CONCILIATION IN THE COMMONWEALTH JURISDICTION—A LEGAL ANALYSIS.

" Nothing . . . . could be farther from the truth than the notion that Parliament has only to express its will in appropriate words, and all legal and social consequences follow as night the day . . . . a very great, and perhaps the most important, part of the operation of (a) statute is indissolubly dependent on the function of the Judge."[1] We have only to look at the history of sect. 51 (xxxv) of our own Commonwealth Constitution (which empowers the Federal Parliament 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 ") to see this process constantly in action. Time and again the courts (notably the High Court and the Commonwealth Arbitration Court) have been called upon to interpret almost every word of this much litigated provision. We have, as a result, a wealth of judicial dicta on the meaning of " arbitration," " industrial dispute," and " extending beyond the limits of any one State " but not, strange as it may seem on that of " conciliation." This, however, is not difficult to explain; it is simply that " conciliation " is a relatively unambiguous term—it means to the lawyer (and the Judge) much the same as it does to the proverbial " man in the street." The other terms[2] " arbitration," " industrial dispute " and " extending beyond the limits of any one State " are, by comparison, much more difficult to define and are, therefore, more likely to give rise to litigation, as has in fact been the case. To this factor must also be added that of the relationship of " conciliation " to " arbitration " in sect. 51 (xxxv). The Commonwealth has power not only to make laws with respect to conciliation for the prevention and settlement of inter-State industrial disputes, but it is also empowered to make laws with respect to " arbitration " for the same purpose. This means that, as regards the Commonwealth jurisdiction, either power can be drawn upon to support the other, and since it has generally been assumed that " arbitration " is the wider of the two, it, and not " conciliation," has almost invariably been used as the yardstick by which the validity of federal legislation has been measured and tested. But the mere fact that " conciliation " has escaped most of the attention focussed on the other terms in sect. 51 (xxxv) should not tempt us to belittle its importance. It is, after all, a key term in that provision (the Commonwealth's main industrial power[3]) and is descrip-

1. Allen: *Law in the Making* (4th edn.) 412.
2. *i.e.*, in Sect. 51 (xxxv).
3. The Commonwealth also derives power to regulate industrial conditions from a number of other sources in the Constitution, *e.g.*, sect. 51 (i) (inter-State trade and commerce), sect. 51 (vi) (defence), sect. 51 (xxiiiA) (unemployment), sect. 51 (xxix) (external affairs), sect. 51 (xxxix) (the incidental power), and so on. Unlike " conciliation and arbitration," however, these powers are limited as to time or as to the persons or class of persons to whom they can be applied.

tive of one of the twin processes by which the Commonwealth normally[4] must (*i.e.* if it wishes to do so) regulate industrial conditions. The meaning of " conciliation," therefore, is, or at least could be, a matter of considerable importance in practice and, particularly so in a country with a federal system of government such as Australia where the " industrial powers " are divided between the Commonwealth and the six States.[5]

The purpose of this article is to make a legal analysis of " conciliation " with particular reference to the use of this process in the Commonwealth jurisdiction. It is readily conceded that the qualifying adjective " legal " is not without its shortcomings but it will serve its purpose if it emphasises that the treatment is essentially positivistic and not functional. With such matters as the success or otherwise of conciliatory methods, the policy of the Legislature and the courts in this connection and the like we are not concerned here. It should also be pointed out that a twofold approach has been adopted to the subject, for " conciliation " in the abstract, as it were, has been linked with and related to " conciliation " in Sect. 51 (xxxv), *i.e.*, " conciliation . . . . for the prevention and settlement of industrial disputes extending. . . ."

The Elements of the Conciliation Process.

Conciliation, as is well known, is not confined to the sphere of labour relations. It is a term descriptive of a process which can be employed in any situation where strained relations, ill feeling, or an actual dispute exists between two or more parties. Its use in the industrial sphere is therefore only one aspect—though certainly a most important one—of its employment in general.

The conciliation process necessarily involves certain elements or conditions—this has already been hinted at in the preceding paragraph. Certain of these elements are essential in the sense that the process or method employed cannot truly be said to be conciliation in their absence. Others, however, are not essential—they are merely refinements of or additions to the basic elements.[6]

Those elements essential to conciliation are, it is contended:

1. Two or more parties.
2. A dispute, and
3. An independent person or body who acts as conciliator.

The Parties.

