## Introduction

The Industrial Mediation Service in New Zealand is a relatively recent invention. The service was established by the 1970 amendment to the Industrial Conciliation and Arbitration Act. The Industrial Mediation Service exists alongside the separate, and distinct Industrial Conciliation Service which is also provided under the same Act, more recently reconstituted as the Industrial Relations Act 1973. A friendly rivalry exists between the two services, largely promoted by the Conciliation Service which has on more than one occasion publicly pointed out that after all they are the Senior service. The Mediators, of course maintain that they are merely our sister service, they employ all the girls.

To the laymen the distinction between a Mediator and Concilator is obscure. This is understandable in so far as the objectives and responsibilities of the two services are set out in the legislative language of the Act, but very little public explanation of the two services has been made. The major objective of this paper is to set out clearly how the Act envisages the separate functions of the services, to examine whether or not the Mediation Service is fulfilling its intended role, and to make recommendations to improve the co-ordination and overall effectiveness of both the Mediation and Conciliation Services.

## Disputes of Interest : The Role of the Conciliation Service

The Industrial Relations Act provides for a system of arbitration and conciliation which has operated with varying degrees of success for almost 100 years. The major objective of the system is to resolve disputes between trade unions and employers without the necessity of work stoppage. The most basic type of dispute is when a trade union seeks to improve its wages or conditions of employment. This type of dispute is known as a dispute of interest. The second type of dispute is known as a dispute of right, and I will turn to its explanation subsequently.

Wages and conditions of employment are provided for in the industrial awards which result when a dispute of interest is settled. The function of the award is not unlike the function of the common law contract in so far as it represents an agreement between two parties. In the case of the award, the employer agrees to provide certain wages and conditions in return for the trade union agreeing on behalf of the workers to supply labour to perform

work under the direction of the employer but in accordance with the conditions specified under the award. This agreement is not for an indefinite period of time. The award sets a specific date on which the agreement shall expire.

At a time before the expiration of the award, both the employer and the union who are parties to the award, are entitled to create a fresh dispute of interest. This does not mean that they are entitled to go on strike or to enforce a lock-out. To create a dispute of interest means that the other party is notified of intention to change the award, and that the changes sought are filed with the Registrar of the Arbitration Court whose responsibilities include the appointment of a conciliator to act as chairman of a conciliation council. At the conciliation council, the claims for changes in the award are tabled and negotiations for a new award take place.

The duties of the conciliation council are to endeavour to bring about a fair and reasonable settlement to the dispute of interest. What is fair and reasonable is a perception which is seldom shared by union and management. The statutory duties of the conciliator are to simply preside over the meeting, but their skills extend beyond simple chairmanship. Often the very settlement of a dispute in conciliation depends on the conciliator's insight. He might propose an intricate formula counter balancing concessions and advances which makes such an attractive package to both union and employers that neither can resist reaching settlement.

Importantly, the conciliator does not have the power to impose this formula on the parties. He must tactfully rely on the powers of persuasion so that, at one and the same time, he can influence the course of negotiations without appearing to impose his will on the parties.

This constraint is important because of the relationship of the conciliation council to the Arbitration Court. The role of the judges and members of the Arbitration Court is that of the highest industrial authority. The Court has the power to impose final and binding decisions resolving issues outstanding from conciliation councils and to make, of its own accord an award to apply to the parties. In the conduct of the conciliation council, the conciliator cannot appear to usurp these functions by coming down with opinions clearly favouring one side or the other. However, the matter is not one simply of the higher authority of the Court.

In Industrial Relations, as in marital relations, arbitration before a Court is the avenue of last resort, the result of a breakdown in the parties' relationship.

Management and the trade union will be on-going partners throughout the period of an award and reliance on arbitration to settle the award, does not auger well for the joint decision making required in the day-to-day operation of industry. The point is not that the conciliator is at a lower step than the Court in the hierarchy of legal authority, but that the conciliator's task is different but no less important than that of the Court.

