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Mediation as a term of employment – a relationship bridge or road-block?

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Contemporary work arrangements sometimes expressly provide for mediation as a grievance or dispute resolution term. The effectiveness of such provisions is sometimes lost in the drafting. In Australia, mediation as a dispute resolution option is not commonly seen in employment contracts.

As a general proposition, there are competing views as to whether specifying a mediation process as a term of an individual employment contract or collective employment agreement is good human resource or sensible labour relations risk management practice.

One view is that inserting a mediator as an intermediary in the employer/employee relationship is an unnecessary interference in the personal service nature of employment. Insisting on mediation terms as specified in individual employment contracts or collective labour instruments could also potentially be used as a road-block to frustrate or injunct proposed investigative, disciplinary, dismissal or other reputational or business protective action.

A competing view is that the employment relationship is, by necessity, built on trust and confidence, and mediation is a proven effective way of bridging deteriorating workplace relationships and restoring and industrial relations peace.

With careful drafting, flexibly adapted mediation provisions can be designed to suit individual employment contracts and collective enterprise agreements in a way that can offer robust alternative grievance and dispute resolution opportunities. Apart from traditional human facilitated mediation, options may even include the appropriate use of artificial intelligence or other technology assisted mediation to take a triaged approach to dispute resolution.

This paper will explore some of the legal and ethical arguments for and against mediation as a term of employment or by way of policy and practice. Discussion will be aided in the conference presentation with some practical case examples, and participants will also be invited to share their views live during the presentation by using their smart phone to poll and provoke thought on the relevant issues.

Mediation as a dispute resolution term in work contracts

In Australia, some contemporary work arrangements include mediation as a dispute resolution option, but it is not as common as in other jurisdictions around the world.[1]

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[1] In New Zealand, one of Australia's closest neighbours, mediation is a common and accepted way to resolve employment disputes: Grant Morris, 'Eclectism versus Purity: Mediation Styles Used in New Zealand Employment Disputes' (2015) 33(2) *Conflict Resolution Quarterly* 203, 203. In European civil law countries, EU law promotes the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings. The Mediation Directive requires European Member States to implement necessary laws in order to protect

Mediation clauses in individual employment contracts in Australia are quite rare, appearing occasionally in senior executive or specialised work contractor arrangements in certain industry sectors. It tends to be a more common collective labour law instrument term.

For example, in the public health services that operate in each State in Australia, the workforces are typically comprised of government employees and other non-employment specialist contractor arrangements. NSW Health is the largest public health system in Australia, with 228 hospitals and 114,000 staff, and 46,000 clinicians. A segment of the NSW Health clinical workforce includes visiting doctors, who are not employees, but are a special statutory class of contracted clinicians. On top of individual contract arrangements, there are industrial instruments which collectively apply to these visiting doctors in public hospitals, the terms of which include a tiered dispute resolution process.[2]

If a dispute between a visiting doctor and a hospital cannot be resolved locally within 14 days, or within such further period as agreed between the parties, the dispute is to be referred to mediation. Each party must serve upon the other the name(s) of a mediator(s). If the mediator cannot be agreed upon between the parties, then a mediator is appointed by the President of the Law Society of NSW (which is the professional body for lawyers in NSW). The mediator's fees are shared equally between the parties. The parties to the mediation may be supported by persons of the parties' choice. Where mediation fails, the parties in dispute can then take the matter to a private arbitrator.

Mediation of visiting practitioner disputes is considered to be in the reputational best interests of the professional and public health service and consistent with ensuring patient welfare and confidence in the health system.

For individual employment contracts, mediation is often reserved for senior executive employment terms where the senior employee is the public face of the business or government enterprise. An acceptance of mediation in these employment settings stems from a mutual desire to keep the risk of potentially embarrassing scandals (that may adversely impact on market confidence or public perceptions of brand, or government administrative competence) confidential and away from the publicity that often surrounds 'sensational' court litigation.

