Finding a Role for Mediation in Workplace Disputes

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Abstract

In June, 1999, the Federal Coalition government proposed further reforms of the Australian industrial relations system. Included in this reform package were proposals for a Mediation Adviser to oversee the use of mediation in industrial relations. The paper critically examines these proposals. Data from a survey of WA practitioners indicates that the core elements of mediation are seen as self-responsibility and voluntariness which clearly distinguish it from the traditional processes of conciliation by the tribunal. However, there is also uncertainty over the nature of mediation and how it might operate in the context of, or as an alternative to, the present framework of dispute resolution. The government's package of reforms, including those relating to mediation, were withdrawn but the interest in mediation remains. This paper suggests that rather than creating a new industrial relations agency (the Mediation Adviser), making provision for mediation by Industrial Commissioners with the parties still able to choose private mediation if they wish would achieve the desired policy objectives.

Introduction

Mediation is becoming increasingly popular as a means of resolving disputes. For a number of years, mediation has been an integral part of the family court process and increasingly mediation is being encouraged in the civil court system as a low cost and more constructive alternative to litigation (ALRC, 1998). The growth of community mediation centres, the

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use of mediation in environmental disputes and its role in the process for dealing with native title claims are all indications of a growing use of mediation in dispute resolution. It is therefore not surprising that some see a role for mediation in the resolution of industrial disputes and that in recent years there have been a number of proposals for mediation to be formally recognised within the Australian industrial relations system. The latest of these was in the 'second wave' of reforms – the *Workplace Relations (More Jobs and Better Pay) Bill* – proposed by the Federal Minister for Employment, Workplace Relations and Small Business in June 1999.

Following a Senate Committee inquiry into the draft legislation the Democrats, whose support was needed for the proposals to become law, rejected the package (*The Australian* 29, 30 November, 1999) and faced with inevitable defeat in the Senate, the Minister withdrew the Bill. The mediation proposals had received little attention during the proceedings of the Senate Committee where much of the evidence related to other aspects of the package such as proposals to further simplify awards and to further encourage individual employment agreements. The issue of mediation was viewed against the broader background of the government's attempts to reduce the role and influence of the Industrial Relations Commission and the proposals were rejected on these grounds

However, mediation has attractions as a low cost, flexible and non-arbitral process. It is consistent with the current trends towards decentralisation and self-responsibility in industrial relationships. As greater encouragement is given to cooperative, joint gain negotiation between managements and unions, third party processes appear to be following in the same direction (Cutcher-Gershenfeld, Power and McCabe-Power, 1996; Karassavidou and Markovits, 1996). Therefore the view that there should be a place for mediation in the Australian industrial relations arena is likely to strengthen and more use will be made of it, just as is happening in other areas of dispute resolution. Although one set of proposals for mediation has been rejected, the issue of the role of mediation in Australian industrial relations remains on the agenda.

The purpose of this paper is therefore to examine the potential role for mediation in the resolution of workplace disputes. The paper has three main parts; it reviews the current interest in mediation, it seeks to clarify the nature of mediation as a process and it considers some of the policy and practical implications. Data from a survey of Western Australian practitioners will provide the basis for some of the discussion. The paper points to the current uncertainty over the place of mediation in the wider workplace

relations system and proposes that making provision for mediation within the existing tribunals might be a more appropriate course of action.

The Emerging Interest in Mediation

Conciliation has always been a significant element in both the institutional framework of Australian industrial relations and its practice. For example, approximately 85% of the matters dealt with in conciliation by the WA Industrial Relations Commission are resolved without recourse to arbitration. Periodically, attempts have been made to strengthen the role of conciliation within a system which has been dominated by compulsory arbitration (see, for example, Foenander, 1959, ch.3). We will return later to the distinction between conciliation and mediation but at this point it is sufficient to note that in reform discussions across Australia mediation has emerged as a distinct dispute resolution process (see, for example, DOPLAR, 1997; Fells, 1997; Industrial Relations Taskforce, 1998; Macken and Gregory, 1995; Niland, 1989). On occasions, the parties to an industrial dispute have used mediation, in one form or another, overcome their differences (Davis, 1998; Fells, 1999).

There has also been interest overseas in the development of alternative dispute resolution processes (ADR) in the employment setting (Dunlop and Zack, 1997; Feuille and Kolb, 1994; McDermott and Berkeley, 1996; SPIDR, 1978; Stitt, 1998; Zack, 1997) but it must be noted that these discussions of ADR generally have two distinctive features. Firstly, mediation is just one of a number of dispute resolution processes; that is, mediation and ADR are not synonymous and a full discussion of workplace relations from an ADR perspective would include consideration of other techniques such as fact-finding, med-arb and mini-trials. Secondly, and importantly, ADR is considered in relation to grievance arbitration, that is, as an alternative to the resolution of disputes of right by arbitration under a labour agreement or company grievance process. With the exception of impasse procedures in the public sector, ADR is not normally discussed in the context of management-union negotiations over a new agreement or contract. As will be seen, the Federal Coalition's proposals for mediation were different in that they related primarily to management-union negotiations but, although the proposition was not developed (because there is no need for any legislative change in this respect), proposals for mediation could also embrace the development of mediation in grievance procedures in both union and non-union workplaces.