The ultimate objective of conciliation is not to supply the answers for the parties, but to influence the parties in a manner that ensures that they are capable of finding their own answers. While the function of the Court is to fix the issues in dispute, the function of the conciliator is to fix the attitudes which are creating the issues. Therefore, their task is more subjective, dealing with broader social and psychological aspects of a dispute.

Herein lies the most fundamental reason for distinguishing the role of the conciliator in a conciliation council from that of an arbitrator. The expectation of the parties entering into a conciliation council is that the ultimate responsibilities for resolving the dispute lies with the parties themselves, and not the conciliator. The trade union and management representatives must bear the responsibility for concession and compromise, a burden which is not light when the results of the conciliation are to be reported back to individual union members and companies. If the role of the conciliator in conciliation council was to include that of arbitration, many representatives would be all too eager to shift responsibility to the conciliator, explaining the results of a settlement in terms of a biased conciliator's decision.

The act specifically provides that the representatives, or assessors at a conciliation council must have full authority to negotiate, and the conciliator must insist on the exercise of that authority, carefully ensuring that his own attitudes and opinions as chairman do not usurp that authority. The importance of the parties' expectations as to a chairman's role is a point also emphasised in my later discussion of industrial mediation.

A settlement of a dispute of interest will ultimately be reached, a point often made by a conciliator in reminding the parties that coming to terms with the issues at todays date, makes more sense that prolonging the inevitable by taking some form of industrial action. Settlement of a

dispute of interest means that negotiations cease and the parties return to the full time business of keeping industry running. A most important feature of awards, as mentioned above, is that they contain a clause pertaining to the term of agreement. The importance of the term of agreement is that the parties forego the right to make further changes to the award for a set period of time, usually one year. The act provides that a fresh dispute of interest may be created before the expiry of the award, but any matters agreed upon cannot take affect before the old award expires. Without these provisions, either the union or management could continue to seek changes in the award at any time, negotiations over the award would be without beginning or ending.

Disputes of Right : The Role of the Conciliation Service

However, the possibilities for disagreement are not limited to changes each party desires to be incorporated in a new award. The award itself, is read through different eyes, and the drafting of the provisions within the award are not always perfect. That a worker be paid $3.00 for each hour worked is quite clear but what does a provision requiring the employer to provide "protective clothing" mean. The union may understand that this provision requires the employer to provide safety footwear, the employer's interpretation of the term "clothing" may differ distinguishing clothing to mean apparel, but not footwear. A dispute pertaining to the interpretation of an existing provision in an award is known under the act as a dispute of interest. This type of dispute raises the question of the meaning of the award, as opposed to a dispute of interest which seeks a change in the meaning of the award, or the inclusion of a new provision within the award.

Disputes of right, are not fundamentally resolved through negotiation, but through ascertaining the intention of the wording of a provision in an award. The role played by the conciliator in a dispute of right, therefore differs from his role in a conciliation council. The act provides that within each award, there will be a disputes clause. The disputes clause contains procedures for settling disputes of right. The disputes procedures are that a disputes committee be set up with equal numbers of union and management representatives. The disputes committee is chaired by the conciliator or a person appointed by the conciliator. Ideally, the conciliator will have acted as the chairman of the conciliation council where the award was settled. This gives the chairman the decided advantage of knowing the industry and often directly observing the drafting of the provision in question. Therefore, the conciliator should have a working

relationship with the personalities in the industry, practical knowledge of its physical operations, and insight into the parties original intentions in agreeing to the clause in question.

In the case of the disputes committee, unlike conciliation, the conciliator has the right to decide the issues in the dispute if the parties cannot agree on interpretation. However, in the case of the disputes committee, the chairman is not passing a value judgment on what should be agreed or should be the end result of a negotiation. This has already taken place in conciliation. He is arbitrating on what is already an established right of law and his decision is appealable to the Court of Arbitration.

