# LEGISLATION SECTION

*The recent death of the Honourable C. E. Martin, Q.C., M.L.A., a Fellow of the Senate of the University, has deprived the Faculty of Law of a valued member.*

*The Editorial Committee regards it as fitting to open the present Legislation Section with a sincere tribute to the important contributions to the cause of law reform in this State made by the late Mr. Martin during his record period of tenure of the office of Attorney-General.*

## CONCILIATION AND ARBITRATION ACT 1952 (COMMONWEALTH)

The Conciliation and Arbitration Act 1952[1] is another step in the long search for satisfactory machinery for the prevention and settlement of industrial disputes in Australia. The Federal Government expressed four objects in promoting the legislation, namely, the speedy settlement of industrial disputes, their settlement by machinery as self-contained as possible and by principles which were consistent in similar situations, and the preservation of valuable features from earlier reforms. The Chief Judge of the Arbitration Court in his first annual report in December 1948 had emphasised the need for authoritative co-ordination in matters of principle in the work in this field; and the essential features of the new legislation consist in machinery for reference of industrial disputes and questions of law by Conciliation Commissioners to the Court and provision for appeals to the Court from decisions of Commissioners. A slight alteration was made in the jurisdictional relation between the Court and the Commissioners to assist that authoritative co-ordination which the legislature believed so essential for the success of the new machinery.[2]

The evils necessitating the new legislation can be traced back to the Commonwealth Conciliation and Arbitration Act 1947[3], which, while seeking to reduce delays and legalism and to allow of greater prominence for the method

[1] Conciliation and Arbitration Act 1952, No. 34, 1952, assented to 17th June, 1952.

[2] Sections 4 and 9 of the Act permit Conciliation Commissioners to make and alter orders and awards dealing with all questions of leave with the exception of long service leave with pay, this latter remaining in the exclusive jurisdiction of the Court. The provisions follow the earlier amendment effected by the Conciliation and Arbitration Act (No. 3) of 1951, whereby Commissioners were enabled to include in their awards provisions relating to annual or other periodical leave with pay or sick leave with pay, if such provisions did not alter the effect of the former clauses in the award. But any alteration of conditions of leave alters the "effect of an award" and the extent to which the Commissioners could fix standards remained doubtful. Leave problems are of common occurrence and the mobile Commissioners are better equipped to handle them, uniformity of treatment being ensured (to a degree at least) by the appeal and reference provisions. Sick leave was apparently considered a field which could be further investigated with profit by the Court and so was left within its orbit.

[3] Commonwealth Conciliation and Arbitration Act 1947, No. 10, 1947.

of conciliation, set up what has been well described as a judicial "dichotomy". The Court was given authority over standard hours of work, the basic wage for males and females, and (generally) over all questions of leave, and the remainder of federal industrial jurisdiction was left to the Conciliation Commissioners. The Commissioners operated in almost complete independence of the Court and there was no method of ensuring consistency of decision.[4] Different trends of decision thus grew up in related industries to the dissatisfaction of all concerned. The artificial division of jurisdiction resulted in disputes which needed the control of a single arbitrator being split between two bodies with consequent confusion due to lack of contact. This was particularly evident in the wages question, where the Court dealt with the basic wage and the Commissioners margins for skill — two clearly related factors in the determination of the "whole wage". Further, the "dichotomy", arbitrary as it was, led to a series of appeals to the High Court for prerogative writs to settle problems of jurisdiction, with a consequent increase in legalism and delay — two things the 1947 Act expressly set out to avoid. The system of divided authority proved itself well nigh unworkable and the resultant confusion demanded immediate remedial measures.

The amending Act of 1952 was directed mainly at the problem of division of jurisdiction.[5] It provided that Commissioners might refer disputes to the Court for its decision if the parties so desired and the Chief Judge concurred in thinking them sufficiently important.[6] The Court then had full control of the dispute and might settle it or refer it back. Further, questions of law might similarly be referred, including disputes as to jurisdiction.[7]

The second attack on the problem lay in the new appeal machinery. Parties to a dispute who were bound by the award of a commissioner or aggrieved by his attitude as to his competency in certain types of disputes might appeal to the Court on being granted leave by the Chief Judge.[8] The Court was given

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[4] There was provision by s. 107 for quarterly conferences of Commissioners and s. 16 empowered but did not constrain the Commissioners to seek the Court's assistance on matters of law.

