CHAPTER 6

SCHEDULE 4 – CONCILIATION AND SCHEDULE 5 – MEDIATION

6.1 This chapter deals with amendments to the WR Act relating to the Commission's powers to conciliate industrial disputes, set out in Schedule 4 of the Bill, and to recognise mediation as an alternative mechanism for resolving industrial disputes, set out in Schedule 5 to the Bill.

Outline of proposed amendments

Conciliation

6.2 Under the WR Act, the Commission may only deal with an industrial dispute by arbitration, or settle an industrial dispute by making an award, if the industrial dispute relates to 'allowable award matters', which are set out in subsection 89A(2) of the Act.[1] There are other limited situations in which the Commission can exercise arbitral powers, for instance, in relation to 'exceptional matters' under section 120A.

6.3 The Commission's ability to conciliate industrial disputes is not currently limited in this way. However, Schedule 4 of the Bill amends the Act so that the Commission can only exercise its compulsory conciliation powers in the same circumstances that it can currently exercise its arbitral powers. These circumstances include, amongst other things:

- settlement of disputes about allowable award matters (item 7 of Schedule 4); and
- settlement of disputes about exceptional matters (item 8 of Schedule 4).[2]

6.4 Schedule 4 also introduces a new Part VA, conferring new powers on the Commission to voluntarily conciliate other types of industrial disputes, matters that are at issue between the parties relating to negotiation of a certified agreements, or issues arising under awards or agreements.

6.5 This new jurisdiction can only be exercised if all parties to the dispute agree to conciliation, and to operate on a user-pays basis, with the Bill proposing a fee of $500 for this service.

6.6 The Bill allows the Commission to decide whether a dispute referred to it can be dealt with by compulsory conciliation, and to separate parts of a dispute that can only be dealt with by voluntary conciliation.

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1 Subsection 89A(1) of the Workplace Relations Act

2 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2330

6.7 A Commissioner who has conciliated an industrial dispute is also prevented from later arbitrating on the dispute, unless the parties agree to the same Commissioner arbitrating.

Mediation

6.8 Item 6 of Schedule 5 introduces new provisions to allow federal industrial disputes to be mediated by independent accredited workplace relations mediators. The Act does not currently prevent parties to a dispute from using mediation to resolve the dispute. However, the new provisions give legislative recognition to mediation as an option, promoting it as an alternative method of resolving disputes.

6.9 The Bill allows for the appointment of a Mediation Adviser, with the functions of overseeing the approval of mediation agencies, promoting the use of mediation, approving mediation agencies to assess and accredit mediators, and determining competency standards for accredited workplace relations mediators.

Compulsory and voluntary conciliation

6.10 The Department submitted that the proposed amendments to limit compulsory conciliation and introduce a new voluntary conciliation function:

> …are consistent with the policy of encouraging employers and employees to take greater responsibility for their own workplace relations. They will also help ensure that voluntary mediation becomes an effective option as an alternative to the Commission's voluntary conciliation role…The proposed changes will not involve a reduction in the role of the Commission, as the Commission will retain its ability to conciliate in relation to all matters where it currently exercises conciliation powers. However, it is proposed to introduce a requirement for the parties to consent to the exercise of this jurisdiction in relation to non-allowable matters.[3]

6.11 The Australian Chamber of Commerce and Industry and the Business Council of Australia, supported the amendments:

> It is difficult to justify compulsory conciliation over a matter which is not allowable, and which either has been or will be removed from awards, and which cannot be arbitrated. Voluntary conciliation over non-allowable matters is a logical consequence of the original decision to restrict awards to allowable award matters, and it appears that this issue was simply overlooked in the initial development of the Bill.[4]
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> This part of the Bill is not about restricting the Commission's real teeth – because it is not about limiting its powers of arbitration. Currently, where the Commission does not have powers of arbitration the parties are

3 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2331

4 Submission No. 399, Australian Chamber of Commerce and Industry, vol. 15, p. 3341

> resolving industrial disputes (often with the assistance of the Commission when a dispute arises) without an imposed solution, although the means may be recommended. Therefore the amendments will ensure that this process occurs in an environment where the parties have a greater say in the process for achieving their resolution, rather than having no choice other than to accept the compulsory conciliation process of the Commission.[5]
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> The establishment of the distinction between 'voluntary' and 'compulsory' conciliation is simply recognition that the Commission now has limits on its arbitral powers and consequently also should have limits on its capacity to compel parties to participate in processes against their will over subject matters that the Commission has now power to arbitrate on.[6]

