

Dispute Resolution – the Early Experience under Work Choices

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1. Introduction

The Work Choices legislation has made major changes to the methods and institutional arrangements for resolving workplace disputes in Australia. Traditionally the domain of the Australian Industrial Relations Commission ('AIRC', or 'Commission'), dispute resolution may now also be carried out by a range of alternative providers, such as private mediators and arbitrators. This paper examines the new provisions for dispute resolution in the *Workplace Relations Act 1996* (Cth) ('WR Act')¹. It focuses in particular on their impact on the AIRC, considering how the institution has responded to the changed environment, and some early indications of how dispute resolution within the Commission has been transformed. The paper also explores the legal and policy arrangements supporting the various alternative dispute resolution ('ADR') options that are now available to parties to workplace disputes, and the limited evidence available about their operation to date.

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¹ As amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('Work Choices Act').

2. The new dispute resolution framework under Work Choices

The Work Choices Act effected a major shift from the traditional notion of *compulsory* conciliation and arbitration by the AIRC, to the concept of *voluntary* dispute resolution. This is consistent with a growing trend towards voluntary means of settling workplace disputes in countries like the UK, Ireland, Canada and New Zealand.² In these jurisdictions (and many others), traditional forms of ‘third party intervention’ have given way to processes such as conciliation and mediation, and industrial tribunals have taken on greater facilitative and advisory roles with the aim of ‘preempting future disputes by encouraging good procedures and employment practices’.³ The difference in Australia is that the AIRC’s dispute resolution role has been significantly reduced, but it has not been charged with any of the facilitative or advisory functions carried out, for example, by the Advisory, Conciliation and Arbitration Service (‘ACAS’) in the UK.⁴

The new dispute resolution system introduced by the Work Choices Act, found in Part 13 of the WR Act,⁵ places considerable emphasis on the resolution of disputes between employers and employees at the workplace level.⁶ If the parties are unable to settle disputes in this manner, they now have the ‘flexibility ... to determine the best forum in which to resolve them’.⁷ The parties can choose between the AIRC and private ADR providers, although they must reach agreement on who they want to carry out the settlement of their dispute.⁸ However, there are significant limits on both the *types* of disputes that the AIRC can deal with, and its dispute resolution *powers*.

² William Brown, ‘Third Party Intervention Reconsidered: An International Perspective’ (2004) 46 *Journal of Industrial Relations* 448, 451-452.

³ *Ibid*, 453.

⁴ *Ibid*, 454; ACAS plays a particularly active role in assisting parties to enter into ‘partnership’ agreements, see also <http://www.acas.org.uk/>; and see further eg Mark Stuart and Miguel Martinez Lucio (eds), *Partnership and Modernisation in Employment Relations*, Routledge, 2005.

⁵ For detailed discussion see Anthony Forsyth, ‘Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission’ (2006) 32 *Australian Bulletin of Labour* 27, 29-33; and Iain Ross (with John Trew and Tim Sharard), *Bargaining Under Work Choices*, Lexis Nexis Butterworths, 2006, Chapter 4.

⁶ See eg WR Act, ss 692(a) and 695.

⁷ WR Act, s 692(b).

⁸ WR Act, s 696(1)-(2).

2.1 The AIRC's dispute resolution role

The WR Act now specifies three kinds of disputes that may be referred to the AIRC.

*(a) Disputes under the Model dispute resolution process ('Model DRP')*⁹

The WR Act provides for various disputes to be resolved using the Model DRP,¹⁰ eg disputes about entitlements (except wages) under the Australian Fair Pay and Conditions Standard ('AFPCS'), meal breaks, public holidays and parental leave.¹¹ The Model DRP also applies as the 'default' dispute resolution clause in awards,¹² and workplace agreements (although parties to agreements can substitute their own dispute settlement procedure).¹³ In dealing with disputes under the Model DRP, the AIRC can hold conferences between the parties and make recommendations in an attempt to resolve the matter. It can even 'arbitrate', if all of the parties want it to. However, the Commission cannot compel the attendance of parties in proceedings before it, or make enforceable orders that are binding upon the parties.¹⁴

*(b) Disputes in bargaining for collective agreements*¹⁵

If both parties agree, they can refer a dispute arising in the course of bargaining for a proposed collective agreement to the AIRC.¹⁶ If this occurs, the Commission has the same dispute settlement powers (and limits upon those powers) as when it resolves disputes under the Model DRP – except that it cannot arbitrate, even if the parties want it to.¹⁷

⁹ WR Act, Part 13, Division 3.

¹⁰ WR Act, Part 13, Division 2, and ss 699-700.

¹¹ WR Act, s 694(2).

¹² WR Act, s 514.

¹³ WR Act, s 353.

¹⁴ WR Act, s 701.

¹⁵ WR Act, Part 13, Division 4.

¹⁶ WR Act, s 704(1).

¹⁷ WR Act, s 706.

(c) *Disputes under workplace agreements*¹⁸

Parties can also seek the AIRC's assistance in resolving disputes under the terms of a workplace agreement.¹⁹ However, this can only occur where the dispute resolution procedure in the agreement confers jurisdiction on the Commission,²⁰ and the parties have completed all other steps specified in the agreement prior to referral to the AIRC.²¹ This is the equivalent of the Commission's dispute resolution function under former s170LW of the WR Act, which became an increasingly significant area of the AIRC's jurisdiction in the few years prior to the Work Choices Act.²² However, the AIRC's powers in this area²³ are now constrained – it only has those powers conferred upon it by the parties in their agreement (or otherwise), and has no power to make enforceable orders.²⁴ Under the Work Choices Act's transitional provisions, the AIRC can continue to perform dispute settlement functions conferred on it by pre-reform certified agreements (that is, those certified before 27 March 2006), and can exercise the full powers that were available to it under former s 170LW.²⁵

(d) *Assessment of the statutory framework for AIRC involvement in dispute resolution*

In summary, the new dispute resolution framework retains several roles for the AIRC, but renders it (at least under the terms of the legal provisions) largely ineffective. For example, entry to the AIRC is subject to the agreement of both parties. Where they

¹⁸ WR Act, Part 13, Division 5.

