A Note on some aspects of conciliation and arbitration in the Commonwealth,

prepared by direction of the Minister for Labour and National Service (Rt Hon HE Holt), 4th May 1956.

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"Those honorable members who have examined the explanatory document that I circulated earlier in the week, will have noted with interest the discussion which went on in pre-federation days before agreement was reached on this particular head of power."

1003

1956

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA.

A NOTE ON SOME ASPECTS OF CONCILIATION AND ARBITRATION IN THE COMMONWEALTH.

PREPARED BY DIRECTION OF THE MINISTER FOR LABOUR AND NATIONAL SERVICE (RT. HON. H. E. HOLT), 4TH MAY, 1956.

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A NOTE ON SOME ASPECTS OF CONCILIATION AND ARBITRATION IN THE COMMONWEALTH.

I. INTRODUCTION.

The purpose of this paper is threefold. First, to provide a brief background to the competence of the Commonwealth Parliament to legislate in the field of industrial relations. Second, to trace the history, in the broad, of the approach made by the Parliament to a number of aspects of our conciliation and arbitration machinery which have been receiving particular public attention in recent years. Third, to give a short appreciation of the bearing of the decision of the High Court in the Boilermakers case on our existing machinery.

That industrial conciliation and arbitration are numbered amongst the powers within the constitutional competence of the Commonwealth is due very largely to the activities of four men: Alfred Deakin, Charles Cameron Kingston, Henry Bournes Higgins and Sir Isaac Isaacs.

In the last decade of the nineteenth century when the projected Constitution for the new Commonwealth was being thrashed out, each of these four men, although in different ways, was actively interested in the problem of industrial disputes and the means whereby they could be reduced and avoided. All were agreed that powers in relation to the settlement of industrial disputes should be exercised by the projected Commonwealth Parliament.

At the first Federal Convention in 1891, Kingston sought to have a clause inserted in the draft Commonwealth Constitution providing "for the establishment of Courts of Conciliation and Arbitration having jurisdiction throughout the Commonwealth for the settlement of industrial disputes". The proposal was defeated apparently on the ground that rights of property in the States might be interfered with. At the Convention of 1897, however, Higgins, the future President of the Arbitration Court, presented Kingston's proposal in a modified form, suggesting that the Federal Parliament should have power to make laws as to "industrial disputes extending beyond the limits of any one State". Despite the support of Deakin, Kingston and Isaacs this proposal was also defeated. Undeterred, Higgins reworded the proposed power and at the final Federal Convention of 1898 was at last able to secure the insertion in the Constitution of a clause giving to the future Federal Parliament power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

Although Kingston and Higgins were in favour of granting the new Commonwealth much broader powers of dealing with all disputes, intra-state as well as interstate, realizing the impossibility of carrying the Convention on this issue they dropped it in favour of the modified one which was finally adopted. However, once the Commonwealth was established their efforts at widening the industrial power were assisted by the operation of section 109. This section provides that where Commonwealth and State laws are in conflict the Commonwealth law automatically prevails. So it has been held that, once a Commonwealth industrial tribunal makes an award covering the same ground as a State law or the award of a State industrial tribunal, the Commonwealth award supersedes the State law or award. (*Ex parte* McLean (1930) 43 C.L.R. 472.)

The first Conciliation and Arbitration Act was passed in December, 1904. Since then the Act has been amended 29 times. In addition six referenda have been held with the object of extending the Commonwealth's industrial power. Each proved abortive.

An attempt was made by the Commonwealth Government in 1929 to relinquish its authority in the industrial arbitration sphere, except in relation to the maritime industries, which it proposed to regulate pursuant to its power with respect to overseas and interstate trade and commerce. The Government was defeated at an election following a vote in favour of submission of the Bill to the electorate which the Government treated as a vote of no confidence.

2. CONSTITUTIONAL BACKGROUND.

It is well known that the competence of the Commonwealth Parliament to legislate in the field of employer-employee relationships and as to terms and conditions of employment is limited. However, sight is often lost of the fact that the Commonwealth Parliament's powers extend beyond that authorized by paragraph (xxxv) of section 51 of the Constitution, viz., to legislate with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Other heads of power are to be found in, e.g., the powers to legislate with respect to defence, trade and commerce with other countries and among the States and external affairs. Moreover, the Parliament has complete competence in relation to the Territories of the Commonwealth and to Commonwealth employees. And there is no reason for thinking that the Parliament would not have extensive powers to legislate in respect of the terms and conditions of employment applicable to works of the Commonwealth.

The Parliament has, indeed, exercised its powers in relation to the regulation of terms and conditions of employment under most of these heads of power. The Stevedoring Industry Act, Part XA. of the Navigation Act, Part IVA. of the Snowy Mountains Hydro-electric Power Act and the Public Service Arbitration Act are examples.

The power conferred by paragraph (xxxv.), i.e., the conciliation and arbitration power, has been the most frequently used by the Commonwealth Parliament in the industrial field. Parliament's first exercise of this power became effective on 15th December, 1904, when the *Commonwealth Conciliation and Arbitration Act* 1904 came into operation.

There is no counterpart to paragraph (xxxv.) in the United States or Canadian Constitutions. Legislation under this paragraph has been therefore a unique experiment in the sphere of industrial relations. Machinery was set up for compulsory conciliation and arbitration with the object of preventing and settling industrial disputes by promoting agreement between employees and employers and by making binding awards. In furtherance of its operation, provision was made for the organization of employees and employers.

The limitations on the constitutional power must be borne in mind to appreciate the form and nature of the machinery. The first limitation is that the Commonwealth Parliament can only act through the provision of machinery for conciliation and arbitration. In the early years of constitutional interpretation, emphasis was laid on the private law analogy of commercial arbitration, and on the essentially "judicial" character of arbitration. Since 1918 the emphasis has been placed rather on the basis that the Arbitration Court is not limited to the adjudication of existing rights and duties, but is authorized prospectively to impose a new standard of rights and duties. The analogy is therefore that of a legislator rather than a judge, and the arbitral function has been held to be in aid of legislative, not judicial power. As Isaacs and Rich, *JJ.* said in a joint judgment in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1918) 25 C.L.R. 434 at p. 463—"An industrial dispute is a claim by one of the disputants that existing relations should be altered, and by the other that the claim should not be conceded. It is therefore a claim for new rights and the duty of the arbitrator is to determine whether the new rights ought to be conceded in whole or in part . . . A Court of law has no power to give effect to any but rights recognized by law."

The distinction between the two functions is to be noted. The arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function involves first the ascertainment whether an alleged right or duty exists in law, and then its enforcement.

The central characteristics of this arbitration function were described by Isaacs, *C.J.*, in *Australian Railways Union* v. *Victorian Railways Commissioners* (1930) 44 C.L.R. 319 at p. 355—"In relation to industrial disputes, arbitration signifies a means of settling a question in dispute by reference to a third party or parties when the contendants themselves have failed to agree."