Detractors who argue for open justice and the right of shareholders and citizenry to know about corporate mismanagement or government maladministration, may not appreciate that confidential mediation is often the usual first step in alternate dispute resolution processes in the civil courts.[3]

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the confidentiality of mediation and to ensure that the limitation period for a judicial action is suspended while parties pursue mediation. *Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, (14) and Articles 5, 7 and 8.* The use of a mediation clauses in employment is quite common in Belgium. The Belgian Judicial Code provides that any contract (and therefore a contract of employment) may contain an agreement to attempt mediation before a judicial proceeding is initiated. Such an agreement is binding upon the parties to the agreement. Therefore, if one of the parties disregards this obligation, the judge is bound to suspend the proceedings upon the motion of the other party. In such cases, court proceedings are resumed as soon as one of the parties notifies the judge that the mediation procedure has been completed: *Article 1725(2), Code Judiciaire.* The Author acknowledges and greatly appreciates European law research by Ms Emilie Iafrate, Intern, Bartier Perry.

2 *Public Hospitals (Visiting Medical Officers - Fee-for Service Contracts) Determination* 2014, clause 12 and *Public Hospitals (Visiting Medical Officers – Sessional Contracts) Determination* 2014: clause 18.

3 For example, in NSW, by reason of Part 4 of the *Civil Procedure Act* 2005 (NSW) and Part 20, Div 1 of the *Uniform Civil Procedure Rules* 2005 (NSW). It has also been the accepted policy of the law to encourage the settlement of disputes, whether by negotiation, mediation or adjudication regardless of the news worthiness of the dispute: *Solution 6 Holdings Limited & Ors v Industrial Relations Commission of NSW & Ors* [2004] NSWCA 200 at [147]

How enforceable are employment agreements to mediate?

In common law countries,[4] there has been two schools of thought about whether it is possible to force parties to a contract to mediate.

As a general common law principle of contract, it is possible for parties to a contract to agree not to invoke the jurisdiction of the courts and agree that some matters courts might be able to adjudicate be instead determined by a third party or facilitated for dispute resolution by way of mediation.[5] There are however recognised limits to this principle.

First, parties to a contract cannot seek to achieve too much by using mediation as a means of totally ousting the jurisdiction of the courts. There may also be statutory protections against contracting out of certain employment regulated matters.[6]

Second, it has been thought that mediation clauses in contracts are no more than an agreement to negotiate, and as such cannot create legally binding relations because it is too uncertain to enforce.[7]

Third, courts exercising equitable jurisdiction will not order specific performance of a mediation clause, notwithstanding that it may satisfy the legal requirements necessary for the court to determine that the clause is enforceable. This is because court supervision of specific performance of the mediation clause would be untenable.[8]

A court may, however, effectively achieve enforcement of a mediation clause by default, by ordering that proceedings commenced in respect of a dispute subject to the clause be stayed or adjourned until such time as the process referred to in the clause is completed.[9]

Courts in Australia are open to encouraging parties to resolve contract disputes in accordance with agreed dispute resolution by mediation processes.

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4 In the European civil law systems the prevailing opinion is that there are two types of rights and that in certain circumstances employment disputes should not be able to be mediated: (1) Labour law disputes might arise for the protection of some minimum standards recognised as non-derogable (fundamental rights); and (2) Labour disputes might arise for the protection of any other right that the applicable law, statutorily, collectively, or individually negotiated, is recognising to the interested worker (accessory rights).

5 *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643. Scrutton LJ in *Metropolitan Tunnel and Public Works Limited v London Electric Railway Co* [1926] Ch 371 stated that "*a guiding principle on one side and a very natural and proper one, is that parties who have made a contract should keep it*." And thus if "*It was their common intention that the dispute resolution procedure be applied in the event of a dispute. It is their contract; and it should be enforced*." (para 31 - 32)

6 For example, the *Long Service Leave Act* 1955 (NSW) provides at s.7(2): *"No contract or agreement made or entered into either before or after the commencement of this Act shall operate to annul or vary or exclude any of the provisions of this Act."* In Australia, there are also statutory restrictions against negotiating out of superannuation (pension) or workers' compensation rights.

7 As Lord Denning in the UK Court of Appeal said in *Courtney & Fairbairn Limited v Tolaini Bros.(Hotels) Limited* [l975] 1WLR297 at 301: "*If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force*." Approved by the House of Lords in *Walford v Miles* [1992] 2 AC 128, which also observed in rejecting US notions that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours as enforceable was explained by Lord Ackner (at 207-208): "*The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty*."

8 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 210.