¹⁹ For example, a union or employee collective agreement, or an Australian Workplace Agreement ('AWA').

²⁰ That is, the parties would have to have adopted their own dispute resolution procedure in the agreement, rather than the Model DRP; see n 13 above.

²¹ WR Act, s 709(1).

²² See further Anthony Forsyth, *The Revival of Arbitration? Recent Experience in the AIRC*, Paper for the 'Legal Edge' Seminar Series, Centre for Commercial Law, Australian National University, 5 August 2003; Andrew Stewart, 'The AIRC's Evolving Role in Policing Bargaining' (2004) 17 *Australian Journal of Labour Law* 245, at 262-270; and Carolyn Sutherland, 'By Invitation Only: The Role of the AIRC in Private Arbitration' (2005) 18 *Australian Journal of Labour Law* 53.

²³ Many of which 'grew' as a result of decisions made by it and, for example, the High Court of Australia, dealing with the operation of former s 170LW; see the pieces by Forsyth, Stewart and Sutherland, above n 22.

²⁴ WR Act, s 711.

²⁵ WR Act, Schedule 7, Part 2, Division 1.

cannot agree, provision is made (but only in respect of disputes under the Model DRP)²⁶ for the parties to seek assistance from the Industrial Registrar, who must provide them with information about dispute resolution options.²⁷ If the parties are still unable to agree within 14 days about who they want to settle their dispute, either of them can apply to have the AIRC perform that role.²⁸ However, this ‘circuit breaker’ has a major flaw – an unwilling party could simply refuse to attend AIRC proceedings, because the Commission can no longer compel parties to attend before it. The Explanatory Memorandum to the *Work Choices Bill* stated that the ability to appoint the AIRC was intended to ensure dispute settlement is not frustrated by parties not being able to agree who should carry it out; and that the AIRC should hear a matter if the refusal by one party to enter discussions to resolve a dispute, or determine who should resolve it, would deny the other party a reasonable opportunity to settle the dispute.²⁹ However, the statutory provisions seem ineffective to achieve this outcome, and indeed tend to point in the opposite direction.³⁰

As well as being unable to compel the attendance of parties when carrying out dispute resolution under Part 13 of the WR Act, nor can the AIRC exercise other powers that are conducive to effective dispute settlement, such as ordering the production of relevant documents or summoning witnesses³¹ (although it could do these things when resolving disputes under workplace agreements, if the parties have explicitly bestowed those types of powers on the Commission in their dispute resolution clause).³² Further, the outcomes

²⁶ This leaves bargaining disputes (Part 13, Division 4) without any mechanism for resolving a situation where the parties cannot agree on who they want to settle their dispute. The issue does not arise in respect of disputes under workplace agreements (Part 13, Division 5), as the parties will have specified the dispute settlement body in their agreement (unless they have adopted the Model DRP, in which case ss 696(3)-(5) and (7) will apply, see further below).

²⁷ WR Act, s 696(3)-(4); note also Chapter 2, Regulation 13.2 of the *Workplace Relations Regulations 2006* (Cth) (‘WR Regulations’), which specifies the information that must be provided by the Registrar, ie information regarding the dispute resolution services provided by the AIRC and private providers, the register of private ADR providers, and funding that might be available to subsidise the cost of private ADR.

²⁸ WR Act, s 696(5) and (7).

²⁹ Explanatory Memorandum, *Workplace Relations Amendment (Work Choices) Bill*, at 344, 347.

³⁰ See eg s 700(2)(b), which gives the AIRC discretion to refuse to hear disputes under the Model DRP, where the parties have not been able to agree who should settle their dispute.

³¹ See eg the AIRC’s general powers under s 111 of the WR Act, which are not available to it when performing functions under Part 13; see ss 701(8), 706(8) and s 711(4).

³² WR Act, s 711(1). See, however, Ross et al at 54, considering the possible limits that may now apply to the parties empowering the AIRC with powers, eg to summons witnesses or order production of

of the Commission's intervention are not enforceable in the way that they used to be.³³ Of course, the other major aspect of the new arrangements is the provision of an alternative avenue for dispute resolution through private ADR providers.

2.2 The role of ADR in dispute resolution

(a) *Background*

The Federal Government has for some time supported the idea of opening up workplace dispute resolution, by providing alternatives to the AIRC. Initially, the proposed shift was towards referral of certain types of disputes to private mediators, on the basis that this would result in disputes being settled quickly, informally and locally; without the need for legal representation; and enabling the parties to have greater responsibility for dispute resolution processes and outcomes.³⁴ Some years after legislative proposals to introduce such a scheme were defeated in the Senate,³⁵ the Government introduced the Small Business Mediation Pilot Program.³⁶ Commencing in May 2005, this was a free service offered to Victorian-based small businesses (those with less than twenty employees). Under the Program, unfair dismissals, bargaining and certain other disputes could be referred to a private mediator rather than the AIRC, if both parties agreed.

Anecdotally, it is understood that there was very little take-up of the private mediation option under the Small Business Mediation Pilot Program. However, precise information regarding the operation of this program has proven to be difficult to obtain. The Australian Industrial Registry's latest Annual Report states that:

documents, in respect of 'strangers to the agreement' (ie persons not employed or otherwise subject to the direction of a party to the agreement).