As an arbitral award binds only the parties to the dispute, the Arbitration Court cannot validly be authorized to make an award a "common rule" throughout a whole industry, i.e., to make the award binding on all employers and employees in an industry, whether or not they were made parties to the proceedings. This was decided in the *Australian Boot Trade Employees' Federation* v. *Whybrow and Co. and Others* (1910) 11 C.L.R. 311 (called the "third Whybrow's case"). With this position may be contrasted the powers of State tribunals, which, unfettered by these constitutional limitations, may make awards which do operate as "common rules".

This doctrine has been re-affirmed in subsequent cases, but its effects have been limited, e.g., in *Hudson (George) Ltd.* v. *Australian Timber Workers' Union* (1923) 32 C.L.R. 413. Provisions were held valid making an award binding on successors and assignees of an employer originally bound, whether individually or as a member of an organization. As Isaacs, *J.* put it, at page 452, "It is a battle by the claimants, not for themselves alone, but by the claimants so far as they represent their class". In *Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (1925) 35 C.L.R. 528, Isaacs, Powers, Rich and Starke, *JJ.* held (Knox, *C.J.*, and Gavan Duffy, *J.* dissenting) that a dispute could exist between an employees' organization and an employer, even though the employer then employed no members of the organization and no dispute existed between the employer and his employees for the time being. As Starke, *J.* said (at page 548), "It is clear, therefore, that the existence of an industrial dispute does not depend upon the actual relation of employer and employee or of master and servant, between the participators in the dispute". In the *Metal Trades Employers' Association and Others* v. *Amalgamated Engineering Union and Others* (1935) 54 C.L.R. 387, Latham, *C.J.*, Rich and Evatt, *JJ.*, held (Starke and Dixon, *JJ.*, dissenting) "that the terms upon which non-unionists may be employed may be as much the subject-matter of an industrial dispute as the question whether non-unionists shall be employed at all". It is of interest that the present Chief Justice considered that the Constitution permits an award binding on such employees only if or when their employers, being personally or vicariously parties to the proceedings, employ some employees who are personally or, as members of an organization, parties to a proceeding.

It was contended in *The King* v. *Kelly, Ex parte The State of Victoria* (1950) 81 C.L.R. 64, that the "third Whybrow's case" had been undermined by subsequent cases and should be overruled. The High Court unanimously held that the "third Whybrow's case" should not be overruled, affirming that the parties to be bound must be parties to the dispute and the proceedings.

The Arbitration Court, exercising the power under paragraph (xxxv.), may only act in cases where there is an industrial dispute of the kind there described. The question arises—how far does a decision of the Arbitration Court preclude the High Court from investigating the facts to determine the existence of a dispute.

Section 32 (1.) of the Conciliation and Arbitration Act purports to make a judgment, order or award of the Arbitration Court final and conclusive and unchallengable by way of prohibition, mandamus or injunction in any Court on any account whatever. Sub-section (2.) makes a determination or finding of the Court upon any question as to the existence of an industrial dispute conclusive and binding, in all courts and for all purposes, on all persons affected by that question. The Constitution, on the other hand, by section 75 (v.), gives the High Court original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. The Judges of the Arbitration Court have been held to be officers of the Commonwealth within the meaning of this provision (Whybrow's case (1910) 11 C.L.R. 1; *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Jones* (1914) 18 C.L.R. 224).

The present Chief Justice has considered on more than one occasion the question of how far a provision such as section 32 (1.) of the Arbitration Act can modify the jurisdiction thus conferred on the High Court. His Honour summed up his views in relation to section 32 (1.) in *R.* v. *Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union* (1951) 82 C.L.R. 208 at page 249. He said that section 32 (1.) operates to protect an order or award of the Arbitration Court from prohibition if, notwithstanding that it was not made in conformity with the Act, "it appears that the order or award is reasonably capable of reference to a power belonging to the Court and relates to the subject-matter of the jurisdiction and amounts to a bona fide attempt to exercise the authority possessed by the Court". His Honour thought that there was nothing in the Act which showed an intention that no excess of the defined powers of the Court should in any circumstances have any effect.

With regard to section 32 (2.), however, the position is different. Parliament has power to legislate only in respect of disputes which are in fact disputes of the description set out in section 51 (xxxv.) of the Constitution. The High Court, as the guardian of the Constitution, cannot be deprived of the jurisdiction to determine whether or not such a dispute exists. It is not competent to Parliament, therefore, to purport to place the final decision as to the existence of a dispute in a tribunal other than the High Court. A majority of the High Court said, of section 32 (2.), in *R.* v. *Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd.* (1952) 85 C.L.R. 138, at page 154—"There are constitutional difficulties about the provision. Section 51 (xxxv.) of the Constitution would not enable the Parliament to confer upon the Court authority to determine its own jurisdiction insofar as it depended on the limitations upon that very legislative power." The High Court decided, in *R.* v. *Blakeley; Ex parte Association of Architects, &c.* (1950) 82 C.L.R. 54 that a decision by a Conciliation Commissioner that no dispute existed was not, under section 16 of the Act as it then stood—a provision similar in effect to section 31 (1.) of the Act—protected from a writ of mandamus under section 75of the Constitution. It seems likely, in view of the dictum from the majority judgment in *R.* v. *Foster*, quoted above, that the decision would be the same in a case where it was the action of the Court, instead of a Commissioner, which was in question. The dictum of the present Chief Justice in *R.* v. *Murray: Ex parte Proctor* (1949) 77 C.L.R. 387 at page 399, in connexion with a Local Reference Board established under the Coal Mining Industry Employment Regulations, is in point. His Honour said—"It is, of course, clear that in a matter which could not under the Constitution be placed by the legislature under the authority of the Board, regulation 17 [a provision similar to section 31 (1.)] could have no effect in protecting the Board's order or determination from prohibition."

Turning now to the question of what constitutes a "dispute", Higgins, *J.* said, in the Felt Hatters' case (1914) 18 C.L.R. 88 at page 109—"There is no need . . . for the employees to strike, or throw the industry out of gear, in order to establish the fact of a dispute", but the log of demands must be "real, genuine, and intended to be pressed by any appropriate means."

The next question to be considered is whether a dispute is "industrial". In the *Federated State School Teachers' Association of Australia* v. *Victoria and Others* (1928) 41 C.L.R. 569, the High Court discussed the various definitions of the "sphere of industrialism" in previous cases, viz., "in operations in which capital and labour are contributed in co-operation for the satisfaction of human wants and desires"—"or in operations in which the relation of employer and employee subsists, including, perhaps, demarcation disputes",—"or in operations which are carried on wholly or mainly by manual labour"—"or in operations with a view to the production or distribution of wealth". The Court considered that these suggestions held the most divergent meanings of which the "sphere of industrialism" is reasonably capable. The majority in this case, Knox, *C.J.*, Gavan Duffy and Starke, *JJ.* held that the state educational system did not satisfy any of these definitions.