The Federal Coalition Government's Proposals

In June of 1999, the Federal Minister for Employment, Workplace Relations and Small Business introduced legislation to bring further reforms to the Australian industrial relations system. The *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill, 1999* sought, amongst other things, to 'make intervention by third parties in decisions made by workers or their employers more democratic and more relevant, removing similar centralisation and control eliminated by governments in comparable economies' (second reading speech 30th June, 1999). In this context 'third parties' refers particularly to the processes of dispute resolution.

This proposal on mediation was foreshadowed in a policy document 'More Jobs, Better Pay' (Liberal and National Parties, 1998) where a commitment was made to give formal legislative recognition to mediation as a voluntary alternative or supplement to the Commission. The contrast was drawn between the low cost, informal and accessible nature of mediation and the quasi-legal processes of the Commission. The Minister, Hon Peter Reith, had previously explored the issue of mediation in a Ministerial Discussion Paper 'Approaches to dispute resolution – a role for mediation?' (Reith, 1998). This discussion paper noted the increased interest in mediation, particularly in the legal framework (where it is one of a number of alternative dispute resolution processes) and in this context, proposed an extension of the process into the workplace relations system. A number of benefits of mediation were suggested including its flexibility which – it was alleged – 'encourages simple accelerated and creative solutions' (Reith, 1998: 5) and the durability of the solutions which are 'owned' by the parties themselves. Mediation was also seen as being consistent with the general thrust of industrial relations change in that it focuses on the workplace and can meet the needs and preferences of the parties. In summary, 'mediation can offer a more confidential, user friendly, non adversarial and accessible system, providing savings in costs and time involved in attending hearings away from the workplace' (Reith, 1998: 6).

The discussion paper canvassed the scope of issues which could be mediated, the legal standing of any mediated settlements, funding and whether mediators should be accredited or have some other formal standing. The broad direction of the points raised was that mediation should be voluntary, the outcomes would be the parties' own responsibility, the sharing of costs has some advantages and accreditation would encourage the public's confidence in mediation. The issue of mediation was again canvassed in May, 1999 in an Implementation Discussion Paper, 'The continuing reform of workplace relations: Implementation of More Jobs,

Better Pay'. This paper outlined the full range of proposals for reform with the section on mediation being just two pages. It was stated that mediation is likely to be particularly suitable for resolving differences related to the negotiation of enterprise agreements; as a step in dispute resolution; in cases of serious or protracted industrial action and where the parties to an agreement have made provision for mediation in their grievance procedures (Reith, 1999i: 20). The ability of the tribunal to intervene compulsorily while the parties were undergoing mediation would be restrained but the availability of mediation would not restrict access for urgent (legal) relief in disputes. Finally, mediation would be provided by private, non-AIRC providers and a mediation agency would accredit mediators as well as generally encourage the use of mediation.

These proposals found their way into the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill* (Schedule 5) principally through a proposal to establish a Mediation Adviser whose task was to maintain a register of accredited mediators, to have responsibility for developing accreditation standards and to advise on and promote the use of mediation. The legislative proposals also addressed the role of the Commission (Schedule 4). A new distinction was made between compulsory conciliation – available only in relation to matters where arbitration can be used – and voluntary conciliation which the Commission can undertake (on a user-pays basis) at the request of the parties. It was proposed that the Objects of the *Workplace Relations Act, 1996* would be changed to recognise these three processes (mediation, compulsory and voluntary conciliation) but although the circumstances in which each of these may be adopted was specified, the actual difference between conciliation and mediation *per se* is not clear.

Mediation or Conciliation – the Same, Similar or Something Different?

These proposals to encourage the use of mediation draw attention to the relationship between mediation and the existing conciliation processes. The Ministerial Discussion Paper distinguishes between them as follows:

> The mediator's role is to work systematically through the issues, help the parties identify possible solutions and facilitate final agreement. Unlike a conciliator, the true mediator will guide the process of resolution, but not advise the parties on the matters in dispute, its resolution, likely settlement terms or likelihood of success at the next stage (if any). A mediator has no decision making powers. (Reith, 1998: 1)

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It is recognised that in practice 'the distinction between mediation and conciliation is often blurred'. An ILO review of conciliation and mediation reached a similar conclusion (ILO, 1983: 11-12).

In many situations the terms mediation and conciliation are therefore used interchangeably and the terminological distinctions have no practical effect. A good example is found in the United States system of industrial relations where the third party agency in the United States is the Federal Mediation and Conciliation Service. According to Simkin and Fidandis (1986: 25), when developing the legislation the House of Representatives proposed a Federal Conciliation Service whilst the Senate proposed a Federal Mediation Service – the compromise solution was obvious. However if, as here in Australia, one process is being advanced to supplement the other then the nature of the distinction increases in significance. In particular, if the parties to a dispute engage in either of the processes they will develop their strategies according to what they expect the process to involve and to achieve. As will be shown later in the paper there is a broad range of opinions on mediation and these variations will have an impact on use made of the process. Further, if both mediation and conciliation are essentially processes of third party involvement where the purpose is not to arbitrate but to assist the parties find their own settlement, why promote mediation as an alternative to the existing conciliation? It is therefore important for policy makers and practitioners to give attention to what the distinguishing characteristics of mediation may be.