9 *State of New South Wales & 3 Ors v Banabelle Electrical Pty Limited* [2002] NSWSC 178 as cited in *The Heart Research Institute Limited and Anor v Psiron Limited* [2002] NSWSC 646 at [60]

If appropriate, courts will also usually help implement mediation as a dispute resolution option.[10]

In many of the courts and tribunals where employment and labour law disputes are commenced, mediation is an ordinary and expected part of the process.

Australian courts and tribunals routinely encourage and refer litigants in employment contract disputes, discrimination, harassment and workplace bullying matters, and even workplace law regulator compliance claims to mediation as a first step before arbitration. While it is in truth a voluntary process requiring consent of both parties, there can be some helpful judicial persuasion involved in referral of litigation to mediation first.

As one NSW Supreme Court judge noted when asked in pre-trial argument "*whether there is any utility in requiring parties, who are clearly bent on being difficult, to submit to conciliation processes?*" his Honour replied:[11]

> *"In my view initial reluctance is not necessarily fatal to a successful mediation. If the parties enter into [it] in good faith, as they all said they would, the skill of the mediator will be given full play to bring about consensus."*

What the courts have recognised is that an agreement to mediate is not forced consent, but agreed "*participation in a process from which co-operation and consent might come*."[12]

So, when parties approach courts for urgent relief, such as the enforcement of post-employment restraint provisions in an employment contract, it is still possible for the matter to be referred to mediation.

Thus, the NSW Supreme Court has been prepared to grant interlocutory injunctions to prevent employees breaching restraint of trade clauses in their employment contracts, and then referred the parties to mediation on the basis that the restraints provided "*a framework for the parties to negotiate an agreed final solution to the proceedings*."[13]

There have been cases in Australia where dispute resolution clauses in employment contracts have been mis-used by employees as a road-block to interfere with employer intentions to terminate the contract.

In the recent case of *Stapleton v City of Parramatta*,[14] the Chief Executive of a metropolitan city council applied to the Supreme Court of NSW for urgent interlocutory relief to restrain termination of his contract of employment. One of the reasons advanced for injunctive relief was that a failure by the parties to first engage the mediation clause would amount to wrongful termination. This argument was not accepted by the Court, as the employment contract expressly provided for the giving of 38 weeks' written notice or making an equivalent termination payment any time for no reason. The argument also ignored the need for the parties to both agree to participate in mediation as a voluntary process.

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10 Indeed, it a requirement of the court process that alternate dispute resolution, including by mediation, be considered as early as is reasonably practicable. For example, Rule 28.01, *Federal Court Rules 2011* (Cth).

11 *AWA Limited v Daniels* (Supreme Court NSW, unreported, 24 February, 1992) at 11, as cited by Angyal, R in 'The Enforceability of Agreements to Mediate', ACLN 34 at 36.

12 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 206.

13 *UP Australia Pty Ltd v McDonald & Anor* [2018] NSWSC 218 at [67].

14 *Stapleton v City of Parramatta Council* [2019] NSWSC 123 at [19]-[20], in which the Author represented the city council.

In other cases, it has been accepted that mediation as a contracted dispute resolution term may be the only sensible and appropriate solution to try to resolve complex workplace management disputes.[15]

It has also been found to be unreasonable for an employee to refuse to participate in workplace mediation on the false belief that they did not understand the substance of employer allegations and concerns before attending the mediation.[16]

Conversely, it has also been found to be procedurally unfair and a breach of a contractual provision for an employer not to follow a mediation clause in the contract of employment.[17]

Are there employment disputes where it is morally wrong to mediate?

Apart from the legal issues, there are some ethical and moral dimensions to the question whether some employment and labour law disputes should be able to be mediated.

Whether mediation is morally acceptable for employment disputes is usually not clearly defined in any legal system. It is often the result of developing community expectations of just and fair resolution of disputes as assessed in a changing environment of competing economic, political and cultural influences.

An underlying rationale supporting the notion that some employment disputes are not suitable for mediation is that some classes of employment rights ought not be 'swept under the carpet of confidentiality.'

Hence the question is sometimes posed: Is it morally right for a large corporate employer to continually use private and confidential mediation to settle sexual harassment claims caused by a serial senior executive offender? Those answering no may point to the need for transparency in knowing what risk management processes are in place to prevent harm to another sexual harassment victim and an inherent unfairness in concealing the recurring wrongs of the perpetrator who continues to cause employer risk of liability.

