a number of employer and employee organisations and associations, as well as State governmental and trading authorities, to be heard in the proceedings.

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[1] For some account of the earlier history of the movement for a reduction in working hours in Australia, see "The Standard Working Week in Australia", by O. DE R. FOENANDER, *International Labour Review*, Vol. XXVI, No. 1, July 1932, pp. 51-74, and No. 3, Sept. 1932, pp. 364-385.

[2] Builders' Labourers case, 47 C.A.R. (1942), p. 194. (C.A.R. = Commonwealth Arbitration Reports.)

[3] Known since September 1947 as the Australian Council of Trade Unions.

[4] Cf. "Australia and the International Labour Conventions", by K. H. BAILEY, *International Labour Review*, Vol. LIV, Nos. 5-6, Nov.-Dec. 1946, pp. 285-304.

Finally the Ministry promulgated statutory rules [1] amending the wage-pegging National Security (Economic Organisation) Regulations.[2] By these means the Court was enabled to undertake an investigation of a general question of standard hours in all industries regulated by its awards. Since the practical effect of Commonwealth awards in determining conditions of work in Australia is not restricted to workers governed by those awards, the question at issue was now the future of the national working week in Australia.

The Hearing of the Case

The Wages Issue.

The hearing began on 22 May 1946. It was soon evident, however, that the Court was uneasy about the relation of the hours problem to the problem of wages. It was keenly sensitive to the growing agitation among workers for substantially higher pay and it made no secret of its agreement with the general opinion that wage rates, now that the need for war-time controls was decreasing, would have to be reviewed at no distant date.

Its embarrassment was to some extent relieved when the Attorney General for the Commonwealth applied to it to reopen certain applications for an increase in the basic wage that had remained adjourned since the year 1941.[3] The request was at once complied with.[4] Invested, in this way, with the necessary jurisdiction, the Court resolved to hear and determine the basic wage question in conjunction with the question of standard hours. The decision was welcomed by employers, who had urged that it would be unsound and inconvenient for the Court to discuss the questions separately, as the matters were complementary and interlocked, and a large part of the argument and evidence was relevant to both issues. Counsel for the employers had indeed proposed that the basic wage should first be reassessed and actually fixed, and that standard hours should then be determined in the light of that assessment. The unions, however, were opposed to any joint treatment of the issues, as they considered that this would introduce

[1] Statutory Rules, 1946, No. 63.

[2] Dated 28 March 1946 and notified in the *Commonwealth of Australia Gazette* of the same date. It is always understood that a curtailing of standard hours by the Court is not to involve any loss of earnings.

[3] These applications had been held over because of the war. The hearing and the determination of these applications are usually referred to as the Basic Wage Enquiry case (1941), 44 C.A.R., p. 41.

[4] By virtue of the Amending National Security (Economic Organisation) Regulations already mentioned, the Court was empowered also, in respect of any industrial dispute of which it had cognisance, to make an award altering the basic wage or the principles upon which it was computed.

confusion, and delay the decision on standard hours. They preferred that the Court should keep the hours problem isolated.

However, the decision that the two matters should be heard jointly did not wholly allay the Court's anxiety about the prevailing discontent among wage earners, since there was every prospect that the now greatly enlarged case would not be concluded for some time to come. The Court believed that in the public interest a cursory or *prima facie* examination of the basic wage should be made immediately, and a provisional Order issued at once, and it emphatically expressed to both parties its concern about the industrial situation. Thereupon counsel for the Australasian Council of Trade Unions formally requested that an interim basic wage declaration should be made. The request was granted, and the Court interrupted its hearing of the coupled issues to deal forthwith with the new application. In December 1946 it promulgated an interim Order, as a result of which the "needs" element in the basic wage was increased by approximately 7.5 per cent.[1] The Court then adjourned for the summer vacation; the final fixing of the basic wage was to await the completion of the proceedings on standard hours in association with a thorough review of that wage.

When the joint case was called at the resumed sittings of the Court in February 1947, the unions urged strongly that discussion of wages should be excluded from the hearing and that further investigation concerning wages should be postponed pending the adjudication of the hours issue. This was agreed to; the wages claim was adjourned indefinitely, and the case continued solely as a standard hours enquiry. In this form the hearing was brought to a conclusion on 13 August 1947.

The Arguments of the Parties.

