EMPLOYMENT DISPUTE RESOLUTION IN WESTERN AUSTRALIA, A NEW JURISDICTION

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ABSTRACT

The *Employment Dispute Resolution Act 2008* (WA) creates a new dispute resolution jurisdiction for the Western Australian Industrial Relations Commission. It expands the commission's ability to resolve disputes between parties in the Western Australian workplace, introducing mediation as a method of resolution. The legislation prescribes the use of mediation where the parties consent in relation to a specific dispute, and other forms of dispute resolution including mediation where they have made a referral agreement empowering the commission to resolve particular disputes, or where a federal agreement allows the commission to conduct a dispute resolution process. Notwithstanding these broad opportunities for employment dispute resolution in Western Australia, the *Fair Work Act 2009* (Cth) may limit the commission's ability to offer their services to all local workplace participants.

I. BACKGROUND

The Employment Dispute Resolution Bill 2007 (WA) was tabled in the Western Australian Parliament on 27 September 2007[1] with the stated intention of developing the role of the Western Australian Industrial Relations Commission in the context of modifications to the dispute resolution powers of its counterpart, the Australian Industrial Relations Commission.[2] It had as its main purpose the creation of a broad dispute resolution jurisdiction for the commission, but was also introduced to allow for free, fast and easily accessible dispute resolution where workplace disputes were recognised as frequently requiring speedy and less formal processes.[3] It survived a change in government and was enacted in part to indicate the new Liberal government's focus on maintaining a separate and modern state workplace relations system.[4] Proclaimed only a week before the Fair Work Bill 2008 (Cth) was introduced to federal Parliament,[5] the *Employment Dispute Resolution Act 2008* (WA) (*EDR Act*) follows the example of other expansionary state

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1 Bill No. 239, Introduction and First Reading, Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 September 2007, 5959-60 (Michelle Roberts, Minister for Employment Protection). The Industrial and Related Legislation Amendment Bill 2007, Bill No.238 was introduced on the same day but was prorogued on a change in government. It was aimed at increasing child labour protections, occupational health and safety and injured worker protections.

2 Explanatory Memorandum, Employment Dispute Resolution Bill 2007 (WA); Introduction and Second Reading, Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 November 2007, 6926-7 (Sue Ellery, Minister for Child Protection)..

3 Second Reading, Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 April 2008, 1778-80 (Giz Watson).

4 See e.g., Government Media Office ,Troy Buswell, 'WA unlikely to hand over its industrial relations powers to Canberra', (Ministerial Media Statement, 8 November 2008), <http://www.mediastatements.wa.gov.au> at 19 January 2009.

5 The Act received Royal Assent on 19 May 200,8. It was proclaimed on 18 November 2008 to commence operation on 1 December 2008: *Western Australian Government Gazette*, 28 November 2008, 5029. The Fair Work Bill 2008 (Cth) was first read on 25 November 2008.

legislation.[6] It is now within the terms of reference of an independent review of the state industrial relations system.[7]

II. EMPLOYMENT DISPUTES

The commission has power to mediate employment disputes,[8] and to use mediation and various other dispute resolution methods[9] to deal with employment disputes referred to it by agreement[10] or pursuant to a federal agreement.[11] Before the *Fair Work Act 2009* (Cth) (*FW Act*) was enacted, the commission was also able to conduct the model dispute resolution process which applied under the *Workplace Relations Act 1996* (Cth) (*WR Act*) where the parties consented.[12]

These powers are distinct and in addition to the commission's traditional industrial dispute settling powers.[13] They are in relation to employment disputes, a broader type of dispute. The subject of consent mediation, referral agreement dispute resolution, and federal agreement dispute resolution processes, must be an employment dispute. The *EDR Act* defines employment disputes widely, as those that arise 'out of or in the course of employment', and are recognised when a 'question, dispute or difficulty' arises.[14] A linchpin connection to an employment, as distinct from a purely commercial relationship, is all that is required. Even a potential employment dispute will hold the commission's attention in its mediation jurisdiction.[15]

III. MEDIATION BY CONSENT

When mediating, the commission has no apparent restriction on who can apply for their services. This is a notable extension on their ability to conciliate and arbitrate only collective disputes under the *IR Act*.[16] Not limited to parties[17] and representatives of parties to employment relationships, the commission can also mediate disputes arising between other combinations of parties and individuals who can claim a connection to the employment. Conceivably, issues between employees, between employees and unions, between employers, and even between employers and employer associations could be categorised as employment disputes. Once employment is identified, the commission is

6 Dispute resolution service offerings in other States include. *Industrial Relations Act 1996* (NSW) s 146A and s 146B, *Industrial Relations Act 1984* (Tas.) s 19A, *Industrial Relations Act 1999* (QLD) s 273A, *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA) sch 1.

7 See Department of Commerce, 'Review of the State Industrial Relations System' <http://www.commerce.wa.gov.au/labourrelations/Content/Your%20business%20your%20workplace/Labour%20Relations%20in%20WA/Review_of_the_Western_Australi.html> at 7 August 2009.

8 *Employment Dispute Resolution Act 2008* (WA) s 6.

9 *Employment Dispute Resolution Act 2008* (WA) s 12(5).

10 *Employment Dispute Resolution Act 2008* (WA) s 12(1).

11 A Commonwealth workplace agreement: *Employment Dispute Resolution Act 2008* (WA) s 27(1).

12 The model dispute resolution process of the *Workplace Relations Act 1996* (Cth) Pt 13 Div 2; *Employment Dispute Resolution Act 2008* (WA) s 27(2).

