# NINETY-SECOND REPORT

of the

# LAW REFORM COMMITTEE

of

# SOUTH AUSTRALIA

to

# THE ATTORNEY-GENERAL

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# INHERITED IMPERIAL SUNDAY OBSERVANCE OR LORD'S DAY ACTS

1987

# NINETY-SECOND REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE INHERITED IMPERIAL SUNDAY OBSERVANCE OR LORD'S DAY ACTS

TO:

The Honourable C.J. Sumner, M.L.C.,

Attorney-General for South Australia.

Sir,

In our Seventy-Ninth report dealing with the Inherited Imperial Law, in making reference to a series of statutes collectively called the Lord's Day Acts or Sunday Observance Acts, we stated that we would prepare a separate report dealing with the repeal, and if necessary re-enactment, of certain portions of those Acts.

We commence our report with a history of Sunday Observance Laws.

History of Sunday Observance Laws

The first Sunday observance laws are generally attributed to the Roman Emperor Constantine in 321 AD.

Constantine's edicts in 321 AD were as follows:-

(A) Let all judges and all city people and all tradesmen rest upon the venerable day of the sun. But let those dwelling in the country freely and with full liberty attend to the culture of their fields; since it frequently happens that no other day is so fit for the sowing of grain, or the planting of vines; hence, the favourable time should not be allowed to pass, lest the provisions of heaven be lost.

Given the seventh of March, Crispus and Constantine being consuls, each for the second time (321).

"Codex Justin" lib. iii tit. xii lex 3.

(B) The August Emperor Constantine to Elpidius:

As it seemed unworthy of the day of the sun, honored for its own sacredness, to be used in litigations and baneful disputes of parties, so it is grateful and pleasant on that day for sacred vows to be fulfilled. And, therefore, let all having the liberty on the festive day of emancipating and mancipating slaves, and besides these things let not public acts be forbidden.

Published the 5th, before the nones of July, at Caralis, in the consulship of Crispus 11 and Constantine 11 (321).

"Codex Theo" lib. ii tit. viii lex 1.

Thus in general terms these early laws enjoined all people and tradesmen to rest on Sundays, but they created certain exceptions for persons engaged in agriculture or for those who were required to perform public acts. The setting aside of Sunday as a special day was not to promote any Christian ideal but to honour the day of the Sun, the Apollo of Roman mythology.

It was not until 386 AD, 65 years later, that the term "Lord's Day" appeared in any civil legislation of the Roman Empire.

"Codex Theo" lib. xv tit. v lex 2, A, prohibited civil judges from attending certain degrading public shows which purported to interfere with the administration of justice.

"Codex Theo" lib. viii tit. viii lex 3 B provided:

> "On the day of the sun, properly called the Lord's Day by our ancestors, let there be a cessation of lawsuits, businesses, and indictments, let no one exact a debt due either to the state or an individual; let there be no cognizance of disputes, not even by arbitrators, whether appointed by the courts or voluntarily chosen. And let him not only be adjudged notorious, but also impious who shall turn aside from an institute and rite of holy religion.
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> Published the third before the nones of November, at Aquilia, in the consulship of most noble, pious Honorius and most illustrious Euodius (386)"

Three years later, this legislation was enlarged to include, as additional days of rest and holiday, an increased number of pagan festivals including the birthdays of the emperors and the days on which they assumed the imperial office. A further three years later, in 392 AD, legislation prohibited the games of the circus on the "festive days of the sun" in order that "no gatherings or shows may turn away the attendance from the venerable mysteries of the Christian religion".

It appears that by the middle of the fifth century, the Christians had succeeded in obtaining legal recognition of Sunday under Roman law as a special religious day quite unlike any other. For example the decree of emperors Leo and Athemis in 469 AD provided.

"We wish the festal days dedicated to the Majesty Most

High, to be employed in no voluptuous pleasures, and profaned by no vexatious exactions.

I therefore we decree that the Lord's Day shall always be so held in honour and veneration, that it shall be free from all prosecutions, that no chastisement shall be inflicted upon anyone, that no bail shall be exacted, that public service shall cease, that advocacy shall be laid aside, that this day shall be free from judicial investigations, that the shrill voice of the crier shall cease, that litigants shall have rest from their disputes and have time for compromise, that antagonists shall come together without fear, that a vicarious repentance may pervade their minds, that they may confer concerning settlements and talk over terms of agreement. But, though giving ourselves up to rest on this religious day we do not suffer anyone to be engaged in impure pleasure. On this day the scenes of the theatre shall make no claim for themselves, neither the games of the circus nor the tearful shows of the wild beasts; and if the celebration should happen to fall on our birthday it may be postponed.

He shall suffer the loss of his office and the confirmation of his estate, who shall attend the games on this festal day, or shall as a public servant, under pretence of public or private business cause these enactments to be treated with contempt".

Dated December 13, at Constantinople, Zeno and Martianus being consuls (469).

"Codex Justin" lib. iii tit. xii lex 11.

With the fall of the Roman Empire in the fifth century, until the creation of the Holy Roman Empire in 800, for the next four centuries, Sunday laws reverted to being ecclesiastical law, with the Pope becoming what the Emperor had been. Sunday laws became more restrictive, and the penalties prescribed for violations became generally more severe and included whipping.

The early Sunday laws in England up to the Conquest in 1066 were basically the product of the ecclesiastical commands of

the Pope. While laws against Sunday marketing and against various forms of recreation and entertainment such as hunting became prevalent, the dominant theme throughout was to compel religious observance of Sunday as a Christian holy day.

Before the Reformation, the Christian church in England began to claim officially that the religious observance of the Lord's Day had the requirements laid down in the Old Testament Fourth Commandment (Exodus 20: 8-11) to observe the legal Sabbath, according to the canonical institutes. Despite this there were an increasing number of commercial and recreational activities taking place on Sundays. With the intent of abating these activities, Parliament enacted the Sunday Fairs Act in 1448, (see Appendix A) which prohibited all manner of fairs and markets on Sundays and principal religious feast days with the exception of "necessary victuals" and on Sundays in harvest season.

