



Western Australia

## **Employment Dispute Resolution Act 2008**

Compare between:

[11 Nov 2011, 00-c0-02] and [16 Mar 2012, 00-d0-02]



Western Australia

## **Employment Dispute Resolution Act 2008**

**An Act to establish a dispute resolution framework for employment disputes.**

The Parliament of Western Australia enacts as follows:

## Part 1 — Preliminary

### 1. Short title

This is the *Employment Dispute Resolution Act 2008*.

### 2. Commencement

This Act comes into operation as follows:

- (a) sections 1 and 2 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

### 3. Terms used in this Act

- (1) In this Act, unless the context otherwise requires —
  - Chief Commissioner** means the Chief Commissioner under the IR Act, and includes an acting Chief Commissioner;
  - commissioner** means a commissioner appointed under the IR Act and includes the Chief Commissioner, the Senior Commissioner and an acting commissioner under that Act;
  - Commonwealth workplace agreement** means a workplace agreement as defined in the Workplace Relations Act or any other agreement or arrangement prescribed under the IR Act section 113 for the purposes of this definition;
  - decision** includes an order, declaration or finding;
  - employee** has the meaning given in the IR Act section 7;
  - employer** has the meaning given in the IR Act section 7;
  - employment dispute** 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 in the IR Act section 7;
  - IR Act** means the *Industrial Relations Act 1979*;

**IR Commission** means The Western Australian Industrial Relations Commission continued and constituted under the IR Act;

**mediation** means mediation under Part 2 Division 1;

**mediation settlement agreement** means an agreement registered under section 11;

**organisation** means —

- (a) an organisation that is registered under the IR Act Part II Division 4; or
- (b) an organisation as defined in the Workplace Relations Act section 4;

**referral agreement** has the meaning given in section 12(1);

**referral proceeding** means a proceeding in relation to a referral under Part 2 Division 2;

**Workplace Relations Act** means the *Workplace Relations Act 1996* of the Commonwealth.

(2) A matter relating to —

- (a) the dismissal of an employee by an employer; or
- (b) the refusal or failure of an employer to allow an employee a benefit under the employee's contract of employment,

is and remains an employment dispute for the purposes of this Act even though the relationship as employee and employer has ended.

## **Part 2 — Dispute resolution services**

### **Division 1 — Mediation**

#### **4. Extended meaning of “employment dispute”**

In this Division —

*employment dispute* includes a potential employment dispute.

#### **5. Constitution of IR Commission**

For the purposes of this Division and despite the IR Act section 25, the IR Commission is to be constituted by as many commissioners as the Chief Commissioner sees fit to assign under the IR Act section 16.

#### **6. Mediation by IR Commission**

- (1) The IR Commission may act as mediator in an employment dispute, whether or not it is within the jurisdiction of the IR Commission under the IR Act, on a request in accordance with section 7.
- (2) The IR Commission must not act as mediator unless the IR Commission is satisfied that each of the parties involved in the employment dispute, or each of the parties that is likely to be involved in the potential employment dispute, has consented to the IR Commission acting as mediator.

#### **7. Request for mediation**

- (1) For the purposes of section 6(1), a request may be made by any of the following parties —
  - (a) an employee;
  - (b) a group of employees;
  - (c) an employer;
  - (d) a group of employers;
  - (e) an organisation of employees or employers.

- (2) The request must be made in a manner and form approved in writing by the Chief Commissioner.

**8. Representative of group**

- (1) Where a request is made by a group of employees or a group of employers, the group may be represented by a person who is appointed by the group to act on its behalf for the purposes of this Division.
- (2) The appointment must be made in a manner and form approved in writing by the Chief Commissioner.

**9. IR Commission may refuse to act or suspend or discontinue mediation**

The IR Commission may, at any time after a request has been made for the purposes of section 6(1), decide to take no action on the request, or to suspend or discontinue any mediation commenced on the request, if the IR Commission is of the opinion that —

- (a) the employment dispute that is the subject of the request should be resolved in some other manner; or
- (b) proceedings that relate to the subject matter of the employment dispute have been commenced under another law of the State or the Commonwealth; or
- (c) there is some other reasonable cause that justifies a decision not to proceed with, or to suspend or discontinue, the mediation.

