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New frontiers for ADR

The changing role of the Australian Industrial Relations Commission in resolving workplace disputes

Amanda Coulthard

Introduction

The substantive provisions of the Work Choices amendments to the *Workplace Relations Act 1996* (Cth) came into effect on 27 March 2006.[1] Work Choices fundamentally alters the regulation of workplace relations in Australia. It creates a (almost) national workplace relations system through its application of the constitutional corporations and by largely overriding the industrial relations legislation of the States and Territories.[2] Significant among the changes made by Work Choices is the change to the traditional dispute resolution role performed by the Australian Industrial Relations Commission (the AIRC).

The role of the AIRC as the central 'umpire' in the settlement of industrial disputes by the processes of conciliation and arbitration has been a cornerstone of the Australian industrial relations system since it was set up by the enactment of the first Commonwealth *Conciliation and Arbitration Act* in 1904. Before the Work Choices Act was enacted a party to an industrial dispute could notify the AIRC of the dispute and seek its assistance in resolving the dispute. Subject to various jurisdictional limitations, the AIRC had the power to resolve the dispute either by conciliating a resolution between the parties or, in the event that conciliation failed, arbitrating.[3] An arbitrated outcome was binding on the parties to the dispute. It was often said that the AIRC's dispute resolution process was 'compulsory', in that once notified of a dispute all parties to the dispute were required to submit to the AIRC's dispute settling jurisdiction.[4]

Since winning office in 1996 the Howard Government has sought to decentralise Australia's industrial relations system by moving away from a centralised system for the determination of wages and working-conditions to one in which the emphasis is on the bargaining of rights at the level of the workplace and, by limiting the traditional role of the AIRC as the conciliator and arbitrator of industrial disputes. The *Workplace Relations And Other Legislation Amendment Act 1996* (Cth) was the government's first step in this direction.[5] However, without control in the Senate the government was not able to secure all of its envisaged reforms. While workplace-level bargaining took centre stage the AIRC retained its power to make Awards through conciliation and arbitration, albeit limited to 20 'allowable matters'. The AIRC continued to resolve disputes that arose during the bargaining process, that is, when parties at a workplace were trying to reach an agreement that would cover wages and working conditions at their workplace, although only in limited circumstances could it arbitrate when bargaining reached an impasse. The AIRC continued to resolve industrial disputes that arose in the workplace and under agreements. It did this by virtue of its broad powers to conciliate and arbitrate industrial disputes. Further, the parties to a certified collective agreement could give the AIRC a power to resolve disputes that arose about the application of their agreement. In that event the AIRC could exercise all of its general powers to resolve the dispute and, depending on the terms of the clause in the agreement, it could recommend a solution to the dispute or go so far as to arbitrate the dispute.[6]

Work Choices significantly alters the way in which disputes are resolved. The new rules with respect to dispute resolution are to be found in Pt 13 of the amended *Workplace Relations Act*. The AIRC no longer has a general power to resolve industrial disputes by conciliation and arbitration. In fact the concept of 'industrial dispute' no longer features in the legislation. In only limited circumstances can the AIRC now exercise the power of compulsory arbitration. The emphasis in Work Choices is on the resolution of disputes by the parties at the workplace level with the AIRC providing voluntary, as opposed to compulsory, dispute resolution. It will do this in competition with private dispute resolution providers using ADR processes. The parties must choose whether disputes about entitlements or other rights under a workplace agreement will be referred to the AIRC or a private ADR provider.[7] If the parties

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choose the AIRC its powers are limited and are determined by the parties. This means that the AIRC will not be able to exercise its traditional and broad range of dispute resolution powers unless the parties agree. Parties will still be able to seek the assistance of the AIRC during bargaining for a collective agreement, but now only if all of the parties agree. And even then, the AIRC has no powers of compulsion.

The remainder of this article comments on the changed role of the AIRC in resolving disputes that arise in the workplace and under agreements reached under the amended *Workplace Relations Act*. It does not consider the changes to the role of the AIRC in regulating the bargaining process or in resolving disputes that arise during bargaining. Nor does it examine the changes to the AIRC's role in dealing with unfair or unlawful dismissals.