The post-Reformation period in England from the sixteenth to the nineteenth century gave rise to some of the most strict Sunday observance legislation that has been enacted. Not only was there curtailment of commercial activities and recreations on Sundays, but many of the laws required open adherence to the practice and doctrines of the established Church of England, in an effort to produce social as well as religious conformity.

For example the Statute of Six Articles, sometimes called An Act Abolishing Diversity in Opinions, passed in 1534 during the reign of Henry VIII (31 Hen. VIII c.14) made it an offence to refuse to be confessed or to receive the holy and blessed sacrament, and was punishable by imprisonment and fine. The Statute 31 Hen. VIII c.14 was repealed in 1547 by 1 Edw. VI c.12

In 1551 the Act of Uniformity 5 & 6 Edw. VI c.1 required all the King's subjects "having no lawful or reasonable excuse to be absent" to attend their parish church or chapel or some usual place where Common Prayers and Service of God were held "upon every Sunday and other days ordained and ... kept as Holidays, and then and there to abide orderly and soberly during the time of the Common Prayer, Preachings or other service of God ... upon Pain or Punishment by the Censures of the Church". This was followed up by the Church Holidays Act of the same year: 5 & 6 Edw. VI c.3. This latter statute was held not to be in force in New South Wales in Exparte Ryan (1855) Legge 876.

It was in the first year of the reign of Charles I in 1625 that the first of a series of Sunday Observance Acts or Lord's Day Acts was passed, namely an Act for Punishing Divers Abuses Committed on the Lord's Day called Sunday: (1625) 1 Car. I c.1 (see Appendix B).

This Act, after reciting that the holy keeping of the Lord's Day was a principal part of the true service of God and that the Lord's Day was profaned and neglected by disorderly people in various ways declared.

> "....[T]here shale no meetings, assemblies or concourse of people out of their owne Parishes on the Lord's Day within this realme of England, or any of the Dominions thereof, for any sports or pastimes whatsoever".

This Statute, it will be noted, applies throughout the Dominions of the Crown, but it may be read as only including those Dominions which have legally established parishes.

In 1627, another Sunday Observance Act was passed, entitled An Act for the Further Reformation of Sundry Abuses Committe on the Lord's Day commonly called Sunday: (1627) 3 Car. I c.2. (see Appendix C). This Act added to the list of prohibitions,

travel by horse carriers, wagon men, cornmen with carts, wainmen with wains and drovers with cattle. Similarly, butchers were prohibited from killing or selling any animals or the meat thereof. Violation of any of these prohibitions resulted in a monetary fine.

Even more stringent laws were enacted during the time of Cromwell. Parliament passed Acts in 1644 and 1650 prohibiting on the Lord's Day all forms of marketing, travel, worldly labours, or any work whatsoever, as well as all forms of sport, all writs, warrants or orders, and boats, taverns, tobacco shops and restaurants. In 1656 even more detailed and coercive legislation was enacted. However it lasted little more than three years because all these Ordinances lapsed on the Restoration of King Charles II in 1660.

The Sunday Observance Act 1677 was enacted during the reign of Charles II. The Act was entitled An Act for the Better Observation of the Lord's Day commonly called Sunday 29 Car. II c.7 (see Appendix D). The Act purported to secure the observance of the Lord's Day by prohibiting any person from engaging in "any worldly labour or business or work of their ordinary calling" upon that day, except for "works of necessity and charity". Similarly, the Act forbade the showing or holding out for sale of any goods. Travelling was proscribed for drovers, horse-coursers, wagoners, butchers and higlers (pedlars), nor were they allowed to go into any inn or lodge upon the Lord's Day. Travelling by any person on a boat was prohibited on Sunday except upon an extraordinary occasion allowed by a Justice of the Peace. In addition to the exceptions for "works of necessity and charity", the Act permitted the preparing of meat in families or dressing or selling of meat in inns and

restaurants, and also the buying or selling of milk before 9 am or after 4 pm on Sundays. The most important section from our point of view today is section VI which forbids the service of any writ, process, warrant, order, judgment or decree on Sunday, avoids such service if effected, and gives a right in damages for a breach of the section. The Statute was held to be in force in Victoria in Ronald v Lalor (1872) 3.V.R. (E) 98, Garton v Coy (1873) 4 A.J.R.100 and Graham v Haig (1885) 11 V.L.R.244. The 1677 Act was modified in 1710 by the Act 9 Anne c.23 which permitted licensed hackney-coachmen, or their drivers, or any chairmen, to ply and stand with their coaches and chairs on Sunday.

The Toleration Act 1689: 1 Will. & Mary c.18 continued the law compelling Sunday attendance at churches. However allowance was made for attendance at churches other than those of the Church of England, provided they were of a Protestant persuasion.

While the main purpose of the seventeenth century legislation in England was to promote religious observance, Blackstone in his Commentaries did point out the health and welfare aspects (see Vol IV (1897 Lewis ed) p 63) where he said

> "....[B]esides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his

> occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their maker".

Under George III an Act was enacted entitled An Act for Preventing Certain Abuses and Profanationson the Lord's Day called Sunday: (1780) 21 Geo III c.49. This Act dealt with public entertainment for an admission fee on Sunday. The Act of 1780, in specific terms, sought to prevent the use of:

> "....[A]ny house, room or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money.

It was held to be in force in Victoria in McHugh v Robertson (1885) 11 V.L.R.410 and Cawsey v Davidson (1906) V.L.R.32 and in New South Wales in Walker v Solomon (1890) 11 L.R. (N.S.W.) 88.

Interestingly enough, the Act was not passed so much for the promotion of religion as for political purposes. The legislations were concerned that the working classes might assemble for political purposes on the one day of the week that they were not working.

The 1780 Act has not had effect in South Australia since 1967 when section 3(2) was inserted in the Places of Public Entertainment Act 1913 (as amended) by s 3(e) of Act 68 of 1967. Section 3(2) provides that:-

> "The Act of 21 George III c.49 of the Imperial Parliament has no force or effect in this State".