[5] However, it also contained important provisions relating to membership of organisations and s. 23 was productive of considerable political controversy. It provided that all persons who work or are qualified to work in an industry shall be entitled to membership of the organisation of employers or employees which covers the particular industry provided they are not of general bad character and pay the dues. Disputes as to their propriety are decided by the Court (or a Judge) whose order automatically makes the person in question a member of the organisation. But no right to claim membership is given to persons reasonably believed to be members of unlawful organisations or to those who within the past year have advocated any of the matters referred to in sub-s. (1) of s. 30 of the Commonwealth Crimes Act. Section 23, it seems, was added to assist and encourage rank and file participation in union affairs, especially in secret ballots. As the executive generally controls union membership it was necessary to allow persons to become unionists if they so wished despite executive opposition. The Government appears to have had certain unions in mind and this is reflected in sub-s. 4 allowing membership to be refused to subversives.

[6] Section 5. The question whether the dispute or question is of such importance that it should in the public interest be dealt with by the Court is for the Commissioner, subject to the concurrence of the Chief Judge. Appeal lies to the Chief Judge within fourteen days from the decision of a Commissioner on this point.

[7] By s. 6 a Commissioner may, and at the direction of the Chief Judge shall, refer a question of law arising before him, including questions on his jurisdiction with relation to a matter, to the Court. Sub-section (d) provides that on reference of questions of jurisdiction to the Court, its decision as to whether the Commissioner has jurisdiction or not shall be conclusive despite anything contained in the Act, and that if a question before a Commissioner as to his jurisdiction in relation to s. 13 is not referred to the Court, he is empowered to exercise jurisdiction in relation to the matter. Similar provision is made by s. 9 (b) as to the conclusiveness of the Court's decision on whether or not it possesses jurisdiction under s. 25 of the Principal Act. No indication is given as to how the Chief Judge becomes aware that a question of law has arisen.

[8] The relevant section is s. 13. This allows organisations or persons bound by an order or award of a Commissioner or aggrieved by the decision of a Commissioner refraining or refusing to refrain from further hearing, or from determining a dispute, on the ground that it has been, or is proper to be dealt with by a State Industrial Authority to appeal to the Court provided that leave to appeal is granted by the Chief Judge within fourteen days of the order. Leave to appeal is not to be given to parties bound unless the Chief Judge thinks that the award deals with matters of such importance that leave to appeal should, in the public interest, be granted.

power to allow or dismiss the appeal and to make a new award as it thought fit.[9]

It is not difficult to see how these provisions might assist in obtaining the desired authoritative co-ordination. The Court is given final power to determine questions of jurisdiction between itself and the Commissioners. This should be effective to stop the multitude of applications to the High Court for writs of prohibition and mandamus so well illustrated by the *Ozone Theatres Case*[10] and make the jurisdiction more self-contained. Thus it has been held in *Regina* v. *Blackburn, ex parte Transport Workers' Union of Australia*[11] that s. 13 is now no longer an imperative limitation on the powers of a Commissioner to proceed with a matter which a party alleges falls outside his authority, and he may proceed according to s. 16 as amended so that a writ of Prohibition on the ground of an infringement of s. 13 is now no longer an appropriate remedy. However, it should be noted that the Court has no conclusive authority to determine the limits of its own jurisdiction (e.g., as to whether an industrial dispute exists), as the High Court is possessed of exclusive jurisdiction in such matters by virtue of s. 75 of the Constitution.[12]

Thus *the provisions on jurisdiction* giving the Arbitration Court new authority and co-ordination is obtained by means of the appeal and reference provisions. These should effectively prevent two Commissioners arriving at opposite conclusions on similar situations in related industries, and, provided the parties to disputes are prepared to use the new machinery[13], consistency of approach should be attainable. However, the *appeal machinery* provided can only be described as cumbrous, and, together with the provisions for reference to the Chief Judge, the power of the Court to refer disputes back and to admit fresh evidence[14], it allows wide scope for delaying tactics. It appears that in hearing applications for leave to appeal the Chief Judge is not exercising the jurisdiction of the Court, and so cannot grant leave on limited grounds only. Therefore, all the issues raised before a Commissioner may be canvassed again before the Court. Greater leniency might also have been allowed in the situations in which leave to appeal may be sought in order to increase the area of benefit of co-ordination, even at the risk of allowing some frivolous applications. Nevertheless, speed is essential in industrial matters, and, though speedy settlement remains as one of the objects of the Act[15], the new machinery hardly seems designed to assist in achieving that end. Much of course depends on the attitude of the parties to the new machinery and it is important to note that the Australian Council of Trade Unions has recently withdrawn its opposition to the appeal machinery. If the system is now to be given some practical application

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[9] The Court may admit further evidence, call for reports from Commissioners and shall confirm quash or vary the order, award or decision under appeal or make a suitable order or award (s. 31A (6) added by s. 13). Provision is also made for the staying of orders and awards, or parts of them, pending the determination of the appeal.