Setting aside the good natured rivalry between mediators and conciliators, I will commit heresy to the extent of arguing that the Conciliation Service provides a function which is more fundamental within the overall structure of our industrial system. To summarise my discussion this far, the industrial relations system most simply described, provides for awards to be settled before a conciliator who either persuades the parties to agree, or refers the dispute for arbitration before the Court. Any dispute on the interpretation of the award arising during its currency is either voluntarily settled in a disputes committee, or arbitrated on by the conciliator whose decision may be appealed to the Court.

The system is theoretically perfect. Industrial stoppages should not occur since the act provides procedures for voluntary settlements of both disputes of interest and of right, and for arbitration in both types of dispute where the parties are unable to reach agreement on their own volition. If this system were strictly accepted there would be no reason for an Industrial Mediation Service, all contingencies are covered by the Conciliation Service and the Arbitration Court. However, before turning to the areas where the system does break down I would like to emphasise that in the vast majority of the cases the system does work. In most industries the complete job is done by the conciliator who is successful in assisting the parties to reach settlement in conciliation, and who may occasionally be required to arbitrate in a disputes committee.

Organisational Problems of the Conciliation Service

However, the statistical facts that most conciliations are settled without industrial stoppages and without reference to the Court exaggerates the effectiveness of the conciliation process. Wage negotiations in

New Zealand are characterised by rigid historical relationships in wage rates between various awards. Certain key negotiations set in motion a chain of wage relativity reactions. Follow on awards are constrained to precedent. Their negotiation is not characterised by the conflict inherent in the first of conciliation councils. The very large number of more easily settled follow on awards should not divert attention from the major difficulties experienced in the settlement of the small numbers of precedent setting awards.

The major organisational problem of the conciliation service is that there are too many award negotiations and too few conciliators. A conciliator is often overly committed to too many conciliation dates in too many industries. These time demands can interfere in more critical negotiations where conciliator involvement should be unencumbered by disputes whose settlement is of lesser sigificance to the overall wage pattern which is to develop during the wage round. In many cases I am confident that were a conciliator's skills more fully utilised and his endeavours allowed to be more single minded, the trend setting award negotiations would not be so prolonged and disruptive.

It is not generally appreciated that a large proportion of the work of the conciliator takes place outside of the conciliation council. The work load and performance of a conciliator should not be measured by the number of days he is booked into conciliation council. Where a conciliator is handling a dispute of national significance, he should not be committed to further disputes, just because the parties to the national dispute have adjourned formal conciliation. Much of the critical work of the conciliator is directly involved in the politics of the dispute which never surface across the formal negotiating table. It is fairly clear at the beginning of a wage round which councils will be significant and specific allowance should be made for the time and freedom necessary for the conciliator to handle that dispute.

Equally, at the conclusion of each set of negotiations, it also is clear whether or not an industry is likely to continue to experience trouble in the future. Latitude should also be given to conciliators for their continued involvement with a troublesome industry after an award is settled. Many issues are in fact impossible to resolve in the tense, formal atmosphere of the conciliation council. For example, where changes in technology require the restructuring of wage classifications, the exercise is more effectively completed outside of conciliation where

attitudes can be more objectively focussed on the skill requirements of jobs rather than on negotiating positions. The Drivers Award is an example of an industry which has been unable to reach agreement on restructuring either inside the conciliation council, or through formal talks during the duration of the award. Given that time was so allocated, allowing for an indepth involvement of the conciliator, I am sure that some agreement could be reached outside of conciliation over this long outstanding issue.

What I am pointing out is that the events in award negotiations give forewarning of industrial problems that are likely to take place during the currency of the award, as well as in future negotiations.

One particular objective which is assigned to the Mediation Service, that of preventing industrial disputes is, in fact, better fulfilled by an industrial conciliator. Conciliators by virtue of their involvement in award negotiations are more intimately and permanently involved with specific industries than are mediators. Their knowledge of the personalities and industrial politics of particular industries places them in a position to anticipate trouble. Mediators generally do not have this type of connection with an industry. Our knowledge of trouble usually comes after the fact, and the history of the Mediation Service is that our job is usually one of industrial repair, not prevention.