Prior to its repeal in this State, the 1780 Act had been almost laughed out of enforcement in England when a Jewish lady Law Clerk changed her surname to a Christian one to make her common informer's prosecution under the Act a credible one: see Orpen v Haymarket Capitol Limited and Others (1931) 145 L.T. 614. However, it must be said that that did not prevent a later qui tam action in Houghton-le Touzel v Mecca Ltd (1950) 2.K.B. 612.

It was not until 1788 that the English Parliament enacted Sunday legislation which could be said to be primarily directed towards labour conditions rather than religious observance. In that year An Act for the Better Regulation of Chimney Sweepers and their Apprentices (1788) 28 Geo. III c.48) was passed in an effort to control the conditions of employment in this particular occupation.

In the indenture the master obligated himself to:-

> "...cause the said apprentice to be thoroughly washed and cleansed from soot and dirt, and shall require the said apprentice to attend the public worship of God on the Sabbath Day, and permit and allow him to receive the benefit of any religious instructions; and that the said apprentice shall not wear his sweeping dress on that day".

This Act does not however apply in Australia, as it was specifically made applicable only to the Kingdom of Great Britain, and not to any of His Majesty's colonies. Of course since that time there has been an increasing amount of regulation of working conditions, both in England and here in Australia, which have included provisions restricting or controlling Sunday employment.

During the early part of the 19th century, a number of shopkeepers began to keep their shops open on Sundays. First it was done because often this was the only time available to factory workers to do their shopping, and secondly because the fine of 5 shillings fixed in the 1677 Sunday Observance legislation was no longer a strong detriment.

However, in 1871 a minister of religion, acting as a common informer, instituted numerous prosecutions against small shopkeepers. An unsuccessful attempt was made to have the 1677 Act repealed. However, as a compromise measure the Sunday Observation Prosecution Act 1871 was passed. This Act provided that prosecutions could only be instituted with the consent in writing of a chief constable or two Justices of the Peace or a stipendiary magistrate, and that no prosecution could be heard before the Justices with whose consent it was brought.

This compromise legislation is not in force in South Australia, due to the fact that it was enacted in England after this State was settled.

The last of the Lord's Day Acts prior to settlement in 1836 is the statute (1833) 3 & 4 Will. IV c.31. This statute provided that where the date for holding the election of officers of corporations and public companies fell on Sunday, the election was to be held on the Saturday preceding or the Monday following. This statute no longer applies in South Australia in relation to local governing bodies for the date of holding elections each year is prescribed by the Local Government Act 1934 and always falls on a Saturday, but it could still apply to corporations erected by private act, letters patent or royal charter or to any joint stock corporations which may still exist. Accordingly the

statute should be repealed in its application to South Australia, but with a saving of the amendment of the law effected by the statute.

What Sunday Observance Acts Have Force In South Australia?

In determining which Sunday Observance Acts have force in South Australia, it is perhaps easiest to look first at which Acts or parts of Acts are not in force.

First, there are the Imperial Acts which were passed after the settlement of South Australia in 1836. This eliminates the Sunday Observance Prosecution Act 1871.

Second, there are the Acts which have legislatively been rendered of no force and effect, which eliminates the Act of 1780 which provided for the Prevention of Certain Abuses and Profanations on the Lord's Day (see section 3(2) of the Places o Public Entertainment Act 1913).

While there is a possibility that some of the other Sunday Observance Acts may in whole or in part not be in force in this State, due either to the fact that the statute in questi was not received at the time of settlement or was already implie repealed prior to December 28, 1836, or that it has been rendere of no effect by subsequent legislation of this State; we hold tl view that it is safest to deal with the remaining statutes in order to clear up any doubt which may exist.

Although while running through the history of Sunday Observance legislation we mentioned the Acts of Uniformity, and the Act Abolishing Diversity in Opinions, we will not deal with those Acts in this Report. Some of those Acts were alread repealed at the date of settlement. As to the remaining parts, this Committee in our Seventy-Eighth Report dealing with Dispa

Subjects in the Inherited Imperial Law between 1225 and 1557 has already made recommendations for repeal.

This then appears to leave us with:-

(1) The Sunday Fairs Act 1448 (27 Hen. 6 c.5)

(2) The Sunday Observance Act 1625 1 Car. 1 c.1)

(3) The Sunday Observance Act 1627 (3 Car. I c.2)

(4) The Sunday Observance Act 1677 (29 Car. II c.7)

(5) The Sunday Observance Act 1833 (3 & 4 Will. IV c.31)

Are the Principles upon which the Sunday Observance Acts were based still valid today?

The current Sunday observance laws are still largely based on principles laid down in the seventeenth and eighteenth centuries, namely that church attendance and religious conformity should be encouraged by prohibiting secular activities and by restricting employment that might attract people away from their religious observance.

That this was the purpose of the legislation is clear from the judgment of Bayley J. in Fennell and another v Ridler (1826) 5 B. & C. 406 108 E.R. 151. Discussing the Act of 1677 the Judge said at pages 407-8 (152 of E.R.):-

> "The spirit of the Act is to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion ... Labour may be private and not meet the public eye and not offend against public decency, but it is equally labour, and equally interferes with a man's religious duties..."

It seems to us that every species of labour, business of work, whether public or private, in the ordinary calling of a tradesman, artificer, workman, labourer, or other person, is within the prohibition of the statute.

It is no longer regarded as acceptable for parliament to attempt to force people to engage in Christian worship but Governments must respect the strong Christian feelings held by many people in this State.

As the initial principles upon which the Sunday Observance legislation was laid down are to a large extent, no longer considered valid, if the legislation is to remain it would seem that new reasons should be found.

One possible justification for Sunday Observance legislation relates to working conditions. At the time that the Sunday Observance Acts were enacted very little thought was given to the conditions of workers, and it was to some extent merely a fortuitous circumstance that Sunday observance legislation meant that Sunday was a day of rest. However, since that time labour conditions have become a very important issue. It is believed that workers should be entitled to adequate time for rest and relaxation, and Sunday is usually the principal day chosen for that purpose. Workers who are required to work on Sundays, are usually entitled to penalty rates of pay, even if they have been given substituted days for rest and relaxation. That problem, however, can safely be left to industrial legislation, and to detailed regulations in awards and industrial agreements.