Another question is associated with the meaning of "extending beyond the limits of any one State". It appears from the cases that it is not necessary that the employers concerned should, themselves, carry on business in more than one State; or that the products (if any) of an industry should have an interstate market; or that the employees concerned should be in the habit of moving from one State to another; or that a dispute should begin in one State and thence spread to others; or that the operations and conditions of the industry in one State should have any direct action or reaction with respect to the operations or conditions in any other State. It is sufficient if the dispute exists, in fact, in more States than one; the industry itself creates a sufficient nexus between employers to link up into one single dispute disagreements which otherwise might be regarded as a series of identical local disputes (*see R.* v. *Commonwealth Court of Conciliation and Arbitration and Others, ex parte G. P. Jones and Others* (1914) 18 C.L.R. 224). However, *Calendonian Collieries Ltd. and Others* v. *Australasian Coal and Shale Employees' Federation* (*No.* 2) (1930) 42 C.L.R. 558 established that a "sympathy" strike alone in one State, supporting a "genuine" strike in another, will not create a dispute "extending beyond the limits of any one State". The employees in each State must be pressing genuine demands against employers in each State.

The power under paragraph (xxxv.) is exercised in the Conciliation and Arbitration, Coal Industry, Navigation, Snowy Mountains Hydro-Electric Power and Stevedoring Industry Acts.

Mention should be made of paragraph (xxxix) of section 51 of the Constitution—"the incidental power"—which confers power on Parliament to legislate with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament . . . or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth". It is under this paragraph, together with paragraph (xxxv.) read in light of the common law rule that everything which is incidental to the main purpose of a legislative power is contained in the grant of the power itself, that much of the Conciliation and Arbitration Act has been enacted. The High Court held, in *Federated Ironworkers' Association of Australia* v. *Commonwealth* (1951) 84 C.L.R. 265, that the provisions in Part VI., Division 3 of the Act, inserted in 1949 with a view to ensuring that the election of officers of industrial organizations is duly carried out, were validly enacted under the "incidental power", and in the same judgment pointed out that similar considerations were responsible for the High Court upholding the provisions contained in Part V. of the Act of 1904 (now contained in Part VI.) for the registration of organizations of employers and employees (*Jumbunna Coal Mine* v. *Victorian Coal Miners' Association* (1908) 6 C.L.R. 309). Because the legislative power conferred by paragraph (xxxv.) related to disputes to which large and changing bodies of men were or might be parties, and appointed arbitration as the means of settling such disputes, it was considered to be incidental to the main purpose of the power to provide for the registration of associations of employers and employees and for the incorporation of the bodies so registered. By that means the double purpose was thought to be served of enabling the representation of potential disputants before the Court and of providing a method of working out the scope and operation of awards. The Court now decided that the incidental power also includes legislative authority to take measures directed to ensuring that the officers of an organization so registered and incorporated shall be elected in a manner calculated to ascertain the authentic will of the members.

Under the incidental power, moreover, Parliament has enacted the enforcement or "sanctions" provisions of the Act.

It will be seen, therefore, that the power to legislate on matters incidental to the execution of the conciliation and arbitration power is of far-reaching effect.

3. AN HISTORICAL SURVEY OF SOME MAIN FEATURES OF THE LEGISLATION RELEVANT TO THE 1956 BILL.

(*a*) Objects of the Legislation.

The chief objects of the original Act were:

(i) to prevent lock-outs and strikes in relation to industrial disputes;

(ii) to constitute a Commonwealth Court of Conciliation and Arbitration having jurisdiction for the prevention and settlement of industrial disputes;

(iii) to provide for the exercise of the jurisdiction of the Court by conciliation with a view to amicable agreement between the parties;

(iv) in default of amicable agreement between the parties, to provide for the exercise of the jurisdiction of the Court by equitable award;

(v) to enable States to refer industrial disputes to the Court, and to permit the working of the Court and of State Industrial Authorities in aid of each other;

(vi) to facilitate and encourage the organization of representative bodies of employers, and of employees and the submission of industrial disputes to the Court by organizations, and to permit representative bodies of employers and employees to be declared organizations for the purposes of this Act;

(vii) to provide for the making and enforcement of industrial agreements between employers and employees in relation to industrial disputes.

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In the course of the 29 amendments of the Act the objects have been altered from time to time. They show conveniently the conceptual changes that the Act has from time to time expressed. For example, the provisions relating to lock-outs and strikes were repealed in 1930 and the first provision then became "to promote goodwill in industry by conciliation and arbitration". The fifth object of the Act was repealed in 1947 when other major changes were made in the legislation.

The 1947 Act's attempt to streamline the machinery led to the first object becoming—

> "to establish an expeditious system for preventing and settling industrial disputes by the method of conciliation and arbitration".

Amplifying this, the third and fourth objects of the 1947 Act were stated—

> "to provide for the appointment of Conciliation Commissioners having power to prevent and settle industrial disputes by conciliation and arbitration";
>
> "to provide means whereby a Conciliation Commissioner may promptly and effectively, whether of his own motion or otherwise, prevent and settle threatened, impending, probable or existing industrial disputes".

The 1947 Act in fact constituted a major departure from the previous machinery in that provision was made for Conciliation Commissioners with powers of conciliation and arbitration which were exclusive of the powers of the Court and only four classes of industrial disputes were then reserved to the Court.

The making and enforcement of industrial agreements—the seventh provision of the chief objects of the original Act—is no longer specifically mentioned among the legislation's objects. It is nevertheless dealt with at length in Part VII. of the existing Act.

Changes in the nature of the Arbitration Court's powers since 1904, particularly in respect of the exercise of judicial powers, questions of enforcement of awards and orders and interpretation of awards, are referred to elsewhere in this paper. The experience of these changes provides reasons for the inclusion in the current Act of two 'objects' provisions not mentioned in the original Act, namely—

> "to provide for the observance and enforcement of such orders and awards"; and
>
> "to constitute a Commonwealth Court of Conciliation and Arbitration having exclusive appellate jurisdiction in matters of law arising under this Act and limited jurisdiction in relation to industrial disputes".

The "goodwill in industry . . ." object which was given pride of place in 1930 was placed second in 1947 as—

> "to promote goodwill in industry and to encourage the continued and amicable operation of orders and awards made in settlement of industrial disputes".

Alone, the object of encouragement of associations of employers and employees to organize and make use of the Court has remained through the years.

(*b*) Conciliation as Distinct from Arbitration.

The power of Parliament, under section 51 (xxxv.) of the Constitution, is to legislate with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". Both conciliation and arbitration import the notion of a third party mediating between opposing parties in dispute. In the case of conciliation the mediator's function, having heard both the disputants, is to bring them to an agreement. In the absence of any agreement it is the function of an arbitrator to determine, having heard the disputants, what their respective rights shall be. "Conciliation" does not apply only to the "prevention" of disputes, nor "arbitration" only to the "settlement" of existing disputes. Both terms—"conciliation and arbitration"—refer to both terms—"prevention and settlement" (*Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* (*No.* 1) (1913) 16 C.L.R. 591). It was because of the absence of any element of a hearing of a dispute between two actual disputants by a third-party mediator that the "conciliation committees" provided for by the Act as it stood in 1930 were held to be unconstitutional by the High Court in the Australian Railways Union Case—*see* below.

Conciliation, as distinct from arbitration, has always been given a special place in the legislation. Note paragraphs (iii) and (iv) of the 1904 Act's objects referred to above.