**10. IR Commission's functions**

- (1) The IR Commission may take such action as is appropriate to assist the parties to resolve the employment dispute.
- (2) The IR Commission does not have power under this Division —
- (a) to compel a person to do anything; or
- (b) to arbitrate the employment dispute; or

- (c) to otherwise determine the rights or obligations of a party to the employment dispute; or
  - (d) to make a decision in relation to the employment dispute.
- (3) The IR Commission —
  - (a) must have regard to any request of a party made to the IR Commission; and
  - (b) subject to subsection (2), if the IR Commission is of the opinion that compliance with the request is practicable and consistent with resolving the employment dispute in an expeditious, convenient and informal way, must endeavour to comply with the request.
- (4) If the parties request the IR Commission to make recommendations about particular aspects of the employment dispute about which they are unable to reach agreement, the IR Commission may make recommendations about those aspects of the employment dispute.

**11. Mediation settlement agreement**

- (1) If agreement is reached between the parties or any of them in relation to the employment dispute or any aspect of the employment dispute, the IR Commission may, with the consent of the parties, register the agreement as a mediation settlement agreement.
- (2) A mediation settlement agreement is binding on the parties to the agreement and may be enforced under the IR Act as if the agreement were an industrial agreement under that Act.
- (3) A mediation settlement agreement cannot vary the operation of an existing award, order or industrial agreement under the IR Act.
- (4) Except as provided in subsection (2), the parties to a mediation settlement agreement must not make a claim under any written law in respect of an employment dispute, or an aspect of an



employment dispute, that is the subject of the mediation settlement agreement.

## **Division 2 — Resolution under referral agreement**

### **12. Referral agreements**

- (1) Two or more parties may enter into an agreement in writing (a *referral agreement*) that a particular employment dispute, or employment disputes of a particular class, between the parties may be resolved by the IR Commission.
- (2) The parties to a referral agreement may be —
  - (a) an employer or group of employers; or
  - (b) an employee or group of employees; or
  - (c) an organisation of employees; or
  - (d) an organisation of employers.
- (3) The referral agreement may specify circumstances in which an individual is entitled to act on behalf of a group of employees or group of employers.
- (4) The referral agreement may specify the functions that may be performed by the IR Commission in relation to any employment dispute or class of employment dispute to which the referral agreement relates.
- (5) Without limiting subsection (4), the functions of the IR Commission may include any of the following —
  - (a) mediating or conciliating the employment dispute;
  - (b) arbitrating the employment dispute;
  - (c) providing a remedy or other relief of the kind that may be provided under the IR Act Part II Division 2;
  - (d) deciding any other issue or question arising in the employment dispute.

- (6) A referral agreement —
  - (a) comes into force —
    - (i) if a commencement date is specified in the agreement — on that date; or
    - (ii) otherwise — on the date on which it is made;and
  - (b) remains in force until —
    - (i) if an expiry date is specified in the agreement but all the parties agree to withdraw from the agreement prior to that date — the date on which the parties agree to withdraw; or
    - (ii) if an expiry date is specified in the agreement and subparagraph (i) does not apply — that expiry date; or
    - (iii) otherwise — the third anniversary of the date on which the agreement came into force.
- (7) The expiry of a referral agreement does not affect a referral proceeding commenced under that agreement before the expiry.
- (8) A party cannot withdraw from a referral agreement without the agreement in writing of the other party or parties to the agreement.

**13. Referral to IR Commission to perform certain functions in referral agreement**

- (1) A party to a referral agreement, or a member of a group of employers or employees that is a party to a referral agreement, may refer an employment dispute to the IR Commission for the performance by the IR Commission of such functions as are specified in the referral agreement.
- (2) The referral must be in a form approved in writing by the Chief Commissioner.

- (3) A party who makes a referral can withdraw the referral at any time.

**14. Constitution of IR Commission**

- (1) For the purposes of this Division the IR Commission is to be constituted by a single commissioner.
- (2) Despite subsection (1), the IR Commission may be constituted by more than one commissioner if —
- (a) the terms of the relevant referral agreement so require; or
  - (b) the terms of the relevant referral agreement so permit and the parties to the referral so request,

and the Chief Commissioner is of the opinion that it is practicable and appropriate to so constitute the IR Commission.

- (3) The Chief Commissioner is to have regard to the terms of the referral agreement when assigning or appointing a commissioner or commissioners to constitute the IR Commission for the purposes of this Division but is not obliged to comply with those terms.