As indicated above, mediators do not have decision-making powers, but neither do conciliators. The difference between the two may simply be in *who* the third party is: a private person assisting the parties would be a mediator while a Commissioner performing the same role and using the same strategies would be conciliating. If this is the case then the essence of the proposals was to simply relocate dispute resolution *away* from the Commission. Alternatively, the contrast which has been made in the Discussion Papers between the low cost, informal and accessible nature of mediation and the quasi-legal processes of the Commission suggests that the *processes* are different. However, the 'conciliation' of the Commission may also be 'low cost, informal and accessible' notwithstanding the quasi-legal nature of other Commission processes.

Although in both conciliation and mediation the final decision-making resides with the parties themselves, one other distinguishing feature can be in way in which the third party proposes the recommendations or solutions. A third party trying to help find a resolution will typically provide additional expert information and will develop their own proposals and suggest them

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to the parties, particularly when the parties are in the process of exploring options. However, in some contexts (for example in the British industrial relations system, see Lowry, 1990), the role of the mediator is to make recommendations in a far more formal way; the recommendations will be in the form of a written document and will be presented to the parties for them to consider. Importantly in this case, the parties will have entered the mediation process *in the expectation* that the mediator will be making formal recommendations. As noted above, the current proposals do *not* envisage that the mediator will make formal recommendations.

A further way of making a distinction between conciliation and mediation is to consider the residual powers of the third party. To the extent that a terminological distinction is made in the Australian industrial relations system, it tends to be on this basis. In most industrial relations systems, where the legislation confers the power on a Commissioner to arbitrate, it also places a prior obligation on the Commissioner to attempt a resolution through conciliation. In other words, the parties know that if they fail to follow the leadings of the Commissioner in conciliation then that same Commissioner will arbitrate. We might presume that in many situations this form of conciliation becomes fairly directive wherein any 'proposals' by the Commissioner carry considerable weight. Early attempts to break the nexus between conciliation and latent arbitration by having separate conciliation commissioners generally failed but in the context of the recent shift to an enterprise focus, more emphasis has been placed on conciliation as a final process. When conciliating, some Commissioners act far more like facilitators than potential arbitrators. However, the fact that there was a proposal for a separate mediation service suggests, in the view of the government at least, that conciliation by the Commission has not been able to break free from its arbitral context.

In summary, we are left with the conclusion that the essence of the difference between conciliation by a Commissioner and mediation by a private third party would not be in the role they perform (to help the parties find their own settlement), or in the strategies they will use, or in who will be paying them, but in who they are. One would be drawn from the ranks of the Commission; the other would be drawn from a list of private individuals separately accredited by the government.

The Views of Western Australian Practitioners

The uncertainty surrounding the nature of and role for mediation is also evident in the responses from a survey of practitioners. The respondents to

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the survey were Western Australian members of the Industrial Relations Society and Associate Fellows of the Australian Human Resource Institute in WA. The survey was undertaken in August, 1999.

A total of 134 useable questionnaires were returned (a response rate of 30%[1]). The categories of respondents are shown in Table 1; 46% of the respondents in employing organisations were in the private sector, 54% were in public sector organisations. The intention of the questionnaire was to gain an indication of practitioners' views on the nature of mediation and on factors which would influence its effectiveness. It was exploratory, utilising only a straightforward checklist approach. Questions were based on issues raised by the proposals and on the existing literature on mediation. Part One focused on the fundamental characteristics of mediation, Part Two on factors affecting the potential effectiveness of mediation. Part Three asked respondents to consider mediator strategies and Part Four requested information about the respondent.

Table 1 Survey respondents by occupational category

senior human resource or industrial relations position in an employing organisation	38%
human resource management or industrial relations, but not in a senior position	9%
union official	4%
employed by an employers' association	3%
human resource or industrial relations consultant	15%
lawyer specialising in employment matters	8%
other involvement in industrial relations and human resource management	23%

Practitioners' Views on the Fundamental Characteristics of Mediation

Respondents were asked to consider twenty statements which might reflect the fundamental characteristics of mediation and to respond if they agreed with any of them. The statements and response rates are presented in Table 2 with the statements ordered by frequency of positive response (the questions were in a different order in the questionnaire). The respondents were asked: 'If you think the statement represents a **fundamental** characteristic of mediation, then please tick the appropriate box. You may tick as many boxes as you wish but we are asking you to identify the very essence of what mediation is.'

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Table 2 Fundamental characteristics of mediation – WA practitioners' views