³³ See further section 3.1(c)(ii) of this paper (below).

³⁴ See The Hon Peter Reith MP, *Approaches to dispute resolution: a role for mediation?*, Ministerial Discussion Paper, August 1998.

³⁵ See Schedule 4, Part 1 and Schedule 5 of the *More Jobs, Better Pay Bill 1999*.

³⁶ See

<http://www.workplace.gov.au/workplace/Category/NewsInformation/LatestNews/Smallbusinessmediationpilot.htm>.

Following an interim evaluation of the pilot, a number of changes were made, with the pilot subsequently extended to all businesses in Victoria and in cases where one party expressed interest in the pilot, the Registry contacted the other party informing them of the expressed interest. An evaluation of the pilot was conducted by the Department of Employment and Workplace Relations (DEWR) in early 2006.³⁷

Information subsequently provided by DEWR indicates that the evaluation of the Program is under consideration and is not finalised at this stage.³⁸ It therefore remains unclear to what extent the Small Business Mediation Pilot Program was utilised, by what parties and for what kinds of disputes.

(b) *Private ADR under Work Choices*

The Government facilitated a more complete shift to an expanded notion of ADR through the Work Choices amendments.³⁹ The new statutory provisions relating to ADR are very limited,⁴⁰ simply setting out (in relation to disputes other than those referred to the AIRC)⁴¹ representation rights of the parties, privacy rules for such proceedings, and preventing the use of private ADR where a matter is the subject of an extant or settled equal opportunity claim.⁴² In effect, the scheme established by Part 13 of the WR Act provides that where both parties agree, any of the three types of disputes discussed above can be referred to a private ADR provider, instead of the AIRC. Further, in comparison to the Commission, ‘there is no limitation of the types of disputes which the parties may agree to have dealt with by a private [ADR] provider.’⁴³ Similarly, there are no specified constraints on the powers of private ADR providers.

³⁷ AIRC, *Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry: 1 July 2005 to 30 June 2006*, at 63.

³⁸ Email correspondence from Linda White, Acting Director, Bargaining and Industrial Framework Section, Strategic Policy Branch, WRPG, DEWR, to the author, dated 8 November 2006.

³⁹ ADR (at least for disputes under the Model DRP) extends beyond mediation to include conferencing, assisted negotiation, neutral evaluation, case appraisal, conciliation and arbitration: WR Act, s 698.

⁴⁰ WR Act, Part 13, Division 6.

⁴¹ WR Act, s 713.

⁴² WR Act, ss 714-716. Parties may be represented in disputes that are referred to private ADR or the AIRC, at the dispute settler’s discretion (see ss 701(6), 706(6) and 714(1)-(2)); if the dispute is one arising under a workplace agreement, representation must be allowed in accordance with the terms of the agreement (s 714(3)). On the privacy rules, see section 3.1(c)(i) of this paper (below).

⁴³ Ross et al, above n 5, 56.

In the absence of statutory direction regarding the use of private ADR to resolve workplace disputes, it seems that the regulation of such processes is a matter for agreement between the parties.⁴⁴ They could, for example, give a private ADR provider the same powers as the AIRC has, or they might agree to procedures and rules specified by that provider.⁴⁵ It is also likely that private ADR processes are subject to the commercial arbitration laws operating in each Australian State and Territory. This would mean (for example) that the outcomes of such processes are legally enforceable under the terms of the applicable commercial arbitration statute, and could be appealed against in the Supreme Court of the relevant jurisdiction.⁴⁶

(c) *Public support for private ADR: the Alternative Dispute Resolution Assistance Scheme*

In various ways, the Government has signalled its preference for parties to workplace disputes to choose the private ADR option.⁴⁷ This is most clearly manifested in the provision of financial subsidies for parties who wish to ‘go private’, under the Alternative Dispute Resolution Assistance Scheme (‘ADRAS’). Introduced in late April 2006 and overseen by DEWR, the key aspects of ADRAS are as follows:⁴⁸

- eligible parties can seek up to \$1,500 (including GST) for the provision of ADR services for each ‘eligible dispute’, plus \$500 for travel costs for ADR provided in regional areas

⁴⁴ Ibid, at 57; John Colvin, Graeme Watson and Nicholas Ogilvie, *An Introduction to the Industrial Relations Reforms*, Lexis Nexis Butterworths, 2006, at 146.

⁴⁵ Colvin et al, above n 44, at 146.

⁴⁶ See further Ross et al, above n 5, at 57-58.

⁴⁷ See eg The Hon Philip Ruddock MP, Address to the Institute of Arbitrators and Mediators Queensland, Brisbane, 22 November 2005.

⁴⁸ The following description is based on information obtained from: The Hon Kevin Andrews MP, ‘\$10.4m Alternative Dispute Resolution Assistance Scheme launched’, Media Release, 28 April 2006; and the Work Choices website, including the ADRAS Information Brochure, Application Form and Operational Arrangements, see:

<https://www.workchoices.gov.au/ourplan/schemes/AlternativeDisputeResolutionAssistanceSchemeADRAS.htm>

- ADR fees in excess of these amounts are to be met by the parties, who are encouraged to discuss arrangements for meeting these costs prior to the commencement of ADR⁴⁹
- eligible disputes include those relating to the following matters: entitlements (excluding wages) under the AFPCS; the application of an award, or a workplace agreement (where the agreement dispute resolution clause provides for private ADR); statutory entitlements to parental leave, meal breaks and public holidays; bargaining disputes, including those where a bargaining period has been suspended or terminated under the WR Act
- financial assistance is *not* available for disputes relating to: unfair dismissals; union right of entry; protected industrial action that has been terminated on public interest grounds; unprotected industrial action; matters where the AIRC has previously handed down a binding decision, or where previous assistance has been provided under ADRAS
- both parties to a dispute must agree to apply for ADRAS funding, and on the ADR provider they want to use
- only ADR providers who are members of professional organisations approved by the Government can be used by parties that obtain ADRAS funding⁵⁰
- ADR cannot commence until an application under ADRAS has been approved, and an ‘ADR Provider Agreement Form’ has been signed by both parties and returned to DEWR
- applicants may seek review of decisions on ADRAS applications made by DEWR, within 14 days; further review may be available through the Commonwealth Ombudsman
- \$10.4 million of funding has been provided to run ADRAS over four years.

