SUBMISSIONS FOR 2017 MINISTERIAL REVIEW OF THE STATE INDUSTRIAL RELATIONS SYSTEM (WA)

TERMS OF REFERENCE

Issue 1.

Review structure of WA Industrial Relations Commission (WAIRC) for streamlining and efficiency

MEDIATION

My submission is focused on the current free-of-charge employment dispute resolution services by way of mediation, offered by the WAIRC under Part 2 – Division 1, of the Employment Dispute Resolution Act 2008 (**EDR Act**).

The WA employment dispute resolution services are not independent of the WAIRC.[1] Under the current law (EDR Act), it is a function of the WAIRC to assist parties to resolve disputes. Jennifer Smith, Acting President of the WAIRC, confirmed that, the WAIRC "is a court."[2]

> *"In any event, through its statutory powers and duties under the IR Act, the Commission adopts the practices and procedures of the adversarial processes of a conventional court…Thus, although the Commission is empowered to exercise inquisitorial powers the procedural model adopted by the Commission for the majority of its hearings it follows adversarial practices adopted in conventional courts*".

The EDR Bill confirms that the "*focus of the Bill is on enabling parties to employment disputes to access the WAIRC on their own terms where they choose to avail themselves of its extensive experience in industrial dispute resolution*". The EDR Bill also confirms that "*the primary objective of the Bill is to create a dispute resolution framework which is informal, easily accessible, expeditious and effective*."

My experience indicates to me that the current mediation service, under the jurisdiction of the WAIRC, may not be working as effectively and efficiently as it could were it an independent body. Recently in WA I acted for an employee of a large public sector employer

[1] Refer to the Employment Dispute Resolution Act 2008.

[2] See Jennifer Smith's paper, "*Rules of Evidence in Proceedings before Industrial Tribunals*" presented at the LSWA Seminar, 20 October 2015, at A [1] and [2].

on an employment related matter. I applied on behalf of my client to the WAIRC for mediation assistance. I did so, based on my experience of the effectiveness and efficiency of the Employment Mediation Service operated in NZ, in which I have participated (for some 20 years) in several hundred mediations, and where most issues were resolved and matters settled.[3] The large public sector employer in WA did not consent to a mediation, when contacted by the WAIRC. That employer subsequently contacted me and offered mediation with my client by a specified process, with the mediator to be sourced by a mediator of *it*s choosing and for it to pay the costs. The public sector employer clearly did not want WAIRC involvement. The employee wanted a free-of-charge mediator, experienced in workplace relations matters, and not selected unilaterally by the employer (for fear of bias). The public sector employer could afford to attend a mediation at its cost. Employees and many small business employers are unlikely to be in a position to afford to pay costs to attend an independent mediation. It has been my experience as a practitioner that *independent mediation* is an effective means of resolving employment and work related disputes.

Reluctance by parties to use the mediation service at the WAIRC may be fuelled by a fear of a lack of independence, or of not wanting to alert the WAIRC to the workplace issues (i.e an application for mediation is allocated to a Commissioner). This inevitably means that some industrial relations matters (including those lacking merit), which could have been efficiently and effectively resolved at an independent mediation (not currently available in WA), are likely to be dealt with at first instance by the WAIRC at a conference. Unless self-represented, this process (with prescribed filing requirements) increases costs to both parties. There are no legal requirements for preparing for mediation.

A more efficient structure for the WAIRC (particularly if its functions are to be expanded in future to take on additional State-based matters) may be to remove mediation services away from it altogether and to institute an independent mediation service, similar to that currently operated in NZ[4]. Under New Zealand law, independence of mediation personnel in the Employment Mediation Service (part of the Ministry of Business, Innovation &

[3] The NZ Employment Mediation Service is set up under Part 10 of the Employment Relations Act 2000. It offers mediation services to all employment relationships (s 144), and provides dispute resolution services to parties in work-related relationships that are not employment relationships (s 144A).

[4] Supra, fn 2

Employment) is required.[5] The mediators are full time public servants. Further, parties are expected to attempt mediation before going to a Tribunal or Court.[6]

I therefore submit that:

(a) That the structure of the WAIRC be made more efficient by removing the existing mediation and dispute resolution services from its current operations and from the functions of the IR Commission.

(b) That the Industrial Relations Act 1979 (WA) (**IR Act**) be amended to provide:

(i) for a free-of-charge mediation service be established to operate independently from the Commission; and

(ii) That no person who is employed or engaged to provide mediation services may hold office, at the same time, as a member of the WAIRC or FWC, or be employed, at the same time, to staff or support the WAIRC or FWC or the Federal Circuit Court; and

(iii) That the WAIRC may refer parties to mediation before it will hear a matter.

(c) That the EDR Act 2008 (WA) be repealed and that the employment dispute resolution matters be incorporated within the IR Act.

Issue 8.

Consider whether (and how best) WA LG workforce should be regulated by state IR system

I understand that there are 138 local governments and 9 regional local governments in WA. Some local governments are trading corporations and fits the definition of a national system employer. Others do not. A jurisdictional hearing is usually required to determine this. When considering the income received by a local government from its trading activities compared to its total income, the WAIRC may find that the income received from trading activities is insubstantial and insufficient to warrant a particular local government being characterised as a trading corporation.

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[5] Employment Relations Act 2000 (NZ), s 153

[6] An article explaining how NZ mediation works under the statute has been written by Franks, Peter (2003) "Employment mediation in New Zealand," *ADR Bulletin*: Vol. 6: No. 1, Article 2. Available at: http://epublications.bond.edu.au/adr/vol6/iss1/2

I submit that the WA Local Government (LG) workforce is best regulated by the state IR system, in order to save parties the costs and resources currently spent on jurisdictional hearings to determine whether the WAIRC (or Fair Work) has authority to deal with a matter. In 2013 the WAIRC determined that trading activities of the City of Albany were peripheral and incidental to its "*primary activities as a local government body and that overall the* [City of Albany] *does not exist for or conduct activities which are of a commercial character*."[7] This case confirms that a local government of any significant size with several trading activities, and genuinely believing itself to be a trading corporation, is no guarantee that the WAIRC will find that local government to be a trading corporation. A statutory change is required to create certainty.

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[7] *Madigan v City of Albany* (2013) WAIRC 00367, at para 38.