Labour's primary argument was that workers should have more leisure, to enable them to enjoy better opportunities for safeguarding their health and more abundant facilities for education and recreation. Because of the increasing strain incidental to operations in present-day mechanised factories, this additional leisure, it was contended, should be granted irrespective of any effects that it might have on industrial production. At the same time labour advocates resolutely refused to agree that the general level of production would be prejudiced by a curtailment of hours of work.

[1] The "needs" element in the Court's basic wage was at the time £4 13s. a week (weighted average for the six capital cities), and the Order was equivalent to an increase of 7s. per week. The remaining constituent of the basic wage is a loading that is not adjustable, as is the "needs" portion under most awards, to movements in the cost of living; as a weighted average for the six capital cities it amounted to 5s. per week.

They submitted that, with the proposed modification of working time, the accident rate in industry would fall, absenteeism in the workshops would diminish, and the industrial wastage caused by discontent and unrest among workers would be substantially reduced. Special emphasis, they maintained, should be placed on the improvement in industrial relations which would accompany the intense satisfaction that success in the application before the Court would cause among workers.

In support of their contention that living standards and the level of employment would not be directly endangered by the inauguration of a 40-hour working week throughout industry, the labour advocates claimed that more leisure, by providing an extra physical and psychological stimulus to industry, would enhance the efficiency of the worker, and pointed out that in the light of the experience of countries in which the 40-hour week in industry had already been accepted (the United States and New Zealand) predictions of lowered output or higher wage costs in Australia under the suggested new conditions had no sound basis. However, even if some immediate decline in production figures or rise in working costs could be proved, the obligation, they argued, would lie upon management to revise its methods and renew installations so that output could be restored and the margin of profits retrieved. Any outlay incurred in the process should be borne, according to the unions, by management solely, since, they contended, capital factors in recent years had secured more than their warranted proportion of the progressive increases in the national dividend. The Court should have no hesitation, in their view, in declaring for the general introduction of a 40-hour working week in industry at the present time.

Management replied that a departure from the prevailing standard hours was unjustified by considerations of health, and that, as things were, the distribution of the national product throughout the communities could not be considered unjust. They urged that acceptance of the applications would cause a serious fall in output (including output of consumer goods), an increase in costs, a loss of export markets and a disturbance of the price structure that could easily bring about a disastrous inflation. Arguments based on developments in New Zealand and the United States were misleading, in their opinion, as the economy of New Zealand is fundamentally different from that of Australia, and the United States enjoys advantages, such as an abundance of cheap power, readily available raw materials, a vast home market and widespread payment by results, which are denied to Australia. By no reasoning, they argued, could the time be regarded as opportune for making the change; they thought that at the very least the adoption of any amendment

respecting hours of work should be deferred so that, in the common interest, arrears of consumer requirements and shortages of capital equipment could be made good. Should, however, the Court come to a different conclusion, they argued, as an alternative, that a reduction of hours should be allowed on principles of selection—selection of crafts, industries, localities, age groups or sex groups. Reductions applied in this way, they considered, would enable initial tests to be made and results observed, and a technique could be followed if this was thought justifiable for the general absorption of the change into the country's economy. From whatever angle the matter was approached the immediate and comprehensive introduction of a 40-hour working week would, they warned the Court, be detrimental to all sections and classes of the people. The finances of the Commonwealth and the States (including publicly owned agencies whose accounts are not directly linked to the State budgets) would, they believed, be as gravely imperilled as those of private industry. Any industrial unrest that might arise from the dismissal of the applications was, they contended, infinitely preferable to the dislocation or even collapse that might befall the economy if they were granted.

Attitude of the Governments.

All the States exercised the right granted to them by the Court to intervene in the case. They were interested both as employers of labour and as trustees of the welfare of the general body of their citizens, and their Government departments furnished the Court with advice and information of a highly useful and detailed character.

With the exception of South Australia and, in the later stages of the case, Western Australia, their attitude favoured, or was agreeable to, the claims of the unions.[1] South Australia did not contest the 40-hour week in principle but affirmed that, as wartime shortages had not yet been made good, the present was not a suitable time for its introduction. Western Australia towards the end of the hearing approved the principle of the 40-hour week but was content to leave to the Court the decision as to when it should be introduced. It exhorted the Court, however, to consider most carefully the time from which the change would operate, emphasising the important national issues involved and the need for the development of the resources of the State.

