Islands.[32]

The Government of the Islands is vested in the Governor-General. Section 8 provides that any law in force in the territory may be amended or repealed by any ordinance or any regulation made under any ordinance, provided it is not disallowed by either House of Parliament within 15 days of its having been tabled.

One final point remains to be considered. The Crown's power of legislating with respect to settled colonies was very limited at common law. The Crown could grant representative institutions with powers of taxation, but it could not impose taxation or take away any rights, and it possessed no general powers of legislating for the colony other than in Parliament. On the other hand, the Crown's powers in relation to conquered or ceded territories[33] were unlimited. In 1887 this distinction was removed by 50 & 51 Vict. c. 54, and the same powers were conferred upon the Crown in relation to settled colonies that it already possessed in connection with conquered and ceded territories. However since the Act was stated to apply only to those settled colonies which were not at that time within the jurisdiction of a colonial legislature it would not appear to have any operation in relation to these Australian Territories, which would, therefore, in the absence of s.5 (1) be regulated by the common law prior to 1887.

D. J. MILLARD, Legislation Editor — Third Year Student.

TASMANIAN CONSTITUTION AND ELECTORAL AMENDMENT ACTS 1953

The recent amendments to the Tasmanian Constitution and Electoral Acts of 1907[1] at first sight appear to contain provisions which are alien to the principles of government usually observed in British countries. The amendments provide, inter alia, that if two parties only are returned to the House of Assembly (Lower House of the Tasmanian Legislature), each party being equally represented in the House, the Governor may issue a proclamation which will have the effect of appointing another member to the House.

To appreciate the significance of these provisions it is necessary to consider them in the light of the background of Tasmania's political history. Election to the Tasmanian House of Assembly is based upon a system of proportional representation. The State is divided into five electoral divisions, each returning six members to the Lower House. From these thirty members the Speaker is elected with a casting, but not a deliberative vote. There are, moreover, only two political parties, namely Liberal and Labour, represented in the State Parliament, who between them hold the balance of political power. Experience over a number of years has shown that the system is finely drawn and that neither party can command a clear majority in the House. This means that the Government, during its period of office, may be severely hampered in passing the legislation that it may desire, and may even be forced to depend on the support of an Independent for its majority.

Since 1945 the position has become more acute with the parties having almost equal strength on the floor of the House and the possibility of a deadlock becoming increasingly real. A crisis was precipitated in 1948 when the con-

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neither necessary nor convenient for them and therefore are not in force." Blackstone's *Commentaries:* Introduction, Section 4, and see *Cooper* v. *Stuart* (1889) 14 App. Cas. 286.

[32] The position was not finally clarified until s.24 of 9, Geo. 4, c.83.

[33] In the case of conquered or ceded territories English Law does not automatically apply, but the law existing before such conquest or cession remains in force until modified.

[1] Act to amend the Tasmanian Constitution Act 1953 (No. 88, 1953); Act to amend the Tasmanian Electoral Act 1953 (No. 76, 1953).

servative Upper House refused to vote supply to the Assembly, whereupon the Governor, on the recommendation of the Premier, Mr. Cosgrove, dissolved both Houses. In the ensuing election, 15 Labour members, 13 Liberals, and 2 Independents were returned. Labour was therefore returned to the Government benches, but once a Speaker had been elected from that party, it was placed in a minority on the floor of the House. Conscious of its tenuous position the Government, by Order in Council, appointed a Committee of both Houses to enquire, *inter alia*, into Parliamentary deadlocks.[2] This Committee, however, was unable to offer any solution to the problem. A further election in 1949 failed to remove the equality of representation[3] in the House of Assembly, and in 1951 the Government appointed a Board of Inquiry,[4] consisting of non-political figures, to investigate the problem of deadlocks in that House. This Board, while being of the opinion that deadlocks could not be prevented so long as the existing electoral system was retained, considered that their occurrence could be minimised by the adoption of one or more of the following measures:

(i) The House to be enlarged to 35 members (this would give either party a majority of at least one, with or without the support of one or more Independents).

(ii) If, after the election of a Speaker, both sides of the House still remained equal, either the seat of the elected Speaker to be filled by an unelected condidate, or a Speaker to be appointed from outside the Assembly.

None of these suggestions was immediately accepted, but they have since been the focal point of legislation in this field, and subsequent Acts have taken root from the recommendations put forward by the Board.

Nothing further was done until 1953, when the resignation of Mr. Wedd, an Independent member, threatened to deprive the Labour Government of its majority in the House, for it was upon his vote that the Government had depended for its 15-14 majority. In the circumstances, the Government feared that a Liberal would be returned to the House with ensuing deadlock. Two Bills to amend the Constitution and Electoral Acts[5] were therefore quickly introduced to meet the emergency. Both contained very elaborate provisions to overcome deadlocks, and although they were extensively altered in their passage through Parliament, the resultant Acts remain, even in their simplified form, obviously emergency legislation passed to meet a crisis.

