

EXAMPLES OF DISPUTE RESOLUTION FUNCTIONS THAT THE COMMISSION MAY PERFORM UNDER A REFERRAL AGREEMENT

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Mediation

- (a) The Commission's role is to assist employers and employees to negotiate themselves a mutually acceptable resolution of their dispute.
- (b) Some of the Commission's roles will include:
 - (i) to assist employers and employees to clarify the issues in dispute;
 - (ii) where appropriate, suggest particular dispute resolution techniques appropriate to individual issues (for example, a non-binding appraisal of the dispute);
 - (iii) to act as the facilitator of direct negotiations between employers and employees;
 - (iv) to provide assisted negotiation. Where employers and employees have identified the issues to be negotiated they can use the assistance of a Commissioner to negotiate an outcome themselves. The Commissioner will have no advisory role;
 - (v) to provide neutral evaluation. Where a Commissioner considers and appraises the dispute and provides advice on the facts of the dispute, the law and in some cases, possible or desirable outcomes and how these may be achieved;
 - (vi) to provide a non-binding case appraisal. Where a Commissioner investigates the dispute and provides advice on possible or desirable outcomes and how these may be achieved;
 - (vii) to provide conferencing. The convening of meetings of the employer and employees by the Commission to take place with or without the Commissioner being present.
- (c) The process of mediation commences with preliminary discussions with the employer/s and employee/s, structured liaison between them and agreement development.

- (d) Employers and employees may elect to use our neutral meeting facilities, or a Commissioner can attend the workplace or other location agreed by them.
- (e) At the initial meeting, the Commissioner will ask questions to gather information needed to identify issues and interests to move the discussion forward. Questioning is also used to brainstorm possible outcomes and help employers and employees assess the practical implications of any given course of action. During the discussion the Commissioner will identify the matters that the employer and employees would like to discuss. By identifying issues, the Commissioner will be able to assist the parties to create an agenda for discussions.
- (f) The Commissioner will help the employer/s and employee/s to determine whether alternative courses of action are attainable and if they realistically meet their interests.
- (g) The Commissioner may take an active role, setting out options and discussing the merits of their respective positions to attempt to facilitate settlement.
 - (i) Throughout the mediation process the Commissioner may communicate and discuss the dispute privately with the employer/s, the employee/s or their representatives or advisers;
 - (ii) The Commissioner must keep confidential the content of any such communications and must not expressly or impliedly convey any knowledge or impression of the content of private communications to any other person unless specifically authorised to do so.
- (h) The Commissioner may make recommendations during the meetings and each person should seriously consider any recommendation.
- (i) If an agreement is reached, the Commissioner can assist with recording it in writing.

Conciliation

This follows the same process as mediation except that the Commissioner is unlikely to communicate and discuss the dispute privately in case the Commissioner is going to arbitrate the dispute if there is no agreement.

In such circumstances the Commissioner is likely to disclose to both parties in general terms what has been privately discussed with the other party so that if the matter is arbitrated by the Commissioner neither party has an advantage over the other. Both will have a clear understanding of all issues that are, or may be, in contention or are of importance to the other. More importantly each is aware of what has been disclosed to the Commissioner by the other.

Alternatively, if it is agreed that private communications should not be disclosed and if a person is of the view that the Commissioner acting as the conciliator should not arbitrate the

dispute, the employer/s and employee/s could agree to request the Chief Commissioner to provide another Commissioner to arbitrate the dispute and the Commission will endeavour to comply with the request.

Similarly, a Commissioner might not consider and appraise the dispute unless it is agreed that in the event that conciliation fails another Commissioner will arbitrate.

Arbitration

1. Formal Arbitration

This is where the employer/s and employee/s present argument and evidence formally to a Commissioner, who will then make a binding determination based on that argument and evidence.

Some issues that may arise include:

(a) Evidence

It is usually agreed that in making a decision the Commissioner is to have regard to equity, good conscience and the substantial merits of the case; is not bound by the rules of evidence; and must act without regard to technicalities and legal forms. It can be agreed that the Commissioner is to apply the rules of evidence although this does not usually occur.

(b) Duty of the Commission

Although it may not be necessary to say so, it can be specified that the Commissioner shall be independent of, and act fairly and impartially between the employer/s and employee/s, giving each of them a reasonable opportunity of putting forward their case and of answering the case of the other; and providing a reasonable opportunity to be heard on the procedure to be adopted by the Commissioner.

The employer/s and employee/s may also wish to provide in their [written referral agreement](#) that it is a function of the Commissioner to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay and expense, so as to provide an expeditious, cost-effective and fair means of determining the matters in dispute.

(c) Witnesses

The employer/s and employee/s may wish to confer a power on the Commissioner to require witnesses to give evidence on oath.

(d) Remedies

The employer/s and employee/s may wish to specify that the Commissioner is to have specific functions in respect of remedies such as the Commission may

make a declaration setting out entitlements that are payable, or that certain action by one person should cease, or that a person should carry out certain steps.

Alternatively, the Commissioner may be given a broad discretion to arbitrate and make any orders or make any declaration as the Commissioner thinks fit, including hearing and determining any counter-claim or set-off, making any orders for a payment of a sum of money, making an order in the nature of specific performance of a contractual or other obligation that the Commissioner finds should bind a person or order a person to do, or to refrain from doing something.

2. Final Offer Arbitration

This is an alternative kind of arbitration where the employer/s and employee/s exchange written final offers to resolve the dispute. If the dispute remains unresolved, the Commissioner, after hearing evidence and submissions (as necessary), will select one of the final written offers according to what it believes to be the most reasonable basis on which to resolve the dispute. The Commissioner will not amend or otherwise qualify the written offer selected.

3. Informal Arbitration

This is where the employer/s and employee/s puts informally to the Commissioner the material they each rely upon and agree to accept the Commissioner's recommendation as a binding resolution of the dispute.

Remedy or other relief under Division 2 of Part II of the *Industrial Relations Act 1979*

Employers and employees may ask the Commission to provide other remedies or give other relief as set out under Division 2 of Part II of the *Industrial Relations Act 1979*. Some of these remedies or other relief are:

- (a) Dismissing or refraining from hearing a matter if the circumstances warrant such action under [s27](#).
- (b) Following arbitration, making an order that an employee has been harshly, oppressively or unfairly dismissed and making an order for relief under [s23A](#).
- (c) Following arbitration making an order or declaration under [s34](#).

Deciding any other issue or question arising in the employment dispute

If the referral agreement states that the Commissioner may decide any other issue or question arising in the employment dispute, the Commissioner may decide issues or questions that, if looked at in isolation from the employment dispute, would not constitute an industrial matter. For example, as part of an employment dispute there may be a dispute about damage to goods provided to an employee by an employer on loan after the employee's employment came to an end.