Before going further, it is important to emphasise that Work Choices extends dispute resolution beyond the traditional framework of conciliation and arbitration by adopting a broader language, that of 'alternative dispute resolution processes' (ADR processes). As such, the fundamental shift is not just away from the AIRC as the only dispute resolution provider but there is clearly an intention to broaden the range of processes by which the dispute might be resolved while at the same time limiting some of the AIRC's traditional powers. ADR processes are defined in the legislation as conferencing, mediation, assisted negotiation, neutral evaluation, case appraisal, conciliation, arbitration or other determination of the rights and obligations of the parties in dispute.

Dispute settlement procedures in agreements

Under Work Choices all workplace agreements, both collective and individual, must contain a dispute resolution procedure for settling disputes about matters arising under the agreement between the employer and employees whose employment will be subject to the agreement.[8] If the agreement does not contain a dispute resolution procedure it is taken to include the model dispute resolution process set out in Div 2 of Pt 13 of the *Workplace Relations Act*.[9]

It is up to the parties to the agreement to decide what kind of dispute resolution procedure is to apply to their disputes. They can adopt the model process or draft their own procedure. It is also up to the parties to decide who will conduct the dispute resolution process, be it the model process or another process. They can agree to refer their disputes to a third party of their choosing or they can nominate the AIRC or a member or members of the AIRC. The AIRC is the default provider in the event that the parties cannot reach agreement.

The AIRC conducting the model dispute resolution process

As already noted, the parties can adopt the model dispute resolution process in their workplace agreement and can agree that the AIRC is to use the model process in resolving disputes.

When the model process is used by the AIRC the following steps apply:

Step 1 Genuine attempts are made to resolve the dispute at the workplace.

Step 2 Failing resolution at the workplace either party can elect to refer the matter for resolution using an ADR process conducted by the AIRC.

Step 3 Genuine attempts are made to resolve the dispute using ADR processes conducted by the AIRC.

Step 4 The matter is resolved when the parties agree that it is resolved or the party that elected to use the ADR process informs the AIRC that it no longer wishes to continue with the process.

Under the model process the AIRC can refuse to conduct an ADR process if it considers that the parties have not made genuine efforts to resolve the dispute. If it engages in the ADR process it must act quickly and informally and take such action as is appropriate to assist the parties to resolve the matter, including arranging conferences at which the AIRC may be present. This has always been the approach of the AIRC.

The powers of the AIRC under the model dispute resolution process are, however, limited. It does not have the broad range of powers that were once available to it in resolving industrial disputes. For example, it can no longer summons witnesses or compel the production of documents.

It is open to the parties to determine what ADR process the AIRC is to use but the AIRC can only arbitrate on the matters in dispute or otherwise determine the rights or obligations of a party to the dispute if all of the parties to the dispute agree to it doing so. The AIRC can go so far as to make recommendations for the resolution of the dispute, but again only if the parties request that it do so. Even if the parties want it to, Work Choices expressly prohibits the AIRC from compelling a person to do anything, making an award, making an order or appointing a board of reference; all powers that were previously available to it. The AIRC must conduct the process in private and must not disclose any information or document given to it during the process except in limited circumstances, for example, for the purpose of conducting the ADR process or with the parties' consent.

By contrast, there are no express restrictions on the powers of a private dispute resolution provider engaged to conduct the model process other

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than with respect to conducting the proceedings in private and the confidentiality of information and documents. Presumably, the parties are free to give the third party whatever procedural and determinative powers they choose. Of course, in that event, the parties will need to exercise particular care in the drafting of their dispute resolution clause, ensuring that they address such issues as the processes to be used by the third party, the powers of the third party, the enforceability of the third party's determinations and the potential applicability of commercial arbitration legislation to the process and outcome. These are issues that parties to workplace agreements have not had to address before.

Resolution of disputes by the AIRC other than using the model dispute resolution process

The parties are not bound to use the model process. They can choose their own dispute resolution process. They can choose the AIRC as the forum for conducting the agreed process.

In that case, the AIRC can conduct a dispute resolution process if the agreement provides that it can and all of the steps, if any, required under the agreement to be taken before the matter is referred to the AIRC have been taken. Generally, it has been the practice to date for a dispute resolution clause in an agreement to provide a procedure for resolving the dispute at the workplace before the matter is referred to the AIRC. The Work Choices Act does not mandate this but it is likely that dispute resolution clauses will continue to provide for discussions to take place at the work place and to progress through various levels of management before the dispute can be referred to the AIRC.