The amendments provide that at an election each elector shall be supplied with two ballot papers. On one ballot paper he is to vote for the individual members of his choice for the division. On the other ballot paper he is to vote for either of the political parties represented at the election. If after the election the Governor is satisfied that only members of two parties have been returned to the House, and that these parties are numerically equal, he shall by proclamation declare the provisions of the amendments to be in force. On the issue of such proclamation, the votes will be counted and the party obtaining the majority of votes will be declared to be the Government. Then the next unsuccessful candidate, who is a member of the majority party, obtaining the greatest number of votes in all five divisions, shall be declared elected as a Member of the Assembly.

This means in effect that a candidate rejected at an election will be appointed to the House, and one division will be granted an extra representative.

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[2] Joint Committee of Both Houses of Parliament, 1948 (Report No. 56 of 1949).

[3] Since 1945 the position of the parties in the Lower House has been as follows:
1945 — Labour 15 seats, Liberals 12 and Independents 2; 1949 — 15 Labour seats, Liberals 14, Independents 1.

[4] Board of Inquiry 1951. Report of Board of Inquiry on Parliamentary Deadlocks in the House of Assembly of the Parliament of Tasmania (Report No. 6 of 1951).

[5] Bill to amend the Constitution Act 1934 (Bill No. 81 of 1953); Bill to amend the Electoral Act 1934 (Bill No. 82 of 1953).

It is clear, however, that such a solution will necessarily infringe two fundamental precepts of representative government, namely that all representatives should be elected at a general election and that each electoral division should have equality of representation. Such a departure from established practice may lead the electorate to feel that the system is not just and therefore sap their confidence in the system.

It would seem, moreover, that these provisions do not offer a complete solution to the problem, if they offer a solution at all. The appointment of an extra member would only have the effect of making the Government numerically equal to the Opposition on the floor of the House. To pass legislation it would be continuously forced to rely on the casting vote of the Speaker, which could easily embroil the Chair in party politics and jeopardise its tradition of impartiality. Even though the Speaker may, in Australia, be readily recognised as a party man, it is quite a long step to make a Government constantly dependent on his vote, when that Government already has in its ranks a member not returned by the electorate. Though, a Government could possibly survive under these circumstances by constant use of the Speaker's vote, and a deadlock could thus be avoided, it is a matter for serious consideration whether the resultant difficulties do not out weigh the potential merits of this legislation.

Nor does the recommendation of the Board of Inquiry, that a Speaker be appointed from outside the House, seem to offer any worthwhile solution. It is true that this system has been adopted in Southern Rhodesia with complete success, but in that country there is not the same constant threat of a deadlock. Under the present electoral system in Tasmania the parties could, notwithstanding the appointment of an outside Speaker, still be equal on the floor of the House.

The alternative suggestion of the Board to increase the number of members from 30 to 35 (to be achieved by increasing the number of members returned by each division to seven) is worthy of close consideration, however. Though the Government for the time being might still be forced to rely on the casting vote of the Chair for its majority, such a provision would at least achieve the same result as the present legislation without introducing any departure from the established system.[6]

The approach to the problem of deadlocks in the Tasmanian House of Assembly by the Legislature and the Board of Inquiry has been, it may be suggested, both narrow and hesitant. They have each postulated the continued existence of the system of proportional representation and have adopted limited emergency measures to operate within the framework of that particular electoral system. As a result, the measures do not and cannot hope to provide a complete or satisfactory solution to the problem. This would seem to indicate that neither party is willing to change the system which, even if it does not give it power, will prevent the other party from exercising effective control when in office. But if either party is ultimately forced to provide a remedy to the problem, it may finally have to *recognise* that there is no rational escape within the system of proportional representation, at least where political power is divided between two parties only, and that a complete overhaul of the electoral system will be necessary to provide a solution.

R. B. MURPHY, Legislation Editor — Third Year Student.

INDUSTRIAL ARBITRATION AMENDMENT ACT, 1953 (N.S.W.)

The controversial Industrial Arbitration Amendment Act of 1953,[1] commonly called the Compulsory Unionism Act, is not, as is sometimes sup-

[6] There is at present before the House of Assembly a Bill to amend the Constitution Act 1907 (Bill No. 30 of 1954), which is aimed at achieving this result.

[1] Act No. 42, 1953 (N.S.W.).

posed, an unprecedented piece of legislation. Enactments to the same effect, if not exactly in the same form, have been in force in New Zealand since 1936[2] and in Queensland since 1933,[3] and appear to have operated without undue inconvenience to the average law-abiding citizen.

