Alternative Dispute Resolution in the Employment and Industrial Field

By David Stewart

51.The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

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(xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

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Commonwealth of Australia Constitution Act

History

The history of industrial relations in NSW is often said to have begun in 1856, when the stonemasons struck for, and won, the right to an eight-hour day.[1] It has also been said that the establishment of special tribunals in Australia for industrial relations purposes had its origins in the major strikes of the 1890s.[2]

However, for a lawyer, the history of industrial relations started with:

1. Federation and the enactment of the Constitution with the power enshrined in ss 51(xxxv); and
2. the passing of the *Apprentices Act 1894* (NSW), *the Factories and Shops Act 1896* (NSW) and the *Conciliation and Arbitration Act 1899* (NSW) in New South Wales.

These important enactments at the turn of the century shaped the way industrial tribunals deal with disputes today. In that sense, there is nothing 'alternative' about conciliation and arbitration as methods of dispute resolution in the industrial field.

Federal legislation

At the Federal level, the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) commenced on 15 December 1904, and notably was not repealed until 1 March 1989. It was enacted pursuant to the power under ss 51(xxxv) of the Constitution.

The Objects of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) provided:

2. The chief objects of this Act are—
   - I. To prevent lock-outs and strikes in relation to industrial disputes;
   - II. To constitute a Commonwealth Court of Conciliation and Arbitration having jurisdiction for the prevention and settlement of industrial disputes;
   - III. To provide for the exercise of the jurisdiction of the Court by conciliation with a view to amicable agreement between the parties;
   - IV. In default of amicable agreement between the parties, to provide for the exercise of the jurisdiction of the Court by equitable award;
   - V. To enable States to refer industrial disputes to the Court, and to permit the working of the Court and of State Industrial Authorities in aid of each other;
   - VI. To facilitate and encourage the organisation of representative bodies of employers and of employees and the submission of industrial disputes to the Court by organisations, and to permit representative bodies of employers and of employees to be declared organisations for the purposes of this Act;
   - VII. To provide for the making and enforcement of industrial agreements between employers and employees in relation to industrial disputes.

To this end, the Act provided, inter alia, for:

1. A Commonwealth Court of Conciliation and Arbitration, which shall be a Court of Record, and shall consist of a President: s 11.
2. The President shall be appointed by the Governor-General from among the Justices of the High Court: ss 12(1).
3. The President shall be charged with the duty of endeavouring at all times by all

lawful ways and means to reconcile the parties to industrial disputes, and to prevent and settle industrial disputes, whether or not the Court has cognisance of them, in all cases in which it appears to him that his mediation is desirable in the public interest: s 16.

4. The Court shall, in such manner as it thinks fit, carefully and expeditiously hear, inquire into and investigate every industrial dispute of which it has cognisance and all matters affecting the merits of the dispute and the right settlement thereof: ss 23(1).

5. In the course of such hearing inquiry and investigation the Court shall make all such suggestions and do all such things as appear to it to be right and proper for reconciling the parties and for inducing the settlement of the dispute by amicable agreement: ss 23(2).

6. Pursuant to section 24, if no agreement between the parties is arrived at within a reasonable time, and the President so certifies, the Court shall, by an award, determine the dispute.

7. Pursuant to section 25, in the hearing and determination of every industrial dispute the Court shall act according to equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform its mind on any matter in such manner as it thinks just.

However, the Court made only six awards in its first five years and in 1910, Higgins J, the President of the Court at the time, observed that the approach to the Court was through a '*bog of technicalities*'.[3]

Conciliation

On the occasions when the High Court of Australia has considered the meaning of *conciliation* it has been held that it necessarily involves three parties being the disputants entitled to participate and be heard pursuant to the legislation and a neutral third party overseeing the negotiations to ensure that the public interest was served.[4]

Conciliation is invariably conducted by a member of the industrial tribunal; and, if the dispute does not resolve, it will then be arbitrated by the tribunal. Arbitration is a process well known to most lawyers.

As MacDermott and Riley explain, the conciliator (active and knowledgeable yet impartial) was appointed as a matter of compulsion and conciliation occurred in the very immediate shadow of compulsory arbitration.[5]

Boilermakers' case

No history of the Commonwealth Court of Conciliation and Arbitration is complete without reference to *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. In the *Boilermakers' case*, the High Court held that the 1904 legislation establishing the Court was unconstitutional because it permitted judicial and administrative power to be exercised by one body.

NSW legislation

The *Conciliation and Arbitration Act 1899 (NSW)* commenced on 1 May 1899. An Act of only ten sections, that any practitioner with a love of legislative brevity would welcome in 2020, it provided at section 2:

> Where a difference exists or is apprehended between an employer or any class of employers and his or their employees, or between different classes of employees, the Minister, may, if he think fit, exercise all or any of the following powers, namely:—
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> a. Direct inquiry into the causes and circumstances of the difference.
>
> b. Take such steps as to him may seem expedient for the purpose of enabling the parties to the difference to meet together, by themselves or their representatives, under the presidency of a chairman mutually agreed upon, or, in the event of their failing to agree, nominated by the Minister, with a view to the amicable settlement of the difference.

c. Failing such amicable settlement direct a public inquiry into the causes and circumstances of the difference on the application of either party. All such public inquiries shall be conducted by a Judge of the Supreme or District Courts, or the President of the Land Court.

d. On the application of either the employers, the employees, or both, and after taking into consideration the circumstances of the case, appoint a person or persons to act as conciliator or as a board of conciliation.

e. On the application of both parties to the difference appoint an arbitrator.