There must, of course, be at least two parties. Normally, conciliation is employed to settle disputes arising between two parties only, but this is not necessarily the case. A multilateral dispute may equally well occur where there are, say, three or four different interests directly

4. The Commonwealth can in certain cases regulate industrial conditions by means of a power other than the " conciliation and arbitration " power—see note (3) *supra.*
5. By the Constitution the Commonwealth may exercise such powers as are expressly granted to it and matters incidental thereto while the States have the so-called " residuary powers."
6. Discussed *post.*

involved; indeed this is by no means a rarity. An inter-union dispute as to work or membership, for instance, may result in a strike at the employer's factory where the members of both unions are employed—indeed this happened recently at Port Pirie[7], where a prolonged dispute between the Australian Workers' Union and the Federated Ironworkers' Association resulted in a stoppage of work at one of the Broken Hill Pty. smelting works.

The parties to conciliation proceedings may be either (*a*) employers and employees (this is most usual); (*b*) employers and employers; or (*c*) employees and employees.[8] The employee party (or parties) is invariably an organisation or union—indeed this is implied from the very notion of an industrial dispute.[9] In Australia, moreover, this notion is made clear by the fact that the industrial tribunals (whether Commonwealth or State) will not or cannot take cognisance of the claims of individual employees. Individual employers, however, may be parties in their own right, although there is an increasing tendency for them to be represented by organisations.

Considered in the abstract, as it were, there does not seem to be any inherent restriction on the rights of parties to conciliation proceedings to appear by representative. This, however, is a matter which will depend on the requirements of the particular jurisdiction in which the conciliation process is employed. Thus, under the present Commonwealth Arbitration Act, a party to conciliation (or arbitration) proceedings before the Court or a Conciliation Commissioner may not be represented at such proceedings by counsel, solicitor or paid agent except by leave of the Court, or the Conciliation Commissioner, as the case may be.[10].

This, however, is only one aspect of the general problem. There is the other and, in a sense, the much more fundamental question of whether a union acts as the agent of its members or as the party principal. This is a matter which goes to the very root of industrial relations and is of equal importance whether labour conditions are regulated (and moulded) by means of conciliation, arbitration or voluntary collective bargaining.[11] If we regard a union as the agent of its members (as did the High Court for a number of years[12]), it is clear that the members

7. South Australia.
8. This is, of course, also true of arbitration proceedings and voluntary collective bargaining.
9. See: *Burwood Cinema Ltd.* v. *Aust. Theatrical Employees' Assn.* (1925) 35 C.L.R. 528 (548).
10. Sect. 46 (2) C. & A. Act (Cwlth).
11. The expression "voluntary collective bargaining" is used here to indicate direct negotiation between a union or unions of employees on the one hand and a single employer, union or unions of employers on the other, without the intervention of any third party. This method of labour regulation is, for instance, widely employed in the United Kingdom.
12. *R.* v. *Cwlth. Court &c.: ex parte Wm. Holyman & Sons* (1914) 18 C.L.R. 273; *The Tramways Case (No. 2)* (1914) 19 C.L.R. 43; *R.* v. *Hibble: ex parte Broken Hill Pty. Ltd.* (1921) 29 C.L.R. 290. *Contra, Aust. Workers' Union* v. *Pastoralists' Federal Council* (1917) 23 C.L.R. 22; *Aust. Timber Workers' Union* v. *John Sharp & Sons Ltd.* (1919) 26 C.L.R. 302.

are the parties principal and the union is merely acting on their behalf. But if, as has now been established by the High Court,[13] the union acts as the party principal and not as the agent, its members can only be said to be represented by it in a broad and non-technical sense.