13 See *Industrial Relations Act 1979* (WA) (*IR Act)* s 23(1) refers to the commission's power to deal with industrial matters. Industrial disputes are not specifically defined, but would commonly be associated with disputes about industrial matters.

14 *Employment Dispute Resolution Act* 2008 (WA) s 3(1).

15 *Employment Dispute Resolution Act 2008* (WA) s 4.

16 *Industrial Relations Act 1979* (WA) s 23(1) refers to industrial matters, defined in s 7(1), as being any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein.

17 *Employment Dispute Resolution Act 2008* (WA) s 3(1) defines the terms employee and employer by reference to *Industrial Relations Act 1979* (WA) s 7 which interprets employees as inter alia any person employed by an employer to do work for hire or reward, and employers as inter alia persons, firms, companies and corporations.

able to mediate. The *EDR Act*'s list of parties able to request mediation confirms this.[18] In addition, groups of employees and employers can be represented by any person appointed to do so, as long as the appointment is in a manner and form approved by the Chief Commissioner.[19]

The commission may refuse to deal with a request for mediation where it considers the dispute should be resolved in another way or there are existing proceedings.[20] If there is another reason for not mediating, the commission is also free to deny its services.[21] This provision could position the commission's mediation jurisdiction as a first port of call for Western Australian disputants, with the commission able to direct parties to the most suitable venue for resolution of their dispute.[22] Where national system employers and employees approach the commission, it has the opportunity to turn them away if it considers its involvement might result in thwarting federal system norms.[23] There is no particular time period specified for processing of requests, however, the commission would endeavour to deal with disputes in an expeditious manner.[24] To aid disputants, the commission can also choose to conduct mediation processes at the workplace.[25]

Where disputing parties reach agreement as a result of mediation it can be registered as a mediation settlement agreement[26] which is enforceable as if it was a state registered industrial agreement.[27] The agreement that is registered operates subject to applicable state instruments.[28] Registration of the agreement is possibly most significant in terms of preventing a party claiming a dispute exists in relation to the subject/s of the dispute in the future.[29]

IV. REFERRAL AGREEMENTS

In addition to providing for voluntary employment mediation, the *EDR Act* also provides for the making of referral agreements. The agreements are in writing and about a particular dispute or class of dispute between two or more specified parties.[30] Referral agreements acknowledge the parties'[31] intention to have specific dispute resolution functions performed by the commission.[32] The agreement may be made in advance of a dispute

18 *Employment Dispute Resolution Act 2008* (WA) s 7(1).
19 *Employment Dispute Resolution Act 2008* (WA) s 8(1).
20 *Employment Dispute Resolution Act 2008* (WA) s 9; the commission may also suspend, discontinue or decide not to respond to a request.
21 *Employment Dispute Resolution Act 2008* (WA) s 9(c).
22 Eg, discrimination complaints could be directed to the Western Australian Equal Opportunity Tribunal, or where the employee is a national system employee, to Fair Work Australia.
23 Eg, where a national system employee is dismissed but is unable to progress a claim with Fair Work Australia because the time period for making a claim has passed and Fair Work Australia have not allowed an extension (see *Fair Work Act 2009* (Cth) s 366).
24 See Western Australian Industrial Relations Commission, *Mediation – General Information*, <http://www.edr.wairc.wa.gov.au/Pages/GeneralInfo/GeneralInfo.aspx> at 12 January 2009.
25 *Employment Dispute Resolution Act 2008* (WA) s 10(3); the commission is to give regard to any request of a party, and if it can practicably comply, consistent with resolving the dispute in an 'expeditious, convenient and informal way', it must 'endeavour to comply'. *Employment Dispute Resolution Act 2008* (WA) s 15(3) requires that in respect of its referral dispute resolution jurisdictions, the commission must also 'endeavour to comply'.
26 *Employment Dispute Resolution Act 2008* (WA) s 11(1).
27 *Employment Dispute Resolution Act 2008* (WA) s 11(2).
28 *Employment Dispute Resolution Act 2008* (WA) s 11(3).
29 *Employment Dispute Resolution Act 2008* (WA) s 11(4).
30 *Employment Dispute Resolution Act 2008* (WA) s 12(1).
31 Employer/s, employee/s, organisation of employers, organisation of employees: *Employment Dispute Resolution Act 2008* (WA) s 12(2).
32 *Employment Dispute Resolution Act 2008* (WA) s 12(5); see Western Australian Industrial Relations Commission, *Examples of Dispute Resolution Functions that the Commission may Perform under a Referral Agreement* <http://www.edr.wairc.wa.gov.au/Files/A pdf> at 24 December 2008.

arising. It can confer on the commission additional authority and discretion, including the power to arbitrate, to provide remedies or other relief, and to decide issues or questions arising in the dispute. [33] Exercise of the commission's authority may result in orders that modify state industrial instruments.

Any party or member of a party to the referral agreement can refer an employment dispute to the commission at any time.[34] A referral agreement may detail rights to representation[35] and an expiry date.[36] As with mediation requests, the commission can refuse to act, suspend or discontinue a referral.[37] Where there is uncertainty about whether national system employers and employees are able to refer a dispute, a decision not to act might be taken.