[1] South Australia was the only State that, over the whole of the hearing, was administered by a non-labour Government. In Western Australia it was not till April 1947 that after the defeat of the Labour Party at the elections the opposition took office and withdrew the full support that had been accorded to the applications since the beginning of the hearing.

The attitude of the Commonwealth was for the greater part of the hearing strictly impartial. Counsel retained for the Federal Attorney General expressly declared that the Commonwealth neither supported nor opposed the demand, but as the matter was of great public importance it was anxious to give every assistance towards the right settlement of the dispute. Like the States, the Commonwealth had an additional interest in the proceedings, since it also was an employer of labour on a large scale. Although under the Constitution it was fully competent to determine the 40-hour question for its own employees in its own way, it was determined, it intimated, to follow the Court's decision. It agreed that it was essential to industrial peace, to harmonious relations in industry and to ordered business, that there should be uniformity in the length of the working week throughout Australia to the greatest extent practicable. It was anxious, therefore, that no disparity should be created by its own independent action between the conditions of its own workers and those of other workers. In his final address, however, counsel for the Attorney General abandoned this formal negative attitude and informed the Court that the Commonwealth supported the applications. In the opinion of the Commonwealth, he said, the evidence that had been submitted warranted the Order for a 40-hour week.[1]

Scope of the Discussion.

At the outset of the hearing there was a tendency, which was very noticeable in the presentation of the case for labour, to oversimplify the problem and to underestimate inherent difficulties. In presenting its arguments, labour was inclined to reduce the question to an easy formula in terms of quantity and measurement without taking sufficiently into account the parallel and secondary forces that are set in motion whenever the pressure exerted upon the economic system by prevailing standards is to any extent released. The effects of an alteration of the length of the working week were examined in a number of industries considered independently. It was left to others (especially the Commonwealth Government witnesses) to discuss what the effects of the proposed change would be on the Australian economy generally.

Briefly stated, the evidence of the Commonwealth Government witnesses was directed to the examination of recent and prospective changes in the productivity of Australian industry, to a description of the economic effects that could reasonably be expected to follow the general introduction of a 40-hour week, and to a study of the

[1] In the Commonwealth a Labour Ministry was in office during the whole course of the proceedings.

relationship between those economic effects and the adoption of a 40-hour standard as a measure of social reform. The case was thus transformed into little less than a study of the entire economic problem in so far as it related to Australia and Australian conditions. Even the wage question, although formally dismissed from the issue, was by no means omitted from the general consideration. Complex, technical, and vast in its proportions as the case became in this later phase, no material point or detail seemed too minute for the consideration of the Court and the body of advocates and witnesses. The Court must have been greatly indebted to the searching and penetrating examination to which highly skilled counsel subjected everything relevant that was submitted in evidence. Its task was doubtless substantially lightened by the absence of asperity and contentiousness and by the atmosphere of earnestness, courtesy, good fellowship and generous co-operation which pervaded the proceedings. Without question, also, the information objectively analysed and dispassionately presented by the Commonwealth witnesses was of inestimable benefit to the Court in assessing the worth of the arguments tendered. The Court, in fact, in its judgment made handsome acknowledgement of its obligation to these witnesses.

The value of the economic and statistical data placed at the disposal of the Court was heightened by the fact that no official man-hour productivity index figures are prepared in Australia. Probably the adequacy and accuracy of this information owed much to the extensive economic surveys that were a feature of the war years in Australia. All in all, the Court was enabled to contemplate the issue broadly as a national matter without overlooking the merits and special circumstances of the industries that were individually seeking a variation in their conditions of employment.

No Concessions by the Unions.

The absence of an expression of union willingness to allay in any degree the burden that the introduction of a 40-hour working week might impose on employers is ground for disappointment and anxiety, particularly as expert testimony in the case held strongly to the opinion that some falling off in production and rise in costs would inevitably follow a reduction in working hours. There might have been an offer, for example, to abandon quota output systems, organised go-slow tactics and other practices conducive to restricted production. The unions might have condemned in language which would leave no room for misconception in the minds of the workers unpunctuality, failure to observe reasonable orders from foremen

and other breaches of discipline, lack of concentration upon the task in hand, indisposition to assist fellow workers in the performance of their tasks and propensity to frequent change of employment—all of them matters of importance in relation to output. They could have consented to waive objections to piece, task, premium or bonus work and other forms of payment by results devised to stimulate productivity; or in order that overhead expenditure might be reduced they might have shown themselves prepared to adopt a more sympathetic policy towards multiple shifts and overtime, and to discontinue attempts to interfere with weekend rostering. Action along these lines would not necessarily entail a sacrifice of earnings or other disadvantages, for awards can provide protection against the abuse by employers of incentive remuneration methods or unjustified demands for work out of ordinary hours.[1] Everyone will share the unions' horror of a business depression with its corroding unemployment that usually follows an over-expanded production, but at the moment many shortages of commodities must be made up before an excess of output is to be feared. The workers themselves are the chief sufferers from these shortages.