There remains the further question whether conciliation implies that only the parties or their accredited representatives can take part in conciliation proceedings or whether the concept enables persons drawn from the same trade or calling as the parties but not directly representative of them to negotiate and enter into agreements on their behalf. As regards the use of conciliation in the Commonwealth jurisdiction, the High Court was called upon to answer this question in the case of the *Australian Railways' Union* v. *The Victorian Railway Commissioners and Others*.[14]

In 1930 the Commonwealth Conciliation and Arbitration Act was amended to provide for the establishment of Conciliation Committees.[15] These bodies were to be appointed on the application of a party to an industrial dispute.[16] "Of the members other than the chairman, one-half are to be representative of employers and one-half representative of organisations of employees. This means no more than that they shall be typical of the class they represent. They are not chosen as the authorised agents of the disputants but as persons .... likely to appreciate their interests.... The chairman of the Committee is to be a Conciliation Commissioner. He is to summon the first meeting of the Committee in relation to a particular dispute, but he is not to be present at, or take part in, its deliberations, until or unless he is of the opinion or is so informed by a representative of one or each of the parties that the representatives appear unlikely to come to an agreement on all of the matters in dispute. Thereafter he is to preside at the meetings of the Committee."[17] If agreement were reached by all the members of the Committee such agreement was to operate as a memorandum-agreement under sect. 24,[18] *i.e.*, it was to have the force and effect of an award. Likewise, where the majority of the members, including the Conciliation Commissioner, were able to reach agreement such agreement was also to operate as an award.[19] "When and only when the

13. *Burwood Cinema Case* (*supra*). Note: (1) Statutory effect has been given to this principle by sect. 63 of the Industrial Arbitration Act (W.A.) and sect. 107 of the Industrial Conciliation and Arbitration Act (Principal Act) (N.Z.). (2) It has been established in the light of the above principle that a union may dispute and the Court (or a Conciliation Commissioner (Cwlth.)) may make an award *in relation to* (*a*) future members of the disputing union (*Burwood Cinema Case* (*supra*); *Amalgamated Engineering Union* v. *Metal Trades Employers' Assn.* (1935) 53 C.L.R. 658), and (*b*) non-members of such union (*Metal Trades Employers' Assn.* v. *Amalgamated Engineering Union* (1935) 54 C.L.R. 387).
14. (1930) 44 C.L.R. 319.
15. Sects. 33 and 34 of 1904-1930 C. & A. Act (Cwlth.) inserted by sects. 26 and 27 of Act 43/1930 (Cwlth.).
16. Or on the application of a party applying for a variation of an award.
17. 44 C.L.R. 381-2.
18. Now Sect. 37 C. & A. Act (Cwlth.).
19. *i.e.*, by virtue of sect. 24 (*supra*).

Committee failed to agree (was) the chairman, as Conciliation Commissioner, to proceed to arbitration between the disputants."[20] In effect, the Federal Government was seeking to establish bodies on the lines of the Victorian Wages Boards by virtue of the concilation and arbitration power (sect. 51 (xxxv)). The attempt failed, however, for in the same year (*i.e.* 1930) the above provisions were challenged in the High Court which, by majority, held them to be invalid. "A law," said Rich, Starke and Dixon JJ., " 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 is, in our opinion, not a law with respect to Conciliation and Arbitration for the prevention and settlement of industrial disputes and is not authorised by sect. 51 (xxxv) of the Constitution."[21] Isaacs C.J. took the contrary view, however, arguing that neither conciliation nor arbitration implied that the disputants or their direct representatives must participate in the actual hearing and settlement of the dispute, and that, even if this were not so, then " an opportunity must," under the disputed provisions," . . . . be given to the parties themselves to be present personally or by their representatives, and to have a full and fair opportunity to support their respective views."[22]

It is hard not to agree with the majority decision on this matter. It is one thing to provide that a party to a dispute need not appear in person but may do so by representative. It is quite another to lay down that the dispute may be settled by persons who in no sense can be said to directly represent the disputants and from such proceedings to exclude the parties and their representatives and then to call that procedure " conciliation."

There are, however, certain dicta in the majority judgment which suggest that legislation providing for bodies on the general lines of the Conciliation Committees but with functions limited to advising and encouraging the disputants to reach agreement would not be *ultra vires* sect. 51 (xxxv) of the Constitution. The members other than the disputants would, in other words, act merely as advisers.[23] Whether such a body could serve any useful purpose is open to conjecture, but evidently the various Federal governments have not thought so for, since 1930, no move has been made from that quarter to revive the Conciliation Committees.

The Dispute.