The Act has not revolutionised the arbitration system in New South Wales; it merely extends the existing provisions regarding preference and imposes a legal obligation on the majority[4] of workers either to join a union or be subjected to a penalty for a breach of the law. Thus it could be argued that the Act is merely the logical culmination of a whole series of legislative enactments regarding preference, dating back to the beginning of the century.[5]

The Act provides that unless a person belongs to an industrial union (which means one registered as such under the Industrial Arbitration Act) or belongs to a class of persons outside the scope of the Act, he cannot be given employment, or continue in employment, in the industry or calling to which an industrial award or agreement relates.[6] The de-registration of a union may raise difficult problems in this connection. It appears that, if the Act is strictly applied, members of a de-registered union must either join another union or be denied employment. While this might seem to add even more force to the sanction of de-registration, it is submitted that its effect will be to make the Court even more reluctant to impose this penalty in view of the grave disturbance it is likely to cause.

The Act also provides that employers who, in contravention of the Act, knowingly continue in employment persons who are not members of a union, and are not within a class of persons exempted, shall be liable to a penalty.[7] The problem arises, therefore, as to whether the employer has actually to know that his employee is not a member of a union. Since the provision is penal in nature, it can be argued that the Courts would construe it so as not to impose too harsh a penalty.[8] On the other hand, it must not be forgotten that this Act is designed to promote better industrial conditions and might be deemed worthy of liberal construction, so as to give it the widest possible application, the imposition of a penalty being treated as merely incidental.[9] The legislature appears, however, to have made its intention clear. The word "knowingly" is placed next to, and so seems to modify and be related to, the phrase "continue in employment". The better view would seem to be, therefore, that the onus is on the employer (under threat of a fine) to see that all his employees are members of a registered union, hold certificates of exemption, or are outside the provisions of the Act. Though this may appear to be very hard on employers, it may still have been the way thought best by the legislature to ensure the effective operation of the new amendment.

The Act further provides that unions must accept persons who apply to become members, and all union rules which are inconsistent with this are declared void.[10] This is obviously designed to prevent the executive of any

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[2] Industrial Conciliation and Arbitration Amendment Act, 1936 (N.Z.), s.18.

[3] Industrial Conciliation and Arbitration Act, 1932 to 1953 (Q'land.), s.8(2).

[4] A number of workers are outside the scope of this Act, e.g. those under federal awards, and conscientious objectors. See *infra*.

[5] The new provisions are, it may be noted, the subject of litigation in the High Court. There appear to be two possible grounds for challenging the validity of the Act, *viz.* (1) that it is inconsistent with federal legislation, and to that extent inoperative under s.109 of the Commonwealth Constitution; (2) that it infringes s.92 of the Constitution. The Act itself makes provision to avoid inconsistency with federal legislation, but the probable outcome of the High Court's decision is outside the scope of this Note.

[6] Section 129 B(1).

[7] Section 129 B(2, 8).

[8] See *Proudman* v. *Day* (1943) 67 C.L.R. 536, at 540, *per* Dixon, J.; *In Re Burdon; Ex Parte Wood* (1888) 21 Q.B.D. 24, at 27.

[9] See *Ex Parte Beard; Re Aldershaw* (1944) 44 S.R. 123, at 126, *per* Davidson, J.

[10] Section 129 B(4).

particular union from discriminating against persons of a particular race,[11] religion or political outlook. This provision is particularly important as it places the question of admission under the control of the Industrial Commission and ensures that the right to employment shall depend in the last resort on an impartial judicial determination.

The section whose meaning has so far given rise to the greatest amount of litigation is the one providing that persons who object to unionism because of some conscientious belief[12] may be granted an exemption. The recent decision of the full Industrial Commission sets out the principles to be applied concerning applications for exemptions under this section.

> The Registrar is not concerned with . . . the truth or falsity of conscientious belief put forward to support the application . . . It is not for the Registrar to say whether the conscientious belief is orthodox or unorthodox, logical or morally tenable, or capable of being supported at all . . . . Thus the question for decision by the Registrar is and always remains: Is the belief professed really held by the applicant in fact of conscience — is it a genuine belief?[13]

The Court, in other words, based its decision on the assumption that each individual has a right to liberty of conscience, and that any attempt to define exhaustively the meaning of "conscientious" would be an infringement of such right. The decision seems consistent with the general policy of the Act of not discriminating against members of a particular race, religion or sect. The number of members lost to unions through such a general interpretation of this exemption clause will scarcely detract from the effectiveness of the general provisions regarding compulsory membership of unions.[14]

B. S. O'KEEFE, Legislation Editor — Third Year Student.

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[11] Possibly this will necessitate the modification of the practice of some unions, which for historical reasons have refused membership to Asiatics.

[12] Section 129 B(11) (a) defines "conscientious belief" as follows "'Conscientious belief' includes any conscientious belief whether the grounds thereof are or are not of a religious character and whether the belief is or is not part of the doctrine of any religion."

[13] Appeals from Registrar under s.129 B(11), Industrial Arbitration Act, 1940-1953 (N.S.W.), reported in Sydney Morning Herald of April 9, 1954.

[14] Section 129 B(11) (d) requires that applicants for exemption shall as a condition of obtaining a certificate of exemption pay to the Industrial Registrar an amount equal to that which they would otherwise have to pay as union fees. These payments go into Consolidated Revenue.