In fact, we are often brought into industries to carry out special assignments such as compulsory conferences and Committees of Inquiry. Not only do we have the problem of acquiring special knowledge of the industry and establishing relationships which the conciliator already has, but the involvement of a second chairman is often incorrectly interpretated as a usurping of the conciliators authority. The actual position is that the conciliator by virtue of his understanding of the industry is usually better qualified than the mediator to carry out the exercise, and is only prevented from so doing because of demands on their time.

Closer identification of the conciliator in all industries is neither possible nor necessary, but it makes sense for industries which are trouble proned. Closer involvement in the day-to-day operations of these industries can only be achieved through the rational assignment of disputes and the assignment of the broader responsibilities for promoting deeper understanding between employers and unions in these troubled areas. This raises the question of how this type of re-organisation should take place.

There has been some suggestion that control of the activities of conciliators should be exercised by the Labour Department. The suggestion is without merit, not only because it would be unacceptable to the conciliators, but it appears that the bureaucrats have sufficient trouble keeping their own bureaucracies in order. More importantly, the conciliation service has been designed specifically to be independent of Government, employers and trade unions. The appointment of conciliators is actually made by the Governor General, although this is made after the recommendation of the Minister of Labour.

The policy of the Labour Department in recent years has been not to become involved in Labour disputes. While superintendents of local Labour Departments used to become directly involved in disputes and stoppages, this function has been taken over by mediators and conciliators with far more specialist knowledge. The involvement of the Labour Department in the affairs of conciliators is a direct contradiction of this policy and would be a retrograde step.

Most importantly, however, has been the emphasis of both Governments that industrial disputes should be resolved within the legal system. The Labour Department may play a role of enforcement within that system, but the Department is not an integral part of the system itself. It can not be both the policeman and the judge. The conciliation service is in fact an integral part of the system. It works directly under the umbrella of the Arbitration Court, and in the case of dispute committees actually performs a judical function.

If some form of co-ordination of the activities of conciliators is required, then the overall administration of the service, belongs with the Registrar of the Industrial Court, a position in the future which I believe should be given greater status and filled by the most able of conciliators. The act already provides that the parties file claims for conciliation with the Registrar and that it is his responsibility to appoint a conciliator. The work of the conciliator requires independence and certainly freedom from the traditional supervisor/employee relationship. However, the Registrar in addition to his present duties, could determine the assignment of disputes on a more rational basis, as well as, supplying leadership in setting objectives and priorties for the service. He could also play a role when differences

arise between the conciliators themselves, or between the conciliators and their industries. A Registrar with a deep knowledge of the law would be welcomed by the members of the Court and could supply a needed co-ordination between the activities of the Court and Conciliation Services. Such matters as ensuring that judicial standards applied by the Courts, are also applied by conciliators in dispute committees have been long neglected. It would be clearly helpful if the standards of proof and the cannons of constructions applied in dispute committee decisions concide with those of the Court in so far as these decisions are ultimately appealable to the Court.

These suggestions are in no way critical of the conciliators themselves. To the contrary, they recognise the value of the considerable body of knowledge and expertise within the Conciliation Service and simply recommend the more efficient use of these skills within the system. One final suggestion which could relieve pressure on conciliators is that where the parties so desire, conciliation councils should be allowed to operate without a chairman. Particularly, in the case of follow on awards, the parties are quite capable of negotiating a settlement on their own. The rights and obligations of the parties in conciliation need not be altered because of the absence of a chairman and the chairman could be called in, only if a critical stage in negotiations develops. Many hours are needlessly spent in conciliation where the skills and abilities of conciliators are not utilised. Their time could be better deployed on other more urgent matters. This type of situation is referred to as "hand holding" by the United States Mediation Services, and certainly not encouraged.

## The Industrial Mediation Service : Its Role and Objectives

In the United States the term "mediation" is synonymous with "conciliation". The Mediation Service is involved in the settlement of disputes of interest, that is, negotiations for new labour contracts. Mediation means the involvement of a chairman with the view of affecting a settlement of the dispute by means other than arbitration. The American Mediator's role is similar to that of a conciliator in conciliation council. However, unlike the New Zealand conciliator, the American Mediator does not arbitrate on disputes of right, or questions of interpretation. The Americans make use of the American Arbitration Association which provides panels of arbitrators from which the parties make a choice of chairman.