There must also be a dispute, for the whole concept of conciliation connotes the existence of a dispute. Even were there no reference to " (industrial) disputes " in sect. 51 (xxxv) a power to legislate with

20. 44 C.L.R. 384. 21. 44 C.L.R. 384-5.
22. 44 C.L.R. 367.
23. See: remarks of Rich, Starke and Dixon JJ. at 44 C.L.R. 386-7.

respect to " conciliation " would necessarily embrace the notion of a dispute for conciliation is not a process " in vacuo " as it were—it is a process directed to certain ends and employed for certain purposes.

But the dispute need not actually be in existence in the sense that all the issues between the parties are settled and precise. The dispute may be potential—there may be differences between the parties although those differences have not as yet crystallised and, as such, have not been formulated in precise terms. There must, however, be some evidence of a dispute although the question of when a " threatened, impending or probable dispute " or a " situation likely to give rise to a dispute " (to use the words of the Commonwealth Arbitration Act)[24] ceases to be a dispute at all is only a matter of degree. The fact that the High Court has upheld the above extensions of the term " industrial dispute " (in the Constitution)[25] is indicative of its conscious policy (manifest in many cases on sect. 51 (xxxv)) of extending the scope of the conciliation and arbitration power albeit at the expense of the States' residual powers. It was prepared to give effect, as far as it considered it possible, to the policy of a legislature and of a Court (of arbitration) seeking to regulate industrial conditions on a national basis but having at their disposal a power limited as to both ends and means.

Because " conciliation " necessarily implied the existence of a dispute, this factor would, it seems clear, always prevent the Commonwealth from giving effect to collective agreements reached irrespective of the existence of a dispute.[26] This does not mean that collective agreements, even if entered into by " organisations " (unions) registered under the federal jurisdiction and bound by federal awards, would be invalid. There is apparently nothing to prevent " organisations," let alone other bodies, from making such bargains.[27] What it does mean, however, is that the Commonwealth might not be empowered to provide for the enforcement of such agreements.[28] They could be enforced (if at all) by an action in the ordinary civil courts[29] or, what is more likely, by the relative bargaining strength of the parties.[30]

24. These terms are included in the definition of " industrial dispute " in sect. 4 of the C. & A. (Cwlth.).
25. *Merchant Service Guild* v. *Newcastle & Hunter River S.S. Co. Ltd.* (1913) 16 C.L.R. 591 (*re:* " threatened, impending or probable dispute ").
26. There are also other obstacles involved (see *post*).
27. See: *The Musicians' Case* (1912) 15 C.L.R. 636, at pp. 643, 648, 657; *The Agricultural Companies' Case* (1913) 17 C.L.R. 261, at pp. 282, 289-9.
28. See: *The Musicians' Case* (*supra*) at pp. 644, 648, 657; *The Agricultural Companies' Case* (*supra*) *passim*.
29. It is possible that a claim to enforce such agreements would be met by the allegation that they were never intended to create binding legal relations. See: " The Enforcement of Collective Bargains in the United Kingdom "—article by F. Tillyard and W. A. Robson in the Economic Journal, Vol. XLVIII (1936), pp. 15 *et seq.*, and " Collective Agreements under War Legislation "—article by O. Kahn-Freund in 6 Mod. L. Rev. (1943) 112.
30. It may be added that, as regards parties bound by Federal awards, contracts of service made pursuant to such collective agreements providing for terms and conditions of employment less favourable than those prescribed by the appropriate award would, by virtue of the Cwlth. Arbn. Act, be invalid.

It follows that (quite apart from existing case law on this matter) the requirement of an industrial dispute will always be an obstacle to the Commonwealth making effective provision for the enforcement of " industrial agreements " of the type used in the State jurisdictions. In most of those jurisdictions[31] the various (State) Arbitration Acts enable industrial unions[32] of employees to enter into industrial agreements with industrial unions of employers or with individual employers. Such agreements may be made in relation to, *inter alia*, any " industrial matter " (which term is widely defined to include wages, hours and other conditions of employment) and provided they comply with certain requirements as to form and filing they are enforceable in the same manner as awards.[33] But in no case is the existence of an industrial dispute an essential precondition to their making and enforcement for the States' residual (industrial) powers are, unlike those of the Commonwealth, plenary and unrestricted.[34]

