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Changing the IR dispute resolution system

Mediation — Transforming the Industrial Relations Landscape

Anthony R Beech

Reliance upon industrial tribunals to resolve industrial disputes in Western Australia has changed significantly over the last 20 years and it is now set to change significantly again. Mediation is the key feature of the *Employment Dispute Resolution Act 2008* (WA) (EDR Act) which was passed in June 2008 by the WA Parliament.[1] It provides a framework for resolving any question, dispute or difficulty that arises out of, or in the course of employment in Western Australia quite separately from the framework under the *Industrial Relations Act 1979* (WA) (IR Act). With its emphasis on mediation, it was a timely piece of legislation in the context of the 9th National Mediation Conference in Perth in September 2008 with its theme of 'transforming the landscape'.

Although the words 'alternative dispute resolution' were probably quite unknown to those WA parliamentarians who in 1912, and in 1963, and again in 1979, established and changed the framework for industrial relations disputes to be dealt with outside the civil litigation process, over that time we have resolved industrial disputes by way of ADR.

Thus, between 1912 when the principal WA *Industrial Arbitration Act* was passed until its substantial amendment in 1963, the central feature of industrial relations was a Court of Arbitration consisting of a judge and a nominee of the unions and a nominee of the employers. It created a system which encouraged, and relied upon, employees being members of representative unions and similarly employers being members of or represented by employer organisations and it decided matters on the basis of fairness. Conciliation played only a limited role within that legislative structure and the primary means of resolving industrial disputes was more likely to be arbitration by the Court with its decisions being final and binding in law.

In 1963 the then State Government abolished the Court of Arbitration and replaced it with an Industrial Commission, the members of which were not required to be legally trained; the emphasis on conciliation remained within this less-formal body.[2] When I use the word 'conciliation' I am referring to conferences called by a Commissioner. They were usually held on the application of a union or an employer. Attendance was compulsory. Every effort would be made by the Commissioner to have the parties reach an agreement. The Commissioner could make suggestions, recommendations and even give directions about the exchange of documents or of information. Both sides knew that in the absence of an agreement being reached, the applicant could request that the dispute be determined by arbitration. It was, therefore, a quite structured conciliation process.

In 1979 a new Act placed a greater significance upon conciliation than upon arbitration.[3] The legislation provided that arbitration would only be used if it was clear that the matter would not be able to be resolved by conciliation. That is largely the industrial relations system that is in place today. I suspect that the fact that the Commission has coercive powers is more widely known in the community than the fact that about 85 per cent of

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the Commission's day-to-day work is conciliation where the participants attend voluntarily. The promotion of court-initiated mediation in the last 10 or so years by the civil courts is a relatively new initiative for them — we have been doing it for at least the last 70 years. We also do it quite successfully with almost 80 per cent of individual-claim matters last year either settled or withdrawn without the need for arbitration.

The emphasis is now upon parties making agreements either outside the Commission, or with the Commission's assistance, and subsequently registering those agreements, rather than having their employment conditions regulated by means of an award arbitrated or amended by the Commission.

This has been accompanied by a significant change in emphasis away from arbitration as a means of resolving industrial disputes by taking that responsibility away from industrial tribunals and devolving it to the parties themselves with the 2006 amendments to the Commonwealth *Workplace Relations Act 1996*. This Commonwealth Act applies extensively in WA to employers which are trading, financial or foreign corporations. Being a federal law applying to constitutional corporations, it overrides the WA IR Act as it applies to constitutional corporations. The EDR Act is part of a suite of legislation enacted by the WA Government to allow constitutional corporations and their employees in WA to continue to have the access to the WA Industrial Relations Commission which existed prior to those 2006 Commonwealth amendments.

In keeping with the historical trend away from compulsory conciliation and arbitration to voluntary use of the Industrial Relations Commission in WA, the EDR Act requires that the employers and employees involved in the industrial dispute agree to use the WA Commission; it is only if all parties agree to use the WA Commission that the Commission can assist them to resolve their industrial dispute.

This is brand-new legislation and the ink which has printed it has only just dried. How it operates in practice will remain to be seen, as with any new legislation. However, my initial impression of how it will operate is as follows. The Commission may be asked to assist the employees and employers to resolve the question, dispute or disagreement in one of three ways.

- First, the Commission can simply be asked to mediate.[4]
- Secondly, the parties can agree in writing that a dispute or a class of disputes can be referred to the Commission and, if a dispute within that class is then referred to the Commission, the Commission can mediate and if the parties agree, and only if the parties agree, become more involved in assisting the parties to resolve their dispute including by an arbitration from which, if both parties agree, there can be a right of appeal.[5]
- The third means of assistance is tied to the model dispute resolution provisions of the Commonwealth *Workplace Relations Act 1996*[6] and it allows for the WA Industrial Relations Commission to provide a dispute resolution service under that Commonwealth Act.[7]

Commissioner, the Commissioner was required to appoint that person as a mediator for the purpose of the dispute.[8] The amendment provided for payment of the mediator by the State and the Registrar was required to maintain a register of persons who were nominated in writing by the unions, the employers, or the Minister as persons who were proper to be, and who were willing to act as, mediators.