	The **fundamental** characteristics of mediation are	%
1	that the final decision lies with the parties	86.1
2	that it is voluntary (ie the parties are not participating simply because of a legislative requirement)	77.6
3	that it must be an accepted principle that what is said in mediation sessions is not repeated or used elsewhere	74.6
4	that the mediator is expressly prohibited from arbitrating on the issue	68.7
5	that the mediation must take place on 'neutral' territory	48.5
6	that the mediator must be chosen by both parties (as opposed to being allocated to the case by a mediation agency)	44.8
7	that the mediator is obligated to bring wider interests (eg industry or economic consequences, government policies) to the parties' attention	34.3
8	that the mediator must be formally accredited by the government or government-endorsed independent agency	31.3
9	that the outcome of a mediation is not legally enforceable	29.9
10	that there must be no formal transcript or recording of mediation proceedings	27.6
11	that mediation can not occur if industrial action is taking place	25.4
12	that the mediator must be paid for jointly by both parties	22.4
13	that once appointed to handle a dispute, the mediator can not be 'sacked'	22.4
14	that the mediator must be appointed by an independent agency, not by the parties	19.4
15	that the only role of the mediator is to maintain a process of dialogue between the parties, and not to make suggestions on the issue itself	19.4
16	that mediation is only possible when the parties are not represented by agents (eg a union official, employer association advocate, consultant or lawyer)	14.9
17	that under an agreed procedure one party can compel the other to participate in mediation	14.2
18	that mediation is not possible in situations where the employee is unrepresented	13.4
19	that with mediation, the parties must renounce their right to pursue the issue in dispute through legal processes, including the Commission	9.7
20	that mediation can not occur if conciliation is an alternative	7.5

A number of interesting observations can be made concerning the survey results presented in Table 2. Two responses at the top of the list (statements 1 and 4) go to the heart of the distinction between mediation and both conciliation (as understood in Australian industrial relations) and arbitration. According to the normal definitions of mediation, the response to both these questions should have been 100% and so the lesser responses could

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point to an understanding that the mediators will have an influence over the final decision. In practical terms this would suggest that it will be incumbent on mediators to fully explain their role and the limitations which are part of it. There is a danger that mis-matched expectations might hinder the effectiveness of the mediation process. The parties to a mediation might have in the back of their minds that if they do not resolve the matter then the mediator will bring a solution to bear. This view of mediation would encourage the parties to remain firm in their positions (the mediation version of the chill effect identified by Feuille, 1975). However, the mediator will not (or, at least, should not) take on this solution-providing role. As a result of these differing expectations of what is involved, the mediation may falter.

Another characteristic seen to be important by the respondents was the voluntary nature of mediation (statement 2). The decision to engage in mediation voluntarily is an aspect of taking ownership and part of the advocacy for mediation is that the parties, by opting for it, will engage in it more fully and be committed to the outcome. Other responses also point to the view that the process is voluntary in other respects: the parties chose the mediator (statement 6) and can dispense with them (statement 13) though neither is seen as a *fundamental* element of mediation. The view that the parties should agree in advance to accept the outcome (from responses to a question on effectiveness) also points to a sense of ownership. One third of the respondents considered that a fundamental element of mediation is that the outcome is not legally enforceable (statement 9). This too points to ownership and the voluntariness of the process but the majority consider that mediation can lead to a legally binding outcome without the process, in effect, becoming some form of compulsory conciliation.

An interesting result is the strong level of response to the statement that 'it must be an accepted principle that what is said in mediation sessions is not repeated or used elsewhere' (statement 3). Confidentiality in mediation is important if the parties are going to be open with each other and indicate areas of flexibility. This question raises some interesting issues about the relationship between mediation and other processes. Clearly, the respondents felt that if concessions or statements were made in mediation but the mediation failed to find a solution, then those concessions or statements should not be repeated in, for example, an arbitration hearing or court of law where the parties might want to present the fullness of their original position. (This can be seen as an argument against having a Commissioner in a conciliation also be the potential arbitrator.) On the other hand, if there

were *no* other processes, except industrial action, then this principle of isolating what transpires in mediation is not relevant.

It will be recalled that one of the claimed advantages of mediation over the 'quasi-legal processes of the Commission' is its accessibility, that it will provide savings in costs and time involved in attending hearings away from the workplace. This will be so if the mediations are held at the place of work. Respondents were evenly divided over whether being on neutral territory was an essential element of mediation (statement 5). This is in contrast to the present system of conciliation in the Commission where Commissioners are allocated and sessions are generally held at the tribunal's premises.[2] Respondents were also broadly divided over whether the parties should chose their own mediator or a mediator be allocated (statement 6) as occurs in the UK and north American systems. Nearly 50% of the respondents felt that either territorial neutrality or joint appointment was fundamental to mediation. (21.6% of the respondents felt that *both* territorial neutrality and joint appointment were fundamental; 26.9% considered that *neither* was.) What these data suggest is that although accessibility and choice of mediator are viewed by the proponents of mediation as being important in making mediation more effective than conciliation by the tribunal, this may not necessarily be the case and the practitioners are not yet convinced.

There is an interesting comparison here with the practice in the United Kingdom. On the question of accessibility, the clear preference there is that conciliation meetings (the equivalent of Australian mediation) should be held at the offices of the Advisory Conciliation and Arbitration Service (ACAS). This adds to the independent standing of the conciliator and it also enables the conciliator to have control of all aspects of the environment. (On the other hand, arbitrations are typically held on company premises, part of the explanation being that by the time a dispute reaches arbitration the 'heat' has typically gone out of it. ACAS arbitrations are also rather more informal than Australian arbitration hearings.) On the question of choice, the parties have a right to refuse a nominated conciliator (or arbitrator) but this rarely happens.