Is it ethical not to afford the victim of workplace sexual harassment the choice to privately and confidentially resolve a dispute by mediation, instead of enduring the ordeal of a public trial? Those answering yes may say that the collective rights of future potential sexual harassment victims are more important than the secrecy and personal wishes of the accused and individual complainant in avoiding potential damage to personal reputations and careers.

Is it ethical for a government to mediate confidentially a class action dispute concerning disability discrimination in employment? Those answering no may say that it is important for governments to operate transparently and that there is a public interest in knowing that certain members of the population are being unfairly deprived of the benefits of employment, and so public litigation (with appeal rights) is the appropriate forum to ventilate argument on a socially significant issue.

Somewhat more controversially, should a certain class of people with disabilities be entitled to use litigation as a platform for media coverage to champion their own cause? Those answering no may assert that public litigation often serves the narrow interests of the parties

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15 *Margaret Isabel McAuliffe and Director General, Department of Premier and Cabinet, on behalf of the Depart of Attorney General and Justice (Corrective Services NSW)* [2013] NSWIRComm 1015, where mediation was also an endorsed return to work process by treating medical practitioners.

16 *Hyland v Ethnic Communities Council* [2002] NSWIRComm 48 at [60].

17 *Simon Richard Lane v The Commonwealth Bank of Australia* [2000] NSWIRComm 274 at [166], [251] – [258].

in dispute only, and rarely improves the plight of others with similar but perhaps with a multiplicity of disability needs. Mediation, it could be said, is therefore less concerned with the unintended consequence of imposed legal precedent defined by a particular dispute, and is a process more amenable to constructive solutions inclusive of broader social improvement and reform.

Another argument against mediation in employment and labour law disputes is the concern that the employer will be tempted to unduly influence the process in its favour. If the employer is agreeing to fund the mediation, arrange an empanelled mediator, and has been the contractual architect of the entire process, how confident can an employee or union feel that the process is impartial and fair?

There are no easy answers to any of these questions. What is ethically or morally acceptable will depend on the circumstances of each case.

A mediator may reasonably question to what extent, if any, should he or she be imbued with the obligation to consider ethical dimensions outside the immediate personal impact of the issue in dispute between the parties in their own private and confidential mediation.

Unless the law demands public scrutiny of dispute resolution in the public interest, or there is a need to ensure the transparency of the public administration of justice (such as in matters of crime) it is generally accepted that parties are free to agree to resolve matters privately and confidentially on what-ever agreed terms best suit their needs in that process.

Hence, many mediators accept that broader ethical or moral issues outside the personal agreement to mediate is not within the province of private mediation.

Mediation is a process that requires consent of both parties. It is, in essence, an understanding respectful of a mutual desire to seek to resolve matters privately and confidentially, or as may be otherwise agreed to be disclosed, including what may be in the public interest as agreed between the parties to disclose.

Mediation is however a process that is capable of being guided by agreed ethical principles.

It is not uncommon for parties in an employment dispute to acknowledge corporate culture and values, or code of conduct principles, to be the over-arching principles with which agreed terms must be consistent.

Some organisations may also adopt religious or cultural philosophies as accepted workplace dispute resolution values.

Such ethical principles agreed by the parties to be terms of the mediation need to be clearly expressed and should not compromise a mediator's role as an impartial facilitator respectful of the agreed secrecy and process rules.

The mediation process may otherwise sensibly accept that an employer and employee may have different interpretations of simply stated 'values' or 'rights'. This difference in understanding may in fact be at the heart of the dispute. A fascinating example is now being played out in the courts in Australia.

An internationally recognised rugby union player is suing his former employer, Rugby Australia, for termination of his multi-million dollar employment contract.

Rugby Australia claims that his contract was terminated because he breached the players code of conduct by posting on social media that homosexuals, among others, would go to hell. Many corporate sponsors of Rugby Australia responded by withdrawing their sponsorship. Rugby Australia's code of conduct deals with social media obligations and expresses corporate values of diversity and inclusion similar to many large employers – such as treating all with respect and dignity regardless of their gender, gender identity, "*sexual orientation*" (sexuality), ethnicity, cultural or religious background.