The Ontario Law Reform Commission when examining Sunday Observance Laws in 1970 came to the conclusion that Sunday should be retained as a "pause day" for secular rather than religious purposes.

That however is to secularize Sunday Observance into non-existence. The time may come when the majority of factories, shops and offices are open seven days a week, with the two (or more) day breaks of workers not necessarily falling on Saturday and Sunday. However, it seems to us desirable to retain at least one regular day a week when it is possible for family and friends to be together. A similar conclusion was reached by the Supreme Court of the United States in the case of McGowan v. Maryland 366 US 420, at 450-451 where the court implied that statutes which do not specify a particular day of rest but merely require an employer to grant an employee one consecutive twenty-four hour period of rest per week do not adequately fulfil the objective of providing a uniform day of rest, because they do not ensure that all members of a family will receive the same day off.

The retaining of Sunday as the day that the majority of people are not obliged to work serves to allow those who wish to attend church to do so. The facilitating of church attendance is indeed a valid reason to retain some of the features of Sunday legislation. It is only when the legislature attempts to force, or "strongly encourage" people to attend church, that it goes beyond the bounds of what is acceptable today.

In summary, therefore, the Committee is of the view that people should not be required to engage in religious observance but that there still appears to be merit in retaining Sunday as a day of rest. The question of exactly what activities should be prohibited on Sundays will be discussed later in this report.

Which of the Sunday Observance Acts should be rendered of no force and effect in South Australia?

We begin to answer the question posed by saying that we believe that all the relevant legislation referred to at page 13 except the statutes 29 Car. II c.7 s.VI and 3 & 4 Will. IV c.31 should be declared to be of no further force and effect in this State. We have three main reasons for recommending this conclusion. First, much of the relevant legislation is obsolete. Secondly, it is desirable to repeal as much of the inherited Imperial legislation as possible, and proceed to re-enact any necessary provisions in contemporary language. Finally, it is not in our view appropriate to have legislation attempting to ensure religious observance.

Thus in our view it is merely a question of deciding which (if any) provisions of the legislation should be re-enacted in our statute books.

In deciding whether or not to enact any such legislation in this State, it may prove useful to examine what has been done in other jurisdictions.

England

The Sunday Observance laws in England, were investigated by the Law Commission for England and Wales. Their study was concerned with finding those laws which were obsolete or inoperative.

In their 1969 report (The First Report on Statute Law Revision: Comnd. 4052) the Law Reform Commission examined, among other things, the possibility of repealing the Sunday Observance legislation.

The Committee recommended that the Acts of 1448, 1625, 1627 and 1677 (along with other Acts not relevant for our purposes) be repealed. The Commission said at page 38:-

> "The first four Acts are directly and mainly against different forms of Sunday entertainment and trading, and were reported by the Departmental Committee on the Law of Sunday Observance (Comnd 2528 - 1964) to be "virtually obsolete and chiefly of historical interest". The statute that now effectively controls Sunday entertainments, sports and pastimes is the Sunday Observance Act 1780 as amended by the Sunday Entertainments Act 1932; and for all practical purposes Sunday trading is now regulated by the Shops Act 1950.
>
> Section 6 of the Act of 1677 deals with the service of process on Sundays. This matter would more appropriately be regulated by rules of court, which either already provide for it or could do so if the section were repealed".

This last recommendation would require an amendment of the Supreme Court rules of Court which do not refer to the matter and obviously rely on the subsistence of the 1677 Act, but the matter is already covered by Local Court rule 53 which forbids service of process on Sunday, Christmas Day or Good Friday.

The recommendations of the Law Reform Commission were enacted in the Statute Law (Repeals) Act 1969.

Section 6 of the Act of 1677 dealing with the service of process on Sundays was in effect, replaced by a new Order 65 rule 10 of the English Supreme Court Rules which provides:-

10 (1) "No process shall be served or executed within the jurisdiction on a Sunday except, in case of urgency with the leave of the Court.

(2) For the purposes of this rule "process" includes a

writ, judgment, notice, order, petition, originating or other summons or warrant".

This rule of course differs from section 6 of the 1677 Act in that it permits service of a process on Sunday in cases of urgency with leave of the Court, and there is no penalty or action for damages for wrongful service.

Tasmania

Tasmania repealed the Imperial Sunday Observance legislation early this century. However, the Sunday Observance Act of 1908, now The Sunday Observance Act of 1968, re-enacted much of the repealed legislation (see Appendix G). For example section 3 of their Sunday Observance Act 1968 provides:-

3 (1) "Except as otherwise provided in this Act, on Sunday no person shall -
(a) purchase, sell, offer for sale, or negotiate the purchase of property
(b) carry out his ordinary calling
(c) transact any business of or in connection with his ordinary calling, or
(d) do for gain any business, work, or labour.

(2) This section does not apply to doing works of mercy or works of necessity.

Section 5 provides:-

5 (1) "No person on Sunday shall serve or execute or cause to be served or executed any writ, process, warrant, order, judgment or decree, except -
(a) where the liberty of the subject is involved
(b) in cases of crime or breach of the peace
(c) in aid of the peace
(d) under the equitable, admiralty, or ecclesiastical jurisdiction of the Supreme Court or jurisdiction in substitution therefor

(e) for the care or custody of persons who cannot look after themselves.

(f) to provide for the maintenance of husbands, wives, dependant females, or children; and

(g) for the arrest of absconding defendants and debtors.

(2) The service on Sunday of any writ, process, warrant, order, judgment, or decree contrary to subsection (1) of this section shall be void to all intents and purposes whatsoever; and the person so serving or executing the same shall be as liable in an action by the party grieved and to answer damages to him for the doing thereof, as if he had done the same without any authority".

New South Wales

Pursuant to the recommendations of the New South Wales Law Reform Commission in their 4th Report relating to the Application of Imperial Acts, the Statute Law (Repeals) Act 1969 repealed the Sunday Observance Acts along with a vast majority of all Imperial statutes having force in New South Wales.