Under our Industrial Relations Act, the Industrial Mediation Service is a separate entity from the Conciliation Service. Therefore, mediation in New Zealand is different from mediation in the United States to the extent that it is not a part of the conciliation of disputes of interest. However, mediation is used in the similar sense that it is a process through which a chairman, without the powers of arbitration, works to affect the settlement of a dispute. Our Act specifically provides that "a mediator shall not have any function under this section (the section specifying the mediators functions and powers) in relation to a dispute of interest during the progress of any conciliation or arbitration proceedings in respect of the dispute".

Essentially, this means that mediators do not chair conciliation councils nor can they intervene when the council is proceeding. It also means that mediators should not be involved in arbitrating. This is a first principle of the American Mediation Service which insists that its mediators do not artitrate, but leaves this role entirely to the American Arbitration Association. The principle is fundamental, and again relates to the expectation of the parties when they come before a chairman. When the parties approach a mediator, their understanding must be that the ultimate responsibility for resolving the dispute is their own. The psychological importance to the proceedings cannot be over-stressed. By virtue of choosing to go before a mediator, the parties will have recognised that concessions must be made, that they must move from their positions if settlement is to be reached. They know that the mediator will not come down on their side because he has no power to do so, and it would be of no avail because the other side would not accept the mediator's conclusion.

On the surface, the mediators position seems less powerful than that of an arbitrator and leads to the mistaken impression that his role will be less active than an arbitrator. To the contrary, the mediator must attack the inflexible positions of the parties in order to invoke compromise. By virtue of having to appear unbiased and objective, the arbitrator's position is often more passive in the sense of simply collecting facts and information in order to make a decision over who is right and who is wrong. The mediator begins from a position that is biased towards both parties in so far as he cannot accept the status quo from either party. In mediation both parties are wrong until a settlement is reached. The result of mediation is a negotiated settlement. That result is also likely

to be different than arbitration.

Where a union claims a 10 cent an hour increase, and the employer resists any increase whatsoever, a fair and reasonable arbitrator might rule for a 5 cent an hour increase. Under mediation, the result is determined by a number of factors other than the simple fairness of a claim. If, for example, the union proposes to strike at a time when business is booming, the employer might settle at 8 cents per hour because he cannot afford to miss out on the orders that a buoyant market will be providing. If on the other hand, the market is in a slump and the employer has excess production capacity, he may well benefit from the results of a short strike. The result of mediation may well be 3 cents an hour.

This is not to say that arbitration always results in splitting the difference. What a fair and reasonable may be 10 cents an hour, or for that matter no increase whatsoever. The point is fair and reasonable attitudes are only one of a large number of factors that a mediator must take into account in effecting a settlement. A few additional factors are industrial power, more skillful negotiation by one party than the other, and a cost benefit analysis which says that this is not a fair and reasonable settlement, but it is less costly than the continuance of the dispute and a final and total capitulation. At the conclusion of a successful mediation, the mediator may return home with the sense that it is an unjust world. Had the mediator been an arbitrator, the final answer would have been different.

In New Zealand very little true mediation occurs. Often discussions take place under the chairmanship of a mediator which lead to the final conclusion that the parties have exhausted all avenues and therefore, the decision is left to the mediator. The mediator then switches hats and becomes an arbitrator. There is nothing wrong with this as a procedure for settlement, but it is not true mediation and one does not need a separate Industrial Mediation Service to provide this facility. Conciliators must often provide exactly the same service in a disputes committee where prior discussions are held with a view of finding common ground, but when agreement fails the issue is left to the conciliator to decide.