6.12 Mr Des Moore, the Director of the Institute for Private Enterprise, also supported reducing the extent of the Commission's powers to compulsorily conciliate industrial disputes:

> I ask that the Committee consider this Bill against the urgent need for Australia to reduce labour market regulation to a minimum and, in particular, to change the existing role of the AIRC to that of a voluntary adviser and mediator providing service to both employers and employees, with those on low incomes being eligible for subsidised or free access.[7]

6.13 There was, however, opposition to the proposed limits on compulsory conciliation from unions and employee associations,[8] academics,[9] lawyers,[10]

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5 Submission No. 375, Business Council of Australia, vol. 12, p. 2606

6 Submission No. 474, Chamber of Commerce and Industry, Western Australia, vol. 23, p. 6015

7 Evidence, Mr John Moore, Melbourne, 7 October 1999, p. 81

8 For example, see Submission No. 423, Australian Council of Trade Unions, vol. 19, pp. 4441-2; Submission No. 461, Australian Medical Association, vol. 22, p. 5628; Submission No. 414, Shop Distributive and Allied Employees Association, vol. 17, pp. 3796-9; Submission No. 416, Independent Education Union of Australia, vol. 18, p. 4299; Submission No. 295, Ansett Pilots Association, vol. 7, p. 1390; Submission No. 424, Australian Manufacturing Workers' Union, vol. 20, p. 4794-5; Submission No 430, Newcastle Trades Hall Council, vol. 20, p. 5011; Submission No. 471, Australian Nursing Federation (WA Branch), vol. 23, pp. 5786-7; Submission No. 479, Construction, Forestry, Mining and Energy Union (United Mineworkers' Federation Division), vol. 23, pp. 6115-7

9 For example, see Submission No. 90, Professor Ronald Clive McCallum, vol. 2, p. 272; Submission 377, Professor Joe Isaac AO, vol. 12, pp. 2689-90

10 For example, see Submission No. 456, Mr Jim Nolan, Barrister, vol. 22, pp. 5377-9; Submission No. 460, International Centre for Trade Union Rights, vol. 22, pp. 5505-9

community groups[11] and some employers, who thought the current system of compulsory conciliation was operating effectively and did not need to be changed.[12]

6.14 Other witnesses submitted that the system of compulsory conciliation was an established and proven method of settling industrial disputes, and that there should be clear evidence put forward to justify any proposals to restrict the Commission's powers to intervene:

> I regard public and prompt conciliation to be a right of Australian citizens at work, as it bolsters the fairness compact. Without compelling evidence showing the failure of Commission conciliation, it is my view that it should not be watered down by a fee for service which is utilised only to push voluntary conciliation into the private domain and out of the public realm.[13]

6.15 Professor Isaac, a former Commissioner, claimed that most conciliation undertaken by the Commission has not been on a compulsory basis, and submitted:

> The Commission has generally exercised this power with discretion and sensibility on the timing of its intervention and the handling of the conciliation process.[14]

6.16 Other submissions and witnesses provided examples of situations where the Commission had exercised its conciliation functions over disputes about non-allowable matters with beneficial outcomes, disputes that would not, in their opinion, have been resolved without conciliation.[15]

6.17 Parties who objected to the amendments in Schedule 4 were primarily concerned about the inability of the Commission to intervene to resolve a dispute where one party to the dispute has significantly less bargaining power than the other. It was submitted that in these cases, the party with greater bargaining power would simply refuse to agree to conciliation:

> The maintenance of a strong and independent industrial tribunal is seen as essential to ensure that the principles of fairness, equity and justice are maintained for employers and employees alike, and to ensure the protection of vulnerable parties. The ACCER suggests that the Bill would narrow the ability of the commission to carry out this role by allowing compulsory

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11 For example, see Submission No. 417, Federation of Ethnic Communities' Councils of Australia Incorporated, vol. 18, p. 4316; Submission No. 440, Uniting Church in Australia Board for Social Responsibility, vol. 21, pp. 5161-2; Submission No. 429, Women's Electoral Lobby, National Pay Equity Coalition and Business and Professional Women Australia (NSW Division), vol. 20, pp. 4895-6; Submission 441, Women for Workplace Justice Coalition, vol. 21, pp. 5188-9

12 Submission No. 392, Australian Industry Group and the Engineering Employers' Association, South Australia, vol. 14, p. 3073

13 Submission No. 90, Professor Ronal Clive McCallum, vol. 2, p. 272

14 Submission No. 377, Professor Joe Isaac AO, vol. 12, p. 2689

15 Evidence, Mr Dave Oliver, Sydney, 26 October 1999, p. 395

> conciliation on arbitral matters only (and) introducing voluntary conciliation for other matters on a fee-for-service basis…[16]