The Decision and the Terms of the Order

On 8 September 1947 the Court announced its decision. The decision, which was unanimous, was to allow, subject to certain conditions, a 40-hour week in all industries that had applied for it. One of the conditions was that the new standard should not go into operation before the beginning of the first pay period to commence in January 1948; management would thus have an opportunity to make the adjustments necessary to meet the change.

The Court directed that Orders should be settled by its registrar to vary existing awards relevant to the applications that were before it—to enable these amendments to be effected was a further

[1] Cf. the foreword to the statement on the economic considerations affecting relations between employers and workers, presented to Parliament in January 1947 by the British Ministry of Labour and National Service, *International Labour Review*, Vol. LV, Nos. 3-4, Mar.-Apr. 1947, p. 292. Cf. also the warning of Professor Leo Wolman in 1937 to the United States trade unions that " if they adhere to the traditional trade union policy of monopolistic wage rates and restriction of output, they will defeat the ends they now strive to achieve and subject themselves and industry to far reaching State control and the progressive monopolisation of business enterprise ", *Political Science Quarterly*, Vol. LII, No. 2, p. 173. Cf. also the advice tendered to the British trade unions in 1927 by Sir Walter Citrine (General Secretary to the Trades Union Congress) that they should " actively participate in a concerted effort to raise industry to its highest efficiency by developing the most scientific methods of production, eliminating waste and harmful restrictions, removing causes of friction and avoidable conflict, and permitting the largest possible output so as to provide a rising standard of life and continuously improving conditions of employment ".

reason for the Court's action in deferring, for some three months, the carrying out of its resolve to reduce hours.[1]

The substance of the Orders was to be as follows :

(1) In industries for which the award had fixed a standard working week of 44 hours, the standard was to be 40 hours per week.

(2) In an industry in which the standard hours per week were not expressly fixed at 44, but were by award based on the Court's previous standard of 44 hours per week, the award governing that industry was to be based on the Court's new standard of 40 hours per week.[2]

(3) In industries in which the standard hours were determined at 44 per week, but more or less than this standard was fixed for some of the occupations, or the matter was left to the agreement of the parties, or was otherwise not fixed, no alteration was made. Nor was the Order or the judgment accompanying the Order to be regarded as affording " any foundation or justification " for applying for a reduction of standard hours in occupations in which the standard had been fixed at 40 hours per week or less.[3] With respect to all other such cases, all questions of differentiation of occupations within the industry were to be left to the determination of the judge or conciliation commissioner in charge of the particular industry.[4] But the judge or conciliation commissioner would assess the judgment in the Hours case as *prima facie* ground for allowing a reduction of the hours fixed, having regard to any special circumstances which were taken into account in the particular fixation of the hours or the absence of a fixation of the hours.[4]

(4) In industries in which a wage rate or condition of employment in an award was fixed by reference to a standard of 44 hours per week, such a provision is to be adapted to a standard of 40 per week. The Order makes particular reference, in this connection (but without limiting the generality of the application), to the basic wage, loadings or margins expressed or required to be ascer-

[1] There were more than 100 applications before the Court.

[2] The Court made particular reference to the maritime industries that were making claims before it. Conditions peculiar to these industries make it impracticable to grant reduced hours to seafarers in the same way as for industries generally. Concessions regarding leisure in these industries have taken the form of longer shore leave to compensate for the maintenance of the *status quo* in the hours worked while at sea. Cf. the remarks of Judge Beeby in the Marine Cooks, Bakers and Butchers case, 25 C.A.R., p. 131.

[3] The Court stated in its judgment: "Nothing in this judgment is to be taken as a reason or an argument for the reduction of standard hours in industries where the hours are already 40 or less per week. These industries call for special consideration which has not been undertaken in these proceedings."

