SUBMISSION TO THE SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

ON THE

FAIR WORK BILL 2008

BY

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SUMMARY OF SUBMISSION

The substance of this submission is:

(a) to highlight those areas of the Fair Work Bill 2008 that already make provision for private mediation and arbitration in industrial relations; and

(b) to suggest some other areas of the Bill where amendments could usefully be made to allow for mediation, arbitration and other forms of alternative dispute resolution (referred to as "ADR") that would be provided by independent or private ADR practitioners.

WHAT THIS SUBMISSION DOES NOT ADVOCATE

This submission does not advocate that in all cases where Fair Work Australia ("FWA") has an exclusive jurisdiction under the Bill to deal with a dispute, it should lose that exclusive jurisdiction and that the field should be opened up to independent mediators and arbitrators.

Indeed, the submission is that some of those areas should remain the exclusive jurisdiction of the FWA, for they cover matters of wide public interest and policy where it is probably best to have the issues resolved by a public body with accumulated knowledge and responsibility.

In those cases the submission is that the Bill should be left as it is.

WHAT THIS SUBMISSION DOES ADVOCATE

This submission advocates that:

1. the cases in the Bill which allow for mediation and arbitration by independent, outside mediators and arbitrators should remain as they are, with some limited amendments; and

2. in some limited cases, where presently the Bill allows mediation and arbitration only by Fair Work Australia, scope should be given for independent mediators and arbitrators to provide those services as well as having them provided by Fair Work Australia.

The author of this submission had started to use the expressions "private mediators and arbitrators" and "outside mediators and arbitrators" before noticing that the Explanatory Memorandum to the Bill had properly used the expression "independent third party" to cover the same concept.

That expression will be used where appropriate, as it has the advantage of emphasising that private mediators and arbitrators, properly trained and accredited, are truly independent.

It is thought that it might be useful to set the context in which this matter arises.

THE CONTEXT WITHIN WHICH THIS ISSUE SHOULD BE SEEN

The policy of the Commonwealth Government is to encourage the use of ADR, not solely by independent practitioners, of course, but with independent practitioners playing a significant part and as an addition to the services provided by government or statutory authorities. The Attorney-General, Mr McClelland, has been a

particular advocate of this approach[1], with respect to mediation, as has the judiciary and State Governments such as Victoria[2].

It has also been used in other Commonwealth legislation to provide for independent arbitration services, for example in A New Tax System (Goods and Services Tax Transition) Act 1999, which, with the A New Tax System (Goods and Services Tax Transition) Amendment Regulations 2005 (No. 1) declared members of four specified ADR organizations[3] to be arbitrators who had power to arbitrate on the incidence of the Goods and Services Tax on long term contracts.

With that in mind, the Bill makes significant acknowledgement of various forms of alternative dispute resolution, which is of course commendable. For example, it gives FWA power to use recommendations and the expressions of opinion as well as mediation and arbitration in appropriate cases.

In particular, Clause 3 of the Bill provides that one of the objects of the Act is "***providing accessible and effective procedures to resolve grievances and disputes***" .[4]

COMMENT: That, of course is a worthwhile provision, but it would set the right framework if this object were expressed more robustly than the way it is presently expressed and if it applied the Government's policy of encouraging private or independent ADR.

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[1] See, for example, his speeches at the launch of the NSW Bar Dispute Resolution Centre, 10 December 2008 and 'Simply resolving disputes' – 'International Commercial Arbitration Conference'**,** 21 November 2008.

[2] See, for example, the Victorian Attorney-General, Mr Hulls' Civil Justice Statement No 2 of October 2008.

[3] The Institute of Arbitrators and Mediators Australia, The Australian Commercial Disputes Centre, The Chartered Institute of Arbitrators Australia and LEADR.

[4] 3' (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and…'

FORM OF THE AMENDMENT: It is submitted therefore that objective (e) in Clause 3 be amended so that it reads, with the proposed amendments in capital letters,

"(e) "*providing accessible and effective procedures to resolve grievances and disputes* **INCLUDING ALTERNATIVE DISPUTE RESOLUTION SERVICES PROVIDED BY PERSONS WHO ARE INDEPENDENT OF THE EMPLOYERS, EMPLOYEES OR EMPLOYEE ORGANISATIONS CONCERNED IN THE DISPUTE."**

The words **"PERSONS WHO ARE INDEPENDENT OF THE EMPLOYERS, EMPLOYEES OR EMPLOYEE ORGANISATIONS CONCERNED IN THE DISPUTE**" are not very radical and in fact are already used in other parts of the Bill and are used to provide for private mediation and arbitration**.** It is not, therefore, as if this proposed amendment were introducing a new notion into the Bill; it merely invokes a concept already used in the Bill and properly reflects it in the Objects of the Bill.

