

CHAPTER 10

Dispute Resolution in the Workplace

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INTRODUCTION

[10.05] Dispute resolution in the workplace covers a range of conflicts, processes and regulatory frameworks. Broadly speaking, there are two main categories of conflicts affecting organisations: internal conflicts, between employees and between employees and management; and external conflicts, between the organisation and/or its representatives and outsiders such as clients, customers, contractors or regulatory bodies. This chapter will focus on the first category, conflict within the workplace.

Conflict is prevalent within workplaces, and recent research has demonstrated that managing conflict is a time-consuming and costly exercise for organisations and their managers. The types of conflicts that might arise within an organisation include: conflicts between employees (based on differences in personality, work styles, goals, etc); conflicts between an employee and a manager about performance issues; and conflicts between groups of employees (perhaps represented by a union) and management about working conditions and pay. Particular types of workplace conflict might include issues of bullying and harassment, discrimination, and unfair dismissal, as well as more minor conflicts between employees around day-to-day workplace activities and personality differences.

CONFLICT IN THE WORKPLACE

[10.10] In May 2008, two simultaneous research projects were carried out about conflict in the workplace in nine different countries around Europe and the Americas. Over 5000 full-time employees and 660 employers (mostly HR professionals and practitioners) participated. The findings demonstrate the prevalence of conflict in organisations, the time and cost of employees attempting to manage or resolve conflict, and various typical outcomes of conflict in the workplace.

Fight, Flight or Face It

[10.15] OPP and the Chartered Institute of Personnel and Development, "Fight, Flight or Face It? Celebrating the Effective Management of Conflict at Work" (July 2008), http://www opp eu com/sitcollectiondocuments/pdfs/fight_flight_or_face_it pdf (accessed 16 January 2014) p 4.

Our study found that the majority of employees (85%) have to deal with conflict to some degree and 29% do so "always" or "frequently". In Germany this latter figure jumps to 56%, while employees in Ireland (37%) and the US (36%) also spend a significant amount of time managing disputes.

The level at which most conflict is observed is between entry-level/front-line roles (cited by 34% of respondents), but conflict also exists at the most senior levels: one in eight employees (12%) say that disagreements among their senior team are frequent or continual.

The primary causes of workplace conflict are seen as personality clashes and warring egos (49%), followed by stress (34%) and heavy workloads (33%). Culture also plays a part in the perception of causes: as Brazilian workers are more likely to see a clash of values as a major cause of conflict (24%). In France, 36% of employees saw a lack of honesty as a key factor, compared with a global average of 26%.

Unsurprisingly, poorly managed conflicts have a cost attached to them: the average employee spends 2.1 hours a week dealing with conflict. For the UK alone, that translates to 370 million working days lost every year as a result of conflict in the workplace. One in six (16%) say a recent dispute escalated in duration and/or intensity, only 11% of those surveyed have never experienced a disagreement that escalated.

Fight, Flight or Face It cont.

Various negative outcomes arise from conflicts.

27% of employees have seen conflict lead to personal attacks, and 25% have seen it result in sickness or absence. Indeed, nearly one in ten (9%) even saw it lead to a project failure. 41% of employees think older people handle conflict most effectively, so life experience evidently helps people become more effective. The skill of leaders in this regard is the key determinant, however. Seven out of ten employees (70%) see managing conflict as a “very” or “critically” important leadership skill, while 54% of employees think managers could better handle disputes by addressing underlying tensions before things go wrong.

However, there is an evident discrepancy between how well managers think they handle conflict and how well they actually do: a third of managers (31%) think they handle disagreements well, but only 22% of non-managers agree. Furthermore, nearly half of non-managers (43%) think their bosses don’t deal with conflict as well as they should, compared to only 23% of managers who share this view.

Training is the biggest driver for high-quality outcomes from conflict. Less than half (44%) of all those questioned have received training in how to manage workplace conflict. This figure rises to 60% in Brazil and 57% in the US. Moreover, 72% of Belgian workers and 73% of those in France have had none.

Where training does exist, it adds value: over 95% of people receiving training as part of leadership development or on formal external courses say that it helped them in some way. A quarter (27%) say it made them more comfortable and confident in managing disputes and 58% of those who have been trained say they now look for win-win outcomes from conflict.