Although restricted by the terms of an agreement and any party requests for supplementary functions, the commission is also able to perform functions that are, in its view, 'consistent' with the agreement's terms.[38] Unless the agreement suggests otherwise,[39] the commission must act with due speed, and according to equity, good conscience and the substantial merits of the case, without concern about technicalities, legal form or rules of evidence.[40] Interestingly, the Chief Commissioner need not follow, but is required to have regard to, the terms of the agreement when assigning a commissioner to deal with a dispute under a referral agreement.[41] A limitation presents with co-mediation and other forms of dispute resolution carried out by more than one commissioner. Such a process is only permitted in accordance with the express terms of a referral agreement and where the Chief Commissioner considers it practicable and appropriate.[42]

Where an agreement is reached following dispute resolution under a referral agreement, the agreement may be registered by order of the commission with the parties' consent.[43] Once registered, an order will modify a state award, state registered agreement or other state commission order, but only in its application to the parties to the referral agreement.[44] Alternatively, the commission may file a memorandum where it forms a view that an order is not required.[45]

Decisions, directions and determinations made by the commission pursuant to a referral agreement will only be enforceable where they are expressly authorised by the terms of that agreement.[46] This is obviously critical for the validity of any arbitration. Decisions and directions of the commission made pursuant to a referral agreement may be enforced

33 Explanatory Memorandum, Employment Dispute Resolution Bill 2007 (WA) 4; *Employment Dispute Resolution Act 2008* (WA) ss 12(4), 12(5).
34 *Employment Dispute Resolution Act 2008* (WA) s 13(1).
35 *Employment Dispute Resolution Act 2008* (WA) ss 12(3), 17.
36 Otherwise, the default expiry date is three years after the agreement commences operating: *Employment Dispute Resolution Act 2008* (WA) s 12(6).
37 *Employment Dispute Resolution Act 2008* (WA) s 21.
38 *Employment Dispute Resolution Act 2008* (WA) s 15(1)(a).
39 *Employment Dispute Resolution Act 2008* (WA) s 15(3).
40 *Employment Dispute Resolution Act 2008* (WA) s 15(2) refers to *Industrial Relations Act 1979* (WA) ss 22B, 26(1)(a), 26(1)(b).
41 *Employment Dispute Resolution Act 2008* (WA) s 14(3).
42 *Employment Dispute Resolution Act 2008* (WA) s 14(2).
43 *Employment Dispute Resolution Act 2008* (WA) s 18(1).
44 *Employment Dispute Resolution Act 2008* (WA) s 18(2).
45 *Employment Dispute Resolution Act 2008* (WA) s 18(10(b).
46 *Employment Dispute Resolution Act 2008* (WA) s 19; an exception would be when the commission makes a determination on the scope of the referral or the meaning of a term in the referral: *Employment Dispute Resolution Act 2008* (WA) s 16.

by application to the Full Bench.[47] These decisions may only be appealed where this is expressly authorised by the referral agreement.[48]

V. FEDERAL DISPUTE RESOLUTION PROCESSES

The commission has obviously capacity to operate as a person other than Fair Work Australia, an alternative provider, within the federal system.[49] When a clause in a Commonwealth workplace agreement made pursuant to the *WR Act* allows for the commission to deal with disputes, a party to that agreement is able to access the commission's services.[50] Their service would be limited to the terms of the agreement clause.[51] The commission can only co-mediate where the agreement requires it, or allows for it and the parties consent.[52]

Whether the commission is also able to resolve a dispute at the request of national system parties to an enterprise agreement made pursuant to the *FW Act* is less clear.[53] While the *FW Act* does not appear to limit national system parties to including in an enterprise agreement any particular forum for dispute resolution, or indeed to include a dispute resolution term at all, there is considerable uncertainty that surrounds the application of the *EDR Act* in relation to national system employers and employees generally. Exclusionary intent of the *FW Act* suggests state legislation like the *EDR Act* should not apply to these workplace participants.[54]

VI. STATUTORY MEDIATION

As discussed, the commission's ability to offer mediation services is an expansion of their dispute resolution powers. Australian legislation has not commonly prescribed mediation for the settlement of industrial disputes. Conciliation and arbitration of collective disputes has instead been common,[55] with individual dismissal grievances also being dealt with in this way. In the past, state systems adopted conciliation and arbitration as primary methods of dispute resolution, in tandem with the federal system's reliance on conciliation and arbitration, a factor of the interstate industrial dispute constitutional methodology.[56] However, an increasing awareness of the benefits of mediation has come with recognition of its popularity in other countries[57] and with interest in development of state industrial

47 *Employment Dispute Resolution Act 2008* (WA) s 20; *Industrial Relations Act 1979* (WA) s 84A.

48 *Employment Dispute Resolution Act 2008* (WA) s 22; such an appeal would need to satisfy *Industrial Relations Act 1979* (WA) s 49.

49 *Fair Work Act 2009* (Cth) s 740.

50 *Employment Dispute Resolution Act 2008* (WA) s 27(1)(b)(i).

51 *Employment Dispute Resolution Act 2008* (WA) s 29.

52 *Employment Dispute Resolution Act 2008* (WA) s 28.

53 Perhaps the commission could mediate under *Employment Dispute Resolution Act 2008* (WA) s 6 or via a referral agreement, *Employment Dispute Resolution Act 2008* (WA) s 12(1). The ability of the commission to act as an alternative dispute resolution provider in relation to a procedure in a modern award, contract, agreement or Australian public service determination is similarly uncertain: see *Fair Work Act 2009* (Cth) s 738 which allows for dispute resolution by others in any of these contexts.

54 See discussion in this paper at VII The Federal Context, 19-23. Note, if the *Fair Work Act 2009* (Cth) does not exclude national system participants from relying on the *Employment Dispute Resolution Act 2008* (WA) s 740(4) clarifies that decisions made by other providers must be consistent with the *Fair Work Act 2009* (Cth) and applicable instruments. In contrast, mediated agreements would not be so limited.