**15. IR Commission's functions**

- (1) If a referral is made under section 13(1), the IR Commission may —
- (a) perform the functions that are specified in the referral agreement, and any other functions that the parties agree may be performed by the IR Commission or that in the opinion of the IR Commission are consistent with the functions specified in the referral agreement; and
  - (b) allow the referral agreement or the referral to be amended on such terms as are agreed to by the parties; and

- (c) unless specifically excluded in the referral agreement exercise the powers set out in the IR Act section 27(1)(b), (e), (f), (h), (ha), (hb), (m) and (v).
- (2) Unless specifically excluded in the referral agreement, the IR Act sections 22B and 26(1)(a) and (b) apply in the performance of the IR Commission's functions under this Division.
- (3) The IR Commission —
  - (a) must have regard to any request of a party made to the IR Commission; and
  - (b) if the IR Commission is of the opinion that compliance with the request is practicable and consistent with resolving the employment dispute in an expeditious, convenient and informal way, must endeavour to comply with the request.

**16. IR Commission may determine scope of referral agreement**

- (1) The IR Commission may make a determination as to either or both of the following —
  - (a) the scope or operation of a referral agreement;
  - (b) the meaning of any provision of a referral agreement.
- (2) A determination under subsection (1) is binding on the parties to the referral agreement and has effect according to its terms.

**17. Representation**

A party to a referral proceeding —

- (a) may appear in person; or
- (b) if the party is a body corporate, may be represented by a director, secretary or other officer of the body corporate; or

- (c) may be represented as provided in the referral agreement or, if no provision for representation is made in the referral agreement, as the parties agree.

**18. IR Commission may register agreement in relation to dispute**

- (1) If agreement is reached between the parties or any of them in relation to the employment dispute or any aspect of the employment dispute, the IR Commission may, with the consent of the parties —
  - (a) make an order in the terms of that agreement binding on those parties that have consented to the making of the order; or
  - (b) where the nature or subject matter of the agreement does not, in the opinion of the IR Commission, require that an order in terms of the agreement be made, make, sign, and file a memorandum of the terms of the agreement.
- (2) An order made under subsection (1)(a) may vary the operation of an existing award, order or industrial agreement under the IR Act in respect of the parties referred to in subsection (1)(a).

**19. Decision, direction or determination of IR Commission may bind parties**

A decision, direction or determination of the IR Commission, other than a determination under section 16 or a decision under section 18, does not bind the parties unless the referral agreement provides for decisions, directions or determinations of the IR Commission to bind the parties.

**20. Enforcement of decisions and directions**

Subject to regulations referred to in section 31(2)(b)(ii), a decision or direction of the IR Commission given under this Division that binds the parties may be enforced under the IR Act

section 84A as if it were a decision or direction given under the IR Act section 32.

**21. IR Commission may refuse to act or suspend or discontinue referral**

The IR Commission may, at any time after a referral has been made under section 13(1), decide to take no action on the referral, or to suspend or discontinue any action on the referral, if the IR Commission is of the opinion that —

- (a) the employment dispute that is the subject of the referral should be resolved in some other manner; or
- (b) proceedings that relate to the subject matter of the referral have been commenced under another law of the State or the Commonwealth; or
- (c) there is some other reasonable cause that justifies a decision not to proceed with, or to suspend or discontinue, the referral.

**22. Appeals**

- (1) A party may not appeal against a decision of the IR Commission made pursuant to a referral under this Division unless the relevant referral agreement provides that the party may appeal against such a decision.
- (2) If a referral agreement provides that a party may appeal against a decision made pursuant to a referral under this Division, the IR Act section 49 applies as if the decision were a decision under that Act.

**23. IR Commission must publish examples of dispute resolution functions**

- (1) The IR Commission must cause examples of the functions that may be performed by the IR Commission under a referral agreement to be published on an internet website maintained by

the IR Commission or by other means approved by the Chief Commissioner.

- (2) The publication of examples of functions does not limit the functions the IR Commission may perform under a referral agreement.