A central element of the federal government's proposals was the intention to establish a Mediator Adviser whose role would be to create and maintain a list of accredited mediators and to generally encourage the use of mediation. The Adviser was to determine competency standards for mediators, in consultation with approved mediation agencies. Accreditation is an issue which has caused considerable debate in the United States where mediation has become far more widespread than here in Australia. One of the central difficulties is identifying the core skills which are needed for

effective mediation. (See Honeyman, 1995 and Reeve, 1998 for a review of some of the problems involved in establishing standards of accreditation.) Of particular interest for this paper is the importance which practitioners attribute to accreditation. It will be seen from Table 2 (statement 8) that only one third of the respondents considered it fundamental that the mediator be accredited, the remainder believing that mediation can take place even where the mediator does not have accredited status. Responses to a question relating to the effectiveness of mediation also indicate divided opinion on the accreditation issue. Only 45% responded positively to the view that mediators need have clear formal independent status (eg are endorsed by a professional or government agency) in order that mediation be effective. It would appear that private mediators will have to build their own reputation for effectiveness rather than rely on having their names on an accredited list.

Accreditation will give some security of choice but the two principal roles of the Mediation Adviser can be clearly separated. It would be possible to promote the use of mediation without necessarily having an accredited list and all which that entails. As the proposal stood, the Mediation Adviser and the related approved agencies could have emerged as an alternative institutional framework for workplace relations in Australia. Again we might be drawn to the conclusion that mediation was being established not for what it is, but for what it is not; that whatever it turned out to be, it would not be the Commission.

Another component of the proposals was that mediation is available on a user pays basis. This was consistent with the voluntary self-determining nature of the workplace relations which the Coalition government has sought to promote. Only 22% of the respondents considered that 'the mediator must be paid for jointly by the parties' was a fundamental characteristic of mediation (Table 2, statement 12) while in responding to the effectiveness question, only 44% considered that mediation being 'a minimal cost procedure' was critical to its effectiveness. While sharing the costs equally might help maintain the independence of the mediator, the level of cost and the cost to individuals as opposed to organisations will impact upon the use which some might make of mediation.

This raises an interesting point about the use of mediation being market driven where its low cost is important. The proposals included a provision that parties in dispute over a range of specified issues would have access to a Commissioner (and presumably would be able to have one of their own choosing). It was proposed that the fee be set at $500, meaning that the parties can have their dispute fixed for $500, no matter how many hours it

takes. If $500 is then the market price for voluntary conciliation by a Commissioner, those in the professions who are used to billing by the hour might not find workplace mediation an attractive proposition.

Some Policy Considerations

The above discussion has identified a number of specific points about practical issues such as location, accreditation, and cost, which those who encourage the use of mediation might consider. There are also a number of broader points which can usefully be made.

The first point relates to the extent to which the parties might make use of mediation. The present government's preference is for individual rather than collective employment relations and if individual arrangements become more widespread in the workplace then there will be a decline in management-union agreements and consequently a decline in disputes and in the possible need for mediation. In this context, any proposals for the provision of mediation indicate a recognition that disputes *will* continue to occur and so formal dispute procedures *are* needed. However the new mediation processes and existing (but increasingly circumscribed) Commission will be competing for a share of a declining area of activity. On the other hand, the encouragement of mediation *is* consistent with the emphasis on management, employees and unions working together to resolve their differences and reach their own agreements. It is also consistent with the use of mediation in other areas of conflict resolution. Consequently the underlying trend will be for mediation to be used in a greater proportion of what will be a declining number of industrial relations disputes.

One of the difficulties of promoting mediation within the existing system is that the industrial relations system as a whole is already an alternative dispute resolution system; it provides conciliation and in some cases arbitration as an alternative to industrial or legal action. The proponents of mediation promote it as a preferable alternative to the rather more directive and quasi-legal conciliation. If it is better, then the parties will resort to it. However, if Commissioners can provide the same service through 'voluntary conciliation' then the advantages of establishing a formal alternative mediation stream would appear to be reduced.

A further consideration is the relationship of mediation to other processes. In this respect, the effectiveness of a dispute resolution procedure is heavily influenced by the ease of access to alternative processes, be they legal actions or industrial ones. The current debate on mediation in industrial relations is generally silent on what might occur if mediation fails

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because the policy proposals simply *add* mediation to other existing processes. The proposals in the *Workplace Relations (More Jobs and Better Pay) Bill* stated that the parties entering mediation would not waive their other rights, which in practice means that a party can try something different if it feels mediation is not heading towards what is considered a suitable outcome. Sixty-three per cent of the survey respondents considered that making a commitment to the process of mediation in the form of agreeing in advance to abide by the outcome was an important factor influencing the effectiveness of the process. However, any such commitment will be undermined by the ready availability of alternatives.

Mediators (or conciliators) in other industrial relations systems also operate in an environment where the parties have alternatives, but in those systems *the* alternative is typically industrial action by either or both parties. The danger in the Australian context is that mediation develops as a *first option* which the parties try knowing full well that they have a range of other low cost alternatives before the ultimate test of industrial action. Mediation can then also be used tactically as a delaying technique. These unwelcome developments would be encouraged if workplace mediation is viewed in terms of alternative dispute resolution as is found other legal contexts, and if mediation is regarded as simply a *facilitative* process. If this approach to mediation eventuates then the availability of mediation may hinder dispute resolution as much as it might aid it.