The original conception was that the Court would be a body promoting a friendly atmosphere in which mutual differences could be settled with the assistance of an impartial chairman. The first Act not only empowered the President to appoint deputies who could exercise such of his powers and functions as he saw fit to assign, but it also provided, in section 34, that the Court could temporarily refer any matters before it to a conciliation committee consisting of an equal number of representatives of employers and employees who were to endeavour to reconcile the parties. In furtherance of the conciliation process the Act also empowered the Court to refer any dispute before it or any matter arising therefrom, to a Local Industrial Board for investigation and report. To this Board the Court was empowered to delegate such powers in relation to conciliation as it deemed desirable.

In practice over the years, however, there has always been more arbitration than conciliation and many attempts have been made to reverse the emphasis on arbitration. In 1926 the Act was amended to provide for the establishment of the first Conciliation Commissioners whose activities were to be restricted to conciliation. Their function was to facilitate the making of agreements by bringing the parties to disputes together into formal discussions. In 1930, however, their powers were extended to enable them, if the parties failed to agree, to make a binding order or award in settlement of a dispute. An appeal lay to the Full Court against any provision in an award or order, made by a Conciliation Commissioner, affecting wages, hours or any condition of employment affecting the public interest. Conciliation Commissioners were also empowered to disallow agreements considered to be detrimental to the public interest. At that time the Government proposed an unlimited number of Commissioners, but the Senate limited the number to three.

Until 1947 the number of Conciliation Commissioners appointed was small. One was appointed under the 1926 legislation but despite the emphasis placed on conciliation in 1930, only one more Conciliation Commissioner was appointed and it was not until the National Security (Industrial Peace) Regulations were made in 1940 that several Conciliation Commissioners were appointed. The establishment in 1930, and subsequent disbandment, of Conciliation Committees are referred to elsewhere in this paper.

When Conciliation Commissioners were appointed under the National Security (Industrial Peace) Regulations of 1940 they were linked with the Arbitration Court and their duty under the general direction of judges was to endeavour to reconcile the parties to industrial disputes and by conciliation to prevent and to settle industrial disputes whether or not the Court had cognizance of them.

The next major change was in 1947. One primary purpose of that year's amendment was stated to be the expedition of the functioning of the machinery of conciliation and arbitration. Once again emphasis was placed on conciliation as a means of settling disputes. The legislation gave to Conciliation Commissioners, fifteen of whom were to be appointed, vastly greater functions than formerly. It also gave them greater security of tenure and independence by providing for appointment until 65. They were to exercise all the Court's conciliation and arbitral power with the exception of four major matters, namely, standard hours, male basic wage, female minimum wage, and annual leave, and their awards or decisions were not to be subject to appeal. Amendments in 1951 transferred long service and sick leave from Conciliation Commissioners to the Court and 1952 amendments handed back annual and sick leave matters to the Commissioners. The 1952 amendments also provided for references by, and appeals from, the Commissioners where, in the opinion of the Chief Judge, the matter concerned was of such importance that in the public interest it should be dealt with by the Court.

(c) The Abortive Conciliation Committees.

In the original Act of 1904 it was provided by section 34 that the Court could temporarily refer any matters before it to a conciliation committee consisting of an equal number of representatives of employers and employees who were to endeavour to reconcile the parties. In the 1928 Act this section was replaced by one providing for the setting up of Conciliation Committees comprised of an equal number of employer and employee representatives chosen by the Chief Judge on the application of any party to an industrial dispute. Provision was made for the appointment by the Chief Judge of a Conciliation Commissioner as Chairman of a Conciliation Committee, except where the other members of the Committee agreed in nominating some other person as Chairman. The Chairman was to preside over meetings but was not entitled to vote. In the event of agreement between any or all of the "parties" the agreement was to be registered as an award. If, however, a majority of the Committee recommended to the Court the terms of the proposed award, the Court had the power to make an order on the question. Under the 1930 Act these provisions were amended to provide that the appointment of a Conciliation Committee should be in the hands of the Governor-General with the Chairman restricted to a Conciliation Commissioner empowered to summon the first meeting but not to be present or to take part in any deliberations of the Committee until or unless he was of the opinion or was informed that in his absence the Committee was unlikely to come to an agreement whereupon he was to preside at all meetings of the Committee. If the "parties" or a majority agreed upon the terms of an award, the agreement was to be registered as an award. Where the "parties" were unable to agree and the views of the Chairman did not coincide with the views of either "party", the Chairman thereupon had the right to make an award subject to the carrying out of certain procedure. Some Conciliation Committees were actually established after 1930, but sections 33 and 34 of the Act as it then stood, which provided for the appointment of, and reference of disputes to, Conciliation Committees, were held to be invalid and unconstitutional by the High Court in *Australian Railways Union* v. *Victorian Railways Commissioners* (1930) 44 C.L.R. 319. The Court pointed out that the explanation of the use of the term "parties" to describe the representatives on the committee was that Parliament had identified the representatives with the class they were intended to represent, and therefore spoke of them as if they were parties to the controversy. The representatives were not in fact chosen as the authorized agents of the disputants, but merely as persons, typical of the class they represented, whom the Governor-General in Council considered likely to appreciate the interests of the disputants. The Court held that a law which enables a body of persons to settle a dispute by issuing a decree arrived at by discussion amongst themselves

without any hearing or determination between the disputants was not a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes, and was not authorized by the Constitution.

The sections referred to were repealed by the amending Act of 1947. The functions and duties of Conciliation Commissioners (who were first appointed in 1926) have been referred to earlier.

(*d*) The Constitution of the Court.

From 1904 until 1926 the Court was constituted by a President and Deputy Presidents. Section 11 of the original Act provided that "there shall be a Commonwealth Court of Conciliation and Arbitration which shall be a Court of Record and shall consist of a President". Section 12 (1) provided that the President, appointed by the Governor-General from amongst the Justices of the High Court, should hold office for a period of seven years and be eligible for re-appointment and not liable to removal during that period except on addresses from both Houses of Parliament. The Act in section 14 also provided for the appointment by the President of any Justice of the High Court or Judge of the Supreme Court of a State to be his Deputy in any part of the Commonwealth, in which capacity he could exercise such powers or functions as were assigned to him by the President.

By Act No. 39 of 1918, provision was made for the appointment of a Deputy President, by the Governor-General instead of by the President, to exercise such functions and powers as the Governor-General thought fit. Act No. 31 of 1920 authorized the appointment of more than one Deputy President. Act No. 29 of 1921 authorized the appointment as Deputy Presidents of barristers and/or solicitors of the High Court or of the Supreme Court of a State of not less than five years' standing.

In 1926, taking account of the decision in the case of *The Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1918) 25 C.L.R. 434 in which the High Court held that the Arbitration Court had no power to enforce its awards as the President was appointed for seven years and not for life—and therefore the Court was not a properly constituted Court to exercise judicial powers under the Constitution—the constitution of the Court was radically altered.