Each party has come to find it more comfortable to reach an arbitrated settlement, in so far as it is easier to explain or blame the results of the settlement on the third party, the scapegoat theory of third party arbitration. More importantly, attitudes are psychological set at the beginning of the hearing with the expectation being that major concessions

will not have to be made since the final responsibility lies with the chairman. It is also important to negotiating strategy that these concessions are not given away before the chairman makes his decisions. Such concessions give the chairman an idea of what the parties are "prepared to wear", but the parties are actually interested in what they can get away with. The cards are played close to the chest and the idea of settling on your own volition is not genuine.

The psychology of this situation also restricts the behaviour of the mediator. At the onset of the proceedings the mediator begins to form an opinion of what his answer as an arbitrator would be. As pointed out above, that answer seldom relates to what a negotiated settlement will represent. In true mediation, the mediator attacks the negotiating positions of the parties with the objective of effecting a settlement which is possible under the complex circumstances of the dispute, but which is unlikely to be related to the answer he would give as an arbitrator.

This approach to mediation is possible only if the understanding is that he under no circumstance will arbitrate. If the implict understanding is that he will in the end arbitrate, then the mediator cannot take positions in the lead-up to the arbitration which will be in gross contradiction to his final answer. His position becomes that he must convince the parties before he gives the decision that his final answer is right, or near enough to right, without explicity stating that answer. The thrust of his endeavours, therefore, is not really directed at insisting on agreement being reached by the parties themselves.

The importance of psychology to mediation is so fundamental that the role of the mediator can never be ambivalent, hence the attitude of the Americans that a mediator should never arbitrate. An effective mediator cannot acquiesce and arbitrate at the end of a dispute today, and in all credibility, tell the parties in tomorrow's dispute that settlement is fully their responsibility, and that his function as a mediator under no circumstance will extend to arbitration. The parties in New Zealand have come to expect, virtually, in every mediation that the mediator at the end of the proceedings will acquiesce to a request to arbitrate. Likewise, most mediators in New Zealand also expect at the end of proceedings that they will be asked to arbitrate, even to the extent that some mediators would be offended if they weren't asked to do so. This form of dispute resolution has become almost institutionalised under the name of mediation, but in actual fact it is simply a style of arbitration. The psychology of the situation actually prevents or retards the parties from

reaching their own settlement.

In fact, a true Mediation Service has not developed in New Zealand but this is not a fault of the staff of the Mediation Service. One major structural change which has taken place during the 1970's is that the length of awards has been shortened so that awards are now negotiated once every twelve months. The major result has been an increase in the work load of the Conciliation Service, so that conciliators, as mentioned above, have been heavily committed to chairing conciliation councils. Conciliators have simply not had the time to do dispute committees. In addition, new provisions in the Industrial Relations Act require personal grievance procedures to be written into each award. These procedures require committees, similar to disputes committees, to be set up to consider matters affecting individual employees such as unjustified dismissals. Conciliators have not been able to fully cover personal grievances either. The primary role of the Industrial Mediation Service has been to assist the Conciliation Service in chairing disputes committees and personal grievance committees.

The irony of the situation is that almost all the work of mediators has been arbitrating in disputes committees and personal grievance committees. Conciliators, in so far as the process of conciliation and mediation are nearly identical, actually do more mediating than do mediators. Mediators have had little choice but to fill in for conciliators, and this is because disputes committee and personal griveance arbitration is more fundamental to the country's overall arbitration and conciliation system. This system is based on the premise of automatic arbitration where parties cannot agree, and not on the basic premise of the American system, that third party intervention is undesirable in a free enterprise system, except in so far as it forces the parties to face up to their own responsibilities and decisions. If I were a conciliator, I would be quick to describe New Zealand's mediators as assistant conciliators. Since I am not, I think the two services might be more aptly be described as the Industrial Conciliation Service and the Industrial Arbitration Service.