The Commonwealth's powers are not plenary and unrestricted—they are, as we have seen, express and limited and, in particular, they are focussed upon the concept of an industrial dispute. This limitation is manifest in the industrial agreement provisions in the Commonwealth Arbitration Act for, as Higgins J. remarked, " The draftsmen of the Commonwealth Act evidently took the view that the Act had to be kept within the bounds of sect. 51 (xxxv) and had to be an Act for the prevention and settlement. . . ."[35] So we find that the relevant provisions in that Act are much narrower in scope than those in the State Acts. Sect. 97 of the present Federal Act, instead of conferring almost unlimited powers on unions and employers to make enforceable collective agreements with respect to " industrial matters," merely empowers employers and unions of employees to make industrial agreements " for the prevention and settlement of industrial disputes existing or future by conciliation and arbitration." The Act then goes on to prescribe the form in which such agreements must be made and provides that when filed they shall bind the parties thereto and be enforceable in the same manner as awards.[36] Circumscribed and limited as these provisions were (and still are) they did not meet with the approval of the High Court and in several decisions[37] that body rendered them almost nugatory. The Commonwealth industrial agreement provisions did not, it held, enable parties to make collective agreements regulating generally the industrial relationships between them. Sect. 73 (now Sect. 97)

31. *i.e.*, N.S.W., Qld., S.A., W.A.
32. *i.e.*, unions registered under the appropriate State Arbn. Act.
33. *i.e.*, by the imposition of penalties for their breach, &c.
34. *i.e.*, provided of course they do not conflict with the lawful exercise of a Federal power.
35. *Fedd. Engine Drivers' and Firemans' Assn.* v. *Broken Hill Pty. Ltd.* (*No.* 3) (1913) 16 C.L.R. 715 at p. 730.
36. Sects. 99-102 C. & A. Act (Cwlth.). Note: In this respect the Cwlth. Act follows the pattern of the relevant provisions in the State Arbn. Acts.
37. *Musicians' Case* (*supra*); *Agricultural Companies' Case* (*supra*); *Broken Hill Case* (*No.* 3) (*supra*).

was designed to enable parties voluntarily to provide for a method of conciliation and arbitration other than that of the Court. Although it is difficult to know what the High Court meant by " a method of conciliation . . . other than that of the (Arbitration) Court "[38]—for assuredly this still could not escape the fetters imposed by Sect. 51 (xxxv)—it is clear that the High Court would not permit that placitum to be used as the basis for collective agreements made irrespective of the existence of an industrial dispute.

It only remains to point out that collective bargains made irrespective of the existence of an industrial dispute and, more specifically, industrial agreements, could not be supported as conciliation for the prevention of *future* industrial disputes. Conciliation cannot be employed in the complete absence of a dispute for there are no disputants to conciliate. It is one thing to say that a dispute already exists in embryo and that it may or may not develop more serious proportions—it is quite another to say that the parties are on perfectly amicable terms but that at some future date a dispute may conceivably develop between them. Moreover, as regards the federal " arbitration " power, it has twice been held that that power could not be used to prevent future industrial disputes[39] and there seems no reason to doubt that this argument could not equally well be applied to " conciliation."

The Conciliator.

There must in the third place be an independent person or body who acts as conciliator.[40] He must be independent in the sense that he stands apart from the disputants for conciliation is, *ex necessitate*, a tripartite process. Thus although he may be appointed by one or both sides he cannot, in his role as conciliator, represent the interests of either or any of the disputants.

The selection of the conciliator is a matter which will vary according to circumstances. In some cases the disputants may be given a free hand to choose their own conciliator. In others the State or some other body may appoint a conciliator should the parties be unable to reach agreement on this matter. In yet other cases the conciliator may be appointed independently of and, maybe also irrespective of, the wishes of the disputants. This, for instance, is the case in the Commonwealth jurisdiction where the disputants have no say in the appointment of the Arbitration Court judges or the Conciliation Commissioners. Likewise the qualifications of the conciliator, the time for which he shall act as such, the question of whether he may or shall combine the function of conciliator with that of arbitrator, are all matters about which it is impossible to generalise in advance—they will depend on the requirements of the particular jurisdiction.