Such an amendment is recommended because it would:

(a) reinforce the notion already reflected in parts of the Bill that independent ADR services can and should be available;
(b) endorse the Government's policy on the wider use of independent ADR services;
(c) provide greater choice to the parties; and , most importantly,
(d) not detract from the notion that on some issues it should be Fair Work Australia and only FWA that is empowered to perform mediation and arbitration functions.

Having set the context, it is now appropriate to see what the Bill provides. It is proposed to look first at those provisions of the Bill that already allow private mediation and arbitration, for there are some. Then it is proposed to look at those provisions that make it

mandatory to use FWA and only FWA for the mediation, arbitration and other resolution of disputes.

1. AREAS OF THE FAIR WORK BILL 2008 THAT MAKE PROVISION FOR PRIVATE MEDIATION AND ARBITRATION.

There are three areas that already make provision for private mediation and arbitration services in the Bill as it is drafted. They are:

A. Under the dispute resolution clause to be inserted into Modern Awards.

B. Under the dispute resolution clause to be inserted into Enterprise Agreements.

C. Under the dispute resolution clause to be inserted into Contracts of Employment (but only to the extent that it relates to disputes about National Employment Standards ("NES") provisions or a safety net term)[5].

It is consistent with this submission to acknowledge these provisions and the fact that the Government recognises that there is a place in the new industrial relations system for such services.

At the same time, there is a case for some strengthening of these provisions.

The areas where provision for private mediation and arbitration is made are as follows.

A. MODERN AWARDS

Part of the industrial relations scheme of the Fair Work Bill 2008 is that industrial awards will be fewer in number than at the present,

[5] Explanatory Memorandum, page 412

they will "provide (along with the NES) the definition of minimum wages and conditions of employment" and will be more flexible than current awards.

The awards will be called Modern Awards and they will come into operation on 1 January 2010 (although some have already been completed and made public).

The Bill provides for the type of matter that may be included in a modern award, described as "additional minimum terms and conditions of employment" which "supplement the (National Employment Standards)".

As most of them concern wages, overtime, allowances, hours, holidays, dispute settlement and the other matters that would be included in any award or contract of employment, and "tailored to the needs of the particular industry or occupation to which the award relates", it can be assumed that modern awards will include provision about all of those traditional subjects.

One of the terms that may be included in a modern award is that set out in Clause 139 (1) (j) of the Bill, namely:

> "(j) procedures for consultation, representation and ***dispute settlement***.[6]"

We will see in a moment that this discretionary provision is in fact compulsory so far as procedures on ***"dispute settlement"*** are concerned.

But even without such a mandatory clause, it is clear that the intention of the Parliament in giving power to include procedures for dispute settlement is the notion that awards in the future might usefully include procedures for dealing with disputes that will inevitably arise when the award is in operation.

[6] All emphases in this submission have been added.

Furthermore, as immediately before the provision allowing such procedures, the same Clause has said that modern awards may also deal with wages, work arrangements (causal and part-time work etc.), hours, overtime, penalty rates, annual pay, allowances, leave and superannuation, it is reasonable to assume that dispute settlement procedures written into a modern award will deal with disputes about any of those issues.

"MAY" BECOMES "MUST"

However, not only will it be discretionary to include in a modern award procedures for dispute settlement, but it will in fact be mandatory.

That is because Clause 146 provides that:

> "Without limiting paragraph 139(1) (j), a modern award ***must*** include a term that provides a procedure for settling disputes:
>
> (a) about any matters arising under the award; and
>
> (b) in relation to the National Employment Standards."

A modern award must therefore set out a procedure for settling disputes "arising under the award", which means disputes about matters covered by the subjects referred to above and disputes about anything else that can be said to have arisen because of provisions of the award.

It will also be seen that the mandatory provision to include in the award a procedure for settling disputes has acquired an additional and new object of its concern apart from disputes under the award, namely disputes in relation to the National Employment Standards.

The National Employment Standards are 10 minimum standards of employment that will apply to all employees (which really means all employees about whom the Commonwealth Parliament has power to legislate). They will cover maximum hours of work, provisions for leave and other basic obligations. But they will not cover minimum wages, which will be covered by Modern Awards[7]. The Standards will be fixed by Fair Work Australia and will come into operation on 1 January 2010.