One basic proposal is that the two services be amalgamated. Here I must set my personal preferences aside. I don't believe I would enjoy acting as a chairman of a conciliation council. However, the suggestion has some considerable merit. The position of a conciliator has far greater utility, than that of a mediator. Conciliators can chair conciliations, disputes committees, personal grievances, as well as, carry out mediation

in the limited definition here in New Zealand. To chair a meeting seeking to bring about agreement without the necessity of arbitration, but arbitrating if necessary, does not present a conflict in the role of the conciliator. The mediator, on the other hand, is limited. He can do part of the conciliator's work in disputes committees and personal grievances, but he is prevented from chairing conciliation councils. The amalgamation of the two services into one Industrial Conciliation and Arbitration Service means that there would be a major increase in staff capable of fully interchanging roles. There would be more chairmen for conciliation councils, thereby giving some scope for specific industry association, which I believe, would improve the possibilities of the new service carrying out a preventative function in regards to industrial disputes, a service which the present mediation service has failed to provide. Certainly, a more indepth involvement in certain industries would lead to greater sense of job satisfaction for most staff in the combined service.

But what of the future of pure mediation as an additional facility for dispute resolution. I have personally pursued the objective of establishing my role as one of a mediator, and not an arbitrator. I have failed in this objective for principally two reasons. The first reason is geographical. Trade Unions and employers in Otago and Southland require firstly that the bread and butter functions of the arbitration and conciliation system be carried out. Mediation is most often a longer and more difficult task. In most disputes the parties simply want a quick and efficient answer to the problem, that follows from the basic premise of our arbitration/conciliation system under which trade unions and employers have been conditioned. They want a chairman on the spot in their locality to provide that service. It is simply impractical to bring conciliators from other parts of the country to supply that service when an experienced man is available.

I would also add that it is equally impractical, although the present provisions of the Act enforce this impracticality, to bring conciliators from out of town to chair local conciliation councils when a chairman is available in the immediate district. An amalgamation of the services with the resulting flexibility for each member of a new service, would allow for the full range of local industrial relations problems to be handled by a single resident member of the Conciliation and Arbitration Service. While the problem of a single mediator or conciliator is peculiar to Dunedin, the resulting flexibility for each individual within a combined Conciliation and Arbitration Service is of no less advantage in meeting the contingencies of industrial problems in the other three metropolitan

districts where staffing levels of the two services are three or more members.

The second reason has been my involvement as chairman of Compulsory Conferences and Committees of Enquiry. The Act provides that where the Minister of Labour has reasonable grounds for believing that a strike or lock-out exists, or is threatened, he may call a compulsory conference in an endeavour to reach a settlement of the dispute. In a compulsory conference, the Minister usually confers on the chairman the right to make a decision. In the case of the Committee of Enquiry, the task of the chairman is to enquire into the dispute generally and to report back to the Minister, rather than to make a decision on specific issues. However, in most Committees of Enquiry, the chairman will state a series of recommendations which will in effect bind the parties to that course of action. In both cases the effect of the Minister's decision to call a conference or enquiry is to give arbitral powers to the chairman. Once again when that chairman is a mediator, we have a contradiction of terms and objectives.

Compulsory conferences and enquiries represent the only provisions under the Act which allow for direct Government intervention into strikes, although there are provisions for fining strikers after a strike has taken place which may be enforced by the Labour Department. The term "compulsory" is a curious misnomer in so far as the conferences are usually compulsory only after the parties have agreed to attend. Ministerial advisors are altogether sensitive to the embarrassment that an unattended Compulsory Conference would cause the Minister. The Act does not provide fines or incarceration for guests that would so rudely turn down an invitation to a compulsory conference, but their enforcement would prove equally difficult to the Labour Department's enforcement of penal provisions for strikers.

Compulsory conferences and Committee of Enquiries, however, do settle disputes. The real trick is how do you persuade the parties to accept the invitation. This is a matter of pure mediation, but not surprisingly under the contradictions of our present system, the mediation is generally not performed by the Industrial Mediation Service. The mediation is usually performed by the Minster's closest advisers or by the Minister himself. The result of their mediation effort is the agreement to have issues arbitrated upon outside the formal arbitration/conciliation system by persons generally masquerading as mediators from the Industrial Mediation Service, but who act as arbitrators. The situation was most

clearly illustrated by the Government's recent agreement with the Public Service Association to bring in a "mediator" to "arbitrate" on the electricity workers housing dispute.