85% of people change the way they approach conflict over the course of their working lives; they become more proactive and take it less personally as a result of experience.

Among all employees, 76% have seen conflict lead to a positive outcome, such as better understanding of others (41%) or a better solution to a workplace problem (29%). This figure rises to 84% and 81% in Brazil and the US, respectively – the countries where training is most common. Belgium and France, where employees experience the least training, also have the lowest incidence of positive outcomes. This shows a clear link between training in conflict management and conflict’s impact as a catalyst for positive change.



[10.20] In organisations in which employees are members of a union, workplace conflict may be managed by union representatives acting on behalf of members (individually or as a collective). Unionised workplaces also have particular kinds of conflicts and conflict resolution processes that are regulated by industrial relations laws. These two types of conflicts are introduced in [10.25].

Conflict Management for Managers

[10.25] S Raines, *Conflict Management for Managers: Resolving Workplace, Client and Policy Disputes* (Jossey-Bass, San Francisco, 2013) p 200.

Unionized environments hold the potential for two distinct types of conflict and collaboration. First, unionized organizations have the same types of conflicts seen elsewhere: claims of wrongful termination, unfair treatment, harassment, workplace safety concerns, discrimination, intrateam disputes, personality conflicts, and so forth. Second, unionized workplaces include organized and highly ritualized forms of negotiations between labor unions and company leaders, called collective bargaining, which is a process of negotiation between employers and the employees’ representatives

Conflict Management for Managers cont.

aimed at reaching agreements that regulate working conditions and pay. A collective bargaining agreement is the agreement reached between an employees' union and the company outlining the terms of employment. This agreement covers the initial contract between a group of employees and company leaders as well as periodic renegotiation of that contract. In each of these separate arenas, various forms of ADR have been used successfully to reduce antagonism and improve collaborative outcomes.



[10.30] In the following article, Katz and Flynn consider the changes in workplace environments in modern times and how these changes are impacting on conflict and its resolution in the workplace. They also emphasise organisational culture and leadership as fundamental factors in workplace conflict.

Understanding Conflict Management Systems and Strategies in the Workplace

[10.35] N Katz and L Flynn, "Understanding Conflict Management Systems and Strategies in the Workplace: A Pilot Study" (2012) 30(4) *Conflict Resolution Quarterly* 393 at 396-399.

Work and Conflict: Yesterday and Today

To provide a context for the study, we provide a brief review of the literature, which lends evidence to the belief that workplace conflict is a significant variable in workplace productivity, effectiveness, and overall success.

Scholarship on workplace conflict has experienced several transformations. While early twentieth-century classical organizational theorists such as Max Weber and Henri Fayol viewed organizational conflict as unpleasant, hostile, and senseless (Alghamdi 2011), most scholars today recognize the inevitability of workplace conflict, defined as "members engaging in activities that are incompatible with those of colleagues within their network, members of other collectivities, or unaffiliated individuals who utilize the services or products of the organization" (Roloff 1987, 19). Moreover, contemporary theorists, including Taylor (1992), and Rahim (2001), Lam (2005), Wilmot and Hocker (2007), and Ritzer (2008), not only admit the inevitability of conflict as a natural occurrence in organizational life but also argue that conflict can serve a positive function in the workplace environment.

The human relations and interactionist perspective places the emphasis on how conflicts are managed as the critical element in determining if they have a negative or positive effect on the workplace environment. Conflict management "involves designing effective strategies to minimize the dysfunctions of conflict and enhancing the constructive functions of conflict in order to enhance the learning and effectiveness of an organization" (Rahim 2001, 76) and developing macrolevel strategies to lower dysfunctional conflict and improve functional conflict (Ozkalp, Sungur, and Ozdemir 2009). Functional conflict flows from the skillful management of substantive disagreements between organizational members, resulting in stronger group performance through better understanding of different perspectives and solutions. Dysfunctional or affective conflict "emerges as a strain or breakdown in interpersonal relationships leading to hurt feelings and emotions of anger and betrayal, and takes its toll on group and organizational loyalty, performance, satisfaction and commitment" (Jehn 1995; Rahim 2001, 2002; Wang, Jing, and Klossek 2007; Alghamdi 2011).