Under the previous legislation the parties were able to provide in their collective certified agreement that disputes about the application of the agreement could be referred to the AIRC for resolution. Even broadly drafted clauses were interpreted as giving to the AIRC all of its general dispute resolution powers such as summonsing witnesses, the production of documents, appointment of experts and making interlocutory orders. Further, a clause giving the AIRC the broad power to 'resolve' a dispute was usually interpreted as giving to it the power to arbitrate.[10]

Now, under Work Choices, when a dispute is referred to the AIRC it only has the powers that are given to it by the parties under the agreement or which they subsequently agree upon once the dispute is before the AIRC. So, the emphasis is on the parties not only choosing the forum for the resolution of their disputes but also on determining the powers that can be exercised.

The AIRC cannot use all of the general dispute resolution powers that it had prior to Work Choices. It only has the powers that the parties agree that it should have. It is open to the parties to agree upon how the AIRC may act to resolve the dispute, that is, whether it can mediate, conciliate or arbitrate. However, even if the parties agree otherwise, the AIRC is expressly prohibited from making orders. Overall, the AIRC must act quickly and in a way that avoids unnecessary technicalities and legal forms and must comply with any procedures that the parties have agreed upon. As with the model process, the AIRC must conduct the process in private and must not disclose any information or document given to it during the process except in limited circumstances.

Comment

Work Choices seeks to remove the role of the AIRC as the principal umpire over industrial disputes. The AIRC must now provide its services in competition with external providers. Its powers to compel an outcome in the settlement of a dispute are limited. Its powers and functions will largely be driven and determined by the parties to the dispute. How this will change the role of the AIRC in practice remains to be seen. The AIRC is actively promoting its services and informing parties on what role it can have in the resolution of disputes. It has made examples of the various dispute resolution models available on its website.[11] There is clearly still a role for the AIRC. The extent of that role will depend on the desire of the parties to continue to use the AIRC, an institution that many consider has served them well. Whether the AIRC continues to provide its services at no charge to the parties will no doubt heavily influence this decision.

What is certain is that whether the parties use the model procedure or their own customised procedure, choose a third party dispute resolution provider or the AIRC, proper consideration will need to given to deciding what powers and procedures the dispute resolver is to have and to expressing those powers and procedures clearly and effectively in the dispute resolution clause. ●

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Endnotes

1. The amending legislation is the *Workplace Relations (Work Choices)*

Act 2005. It is referred to in this note as Work Choices or the Work Choices Act.

2. A constitutional corporation is a trading, financial or foreign corporation within the meaning of s 51(xx) of the Commonwealth Constitution.

3. The AIRC's jurisdiction was with respect to industrial disputes extending beyond the limits of any one State. Despite this limitation the AIRC regularly dealt with local disputes lacking the element of 'interstateness' by conciliation. See B Creighton and A Stewart, *Labour Law: An Introduction*, 4th edition, Federation Press, Sydney, 2005 at [6.08].

4. Above note 3 at [6.11].

5. This Act made substantial amendments to the *Industrial Relations Act 1988* (Cth) and renamed it the *Workplace Relations Act 1996*.

6. The parties' right to provide for such a dispute resolution clause in their agreement was to be found in s 170LW of the pre-Work Choices *Workplace Relations Act 1996*. For a review of the scope of the AIRC's power under such clauses see A Stewart 'The AIRC's evolving role in policing bargaining' (2004) 17 *AJLL* 245 at 262–70.

7. It is understood that the Federal Government is establishing a register of accredited ADR providers for this purpose.

8. Section 353 of the *Workplace Relations Act 1996*.

9. The model process must also be used for certain disputes that arise under the Work Choices Act, for example, in respect of disputes about legislated minimum standards. It will also be incorporated into all federal awards and State awards and agreements that 'transition' into the federal system, replacing existing dispute resolution clauses in those instruments.

10. See above note 6.

11. See <www.airc.gov.au/wc2k6/fact_sheets/dispute_guide.html and www.airc.gov.au/wc2k6/fact_sheets/dispute_guide_add.html>.