The Arbitration Court of NSW was then established in 1902 under the *Industrial Arbitration Act 1901* (NSW).

As with the Federal system, the NSW industrial framework sought to have the parties reach an 'amicable settlement' under the auspices of the NSW tribunal; under the 'shadow' of a public inquiry and compulsory arbitration.

At the risk of oversimplifying the current regime in Australia, the vast majority of industrial and employment disputes are now dealt with at the Federal level. These disputes are not only industrial in nature as between employers and unions, but also disputes between individual employees and their employer such as unfair dismissal, adverse action and bullying.

Regardless of the nature of the dispute in the industrial and employment area, the disputes are conciliated by a specialist tribunal; usually, the Fair Work Commission. In order to streamline the process in unfair dismissal cases, a conciliation is now often conducted by telephone.

The reliance by the Commonwealth parliament on the 'corporations' power in legislating with respect to industrial and employment matters in Australia, has not altered the position that disputes are in the first instance, to be conciliated.

Employment disputes litigated in the Federal and State Courts are now also invariably mediated prior to a hearing.

Underpinning principles and the future

Experience in this area shows that the participants in conciliation benefit from the process being conducted by a person with obvious expertise – a person who is often a member of the tribunal that will determine the matter, absent a resolution. While the tribunal member who acts as the conciliator may or may not then determine the arbitration, the conciliator speaks 'with authority' to the participants. In short, the participants get a real sense of how the matter may *play out*.

The conciliators in this area are very careful not to provide advice in the legal sense; or, advice as to the most likely outcome. In turn, a conciliator may give a participant (often unrepresented) guidance as to real potential outcomes, i.e. reality testing what is sought as a potential resolution. For example, an applicant will invariably know that the maximum amount for compensation for unfair dismissal is six months' pay. However, a conciliator may explain to the applicant that the average award of compensation made by the Commission is markedly less.

As a counterpoint it would not be sensibly suggested that a Registrar of the Supreme Court of NSW conducting a Court-annexed mediation, would be acting as a conciliator despite that mediation process having some of the same attributes, for example, a person speaking with authority.

A number of unique factors should also be borne in mind, that contribute to the success of conciliations in the employment and industrial field. These are:

1. The process is straightforward. Matters do not proceed by way of pleading. For example, an unfair dismissal claim in the Fair Work Commission is commenced by the completion of a Form F2, which includes a helpful guide; poses questions directed at identifying jurisdictional matters; and, a section where an applicant sets out why she or he believes the dismissal was unfair. The employer puts on a Form F3 response. A conciliation occurs before any evidence is served.

2. The process is fast. An unfair dismissal application must be filed within 21 days of the dismissal. A conciliation usually occurs between four and six weeks after the application is lodged. In the case of industrial disputes, a conciliation can occur within a few days, if not hours.

3. The process operates principally in a 'no costs' jurisdiction. Costs can be awarded in limited circumstances where the Fair Work Commission is satisfied the application or response was vexatious or without reasonable cause; there was no reasonable prospect of success; or costs were caused by an unreasonable act or omission in connection with the conduct or continuation of the matter: ss 400A and 611, *Fair Work Act 2009* (Cth). Accordingly, costs awards are rare in the jurisdiction.

4. As the process is straightforward and fast, the parties have not, by the time they have reached conciliation, spent sizable amounts on legal costs. Of course, many participants are not legally represented. Permission is required from the Fair Work Commission for a party to be legally represented. However, where they are legally represented the costs issue is not one that is an issue to be negotiated between the parties per se. In turn, if a party is legally represented, she, he or it will sensibly seek to minimise their costs by reaching a resolution at an early stage, where they have little prospect of recovering their costs regardless of any success. These factors often inform a party's attitude to resolution at a conciliation by each preferring to spend money on resolving the matter rather than expending costs that are unlikely to be recovered.

5. There is a significant role to be played by barristers because they are, in my view, well placed to understand and explain the reality of litigation and its likely outcomes.

Conclusion

We should not lose sight of the history of industrial relations that has moulded the current role of conciliation (and arbitration), in resolving disputes in this dynamic field. The system is designed to bring disputants to the table as soon as possible, primarily given the importance of resolving industrial disputes for the overall good of Australian society. In this way, it was recognised that the implications of the dispute invariably went beyond the interests of the particular parties. The solution was the creation of the role of an industrial umpire, albeit under *the very immediate shadow of compulsory arbitration*.

Of course, mediation often exists under the immediate shadow of litigation; and, mediators are invariably imbued with significant experience in the areas in which they are called upon to mediate.

However, one advantage for a participant in a conciliation is the opportunity to have advice and/or guidance from an impartial and experienced person as to realistic potential outcomes. Of course, it is difficult to evaluate the extent to which this occurs in a conciliation or the real benefit afforded by such an approach.

In any event, conciliation and arbitration has had a long and successful history in Australia, as an 'alternative' dispute resolution process. BN

ENDNOTES

1. NSW Department of Industrial Relations: https://www.industrialrelations.nsw.gov.au/about-nsw-ir/history-and-timeline-industrial-relations-nsw.
2. Australian Industrial Relations Commission Historical Overview, Issued December 2006, p. 2.
3. Australian Industrial Relations Commission Historical Overview, Issued December 2006, p. 3.
4. T MacDermott and J Reilly, 'ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances' (2012) (Vol 38, No 2) *Monash University Law Review* 82, 86. See also *Australian Railways Union v Victorian Railways Commissioners* (1931) 44 CLR 319.
5. Ibid, p. 87.