

ADR in Pension Law Dispute Resolution – Quo Vadis? The art of the con- artist

Midnight
in the
garden of good and evil

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thanks to Karin MacKenzie)

1. INTRODUCTION

- 2000 PLA Conference at Spier
- 2001: Article by Prof John Murphy in the Journal of Pensions Management, on Dispute Resolution
 - Similarities with Office of Pensions Ombudsman in the UK
 - He proposed a one-stop Pension Complaints Tribunal
- Supported by a separate, internal mediation service
- Nothing came of this



2. UK MODEL

- Generally adjudicative in nature, but
- Effective pre-screening/gate-keeping process
- Ad hoc “mediation” (in effect advisory awards)
- At the determination stage, “rule nisi” type determinations issued



3. THE AUSTRALIAN MODEL

- S27 of the Governing Act:
 - The Tribunal must inquire into the complaint and try to settle it by conciliation.
 - Notice to parties to attend
- s28:
 - If a complainant fails to attend, complaint deemed to be withdrawn
 - If others fail to attend – they commit an offence punishable by up to 6 months imprisonment



4. AUSTRALIAN CONCILIATION PROCESS

- Conciliation conducted by phone, CCTV or otherwise
- Confidentiality and without prejudice nature of the process



5. OBSERVATIONS ON THE AUSTRALIAN PROCESS

- Overall structure is different to ours
 - Dealt with by fulltime professional staff of the Tribunal not involved in the determination (review) process which is conducted by a panel of part-time professionals;
- Consequences of this are two-fold:
 - a) expert knowledge and skills in the area
 - b) strong “bamboo curtain” between conciliators and deciders



AUSTRALIAN INTERNAL PROCESS

- Conciliators put files and material together for the deciders;
 - On the plus side – efficiency
 - On the downside – suspicion and perception of bias



AUSTRALIAN MODEL – PRE-SCREENING/GATE-KEEPING

- There is a port of entry barrier, but an invitation to the complainant to persuade that the Tribunal has jurisdiction and should entertain the complaint.



AUSTRALIAN MODEL contd.

- A detailed explanation of the process of conciliation is provided which is extremely helpful.



AUSTRALIAN MODEL contd

- Representation at conciliation:
 - Lawyers or not?



6. ANALYSIS & DISCUSSION

- 6.1 The Australian model closely resembles the SA model of Labour Dispute Resolution (e.g. the CCMA)

- 6.2 Our law in many other spheres requires compulsory mediation or conciliation prior to adjudication (e.g. land claim disputes, Family Advocate, disputes between organs of state, competition law disputes and many others)



7. CONCLUSION & QUO VADIS

7.1 Mediation or conciliation?

→ I recommend conciliation as the preferred process



7. CONCLUSION & QUO VADIS contd

7.2 Selection of matters for referral to conciliation:

- Pre-screening/gate-keeping
 - This is essential – some examples of matters currently being referred for conciliation which should not be entertained :
- Claims for RA benefits prior to 55 years
- Claims for lump sum payments from pension/RA Fund exceeding the statutory 1/3rd limit
- Claims for benefits which the Fund can prove have been paid
- Complaints which are time-barred
- Matters which properly reside under the LTI Ombud or FAIS Ombud
- Complaints which are not cognisable by law or by the rules
- “No-brainers”



7. CONCLUSION & QUO VADIS contd

7.3 Conciliators must be familiar with pension law and must be skilled and trained in the process of conciliation;

7.4 In-house or outsourced conciliation?

- Recommend in-house, especially given the quantum of disputes and disparity of means and resources of disputing parties



7. CONCLUSION & QUO VADIS cont

7.5 Conduct of conciliation proceedings

- Follow the Australian model guided by our own indigenous experience
- Phone and video conferencing



7. CONCLUSION AND QUO VADIS cont

7.6 Representation?

Lawyers – yay or nay



7. CONCLUSION & QUO VADIS contd

7.7 Dispute of rights/interest



7. CONCLUSION & QUO VADIS contd

7.8 Should conciliation be compulsory

- Yes, with provisos



7. CONCLUSION & QUO VADIS contd

7.9 The cost of ADR

- Who is to bear this?



8. FINAL WORDS

- 8.1 The jury is out as to what the current Act allows;
- 8.2 Cure by amendment
- 8.3 Vision of the Adjudicator's office – expand to include facilitating resolution of disputes through conciliation prior to adjudication.
→ Con-arbists have a definite role to play in this area!

Thank you!

