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# The prospects for mediation having a formal role in Australia's industrial relations system

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### Industrial relations and ADR

# The prospects for mediation having a formal role in Australia's industrial relations system

**Roger Boland**

#### Extensive legislative change

The past four years have witnessed extensive legislative change to the federal industrial relations system. The changes were perhaps the most significant reforms since 1904 when the first comprehensive statute regulating the system commenced operation.<sup>1</sup>

#### 1993 amendments

In 1993 the Keating Labor Government introduced into the *Industrial Relations Act 1988* a system of enterprise bargaining.<sup>2</sup> This enabled employers and unions to engage in bargaining over wages and working conditions at the enterprise level and to have any agreement ratified by the Australian Industrial Relations Commission (AIRC) so that the agreement was enforceable under the statute. For the first time limited scope was also available for employers to bargain directly with employees without union involvement and make binding agreements known as Enterprise Flexibility Agreements.

A system of 'protected action' was introduced enabling unions and their members to undertake industrial action with limited immunity from civil liability in support of enterprise bargaining claims.<sup>3</sup> Employers were given the right to 'lockout'.<sup>4</sup> The system of awards was

retained and constituted the safety net underpinning enterprise bargaining.<sup>5</sup>

The AIRC retained its powers of conciliation and arbitration in relation to the award system. However, through the mechanism of 'wage fixing principles' determined by the AIRC the intent of the legislation was achieved, namely, primacy of enterprise bargaining over the award system. The AIRC's September 1994 Safety Net Decision stated:

The priority in this system is on the parties at an enterprise — employers, employees and their representatives — taking responsibility for their own industrial relations affairs and reaching agreements appropriate to their enterprise.<sup>6</sup>

In the same decision the AIRC (the Commission) said:

The Commission will generally not arbitrate in favour of claims above or below the safety net of award wages and conditions except in certain circumstances.

Thus the AIRC adopted an 'arms' length' approach to arbitration, forcing the parties to find their own solutions.

The 1993 amendments represented profound change. Up until this time arbitration played a key role in this system. Indeed, for much of the time it dominated the system. For example, throughout the latter part of the 1980s the wage fixing ➤



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➤ system was highly centralised. The only source of wage increases was arbitration in the form of National Wage cases. These delivered wage increases across the board regardless of economic circumstances or business conditions in an individual industry let alone an individual firm. Moreover, individual firms were constrained from engaging in overaward wage bargaining for the purpose of increasing productivity or workplace efficiency.

The 1993 amendments to the *Industrial Relations Act* coupled with the AIRC's wage fixing principles put an end to arbitrated, across the board, actual wage increases and while National Wage cases continued, their purpose was to maintain the safety net of minimum award rates of pay. Enterprise bargaining was the mechanism by which overaward wages were to be adjusted and productivity increased.

The system was far from perfect. What it did do, however, was to limit access to arbitration in a way not previously done.

### 1996 amendments

In 1996, the Howard Coalition Government took the shift away from arbitration a giant step further.

The Coalition Government's *Workplace Relations Act* was more than different in name only to its predecessor. It:

- provides that an industrial dispute is taken to include only 20 allowable award matters. This limits the AIRC's arbitration powers to only those matters unless the matter is exceptional or unless a Full Bench is arbitrating in the context of a terminated bargaining period;<sup>7</sup>
- emphasises the safety net nature of awards and puts in place a process and timetable to achieve true safety net arrangements;<sup>8</sup>
- provides for collective enterprise agreements to be made between an employer and employees without union involvement;<sup>9</sup>
- provides for agreements to be made between an employer and individual employees in a manner that has made this option more successful than the previously available Enterprise Flexibility Agreements;<sup>10</sup>

- expands and strengthens provisions relating to freedom of association so as to limit the capacity of unions to establish and maintain closed shop arrangements;<sup>11</sup>
- expands and strengthens sanctions and remedies against unlawful industrial action.<sup>12</sup>

One of the objects of the *Workplace Relations Act* (the Act) is to ensure 'that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level'.<sup>13</sup> Many of the amendments were directed to this objective. Especially the reduced access to arbitration.