The former rugby player claims that his social media 'tweet' was his personal right of religious freedom of expression, and that termination of his contract was unlawful discrimination on the grounds of his religion. He is claiming $AUD10 million in compensation for the remainder of his contract and lost commercial opportunities.

The case is listed for court hearing in early 2020, but the parties are required to undertake court appointed mediation first in December 2019.

In the face of what appears to be an overwhelming public interest in a judge determined court trial, where the sanctity of corporate culture will be pitted against sanctity of personal religious beliefs (or the presumed after-life fate of certain unrepentant fellow human beings), the Chief Judge of the Federal Court has optimistically praised the virtues and prospects of successful mediation by reportedly saying:[18]

> *"The matter of mediation is incredibly important in modern litigation."*
>
> *"We have excellent mediators, inside the court, registrars of great experience that can facilitate a mediation."*

Employment and industrial relations tensions with mediation

For employers, mediation can be an unnecessary and additional interference to managerial prerogative. That is, there is possibly a perception that agreeing to cede control to an independent third party, erodes an employer's basic right to lawfully and reasonably unilaterally direct performance of the contract, or to terminate the relationship on agreed terms. This mindset however ignores the obvious fact that by making no agreed provision for and leaving to chance that an employment contract dispute will likely proceed to litigation is the ultimate ceding of control to an external third-party adjudicator (whose imposed decision may not be desirable to any of the parties to the dispute). This foreseeable consequence is better managed up front by some carefully chosen precautionary alternate dispute provisions in the employment contract.

Even where an industrial award or enterprise agreement provides for a process of mediation, there is often employer and union resistance to engaging in mediation and a preference to fall into more traditional forms of conciliation and arbitration in the industrial tribunals.

This may be because mediation is perceived as a contractual escape-hatch, designed to avoid familiar and well-understood industrial relations dispute resolution processes where unions and employer associations have rights of appearance in specialist labour law tribunals and courts.

It is sometimes only recognised by those asked to judge employment disputes that mediation is not a labour relations road-block but a relationship bridge, and preferable means of resolving difficult workplace issues. In a bitter dispute involving two senior teachers and their

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18 ABC News, 13 August 2019, *'Israel Folau's unfair dismissal case against Rugby Australia set for trial in February'.*

school in an alleged workplace bullying claim, a Deputy President of the Fair Work Commission poignantly observed: [19]

> *"It is a sad indictment on the capacity of two education professionals and the educational institution in which they are employed, that to resolve a tense interpersonal relationship involving some mutual animus, resort must be had to this tribunal… But, that it seems is the way of things, with workplace combatants all too keen to cede to a third party the capacity to resolve conflict, which with a modest amount of goodwill, some introspection and reflection, ought be capable of resolution by the combatants themselves."*
>
> *…*
>
> *"I consider that interpersonal relationship disputes are best resolved through the efforts of the parties and perhaps assisted by some form of facilitation or mediation [that path] is much more likely to produce a lasting positive improvement in the working relationship ... than any order that I may make. The better the relationship repair, the less likely it will be that orders are necessary."*

This is an insightful recognition that mediation is not a lost cause in helping to resolve complex and tense individual employment or collective labour law disputes.

Hybrid mediation options for resolving employment disputes

There are of course many recognised approaches mediation, some better suited to workplace dispute resolution than others.

Indeed, many large employers have designed and adapted workplace specific mediation models best suited to the unique nature of their workforce and the type of employment issues and challenges which they typically face - ranging from everyday interpersonal grievances, to more serious risks of sexual harassment, bullying or other physical and psychological risks to workplace safety and well-being.[20]

Some workplace disputes may be more amenable to certain styles of mediation. Sufficiently skilled mediators can deftly move in and out of various facilitative and transformative mediation styles to optimise workplace dispute resolution outcomes.[21]

A hybrid approach to mediation is also a possible. That is, it is sometimes possible to convince parties to a workplace dispute to pause inside another dispute resolution process (whether that be a workplace investigation; or during tribunal conciliation or arbitration) and try and resolve matters differently by mediation, part way into, or as a hybrid part of, the other dispute resolution process.

This can be possible even when mediation is not contemplated as a form of dispute resolution in the individual contract of employment or in a collective industrial agreement.

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19 *Purcell v Farah (2016) 261 IR 361 at [1] and [221]* per Gostencnik DP. The Fair Work Commission in Australia is the first instance federal tribunal empowered to hear a wide range of labour law disputes, including anti-bullying claims.