[4] Under amending legislation now in force, the conciliation commissioner alone is invested with this jurisdiction.

tained on an hourly basis, rates for piece work fixed or required to be ascertained with regard to the output or earnings of a worker of average competence over a period of 44 hours, and the provisions on the subject of annual leave and sick leave. It is expressly provided, however, that the content of this paragraph is not to apply to hourly rates of wages which are not fixed on the basis of the standard 44 hours per week.

(5) In industries in which standard hours are at present fixed, solely or alternatively, at some multiple of 44 to be worked in two or more weeks, the corresponding multiple of 40 is to be substituted.[1] It is provided, however, that by reason of the Order there is to be no variation in the maximum number of hours that, in such circumstances, may be worked in any one week or in any number of weeks less than the full multiple. All such provisions as to the number of weeks over which hours may be spread so as to result in an average of 40, and the maximum number of hours that may be worked in any one week or number of weeks less than such full number are to be left to the further consideration of the judge or the conciliation commissioner in charge of the industry.[2]

(6) In the awards affected by any of the considerations already set out there are to be inserted provisions to the following effect: *(a)* that any employer is empowered to require any of his employees to work reasonable overtime at overtime rates; *(b)* that no organisation that is party to the award shall, in any way, authorise or be concerned in any ban, limitation or restriction upon the working of overtime in terms of the provision for overtime working; *(c)* that the provision as to overtime is to remain operative only until otherwise determined by the judge or conciliation commissioner in charge of the industry.[2]

At the same time, however, nothing in these provisions is to be deemed to affect the operation of any existing clause in an award providing for compulsory overtime.

(7) The question of the days and hours in which standard hours are to be worked and all questions of meal breaks and other breaks in the continuity of the work are to be left to the discretion of the judge or conciliation commissioner in charge of the industry.[2] Where

[1] Under some awards, particularly where continuous work processes are involved, the standard is in terms of 88 hours per fortnight, or 132 hours per three weeks, or 176 hours per four weeks, instead of what was the usual unit of 44 hours per week, enabling an employer to require more than 44 hours (but up to a fixed maximum) to be worked in any one week of the fortnight (with corresponding provision for shift working where the cycle is longer than two weeks) without liability for payment at overtime rates. Cf. *Industrial Regulation in Australia*, by O. DE R. FOENANDER (Melbourne University Press, 1947), pp. 148-149.

[2] Under amending legislation now in force the conciliation commissioner alone is invested with this jurisdiction.

an award provides that hitherto existing standard 44 hours per week are to be worked in specified numbers of hours on specified days, these numbers of hours are to be regarded as maxima and the awards are to be varied accordingly, pending final determination as indicated by the judge or conciliation commissioner of the matter of the hours and days during and on which the new standard hours are to be worked.[1]

Reasons for the Decision

General.

In the judgment, issued at the same time as the Order, furnishing reasons for the momentous decision to grant a 40-hour week, the Court made no attempt to analyse in any detail the evidence submitted. Any such suggestion it repudiated as utterly impracticable. In broad terms, however, it recorded its conviction *(a)* that the demand of the worker for the increased leisure that would be made available by the reduction of the working week to 40 hours was real and sincere; *(b)* that the national economy was in a position to stand the strain of this concession; and *(c)* that there was no ground for the opinion that a correct balance between the different interests in the national economy had already been established which apportioned to the workers their just share in the national dividend. Indeed the Court ventured the opinion that "there is no 'just' division between capitalists and workers or between the various sections of the community, nor if there were is there any means of ascertaining it".[2] "The Court's principle, often acted upon, that industry should pay the highest wage compatible with its continued prosperity, is", it added, "in contradiction of it."

The Conception of Leisure.

Although in this judgment the Court makes reference to leisure as "freedom from the grind of unremitted labour", other of its more recent judgments show that it interprets the term positively and constructively. In the Metal Trades case it said that "by leisure we mean not mere idleness but recreation and rest and freedom from the compulsion of rendering services", and it presupposes, in the provision of it, the "opportunity to live and develop and indulge one's own individual tastes and culture and to give attention

[1] Under amending legislation now in force the conciliation commissioner alone is invested with this jurisdiction.