During the period 1918-1926, as a result of amendments to the Act made by Act No. 39 of 1918, judicial powers incidental to the enforcement of awards had been exercisable by courts other than the Arbitration Court—including District, County or Local Courts, Courts of Summary Jurisdiction, and, by Act No. 31 of 1920, the High Court. It was felt that enforcement of industrial awards by the ordinary courts was unsatisfactory, however, and Act No. 22 of 1926 accordingly abolished the office of President and provided for the appointment of a Chief Judge and Judges with life tenure in lieu of the President and Deputy Presidents. The Arbitration Court was at the same time added to the courts having power judicially to enforce awards—see below, under "Sanctions". The Chief Judge and each other Judge was to be a barrister or solicitor of the High Court or of the Supreme Court of a State of not less than five years' standing.

In 1947 the Court was designated a Superior Court of Record.

(*e*) Jurisdiction.

The 1904 Act provided for the exercise of the jurisdiction of the Court in the settlement of industrial disputes by conciliation with a view to amicable agreement between the parties and in the event of no agreement by the means of equitable award. All award making functions were exercised by the President or Deputy President who dealt with the case.

In 1920 provision was made that an alteration of standard hours (at this time they were 48 per week) could only be made by a Bench comprising the President and two Deputy Presidents. Under the 1926 Act standard hours was a matter within the jurisdiction of a Bench consisting of the Chief Judge and not less than two other judges. In 1930 alteration of the basic wage was added to the matters which could be dealt with only by the Court so constituted.

Until the 1947 Act, the basic wage and standard hours were dealt with by the Court consisting of the Chief Judge and not less than two other judges and the normal work of the Court by single judges each ordinarily dealing with a group of awards and industries. Each judge could invoke the assistance of a Conciliation Commissioner who after 1930 had the power to make awards on any subjects within the jurisdiction of a single judge, subject to a right of appeal to the Court in certain circumstances.

As already mentioned, the 1947 Act provided for Conciliation Commissioners independent of the Court who had power to exercise all conciliation and arbitration functions in respect of a group of industries allotted to each of them by the Chief Judge, except in relation to four matters which were reserved to the Court, viz., standard hours, male basic wage, female minimum wage and annual leave.

(*f*) Basic Wage Fixation.

The 1904 Act, in section 40, empowered the Court to prescribe a minimum rate of wages or remuneration. The Court first determined what was essentially a basic wage when Higgins *J.* in what is known as the Harvester Judgment, in a case not under the Conciliation and Arbitration Act, determined

that the minimum amount which it was fair and reasonable to pay to an unskilled labourer was 7s. per day. He then adopted the principle of applying this minimum standard in other cases with which he dealt in settling industrial disputes.

In 1913 the concept of adjusting the basic wage in accordance with variations in the Commonwealth Statistician's retail price index numbers emerged. Then the Court took cognizance of the index numbers covering food and groceries and rent of all houses ("A" series) for the 30 more important towns of the Commonwealth, which had been published by the Commonwealth Statistician for the first time in the preceding year. (Adjustments were subsequently based on the "All-Items" index number—the "C" series, on which the Court bases its "Court" series index number.) At first the Court used the Statistician's figures for the calendar year prior to the date of the award. In 1918, however, the figures for the nearest twelve months available prior to the making of the award were used (Gas Employees' case 13 C.A.R. 437). In 1920 private arrangements were being made between employers and employees to adjust wage rates automatically at intervals in accordance with price level changes. In 1921 the Court made provision in an award for the automatic adjustment of wages according to the rise or fall in the cost of living as shown by the Statistician's index numbers. Previously any adjustment of wages to meet changes in the cost of living had to be by variation of the award by the Court. Now it became a term of the award that wages were to be adjusted quarterly, on the basis of the Statistician's figures for the preceding twelve months prior to each quarterly adjustment. (Engine-drivers' and Firemen's Case (1921) 15 C.A.R. 883 at p. 913; Federated Gas Employees Case (1922) 16 C.A.R. 3 at p. 16). The principle of automatic adjustment of the basic wage was abandoned by the Court as a result of its Basic Wage and Standard Hours Inquiry, 1952-1953 (77 C.A.R. 477).

In 1931 the first separate hearing or inquiry to determine the basic wage was held. Prior to 1930 the Court dealt with the basic wage through its power to fix minimum rates of pay.

In 1947, the Act was amended to prescribe, amongst other things, that the Court might, for the purpose of permitting or settling an industrial dispute, make an order or award altering the basic wage or the principles upon which it was computed. It also provided that the Court might make an order or award altering the minimum rate of remuneration for adult females in an industry.

In 1949, the present provisions, which include a definition of the basic wage, were inserted as follows:—

> "The Court may, for the purpose of preventing or settling an industrial dispute, make an order or award—
>
> (*a*) altering the basic wage for adult males (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult male, without regard to any circumstances pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed;
>
> (*b*) determining or altering the basic wage for adult females (that is to say, that wage, or that part of a wage, which is just and reasonable for an adult female, without regard to any circumstance pertaining to the work upon which, or the industry in which, she is employed) or the principles upon which it is computed."

Basic wage fixation has thus been developed by the Court rather than by the legislature. The amendments of the Act from time to time have merely given recognition to the Court's practice.

(*g*) Procedure and Legal Representation.

The 1904 Act provided that the Court could, subject to the approval of the Governor-General, make rules regulating the practice and procedure of the Court. All rules made were to be laid before both Houses of Parliament which could disallow them.

Amending legislation in 1909 invested the President with power, subject to the approval of the Governor-General, to make rules not inconsistent with the Act or the regulations. In 1926, when the office of Chief Judge was created, this power was vested in that office.

The 1947 Act empowered the Governor-General to make regulations for regulating the practice and procedure of the Court and the Conciliation Commissioners. It also provided that—

> "In the hearing and determination of an industrial dispute—
>
> (*a*) the procedure of the Court or Conciliation Commissioner shall, subject to this Act and the regulations, be within the discretion of the Court or Commissioner;
>
> (*b*) the Court or Commissioner shall not be bound to act in a formal manner and shall not be bound by any rules of evidence but may inform its or his mind on any matter in such manner as it or he thinks just; and
>
> (*c*) the Court or Conciliation Commissioner shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms."

Paragraphs (*b*) and (*c*) were not new in substance. In changing form they had appeared in the Act since 1904.

The 1904 Act provided for legal representation before the Court only by consent of all the parties *or* by leave of the President. In 1910 the power of the President to grant leave was deleted and, until the Act was amended in 1928 the parties could be legally represented by consent of all parties only. Amending legislation of 1928 returned to the 1904 position. In 1930 for the first time, the consent of all the parties *and* the leave of the Court were required. With the "dichotomy" of the 1947 legislation, the 1930 requirements were continued as to proceedings before the Court but legal representation was not permitted at all in proceedings before Conciliation Commissioners. These restrictions did not apply, however, to judicial proceedings before the Court.

In 1951 the Act was again amended to provide that, in proceedings before the Court or a Conciliation Commissioner, legal representation of a party was permissible by leave of the Court or a Conciliation Commissioner. The Court has indicated that leave would, as a matter of prima facie right, be granted. (*The* Waterside Workers' Award (1936) (1953) 77 C.A.R. 74.)

(*h*) Sanctions.

The history of sanctions can be divided into three phases.