EFFECT OF CLAUSES 139 AND 146

The combined effect of these provisions is that under the new regime, once modern awards and the National Employment Standards come into operation, there will be, in all awards, procedures for settling disputes arising both from the award and from the National Employment Standards.

WHAT TYPE OF PROCEDURE?

These Clauses of the Bill do not say what sort of procedures must be set up for settling disputes and in particular they do not say who or what is to be responsible for implementing those procedures or for providing them.

The answer is that disputes may be settled using Procedures implemented by Fair Work Australia **OR** by another "person" other than Fair Work Australia.

That result comes from Clauses 738-740.[8] The combined effect of

[7] Explanatory Memorandum on the Bill, page x.

[8] **Subdivision B—Dealing with disputes**

738 Application of this Division

This Division applies if:

(a) a modern award includes a term that provides a procedure for dealing with disputes, including a term in accordance with section 146; or

these provisions is, first, that if the modern award requires or allows FWA to arbitrate the dispute, then FWA ***may*** do so. The Explanatory Memorandum suggests[9] that the award, enterprise agreement or contract of employment has given power to the FWA to arbitrate, even if they do not use the word "arbitrate' and that it will be sufficient if they give power to make a "final determination", "award", "order" or "something similar".

This clearly gives ***power*** to FWA to deal with the dispute by way of

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(b) an enterprise agreement includes a term that provides a procedure for dealing with disputes, including a term referred to in subsection 186(6); or

(c) a contract of employment includes a term that provides a procedure for dealing with disputes between the employer and the employee, to the extent that the dispute is about any matters in relation to the National Employment Standards or a safety net contractual entitlement.

739 Disputes dealt with by FWA

(1) This section applies if a term referred to in section 738 requires or allows FWA to deal with a dispute.

(2) FWA must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4).

(3) In dealing with a dispute, FWA must not exercise any powers limited by the term.

(4) If, in accordance with the term, the parties have agreed that FWA may arbitrate (however described) the dispute, FWA may do so.

Note: FWA may also deal with a dispute by mediation or conciliation, or by making a recommendation or expressing an opinion (see subsection 595(2)).

(5) Despite subsection (4), FWA must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

(6) FWA may deal with a dispute only on application by a party to the dispute.

740 Dispute dealt with by persons other than FWA

(1) This section applies if a term referred to in section 738 requires or allows a person other than FWA to deal with a dispute.

(2) The person must not deal with a dispute to the extent that the dispute is about whether an employer had reasonable business grounds under subsection 65(5) or 76(4).

(3) If, in accordance with the term, the parties have agreed that the person may arbitrate (however described) the dispute, the person may do so.

(4) Despite subsection (3), the person must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.

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arbitration.

That much is clear. That power seems to have been exercised in the recently published modern award, the Hospitality Industry (General) Award 2010 (MA000009). The dispute resolution clause in that award appears below.[10]

The problem, however, is that the provisions do not make it ***compulsory*** for FWA to deal with the dispute by way of arbitration or in any other way. It is not argued here that the Bill should make it compulsory for the FWA to do so. Rather, it is submitted that there should be a variety of flexible options set out that will substantially contribute to the dispute being settled if they are used by the parties.

Under the present structure of the Bill, Clause 739 allows the FWA to arbitrate on the dispute, but if it declines to do so, there should be some other avenue open to the parties to try to resolve whatever it is that prevents them from reaching agreement on the matters in dispute.

There should also be avenues open to them to use other forms of ADR apart from arbitration. To some extent this problem is already covered, for Clause 595(2) of the Bill allows FWA may deal with a dispute by mediation or conciliation or even by making a recommendation or expressing an opinion.

[10] 9. Dispute resolution 9.1 In the event of a dispute in relation to a matter about this award, or in relation to the NES, in the first instance the parties must attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor. If such discussions do not resolve the dispute, the parties will endeavour to resolve the dispute in a timely manner by discussions between the employee or employees concerned and more senior levels of management as appropriate. 9.2 If a dispute in relation to a matter arising under this award or the NES is unable to be resolved at the workplace, and all appropriate steps under clause 9.1 have been taken***, a party to the dispute may refer the dispute to the Commission***. 9.3 The parties may agree on the process to be utilised by the Commission including mediation, conciliation and consent arbitration. 9.4 Where the matter in dispute remains unresolved the Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute. 9.5 An employer or employee may appoint another person, organisation or association to accompany and/or represent them for the purposes of this clause. 9.6 While the dispute resolution procedure is being conducted, work must continue in accordance with this award and the Act. Subject to applicable occupational health and safety legislation, an employee must not unreasonably fail to comply with a direction by the employer to perform work, whether at the same or another workplace, that is safe and appropriate for the employee to perform.