Where agreement was reached before a mediator then a memorandum of the terms of the agreement was to be drawn up and referred to the Commissioner and the Commissioner was able to issue that agreement as an award or an order amending an award.

There are no records available in the Commission showing that this mediation opportunity was ever used. I cannot say that it was never used, merely that no record of it being used was able to be found when I was preparing this article. It is also a fact that when the IR Act was re-written in 1979 to take effect in 1980[9] these mediation provisions were omitted and did not form part of the new Industrial Relations Act. Thus, for a period of perhaps between six and seven years,

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I pause to say that timing is everything, not just in resolving industrial relations issues, but in particular in mediation in industrial relations. I say that for this reason: in 1973 the then WA Government tried to steer parties to industrial disputes down the path of mediation, however, its efforts were unsuccessful. In 1973 the *Industrial Arbitration Act 1912* was amended to provide that where the parties to an industrial dispute request a Commissioner in writing to appoint a person as a mediator in the dispute, that is a person who is not the Commissioner or another

there was provision for mediation outside the Commission, by somebody who was not a Commissioner, with the imprimatur of the Commission, but it appears that the parties to industrial disputes simply were not ready to take advantage of it. I wonder, are they ready now?

Industrial relations today is substantially concerned with enterprise bargaining. Often this occurs between parties directly and not in the Commission. There has been a significant decline in trade union membership and an industrial relations system which is designed to encourage

employees to join unions, and for those unions, but not the employees themselves, to have unlimited access to the industrial relations system, is not sustainable in the long term. We are also in a time of statutory individual employee agreement-making. All these changes create an environment which might well encourage the use of mediation in industrial relations.

The EDR Act is a simple piece of legislation and its operative provisions are similarly quite simple. A request for mediation can be made by an employee or a group of employees or an employer or a group of employers, but all of the parties to the employment dispute must agree to the mediation occurring. The dispute can be about any question, dispute or difficulty that arises out of or in the course of employment including a dismissal from employment.[10]

I have referred to the three ways under the EDR Act by which the Commission may be asked to become involved. The first way is merely a request to mediate. If the Commission receives a request for mediation then the Commission 'may take such action as is appropriate to assist the parties to resolve the employment dispute'.[11] Importantly, the Commission does not have the power in a mediation to compel a person to do anything or to arbitrate the employment dispute or to otherwise determine the rights and obligations of a party to the employment dispute or to make a decision in relation to the employment dispute.

Further, the Commission must have regard to any request made to the Commission and, if the Commission is of the opinion that the request is practicable and consistent with resolving the dispute in an expeditious, convenient and informal way, the Commission must endeavour to comply with the request.[12]

The legislation doesn't limit the request that can be made and it would appear broad enough to encompass a request for the mediation to be conducted by a particular Commissioner rather than one merely chosen by the Chief Commissioner, or it may be for the mediation to be held at a particular location including a country location, or even in the workplace. The services of the Commission are without charge.

The Commission will not take sides or judge who is right or wrong. The Commissioner will not have power to compel a person to do anything, to arbitrate the employment dispute, to otherwise determine the rights and obligations of a party to the employment dispute or make a decision in relation to the employment dispute. Any agreement must be acceptable to all persons involved in the process.

There is often an issue of the enforceability of agreements reached in a mediation. In the ordinary run of things, the normal rules relating to the formation of contracts will be applicable. In this legislation, where an agreement results from a mediation involving the Commission, the Commission is able to give that agreement legal effect if the parties wish to do so:[13] the Commission has the power to effectively register the terms of any agreement reached. The Commission has an administratively simple registration process under the IR Act and the registration process for a mediated settlement agreement links into that process.

Registration does not mean that the registered mediated settlement agreement thereby becomes a public document. It remains private to the parties because mediation is to be held in private.[14]

It also remains confidential. Trying to resolve an employment dispute by mediation under this Act will not prevent an employer or employee who has a right to take action in a court or before the Commission under the IR Act exercising that right and also referring the same matter to that court or to the Commission. However, evidence of anything said or done or any admission made in the course of attempting to settle an employment dispute by mediation or a referral proceeding is to be taken to be in confidence and is not admissible in any proceedings before any court, tribunal or body.[15]

Another issue of potential significance is the standing of the mediated settlement agreement in relation to a State award. State awards still exist and continue to apply to those employers that are not constitutional corporations

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and to their employees. A mediated settlement agreement does not override a State award, and therefore where the State award and the mediated settlement agreement are inconsistent, the award will prevail. There will be many questions, disputes or difficulties that arise out of or in the course of employment about which a State award will be silent. The obvious examples are disciplinary issues, or even a dismissal, or over an employee's non-award benefits. In such circumstances, if an agreement is reached in mediation the agreement is quite unlikely to be inconsistent with an award because the award is likely to be silent on the issue.