Today's organizations deal with high levels of workplace conflict resulting from differences in human relations, confusing organizational structures, competition among members and units for scarce resources, budget cuts, employee layoffs, job expansion, and global competition. Groups and

Understanding Conflict Management Systems and Strategies in the Workplace cont.

organizations experience increased interdependence among stakeholders, and more demanding and complex work assignments. These challenges [397] accelerate the need to work more often in teams and task forces and the necessity of success in networking, partnerships, and critical alliances. Demanding customers and clients, employee differences, and employee desire for more participation in decision making also heighten tensions in the workplace.

Several studies document that senior and middle-level managers and supervisors spend 21 to 42% of their time dealing with conflict as a primary party or as a third party (Thomas and Schmidt 1976; Watson and Hoff man 1996; Dana 2001). Other studies conclude that over half of supervisors' and managers' workdays are spent engaging in back-and-forth communication trying to reach agreement and collaboration among horizontal and vertical stakeholders and constituents (O'Leary and Van Slyke 2010).

Conflict and the Workplace

Ample evidence exists that workplace conflict that is not handled well has heavy direct and indirect costs for employers, employees, and organizational effectiveness and efficiency. Research notes that more performance problems result from strained relationships than from deficits in skills or motivation. Dana's (2001) exit interview data document that 50% or more of voluntary resignations relate directly to unresolved conflict and show that "conflict is a decisive factor in at least 90% of involuntary terminations excluding cases of staff reduction due to downsizing, mergers and restructuring" (22). Additional studies more specifically document the psychological effects of unmanaged conflict due to hostile work environments (Bloom 2006). As organizations become conscious of costs and bottom-line calculations, attention must be directed to conflict management systems and strategies. Dana (2001) proclaims, "The means by which organizations manage conflict might very well be one of the most significant factors they currently face in regards to costs, efficiency, effectiveness and employee retention" (see <http://www.mediationworks.com>).

Organizational conflict is experienced at all organizational levels and results from many procedural and personnel issues (Hovtupo, Assokere, Abdul-Azeez, and Ajemunighbohun 2010). Data on the causes of conflict range from the obvious – lack of resources, poor communication, competition, power abuses, and salary/rewards comparisons and dissatisfaction – to less obvious causes such as ambiguous reporting lines and unclear expectations, extreme behavior regulation, and subtle cultural differences (Arops and Beye 1997; Hovtupo et al. 2010). In summary, scholars note three key elements influencing conflict manifestations: [398]

- Power – the capability and the means to accomplish things
- Organization demands – differing expectations of work duties, quality, and speed
- Worth – self-esteem and other emotional needs

Each of these is highly relational and interdependent, affecting the kinds and intensity of conflict in work settings (Arops and Beye 1997).

The Role of Culture and Leadership

Although a comprehensive exploration of the relationship of leadership style, organizational culture, and conflict management systems and strategies is beyond the scope of this article and the pilot study, a brief acknowledgment of their importance in workplace conflict procedures and practices is necessary.

Organizational culture is key to influencing conflict management systems and strategies. Several studies make a compelling case that organizational culture is one of the most important variables in organizational success. *Organizational culture* is defined as "a pattern of shared basic assumptions – invented, discovered or developed by a given group as it learns to cope with its work of external

Understanding Conflict Management Systems and Strategies in the Workplace cont.

adaptation and internal integration that has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think and feel in relation to those problems" (Schein 2010, 18). Since culture is a "shared set of values, beliefs, norms, attitudes, behavior and social structures that define reality and guide everyday interactions" (Ford 2001, 2), its impact on the organization and its members is profound. More specifically, the overall culture affects fundamental parts of the organization, including "how the organization is structured, role expectations, how to act on the job, how to solve problems, who makes decisions under varying circumstances, job descriptions, how to think about and behave towards co-workers, and supervisory and industry norms and practices encompassing such beliefs and practices on issues of diversity, openness to feedback, and ongoing learning" (Bates et al. 1995, 1568). Indeed, the subculture of conflict is a critical dimension of the overall organizational culture.

Closely related to the role of organizational culture in influencing conflict dynamics are the critical variables of leadership style, behavior, and perception. In particular, Argyris and Schön (1974) noted the important [399] distinction between *espoused theory* and *theory in use*. Their research explores the gap between leaders' espoused theory, which is the worldview and values people give allegiance to and proclaim to others that they believe governs their behavior, and theory in use, the worldview and values implied and witnessed by their behavior that actually predict and govern their actions. The wider the gap is, the more the likelihood is of potential conflict issues between leaders and their employees.