6.18 The Committee was provided with one example of a group of employers who oppose the proposed amendments because of the industrial strength of their employees:

> The position of contractors on building sites makes them commercially vulnerable to industrial action. Almost universally notification of industrial disputes to the Commission is made by an employer or employer organisations in an attempt to enlist the aid of an independent third party to bring pressure to bear on the CFMEU to cease industrial action, constructively negotiate etc. There are a range of issues which are likely to fall outside of matters where the Commission can compulsorily conciliate. …Voluntary conciliation requires the agreement of both parties. It would be our expectation that the CFMEU would not generally agree to voluntary conciliation as it has the knowledge that it is able to exert considerable commercial pressure on subcontractors through the pursuit of industrial action…[17]

6.19 It was stated to the Committee that there were many employers and employees who would behave responsibly under the proposed system of voluntary conciliation, but some witnesses were concerned that it is not these employers and employees who generally become involved in protracted industrial disputes.

6.20 Reference was made during the public hearings to the successful use of voluntary conciliation and mediation in the United Kingdom to resolve disputes.[18] The Advisory Conciliation and Mediation Service (ACAS) was established in the late 1970s in Britain, and provides voluntary conciliation, arbitration and mediation services to employers and employees: ACAS conciliators have no power to impose, or even recommend, settlements. ACAS has also evolved to provide assistance to employers and employees to construct workplace cultures which prevent disputes from occurring in the first place and following a 'rational approach', perceived to be based upon 'jointness'.[19]

Conclusion

6.21 These amendments have attracted some criticism that they are intended to reduce the powers and functions of the Commission. The Committee does not agree with this assertion, and considers that the Commission remains an integral part of Australian industrial institutional arrangements. The Committee emphasises that its

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16 Evidence, Mr John Ryan, Melbourne, 8 October 1999, p. 138

17 Submission No. 267, Master Builders Australia Incorporated, vol. 6, p. 1238

18 See, for example, evidence, Mr Walter Stewien, Melbourne, 8 October 1999, p. 163

19 *Joint problem solving: does it work? An evaluation of ACAS in-depth advisory mediation*, Kessler, I. and Purcell, J. ACAS Occasional Paper No. 55 http://www.acas.org.uk/pubs/occp55.htm (7 November 1999)

support for these amendments is not in any way to be taken as a reflection on the professionalism of the Commission and its Commissioners.

6.22 The Committee considers that most of the evidence opposing these amendments demonstrates why the amendments are necessary: many participants in Australia's industrial system continue to take the view that they are locked into an adversarial process where the focus is not on reaching mutually acceptable outcomes, but arguing before the Commission why one party is right and the other wrong. For this reason, the Committee considers that it is necessary to limit access to the 'safety blanket' of compulsory conciliation.

Recommendation

6.23 That the amendments proposed in Schedule 4 to limit compulsory conciliation to matters where the Commission could later arbitrate, and to allow the Commission to conciliate on a voluntary basis in other circumstances, and associated amendments, be enacted.

Fees for voluntary conciliation

6.24 The Bill requires that the Commission charge $500 for parties to use its new voluntary conciliation services. The Department submitted that it would be necessary to charge a fee for the Commission's voluntary conciliation services to:

> …encourage employers and employees to resolve minor disputes directly in the workplace…encourage employers and employees to consider more fully whether conciliation provided by the Commission, or private mediation is best suited to their needs and the particular circumstances of the dispute [and] remove the current disincentive to using alternative dispute resolution services which may be more appropriate, but for which fees are payable..[20]

6.25 Some witnesses were opposed to the introduction of fees on the basis that this would disadvantage those on low incomes. However, it should be noted that item 54 of Schedule 4 introduces a provision to allow the Commission to waive all or part of this fee where the Commission is satisfied that charging the fee would cause a person hardship.[21] Other witnesses opposed the amendments, as they would tend to discourage the use of relatively flexible and non-legalistic conciliation procedures to resolve disputes.[22]

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20 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2333

21 Submission No. 329, Department of Employment, Workplace Relations and Small Business, vol. 11, p. 2331

22 Submission No. 412, Slater and Gordon Solicitors, vol. 16, pp. 10-11

Conclusion

6.26 A majority of the Committee believes that there is merit in the proposal to create a 'level playing field' to allow private sector firms to compete in the dispute resolution market.