20 For example, in the United States, the US Postal Service has for a long time used the REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly) approach, including to combat workplace violence. The Australian Defence Force has adopted a form of dispute resolution named Transformative Justice Australia (TJA), using interest-based mediation techniques, in part arising from the incidence of workplace harassment and bullying.

21 L Boulle, *Mediation: Principles, Process, Practices* (LexisNexis Butterworths, 2nd ed, 2005) 43, n.49 43-48.

For example, it has been the experience of the author that what could have been a costly and time-consuming workplace investigation process is truncated or avoided entirely,[22] by the parties agreeing to mediate issues first. This is done on the understanding that if mediation is not successful within a specified time frame a formal workplace investigation will still need to be completed. Success in mediation with this hybrid approach is often motivated by the mutual desire to avoid the creation of investigation evidence which could be detrimental to the interests of parties in court litigation.

In complex industrial disputes, a hybrid mediation process may also more quickly resolve identified issues for early resolution. This is seen as better than leaving such issues to the risk of the uncertain forensic and adversarial process in arbitration. Where parties can identify core industrial dispute issues for immediate resolution, the parties then only need suffer the time and expense of preparing evidence and written submissions for testing in arbitration on those issues left unresolved (if any) after mediation.

It may also be possible to minimise or avoid litigation costs if the parties agree to a further hybrid process - where an industrial tribunal member consents to using conciliation powers only on issues left unresolved by mediation, but not by way of tested evidence. Often the concern about not being able to prove or disprove on available evidence industrial issues sufficiently motivates the parties reason to seek resolution of all issues in mediation, rather than running the risk of an uncertain or undesirable outcome in arbitration.

Essential ingredients of employment dispute mediation clauses

The guiding principle of any effective mediation provision is that it must be clearly drafted and unambiguous.

Mediation as a dispute resolution process offers greater flexibility than what may be available by way of court or tribunal arbitration. So, without the inadequacies of limited legal remedies, it need not prescribe precise resolution options. A mutually acceptable solution can better left to the creativity of the parties in mediation.

However, a corporate or government employer or union party may need to ensure that any party mediated outcomes are still subject to final approval by governance or audit oversight processes as a pre-condition of final settlement.

Parties are generally free to specify how mediation should take place, where and when. It is also possible for parties to a contract governed by Australian law to incorporate, as terms of the contract, provisions of another system of law as potentially guiding the process.[23] Despite these freedoms, it may still be sensible to limit options.

For instance, a suitable place for mediation of a workplace dispute may not be within the local work area, but for practical convenience, it should not be too far away either. Also, the choice of venue and costs associated with it may need to be subject to reasonable limits. While it may be considered by the parties that first class air travel to Tahiti all expenses paid mediation is most conducive of a positive outcome, such an extravagant process may not pass scrutiny of a public administrator or company board expenditure committee with expectations of mediation being a cost effective and time efficient dispute resolution process.

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22 Provided that there is no legal obligation to investigate, or it is legally possible to defer investigation briefly to mediate a limited scope of matters not essential in any statutory or collective agreement mandated investigation process.

23 Although such terms must be sufficiently certain as to what is being incorporated as contract terms: *In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)* [2017] NSWSC 823 at [30].

A reason why mediation clauses may not be popular in Australian employment contracts is perhaps because the employment relationship is already highly regulated by State and Commonwealth laws. While there are ample laws that can theoretically provide relief for a wide range of disputes in Australia,[24] the legal process that must be followed can be time consuming and prescriptive. Remedies available are limited, and often unsatisfactory and disproportionate to the expense involved in obtaining the remedy or defending the legal action (as costs are not generally recoverable).

Some care though should be taken to tailor the mediation process to be suitably adapted for resolving employment disputes, and to recognise that ultimately parties may still have resort to employment and labour law tribunals on discrete issues. Copying a standard dispute resolution clause from a commercial contract into an employment contract will unlikely achieve these goals and will likely invite a host of unfortunate or unintended consequences.

It may also be necessary to consider whether the special nature of the employment relationship involves adapting mediation to suit industry custom or industry practice.