55 James Joseph Macken and Gail Gregory, *Mediation of Industrial Disputes* (1995) 30.

56 *Commonwealth of Australia Constitution Act 1900 (Imp.)* s 51(xxxv); establishment of the federal commission was based upon this sub-section until 2006 when the WorkChoices reforms moved the bulk of workplace laws to s 51(xx) (corporations power) foundation.

57 See, eg, the commission referring to the Irish, United Kingdom and American systems in their online information about their mediation services Western Australian Industrial Relations Commission, *Background* <http://www.edr.wairc.wa.gov.au/Pages/Background/Background.aspx> at 24 December 2008.

relations systems.[58] Its successful use in Australia as an alternative method of dispute resolution in family and commercial contexts will also have been noticed. In 1999, mediation was proposed as a means of dealing with non-allowable matters in the federal system, to be delivered by accredited workplace relations mediators approved by an advisory body separate to the commission.[59] The proposal was presented in the context of an imposed limitation on the jurisdiction of the federal commission.[60] No longer constrained by a constitutional power that dictates methods of dispute resolution, the current federal system has introduced a much increased role for mediation.[61]

Interestingly, the Western Australian industrial relations system has previously used mediation as a method of dispute resolution.[62] Mediation was introduced in 1974 as an alternative to conciliation and arbitration of industrial disputes by the state commission.[63] On the application of parties to an industrial dispute[64] the commission could appoint a mediator for the duration of the dispute[65] or until the appointment was terminated on a party's advice they had no further need of the mediator.[66] The mediator was free to resign from the appointment.[67] Implicitly, the mediator was not a commissioner, and had no specific qualifications or prerequisite service, but was paid from the state's purse and could be listed on a register.[68]

The process of mediation was not described or defined specifically in the legislation, but the mediator was to preside over negotiations, ideally until the parties had reached agreement over all of the matters in dispute.[69] When an agreement, the result of the mediation, was referred by the mediator[70] to the commission, the commission could register the agreement as an award.[71] Another option was for the agreement to be registered by the parties as an industrial agreement.[72] Where no agreement resulted or some disputed matters were not resolved, the mediator could refer the matters to the commission for their hearing and determination.[73]

58 See, eg, Queensland Government, Department of Employment, Training and Industrial Relations, *Review of Industrial Relations Legislation in Queensland* (1998).

59 Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999, Schedule 5.

60 The introduction of mediation in the Western Australian state system could be viewed as having a similar impetus; constructing new state jurisdiction in the context of reduced coverage of local workers, a result of WorkChoices reforms.

61 A discussion of the increased use of mediation in the federal system would include Fair Work Australia's empowerment to use it as an alternative to conciliation when handling complaints about dismissal and other workplace rights including freedom of association and discrimination, and disputes about right of entry and stand down; see *Fair Work Act 2009* (Cth) s 595(2).

62 See *Industrial Arbitration Act 1912* (WA) (*IA Act*), Pt IVB, as amended by the *Industrial Arbitration Act Amendment Act No. 108 of 1973* (WA).

63 Marcelle Brown, *Western Australian Industrial Relations Law* (2nd ed, 1991)13-14.

64 Industrial disputes, for the purposes of mediation, included 'any difference or dispute' and regardless of whether the subject matter was governed by an award or industrial agreement: *Industrial Arbitration Act 1912* (WA) s 108K.

65 *Industrial Arbitration Act 1912* (WA) s 108F(2)(a).

66 *Industrial Arbitration Act 1912* (WA) s 108F(2)(b).

67 *Industrial Arbitration Act 1912* (WA) s 108F(2)(c).

68 *Industrial Arbitration Act 1912* (WA) s 108F(3), 108F(4).

69 *Industrial Arbitration Act 1912* (WA) s 108G(1).

70 With the written request of the parties: *Industrial Arbitration Act 1912* (WA) s 108G(1)(a).

71 *Industrial Arbitration Act 1912* (WA) s 108G(1)(b).

72 *Industrial Arbitration Act 1912* (WA) s 108G(3).

73 *Industrial Arbitration Act 1912* (WA) s 108H(1)(b); the commission would issue an order binding the parties to the dispute pursuant to *Industrial Arbitration Act 1912* (WA) s 108H(2)) and, if the parties requested, follow it with an award pursuant to *Industrial Arbitration Act 1912* (WA) s 108H(3).

The mediation option was only available until 1980, when new legislation omitted to include it.[74] The relatively short period of availability suggests the option was not popularly used, was no longer needed (if introduced because of a shortage of commissioners), or was not considered successful for some other reason. It could also have been that industrial parties were not yet ready for a new method of dispute resolution.[75] Whatever the reason, mediation has been absent from the Western Australian industrial relations system for nearly thirty years.

A. Defining Mediation

Mediation can be described as a process involving an independent person in negotiations over a dispute for the purpose of assisting the disputants in their effort to find a solution. This is a general definition that could also fit other forms of dispute resolution. The unique character of mediation is difficult to identify and to distinguish from other forms of dispute resolution. Lack of a specific definition has generally led to a range of dispute resolution methods being described as mediation.[76] The National Alternative Dispute Resolution Advisory Council defines mediation as 'a process in which parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.'[77] Even with the help of this more specific definition, a lay person might wonder whether mediation is the same as voluntary conciliation, or facilitated negotiation, or other forms of dispute resolution. A number of common characteristics, including a third party and the desire of agreement, complicate this. Differences between the forms of dispute resolution are arguably increasingly significant now, with statutorily provided mediation forming part of regulatory schemes. This is particularly so in the context of statutory mediation being introduced as an alternative and not as a replacement for conciliation.