However, it would be better all round if the Bill were amended so that the parties could see what is ahead of them and the options that will be available to them if they reach an impasse in their negotiations on the dispute. Some amendments would achieve this objective without limiting at all the power given to FWA by Clause 739 to arbitrate on the dispute if it wishes and by implication if an application is made to it to do so.

FORM OF THE AMENDMENT: amend Clause 739 (4) so that it reads, with the proposed additions in capital letters:

(4) If, in accordance with the term, the parties have agreed that FWA may arbitrate (however described) the dispute **OR OTHERWISE DEAL WITH IT**, FWA may do so.

(5) **FOR THE PURPOSE OF OTHERWISE DEALING WITH THE DISPUTE, FWA MAY REFER THE DISPUTE TO ANY PERSON OR BODY FWA CONSIDERS APPROPRIATE, PROVIDED THAT SUCH PERSON OR BODY IS INDEPENDENT OF THE EMPLOYERS, EMPLOYEES OR EMPLOYEE ORGANISATIONS CONNECTED WITH THE DISPUTE TO DEAL WITH THE DISPUTE AND ASSIST THE PARTIES TO RESOLVE IT, BY MEDIATION OR CONCILIATION OR BY MAKING A RECOMMEBDATION OR EXPRESSING AN OPINION.**

There would be consequential amendments to the numbering of Clause 739 (5) and (6). However, the Government would be entitled to expect that a similar provision to that in Clause 739(5) would remain, to prevent departures from the NES or a modern award when the dispute is being resolved.

These suggested amendments show the parties that they may ask the FWA to arbitrate the dispute, they may ask it to deal with the dispute by some means other than arbitration and they also provide several new avenues of dispute resolution for FWA to pursue, such as referring the dispute out to independent professionals who will have the same wider powers like mediation and conciliation.

It will also be seen that the wording paraphrases language that is already used elsewhere in the Bill, namely in Clause 192 (the power for the FWA to refer a proposed enterprise agreement out to an appropriate person or body when the FWA declines to approve it); Clause 595(2), invoking the power of the FWA available in several specified cases to mediate, conciliate, make a recommendations and express an opinion; and Clause 739 itself which is therefore consistent.

Using these provisions in the way suggested has removed some uncertainty, shown the parties the clear path that is ahead of them and provided another opportunity to advance the Government's policy of encouraging ADR by independent providers.

NON - FWA SETTLEMENT OF DISPUTES ARISING FROM MODERN AWARDS

There are similar provisions that apply where the modern award requires or allows disputes to be dealt with by a "person" other than the FWA. In those cases the "person" other than the FWA may deal

with the dispute. So, likewise, if the parties have agreed that the person may "arbitrate (however described)", the person may do so.

The Explanatory Memorandum acknowledges that the "independent third party" has power to make "a binding decision"[11].

However, the Bill does not give an express power to such a person to mediate or conciliate. Indeed, the Explanatory Memorandum makes the point[12] that although the FWA can use all of its powers, an independent third party has only those powers "that are expressly conferred by the term." That comment is very true and it draws attention to a significant limitation of the powers of independent third parties and hence their value and usefulness.

It would be wise, therefore, for the award to confer those powers on whoever is contemplated as being the provider of the dispute resolution services. Such provisions are common in dispute resolution clauses.

FORM OF AMENDMENT: amend Clause 740 (3) so that it reads:

(3) If, in accordance with the term, the parties have agreed that the person may arbitrate or **OTHERWISE DEAL WITH THE DISPUTE** (however described), the person may do so.

(4) FOR THE PURPOSE OF OTHERWISE DEALING WITH THE DISPUTE, THE PERSON MAY ASSIST THE PARTIES TO RESOLVE IT BY MEDIATION OR CONCILIATION OR BY MAKING A RECOMMENDATION OR EXSPRESSING AN OPINION AND WITH THE CONSENT OF THE PARTIES AND SUBJECT TO ANY TERMS AGREED

[11] Page 414
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TO BY THE PARTIES MAY COMBINE ANY OF THOSE FUNCTIONS WITH THAT OF AN ARBITRATOR.

It will be seen that one other significance of the amendment is that it imports the notion used with success overseas, particularly in China, of allowing an arbitrator to assume the role of a mediator or conciliator as well as that of an arbitrator. In our experience, it has always been assumed that arbitrators could not resume their functions objectively if, during the arbitration, a mediation was held and the arbitrator learnt something in a private session that was not communicated to the other side. That is regarded now as something of an outdated concept and it would be a great help if an arbitrator in industrial relations matters were able, with the support of this legislation, to proceed with the arbitration even after an attempt in a mediation to try to resolve the dispute.