Arbitration during a bargaining period is prohibited under the Act.<sup>14</sup> This means that while parties at the enterprise level are engaged in the bargaining process the AIRC is precluded from arbitrating any issue between them. In order to arbitrate, the bargaining period has to be terminated. Termination of a bargaining period may only be achieved in very limited circumstances and for all practical purposes it is not normally an option.<sup>15</sup>

### Access to arbitration curtailed

From this brief survey it should be evident that in the past four years access to arbitration as a means of resolving an industrial dispute has been severely curtailed in favour of imposing greater responsibility on the parties to the dispute to resolve it themselves. It should also be evident that this represents a most significant shift from what was a unique system of compulsory arbitration that had dominated Australian industrial relations for most of the century.

Despite the limitations on future access to arbitration, no attempt has been made to fill the vacuum this has created with any other dispute settling mechanism other than an expectation that conciliation will fill the void.

To this extent the Commission's conciliation powers have remained intact and it is now conciliation which is the primary mechanism for resolving disputes as parties at the enterprise try to come to terms

continued on page 20 ➤



"It would seem open under the corporations power to adopt new processes of dispute resolution and to require constitutional corporations to use these processes in resolving differences which arise, for example, in enterprise bargaining."

➤ **continued from page 18**

with new responsibilities for resolving their industrial differences.<sup>16</sup>

**Is conciliation adequate?**

The question is whether conciliation, as it is available under the Act, is adequate.

Under the terms of the *Workplace Relations Act*, where an alleged industrial dispute is notified to the AIRC the Commission is required to undertake conciliation.<sup>17</sup> Where a dispute is referred for conciliation a member of the Commission shall do everything that appears right and proper to assist the parties to agree on terms for the prevention or settlement of the industrial dispute.<sup>18</sup> This may include:

- arranging conferences of the parties or their representatives presided over by a member of the Commission;
- arranging for the parties or their representatives to confer among themselves at conferences at which the Commission member is not present.

The Commission is able to exercise the full extent of its conciliation powers in relation to any matter arising in the course of negotiation for a certified agreement.<sup>19</sup>

Conciliation is not defined in the *Workplace Relations Act* or, indeed, in the Constitution from where it is derived. It has been said, however, that conciliation is aimed at bringing parties to a dispute to agreement, and that the role of a tribunal chairperson is to encourage, advise and make recommendations to facilitate agreement.<sup>20</sup>

In examining the exercise of conciliation powers by the AIRC, one place to start is the appointment of the members of that Commission. Sub-section 10(3) of the Act provides that:

The Governor-General may only appoint a person as a Commissioner if the person has, in the opinion of the Governor-General, appropriate skills and experience in the field of industrial relations.

Presidential members of the Commission may only be appointed if:<sup>21</sup>

- the person has been a judge of a court or a legal practitioner for at least five years;
- the person has had experience at a high level in industry or commerce or in the service of:

- (i) a peak council or another association representing the interests of employers or employees; or
- (ii) a government or an authority of a government; or
- (iii) the person has, at least five years previously, obtained a degree of a university or an educational qualification of a similar standard after studies in the field of law, economics or industrial relations or some other field of study considered to be of substantial relevance.

Nothing in the criteria for appointment requires a member to have any particular skills or experience at conciliation. Indeed, it is most likely given their backgrounds that the majority of sitting members prior to their appointment to the Commission had little or no experience of formal conciliation and it has been more a matter of 'learning on the job'. No formal training in conciliation is given to members after their appointment.

The manner of exercising conciliation powers varies from one member of the Commission to another. Many take the duty very seriously and put in considerable time and effort to bring parties together. Others are considerably less diligent.