When commenting upon the 1625 Act (1 Car. I c.1) the Commission came to the conclusion that it had never applied in that state, saying at page 93

"The Act of 1625 applied to the "dominions" but its application depended upon the existence of parishes in the English sense and accordingly we think that it did not apply in New South Wales. The Act forbade "meetings, assemblies or concourse of people out of their own parishes on the Lord's Day within the realm of England or any of the dominions thereof, for any sports or pastimes whatsoever"; and forbade also

common plays and sports.

In any event, the Act appears to be repealed in part by the Sunday Entertainment Act, 1966, section 7".

With respect to the Act of 1627 (3 Car. I c.2) the Commission took the view that although the Act did not depend upon the existence of parishes, its provisions were obsolete.

The Commission in examining the 1677 Act (29 Car. II c.7) was mainly concerned with sections 1 and 6, both of which had been held to be in force in New South Wales.

Section 1 provides that no tradesman, artificer, workman, labourer or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day .... (works of necessity and charity only excepted). The exception was applied to the droving of sheep on Sunday in Melbourne Banking Co v Brewer (1875) 1 S.C.R. (N.S.) 103.

Of section 1, the Commission said that it was very partial in its operation, as the expression "other person whatsoever" has been taken to refer only to persons who are ejusdem generis with tradesmen, artificers, workmen or labourers. Various classes of person have been held to be outside the statute. Thus in Land Development Co Ltd v Provan (1930) 43 C.L.R. 583, the High Court, reversing the decision of the Supreme Court of New South Wales, held that neither the appellant company nor its agent selling land in subdivisional form came within the provisions of the section.

The Commission added that the provisions of the Act were subject to Division 3 of Part IV of the Factories, Shops and Industries Act 1962-1965.

The Commission expressed the view that the only portion of the statute which should be reproduced was section 6

which relates to service of process on Sundays. It was recommended that the proposed Imperial Acts Application Act contain the following provision

> "Service of any writ, process, warrant, order, judgment or decree (except in case of an offence, breach of the peace or any warrant, writ or process for the apprehension of any person) upon a Sunday shall be void".

This was subsequently enacted as section 41 of the Imperial Acts Application Act 1969.

Although the Sunday Fairs Act of 1448 (27 Hen. VI 6 c.5) was not expressly referred to in the Commission's Report and the resultant Act, it would in effect have been repealed by section 8(1) of the N.S.W. Act, which provides:-

8(1) "In addition to the repeals effected by subsection two of section five of this Act, all other Imperial enactments (commencing with the Statute of Merton, 20 Henry III 1235-6) in force in England at the time of the passing of the Imperial Act 9 George IV Chapter 83 are so far as they are in force in New South Wales hereby repealed".

In recent times the New South Wales Law Reform Commission has re-examined the question of whether or not service of process should be allowed on Sundays. In 1983 the Commission, through its Community Law Reform Program issued a Report on Service of Civil Process on Sunday. The details of that report will be examined later in this report when we deal with the matter ourselves. At this stage it will suffice to say that the Commission concluded at page 59 of the report that the law should be amended so as to make lawful the service of civil process on Sunday.

Queensland

The Queensland Law Reform Commission in 1979 issued a working paper dealing with imperial statutes in force in Queensland.

In that working paper the Commission recommended that with the exception of certain stipulated enactments, all enactments commencing with the Statute of Merton which were still in force in 1828 should be repealed, in so far as the Queensland Parliament had authority to repeal them.

The Commission recommended that certain provisions of Imperial Statutes be replaced by sections of an Imperial Acts Application Act. Clause 9 of the draft bill proposed by the Commission provided

9 "Service of Process on Sunday (29 Charles II c.7) Service of any writ, process, warrant, order, judgment or decree (except in case of an offence, breach of the peace or any warrant, writ or process for the apprehension of any person) upon a Sunday shall be void".

The Commission in commenting upon this clause said at pages 3-4 of their Report

"Under the Imperial Statute of 1677 no writ, process, warrant, order, judgment or decree may be served or executed on Sundays except in case of treason, felony or breach of the peace. Order 93 rule 15 of the Supreme Court Rules (Queensland) operates against the service of an instrument (except a Warrant in an admiralty action) on a Sunday. Section 75 of the Justices Act 1886-1978 permits the granting or issue of a warrant upon a complaint of an indictable offenc or a search warrant, on a Sunday as on any other day. Clause 9 of the attached Bill retains the existing law but excepts its application in case of an offenc breach of the peace, or any warrant, writ or process

for the apprehension of any person. In this respect it resembles s.102(3) of the English Magistrates Court Act 1952".

Service of Process on Sunday

It is apparent from a brief examination of reform relating to Sunday Observance in other jurisdictions, that when recommending the repeal of the Imperial Sunday Observance legislation, a number of law reform agencies have held the view that the prohibition of service of process on Sundays is one matter contained in the Sunday Observance legislation which should be retained.

Service of process on Sundays is prohibited in this State by section 6 of the Sunday Observance Act 1677 (29 Car. 2 c.7) which provides that:-

"no person or persons upon the Lord's Day shall serve or execute or cause to be served or executed any writt, process, warrant, order, judgment or decree (except in cases of treason, felony or breach of the peace) but that the service of every such writt, processe, warrant, order, judgment or decree shall be void to all intents and purposes whatsoever and the person or persons soe serving or executing the same shall be as lyable to the suite of the partie grieved and to answere damages to him for doeing thereof as if he or they had done the same without any writt, processe, warrant, order, judgment or decree at all".

Service of process on Sundays is also prohibited by Local Court Rule 53 which provides

"No process shall be served or executed on Sunday, Christmas Day or Good Friday".

The question which is raised at this stage, is whether when repealing the 1677 Act there should be re-enacted some provision prohibiting service of process on Sunday. Alternatively should there be no impediment to service on Sunday, in which case Rule 53 of the Local Court Rules dealing (inter alia) with service on Sunday should be deleted, as the same points would apply to Christmas Day and Good Friday.

As has previously been mentioned England has replaced section 6 of the 1677 Act with Supreme and County Court Rules prohibiting service on Sundays. Order 65 rule 10 of the Supreme Court Rules provides:-

10(1) "No process shall be served or executed within the jurisdiction on a Sunday except, in case of urgency, with the leave of the Court.