38. And now, of course, also the Conciliation Commissioners (Cwlth.).
39. See: *The Common Rule Case* (1910) 11 C.L.R. 311, affirmed in *R.* v. *Kelly; ex parte the State of Victoria* (1950) 81 C.L.R. 64.
40. See: O'Connor J. in the *Jumbunna Case* (1908) 6 C.L.R. 309 (366).

The duties of the conciliator are epitomised in the words of sect. 51 (xxxv)—" the prevention and settlement of industrial disputes." Indeed it has never been questioned that the term " conciliation " (in sect. 51 (xxxv)) cannot be read as applying distributively to both " prevention " and " settlement."[41] How the conciliator will go about the task of preventing and settling disputes is usually—nay almost invariably—left to his own discretion. A procedure may be laid down for him to follow but this is most unusual, for perhaps the most characteristic feature of the conciliation process in action is its flexibility and informality. It follows that the extent to which the conciliator must participate in the actual proceedings is a matter which will depend upon the nature of the dispute and the attitude and relative bargaining strength of the parties. In some cases it may be desirable, if not essential, for him to be present during the whole of the proceedings. In others he may achieve the most satisfactory results by confining his activities to bringing the parties together, inducing them to clarify the matters in issue and then leaving them to work out an agreement between themselves. The essential fact remains, however, that in order to constitute conciliation there must be an independent conciliator who at some stage in the proceedings intervenes in the negotiations and uses his best offices to induce the disputants to reach amicable agreement.

This brings us back once more to the question of collective agreements and, more specifically, to that of industrial agreements. Quite apart from other considerations, collective bargaining between two or more parties without the intervention at any stage of an independent conciliator cannot be regarded as conciliation and no collective agreement reached as a result of such negotiation can be classed as an agreement resulting from or based upon the conciliatory process. It follows that, as regards the Commonwealth jurisdiction, the Federal Parliament could not, under the guise of " conciliation " provide for the enforcement of collective agreements reached by such means. It is true that Griffith C.J. took the view that the coming together of parties out of court for the purpose of agreeing to terms of settlement followed by an agreement embodying such terms was not inaptly described as " conciliation,"[42] but this reasoning did not find favour with the other members of the High Court. Nor can it be argued that the provision in the Commonwealth Act for the filing of industrial agreements[43] satisfies the requirement of a conciliator for this is a purely administrative act—neither the Court nor the Conciliation Commissioners have any power to veto such agreements whatever they may think of them.[44] In any

41. See: *Aust. Boot Trade Employees' Fedn.* v. *Whybrow & Co.* (1910) 11 C.L.R. 311; *Merchant Service Guild Case* (*No.* 1) (*supra*).
42. *Musicians' Case* (*supra*) at pp. 643-4.
43. Sect. 100 C. & A. Act (Cwlth.).
44. This does not, however, prevent a party to an industrial agreement from applying for and obtaining an award during the currency of the industrial agreement. (See *Agricultural Companies' Case* (*supra*) over-ruling *Musicians' Case* (*supra*). But this does not empower the Court or Conciliation Commissioners to control the registration of such agreements.

case, the agreement has been reached and hence the dispute (if one existed) has been settled without the intervention of any third person (conciliator) before the formal document embodying the terms of the agreement is lodged for filing.

Now it is true that the cases concerning the scope and validity of the industrial agreement provisions in the Commonwealth Act turned for the most part upon the rather narrow wording of sect. 97 (of that Act) and not upon the meaning of " conciliation " in the Constitution. But even if sect. 97 had been more widely drawn it still could not have escaped two requirements essential to the conciliatory process—a dispute and a conciliator. It is just because the other species of collective agreement provided for in the Commonwealth Act, namely, the " memorandum-agreement,"[45] possesses these two attributes that it is clearly *intra vires* the power of the Commonwealth Parliament, for such agreements can be made only during the hearing of a dispute before a conciliator (and arbitrator), in this case the Court or a Conciliation Commissioner.

The Element of Compulsion.