The first, that of the direct prohibition of strikes and lockouts by the Act itself, ran from 1904 until 1930. The second phase, from 1930 to 1947, might be broadly described as one of no sanctions, for the Act contained no provisions against strikes as such. Provisions for the enforcement of awards, however, were retained—for example, section 49 prohibited wilful default in compliance with an award. So also were retained the Court's powers to order compliance with an award (inserted in 1904) and to enjoin breaches of the Act. The third period, from 1947 to the present, has seen the use of the Court's contempt jurisdiction founded on its exercise of its long standing power to order compliance and enjoin.

The current Act continues, of course, provisions which date back to 1904 directed to the observance of awards, e.g., powers to fix penalties and to impose penalties for breach of non-observance of awards. There are, in addition, penalties for breaches of procedure and for breaches of provisions relating to secret ballots.

A chronological account of the major sanctions provisions in the Act follows:—

Phase 1.

1904 *Act.*

Part II. prohibited lockouts and strikes in relation to industrial disputes under heavy penalty.

Section 7 provided that a refusal to offer or accept employment upon the terms of an industrial agreement should be tantamount to a lockout or strike.

Section 8 provided that any organization which, for the purpose of enforcing compliance with the demands of any employers or employees, ordered its members to refuse to offer or accept employment should be deemed to be guilty of a lockout or strike.

Acts No. 6 *of* 1911 *and No.* 18 *of* 1914.

The foregoing provisions were amended in minor aspects.

Act No. 31 *of* 1920.

Definitions of "strike" and "lockout" were widened. A new section, 6A, included in those bound by the prohibition of strikes and lockouts, persons or organizations bound by an award of the Court or entitled to the benefit of an award of the Court.

Section 8 of the original Act was also widened to provide that an organization which "encouraged, advised or incited" its members to refuse to offer or accept employment should be deemed to be guilty of a strike or lockout as well as one which "ordered" its members to do so. Also a new sub-section (2) was added which provided that an organization would be deemed to have ordered, &c. its members if the committee of management or an officer or officers of the committee of management did so.

Act No. 18 *of* 1928.

A new section, 6B, instructed the Court in fixing a penalty to take into account any bona fide efforts made by an organization to prevent the committing of an offence. A new section was also inserted entitling persons or organizations entitled to the benefit of an award to apply to the Court for an order declaring that a strike or lockout existed. This provision was inserted to meet the case of sectional strikes. If the Court did make an order declaring that a strike existed in an industry or section of industry, employers could, under the new provision, lock out other sections of workers not on strike without committing an offence.

Section 8 was also amended, principally to provide for penalties where an organization ordered, encouraged, advised or incited its members to refuse to offer or accept employment.

Sub-section (2) of section 8 was also strengthened. This sub-section had been found to be practically useless because of the difficulty of proving that a committee of management approved of a lockout or strike. The new sub-section provided that an organization was deemed to have ordered, encouraged or advised its members to refuse to offer or accept employment if—

(*a*) the committee of management of the organization or of a branch of the organization,
(*b*) a member of the committee of management,
(*c*) any body of persons controlling the organization or a branch of the organization, or
(*d*) an officer of the organization or of a branch of the organization

advised, &c., members to refuse to offer or accept employment.

Paragraph (*c*) was aimed at the ostensible control of an organization by a shadow committee which carried on in a troublesome period whilst the official committee sank into the background.

Phase 2.

Act No. 43 *of* 1930.

This Act effected a radical change by abolishing the provisions in the previous Acts prohibiting strikes and lockouts. A new section was inserted which provided that no officer of an organization or member of any committee or servant or agent thereof, should, during the currency of an award in the industry concerned, advise, encourage or incite any member of the organization to refrain from—

(*a*) entering into a written agreement, or
(*b*) accepting the employment, or
(*c*) offering for work or working in accordance with the award.

This section became section 78 in the 1947 Act.

Phase 3.

The 1947 Act made the Court a Superior Court of Record. Previously its powers to punish contempt had related to contempt in the face of the Court. The changed provision made much more significant the powers which the Court had possessed for many years to order compliance with its awards and enjoin breaches of the Act. The history of these provisions follows:—

1904 *Act.*

Section 38 gave the Court power to fix maximum penalties not exceeding £1,000 for breaches or non-observance of awards in the case of an organization or employer, or £10 in the case of an individual member. It also had power to impose penalties not exceeding the maximum penalties fixed for any breach or non-observance of an award proved to its satisfaction to have been committed, and further, to enjoin an organization or person from committing or continuing any contravention of the Act.

Under section 48 the Court could make an order in the nature of a mandamus or injunction compelling compliance with the award or restraining its breach under pain of fine or imprisonment. Penalties of £100 or three months imprisonment were provided. In addition to the penalty, any person found guilty of any contravention of the section in relation to lockouts and strikes or of wilful default in compliance with an award, was subject to disabilities which took away any rights, privileges, benefits or advantages under the Act and caused him to cease to be a member or officer of any organization or association and took away his existing or accruing rights to any payment out of the funds of the organization.

Under section 78, penalties of £500 in the case of an organization, £250 in the case of an employer and £10 in the case of an employee, were fixed for breaches or non-observance of any term of an industrial agreement.

Section 87 provided that a person or organization directly or indirectly concerned in the commission of any offence against the Act or counselling, taking part in or encouraging the commission of any offence, should be deemed to have committed the offence.

Act No. 18 *of* 1914.

Section 38 of the 1904 Act was amended to give the Court power to order compliance with any term of an order or award proved to its satisfaction to have been broken or not observed.

In 1918, in Alexander's case (25 C.L.R. 434), the High Court held, as mentioned above, that as the President of the Court was appointed for seven years only, and not for life as provided by the Constitution, the Court was incompetent to exercise any judicial power. The result was that the Court could not impose penalties for breach or non-observance of its orders or awards.

Act No. 39 *of* 1918.

To meet this problem section 48 was amended to provide for the enforcement of awards by a county, district or local Court.

Act No. 31 *of* 1920.

The High Court, or a Justice thereof, was added to the Courts that could make orders enforcing awards and the above-mentioned Courts were also given power to enjoin any organization or person from committing or continuing any contravention of the Act or award.

Act No. 22 *of* 1926.

Following, it seems, all-Party agreement that the ordinary civil Courts were not appropriate for these tasks, the constitution of the Court was altered to provide for the appointment of judges with a life tenure instead of a President and Deputy Presidents with limited tenures and section 48 was amended to restore to the Court the power to enforce awards and to apply penalties. However, the provisions of the 1918 Act giving civil Courts power to enforce were also retained.

Act No. 18 *of* 1928.

This Act considerably strengthened the enforcement provisions. A new section, 38D, provided that the Court could suspend or cancel for such period as it thought fit, all or any of the terms of an order or award insofar as an order or award applied to or was in favour of any organization or its members, if that organization did anything in the nature of a lockout or strike, or committed any breach or non-observance of the Act or an award, or if a substantial number of members of the organization refused to accept employment in accordance with existing orders or awards, or for any other reason.