CONCLUSION SO FAR

The conclusion so far is that the Bill makes some provision for dispute resolution other than by the FWA. In other words, there is scope for parties to a modern award to provide in advance that disputes arising under their award will be resolved by mechanisms of their own choice other than the FWA.

This may be seen as valuable by parties in the same way that commercial parties have always seen the advantages of private mediation and arbitration over and above court proceedings as being to keep control over their own dispute, keep a measure of confidentiality over the proceedings (the Explanatory Memorandum envisages that FWA hearings will "ordinarily be held in public" [13]) and to preserve if possible their on-going commercial relationship.

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But it has also been seen that there are a few amendments that could usefully be made to these provisions in the Bill which will only improve them. Those amendments are to give express power to the FWA to refer a dispute to independent mediators or arbitrators and to give them an express power to use the full range of alternative dispute resolution mechanisms.

B. ENTERPRISE AGREEMENTS

The Bill provides in Clause 186(6) for private mediation and arbitration (or at least for power for an independent person "to settle disputes") to be considered when an enterprise agreement comes to be approved by Fair Work Australia, as it must be.

In the course of the approval process, the FWA must be satisfied that the enterprise agreement allows FWA or an independent person to settle disputes.

The independent person is described as a "***person who is independent of the employers, employees or employee organisations covered by the agreement…".***

The disputes to be settled under those procedures are, like the disputes arising from modern awards, disputes

(i) about any matters arising under the enterprise agreement; and

(ii) in relation to the National Employment Standards.

So it is enough to enable an enterprise agreement to be approved, that the agreement provides for outside or independent dispute settlement.

The FWA must also be satisfied that there is a term in the agreement that allows for the representation of employees covered by the agreement for the purposes of the dispute-settling procedure.

It is clear therefore that, as with Modern Awards, there is scope here for independent providers to be involved in the process of settling disputes arising under enterprise agreements.

But as is the case with Modern Awards, so likewise in the case of enterprise agreements, there is scope for improvement. That improvement has been made, it is respectfully submitted, by the amendments proposed to be made to Clause 740 (3).

The power of the FWA and independent mediators and arbitrators to settle disputes arising under enterprise agreements comes from Clauses 738-740, the same source of power for each of them to arbitrate on disputes arising under modern awards. Accordingly, if the proposed amendment is made for the purpose of modern awards it will also be made for the purpose of enterprise agreements. Thus, if the amendment is adopted:

(1) the FWA will have a new power to refer the dispute to an outside, independent provider to deal with the dispute by arbitration, by mediation or conciliation or by making a recommendation or expressing an opinion; and

(2) the independent provider will be expressly empowered to exercise those functions by a combination of arbitration and the other forms of alternative dispute resolution.

CONCLUSION SO FAR

The conclusion so far is that the Bill makes some provision for dispute resolution other than by the FWA. In other words, there is scope for parties to a modern award and an enterprise agreement to provide in advance that disputes arising under their award or agreement will be resolved by mechanisms of their own choice other than the FWA.

But it has also been seen that there are a few amendments that could usefully be made to these provisions in the Bill which will only improve them. Those amendments are to give express power to the FWA to refer a dispute to independent mediators or arbitrators and to give them an express power to use the full range of alternative dispute resolution mechanisms.

C. **CONTRACTS OF EMPLOYMENT**

The power of the FWA and independent mediators and arbitrators to settle disputes arising under enterprise agreements comes from Clauses 738-740, the same source of power for each of them to arbitrate on disputes arising under modern awards and enterprise agreements. Accordingly, if the proposed amendment is made to Clause 740 for the purpose of modern awards and enterprise agreements it will also be made for the purpose of contracts of employment.

2. AREAS OF THE FAIR WORK BILL 2008 WHERE FAIR WORK AUSTRALIA CURRENTLY HAS EXCLUSIVE POWER IN DISPUTE RESOLUTION.

A. ARBITRATION WHERE BARGAINING REPRESENTATIVES CANNOT RESOLVE A DISPUTE.

CURRENT PROVISION IN THE BILL: In some cases where there is bargaining underway for an enterprise agreement and a dispute has arisen about finalising the agreement and it cannot be resolved, Clause 240 provides that the FWA may arbitrate to break the logjam. This situation will arise if the bargaining representatives for the agreement are unable to resolve the dispute. In other words, it is a case of arbitration to resolve a dispute. But it is arbitration only by FWA, the statutory authority.