In addition to the three essential elements discussed above there are various other factors involved in the use of this process. Of these perhaps the most important is the use of compulsion. Compulsion may attach to the use of the conciliatory process in three different ways. The conciliator may, as we have seen, be appointed independently of and, maybe also irrespective of, the wishes of the disputants. The disputants may, in the second place, be compelled to attend before the conciliator. Finally the disputants may be compelled to observe the terms of an agreement reached during proceedings before a conciliator, *i.e.*, as a result of conciliation. Compulsion in all three aspects is employed in the Commonwealth jurisdiction. It has never been decided (in the High Court) whether the conciliation power alone would support all or any of the various ways in which compulsion is employed in relation to that process although it was early laid down that a power to legislate with respect to arbitration conferred a power to provide that such arbitration should be compulsory.[46] Here we see the relationship of " conciliation " to " arbitration " (in sect. 51 (xxxv)), referred to earlier in the piece for, since the use of compulsion has been upheld on the basis of the " arbitration " power and since " arbitration " is generally believed to be wider in scope than " conciliation " it has, for practical purposes, been unnecessary to enquire whether the use of compulsion could be upheld on the basis of the conciliation power alone. If one may hazard an opinion, however, it would seem that a power to legislate with respect to conciliation would support the use of compulsion in at least the first two of the aspects referred to above. In other words,

45. Sect. 37 C. & A. Act (Cwlth.).
46. *R.* v. *Cwlth. Court &c.; ex parte Whybrow & Co.* (1910) 11 C.L.R. 1.

disputants could be compelled to attend before a conciliator appointed independently of their wishes. Whether a power to legislate with respect to " conciliation " permits the enforcement of agreements reached by means of that process is far more doubtful.

The Distinction between Conciliation and Arbitration.

At this stage it is useful to indicate the essential difference between the two processes—conciliation and arbitration. We must at once decide, however, whether the distinction is to be based on form or on substance. This question is of considerable importance, for in the Commonwealth jurisdiction[47] many awards are awards in form only—the parties reach agreement " outside the court " as to all or practically all of the matters in issue and then approach the Court or a Conciliation Commissioner to have the terms of the agreement embodied in the form of a consent award. The Court or the Commissioner merely affixes its or his *imprimatur* to an agreement reached neither by conciliation nor arbitration but by direct negotiation between the parties. So although it is a matter of personal choice whether form or substance shall be used the balance of convenience seems to be clearly on the side of form. Otherwise it would be necessary to examine the facts in each case to ascertain whether a particular award was, in truth, the result of arbitration.

On the basis of form the true distinction appears to be this: if the activities of the person or body interposed between the disputants are limited to advising the parties, encouraging them to reach agreement but in no direct sense imposing his will upon them as regards the actual terms of the settlement then this is conciliation. But if, after hearing the disputants, he makes a decision (award) prescribing what he considers to be a fair and equitable settlement of the dispute (whether or not his decision is binding on the disputants) he is an arbitrator and what he does is arbitration. It follows that the distinction between the two processes does not depend on the title of the person or body performing the function in question.[48] Nor does it depend on the qualifications of the persons or on the constitution of the bodies exercising that function. Nor again does it depend on whether the element of compulsion attaches to conciliation or to arbitration or to both. It depends on whether the person or body interposed between the disputants has the power to make an award in settlement of the dispute. *The essence of conciliation is, therefore, mediation with a view to agreement—the essence of arbitration is the award of the independent arbitrator.*

47. This is equally true of the State jurisdictions.
48. Thus the Conciliation Commissioners appointed under the Industrial Arbitration Act (N.S.W.) have only limited power to conciliate disputants, whereas the Commonwealth Conciliation Commissioners may both conciliate and arbitrate.

Conclusion.

Conciliation is essentially an informal process. Its basic elements are few and simple—two or more parties, a dispute and a conciliator. There is no inherent suggestion of formality in the process—it does not, like arbitration, carry with it the notion of a tribunal and litigants ranged on opposite sides. Provided the basic elements are present, it can be applied and exercised by anybody anywhere at any time. Its shortcomings are the shortcomings of human nature itself—intransigence of the disputants, inability of the conciliator. And if in Australia (and more specifically in the Commonwealth jurisdiction) conciliatory methods fail it may well be that in the long run other methods will prove no more successful.

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