The cost of workplace conflict

[10.40] Conflict, when it is not prevented or managed effectively, costs workplaces a significant amount of money each year. Some of these costs are direct expenses in implementing conflict management and resolution processes, but there are also costs that are more difficult to quantify, such as the diversion of managers' time to manage conflicts instead of progressing the organisation's mission and the cost of employee turnover. In [10.45] Susan Raines provides an overview of the many different costs of conflict in the workplace.

Conflict Management for Managers

[10.45] S Raines, *Conflict Management for Managers: Resolving Workplace, Client and Policy Disputes*, (Jossey-Bass, San Francisco, 2013) pp xxii-xxiv.

In organizations, "the typical manager may spend 25% of his time dealing with conflicts". The costs of conflict include the obvious expenses of legal fees and settlements but also include the costs of lost customers, employee turnover, and damage to the reputation of the organization and the brand name. Alternative dispute resolution refers to a host of processes that serve as alternatives to costly adversarial litigation, including mediation, arbitration, peer review, the use of an ombudsman, and others. According to Europe's leading ADR organization, conflicts cost British corporations more than 33 billion pounds per year (52 million US dollars). To give some perspective, if this sum were a country, it would be the fifty-seventh largest economy in the world. Of this amount, only about 22% comes from legal fees, with 78% stemming from lost business due to customer dissatisfaction. A 2008 study showed that US employees spent an average of 2.8 hours per week dealing with overt conflict, which equals about \$359 billion dollars' worth of average hourly wages. This amount equals approximately 385 million days of work. It is likely that this number is underestimated because many people do not accurately recognize or label conflict when it occurs, preferring not to acknowledge its presence. For managers, conflict takes up even more time, with one survey showing it takes about 42% of the

Conflict Management for Managers cont.

average manager's day and with *Fortune 500* executives devoting 20% of their time explicitly to litigation. Unfortunately, these statistics are not trending in a positive direction. In 2010 the EEOC reported a record high number of lawsuits (Equal Employment Opportunity Commission).

Numerous studies detail the costs of high employee turnover. Studies peg the costs of hiring and training a new employee to be between 75% and 150% of the employee's annual salary. According to the US Bureau of Labor Statistics, 23.7% of Americans voluntarily quit their job in 2006. Let's do the math for a moment: for an organization with 100 employees, with a relatively low turnover rate of 15% per year and an average salary of \$50,000, this turnover rate means costs of \$562,000 to [xxiii] \$1,125,000 every year! If that much money could be saved by mechanizing or changing a manufacturing process most managers would jump at the chance to reap this much in savings. Unlike changes to the assembly line or cutting back on technology purchases, many managers feel helpless to reduce employee turnover, improve morale, or change company culture. The good news is these can be changed and at relatively low cost.

Unfortunately, many managers view employee turnover as inevitable, like the weather – something that must be endured because it cannot be changed. Yet some organizations and some managers have realized that managing conflict is crucial to retaining employees and thriving as an organization. A growing body of research links high turnover rates to shortfalls in organizational performance and low customer satisfaction. "For example, one nationwide study of nurses at 333 hospitals showed that turnover among registered nurses accounted for 68% of the variability in per-bed operating costs. Likewise, reducing turnover rates has been shown to improve sales growth and workforce morale". ...

Organizations that have high rates of employee turnover have related problems with high levels of absenteeism, low employee commitment to the [xxiv] organization and its mission, employee tardiness, and overall low worker productivity.

It is a myth that employees leave primarily for higher paying jobs. The primary drivers of employee turnover include the relationships experienced on the job (between coworkers and between employees and managers), the work environment, the quality of communication within an organization, and job characteristics such as the opportunity to advance and develop professionally ...

Keeping employees happy is closely related to keeping customers and clients happy. Companies with high levels of employee satisfaction consistently produce high levels of customer or client satisfaction. In addition to lost productivity at work and high employee turnover, an organization's reputation and brand name suffer due to litigation over unresolved conflicts. A study in the *Journal of Financial Economics* showed that the stock value of large firms drops an average of 1% on the announcement of a lawsuit against the company whereas the stock of the plaintiff's company does not increase at all. Stock prices tend to rebound when an out-of-court settlement is announced. One percent may seem small but for the companies analyzed in this study the overall drop in stock value was equal to \$21 million.