[2] In the Main Hours case, Chief Judge Dethridge referred to the "extreme difficulty of determining what is a fair reward for management and for the risks that capital has to take" (24 C.A.R. (1927), p. 765.)

to activities other than those associated with the earning of money ".[1] In that sense the Court assessed added leisure as the " first instalment " of a higher standard of living which, while it must be subordinated to the proper requirements of the community as a whole, constitutes a demand that should be granted if at all compatible with the continued prosperity of the country.

The Court believed that the avowed desire of the Australian worker for extra leisure was real and sincere, amounting to a yearning that could not be satisfied by the award of a substitute in the form of a higher wage.[2] The claim as put forward by the unions was, it believed, an expression of a movement that had now reached world proportions. That fact, together with the consideration that the movement had the commendation and sanction of the International Labour Organisation, as shown in the adoption by the Organisation of the principle of the 40-hour week [3], the Court estimated as further evidence of the genuineness and truth of the Australian workers' request.

Anticipated Effects on Production.

From its estimates of the effects of the introduction of the 40-hour week on production, the Court concluded that the national economy could well support the change, and that the drop in production would be neither substantial nor permanent. The Court reckoned on three developments: *(a)* the emergence of industrial contentment; *(b)* the disappearance of employer and employee laxities and of the bad discipline that began during the war years; and *(c)* the general adoption of the principle of incentive payments in industry.

Industrial contentment. The loss of production would, the Court said, " be mitigated by the elimination of this claim as a cause of industrial unrest ".

> As realists with past experience as a guide, it continued, we know that production would suffer quite substantially by such unrest, and thus the differences between what might have been produced in a 44-hour week on a rejection of these claims, and what will be produced in a 40-hour week if they are granted, is likely, on this ground alone, to be substantially lessened.

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[1] 54 C.A.R., p. 35. Chief Judge Dethridge saw in the provision of more leisure the means by which the worker could " take a share in the other interests and pursuits of civilised life " (Main Hours case, *op. cit.*, p. 763). In the same case, Judge Beeby said, " more time for fostering other interests and for recreation is necessary to those whose natural creative instinct is suppressed by economic necessity " (p. 877).

[2] Surprisingly, the Court made no mention of the suggestion that although there may be a strong body of opinion among unmarried workers in favour of extra leisure rather than extra wages, many family men would prefer extra wages.

[3] Cf. " The Nineteenth Session of the International Labour Conference ", *International Labour Review*, No. 3, Sept. 1935, pp. 289-343.

Improvement in discipline. Referring to the lax discipline now hampering industry, the Court stated:

> War-time conditions had very great physical and psychological effects upon industry; both management and workers were affected. Managerial laxity arose out of "cost plus" methods, the continued existence of a seller's market and the necessity of production at all costs. Easy profits and such factors greatly affected factory discipline for which management is responsible, and the manpower regulations under which labour was controlled and directed, the security of jobs, the long hours and high wages which resulted from much overtime and full family work, tended also to affect the output per man-hour of the workers. Laxities then permitted are now grown into habits, but they can be overcome . . . . 40 hours' work might easily equal 44 hours of the kind of work and management we have in our actual experience witnessed. Reasonable discipline therefore is essential, and the unions and employers owe a duty to the community to secure it. The Court's Order in this case establishes a new industrial relation and implies that a full 40 hours should be worked in every case, less only prescribed or agreed-upon remissions. Awards should be drawn up to give full effect to this and to make clear that *pro rata* reductions of pay may be made for unauthorised omissions.

Incentive payments. The Court expressed its confidence that the unions, once they appreciate the real significance of full employment conditions now obtaining in Australia and which according to expert evidence show no signs of abating, will quickly abandon their traditional hostility to the adoption of legitimate incentive payment systems in industry. The Court stated:

> . . . there must come into industry both for the worker and the manager a new outlook. In the past the worker was kept at high pressure by the cudgel of unemployment or the carrot of incentives. He feared that he would ultimately work himself out of a job and into a condition wherein while he starved he was told there was overproduction. Naturally this spectre haunted him as his greatest fear and he resisted incentives and resented the threat. When the new doctrine is absorbed by employer and employee, when the employer realises that he has lost his cudgel and when the worker realises that there is no need to fear unemployment, then we may be assured that well planned and safely guarded incentive systems will not only not be resisted but will be welcome . . . some employers told us what our own experience has taught us—that, given incentive systems, Australian industry could take the 40-hour step in its stride.