**Deficiencies in conciliation**

From my observation and participation in it over the past 27 years, the practice of conciliation in the federal jurisdiction suffers from a number of deficiencies:

1. There is a lack of 'conciliation culture' in the federal jurisdiction. Because of this, insufficient emphasis is placed on conciliation as a primary means of dispute settling.
2. Persons exercising conciliation powers generally have no background in conciliation and some do not appear to have the temperament for it.
3. No training in conciliation is provided to members of the Commission.
4. Arbitration continues to run deep in the psyche of the AIRC — understandably given that it has been the dominant means of dispute settling for so long — and conciliation is still regarded as a secondary means of resolving disputes.
5. Parties who seek the Commission's assistance in the form of conciliation ➤



➤ tend to think that by doing so they relieve themselves of any responsibility to resolve the dispute and expect the Commission to provide all the answers.

6. There is often a lack of preparation and planning by parties who seek to engage in conciliation before the Commission and this makes it difficult for the Commission to be effective. This lack of preparation and planning reflects an attitude that in approaching the Commission for assistance through conciliation the parties do so more in hope than in earnest.

7. Conciliation is often not successful because there is no real commitment by the parties to making it work. There is no obligation on either party, legally or morally, to accept any recommendation the Commission might make in the course of conciliation other than if the recommendation is made pursuant to s 111AA of the *Workplace Relations Act*. This provision of the Act is rarely utilised.

As a consequence of these deficiencies conciliation in the federal jurisdiction is a much less effective means of resolving disputes of an industrial nature than otherwise could be the case.

### Addressing the deficiencies of conciliation

One obvious solution, is to address the individual deficiencies largely within the existing framework. That is retain the system of arbitration — or what is left of it — and conciliation; retain the existing structure of the Commission; strengthen the role of conciliation in the statute; provide for compulsory training for members of the Commission in conciliation; and amend the requirements for appointment to the Commission to require training or hold qualifications in conciliation or mediation.

The alternative is to take a fresh approach and explore whether there is some alternative dispute resolution mechanism that provides a better process and potentially better outcomes and which is seen to represent real change to the current arrangements.

One obstacle to abolishing conciliation is the requirement in s 51(xxxv) of the Constitution that the Parliament shall have power to make laws with respect to

'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'. The Constitution does not provide for any other means of settling industrial disputes other than by conciliation and arbitration.

This, however, may not be insurmountable. The corporations power of the Constitution has been used to underpin new approaches to labour market regulation in the *Workplace Relations Act* in ways not previously considered. For example, certified agreements between employers and employees without union involvement; Australian Workplace Agreements (AWAs). It would seem open under the corporations power to adopt new processes of dispute resolution and to require constitutional corporations to use these processes in resolving differences which arise, for example, in enterprise bargaining.

### Mediation as an alternative

One of the alternative processes of dispute resolution to consider is mediation.

On the face of it mediation does not appear to be much different to conciliation and, in fact, it does seem the distinction can be quite blurred to the extent the terms are used interchangeably. It is noted, for example, that while 'conciliation' is referred to in the US model the whole focus is on mediation.

A colleague who was briefed last year on mediation by the US Federal Mediation and Conciliation Service (FMCS) described mediation as 'conciliation with attitude'. The difference between conciliation and mediation in the context of industrial relations can be described thus:

The union claims a 5 per cent wage increase, the employer responds with an offer of 3 per cent. Whereas the conciliator splits the difference, the mediator asks the union 'why 5 per cent?' and the employer 'why 3 per cent?'.<sup>22</sup>

In other words, the mediator tests the position of the parties in order to bring out onto the table the real issues and underlying concerns so that solutions can be developed that best meet the needs of the parties. This in turn leads to a solution that will be more acceptable and lasting

than one that simply splits the difference — an outcome which may not suit any of the parties.

### US model of mediation

Further guidance on how mediation operates in an industrial relations context is available from the FMCS which is an independent agency set up under the *Labor Management Act 1947*.

The 48th Annual Report for fiscal year 1995 of the FMCS describes dispute mediation as follows:

In collective bargaining, Dispute Mediation is a voluntary process which occurs when a third-party neutral assists both sides in reaching agreement in contract negotiations, including initial contract negotiations, which take place between a company and a newly-certified union representing its employees.