A further complication arises with the present system's notion of protected action which provides a role for the Commission to intervene to bring industrial action to an end and which (implicitly at least) encourages the use of civil remedies where action is not 'protected'. The proposed role for mediation is not free of this complication and the opportunity to deal with the impact of industrial action in a forum other than around the mediator's table is also likely to undermine the mediation process. A 'cleaner', more effective but undoubtedly more challenging option would be for either party to be able to engage in industrial action while the parties are engaged in mediation. This approach would be consistent with placing the emphasis on the parties to find their own solutions and take the consequences of their own actions. It could simply be achieved by mediation being a purely private affair, as can be done at present, or by enabling Commissioners to formally act as mediators. The proposals in the *Workplace Relations (More Jobs and Better Pay) Bill* showed the ambivalence between encouraging the parties' self-responsibility and yet intervening on the basis of the public interest.

The role of a third party can extend beyond the resolution of individual disputes to include a role in macro-economic policy or an advisory function. The industrial tribunals in Australia have, until recently, been prominent in the former role but they have not had a history of advisory work (though undoubtedly many Commissioners have worked hard to encourage cooperative relationships between the parties in their particular areas of responsibility). In contrast, both the Advisory Conciliation and Arbitration Service in the UK and the Federal Mediation and Conciliation Service in the USA have generally stood apart from any government attempts to influence wage outcomes but they have had advisory programs which seek to prevent industrial disputation by improving the ongoing relationships between managements and unions. The provision in the Australian Constitution which allows for the 'prevention and settlement of industrial disputes' has not been given this broad interpretation and the Commission has never had a formal advisory role. The Commission could develop this role and, though it was not suggested, so too could the proposed Mediation Adviser.

However it is unlikely that the Mediation Adviser would have welcomed having to take on another of the roles which industrial relations third parties such as tribunals can perform, namely to serve as a political convenience. The existence of a third party charged with the task of resolving industrial disputes enables a government, if it so wishes, to distance itself from any particular dispute. If there is a groundswell of public opinion over a major dispute ("what is the government doing about it?") then the government can maintain a public position of "it's up to the umpire" while perhaps working behind the scenes to secure a satisfactory solution. Also, if a political dimension emerges in disputes where the government itself, or a public sector agency, is the employer then the presence of a third party enables a compromise to be discretely made.

A Proposed System of Public and Private Mediation

These considerations give rise to the conclusion that the industrial relations parties in Australia might be better served by a system which provides for genuine mediation within the existing institution of the Commission and also provides for genuinely private and independent mediation. At the core of the proposals for a Mediator Adviser and panel of accredited private mediators is the apparent belief that existing Commissioners can not, or will not, resolve the disputes that come before them by using facilitative mediation techniques. It may well be the case that parties entering into conciliation by the Commission find the process is essentially one where they explain their position and the Commissioner then gives them some very clear

'advice'. However, even if this directive conciliation is not the best way to resolve industrial disputes it does not necessarily follow that the best remedy is to create an alternative dispute resolution agency.

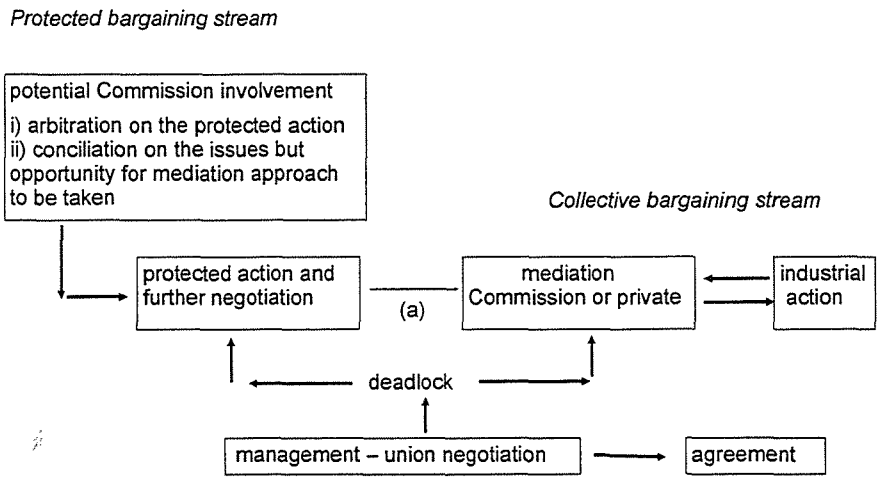
The survey data and much of the argument for mediation emphasise the 'voluntariness' of mediation and the importance of the parties maintaining some control over the process. These important characteristics are consistent with the current trends in workplace relations in Australia and should indeed be emphasised. They can be achieved by providing for mediation within the existing institutional framework.

The issue of whether Commissioners are directive conciliators or facilitative mediators has to be addressed. A number of factors would contribute towards the 'genuineness' of the mediation within the Commission. Firstly, the Commission mediators would not be able to arbitrate.[3] Secondly, the Commission mediators would need to be conversant with the facilitative approach which is integral to mediation and where familiarity with this approach is lacking, further skills enhancement would be needed. In the longer term, this would be a factor to be taken into consideration when appointing Commissioners. Thirdly, either party entering into mediation would be able to engage in industrial action and take the consequences at the mediation table. It would be beneficial if the parties were required to notify the Commission of forthcoming negotiations prior to the expiry of their agreement. This would enable the Commission to monitor the progress of negotiations and make itself 'available' to the parties and thereby encourage an early rather than late request for mediation should the parties find themselves heading into a deadlock. The parties would have a limited right to object to any particular Commission mediator. The mediation would typically be in the Commission offices but the question of location would be a matter for the Commission mediator to decide, having regard to the circumstances of the dispute. The mediation would be free. Finally, if the parties find that the Commission mediators really do not provide the facilitative dispute resolution process which they want then the use of private mediators will increase and requests for Commission mediation will decline.