(2) For the purposes of this rule "process" includes a writ, judgment, notice, order, petition, originating or other summons or warrant".

This rule differs to some extent from section 6 of the 1677 Act in that it permits service of a process on Sunday in cases of urgency, if the Court gives leave.

Section 41 of the New South Wales Imperial Acts Application Act 1969 in replacing section 6 of the 1677 Act provides

> "Service of any writ, process, warrant, order, judgment or decree (except in case of an offence, breach of the peace or any warrant, writ or process for the apprehension of any person) upon a Sunday shall be void".

The Queensland Law Reform Commission in a 1979 working paper dealing with Imperial Statutes in force in Queensland recommended the enactment of a section in identical terms to section 41 of the New South Wales Act.

Tasmania, when re-enacting a number of the Sunday Observance provisions in the Sunday Observance Act of 1908, also included a provision prohibiting service on Sundays.

Despite this apparent agreement that there should not be service on Sundays, more recently the matter has been questioned.

In 1983 the New South Wales Law Reform Commission, through its Community Law Reform Program issued a report on service of Civil Process on Sunday.

In considering whether reform was appropriate in respect to this aspect of the Sunday laws, the Commission said at page 52 of the report:-

> "If we accept that Sunday is now a day of rest and recreation for predominantly secular reasons, we face an important question. This is whether serving legal documents on that day is inconsistent with the concept of rest and recreation. If the answer to this question is "no" we can then consider whether there are positive reasons for favouring reform".
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> The Commission concluded on the following page:-
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> "We take the view that the service of process would not be inconsistent with the concept of Sunday as a day of rest and recreation. We have several reasons for this view
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> - The community obviously accepts that many people must work on Sunday in order for society to function.
> - In our view the classification of Sunday as a day of rest and recreation does not necessarily mean that rest and recreation should be compulsor for all.

- A correlative of the 'right' to have Sunday for rest and recreation is the entitlement of any person to choose to work on that day. This policy is, in our opinion, implicit in current legislation governing Sunday retail trade and industrial conditions. Small businesses (with some exceptions) may trade on Sunday. The restrictions on trading by large retailers are not necessarily inconsistent with the general principle that people are entitled to choose to work on Sunday, since the restrictions may have other justifications. Further, there is a clear difference in principl between the imposition by an employer upon an employee of an obligation to work, and a voluntary decision by a person to carry out his or her normal business or trade activity on that day.
- Some of the restrictions in current legislation are arguably designed to facilitate the exercise of individual freedom of behaviour on Sunday. For example, laws concerning Sunday entertainmen often relate to particular hours of the day, which suggests that they are designed to allow the give and take necessary to accommodate the conflicting interests of particular groups, such as those who wish to go quietly to their churche and those who are football supporters (and players).
- The act of service of process is simple. Apart from reluctance or personal annoyance experience by the recipient of unwanted process, the interruption to the day's activities is small".

The Commission expressed the view that service of civil process should be permitted on Sunday. The first reason was that there has been a general relaxation of the laws governing commercial and other activities on Sunday. Secondly, the Commission pointed out that under existing State and

Commonwealth law, a large amount of legal process may already be served on Sunday in New South Wales. For example, all criminal process, process for the apprehension of any person, all process issued out of both the Federal Court of Australia (including bankruptcy notices and bankruptcy process) and the Family Court of Australia.

The Commission expressed the desirability of having uniformity between Commonwealth and State law, and also pointed out that in some instances Sunday will either be the most convenient time for service of process (for example the defendant is away from home during weekdays) or will be the only time in which service could usefully have effect, (for example in the case of a Mareva injunction).

In conclusion the Commission recommended that the law of New South Wales be amended so as to make lawful the service of civil process on Sunday. It was recommended that the statutory provision go further than the simple repeal of section 41 of the Imperial Acts Application Act (which renders such service void), and that the lawfulness of those acts which have hitherto been void be spelt out. The following section was suggested.

> "Any writ, process, warrant, order, judgment or decree may be served on a Sunday".

The recommendations of the Commission have recently been enacted in the Sunday (Service of Process) Act 1984 (see Appendix ). Section 3 of that Act provides

> "Service of process on a Sunday.
>
> 3(1) Any writ, process, warrant, order, judgment or decree may be served on a Sunday.
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> (2) Notwithstanding subsection (1), service of any writ, process, warrant, order, judgment or decree (except

in the case of an offence, breach of the peace or any warrant, writ or process for the apprehension of any person) on a Sunday on which Christmas Day falls shall be void".

This Committee is therefore in a position where it must decide which course to take with respect to service of process on Sunday. There appears to us to be three basic options namely -

(1) to re-enact section 6 of the Sunday Observance Act 1677, basically as it is.

(2) to have provision along similar lines to 65 r. 10 of the English Supreme Court Rules, and thus allow service on Sundays in cases of urgency.

(3) to have a provision similar to that proposed by the New South Wales Law Reform Commission, which expressly allows service of process on Sundays.

We discarded the first option, being of the view that whatever was decided upon, service of process in cases of urgency should be allowed on Sundays. In the case of certain court orders such as Mareva injunctions and Anton Piller Orders, it will be crucial that the order be served as quickly as possible. Indeed if it is necessary to delay until the Monday the order may be of no avail as the damage may have already been done.

The choice between options (2) and (3) is more difficult to make. The matter obviously becomes one of policy. A majority think on the whole the English compromise contained in their Order 65 Rule 10 is best. No plaintiff should be in jeopardy of losing his rights by refusing all service of process on Sunday. On the other hand a defendant served with legal process on a Sunday and unsure what to do

about it may have considerable difficulty in locating his solicitor that day and, if he does, that solicitor may have equal difficulty in locating a barrister of his choice whose skills lie in the particular area of law with which the process deals. Lawyers, like the rest of the citizenry, commonly have Sunday as a day of rest and relaxation with their families and usually do so away from home.

This would of course require the repeal of s.6 of the 1677 Act to leave the way open for the Courts to enact rules of Court equivalent to English Order 65 Rule 10. Alternatively the substance of that rule could be embodied in South Australian legislation.