In one interesting case, involving an employment dispute between a Rabbi and his Synagogue, wrongful dismissal was found to occur when administrators of the Synagogue failed to first follow the usages, customs, practices and traditions of Judaism as the contract was "*defined in accordance with Halacha*". Defining the employment contract this way meant that the Rabbi was employed with a life tenure (Hazakah). Despite redundancy of his position, the contract was found only to be lawfully terminable if a judge of the Din Torah determined that the Rabbi had fundamentally failed to perform his duties.[25]

Despite the broad flexibility of process available in mediation, it is often desirable to specify some certainty on minimum standards. This might involve reference to standards as recognised by a mediation peak body or industry accepted mediation rules.[26] This will help guard against perceptions of party bias and may well improve the certainty in reliability and quality of the process.

Timeframes to mediate workplace disputes should be kept reasonably tight. A time uncertain mediation process is unlikely to be agreeable to both parties, especially if an employee has limited time to commence a legal process, or if an employer has shareholder or government stakeholder expectations of expeditious resolution.

Confidentiality and privacy are understood hallmarks of mediation. Even if the parties do not specifically agree, the law often affords some protection from matters disclosed in mediation being used in evidence in later court proceedings.[27] Although mediation usually expressly imposes obligations of confidentiality, some leeway should be drafted to enable a degree of high level reporting of the outcome of mediation to satisfy board or risk management obligations or perhaps to give acknowledgement of the likely disclosure of aspects of the agreed outcome to the immediate family of an individual employee. Mediation may also need to be expressly subject to mandatory reporting laws or audit obligations.

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24 The *Fair Work Act* 2009 (Cth) provides for a wide range of potential relief against many employment disputes including for example, unfair dismissal but limited to up to 6 months' pay; and workplace bullying but with no monetary remedy.

25 In the matter of *South Head & District Synagogue (Sydney) (Administrators appointed)* [2017] NSWSC 823.

26 For example, the Resolution Institute in Australia publishes Mediation Rules. The Supreme Court of NSW publishes a Practice Note (SC Gen 6) on Mediation.

27 For example, s.131 *Evidence Act* 1995 (NSW) provides that evidence is not to be adduced of: (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute, or (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

It is generally not possible for parties in mediation to agree absolutely to keep confidential or secret matters that either party may be obliged by law to disclose. Great care needs to be taken in drafting so that mediation does not create an unreasonable expectation of it being a complete veil of secrecy. To help overcome such expectations or concerns, it may be necessary for parties not sure of their rights or privileges, to first obtain their own separate legal advice on the limits of confidentiality.

A process of mediation should contemplate what happens if full resolution is not achieved by mediation. This may be particularly important when substantial agreement is reached on most issues in dispute, but where some seemingly 'minor' issues remain unresolved.

It may also be necessary to decide if the mediation clause should permit the entire dispute to be litigated in the courts, regardless of some partial resolution of issues in mediation. This may involve considering if it is appropriate to further restrict the parties from going to court on certain issues, especially if such issues could more appropriately be determined by expert determination, private arbitration or some other 'med/arb' dispute resolution process.

Future mediation options to overcome employment relationship concerns?

Reluctance to include mediation as an employment contract dispute resolution option may stem from uncertain feelings parties have about the true power dynamic in the relationship of employment.

Similar to family disputes, employment relationship disputes often involve, at least for the employee, a high degree of financial dependence and personal pride. For the employer there may be hierarchical organisational rigidities and restrictions in place with little delegated power to implement accommodations or adjustments to keep a working relationship viable.

Similar to large commercial disputes, collective demands of an entire workforce may put at risk an entire corporate or government values system or even the financial viability of a business if not resolved expeditiously. The emotional and economic stakes can be high, and misconceptions of an apparently unstructured and uncertain process of agreement making may stymie preparedness to fully engage in specialised workplace mediation processes.

Parties may reluctantly resort to accepted traditional forms of mediation, framed around familiar or commercial mediation models, without consideration to its suitability for employment and labour law disputes.

It is surprising that employment mediations tend not to look at different mediation models. It could be that most employment disputes are managed by human resource professionals, who are familiar and comfortable with face to face mediations facilitated by human mediators in person. This process, in the vast majority of workplace disputes, may well be the most appropriate and effective form of mediation. In other situations it could be counter-productive.

There is scope to look to alternative mediation options involving existing or emerging technologies.