⁴⁹ The ADRAS Application Form (above n 48) includes a declaration to the effect that parties ‘understand that [they] will be jointly liable for any amounts charged by the ADR provider in excess of [the] capped amounts’.

⁵⁰ According to DEWR, while the list of approved professional organisations is still being finalised, participating organisations at present are: Law Societies and Bar Associations of all States and Territories; Australian Commercial Disputes Centre; Institute of Arbitrators and Mediators Australia; LEADR; Relationships Australia; Conflict Resolution Service; Positive Solutions; and Western Australia Dispute Resolution Association (Email correspondence from Linda White, Acting Director, Bargaining and Industrial Framework Section, Strategic Policy Branch, WRPG, DEWR, to the author, dated 8 November 2006).

An assessment of the new arrangements for private ADR is provided in section 3.2 of this paper (below).

3. Dispute resolution in the first seven months of Work Choices

3.1 The AIRC

(a) How has the AIRC responded?

The Commission has responded in a very pro-active fashion to the new environment ushered in by Work Choices, by seeking to position itself as the provider of ‘first choice’ in the ‘market’ for dispute settlement services. In doing so, it has highlighted its century-long involvement in dispute resolution, and the wide experience of its members in utilising various ADR techniques.⁵¹ Justice Giudice, the President of the AIRC, indicated (just as Work Choices came into effect) that the Commission would seek to become more ‘user-friendly’ and ‘responsive’ to the needs of the parties.⁵² This has occurred through a series of measures, including:

- enabling parties to choose the Commission member that they want to resolve their dispute, subject to availability⁵³
- the AIRC has produced a series of ‘fact sheets’ to assist parties in accessing its dispute resolution services;⁵⁴ these include information about drafting dispute

⁵¹ See http://www.airc.gov.au/wc2k6/fact_sheets/assist.html; see also ‘Giudice confident of AIRC’s ‘strong brand’, *Workforce*, Issue 1533, 31 March 2006; and ‘Fair Pay Commission to put brake on wage growth for low paid: Giudice’, *Workplace Express*, 17 March 2006.

⁵² ‘AIRC responds to Work Choices environment’, *Workplace Express*, 29 March 2006. It should be pointed out that the Commission has long been accessible and responsive to the parties’ needs, eg by listing urgent matters promptly and holding proceedings outside normal business hours.

⁵³ Ibid; and ‘AIRC to offer ‘choice of member’’, *Workforce*, Issue 1531, 17 March 2006. Previously, disputes notified to the AIRC were mainly allocated to members through the ‘panel system’.

⁵⁴ See ‘Assisting with dispute resolution’, available at: http://www.airc.gov.au/wc2k6/fact_sheets/assist.html; and ‘How to make an application – dispute resolution’, at: http://www.airc.gov.au/wc2k6/fact_sheets/dispute_guide_app.htm

- settlement procedures in agreements, with sample clauses that build in reference of disputes to the Commission⁵⁵
- the Commission offers to assist parties in ‘designing and reaching agreement on a [dispute resolution] provision that meets [their] needs and the needs of the enterprise’,⁵⁶
 - more generally, the AIRC states that it: ‘... will endeavour to deal with disputes in the manner which best suits the needs of the parties. So far as practicable, it will meet with the parties at the time and place which are most convenient to them and deliver any decisions in a timely way.’⁵⁷

(b) *Evidence of the AIRC’s continuing role in dispute resolution*

The discussion that follows demonstrates that the Commission’s efforts to remain available to those who are familiar with it, and to increase its accessibility, have (thus far) produced the desired results.

(i) *Section 170LW arbitrations*

Justice Giudice reported in early September 2006 that applications under former s170LW of the WR Act for ‘private arbitration’ under dispute settlement clauses in pre-reform certified agreements were higher than for the equivalent period in the previous year.⁵⁸ This continues the steady increase in s 170LW notifications over the last eight years, as shown in the AIRC’s 2005-06 Annual Report.⁵⁹ It will remain an important area of the Commission’s jurisdiction for the next few years at least (that is, until the many three-

⁵⁵ See ‘Dispute resolution procedures in agreements’, available at: http://www.airc.gov.au/wc2k6/fact_sheets/dispute_guide.html; and ‘Dispute resolution procedures: Additional material’, at: http://www.airc.gov.au/wc2k6/fact_sheets/dispute_guide_add.html. Justice Giudice stated that this was a response to user requests for a ‘custom-built’ dispute resolution clause; see ‘AIRC responds to Work Choices environment’, above n 52.

⁵⁶ See http://www.airc.gov.au/wc2k6/fact_sheets/dispute_guide.html.

⁵⁷ Ibid.

⁵⁸ See ‘Big drop in industrial action after Work Choices, says AIRC’, *Workplace Express*, 4 September 2006.