The minority would follow the recent legislation in New South Wales. All members would prohibit the service of process on Good Friday, Easter Day and Christmas Day.

Sunday Work

Section 1 of the 1677 Sunday Observance Act purported to secure the observance of the Lord's Day by prohibiting any person from engaging in "any worldly labour or business or work of their ordinary calling" upon that day, except for "works of necessity and charity".

As this provision would appear to be still in force in this State, it would be prudent on our part to examine the present effect of the section and also the expected effect of its repeal.

There have been comparatively few cases dealing with this section of the Act, and because the Courts have in recent years read the terms of the provision in a relatively restrictive manner, the particular work in question has often been held not to come within the terms of the section.

For example in Land Development Co. Ltd v Provan (1930) 43 C.L.R.583 it was held that neither a company, nor its agent, selling land in a subdivision came within the provisions of the section. In Ex parte Pughe (1902) 19 W.N. (N.S.W.) 19 where the first mate of a vessel employed on Sunday in unloading, was prosecuted under the Sunday Observance Act and convicted, it was held by Cohen J. that the Act does not apply to seamen, and that the conviction should be set aside. In Marshall v Foster (1898) 24 V.L.R. 155, Hood J. held that a fireman employed on a steamship is not a "tradesman, artificer, workman or other person whatsoever" within the meaning of the Sunday Observance Act. Therefore an order by the captain to his fireman to steam up on a Sunday while the vessel is in port is a lawful command.

In some cases the work has been held to be work of necessity. For example in Melbourne Banking Co. v Brewer (1875) 1 S.C.R.(N.S.) (N.S.W.) 103 the Full Court held that the droving of travelling sheep on a Sunday is a "work of necessity" within the exception in the Sunday Observance Act.

However on some occasions the Act has been held to apply. For example in Row v Fenton 7 December 1864 (Argus Newspaper) (Vic), noted in 37 Australian Digest (2nd) at 619 the defendant was convicted for working on the Lord's Day. In that case the evidence was that the defendant was a wool-washer, and that he had spread his wool out to dry on a Sunday, and that if the wool had not been spread out it would have become heated and damaged. The Victorian Full Court held on appeal that as it had not been shown that arrangements could not have been made to obviate the necessity of working on Sunday, it was not a "work of necessity" within the meaning of the section.

In Sawyer v Amalgamated Electrical and Battery Engineers Ltd (1935) 9 W.C.R. 231, the New South Wales Workers Compensation Commission held that a commercial traveller who had been injured while obtaining orders on Sunday had been doing "worldly labour, business or work" of his ordinary calling within the meaning of the Act. However, the Commission held that he was doing what he was employed by the respondent to do, notwithstanding the illegality. The Commission therefore exercised its judicial discretion under section 40 of the Workers' Compensation Act 1926 (N.S.W.) in favour of the applicant and dealt with the matter as if the applicant had at the time of the injury been "a worker under a valid contract of service".

It appears that section 1 of the Sunday Observance Act 1677 is very rarely raised as a defence in litigation, and there does not appear to have been a prosecution in this State for a very long time. Indeed, Sunday-work (at least in continuous process and service industries) seems to have come to be accepted and the various Industrial Commissions at State and Federal level have in a number of instances been willing to make awards authorising work on Sundays.

In In re Iron and Steel Works Employees (A.I.S. Ltd Port Kembla) Award (1934) A.R. (N.S.W.) 144, the then President of the New South Wales Industrial Commission held that notwithstanding the Sunday Observance Act 1677 (29 Car. II c.7) award making tribunals may authorize work on Sundays whether or not the work is a work of necessity within the terms of the 1677 Act.

However, ten years later Kinsella J. in In re Charcoal Manufacture (State) Conciliation Committee (1944) 1 A.R. (N.S.W.) 398

expressed extreme reluctance to treat Sunday as a working day, although in the end he allowed Sunday work because it had been agreed upon by all the employees. Kinsella J. did so with misgivings saying at pages 399 - 400:-

> "This would enable the men to have a long weekend each fortnight. On the other hand, it would involve their treating one Saturday and one Sunday in the fortnight as ordinary working days. I am extremely reluctant to take any step which may tend to destroy the traditional significance of Sunday. In this country among a large section of the community Sunday has a solemn significance as a day of religiou observance, and in addition, from time immemorial in British communities it has been universally accepted as a day of rest from labour.
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> Notwithstanding the doubt expressed by Brown J. on this point: (In re Steel Works Employees (Broken Hill Proprietary Company Ltd) Award (1936) AR at page 159) I am clearly of opinion that the Sunday Observance Act is still in full force and effect in this State (see Terry v McGirr 33 S.R. 453, Land Development Company v Provan 43 CLR 583). I shall do nothing which may compel any man against his religious principles, or indeed, apart from religious principles, against his will, to treat Sunday as an ordinary working day .....
>
> ..... solely on the understanding that no employee is to be compelled against his will to work on any Sunday, I am prepared to grant a qualified exemption from clauses 2 and 4 of the award I am about to make, in respect of employees of K.C.W. Charcoal Supplies. I do so with considerable misgiving and in the hope that this will not be taken as a precedent tending to the further extension of Sunday working beyond the present limited fields in which it is countenance by industrial authority".

However, despite Kinsella J's misgivings, Sunday work has become accepted practice in some industries. In

In Re Glass Workers Award (1953) 75 C.A.R. 122, the Commonwealth Arbitration Court, when considering the desirability of requiring employees by award to work on Sundays, expressed the view that it is not prejudicial to the public interest to permit Sunday work in an industry, and that the public interest may indeed be served if such work eliminates certain waste in that industry. The Court also said that the loss of the full advantage of participation in religious observances, in family and social intercourse and in recreations during the weekends by those who necessarily work can be adequately compensated for by the prescription of additional rates.

From the earliest days of award-making it has been recognised by industrial tribunals that special compensation should be afforded employees who are required to work on Sundays. In 1919 Higgins J. in the Gas Employees Case 13 C.A.R. 437 at p469 when drawing attention to the special nature of the Sunday work, said:-

> "The true position seems to be that the extra rate for all Sunday work is given on quite different grounds from on extra rate for work done on the seventh day. The former is given because of the grievance of losing Sunday itself - the day for family and social and religious reunions, the day on which one's friends are free, the day that is the most valuable for rest and amenity under our social habits".