Considering the extent technology already permeates the modern workplace, there may be a diminishing resistance to offering a technology focussed mediation option to help resolve a workplace dispute.

There appears to be technological options capable of building employer, employee and union confidence in new mediation options.

Technology could analyse the best triaged approach for complex workplace disputes.[28]

More than just enabling a remotely located mediator to facilitate a workplace dispute online or by video, employee, union and employer parties could be convinced to agree to have certain aspects of a workplace dispute facilitated by a human to technology interface.

Options to agree could be inferred from artificial intelligence algorithms.

An online mediator could well enhance confidence in an unbiased outcome, by verifying the machine objectivity of a suggested resolution and passing it through a non-human logic system to generate mediation options for human participants to consider.

Complex financial outcomes (as is typical in collective agreement disputes) could be better managed in real-time by parties viewing calculation modelling as different settlement scenarios are offered and counter-offered during mediated negotiations.

It is not inconceivable that emotionally distraught employee complainants, medically certified as unfit to participate in any process involving the alleged workplace bully or harasser, could more comfortably interact (online from their home or other location) with a non-human facilitator. The emotionally distressed and confused manager may find solace in knowing that an artificially intelligent mediation system is not passing any moral judgment on them as a human professional or in the face of another manager of their employer.

A hybrid approach to mediating certain non-human relationship issues in dispute may be better left to a non-human mediation system. Such systems are commonly used to resolve online shopping and high-volume commercial transactions, without too much concern by those submitting to the process because it offers an impartial, quick and cost-effective outcome.

A corporate employer intent on the best commercial outcome, may be more comfortable submitting to a big data analytics mediation engine, designed to optimise the best commercial outcomes derived from a myriad of complex workplace dispute resolution scenarios.

Thus, it seems that there is tremendous opportunity for future technology-based mediation options to co-exist and enhance traditional mediation models.

Mediation as a relationship bridge, not road-block, employment contract term

Mediation as a term of employment can be better promoted and better utilised as a relationship building bridge, not a road-block, for successful and innovative workplace dispute resolution.

Although mediation as a term of the employment contract tends to be more the exception than the norm, there is judicial recognition that mediation is an effective tool to help resolve interpersonal relationship issues that often manifest in employment.

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28 For example, a triaged approach is recommended as preferable to an investigation, or allowing the matter to fester and result in bullying litigation, as suggested by Murphy and Sourdin, 'Skilled Mediators and Workplace Bullying', (2019) 29 *Australian Dispute Resolution Journal* 146 at 148-151

Courts actively encourage parties in dispute to adjourn and mediate first and litigate, if need be, later.

Courts and tribunals are also prepared to uphold as enforceable employment agreements to follow a mediation process first before permitting the court process to follow.

Other than large sophisticated employers, that may have specialised mediation systems adapted as a consequence of painful lessons learnt from past workplace disputes, most employers though seem to be reluctant to embrace mediation as an early dispute resolution mechanism very adept at protecting against reputational risk. Yet those same employers are prepared to cede automatic control of any unresolved workplace dispute, including in highly embarrassing corporate or government scandals, to a third-party adjudicator.

The contract of employment is merely an agreed list of mutually acceptable expectations of the future course of an employment relationship. Despite some philosophical, ethical or moral concerns about the appropriateness of mediation in certain employment relationship scenarios, the practical experience for employers and employees in dispute is mediation. Rather than carefully draft mutually acceptable circumstances where mediation would be acceptable, parties tend to fall into mediation as a consequence of an adversarial process rather than as agreed precursor to litigation. Mediation as a term of employment can better manage, at the formation of the employment relationship, legitimate expectations of resolving workplace conflict by the parties, rather than leave it as a matter of uncertain consequence.

As workplaces become more and more reliant on the interface of human workers and technology, there appears to be a bright future for technology augmented mediation processes.

Human frailties that may discourage parties from traditional approaches to mediation may be overcome or outsourced to more objective and impartial technological processes. This in turn may address some of the perceptions of employer bias or imbalance of power inherent in the relationship of employment.

It is indeed an exciting time for the future of mediation as a more effective workplace dispute resolution option.

Academics and practitioners alike can actively promote the suitability and effectiveness of mediation as a proven means of bridging differences of opinion and fostering more reliable and lasting workplace and industrial harmony and peace.