Interestingly, the *EDR Act* does not attempt to limit the meaning of mediation for the Western Australian statutory context.[78] As a section 3 defined term, mediation is mediation under the first division of Part 2. The division describes procedural matters, like requests for mediation services, the constitution of the commission, its ability to act as mediator, representation of disputant groups, and the commission's ability to refuse to act or suspend or discontinue mediation.[79] Division 1 does deal with the commission's functions in relation to employment disputes.[80] In this context mediation is described in the negative, that is, what mediation does not include is outlined. The commission is not to, for example, compel parties to do anything.[81] It must not arbitrate, or make determinations or decisions.[82] Defining mediation by reference to an entire division of disparate provisions is obviously in contrast to a definition that describes distinctive processes or focuses on the nature of mediation, but may be preferred by some because of the consequential default to an all-inclusive meaning. Without positive prescription, and for the benefit of disputants, the commission has described likely mediation activities on its

74 *Industrial Arbitration Act 1912* (WA) was repealed by *Industrial Arbitration Act 1979* (WA) s 2, No. 114 of 1979.
75 Chief Commissioner Anthony Beech, 'Mediation – Transforming the Industrial Relations Landscape' (Paper presented at the 9th National Mediation Conference, 9 – 12 September 2008) 3 <http:/www.wairc.wa.gov.au/Pages/Publications/Discussion Papers.aspx> at 26 March 2009.
76 James Wall, 'Mediation. An Analysis, Review and Proposed Research' (1981) 25 *Journal of Conflict Resolution* 157, 160.
77 National Alternative Dispute Resolution Advisory Council, *Alternative Dispute Resolution Definitions Paper 1997* (1997) <http://www.nadrac.gov.au> at 19 January 2009.
78 *Employment Dispute Resolution Act 2008* (WA) s 3 and Pt 2 Div 1.
79 *Employment Dispute Resolution Act 2008* (WA) s 6–11.
80 *Employment Dispute Resolution Act 2008* (WA) s 10.
81 *Employment Dispute Resolution Act 2008* (WA) s 10(2)(a).
82 *Employment Dispute Resolution Act 2008* (WA) s 10(2)(b)-(d).

website.[83] Of note, Division 1 proceeds to include the availability of registration of settlement agreements[84] and, where parties request it, the making of recommendations in relation to particular aspects of an employment dispute on which parties are unable to reach agreement.[85] These may not be typical parts of private mediation, although making substantive recommendations has long been considered a part of conciliation.[86]

Which model of mediation the commission is required to use, settlement, facilitative, evaluative, transformative, narrative, shuttle, or multi-party, is not specified. The *EDR Act's* silence on the model or models to be used might allow for a variety to be selectively applied to particular types of dispute.[87] Mediation concerning collective bargaining and agreement terms could be dealt with differently to disputes relating to interpersonal workplace conflicts and individual grievances.[88] The risk is that less ideal models could be resorted to. For example, settlement based incremental models are criticised as less likely to result in attitudinal shifting or transformation of the parties' feelings toward each other.[89]

B. Mediation, Not Conciliation

There is a suspected difficulty in distinguishing mediation and conciliation processes in their statutory practice, given the commission's traditional expertise in conciliation. Of course, conciliation remains identified as a statutory process associated with an authoritative third party (the commission) and with a prescribed progress to arbitration. The involuntary aspects of conciliation distinguish it from mediation and can provide a conceptual distinction from mediation.[90] However, both methods of dispute resolution have numerous common characteristics; both have an interactive style of disputant discussion and the ability of the parties to determine their own terms of agreement.

Mediation can alternatively be distinguished from conciliation in terms of a continuum based on the level and type of interference offered by the third party.[91] At one extreme, mediation would not involve the third party intruding on the substantive matters in dispute, but merely overseeing and recommending a suitable process of resolution. At the other end of the continuum, conciliation would involve active advice and recommendations for resolution of particular matters in dispute. The continuum would allow for the third party's variable approach on content of dispute involvement and process-only facilitation. At any

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83 See e.g. Western Australian Industrial Relations Commission, *Mediation by consent* <http://www.edr.wairc.wa.gov.au/Files/A%20pdf.pdf> at 19 January 2009.

84 *Employment Dispute Resolution Act 2008* (WA) s 11.

85 *Employment Dispute Resolution Act 2008* (WA) s 10(4).

86 *Industrial Relations Act 1979* (WA) s 32(2) authorises the commission to do 'all such things as appear to it to be right and proper to assist the parties to reach an agreement on terms for the resolution of the matter'.

87 Eg narrative and transformative models have been recommended for workplace disputes to minimise any gender vulnerability: Kathy Douglas, 'Workplace Conflict and Court-Connected ADR: an Argument for Researching Reflexive Practice', in Sara Charlesworth, Kathy Douglas, Maureen Fastenau and Sheree Cartwright (eds) *Women and Work 2005: Current RMIT University Research* (2005) 99.

88 In New Zealand there is an established distinction made between the different services required depending on the type of dispute, and an expectation of mainly personal grievance dispute mediation services required: Peter Franks, 'Employment Mediation in New Zealand', (2003) 6(1) *Alternative Dispute Resolution Bulletin* 4, 8.

89 Carolyn Manning, 'Transformative and Facilitative Mediation Case Studies: Workplace Conflict' (2007) 10(2) *Alternative Dispute Resolution Bulletin* 35.

90 *Employment Dispute Resolution Act 2008* (WA) s 6(2) requires that each party consents to the commission acting as mediator. Certainly, there is no automatic arbitration if no agreement is reached. Still, whether mediation is voluntarily entered into by an individual employee is questionable if a collective agreement refers disputes automatically to the commission and requires employees to use the collectively agreed process.