Under some awards, production work on Sundays is prohibited, except by agreement with the Union, but in most cases it is permitted, with provision for payment of double time or other penalty rates for such work.

Thus it would appear that section 1 of the 1677 Act has not, of itself, affected labour law to a great extent in Australia. What has had a greater effect has been the social expectation that people are entitled to have Sundays free for the pursuit of their leisure time activities (whether that be religious observance or otherwise).

While people running their own business quite often need to work on Sundays, and are generally not adversely thought of for doing so, on the other hand there is a general resistance against employees being required to work on Sundays unless (1) it is necessary and (2) the workers are adequately recompensed. It therefore appears that although Sunday does not hold religious significance for many people, it certainly is still regarded as an important rest day in a secular sense.

We consider that most employees are given sufficient protection by their particular award or agreement. If the award or agreement allows work on Sunday, the higher award wages will usually either be enough to make the employee reasonably content to work on Sunday, or so high as to discourage employers from requiring Sunday work.

Places of Public Entertainment Act 1913

As has been mentioned earlier in this report, the Sunday Observance Act 1780 (21 George III c.49) which was enacted for preventing certain abuses and profanations on the Lord's Day, has had no force and effect in South Australia since 1967 as a result of section 3(2) of the Places of Public Entertainment Act 1913 (as amended).

However, section 20 of the Places of Public Entertainment Act does place certain limitations on Sunday entertainments, just as the Act of 1780 had done (For section 20 see Appendix F). Section 20 differs from the Imperial legislation in that the religious significance of Sunday is not emphasized. The actual reason for imposing restrictions on particular entertainments is perhaps best gathered from section 20(4) which provides the circumstances in which the Minister may grant a permit for Sunday entertainment

> "....but a permit shall not be granted unless the Minister has first considered
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> (a) whether in consequence of the permit being granted there will be a significant increase in the number of persons required to work on a Sunday who would not otherwise work on that day.
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> (b) whether the granting of the permit will cause a departure from practices existing before the commencement of the Places of Public Entertainment Act Amendment Act 1967, by the standards currently prevailing in the community and in the locality in which it is proposed to hold the entertainment, such as might reasonably cause offence to persons who adopt those standards.
>
> (c) whether the quiet of the locality in which it i proposed to hold the entertainment will be unduly disturbed if the permit is granted.

This section appears to work well enough in this State and we do not recommend any change in the legislation.

The Shop Trading Hours Act 1977 (as amended)

Shop trading on Sundays was previously governed by the Industrial Code 1967 (as amended). However since 1977 shop trading has been governed by the Shop Trading Hours Act 1977 (as amended). Section 14(3) of that Act provides

3 "Except as otherwise provided in this Act, a shopkeeper shall keep his shop closed and fastened against the admission of the public for the whole of each Sunday and each other public holiday and during such other period that the shop is required by this Act to be closed".

Certain types of shop are exempt from the trading provisions.

Certain other trading may be permitted by the Minister. For example section 13 a (a 1980 amendment) provides that the Minister may grant a permit for hardware shops to be open on Sundays. Section 17 provides that the Minister may grant a licence permitting the sale of motor spirit and lubricants.

In our view this legislation has no overtones of the requirement of religious observance. We make no comment as to the actual requirement of Sunday closing, or as to the definition of "exempt shop" as we consider that these are matters best left to Parliament which of course is ultimately influenced by the views of the public.

Contracts

One benefit of repealing the Sunday Observance Acts, and in particular the Act of 1677, is that it will do away with difficulties and uncertainties which are under the present law capable of arising in relation to some contracts made on Sundays.

Although at common law, a contract made on a Sunday is valid, it was held in 1827 that pursuant to the Sunday Observance Act of 1677, that contracts made and completed on Sunday in relation to "any business" were unlawful, void and invalid. (See the judgments of Best C.J. Park, Burrough and Gaselee JJ. in Smith v. Sparrow (1827) 4 Bing. 84; 130 E.R. 700). On the other hand, contracts not within the ambit of the Act of 1677 can apparently be enforced even though made on a Sunday (see Drury v. Defontaine (1808) 1 Taunt. 131 127 E.R. 781).

Thus in Ronald v Lalor (1872) 3 V.R. (E) 98, the Victorian Full Court held that the Sunday Observance Act 1677 does not apply to a land agent, who is not within the words "other person" in the Act; and, therefore, a contract for the sale of land completed by a land agent on a Sunday may be valid. A year later the Victorian Full Court again had cause to look at the effect of a contract made on a Sunday. In Garton v Coy (1873) 4 A.J.R. 100, the Full Court held that the trade of a livery stable keeper is within the Sunday Observance Act, and that no action can be maintained upon a contract made on a Sunday for hiring a horse and carriage.

In our view this aspect of the Sunday Observance Acts is particularly undesirable. Apart from anything else it is unsatisfactory that the parties to the contract are unlikely to know before hand whether or not the contract is likely to be held outside or inside the terms of the statute. We see no reason why contracts should be held to be invalid merely because they were made on a Sunday, and believe that the abolition of this rule will be a welcome side benefit of the repeal of the Act of 1677.

Summary

The Imperial Sunday Observance legislation contained in The Sunday Fairs Act 1448 (27 Hen. VI c.5), The Sunday Observance Act 1625 (1 Car. I c.1), The Sunday Observance Act 1627 (3 Car. I c.2) and The Sunday Observance Act 1677 (29 Car. II c.7) should in our view be repealed. The Imperial Act 3 & 4 Will. IV c.31 should be repealed with a saving of the amendment of the law effected by the statute.

In relation to section VI of the Sunday Observance Act 1677, which prohibits service of process on Sundays, a majority of the Committee think that service of process should be allowed on Sundays in cases where there is an urgent necessity to do so.

Although there still appear to be valid reasons for disallowing, or at least regulating some activities on Sunday, in our view these matters are adequately dealt with by state and federal legislation and industrial awards and agreements.

We have the honour to be

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