It is pertinent to add that full employment is part of the official Commonwealth policy in relation to industry and that in the belief of the Government full employment does not militate against the provision of the incentive necessary to enterprise and efficiency.[2]

Expected Rise in Prices.

It was apparent to the Court that any decrease in production must inevitably be reflected in an increase in prices and costs, and that the increase would be borne mainly by the unsheltered

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[1] Cf. also the Main Hours case, *op. cit.*, p. 874.

[2] Cf. *Commonwealth White Paper on Full Employment in Australia* (30 May 1945), secs. 1 and 63.

sections of the community comprising *(a)* those whose incomes are dependent on world market prices; *(b)* those whose incomes are derived from industries in competition with imported goods; *(c)* those whose incomes are derived from investments, and those drawing fixed incomes; and *(d)* wage and salary earners, but only to the extent of the part of their wage or salary that is not adjustable to movements in the cost of living. The loss to be suffered by those whose incomes are drawn from the sale of rural products could, in the Court's view, be supported with comfort, and their position could be contemplated with equanimity; the prices of these commodities have risen sharply of late years and according to expert evidence the outlook for a maintenance of the existing figures is encouraging. Indeed, because of the current level of Australian rates of exchange on overseas countries and the relative international value of the Australian monetary unit, the Court was led to believe that some increase in prices is justified and " may be desirable "; it was advised that the expected rise in internal prices consequent upon the introduction of the new standard of hours would not be such as to prejudice the external trade that Australia, with her labour and other resources, could at present undertake. The price increase, it believed, could be kept within bounds under the present Australian system of legal price control which can be directed to prevent traders and others from passing on the costs incurred through the reduction of the working time in industry. Compulsory absorption of added labour costs by business itself to the extent found desirable need not, in the view of the Court, constitute a serious impediment to the expansion of investment in profit-making industries in Australia. Nor, the Court believed, would the anticipated movement in prices and profits adversely affect the country's capacity and will to accumulate savings adequate for the replenishment and healthy increase of her capital stocks. The Court further considered that any inequity or hardship resulting from the pressure of rising costs could be regulated by the adjustment of taxation. The Court was satisfied, all things considered, that the behaviour of prices after the change to a 40-hour week standard in industry would not inflict any injury of consequence upon the Australian economy.

The Views of Governments and Employers.

The approval accorded to the applications by the Governments of the Commonwealth and of the four States in their capacities as Governments and as employers of labour (direct or indirect) was to the Court a matter " of first importance " to which it attached " very substantial weight " in arriving at a decision. One assumption

that it felt fully entitled to make from a study of the submissions and evidence was that the Commonwealth Government had deliberately calculated the extra costs in which State industrial instrumentalities (in particular, railways and tramway undertakings) would be involved if hours were shortened. In Australia the Commonwealth is in very large measure the single taxing authority, the budgetary balances of the States being preserved by grants made to them by the Commonwealth from the Consolidated Revenue Fund, under section 96 of the Constitution. The Court thought, therefore, that fears as to adverse effects on public finance consequent upon the granting of the applications could now be safely dismissed.

The Court expressed satisfaction also that the Governments of the States of South Australia and Western Australia (speaking in their twofold capacity) had not disputed the principle of the 40-hour week. It recalled also that private employers had not criticised the proposal to introduce the 40-hour week as a matter of doctrine; their principal argument had been that the time was not appropriate for a reduction in existing standards of working hours.

Date of Coming into Force.

The Court could see no reason for delay in the carrying out of its decision beyond the time required to make necessary changes in factory arrangements and to alter awards in terms of its own Order. To the objection that the date of coming into force of the Order should be deferred until the present shortages were made good, the Court's answer was that the shortages were largely attributable to lack of coal supplies, and the Court's jurisdiction no longer extended to the coal mining industry. It argued, moreover, that the coming rise in prices should reduce demand and so afford some relief. Discussing the special case of housing accommodation, the Court admitted that Australia was " tragically short " of houses, but it could suggest only that the period of postponement of the " final overtaking of this demand " resulting from the hours reduction would at worst not be long.

The Court rejected without qualification the thesis of some employer witnesses that in order to widen the distribution of the available work and to relieve the pressure of unemployment the downswing days of the trade cycle constitute the proper occasion for the shortening of hours. The buoyancy of present conditions and the extremely favourable outlook made the present time eminently suitable, in the Court's opinion, for an alteration in standards.