Having entered into mediation by a Commission or private mediator, either party could withdraw. Other proposals (eg Boland, 1999) suggest that parties sign an agreement which commits themselves to the process, but with the caveat 'but not to reaching agreement'. This might be useful in putting extra moral pressure on the parties to remain in the process and the commitment would be stronger if the parties had written into their existing agreement a negotiating procedure which obligated a joint reference to

mediation *prior* to taking any industrial action. However, the *real* commitment to mediation arises because the parties (or at least one) knows that other ways of resolving the dispute are far less palatable. If either party has concerns in this regard, then they simply refuse mediation, as is their right, and remain in the existing arrangements. Should the Commission then intervene in relation to the bargaining period the Commissioner should then bring all his or her mediation skills to bear on the dispute and thereby assist the parties, just as if they had opted for mediation.

Figure 1 Possible arrangements for the encouragement of mediation



The essence of the proposed arrangements can be presented diagrammatically (Figure 1) (though any attempt to reduce the complexities of the Australian industrial relations system to a simple diagram is fraught with difficulty). The protected bargaining stream represents the present arrangements whereby the parties can negotiate and can engage in protected industrial action and the Commission, under certain circumstances can intervene. The opportunity for Commissioners to use a mediation approach rather than directive conciliation is highlighted and there will be every incentive for the Commissioners to use such an approach. Rather than take the protected bargaining route the parties may opt for the collective bargaining stream where deadlocks are overcome through mediation with or without accompanying industrial action. Mediation can be provided either by a Commission mediator or by a private mediator; the choice in this regard lies with the parties.

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These proposed arrangements are a response to the emerging recognition of the value of mediation as a process of dispute resolution. They closely reflects the present arrangements but will create a framework in which mediation can be encouraged without the need for creating an additional Agency and all the difficulties which that might bring. The proposed arrangements are still rather more complex than many other industrial relations systems but this complexity stems from the desire of those involved in and responsible for the Australian industrial relations system to maintain a public interest in industrial action. An alternative would be to allow voluntary access to mediation from the protected bargaining stream (arrow (a) in Figure 1); there would then be no opportunity for unfettered industrial action as is proposed for the collective bargaining stream. The difficulty with this single stream option is that mediation is then just one of a number of possible processes and, explained above, it then becomes just a first option and its effectiveness is undermined.

Another approach which might also enable disputing parties to gain the benefits of mediation would simply be to make no changes to the system other than to ensure that existing and new Commissioners are competent mediators and to not refer disputes to any Commissioners who are not comfortable with the mediation approach. This minimalist option may not be sufficient demonstration of change and does not really encourage the use of mediation through the provision of alternative sources of expertise, hence the proposal for two formal streams as shown in Figure 1.

Conclusion

The Australian industrial relations system is still undergoing change and this change is occurring in several directions at once and they all impact upon the question of how workplace disputes should be resolved. The Minister's attention is now on the development of a single industrial relations system (Reith, 1999ii), a development which would still require the scope of Commission's role in dispute resolution to be addressed. There is a trend towards individual employment relationships and there is also an increasing emphasis on the use of civil law. At the same time the collective arrangements are showing some resilience, as is the Commission. Into this arena of change mediation continues to gain some prominence as a better way of resolving disputes. Anything which has the potential to be an improvement is to be encouraged but any new process has to be accommodated within existing broader policy objectives and must have the opportunity to prove itself over time. It should not be proposed as a superior process

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but then be inhibited in its application by the complexities of the present arrangements.

This is particularly so in this instance where, if the survey data from WA practitioners can be generalised, there is still some uncertainty about the fundamental nature of mediation. To some extent mediation is being understood in terms of what it is not – that it is *not* a form of dispute resolution by the Commission. It is seen as a voluntary process where the parties retain responsibility for making the final decision. In other areas, mediation can be compulsory (for example in court-mandated ADR processes) but in the context of the current evolution of Australian workplace relations it would seem important to emphasise the 'voluntariness' of mediation.

This paper has critically examined the federal government's proposals for a mediation adviser and panel of accredited mediators and has suggested that the desired policy objectives could be equally well achieved without the creation of this new agency. Our proposals advocate a collective bargaining stream as a means of giving full reign to mediation though we recognise that this gives rise to a much broader question of the scope for industrial action. Our purpose here has been simply to address the policy objective of encouraging mediation and our point is that this is achieved it the parties are faced with few but stark alternatives. We propose either public or genuinely private mediators. We also advocate that the Commission be encouraged to take more of a mediation approach when acting under its conciliation powers. Finally we recognise that practitioners really hold the key to the future development of mediation. There are already opportunities for Commissioners to operate in a private capacity, there are already private mediators who ply their trade. If the existing system of industrial dispute resolution is found wanting, as the various proposals to introduce mediation seem to imply, and if mediation proves to be a better process, then practitioners can and will make use of it irrespective of the fate of any proposals to introduce mediation formally into the Australian system of industrial relations.