### **Division 3 — Provisions that relate to mediation and referral proceedings**

#### **24. Privilege**

- (1) Evidence of —
- (a) anything said or done; or
  - (b) any communication, whether oral or written; or
  - (c) any admission made,
- in the course of, or for the purpose of, attempting to settle an employment dispute by mediation or a referral proceeding is to be taken to be in confidence and is not admissible in any proceedings before any court, tribunal or body unless subsection (4) applies.
- (2) Each of the following —
- (a) a document prepared in the course of, or for the purpose of, mediation or a referral proceeding;
  - (b) a copy of such a document;
  - (c) evidence of such a document,
- is to be taken to be subject to a duty of confidence and is not admissible in any proceedings before any court, tribunal or body unless subsection (4) applies.
- (3) Subsections (1) and (2) do not apply to a proceeding to enforce a decision or direction of the IR Commission or a mediation settlement agreement.

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- (4) Evidence or a document referred to in subsection (1) or (2) is admissible in proceedings if —
- (a) the parties to the mediation or referral proceeding consent to the admission of the evidence or document; or
  - (b) there is a dispute in the proceedings as to whether the parties to the mediation or referral proceeding entered into a binding agreement settling all or any of their differences and the evidence or document is relevant to that dispute.

**25. Privacy**

- (1) Mediation or a referral proceeding must be held in private and the IR Commission may give directions as to persons who may be present during the mediation or referral proceeding.
- (2) The IR Commission may direct that —
- (a) evidence given before the IR Commission in mediation or a referral proceeding; or
  - (b) matters contained in documents lodged with the IR Commission or received in evidence by the IR Commission in mediation or a referral proceeding,
- must not be published or disclosed, or must not be published or disclosed except in the manner or to the persons specified by order by the IR Commission.
- (3) Subject to regulations referred to in section 31(2)(b)(ii), a direction or order given under this section may be enforced under the IR Act section 84A as if it were a direction or order given under the IR Act section 32.



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**Division 4 — Resolution under Commonwealth workplace agreement or model dispute resolution process**

**26. Terms used in this Division**

In this Division —

*dispute settlement procedures* has the meaning given in the Workplace Relations Act section 353;

*model dispute resolution process* means the model dispute resolution process set out in the Workplace Relations Act Part 13 Division 2.

**27. Application for IR Commission to conduct dispute resolution process**

(1) A party to an employment dispute may apply to the IR Commission to have a dispute resolution process conducted by the IR Commission in relation to the employment dispute if the parties to the employment dispute —

(a) are bound by a Commonwealth workplace agreement; and

(b) either of the following applies —

(i) the Commonwealth workplace agreement authorises, permits or provides for the IR Commission, or a member of the IR Commission, to conduct a dispute resolution process under dispute settlement procedures set out in the agreement;

(ii) no dispute settlement procedures are set out in the Commonwealth workplace agreement and the parties to the employment dispute agree to have a model dispute resolution process conducted by the IR Commission.

(2) A party to an employment dispute may apply to the IR Commission to have a model dispute resolution process

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conducted by the IR Commission in relation to the employment dispute if —

- (a) the employment dispute is a dispute to which the model dispute resolution process applies under the Workplace Relations Act; and
- (b) the parties to the employment dispute agree to have the model dispute resolution process conducted by the IR Commission.

**28. Constitution of IR Commission**

- (1) For the purposes of this Division the IR Commission is to be constituted by a single commissioner.
- (2) Despite subsection (1), the IR Commission may be constituted by more than one commissioner if —
  - (a) the terms of the relevant Commonwealth workplace agreement so require; or
  - (b) the terms of the relevant Commonwealth workplace agreement so permit and the parties to the agreement so request,

and the Chief Commissioner is of the opinion that it is practicable and appropriate to so constitute the IR Commission.

- (3) The Chief Commissioner is to have regard to the terms of the Commonwealth workplace agreement when assigning or appointing a commissioner or commissioners to constitute the IR Commission for the purposes of this Division but is not obliged to comply with those terms.

**29. IR Commission's functions**

- (1) On an application under section 27 in relation to an employment dispute, the IR Commission has and may exercise such functions with respect to the resolution of the dispute as are conferred or imposed on it under —
  - (a) the Commonwealth workplace agreement concerned or the model dispute resolution process, as the case may be; and
  - (b) the Workplace Relations Act.
- (2) The Workplace Relations Act sections 714, 715 and 716 apply to a dispute resolution process conducted under this Division.