⁵⁹ AIRC, above n 37, at 49. See also the Appendix to this paper, which provides a broad ‘snapshot’ of the changing nature of the AIRC’s jurisdiction since the introduction of formalised enterprise bargaining in the early 1990s.

year, pre-reform collective agreements certified before 27 March 2006 expire, and are replaced by agreements made under Work Choices). Recent decisions under former s170LW have included:⁶⁰

- *TWU v Brinks Australia Pty Ltd*:⁶¹ SDP Lacy issued interim orders restraining the company from implementing redundancies, pending the resolution of a dispute over redundancy packages under the certified agreement and s 170LW. SDP Lacy found that the Commission's powers to make such orders applied both under s111(1)(p)⁶² (although not s 111(1)(c))⁶³ of the post-reform WR Act, and s111(1)(t) of the pre-reform WR Act⁶⁴ (which continued to operate by virtue of the Work Choices Act transitional provisions). The decision confirms that when conducting proceedings under former s 170LW, the AIRC has available to it not only the procedural powers prescribed in the *post*-reform WR Act, but also the more expansive powers that it could exercise under the *pre*-reform WR Act.
- *CFMEU, CEPU and AMWU v Leighton Kumagai Joint Venture*:⁶⁵ Gregor C found the AIRC had jurisdiction to conduct a conference between the parties in a dispute over the company's closure of a worksite canteen. The dispute resolution provisions in the relevant pre-reform agreements, and former s 170LW, provided the basis for that jurisdiction. Curiously, the Commissioner stated in his decision that:

To decline to conduct conferences would on matters like this which are clearly mentioned in the several agreements be contrary [to the] intent and purpose of the Work Choices legislation which has as one of its drivers the aim of having parties resolve their own disputes at the lowest level possible.

⁶⁰ See also eg *AMIEU v The Australian Country Choice Pty Ltd*, Bacon C, PR972870, 2 June 2006.

⁶¹ PR973306, 12 July 2006.

⁶² The AIRC's power to make interim decisions.

⁶³ The AIRC's power to give directions regarding procedural matters in proceedings before it.

⁶⁴ The AIRC's former power to give all such directions and do anything necessary or expedient for the speedy and just hearing and determination of an industrial dispute.

⁶⁵ PR973663, 14 August 2006.

- *FSUA v National Australia Bank Limited*:⁶⁶ Smith C determined that the Commission had jurisdiction to deal with a dispute over NAB's withdrawal of subsidised travel arrangements provided to certain staff to return home after working late shifts. The Commissioner found that the dispute related to the certified agreement provisions regarding occupational health and safety, and work-life balance. The absence of a specific provision in the agreement relating to the travel arrangements in question was not a bar to the AIRC's jurisdiction.

(ii) *Other matters referred to the AIRC, including its approach to bargaining disputes*

The 2005-2006 Annual Report also provides very early figures on notifications to the AIRC to settle disputes under Part 13 of the WR Act.⁶⁷ In the period from 27 March to 30 June 2006:

- 61 Model DRP disputes were referred to the Commission (under s 699); and as at early September 2006, only one matter had been referred to the AIRC under the Model DRP where the parties had been unable to agree on a dispute settlement provider within the 14 day time limit;⁶⁸
- 5 bargaining disputes were notified (s 704);
- 27 disputes were lodged under new workplace agreements made under Work Choices (s 709).⁶⁹

More recent figures on the levels of notifications to the AIRC under Part 13 could not be obtained from DEWR. The WR Regulations require the Industrial Registrar to provide information about such notifications to the Minister for Employment and Workplace

⁶⁶ PR974260, 6 October 2006.

⁶⁷ AIRC, above n 37, at 50.

⁶⁸ 'Big drop in industrial action after Work Choices, says AIRC', above n 58.

⁶⁹ For a recent example of a s 709 dispute, see *CPSU v University of New South Wales* (Recommendation of Raffaelli C in DR2006/595), reported in 'AIRC recommends UNSW reveal voluntary redundancies', *Workforce Daily*, 6 November 2006; the employer in that case has foreshadowed a possible jurisdictional argument, as to whether the Commission can hear the matter under the applicable collective agreement.

Relations, on a quarterly basis.⁷⁰ However, DEWR does not currently make this information publicly available.⁷¹

The relatively small number of bargaining disputes notified to the AIRC under s 704 (five in three months, compared to 98 for the preceding nine months under s 170NA of the former WR Act)⁷² may be explained as follows:

- anecdotally, it appears that the AIRC is adjourning many applications for secret ballot orders⁷³ into conference, with the consent of the parties, in order to attempt resolution of the underlying dispute⁷⁴
- in some cases, this has occurred after the relevant Commission member has explicitly drawn attention to the option of dispute resolution in the AIRC⁷⁵
- applications for orders to stop or prevent industrial action⁷⁶ are also leading to conciliation hearings, despite the new 48 hour time limit for dealing with such applications⁷⁷ – for example, in the vehicle industry crisis in July 2006 precipitated by Huon Corporation (a parts manufacturer) entering into voluntary administration, the AIRC facilitated negotiations between unions, the administrators, and Huon's major customers including Ford, Holden and Toyota,

⁷⁰ WR Regulations, Schedule 4. Specifically, the information that must be provided is as follows: the number of matters notified under s 696(3) of the WR Act (ie where the parties cannot agree on who should conduct ADR); s 699 (disputes under the Model DRP, including what type of matter the dispute relates to, and whether the notification was made by consent or by one party only); s 700 (applications under the Model DRP refused by the AIRC); s 704 (applications in relation to bargaining disputes); s 709 (applications under workplace agreements), and s 710 (refusal of such applications).

⁷¹ Email correspondence from Linda White, Acting Director, Bargaining and Industrial Framework Section, Strategic Policy Branch, WRPG, DEWR, to the author, dated 8 November 2006.

⁷² AIRC, above n 37, at 49.

⁷³ Under s 451 of the WR Act; this is the first step in the process of employees/unions obtaining the necessary approval of employees, through a secret ballot process, prior to taking protected industrial action: see further the detailed provisions of Part 9 of the WR Act, especially Division 4.