91 Geraldine Van Gramberg, *Managing Workplace Conflict, Alternative Dispute Resolution in Australia* (2006) 51; Jenny David, 'Alternative Dispute Resolution – What is it?', in Jane Mugford (ed) *Alternative Dispute Resolution*(1986) 27.

one point on the continuum, the process applied might be a blend of both conciliation and arbitration. This continuum might be most applicable for mediation in the Western Australian industrial relations context given it has been considered to involve more intervention than might be typical in a commercial or family mediation.[92] It is possible that confusion about the differences between the two processes could arise and result in a reduced access by disputants. This could lead to a missed opportunity for cultural movement toward less adversarial dispute resolution.[93]

C. Commission mediators

The *EDR Act* gives the Chief Commissioner the ability to have as many commissioners as is appropriate to perform the dispute resolution functions of the Act.[94] Presumably, this means co-mediation is generally permitted.[95] The other implication is that commissioners, and only commissioners, would perform dispute resolution services, with additional commissioners being appointed if required. There is no new class of commissioner enlisted for the provision of the services.[96] Any commissioner appointed to perform employment dispute resolution would already possess the expertise required.[97]

Drawing on the skills used in conciliation and arbitration, an industrial relations commissioner might present as a most suitable mediator. However, that suitability could be called into question where the commissioner is not recognised as clearly distinguishing between his or her disparate dispute resolution roles.[98] Difficulties resulting from a perceived power imbalance between the disputants and the commissioner, where the commissioner's statutory appointment credits a judge-like power, can threaten disputants' ability to participate in dispute resolution processes.[99] This power imbalance can be accentuated where factors like gender, race, disability and socio-economic status intersect.[100] Serious issues relating to impartiality can arise if a commissioner acting as mediator holds unconscious biases.[101] Accredited mediation training and use of an independent code of ethics might dispel some concerns.[102]

Consistent with many private avenues for dispute resolution, the *EDR Act* provides no formal complaint mechanism. That is, a disputant cannot complain about the services provided by the commission or seek an alternative commissioner by complaining about a particular one. Interestingly, the *EDR Act* has not explicitly barred a challenge to its

92 Ray Fells, 'Settlement Process or Tactical Opportunity? Mediation in Industrial Relations' (1999) 41 (4) *Journal of Industrial Relations* 594, 595.

93 Claire Bayliss, 'Statutory Mediators and Conciliators: Towards a Principled Approach' (2002) 20 *New Zealand Universities Law Review* 101.

94 *Employment Dispute Resolution Act 2008* (WA) s 5.

95 Where two or more commissioners conduct the mediation of a dispute: Archie Zariski, *'Co-Mediation'*, *Western Australian Dispute Resolution* <http://www3.telus.net/zariski/Co-mediation.htm> at 13 January 2009. Note, *Employment Dispute Resolution Act 2008* (WA) s 14(1) requires that dispute resolution under a referral agreement must be carried out by a single commissioner unless the referral agreement specifies otherwise, and *Employment Dispute Resolution Act 2008* (WA) s 28(1) which requires that a single commissioner deals with a dispute resolution process unless the federal agreement provides otherwise.

96 In contrast, the *Employment Relations Act 2000* (NZ) provides for employee mediators, employed by the Employment Relations Authority, Department of Labour.

97 *Industrial Relations Act 1979* (WA) s 19.

98 Claire Bayliss, 'Statutory mediators and conciliators: towards a principled approach' (2002) 20 *New Zealand Universities Law Review* 101, 113-14.

99 Claire Bayliss and Robyn Carroll, 'The Nature and Importance of Mechanisms for Addressing Power Differences in Statutory Mediation' (2002) 14 (2) *Bond Law Review* 285, 309.

100 Hilary Astor, and Christine Chinkin, *Dispute Resolution in Australia (2nd ed*, 2002) 166.

101 Douglas, above n 87, 113.

102 Julie Douglas, 'Absolute ethical principles in mediating employment disputes: is this a reasonable or desirable expectation?' (2007) 13(1) *International Employment Relations Review* 57.

services,[103] but does set out limited rights of appeal in circumstances where the commission has made a decision pursuant to a referral agreement and that agreement permits an appeal.[104]

D Confidentiality

The promise of confidentiality encourages the disputant to trust the mediator and actively participate and disclose relevant information.[105] Confidentiality is usually ensured by obligations of non-disclosure of any and all of the discussion and actions occurring and information revealed in proceedings. Disputants can agree to whatever degree of confidentiality suits them, bearing in mind any legal professional privilege that may apply. The *EDR Act* does not impose any general confidentiality obligations on the parties or the commission.[106] However, the legislation does ensure that the parties' conduct and any disclosures made during mediation or referral proceedings are not admissible as evidence in any future proceedings.[107]

The confidentiality of dispute resolution processes is also affected by the privacy provisions in the *EDR Act*. Insulation from public view would be essential for many mediation processes. However, the *EDR Act* does not seek to restrict the disclosure of the names of parties who access the dispute resolution services, or the types of services which they use.[108] There is an automatic privacy afforded to the parties in the closed-room nature of the proceedings and the commission determines who may be present.[109] However, it is the ability of the commission to prevent or restrict the publication or disclosure of evidence and matters contained in documents lodged with it that could significantly impact on the level of confidentiality enjoyed by disputants.[110] In deciding whether to make a confidentiality order, a commissioner would presumably take into account any sensitivity of the relevant material or a party's request for such an order. In the absence of such an order, the parties may be cautious about revealing information and making disclosures during the process of dispute resolution.