### **Part 3 — Miscellaneous**

#### **30. Application of IR Act**

- (1) The functions conferred on the IR Commission under this Act are in addition to, and do not derogate from, any function of the IR Commission under the IR Act or any other written law.
- (2) The IR Act sections 3, 16, 16A and 17 apply to and in relation to this Act as if a reference in those sections to “this Act” included a reference to this Act.

#### **31. Regulations**

- (1) Regulations may be made under the IR Act section 113 prescribing any matter that is required or permitted by this Act to be prescribed by the regulations, or that is necessary or convenient to be prescribed for giving effect to the purposes of this Act.
- (2) Without limiting subsection (1), regulations may be made under the IR Act —
  - (a) regulating the practice and procedure to be followed in relation to any matter under this Act; and
  - (b) providing for or with respect to the application of the provisions of the IR Act (with any modifications that are prescribed) to —
    - (i) the performance of functions conferred or imposed on the IR Commission under this Act; and
    - (ii) the enforcement of directions and decisions of the IR Commission under this Act that are binding on parties.

### Notes

<sup>1</sup> This is a compilation of the *Employment Dispute Resolution Act 2008* and includes the amendments made by the other written laws referred to in the following table <sup>1a</sup>.

#### Compilation table

Short title	Number and year	Assent	Commencement
<i>Employment Dispute Resolution Act 2008</i>	18 of 2008	19 May 2008	s. 1 and 2: 19 May 2008 (see s. 2(a)); Act other than s. 1 and 2: 1 Dec 2008 (see s. 2(b) and <i>Gazette</i> 28 Nov 2008 p. 5029)

<sup>1a</sup> On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.

#### Provisions that have not come into operation

Short title	Number and year	Assent	Commencement
<i>Industrial Legislation Amendment Act 2011 Pt. 5</i> <sup>2</sup>	53 of 2011	11 Nov 2011	<del>To be proclaimed</del> <a href="#">1 Apr 2012</a> (see s. 2(b)) and <i>Gazette</i> <a href="#">16 Mar 2012 p. 1246</a> )

<sup>2</sup> On the date as at which this compilation was prepared, the *Industrial Legislation Amendment Act 2011 Pt. 5* had not come into operation. It reads as follows:

### **Part 5 — *Employment Dispute Resolution Act 2008* amended**

**51. Act amended**

This Part amends the *Employment Dispute Resolution Act 2008*.

**52. Section 3 amended**

(1) In section 3(1) delete the definitions of:

***Commonwealth workplace agreement***

***Workplace Relations Act***

(2) In section 3(1) insert in alphabetical order:

**Commonwealth enterprise agreement** means an enterprise agreement as defined in the *Fair Work Act 2009* (Commonwealth) or any other agreement or arrangement prescribed under the IR Act section 113 for the purposes of this definition;

- (3) In section 3(1) in the definition of **organisation** delete paragraph (b) and insert:
- (b) an organisation registered under the *Fair Work (Registered Organisations) Act 2009* (Commonwealth);
- (4) In section 3(1) in the definition of **referral proceeding** delete “Division 2;” and insert:

Division 2.

**53. Section 26 deleted**

Delete section 26.

**54. Section 27 replaced**

Delete section 27 and insert:

**27. Application for IR Commission to conduct dispute resolution process**

A party to an employment dispute may apply to the IR Commission to have a dispute resolution process conducted by the IR Commission in relation to the employment dispute if —

- (a) the parties to the employment dispute are bound by a Commonwealth enterprise agreement; and
- (b) the Commonwealth enterprise agreement authorises, permits or provides for the IR Commission, or a member of the IR Commission, to conduct a dispute resolution process under dispute settlement procedures set out in the agreement.

**55. Section 28 amended**

In section 28(2) and (3) delete “workplace” (each occurrence) and insert:

enterprise

**56. Section 29 amended**

- (1) Delete section 29(1)(a) and (b) and insert:
  - (a) the Commonwealth enterprise agreement concerned; and
  - (b) the *Fair Work Act 2009* (Commonwealth).
- (2) Delete section 29(2) and insert:
  - (2) The *Fair Work Act 2009* (Commonwealth) section 740 applies to a dispute resolution process conducted under this Division.

**57. Section 31 amended**

In section 31(1) after “may be made” insert:

by the Chief Commissioner