This situation will not arise in all cases of disagreement. All of the bargaining representatives have to agree to approach FWA before FWA can use its arbitration powers, unless the proposed agreement is a single enterprise one or one where "a low-paid authorisation is in operation." [14]In those cases, one bargaining representative alone may approach FWA to ***"deal"*** with the dispute. The Explanatory Memorandum sets this out at paragraphs 990-991 and also notes that what the parties are approaching FWA for in these cases is "assistance".

The substance of Clause 240 is that if the bargaining representatives have agreed that FWA "may arbitrate (however described)", then it may do so.

However, there is no provision in the Bill to allow anyone else, such as a private mediator or arbitrator, to arbitrate on such disagreements or render "assistance" to the parties to help them reach finality over their proposed enterprise agreement. This is in contrast to the two situations we have already looked at where private mediation and arbitration are allowed under modern awards and also under enterprise agreements.

COMMENT: There may be cases where the parties want arbitration, but want to keep control over the dispute, have some say about who the arbitrators will be and retain some confidentiality. Hearings by FWA "must" be held in public, except where they are ordered to be private and the parties may want more of a guarantee of confidentiality that this. The parties may therefore find private mediation and arbitration more attractive than arbitration by FWA.

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r.1. [14] The precipitating event is described in the Explanatory Memorandum at page xl as follows : "If the bargaining representatives for an agreement in the low paid bargaining stream are unable to reach agreement on the terms that should be included in the agreement, employee representatives and one or more of the employers could seek a workplace determination by consent. There will also be capacity for FWA to make a workplace determination on the application of only one party. Under this category, FWA would apply a set of threshold criteria to decide whether the arbitration should proceed including that the parties had genuinely tried to reach agreement, and that making the determination will promote productivity and efficiency in the enterprises concerned."

CONCLUSION: It is submitted that Clause 240 should be amended so that, if the parties are unable to resolve the dispute about what the proposed enterprise agreement will contain, they may apply to an independent mediator for assistance in resolving the dispute or to an independent arbitrator, as an alternative to applying to the FWA, to "deal" with the dispute. At the present, the parties may agree only that FWA may arbitrate the dispute.

FORM OF THE AMENDMENT: The amendment could be expressed so that either:

(a) if the parties have agreed that independent mediators may be enlisted to help resolve the dispute, then they may do so;

(b) if the parties have agreed that independent arbitrators may arbitrate the dispute, then they may do so; or

(c) if the parties have agreed that the FWA may deal with the dispute, or specifically that it may arbitrate the dispute, the FWA has power to appoint an independent arbitrator.

DISCUSSION

It might be said that the parties already have power to enlist outside help. That is doubtful, in the light of the way the Bill is expressed and in the light of the fact that in other cases the Bill expressly allows for an "independent third party", whereas in this case it does not.

Even if that is so, it would do no harm to have stated in the legislation that there is a body of independent mediators and that the involvement of one of them might assist and it might well advance the more general use of independent dispute resolvers.

The other issue, namely appointing a mediator or arbitrator who is truly independent to deal with a dispute of some significance is always present. But professional mediators are truly independent, there is now a stringent National Accreditation system for mediators and in any event if this is a concern to the parties there could always be power to appoint two mediators to represent employer and employee interests. The Victorian Government is presently working with the practice of using two mediators per dispute at its Dispute Resolution Centre and in its experiment in using two retired Magistrates in Magistrates' Court mediations. Two mediators are also used on occasions in international mediations and of course regularly in arbitrations.

It might also be said against this proposal that the independent mediation and arbitration already allowed under the Bill is entirely different from what is being proposed here. That is of course true in the form of the dispute or the type of dispute being resolved. The areas where it is already allowed under the Bill are 'only' disputes on the application of an award or enterprise agreement, whereas what is under consideration here is what should actually be in an enterprise agreement.

But on reflection it will be seen that they are both essentially disputes about the terms of employment. Those actually involved in these sorts of disputes do not see a very big difference between a dispute over what an enterprise agreement provides and what it should provide.

Moreover, this point really strengthens the case for allowing independent third parties, by agreement of the parties. The disputes in question are disputes about what sort of agreement is suitable for an enterprise or more than one enterprise. They are not disputes of national significance. They are the sort of disputes that experienced mediators and arbitrators regularly handle and it is hard to see why they should be excluded from this work or why parties should be prevented from using them when they want to or even when they agree.