Business interests, the Court stated, are not worse off because there continues to be an unsatisfied demand both internally and overseas, however much they may feel aggrieved by the inability to meet this demand. When pressed in cross

examination, managers agreed that they could better cope with an added burden when business was booming than when curtailment was necessary in an incipient depression.

Elsewhere in the judgment the Court expressed its complete satisfaction with the overseas debt position of Australia and drew attention to the comparative ease with which this debt was being serviced.

Looking to the future, the Court said :

> We see in the net gains made by Australian industry not only in mechanisation, equipment, building and resources but also in technical knowledge and skill, a potential which must with the will to use them make possible great advances. . . . These things must in time work through our industry, rendering the need for man-hours less and less.

The judgment, however, closes on a note of warning. The Court reminded the parties that it can always withdraw what it has bestowed if it discovers that it has misinterpreted statistical data or that the assumptions on which it acted were ill-founded.

Conclusion

Labour will, of course, strive to have the 40-hour week extended as soon as possible into all normal industries throughout Australia that are subject to Commonwealth control.[1] The complete application, however, may take rather longer than is popularly supposed. The unions will be the more eager for success because they know the effect of Federal Orders and awards on State law and their influence on State industrial policy. Thus, in Victoria, wages boards are bound by State law to incorporate in their determinations such provisions of a Federal award as it is within their powers to include.[2]

Already the Western Australia Court of Arbitration and the Industrial Court of South Australia have declared their adherence to the 40-hour principle. Tasmanian wages boards, in making their determinations, have a reputation for copying closely the conditions of Commonwealth awards, and they can be expected to continue in this course, even if no direct State legislation is passed providing for a general 40-hour week throughout State industries ; some of them have already adopted the standard. New South Wales, for her part, did not await the decision of the Commonwealth Court, but enacted the Industrial Arbitration (40-hour Week)

[1] The finding in the Hours case is limited to the industries that were the subject of adjudication, the Court having no power to make a common rule.

[2] Factories and Shops Act, 1934, sec. 23, as amended by Factories and Shops Act, 1936, sec. 5. The boards are empowered to determine matters relating to hours of work.

Amendment Act of 1947, by virtue of which the ordinary working week of all employees governed by State awards was declared to be 40 hours as from 1 July 1947, without any reduction in rates of pay.[1] So that the Act could operate legally from that date the Commonwealth Government had issued further amending National Security (Economic Organisation) Regulations.[2] The Premier of Queensland before the conclusion of the Hours case announced the intention to introduce into Parliament a measure substantially identical with the New South Wales law; such legislation has now been passed and is in operation.

A 40-hour working week throughout industry is not, however, the final goal of Australian workers. The unions envisage a series of approaches to the Court and to the States for progressive reductions until such time as a 30-hour week in Australian normal industries becomes an accomplished fact. The Court, however, holds out no promise of further concessions in the near future, observing that the change now allowed must be digested and assimilated by the economy. "Perhaps this decision completes", it said, "what could safely be done for the time being and the immediate future." Gains in due season in this direction, however, emanating from authority and based on argument and wise reflection, should afford general satisfaction to students of human relations.

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[1] In this instance it was not a matter of a Federal Order or award influencing State policy; on the contrary, the influence exerted was that of State legislation on the decision of the Commonwealth Court.

[2] Statutory Rules, 1947, No. 75, notified in *Commonwealth of Australia Gazette*, 13 June 1947. Although the National Security Act was repealed with effect from 31 December 1946, certain regulations attached to it (including wage-pegging provisions in the Economic Organisation Regulations) were continued in force till 31 December 1947 under terms of the Defence (Transitional Provisions) Act of 1946. To the extent that there is any inconsistency between Federal and State law, the Federal law is paramount and prevails—see section 109 of the Constitution and *Clyde Engineering Company Ltd.*, v. *Cowburn*, 37 C.L.R., p. 466. A State law that is in conflict with Commonwealth law is not rendered invalid by that circumstance alone; the cases show that the effect of the inconsistency is to render the State law legally inoperative during such time as the Federal law, which it contravenes, is in force—see *R.* v. *Brisbane Licensing Court ex p. Daniell*, 28 C.L.R., p. 33; *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*, 28 C.L.R., p. 154; *Carter* v. *Egg and Egg Pulp Marketing Board (Victoria)*, 66 C.L.R., p. 573. (C.L.R. = Commonwealth Law Reports.)