In dispute mediation, FMCS mediators are in touch with both parties even before negotiations begin. The contact is triggered by the legally required notice of intent to open a collective bargaining agreement. During negotiations, effective mediators use knowledge of the parties and the issues 'on the table' to guide negotiators through potential deadlocks to a settlement which both sides can accept. Mediators may make suggestions, and offer procedural or substantive recommendations with the agreement of both parties. However, they have no authority to impose settlements. The only tool is the power of persuasion. Their effectiveness derives from their acceptability to both parties, their broad knowledge and experience in the process of collective bargaining, and their status as respected neutrals.

### Key features of US model

Dispute mediation in the US system appears to involve the following key features:

- Early intervention. The mediator is in contact with the parties once a legally required notice is given of an intent to open collective bargaining, however mediation usually only occurs towards the end of the negotiation process.
- Voluntary. All parties must agree to mediation which can be terminated by a party at any time.





"A more structured approach to dispute resolution built around voluntary mediation has the potential to improve the existing system. It is proposed, however, to take it one step further by enabling a mediator to intervene in serious disputes through the mechanism of a cooling off period."

- • Confidential. The proceedings are confidential and without prejudice.
- Neutral. Mediators must be always neutral and be seen to be neutral. The mediator does not impose an outcome.
- Structured. The mediator helps to identify the issues and structure the discussion.
- Free. Mediation is free but it is not available to non-union employers.
- Test. The mediator aims to 'create doubts in the minds of parties' and test whether their positions are consistent with their interests.
- Authority. It is unlawful to bargain without authority; those at the bargaining table must have the necessary authority.
- Review. An analysis of the negotiations is undertaken by the FMCS after they have been completed and suggestions made for improvement.
- Experience. FMCS mediators must have at least seven years experience in collective bargaining.

The US model of mediation is by no means ideal. Participation in mediation is purely voluntary and it is not uncommon for strikes to drag on for weeks or months with enormous damage being done to business and to the livelihood of employees.<sup>23</sup>

Nevertheless, it may be that a better model, suited to Australian conditions, can be framed.

**Elements of an Australian mediation model**

The elements of a federal mediation service in Australia might be as follows:

1. Mediation could be made available to parties negotiating an agreement under Pt VIB of the Act that is, those negotiating certified agreements or AWAs.
2. Mediation could be carried out by members of the AIRC appointed as federal mediators. Mediators would not have a dual mediation/arbitration role but would be exclusively available for mediation.
3. Persons appointed to the role of mediator would need to undergo a rigorous selection process to ensure their

suitability for the role.

4. Persons selected for the role would need to undertake accredited training in mediation for example, training conducted by the Australian Commercial Disputes Centre or other training institution.

5. Upon the notice to initiate a bargaining period being filed with the AIRC, the mediator would contact both parties to inform them of the availability of mediation if the parties agree.

6. The parties must all agree to mediation (subject to 13 below).

7. The parties cannot choose a particular mediator but if such a request is made the President of the AIRC would give it due consideration.

8. Where the parties agree to mediation a preliminary conference would be called by the mediator to advise the parties about the process and to ensure that the parties adequately prepare themselves for the mediation.

9. Parties would be required to sign a mediation agreement that commits them to the mediation process (but not to reaching agreement), the confidentiality of the process, and the 'without prejudice' nature of the process. The parties would also be required to indicate that they have authority to make a binding settlement.

10. Persons at the bargaining table would be required to have the necessary authority to negotiate and to make a binding agreement.

11. The mediator would have the power to —

- convene meetings at any time or place of all parties or only one party;
- order independent/expert examination of one or all parties' contentions;
- certify or approve any agreement arising out of the mediation process;
- review the negotiating process in order that it might be improved.

12. The mediator would not have the power to recommend a solution to the parties if it was evident that one party would not accept the recommendation, and the mediator could not impose a solution.

13. A Presidential member of the AIRC would have the power to order a cooling off period where one or more parties ➤

are engaged in protected action so that mediation can take place.

### Cooling off period

The last element deserves more detailed treatment.

The FMCS does not have the power to order a cooling off period and given the strong emphasis on voluntarism, an involuntary cooling off period does not fit easily in the traditional model of mediation.