⁷⁴ See eg 'CFMEU plans ballot for industrial action; AIRC conciliates ANF test case', *Workplace Express*, 4 May 2006; 'News in brief (Nursing home secret ballot case referred to conciliation)', *Workplace Express*, 3 July 2006.

⁷⁵ See eg 'Another strike ballot bid falls over as AIRC stresses ADR role', *Workplace Express*, 17 May 2006.

⁷⁶ Under s 496 of the WR Act.

⁷⁷ See WR Act, s 496(5) and (6)-(8), requiring an interim order to be made if the application cannot be determined within 48 hours, unless it would be 'contrary to the public interest' to make an interim order; it is unclear to what extent the conduct of conciliation proceedings aimed at resolving disputes might be providing a basis for the exercise of this 'public interest' exception.

which contributed to the parties reaching agreement on a ‘rescue deal’ that involved protection of workers’ redundancy entitlements.⁷⁸

(iii) ‘Good faith bargaining’

Another interesting development has been the series of AIRC decisions (including several Full Bench decisions) examining the question whether parties are ‘genuinely trying to reach agreement’ under the bargaining framework established by Work Choices.⁷⁹ This issue has the potential to arise at several points in the bargaining process, under provisions of the WR Act that:

- prohibit protected industrial action in support of ‘pattern bargaining’;⁸⁰
- require the AIRC to refuse an application for a secret ballot order, where the applicant (usually, a union) has not been or is not genuinely trying to reach an agreement with an employer;⁸¹ and
- empower the Commission to suspend or terminate a bargaining period on similar grounds.⁸²

Taken together, what can be identified in the AIRC’s recent decisions in this area⁸³ are the early stages of the development of a de facto ‘good faith bargaining code’ operating

⁷⁸ See ‘Huon Corp s 496 case adjourned; conference called for tomorrow’, *Workplace Express*, 19 July 2006; ‘Huon talks resume this afternoon, as Ford stands down workers’, *Workplace Express*, 21 July 2006; Mark Skulley and Matthew Duncley, ‘Huon at mercy of courts and clients’, *Australian Financial Review*, 24 July 2006; ‘Car firms balk at Huon rescue deal; more strikes, more stand-downs threatened’, *Workplace Express*, 25 July 2006; ‘Huon strike set to end after car companies agree to sign rescue package’, *Workplace Express*, 25 July 2006.

⁷⁹ See generally Parts 8 and 9 of the WR Act.

⁸⁰ WR Act, s 439; an exception to the pattern bargaining prohibition is provided under s 421(3), ie where a party is ‘genuinely trying to reach agreement’ for a single business (or part), which is to be determined by reference to the factors set out in s 421(4) (eg whether a party has agreed to meet at reasonable times proposed by the other party, has considered and responded to the other party’s negotiating proposals within a reasonable time, and has not capriciously added or withdrawn bargaining items).

⁸¹ WR Act, s 461(1).

⁸² WR Act, s 430(2).

⁸³ See eg *CEPU and AMWU v Cadbury Schweppes Australia Ltd*, Acton SDP, PR973290, 11 July 2006; *AMWU v Kempe Engineering Services Pty Ltd t/as Kempe Installation and Maintenance Services*, Acton SDP, PR973592, 8 August 2006; *AMWU, NUW and AWU v Visy Industrial Plastics Pty Ltd*, Marsh SDP, PR973594, 8 August 2006; *AMWU and CEPU v BP Refinery (Bulwer Island Pty Ltd)*, Bacon C, PR973642, 10 August 2006; *AMWU v EDI Rail Pty Ltd*, Cartwright SDP, PR973839, 31 August 2006;

under the WR Act⁸⁴ (this will be the subject of ongoing research and analysis by the present author).⁸⁵

(c) *Summary: the changed nature of dispute resolution in the AIRC*

As indicated earlier in this paper, it is clear that the dispute settlement functions of the AIRC have been radically transformed by the Work Choices amendments. The major change has been the shift towards the notion of dispute resolution as a *voluntary* process. Almost every aspect of that process requires agreement between the parties, so that if one party ‘holds out’, it can frustrate effective dispute resolution by the Commission. As Justice Giudice recently observed, in cases where one party wants to refer a dispute to the AIRC but the other does not: ‘the Commission “can’t actually do much” with such a dispute apart from calling the parties to a conference – “it still can’t compel an unwilling party to do anything really”’, although he added that ““for that reason the unwilling party doesn’t have a great deal to lose by turning up””.⁸⁶

Despite the stringent limitations on its role and powers, the examples discussed above⁸⁷ illustrate the continued desire of parties to utilise the AIRC’s dispute resolution services, and its effectiveness in performing this function.⁸⁸ Even so, it is clear that in several

Heinemann Electric Pty Ltd v CEPU, Full Bench, PR974265, 6 October 2006; *Tyco Australia Pty Ltd trading as Wormald v CEPU*, Full Bench, PR974317, 12 October 2006; *CFMEU v Ulan Coal Mines Pty Ltd*, Lawler VP, PR974347, 13 October 2006; *CEPU and AMWU v BP Refinery (Kwinana) Pty Ltd*, Thatcher C, PR974352, 16 October 2006; *AMWU and CEPU v VisyPak Operations Pty Ltd*, Eames C, PR974415, 23 October 2006.

⁸⁴ This is despite the absence of any specific powers under the WR Act for the AIRC to impose good faith bargaining obligations on the parties (those powers, introduced in 1993, were removed by the 1996 legislative changes). Efforts were made by some Commission members to ‘imply’ such obligations into the statutory framework operating post-1996; for further detail, see Forsyth, above n 5, at 34-35, and at 35-36 where the potential for the AIRC to develop good faith bargaining concepts under s 430(2) of the amended WR Act is explored.