Recommendation

6.27 That the amendments in Schedule 4 regarding the new voluntary conciliation powers of the Commission be enacted.

Mediation

6.28 There is a difference between 'conciliation' and 'mediation'. The Committee received evidence about the technical difference:

> In the terms of the AIRC, you will have a commissioner who is conciliating who will frequently express the point of view during the process. A mediator will attempt to get the parties to look at all the opportunities and do some lateral thinking. They will talk to the parties one on one privately and get to know what they are thinking. A conciliator does the same thing, but a conciliator will express views during the process, and will say, 'This is a point of view in the legislation. Have you looked at that?' It is really a situation of mediation with a little more involvement. But having said that, the Americans tend to use the words 'conciliation' and 'mediation' as meaning exactly the same thing.[23]

6.29 It was generally accepted that the introduction of legislative provisions to recognise private mediation as an alternative to Commission conciliation procedures would be a positive step. There was some opposition to the amendments contained in Schedule 5, but this opposition was generally associated with the perception that the mediation provisions were part of a 'package' of amendments to reduce the Commission's powers and standing, rather than opposition to the principle of mediation:

> We see mediation as being appropriate in matters to do with equal opportunity and harassment. The problem with mediation for us is that people have to agree, they have to abide by the outcome. We believe that the existing disputes resolutions procedures, when helped by the independent umpire, provide the most commonsense resolution. Some of the debate about mediation is really about the privatisation of the Industrial Relations Commission…We have no objection to mediation in some areas, but we think in workplace relations and industrial relations the existing system provides an adequate alternative…It depends on the dispute. With matters

23 Evidence, Mr Walter Stewien, Melbourne, 8 October 1999, p. 166

> which are easy to resolve, mediation is good, but with matters which are protracted, that is not so.[24]

6.30 Some witnesses indicated that they considered the amendments in Schedule 5 unnecessary, as parties could already access private mediation if they chose to do so:

> The empirical evidence is the almost total absence of mediation from our current system. Mediation is available now and has always been available. It is not used because it does not work and because it is unnecessary.[25]

6.31 Others supported the use of mediation as an alternative dispute resolution mechanism, but did not agree with the proposed model:

> …there is merit in introducing mediation as an alternative means of dispute resolution. The AI Group proposes, however, that the mediation process should be built into the existing system, be carried out by accredited members of the commission and be publicly funded. We strongly favour dispute resolution through conciliation or mediation rather than through litigation.[26]…if you want to introduce mediation—and there might be some advantages—then it ought to be on the same basis, without a fee. However, it should not prevent private providers, if they wish to enter the market, from being there, for which understandably they would charge a fee.[27]

6.32 Some witnesses supported the amendments on the basis that the provisions would promote mediation as an alternative dispute resolution mechanism:

> A process of rational analysis, discussion and negotiation can occur in a confidential form without legal jargon and where mutually agreed resolutions can be achieved. In my view, mediation provides such a process. The amendments in the Bill encourage the greater use of mediation whilst ensuring standards and accreditation to maintain the professionalism of the mediators. Legislation which encourages mediation will help to change the mind-set of some parties and voluntary mediation will become more common.[28]

6.33 The Committee was also given evidence that small businesses would be likely to support the increased use of mediation to resolve industrial disputes:

> The optimum is to resolve it in the workplace without a third party. Between that and going before the Industrial Relations Commission, I have no doubt that mediation in some form would be far more acceptable to small firms as it is in so many other areas—taxation law and trade practices law. There are

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24 Evidence, Mr Bill Shorten, Melbourne, 8 October 1999, pp. 151-2

25 Evidence, Mr Lloyd Freeburn, Melbourne, 7 October 1999, p. 74

26 Evidence, Mr Robert Herbert, Canberra, 1 October 1999, p. 44

27 *ibid*., p. 46

28 Evidence, Mr Walter Stewien, Melbourne, 8 October 1999, p. 162

> all sorts of mediation processes. Small business wants to get the job done and stay on the job. That has got to be the principal objective. But between that and the industrial relations process, without question I think mediation is a better option.[29]

Conclusion

6.34 A majority of the Committee agrees with measures to support and extend the use of mediation, a non-adversarial and non-legalistic means of resolving disputes similar to the conciliation function exercised by the Commission. It is noted that businesses may prefer to use the option of private mediation as an alternative to conciliation by the Commission, which is still perceived by some to be adversarial and formal in its processes.

Recommendation

6.35 That the new provisions to formally recognise mediation as a mechanism for resolving industrial disputes, and to establish a system of accredited workplace relations mediators be enacted.

29 Evidence, Mr Rob Bastian, Canberra, 28 October 1999, p. 523