It also, in sections 86A, 86B, 86C and 86D, inserted provisions providing against intimidatory tactics to prevent persons from observing awards. Section 86A provided for a penalty of £20, or, in the case of a registered organization, £100 if that person or organization prevented or attempted to prevent any person from offering or accepting employment or working in accordance with the terms of an award or order of the Court—

(*a*) by violence to the person or property of another person;
(*b*) by any threat;
(*c*) by any pecuniary penalty or injury;
(*d*) by intimidation of any kind;
(*e*) by abusive or insulting language;
(*f*) by declaring goods, places, persons, undertakings or positions "black";
(*g*) by any form of boycott or threat of boycott.

Section 86B provided for a penalty of £500 to be imposed on any organization or the Committee of a branch or organization which imposed or declared that it imposed or that it intended to impose a penalty, forfeiture or disability of any kind on a member of the organization by reason of the fact that he had worked or that he was working, or intended to work, in accordance with the terms of an award or order of the Court.

Section 86C provided for the imposition of a penalty of £20 on a person who moved, seconded, or put at any meeting of an organization or at a public meeting, any resolution, the terms of which were abusive or insulting to the Court or any judge or officer thereof or which was in contempt of the Court.

Section 86D provided a penalty of £100 against any person who printed or published any report or other matter containing any order, encouragement, advice or incitement to commit a breach or non-observance of the Act or of any award or order, or any report or other matter containing language insulting to or abusive of the Court.

Another new section, 89B, provided that persons committing an offence against certain sections of the Act could be charged before the Court, and the Court could impose the penalty provided by the Act in respect of the offence.

Act No. 43 *of* 1930.

This Act removed many of the penalty provisions from the Act, reduced the maximum penalties for breaches or non-observance of awards in section 38 of the Act, from £1,000 to £100, and completely repealed sections 48, 86A, 86C, 86D and 87. In section 86B, the penalty was reduced from £500 to £100.

On the question of contempt, section 83 of the original Act provided that no person should wilfully insult or disturb the Court . . . or be guilty in any manner of any wilful contempt of the Court. A penalty of £100 was provided.

Act No. 28 *of* 1909.

This Act added to section 83 a new sub-section (2) which provided that nothing in the section should be taken to derogate from the power of the Court to punish for contempt.

Act No. 18 *of* 1928 repealed sub-section (2) of section 83 and inserted in its stead a new sub-section which provided that the Court was to have the power of a Superior Court of Record to punish by attachment and committal any person whom it found to have been guilty of contempt of Court.

In 1945, the High Court held that the Arbitration Court could not punish a corporation at all under this section.

The 1947 Act made the Court a Superior Court of Record. Former specific and limiting provisions with regard to punishments of contempts were omitted. So the Court as a Superior Court of Record had the common law powers of punishing for contempt possessed by such Courts, including the power to fine.

The 1947 Act embodied in section 29 powers to impose penalties, to order compliance with an order or award and to enjoin any organization or person from committing or continuing any contravention of the Act similar to those previously contained in section 38 of the 1904 Act.

In March, 1951, the High Court held in *R. v. Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union* (82 C.L.R. 208) that orders made by the Arbitration Court in June, 1950, against the A.E.U. under section 29 (*b*) of the Act ordering compliance with an award and under section 29 (*c*) enjoining the union from committing or continuing any contravention of the Act, were invalid. The High Court also held that an order made by the Arbitration Court in July fining the Union £100 for contempt of Court, was invalid.

The majority of the High Court found that the order under section 29 (*b*) directing compliance with the award was invalid because it purported to impose upon the union an obligation different from and more onerous than any obligation that the award imposed upon it, in that the award did not bind the union to undertake the responsibility of compelling its members to work overtime. The Chief Justice, who with Dixon *J.* dissented, was of the opinion that section 29 (*b*) authorized the Arbitration Court to order a party bound by an award to do acts or observe forbearances which that Court thought necessary or desirable to bring about observance of the award.

The majority of the High Court held that section 29 (*c*) referred only to contraventions of the Act, as distinct from breaches or non-observances of awards. The Chief Justice was of opinion that a breach of an award, which subjects a person to an action for penalties, might fairly be described as something done in contravention of the Act, and Kitto *J.* considered that the order could be supported as a valid exercise of the power conferred by section 29 (*b*).

As to the fining of the union, the majority held that, as the whole question of the enforcement of orders and awards of the Arbitration Court had received the particular attention of the legislature and as specific statutory provisions had been made for the purpose of giving a statutory remedy, the Act should be read as excluding recourse to the summary jurisdiction belonging at common law to a Superior Court of Record to enforce its orders by punishment for contempt of its authority. The Chief Justice took the view that the power to punish for contempt was not so excluded.

Following the High Court decision, amendments to the Act were introduced in 1951 to restore the Court's power of enforcement of awards and to clarify and establish its powers to punish contempts of its power and authority.

In these amendments section 29 (*c*) was broadened to give the Court, in addition to its earlier power to enjoin an organization or person from committing or continuing a contravention of the Act, power to enjoin a breach or non-observance of an order or award. A new sub-section (2) gave the Attorney-General, on behalf of the Commonwealth, and in the public interest, the right to apply to the Court for an order under section 29 (1) (*b*) and (*c*).

Section 29A was inserted to give the Court the same power to punish contempts of its powers and authority whether in relation to its judicial powers and functions or otherwise, as is possessed by the High Court in respect of contempts of that Court. Jurisdiction to punish a contempt committed in the face or hearing of the Court was restated. The Court was given power to punish, as a contempt of the Court, an act or omission, although a penalty is provided in respect of that act or omission under some other provision of the Conciliation and Arbitration Act. And finally, the maximum penalty which the Court might impose in respect of a contempt of the Court consisting of failure to comply with an order made under section 29 (1) (*b*) or (*c*) was fixed at £500 in the case of an organization (not consisting of a single employer), £200 in the case of an employer, or the holder of an office in an organization, and in any other case £50.

The Court's jurisdiction as a Superior Court of Record to punish for contempt was vindicated by the High Court in *R. v. Taylor, Ex parte Roach* (1951) 82 C.L.R. 587, when an order nisi for a writ of prohibition, challenging the validity of two orders of the Arbitration Court finding the prosecutor in prohibition guilty of contempts and fining him, was refused. The High Court affirmed that the effect of establishing the Arbitration Court as a Superior Court of Record was to give it a general power of punishing for contempt, and pointed out that the High Court's decision in *R. v. Metal Trades Employers' Association* (1951) 82 C.L.R. 208 was restricted to the effect of the special provisions of the Act which excluded a power to punish for contempt as an alternative means of enforcing orders and awards.