Notes

1 The response rate from Industrial Relations members was higher than that from AHRI members, partly explained by the AHRI membership having a much broader professional involvement. For example HR specialists in recruitment and selection might not have a particular interest in workplace mediation and so not feel in a position to complete the questionnaire.

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2 Commissioners operating in WA, particularly those with responsibilty for the mining or rural industries, will regularly hold conciliation or even arbitration sessions in a local community hall or on company premises. However, it would be unusual for a conciliation session to be held at the employer's premises in the Perth metropolitan area.

3 The *Workplace Relations Legislation Amendment Bill* included a clause, subsection 105(1), which would preclude any Commissioner who conciliated in a dispute from then proceeding to arbitrate over it, unless the parties had given their consent.

References

ALRC (1998), *Review of the Adversarial System of Litigation: ADR – its role in federal dispute resolution issues*, Australian Law Reform Commission, Sydney.

Boland, R. (1999), 'The Prospects for Mediation Having a Fromal Role in Australia's Industrial Relations System' Australian Industry Group, Sydney.

Cutcher-Gershenfeld, J., Power, D. and McCabe Power, M. (1996) 'Global Implications of Recent Innovations in U.S. Collective Bargaining' *Relations Industrielles* 51, 281-300.

Davis, E. (1998), 'Mediation within Enterprise Bargaining: New South Wales Fire Brigade 1995' *Australian Dispute Resloution Journal* 9(1) pp. 5-10.

DOPLAR (1997), *Labour Relations Reform Discussion Paper*, Department of Productivity and Labour Relations, Perth.

Dunlop, J.T. and Zack, A.M. (1997), *Mediation and Arbitration of Employment Disputes*, Jossey-Bass, San Francisco.

Employment, Workplace Relations, Small Business and Education Legislation Committee, The Senate, http://www.aph.gov.au.hansard/senate/committee/s-ewrbe.htm

Fells, R. (1997), 'What might be the role for mediation in the future development of workplace and industrial relations?', *Occasional Papers* December, 1997, Industrial Relations Society of WA.

Fells, R. (1999), 'Settlement process of tactical opportunity? Different perspectives on the role of mediation in industrial disputes' *Journal of Industrial Relations* 41(4) pp. 594-611.

Feuille, P. (1975), 'Final Offer Arbitration and the Chilling Effect', *Industrial Relations* 14(3) pp. 302-310.

Feuille, P. and Kolb, D.M. (1994), 'Waiting in the Wings: Mediation's Role in Grievance Resolution', *Negotiation Journal* 10, pp. 249-264.

Foenander, O. (1959), *Industrial Conciliation and Arbitration in Australia*, Law Book Co., Sydney.

Honeyman, C. (1995), *Performance-Based Assessment*, National Institute for Dispute Resolution, Washington, DC.

ILO (1983), *Conciliation Services: Structures, Functions and Techniques*, International Labour Office, Geneva.

Industrial Relations Taskforce (1998), 'Review of Industrial Relations Legislation in Queensland', Department of Employment, Training and Industrial Relations, Brisbane.

Karassavidou, E. and Markovits, Y. (1996), 'The evolution of dispute resolution, negotiation and mediation in Greece', *Relations Industrielles* 51, pp. 357-389.

Liberal and National Parties (1998), *More Jobs Better Pay*

Lowry, P. (1990), *Employment Disputes and the Third Party*, Macmillan, London.

McDermott, E.P. and Berkeley, A.E. (1996), *Alternative Dispute Resolution in the Workplace*, Quorum Books, Westport, Conn.

Macken, J.J. and Gregory, G. (1995), *Mediation of Industrial Disputes*, Federation Press, Sydney.

Niland, J. (1989), *Transforming Industrial Relations in New South Wales*, Department of Industrial Relations and Employment, Sydney.

Reeve, C. (1998), 'The quandry of setting standard for mediators: where are we headed?', *Queens Law Journal* 23, pp. 441-474.

Reith, P. (1998), *Approaches to dispute resolution: a role for mediation?,* Department for Employment and Workplace Relations, Canberra.

Reith, P. (1999i), *The Continuing Reform of Workplace Relations: Implementation of More Jobs, Better Pay*, Department for Employment, Workplace Relations and Small Business, Canberra.

Reith, P. (1999ii) Speech given at the Industrial Relations Society National Convention, Perth, October, 1999.

Simkin, W.E. and Fidandis, N.A. (1986), *Mediation and the Dynamics of Collective Bargaining*, Bureau of National Affairs, Washington, DC.

SPIDR (1978), *New Dimensions in Dispute Resolution*, Society of Professionals in Dispute Resolution, Washington, DC.

Stitt, A.J. (1998), *Alternative Dispute Resolution for Organizations*, John Wiley, Toronto.

Workplace Relations Act, 1996

Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill, 1999

Zack, A.M. (1997), 'Can alternative dispute resolution help resolve employment disputes?', *International Labour Review,* 136, pp. 95-108.