B. ARBITRATION OF WORKPLACE DETERMINATIONS

Clause 260 *et seq.*

Workplace determinations are explained in the Explanatory Memorandum as being a type of FWA based addition to the process of enterprise agreements. As it is put at paragraph 1076 of the Explanatory Memorandum:

> **"The expectation is that in the overwhelming majority of cases bargaining will result in an enterprise agreement being submitted to FWA for approval. However, in special or unusual cases, there will be capacity for FWA to determine terms and conditions, but only after specific requirements are met. A workplace determination can only be made by a Full Bench of FWA."**

The justification for this additional layer to the free bargaining process is such that it includes a substantial public interest element.

It is therefore not submitted that there should be a right of private arbitration and mediation in these areas. That is because there is a public interest element in each of them that makes the determination more appropriate to be made by FWA. The following details are included only for the sake of completeness and to illustrate the public interest that is present, which, by inference is not the case in other situations where it is submitted that independent mediators and arbitrators should be permitted.

Workplace determinations are either low-paid, industrial action related or bargaining related determinations about terms and conditions of employment. They apply to who they are expressed to apply and are superseded by an enterprise agreement.

Low-paid determinations.

If agreement is not reached the bargaining representatives may apply to the FWA to make the Determination. A Full Bench of FWA must make the determination if certain public interest tests are met. There are provisions for what must be included.

Industrial action related workplace determinations.

If there is a proposed enterprise agreement and the 'time for negotiating' has ended, but no settlement of all matters has been reached, a Full Bench of the FWA must make a determination as quickly as possible. It must include certain terms.

Bargaining related workplace determination

If the negotiating time for an enterprise agreement has ended but not all issues have been settled, a Full Bench of the FWA must make a determination as quickly as possible. It must include certain terms.

Mandatory terms of workplace determinations

The determinations must include a term that provides a procedure for settling disputes about matters arising under the determination and in relation to the National Employment Standards. This would appear to allow the settlement of disputes arising under the

workplace determination using the services of private mediators and arbitrators.

But as for the making of the workplace determination itself, the Bill makes it clear that only FWA may perform the decision-making Process of making the determination itself. It should be seen, However, that the form of arbitration or "assistance" provided by FWA under Clause 240 is different from that provided for under Clause 260 *et seq*. The former seems to give rise to issues that lend themselves to private arbitration and the latter do not. That is the reason why this submission argues for private arbitration in the former case but not the latter.

C. DEALING WITH DISPUTES ARISING FROM DISMISSAL IN BREACH OF RIGHTS AND RESPONSIBILITIES OR DISCRIMINATION

Chapter 3, Part 3 disputes; Clauses 365 *et seq.*

In cases of dismissal because of discrimination and other breaches of rights and responsibilities, the employee or union may apply to the FWA to "deal with the dispute" (Clause 365). The FWA ***must*** conduct a conference ***in private*** to deal with the dispute, but it may also use its powers under Clauses 595(2) and deal with the dispute by mediation or conciliation, by making a recommendation or expressing an opinion.

Because of the provisions of Clause 595 it appears that the FWA may nor arbitrate on the dispute. But it does have the extensive dispute settlement powers referred to above. As FWA has only those limited functions, there seems to be no reason why they cannot be performed equally well by independent mediators and conciliators, a function that they already widely perform under all

sorts of industrial and employment arrangements.

Indeed, as the structure of the Clauses of the Bill on this issue seems to contemplate court proceedings as the final method of dealing with the dispute, it would surely be better to allow professional mediators to try to settle the dispute before the applicant embarks on court proceedings.

It is therefore submitted that the employee and the union should have the right to apply to a private mediator or conciliator to 'deal with' the dispute and that the mediator or conciliator should have similar powers as those conferred on the FWA by 595(2).

Disputes of this sort, although they are significant, have issues that fall within a comparatively small compass and lend themselves to the work and skills of the many mediators and conciliators who already do this and similar work in the industrial community.

D. UNFAIR DISMISSAL DISPUTES

Clause 379 *et seq*

Unfair dismissals are those that are harsh, unjust or unreasonable and not consistent with the Small Business Fair Dismissal Code.

Applications go to FWA which will decide if the dismissal is harsh, unjust or unreasonable after considering specified criteria and "any other matters that FWA considers relevant": Clause 387 (h).

If there are contested facts, the FWA must conduct a conference or hearing. A conference must be held in private. A hearing is apparently subject to the general rules on public/private hearings.

There is an appeal apparently from decisions made in both conferences and hearings, but only by leave. The applicant may be represented by a lawyer or paid agent with leave (Clause 596).