[10] *The King* v. *Commonwealth Court of Conciliation and Arbitration ex parte Ozone Theatres (Aust.) Limited* (1949) 78 C.L.R. 389.

[11] (1952) 86 C.L.R. 75.

[12] See the discussion of this point in O. de R. Foenander, *Studies in Australian Labour Law and Relations* (1952) 74, and the cases there cited.

[13] Considerable improvement in the general machinery of the Arbitration system is achieved by the Act, especially by ss. 7 & 8. Section 7 allows the hearing and determination of a dispute commenced by one Commissioner to be completed before another in the event of illness, death or assignment of the first. Section 8 extends the jurisdiction of single judges to perform the functions of the Court in matters of interpretation of orders or awards, granting of leave to appeal to the Court from acts of the Registrar, the Court's power under s. 29 (1) (f) and ss. 71 and 83A as well as the former jurisdiction over prescribed matters of practice and procedure — all matters of limited significance and best disposed of expeditiously by a single judge. The Court may also sit in more than one division and sub-ss. 4, 5 and 6 of the new s. 24 added by s. 8 provide that in the event of a judge sitting as a member of the Court being unable to continue, the Court composed of the remaining judges has jurisdiction to complete the case provided two judges concur in the final award. If lack of concurrence prevents the conclusion of a matter a new Court may be constituted to hear the dispute and shall have regard to evidence already given, arguments adduced and judgments delivered during the previous hearing.

[14] See ss. 5 and 13 for the powers of the Court in this regard.

[15] See s. 2 (a) of the Principal Act.

many of its present weaknesses may soon be corrected.

Thus, while the Act may have been effective to reduce appeals on jurisdictional disputes and to reduce legalism, it is still to be observed that any system of arbitration machinery which allows disputes to be handled by two bodies with only clumsy reference machinery to ensure uniformity of treatment seems unlikely to arrive at that balanced and weighted award so essential in industrial disputes. There can be no compromise with the principle of unity of administration, as the working of the 1947 machinery has shown, and it may be that a return should be made to the system of one corporate authority having full responsibility for industrial peace.[16] Within this authority individual judges, with the assistance of subordinate Commissioners to ensure mobility, could deal with various groups of industries and combine specialist knowledge with co-ordinated principles. It is to be hoped that the 1952 Act is a first step in this direction. If so, the cumbersome machinery may be necessary at this stage to prevent the Act being used to delay unduly the course of justice. The attitude of the parties to industrial disputes now seems more hopeful and the new Act may well open a new vista in the field of conciliation and arbitration.

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## THE VISITING FORCES ACT, 1952

The Visiting Forces Act, 1952,[1] will enable the United Kingdom to ratify the Agreement between the Parties to the North Atlantic Treaty regarding the status of their forces[2], and it will apply also to the British Commonwealth countries.[3] Under the Agreement and the Act, the service courts of a visiting force of any country to which they apply are to have the right to exercise all the jurisdiction conferred on them by the law of their State over persons subject to its service law.[4] The courts of the receiving State are precluded from exercising criminal jurisdiction over members of such a force in regard to offences (1) arising out of and in the course of official duty, or (2) against the person or property of another member of the force, or (3) against the property of the sending State, unless the service authorities give notification of their intention to take no action.[5] The local courts are also precluded from trying a member of the force who has already been tried by a service court for the same offence.[6] There is no further immunity given under the Act to members of a visiting force from either the civil or criminal jurisdiction of the United Kingdom courts.[7]

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[16] I am indebted to O. de R. Foenander, *Studies in Australian Labour Law and Relations* (1952), for the basis of these suggestions. The learned author anticipated, and indeed suggested, many of the provisions of the Act here discussed and his treatment of the whole problem as presented by the 1947 Act is most illuminating.

[1] 15 & 16 Geo. 6 & 1 Eliz. 2 c. 67. The Act will come into force on a date to be proclaimed by Order in Council (s. 19 (2) ).

[2] 19 June 1951. The Agreement came into force between France, Norway, Belgium and the United States on 23 Aug. 1953 (*Cmd.* 8279).

[3] Section 1.

[4] Article VII (1) (a); s. 2. There is a limitation in respect of death sentences (Art. VII (7) (c); s. 2 (4) ).

[5] Article VII (3); s. 3.

[6] Article VII (8); s. 4. This does not apply to service courts in cases of breach of discipline (Art. VII (8) ).

[7] But under Art. VII (5) (g) of the Agreement no member of a visiting force is to be subject to proceedings for the enforcement of a judgment given in a civil claim arising out of acts done in the performance of duty (procedure is set out for the settlement of these and other tortious claims (Art. VII (5 and (6); s. 9) ). There is no similar immunity under the Act, but see *infra* n. 25.