Moreover, the party that has the upper hand in an industrial confrontation may not welcome any external intervention at what might be a critical time and therefore may not approach mediation in good faith.

However, the main reason for proposing a cooling off period to enable mediation to occur is to protect the public interest by providing a circuit breaker in serious dispute situations where a business is being severely damaged and employees and their families are suffering unwarranted hardship. To stand by and allow this to occur does seem somewhat senseless.

In the event mediation is not successful — an eventuality that the mediator would be required to certify — then it would be open for the confrontation to resume but at least in the meantime an experienced, professional mediator has had the opportunity to attempt to resolve the dispute.

In ordering a cooling off period it is envisaged that there would be a return by the parties to the status quo that existed immediately prior to the initiation of the bargaining period. The bargaining period would be suspended to allow mediation to occur. This means any strike or lockout would have to cease.

The difficult issue here is the circumstances that would allow the AIRC to order a cooling off period. This might involve a consideration of whether the current grounds in s 170MW of the Act for suspending a bargaining period should be used as the basis for ordering a cooling off period for the purpose of mediation or whether these grounds or any one of them should be made less stringent.

This may be a matter for further debate but under the current law it would be very difficult for a single employer in, say, manufacturing

to achieve a suspension of the bargaining period.<sup>24</sup> Access to mediation during a bargaining period would therefore be virtually impossible.

A more structured approach to dispute resolution built around voluntary mediation has the potential to improve the existing system. It is proposed, however, to take it one step further by enabling a mediator to intervene in serious disputes through the mechanism of a cooling off period.

### Concluding remarks

The federal system of industrial relations in Australia has undergone profound change in the past four years. Arbitration as a means of resolving disputes has been effectively sidelined and conciliation is now the primary means available to resolve disputes.

Conciliation suffers from a number of deficiencies and is not as effective as it could be. These deficiencies could be addressed but unless a fresh approach is taken it will be difficult to achieve attitudinal change which is so important to the day to day operation of the system.

The US model of industrial mediation provides the basis of some ideas for an Australian model.

Mediation can be incorporated into Australia's federal system and mediation could be a service offered by the AIRC.

It is proposed that the US model be taken a step further by enabling a mediator to compulsorily intervene in serious disputes through the mechanism of a cooling off period. ●

*Roger Boland, Director, Industrial Relations, Metal Trades Industry Association.*

*This is a modified version of a paper first presented at the 4<sup>th</sup> National Mediation Conference, Melbourne, 4–8 April 1998.*

### Endnotes

1. *Conciliation and Arbitration Act 1904.*
2. *Industrial Relations Reform Act 1993.*
3. See Pt VIB, Div 4 of *Industrial Relations Act 1988* (IR Act).
4. IR Act, s 170PG.
5. IR Act, s 88A.
6. Print L5300, *Safety Net Adjustments and Review* decision, September 1994.
7. *Workplace Relations Act 1996* (WR

Act), ss 89A, 170MX.

8. WR Act, ss 88A, 88B; *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA Act), Sched 5.

9. WR Act, s 170LK.

10. WR Act, Pt VID.

11. WR Act, Pt XA.

12. For example see WR Act, ss 127, 166A, 170NC, 187AA and ss 45D, 45DB, 45E of the *Trade Practices Act*.

13. WR Act, s 3(b).

14. WR Act, s 170N.

15. See Full Bench decision in *Coal & Allied* (Print 8382).

16. WR Act, ss 100, 170NC.

17. WR Act, s 100.

18. WR Act, s 102.

19. WR Act, s 170NC.

20. See *Re Milk Processing and Cheese etc., Manufacturing Award 1978* AIRL 94.

21. WR Act, s 10(2).

22. *What is Mediation?* An essay by Stephen R Marsh.

23. For example, 94 day strike in 1996 by 6700 employees of McDonnell Douglas at St Louis facility; 44 day stoppage by 44,500 workers in the Denver grocery industry in May 1996.

24. See *Coal & Allied* decision (Print 8382).