⁸⁵ Space and time constraints have prevented any examination of the emerging case law in this paper.

⁸⁶ Quoted in ‘Big drop in industrial action after Work Choices, says AIRC’, above n 58.

⁸⁷ See section 3.1(b) of this paper.

⁸⁸ See further evidence to the same effect in the context of the AIRC’s role following the 1996 legislative changes, in Helen Forbes-Mewett, Gerard Griffin, Jamie Griffin and Don McKenzie, ‘The Role and Usage of Conciliation and Mediation in the Australian Industrial Relations Commission’ (2005) 31 *Australian Bulletin of Labour* 171, at 183, 186-188.

important respects, the way that the Commission carries out dispute settlement has changed considerably.

(i) *Privacy*

Dispute resolution by the AIRC must be conducted in private, and the Commission must not disclose any documents or information provided to it in the course of such proceedings. Further, evidence of anything said or done in Commission proceedings is inadmissible in court proceedings related to the dispute.⁸⁹ This is a marked departure from the past tradition of conducting open, publicly accessible hearings in the AIRC (except when it adjourned into conference).⁹⁰ Another significant implication of these privacy rules is that, generally, decisions in matters dealt with by the AIRC under Part 13 of the WR Act will not be made publicly available. This raises real concerns about the consistency of decision-making in the Commission. Riley and Sarina have also expressed trepidation about the notion of essentially ‘privatising’ disputes over employment standards and workplace rights, which have a strong public interest element.⁹¹

(ii) *Enforcement*

A further important issue arising from the new dispute resolution terrain is the question that now hangs over the enforceability of any outcomes forged by the AIRC. In each of the three areas in which it can carry out dispute settlement functions, the Commission is prohibited from making enforceable orders.⁹² Previously, awards, orders or agreements made by the Commission were enforceable by way of Federal Court proceedings for any

⁸⁹ See WR Act, ss 702, 707 and 712; the same privacy rules apply in respect of private ADR, see s 715. Colvin et al, above n 44, at 146-147 observe that the privacy constraints do not appear to prevent *parties* from disclosing information made available in dispute resolution proceedings, so parties should obtain confidentiality undertakings from other parties before providing confidential or commercially sensitive information in such proceedings.

⁹⁰ See ‘AIRC Cmr Greg Smith mixes it up’, *Workforce*, Issue 1533, 31 March 2006.

⁹¹ Particularly in the context of private ADR; see Joellen Riley and Troy Sarina, *The new conflict managers: A critical assessment of ADR methods under Work Choices*, Paper to the ‘New Actors and Institutions in Australian and New Zealand Industrial Relations’ Conference, School of Business, University of Sydney and Employment Studies Centre, University of Newcastle, 2-3 November 2006, at 6-7, 10.

⁹² See section 2.1 of this paper, and (specifically) WR Act, ss 701(4)(e), 706(4)(e) & 711(2).

breach.⁹³ The Commission's powers are now generally limited to making recommendations or determinations, where both parties agree, but to what extent are these 'binding' on the parties? It has been suggested by Ross et al that:

In the absence of provision under the WR Act, it appears that any binding force of a determination of the AIRC made in this context would have to derive from the agreement of the parties to the dispute under the general law and that the determination would have to be enforced under the general law, in the same manner as a determination of a private ADR provider ... The general law would operate subject to the statutory jurisdiction for the determination and enforcement of entitlements under the WR Act (eg, where the dispute was about entitlements under the AFPCS), although estoppel arguments may be open where the AIRC has properly determined an issue in conducting ADR.⁹⁴

On this view, the outcomes of AIRC dispute settlement proceedings (and private ADR) are enforceable *contractually*, based on the agreement between the parties to enter into such processes. Presumably, the parties could stipulate terms about the enforceability of the dispute settlement process, including the preferred jurisdiction for doing so, in a written agreement.

There may be an added dimension to enforceability in the context of dispute resolution by the AIRC under a workplace agreement.⁹⁵ According to Ross et al, there is AIRC Full Bench authority supporting the view (in respect of former s 170LW) 'that if the parties agree to submit their dispute to arbitration by the AIRC then the arbitrator's determination is enforceable through the enforcement of the agreement itself.'⁹⁶ On that basis, the outcome of arbitrations under workplace agreement dispute resolution clauses, pursuant to former s170LW and (possibly) new ss 709-712, may be enforceable through the statutory process for enforcement of agreements under the WR Act.⁹⁷ However, the

⁹³ Under former ss 178-179 of the WR Act.

⁹⁴ Ross et al, above n 5, at 50, see also 48-49.

⁹⁵ See section 2.1(c) of this paper.

⁹⁶ Ross et al, above n 5, at 53; however, as this view was expressed in respect of former s 170LW, it does not automatically follow that the same conclusion would apply to the new statutory provisions for dispute resolution by the AIRC under workplace agreements. In any case, despite the view posited by Ross et al, the position as to the enforceability of the outcome of arbitrations under former s 170LW was not settled; see the discussions of relevant case law in Stewart, above n 22, at 268-269, and Sutherland, above n 22, at 67-69.