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103 See *Employment Relations Act 2000* (NZ) s 152, where mediation services cannot be challenged or called into question as inappropriate. Presumably, this bars complaints about conflict of interest, inconsistency and unfair treatment by mediators.

104 *Employment Dispute Resolution Act 2008* (WA) s 22.

105 Douglas, above n 102, 60.

106 In contrast, *Employment Relations Act 2000* (NZ) s 148(1) imposes on parties and mediators and others a general duty to keep confidential 'any statement, admission or document created for or made for the purposes of the mediation and any information that for the purposes of the mediation is disclosed orally in the course of mediation'. *Employment Relations Act 2000* (NZ) s 148(3) directs the duty at individuals. It exists in addition to a ban on admissibility of evidence in relation to the mediation. Some limitation on the duty has been recognised in its considered exclusion of the disclosure of reactions and behaviours of parties present during mediation: the disclosure of a party's tears during mediation was not considered a breach of confidentiality in *Plimmer v Hawkesbury Community Living Trust* New Zealand Employment Relations Authority, CA 31/07, 28 March 2007, Montgomery J; *Employment Cases Summary Online – October 2007*, at <http://www.ers.govt.nz/publications/ecs/november2007/ecs-nov-07_11.html> at 8 January 2009; see also Carol Powell, 'Confidentiality in Mediation' (2007) (May) *New Zealand Law Journal* 139.

107 *Employment Dispute Resolution Act 2008* (WA) s 24; The exception is a proceeding to enforce a mediation settlement or a decision of the commission: *Employment Dispute Resolution Act 2008* (WA) s 24(3).

108 There is no secrecy surrounding who uses the services of the commission, applications are a matter of public record: *Employment Dispute Resolution Regulations 2008* (WA) reg 8 provides for the registration of all requests for mediation, referrals of disputes, and applications for federal workplace agreement dispute resolution processes.

109 *Employment Dispute Resolution Act 2008* (WA) s 25(1).

110 *Employment Dispute Resolution Act 2008* (WA) s 25(2).

VII. THE FEDERAL CONTEXT

Broadening of the state commission's powers endorses the view that a variety of dispute resolution methods and open access to them might best serve Western Australian workplaces. In this context the *EDR Act* highlights the federal system's movement away from a dispute resolution focus, to a minimum standard and agreement based model.[111] At the time of the *EDR Act* enactment the Australian Industrial Relations Commission was empowered only to handle, using methods of dispute resolution including mediation, disputes arising in the course of bargaining in relation to a proposed collective agreement where the parties agreed,[112] disputes referred to it pursuant to a federal agreement,[113] and disputes which by default were referred to it through reliance on the model dispute resolution process applicable to a federal agreement.[114] The *FW Act* maintains a specific authorisation modality in relation to dealing with disputes.[115] There is no broadly defined type of dispute that gives a national system employee or employer access to the mediation or conciliation services of Fair Work Australia. Dispute resolution can only occur where Fair Work Australia considers it appropriate[116] and is empowered to deal with the particular dispute. For example, where dismissal has occurred in relation to a workplace right,[117] freedom of association, or workplace discrimination, a national system employee or the industrial association representing them can apply for mediation services.[118] Fair Work Australia can also provide mediation services when an International Labour Organisation Convention or Recommendation based termination has been alleged.[119] Besides dismissal situations, Fair Work Australia can mediate when a modern award or enterprise agreement allows or requires it to do so, or when a contract allows or requires it to do so in relation to a National Employment Standard or safety net entitlement.[120] Fair Work Australia can also use mediation to resolve a bargaining dispute in relation to a proposed agreement[121] or a right of entry dispute.[122]

By offering dispute resolution services to all Western Australian employers and employees, the commission is positioned as an alternative provider of dispute resolution, alternative to Fair Work Australia in the case of national system employers and employees. The opportunity for the commission to supply mediation services extends to modern award, agreement and contract term situations only,[123] and does not include dismissal,

111 Because federal legislation is now based on constitutional powers not aligned with dispute resolution (eg the corporations power, the external affairs power, the Commonwealth exclusive power), there may be a consequential lack of focus on dispute resolution.

112 *Workplace Relations Act 1996* (Cth) s 704.

113 *Workplace Relations Act 1996* (Cth) s 709(1).

114 *Workplace Relations Act 1996* (Cth) s 699(1).

115 *Fair Work Act 2009* (Cth) s 595(1) limits Fair Work Australia to dealing with disputes they are expressly authorised to deal with under or in accordance with the legislation.

116 *Fair Work Act 2009* (Cth) s 595(2)(a); Fair Work Australia can alternatively conciliate, make a recommendation or express an opinion pursuant to *Fair Work Act 2009* (Cth) ss 595(2)(a), 595(2)(b).

117 *Fair Work Act 2009* (Cth) s 341 defines these as including an entitlement to a benefit under a workplace law, instrument or order.

118 *Fair Work Act 2009* (Cth) s 365; *Fair Work Act 2009* (Cth) s 368 provides for conciliation, a recommendation or an expressed opinion as alternative services of Fair Work Australia.

119 *Fair Work Act 2009* (Cth) s 773; *Fair Work Act 2009* (Cth) s 776 provides for conciliation, a recommendation or an expressed opinion as alternative services. *Fair Work Act 2009* (Cth) s 772 identifies the certain grounds, including temporary absence due to illness, union membership, and discrimination.

120 *Fair Work Act 2009* (Cth) s 739.

121 *Fair Work Act 2009* (Cth) s 240; arbitration is allowed where the bargaining representatives agree.