Again the response is "who cares about terminology, thank God the dispute has been resolved". Relief is pleasurable, but not without overall implications for the operation of the basic conciliation and arbitration system. While a limited use of Compulsory Conferences, Committees of Enquiries and other forms of ad hoc arbitration may be inevitable, these procedures are being used indiscriminately. They are being used to resolve disputes that should actually be resolved either before the Arbitration Court, within conciliation, or before disputes committees. The Government by too hastily using these procedures has undermined the function of the central institutions upon which the whole arbitration and conciliation system is built.

The other major implication of using these procedures is that they are forms of Government intervention into industrial relations. The critical feature of our industrial relations system is that it works according to the law, and not according to the politicians. Both Governments have in principle accepted this proposition but in practice have unconsciously undermined the system. Ministers of Labour should be quick to remind parties, all too eager to rush to his office for answers, that the business of running the private enterprise system is that of the employers and trade unions and not the Minister of Labour. The reminder should be made with less sensitivity than is now felt for the inconveniences of industrial stoppages, through suffering comes wisdom.

However, the public is often impatient and does not see what is considerable wisdom of Government inaction in certain circumstances. What are the alternatives in the case of a stoppage of national significance which do not involve direct Government intervention and do not undermine the traditional institutions of the conciliation and arbitration system? Here there is a role of mediation in the strict sense that I have described. The Chief Mediator should be retained in his present position in Wellington, but under reconstituted provisions for the Industrial Mediation Service which explicitly exclude an arbitral function. Stoppages of national significance should stop at the desk of the Chief Mediator and not the Minister of Labour. The objectives of the service would be two-fold. The first and dominant objective should be to insist that the parties resolve the dispute themselves, that compromise be achieved. The second objective would be where agreement is not reached, that the

parties use the traditional institutions to have the matter arbitrated on. Voluntary agreement before the mediator does not conflict with the arbitration and conciliation system, and the mediator's insistence on the use of traditional procedures reinforces that system.

The Minister of Labour should ensure that arguments are not presented in his office, but in the office of the Industrial Mediation Service. One helpful addition to the Industrial Relations Act, I believe, would be for compulsory mediation. The Government could then act by requiring the parties in dispute to participate in mediation. This form of compulsion would be less offensive in so far as the Government would not be imposing answers through arbitration as is the case of Compulsory Conferences. The requirement for compulsory mediation could be made as a decision, by itself, or it could be coupled with a "cooling off" provision similar to that used in the United States. This provision would require the continuance of normal work, or the return to normal work for the period while the parties are under mediation.

In summary, I believe that the Industrial Mediation Service needs a redirection. This redirection would establish the objectives of either encouraging the parties to reach a settlement or to use existing procedures for arbitration. The demand for pure mediation is in fact limited in so far as our system is based on the premise of automatic arbitration to resolved differences, but where the parties refuse to use the system, mediation has a critical role. The demands could be met by centralising the service in Wellington and retaining the Chief Mediator who would take over a large part of the mediation which is presently carried out by the Government and its advisers. If under closer analysis the need exists for a further mediator, then the additional mediator should be retained.

The remainder of those employed by the Industrial Mediation and Conciliation Services should be employed under a reconstituted Industrial Conciliation and Arbitration Service. The functions of the members of the service should include the full range of industrial activities including conciliation councils, disputes committee, and personal grievances to ensure the greatest possible flexibility in the service. The activities of the service should be organised through the Registrar of the Industrial Court. These should include the assignment of conciliators to industrially troubled industries so that a more permanent and indepth solution to their problems might be sought and so that more effective prevention of industrial disputes should be practiced. The re-organisation should also provide for sufficient

time for conciliators to work towards the resolution of disputes of more obvious national significance.

My proposals are tentative. However, a closer look at the direction of the Conciliation and Mediation Services is about to become over due. Hopefully, this paper may initiate the required debate.