The process

The power to investigate an alleged wrongful dismissal is in the power of the FWA. The employee is deemed to have been unfairly dismissed if FWA so decides. The remedy is, therefore, also in the power of the FWA and it may order reinstatement or compensation, with preference being given to the former.

The end result of proceedings in the FWA is a 'decision' although the process is not described as an arbitration.

The case for outside mediation and conciliation

It is submitted that independent mediation and conciliation of unfair dismissal disputes should be allowed. Indeed, if the Government is looking for budgetary savings, there is at least scope here for savings as a flat rate fee to a private mediator would be attractive to the private mediating profession.

Private mediators and conciliators frequently deal with these and related disputes and it seems unwise not to use their skills and experience.

Indeed, one could say that such disputes are classic cases for independent mediators and conciliators.

Disputes of this sort, although they are significant, have issues that fall within a comparatively small compass and lend themselves to the work and skills of the many mediators and conciliators who already do this and similar work in the industrial community.

The time taken for resolution

The statistics show that 85% of termination of employment cases in the Australian Industrial Relations Commission are finalised within 102 days[15]. Professional mediators are used to working to such deadlines and to resolving such disputes within much shorter times, as they, or the institution appointing them, have control over their own rules and timetable. It may confidently be expected, therefore, that if private mediators are given access to this work, the time taken to resolve these disputes will be less than 102 days.

E. ARBITRATION AND MEDIATION OF DISPUTES ABOUT RIGHTS OF ENTRY

Clause 505

The FWA has exclusive rights to deal with disputes about whether a request under Clause 491, 492 or 499 is reasonable (they deal with disputes about whether requests to use particular rooms or to comply with occupational health and safety requirements are reasonable).

The FWA may deal with the dispute by arbitration, mediation or conciliation or by making a recommendation or expressing an opinion. Clause 595(2). An order made under this process must be complied with.

So this is a case where it is an express arbitration power that is given to the FWA as well as a mediation and conciliation power.

Again, these disputes seem to be candidates for allowing them to be dealt with by independent arbitrators and mediators.

[15]Explanatory Memorandum, Page lxx11

F. STAND DOWN

The FWA alone may deal with a dispute about stand down by arbitration but also by mediation, conciliation, recommendation or expressing an opinion - Clause 526 and the general powers conferred on the FWA 595(2).

The rights and wrongs of stand downs have such a degree of public interest with political and economic consequences, that it is not submitted that this provision should be changed to allow private mediation and arbitration.

G. GENERAL DEALING WITH DISPUTES
Clause 737 et seq

For the purpose of information, it might be noted here that these Clauses deal with the dispute resolution procedure in modern awards, enterprise agreements and contracts of employment where the FWA is required or allowed to deal with a dispute and they have already been looked at. Power is given to the FWA to arbitrate or use its other powers under Clause 595(2).

H. TERMINATION BECAUSE OF INTERNATIONAL OBLIGATIONS

Section 771 *et seq*

Application for redress may be made only to FWA to deal with

the dispute.

Clause 776. A conference must first be held in private and the

FWA may use its powers under Clause 595(2).

It is very apparent from the above Sections that the type of disputes

that will arise for resolution here are the type of matters dealt with every day by independent mediators and conciliators who go as far as making decisions that are in reality arbitrations. It is difficult to see why independent mediators and conciliators should not be given power to deal with these disputes by mediation and conciliation.

A POSSIBLE OBJECTION TO PRIVATE ARBITRATORS AND MEDIATORS

It will be said that parties will not use private mediation and arbitration services for which they will have to pay, when they may obtain the services of FWA free, except for application fees.

This may be true in some cases, but it is submitted that this possibility should not rule out using private mediation and arbitration services altogether. That is so because:

(a) the Government and Parliament should provide opportunities for individuals and it is up to individuals to decide if they will take up those opportunities;

(b) it may be that some parties are prepared to pay for private mediation and arbitration services for reasons of their own, such as confidentiality or to have some say on choosing their own mediator or arbitrator; and

(c) the Government's position already reflected in the Bill is that there should be scope for private mediation and arbitration services; all that this submission is advocating is that there should be further opportunities for private mediation and arbitration services which it has been argued can be justified on the facts in some situations.

CONCLUSION

It has been argued in this submission that in some specified cases where FWA presently has an exclusive jurisdiction,
but not in others, there should be scope for independent mediation and arbitration.

The opportunity to make this submission to the Committee is Appreciated.

The Hon N A Brown QC