122 *Fair Work Act 2009* (Cth) s 505; including disputes over whether a reasonable request has been made in relation to conducting interviews or complying with occupational health and safety requirements (*Fair Work Act 2009* (Cth) ss 491, 493, 499).

123 *Fair Work Act 2009* (Cth) s 740.

bargaining or right of entry disputes. This opportunity was also a feature of WorkChoices reform[124] and indicated statutory approval of voluntary dispute resolution.[125] The *FW Act* retains this feature, suggesting that dispute resolution by other competent bodies is suitable. Whether it also suggests the *EDR Act*'s provision of state-based dispute resolution services is acceptable is not so obvious.[126]

State system provision of dispute resolution to Western Australian employees and employers who are national system employees and employers presents as problematical. The *WR Act* was expressly stated to apply in respect of federal system employees and employers to the exclusion of state industrial and employment legislation.[127] That is, state legislation about industrial relations and employment was not intended to apply to employees and employers covered by the federal system, apart from specifically allowed legislation about workers compensation, child labour and industrial action affecting essential services.[128] It could be argued the *WR Act* meant to exclude the operation of state legislation only in respect of matters expressly dealt with by the federal legislation, and not generally.[129] However, a Full Court of the Federal Court interpreted the *WR Act* provisions by recognising a clear declaration of intent to exhaustively regulate employees and employers within its coverage.[130] This interpretation leads to the conclusion that state industrial law[131] had no ability to operate in respect of national system participants.[132] . More particularly, the interpretation would suggest the *EDR Act* had no valid operation in respect of national system participants.[133]

The *FW Act* similarly evinces an exclusionary intention,[134] ensuring that intent is plain by defining state industrial legislation broadly.[135] The definition includes 'general State industrial law' as well as any law applying to 'employment generally'[136] which has as one of its main purposes the regulation of workplace relations[137] or other areas relating to employment.[138] These provisions are enhanced by regulations that exclude the operation

124 See *Workplace Relations Act 1996* (Cth) s 713–716.
125 Anthony Forsyth, 'Dispute Resolution under WorkChoices: The First Year' (2007) 18(1) *Labour and Industry* 21.
126 See discussion of the *Fair Work Act 2009* (Cth) express exclusion of state laws on following pages.
127 *Workplace Relations Act 1996* (Cth) ss 16(1)(a), 16(1)(b).
128 *Workplace Relations Act 1996* (Cth) s 16 (3).
129 This argument might be used to say there is no direct inconsistency between the federal and state legislation, or no direct collision: see, eg, *Clyde Engineering v Cowburn* (1926) 37 CLR 466.
130 *Tristar Steering & Suspension Ltd v Industrial Relations Commission of New South Wales* (2007) 158 FCR 104, 114-115; this interpretation was made in the context of the NSW Industrial Relations Commission inquiring into a dispute involving an employer covered by the federal system.
131 *Workplace Relations Act 1996* (Cth) s 4(1) defines 'State or Territory industrial law' by naming the state industrial Acts; of relevance in relation to the decision in *Tristar* is that the *Industrial Relations Act 1996* (NSW) was specifically defined as a 'State or Territory industrial law' in *Workplace Relations Act 1996* (Cth) s 4(1) and therefore expressly excluded by *Workplace Relations Act 1996* (Cth) s 16(1).
132 See Andrew Stewart and Joellen Riley, 'Working Around WorkChoices: Collective Bargaining and the Common Law' (2007) 31(3) *Melbourne University Law Review* 903, 932-934.
133 *Workplace Relations Act 1996* (Cth) s 4(1) also includes in its definition of 'State or Territory industrial law' those state acts about 'employment generally' with a 'main purpose' in 'regulating workplace relations'. If the *EDR Act* is identifiable within these terms, it is also excluded.
134 *Fair Work Act 2009* (Cth) s 26 (1); s 30 also adds that the relevant sections are not a complete statement of the circumstances in which the legislation and its instruments are intended to apply to the exclusion of state laws.
135 *Fair Work Act 2009* (Cth) s 26 (3).
136 *Fair Work Act 2009* (Cth) s 26 (4); a law applies to employment generally if it applies to all employers and employees in the state.
137 *Fair Work Act 2009* (Cth) s 26(2)(b)(i); 'workplace relations' is not a defined term in the *Fair Work Act 2009* (Cth) and may be considered to refer to the relations between employers and employees in workplaces and even extend to the relationship between other workers and their principal.
138 *Fair Work Act 2009* (Cth) ss 26(2)(b)(ii)-(vi), 26 (c)-(h).

of additional state law.[139] It is likely the *EDR Act* would be identified as a state law about 'employment generally' having a main purpose in 'regulating workplace relations'. Such a classification would appear to exclude the *EDR Act* from operation in respect of those covered by the national system. This conclusion would be endorsed by an application of the interpretation given to the exclusion provisions in the *WR Act*. In the event the *EDR Act* cannot be otherwise categorised, it is evident the *FW Act* may effectively exclude the *EDR Act*'s operation in relation to Western Australians regulated by the national system.

CONCLUSION

The *EDR Act* modifies the Western Australian industrial relations system. It embraces non-traditional dispute resolution methods and enables the commission to provide services to state system employers and employees. In addition it offers an alternative to single system coverage for national system participants, supplementing and complementing *FW Act* mechanisms. The extent to which it can validly offer services to national system participants is as yet undetermined. A clear decision on this matter would allow for a more confident use of the commission's services. Meanwhile, the commission stands as a body equipped with valuable local industrial knowledge, ready to serve Western Australian workplace participants.

139 *Fair Work Act 2009* (Cth) s 28(1) refers to the *Fair Work Regulations 2009* (Cth), r 1.14 is relevant.