As the High Court subsequently pointed out in the Boilermakers' Case, although the refusal in Roach's case of a writ of prohibition directed to the Arbitration Court implied in point of logic the existence in the Arbitration Court of a judicial power to punish for contempt, the actual question whether

this judicial power could validly co-exist in the Arbitration Court with its arbitral functions was not in issue in Roach's case—in other words, the question of validity which the High Court had to decide in the Boilermakers' case was not raised. Roach's case did, however, raise squarely the fact that the Arbitration Court exercised two distinct kinds of power—one being said to be part of the judicial power of the Commonwealth and the other derived under an exercise of the power conferred by section 51 (xxxv) of the Constitution. The writ of prohibition was sought upon the ground that the jurisdiction of the Arbitration Court did not extend to punishing as contempts attacks made upon the members of the Court in respect of the exercise of the arbitral powers as distinguished from their judicial powers. The High Court said—

> ". . . although the occasion of the attack arises out of the exercise by the judge of his industrial functions, the attack is associated with an intended exercise by him of the jurisdiction forming part of the judicial power of the Commonwealth, namely, the jurisdiction to entertain an application to commit for contempt in breach of an undertaking. . . . Conceding . . . the validity of the distinction which it is sought to make on behalf of the prosecutor between what is a contempt of the judicial power and what concerns other kinds of power, the case is nevertheless one in which it was competent for the Arbitration Court to find in the publications a contempt against the administration of justice, that is to say, the exercise of the judicial power of the Arbitration Court".

It was left for the High Court in the Boilermakers' case to decide that the Arbitration Court could not in fact validly exercise part of the judicial power of the Commonwealth.

In a decision on an application by Commonwealth Steel Co. Ltd. for an order under section 29 against the Federated Ironworkers' Association of Australia reported in 74 C.A.R., p. 91, the Arbitration Court held that "an organization is responsible for the actions not only of its branches but also of any section or group of its members", and that "knowledge of any such action, if in breach of the legislation under which the organization is registered or of some award or order made in accordance with powers thereby granted, is sufficient to involve the organization itself".

(*i*) Appeals.

The first provisions for appeals against awards or orders were inserted in the amending act of 1930, which provided that an appeal lay to the Court constituted by the Chief Judge and not less than two other judges against any provision in an award or order of a Conciliation Commissioner or a Conciliation Committee affecting wages, hours or any condition of employment which in the opinion of the Court was likely to affect the public interest

No appeal lay from the award of a Judge though the 1920 amendments had authorized a single Judge (earlier a Presidential member) to invite two of his colleagues to sit with him in relation to a dispute.

The 1947 Act providing for Conciliation Commissioners independent of the Court left their awards unchallengeable. However, a Commissioner was enabled to refer to the Court any question of law arising out of a matter before him or any question as to whether he had jurisdiction under the Act in relation to the matter.

The 1952 legislation provided for appeals from the decisions of Conciliation Commissioners and references to the Court where, in the opinion of the Chief Judge, the matter was of such importance that in the public interest it should be dealt with by the Full Court. The requirement of securing the leave of the Chief Judge was inserted with the object of limiting appeals and references except in really important cases.

4. IMPLICATIONS OF THE HIGH COURT JUDGMENT IN THE BOILERMAKERS' CASE.

On March 2, 1956, the High Court delivered judgment in what is commonly known as the Boilermakers' case. By majority, Dixon, *C.J.*, McTiernan, Fullagar and Kitto, *JJ.* (Williams, Webb and Taylor *JJ.* dissenting), the Court made absolute an order *nisi* for a writ of prohibition which called in question orders made by the Arbitration Court on May 31 and June 28, 1955. The purpose of the first order was to require the Boilermakers' Society to observe a provision in an award which prohibits bans, limitations or restrictions on the performance of work in accordance with the award; while the second order, which found the Boilermakers' Society guilty of contempt of the Arbitration Court by wilfully disobeying the order of May 31, imposed a fine of £500 upon the Society and ordered it to pay the costs of the proceedings. The High Court in so doing upheld a challenge to the validity of sections 29 (1) (*b*) and (*c*) and 29A of the *Conciliation and Arbitration Act* 1904-1952, the sections under which the orders were made.

The following states shortly the implications of this decision:—

It is beyond the competence of the Parliament to invest with any part of the judicial power any body or persons whose primary function is not the exercise of judicial power.

The Constitution does not allow the use of Courts established by or under Chapter III. for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto.

The function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order.

The Arbitration Court is not a "federal Court" within the meaning of section 71 of the Constitution. It was created and exists as and for an authority entrusted with the work of industrial conciliation and arbitration and it is not possible to combine in one body the arbitral powers and functions and any part of the judicial power of the Commonwealth.

The provisions which either are or may be thought to be capable of reference only to the judicial power of the Commonwealth and which therefore involve functions which cannot be discharged or may not be capable of being discharged by the Arbitration Court appear to be—

- s. 29 (1) (*a*) which authorizes the Court to impose penalties fixed under sec. 40 (*c*) for breach or non-observance of an order or award proved to the satisfaction of the Court to have been committed.
- s. 29 (1) (*b*) and (*c*) which empower the Court to order compliance with an order or award proved to the satisfaction of the Court to have been broken or not observed or to enjoin the committing or continuation of a contravention of the Act or a breach or non-observance of an order or award.
- s. 29A which gives the Court power to punish contempt of its power and authority.
- s. 119 which allows persons who have committed offences against the Act to be charged before the Court.
- s. 59 which gives the Court (and other Courts) jurisdiction to impose penalties for breach or non-observance of an order or award.
- s. 86 which protects organizations and members from being sued for pecuniary penalty except in the Court for acts and omissions in respect of which the Court has jurisdiction.
- s. 96G (3) (*a*) and (*b*) which authorize the Court, where an election irregularity has been found, to declare an election void or a person purporting to have been elected not to have been and to declare another person to have been elected.
- s. 96H which authorizes the Court to enforce orders made under the disputed election provisions.
- s. 96J which validates certain acts done by the Court under the disputed election provisions.
- s. 16 (2) and (3) which authorize a Conciliation Commissioner to refer a question of law to the Court and the latter to determine it.
- s. 16 (6) which seeks to overcome jurisdictional problems of the dichotomy between the Court and Commissioners by making the jurisdiction of each depend on the opinion of the Court.
- s.83A (5) which authorizes the Court to hear and determine questions involving claims to membership of an organization.

The observations in the majority decision about these sections, other than from sections 29A and 29 (1) (*b*) and (*c*), are *obiter dicta* only. The majority decision commended that the purpose sought to be achieved by sections 96G (3) (*a*) and (*b*), 96H and 96J might be achieved by provisions differently conceived; that sections 16 (2) and (3) might not be open to attack as involving an advisory and not a judicial function; and that section 16 (6) might be sound as it is.

In addition, there could be doubt about the validity of section 29 (1) (*d*) and (*e*) authorizing the Court to give an interpretation of an award or order and to hear appeals from the Registrar.

There is no reason why the Parliament should not clothe the arbitral authority with the designation and character of a Court and provide a status and tenure for the arbitrators of the same description as that required for judges. It cannot, consistently with the Constitution, exercise the power conferred by section 71 of the Constitution for the creation of a Court for the fulfilment of the functions and objects forming the subject of the legislative power conferred by section 51 (xxxv.).

It needs to be emphasized that the High Court's decision does not mean that what the sections referred to above sought to do cannot be done at all—merely that it cannot be done through the instrument which is the Arbitration Court as known at present.

The implications of the High Court judgment, however, extend far beyond the Conciliation and Arbitration Act and other Commonwealth legislation in the industrial field.

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