

B: SOME EXAMPLES OF DISPUTE RESOLUTION CLAUSES FOR REFERRAL AGREEMENTS

Contents

Description.....	1
Mediation only.....	1
Conciliation	1
Arbitration	3

Description

The role that you want the Commissioner to have will be set out in the referral agreement. It may be appropriate to draft the terms of the referral widely so as to give flexibility to how the dispute is to be resolved. For example, if arbitration is to be included it may be appropriate not to define the type of arbitration in the referral agreement so as to enable the parties to choose it at the time of the referral.

Mediation only

If only mediation will be required the following clauses may be appropriate.

- A. *This referral agreement is made between [set out the names and addresses of each employer and employee].*
- B. *This referral agreement comes into force on [specify date] and remains in force until [specify a date no later than three years after the date on which the agreement is to come into force].*
- C. *Where an employment dispute occurs in respect of a matter under this referral agreement and it is unable to be resolved at a workplace level and all persons have undertaken the agreed steps within this referral agreement to resolve the dispute, **(steps to be taken should be set out in another clause)** the matter may be referred to the Western Australian Industrial Relations Commission ("the WAIRC") by the employer or an employee for mediation of the employment dispute.*

OR

- C. *The parties agree that in relation to any employment dispute that arises between them which they have not been able to resolve, they will seek the assistance of the Western Australian Industrial Relations Commission ("the*

WAIRC") to resolve the matter by either the employer or an employee referring the matter for mediation or conciliation.

- D. *Employment dispute in this referral agreement means any question, dispute or difficulty that arises out of or in the course of employment, and includes any industrial matter. Industrial matter has the meaning given to it in s 7 of the Industrial Relations Act 1979.*
- E. *It is agreed that the Commission may make recommendations and that each person will properly consider any recommendation made by the Commission.*
- F. *The parties agree that:*
 - (a) *Throughout the mediation process, the Commissioner providing the mediation service may at his or her own unfettered discretion, communicate and discuss the dispute privately with any of the parties or their representatives or advisers;*
 - (b) *The Commissioner will not disclose 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 party unless specifically authorised to do so.*
- G. *The parties agree that if agreement is reached to settle the matter they will consider whether to request the Commission to register the agreement under s 18 of the Employment Dispute Resolution Act 2008.*

If you agree that persons may be represented add:

- H. *In mediation proceedings a person or persons may be represented by [specify the title of persons who may act as a representative, such as an industrial agent, a spokesperson nominated by a group of employees or employers, union delegate or union official etc].*

If it is intended to allow for the option of arbitration and of having a different Commissioner arbitrate this may be added:

- I. *Where no agreement is reached, the employer or an employee may make a request to the Chief Commissioner to provide another member of the Commission to arbitrate the dispute and the Chief Commissioner will take steps to grant the request.*

Conciliation

Same as above except that F.(b) could read as follows:

- (b) *Except if agreed otherwise during conciliation the Commissioner will disclose the substance of any such communications to the other party.*

Arbitration

The following can be included if it is agreed a Commissioner may arbitrate:

- I. *It is agreed that if an agreement is not reached to resolve the employment dispute following conciliation or mediation, the employer or an employee may refer the dispute to the WAIRC for arbitration. On dispute being notified to it for arbitration, the WAIRC may exercise such powers and functions as agreed at the time are appropriate.*

The following is more prescriptive:

- I. (a) *Where a matter has been referred to the WAIRC in accordance with the terms of this referral agreement, the parties agree that the WAIRC may exercise any of its relevant statutory powers under the Industrial Relations Act 1979 (WA), the Employment Dispute Resolution Act 2008 (WA) or s740 of the Fair Work Act 2009 (Cth) which are necessary to make the arbitration effective, including its powers:*
 - (i) *of arbitration, including its powers of conciliation or mediation during arbitration;*
 - (ii) *which are procedural, in relation to hearings, witnesses, production of documents, evidence and submissions;*
 - (iii) *to make a determination, order or declaration to determine the matter ("a decision").*
- (b) *In making a decision the parties agree that the WAIRC 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.*

If the employer or an employee also wish to allow any other issue or question arising in the employment dispute to also be referred they could provide in the referral agreement:

- J. *The parties also agree that any other issue or question arising in the employment dispute may be referred by either party to the WAIRC for arbitration.*

An order or declaration will not be binding unless the employer and employees agree that it is. The following clauses can be used:

- K. *The parties agree that any decision made by the WAIRC will bind them. Once the decision is delivered to the parties, the parties shall implement the decision forthwith or within such other time as may be specified by the WAIRC.*

OR (if they wish to have a right of appeal)

- K. (a) *Subject to either party exercising a right of appeal to the Full Bench of the WAIRC the parties agree that any decision made by the WAIRC*

will bind the parties and once the decision is delivered the decision shall be implemented forthwith or within such other time as may be specified by the WAIRC.

- (b) Any appeal must be filed in the WAIRC within the time prescribed by s 49 of the Industrial Relations Act.*
- (c) Where an appeal is made, the parties agree that any party to this referral agreement may apply to the President of the WAIRC within 21 days of the decision being made, for a stay of the decision. The parties agree that the President may exercise the statutory power to stay the decision that is conferred on the President under s 49 of the Industrial Relations Act.*
- (d) In hearing and determining the appeal the parties agree that the Full Bench of the WAIRC may exercise all of its statutory powers under s 49 of the Industrial Relations Act and any regulations made under the Industrial Relations Act that apply to Full Bench appeals or practice directions that apply to Full Bench appeals.*