The second way under the EDR Act by which the Commission may be asked to become involved does allow a mediated settlement agreement to override a State award. This second way occurs when all the employees and the employer have agreed in writing that the question, dispute or difficulty can be referred to the Commission.[16] If a dispute then arises that is encompassed within that written referral document, the Commission can be requested to mediate in that dispute and the role of the Commission in doing so will only be what the parties have agreed it can be in that written referral document.

For example, take a situation where some employees in a particular business wish to start work two hours earlier and finish two hours later but the employer refuses only because it will incur penalty payment under a State award for working outside the ordinary hours of work prescribed in the award. If those employees and the employer make a written referral agreement saying that disputes over the working of ordinary hours may be referred to the Commission, and then refer that dispute over starting work two hours earlier and finishing two hours later to the Commission for mediation, if they do reach agreement, and agree to it being registered by the Commission, that registered mediation settlement will override the State award. This has potentially wide possibilities for employees and employers that cannot, or do not otherwise wish to, access the formal industrial relations system.

The terms of the registered mediated settlement agreement arising out of a written referral agreement again remain confidential to the parties to it, but it is intended that a register will be created to record for each State award the existence of a mediated settlement agreement which prevails over it.

With this legislation, employers and employees in WA not only have the ability to access the Commission's extensive experience in resolving disputes throughout the State, but to do so in a way that retains for them the control over the resolution of the question, dispute or difficulty. It allows them to craft an agreement that suits all involved. Its lack of coercion, and the retention of control by those employers and employees, may make mediation in industrial disputes an attractive option for small businesses as well as those that have a more structured HR or ER department. It will obviously be up to the employers and employees with the question, dispute or difficulty to determine whether this legislation will assist them in changing the industrial relations landscape.

For our part, the WA Industrial Relations Commission intends to make the whole process as simple as possible. Requests for mediation will be able to be made by letter, email, fax or even by a telephone query although there will need to be a certain minimum amount of detail provided by an applicant for the Commission to be able to respond to the request. There will be a form on the web available for completing or downloading.

Industrial Commissioners are used to exercising their ADR skills against a legislative background which can lead to binding arbitration even if one party does not agree. Mediation in this voluntary situation is quite different. We therefore drew upon the experience of ACAS (Advisory, Conciliation and Arbitration Service) in the United Kingdom, the Federal Mediation and Conciliation Service in the United States and the Labour Relations Commission in Ireland to see at first hand how state-funded bodies resolve industrial disputes in those countries. The three-day workshop that resulted was attended by Commissioners from the Australian Industrial Relations Commission, and the NSW, Queensland and SA Commissions, which shows an interest in mediation in the other States and nationally.

The workshop that we held showed in particular that the government bodies in those countries do not regulate industrial relations in the way that we have regulated industrial relations to date. For example, the location of the mediation, or its timing, are what the parties request them to be and not what suits the tribunal. The culture of those countries arise from a past that involved compulsory conciliation and arbitration. However I am confident that the culture of resolving industrial disputes, particularly in the WA Industrial Relations Commission, will also change away from the compulsory nature of the Commission. We shall learn from their experience.

I am confident that mediation will increasingly transform the industrial relations landscape in WA. ●

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Endnotes

1. The EDR Act was still not proclaimed at the time of the 9th National Mediation Conference in September 2008, it commenced on 1 December 2008.
2. *Industrial Arbitration Act (No 2) 1963* (No 76 of 1963), s 61.
3. *Industrial Arbitration Act 1979* (No 114 of 1979), commenced on 1 March 1980, s 43.
4. EDR Act, Part 2, Division 1.
5. EDR Act, Part 2, Division 2.
6. This process is defined in Division 6 of Part 13 of that Act.
7. EDR Act, Part 2, Division 4.
8. *Industrial Arbitration Act Amendment Act 1973* (No 108 of 1973), s 51 which inserted Part IVB — Mediation and Conciliation.
9. See above note 3.
10. EDR Act, s 3(2)
11. EDR Act, s 7.
12. EDR Act, s 10(3).
13. EDR Act, s 11(1).
14. EDR Act,s 25(1).
15. EDR Act,s 24(1).
16. EDR Act,s 18(2).