⁹⁷ See now WR Act, ss 717-720.

position remains far from settled; as Justice Giudice has recently stated, if the parties give the Commission power to arbitrate a dispute, ‘one assumes that that arbitration has binding effect of some kind, but it is yet to be seen exactly how such an arbitration would be enforced’.⁹⁸

(iii) *Appeals*

A related issue to that of enforceability is whether an appeal may be brought against any determination made by the AIRC when it is conducting dispute resolution functions under Part 13 of the WR Act. The position seems to be that the parties could make provision (eg in an agreement dispute resolution clause) for appeals ‘on the merits’ against the Commission’s determination. Otherwise, such appeals would not be available, although appeals could be made on jurisdictional grounds.⁹⁹ For example, in respect of dispute resolution under a workplace agreement, an appeal could be brought arguing that the AIRC had wrongly interpreted the relevant agreement clause as providing it with jurisdiction to deal with the dispute.¹⁰⁰

(iv) *The relationship between dispute resolution and court proceedings*

Parties retain the right to bring court proceedings in relation to matters that are the subject of dispute resolution conducted by the AIRC (or indeed, private ADR).¹⁰¹ In this respect, it is important to note that many claims under the WR Act (eg for breaches of the AFPCS, or breaches of the provisions relating to meal breaks, public holidays and parental leave)¹⁰² may be brought in the Federal Magistrates Court,¹⁰³ a more accessible, lower cost jurisdiction than the Federal Court.¹⁰⁴ However, the courts may well refuse

⁹⁸ See ‘Big drop in industrial action after Work Choices, says AIRC’, above n 58.

⁹⁹ Under WR Act, s 120(1)(f).

¹⁰⁰ See further Ross et al, above n 5, at 53.

¹⁰¹ WR Act, s 693; however, disputes relating to equal opportunity claims that are the subject of extant or settled court or tribunal proceedings cannot be dealt with under the Model DRP, or private ADR (ss 700(1)(b), 716).

¹⁰² All of which are disputes that are to be resolved under the Model DRP, see n 11 above.

¹⁰³ WR Act, ss 717-720.

¹⁰⁴ See Colvin et al, above n 44, at 148; and Leigh Johns, ‘Change of referee in workplace disputes’, *Australian Financial Review* 21 March 2006.

relief to a party that has not first utilised the dispute settlement processes in the WR Act, or may order that this occurs instead of mediation conducted by the court itself.¹⁰⁵

3.2 Private ADR

(a) Is anyone using private ADR under Work Choices?

Very little can be said about the take-up or operation of the new arrangements for private ADR of workplace disputes under Work Choices, given the dearth of information in this area. There does not appear to be any provision for monitoring the numbers or types of cases referred to private ADR under Part 13 of the WR Act.¹⁰⁶ It seems that DEWR does intend to monitor the operation of ADRAS for statistical, research and evaluation purposes,¹⁰⁷ although such information (including information regarding the number of applications under ADRAS to date) is not currently publicly available.¹⁰⁸ In one recently reported case, parties involved in a long-running bargaining dispute in the ACT teaching service agreed to 'private arbitration' outside the AIRC.¹⁰⁹

(b) An assessment of the private ADR option

The arrangements for private ADR of workplace disputes instituted under Work Choices are something of a jigsaw, with a few important pieces missing. For example, there is no regulation of the fees that private ADR providers can charge. This raises significant questions about the accessibility of private ADR, or, if fees in excess of the ADRAS subsidy are met by the employer, its potential 'power' implications (eg the possibility of bias in the employer's favour).¹¹⁰ Another problem is that there is no formal accreditation

¹⁰⁵ Colvin et al, above n 44, at 141.

¹⁰⁶ Cf the provisions in the WR Regulations for monitoring of disputes notified to the AIRC, see n 70 above.

¹⁰⁷ See p 8 of the ADRAS Application Form, above n 48.

¹⁰⁸ Email correspondence from Linda White, Acting Director, Bargaining and Industrial Framework Section, Strategic Policy Branch, WRPG, DEWR, to the author, dated 8 November 2006.

¹⁰⁹ 'ACT teachers likely to call off further strikes, after Government agrees to private arbitration', *Workplace Express*, 31 October 2006.

¹¹⁰ See further Bernadine Van Gramberg, *Managing Workplace Conflict: Alternative Dispute Resolution in Australia*, The Federation Press, 2006, Chapter 6; and Riley and Sarina, above n 91.

process to ensure that private ADR providers have the requisite knowledge, skills and experience for dealing with the specialist area of workplace relations disputes.¹¹¹

Further, the processes established under ADRAS appear somewhat bureaucratic, and ill-suited to the fast-paced nature of most industrial and workplace disputes – by the time the parties complete their ADRAS application and have it processed by DEWR, and return the ADR Provider Agreement Form, they could have been to the AIRC and had their dispute resolved. Overall, the Government maintains that it wishes to provide parties with ‘genuine choice in dispute resolution’.¹¹² However, it must be questioned whether there is a ‘level playing field’ to ensure genuine choice, when parties are encouraged in various ways ‘to consider alternatives to the AIRC’.¹¹³

4. Conclusion

The early experience of dispute resolution under Work Choices suggests that the AIRC is continuing to play a central role, despite the Government’s obvious intent to limit the Commission’s influence through the narrow confines imposed by the provisions in Part 13 of the WR Act. It is not possible at this stage to form an accurate picture of the extent to which parties are opting for private ADR providers to resolve workplace disputes, although anecdotally this does not appear to be occurring to any appreciable extent. Further research and monitoring of the operation of the new dispute settlement framework is required, to determine whether it provides fair, timely processes for resolving workplace disputes that are also responsive to the needs of the parties involved. This research would be assisted by increased accessibility to Government information on this important aspect of the Work Choices reforms.

¹¹¹ See Van Gramberg, above n 110, at 44-47, 135-140, 183-184; Riley and Sarina, above n 91, at 15, 18-19.

¹¹² ADRAS information on Work Choices website, above n 48.

¹¹³ See n 47 above; and Commonwealth of Australia, *WorkChoices: A New Workplace Relations System*, 9 October 2005, at 39.

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