According to the Centre for Effective Dispute Resolution (CEDR), Europe's largest dispute resolution organization, the majority of managers state they have not been adequately trained to handle the conflicts they encounter. In CEDR's survey of conflict among managers, more than one-third of managers claimed they would rather jump from a plane in a parachute for the first time than address a problem at work! The desire to avoid confronting problems results in wasted opportunities for improved performance on the part of employees and the entire company but apparently it bodes well for the parachute business.



[10.50] Evidence of the cost of conflict in an Australia context is provided by the State Services Authority's report *Developing Conflict Resilient Workplaces*.

Developing Conflict Resilient Workplaces

[10.55] State Services Authority, *Developing Conflict Resilient Workplaces: A Report for Victorian Public Sector Leaders* (State Government of Victoria, Melbourne, 2010) pp 4-5.

Analysis of data available from People Matter Surveys consistently indicates concerning levels of workplace conflict, combined with low levels of confidence in traditional, formal grievance resolution processes. The data also shows that people experiencing workplace conflict have significantly lower levels of job satisfaction and engagement.

Researchers and practitioners have long suggested that unresolved conflict is among the largest reducible cost in organisations. Estimates suggest that the average Victorian public sector stress claim is \$110,000. This is consistent with the average cost reported by the Australian Government's medical insurer, Comcare. The Australian Institute of Management (AIM) has reported that between 30 and 50% of a manager's time is spent managing workplace conflict.

The costs of unresolved conflict include:

- Individual distress: Mental and physical wellbeing, absenteeism, counter culture activities and ongoing dissatisfaction, irrespective of result.
- Broken relationships: Lost productivity ("presenteesim"), lost opportunities, declining trust and morale and increased disputation.
- Organisational resources: Case management, recruitment and retention.

As can be seen from the above the costs of this unresolved conflict are many, ranging from individual distress, to broken relationships and strained organisational resources. [5]

We know that a growing proportion of workers compensation claims are based on injuries related to stress, and much of that stress is associated with unresolved conflict. (Figure [below])

While the research does not specifically refer to the term workplace conflict, it is reasonable to assume these findings are relevant to the issue of workplace conflict. Also, while the research did not differentiate between conflict-related stressors relating to contact with clients and co-workers, there is clear evidence that workplace conflict can result in significant costs.

Figure 1: Workers compensation and stress

Research undertaken by WorkSafe Victoria has found that:

- Work-related stress is the second most common compensated illness/injury in Australia.
- Since 2001, stress related injuries have continued to make up a growing proportion of workers compensation claims (increasing year to year from 8% in 2000-01 to 10% in 2004-05).
- In Victoria, work-related stress, particularly in the public sector, has in recent times presented a growing percentage of workers compensation claims.
- Public sector workers account for a disproportionate share of work related stress (20% of claims, compared to 7% of claims by workers in other sectors).
- Roughly double the amount of compensation is paid to workers suffering from stress, compared to other injuries.
- Of 13 identified ‘key stress risks’, 2 ('bullying' and 'interpersonal relationships') were in the top 5.

Developing Conflict Resilient Workplaces cont.

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- Public sector workers account for a disproportionate share of work related stress (20% of claims, compared to 7% of claims by workers in other sectors).
- Roughly double the amount of compensation is paid to workers suffering from stress, compared to other injuries.
- Of 13 identified “key stress risks”, (“bullying” and “interpersonal relationships”) were in the top 5.

Many of the issues resulting in complaints and grievances to the Public Sector Standards Commissioner need not have escalated into unresolved conflict. Analysis suggests that many of the underlying issues could have been resolved through early intervention and informal approaches.



RESPONSES TO WORKPLACE CONFLICT

[10.60] All conflicts can be managed by dispute resolution processes that are rights based, power-based or interest-based. In the following extract, Raines explains how interests, power and rights based processes can be used in a workplace context, and makes the point that many organisations tend to use rights and power based processes, despite the fact that these are often not as beneficial in the long run.

Power, rights and interests

Conflict Management for Managers

[10.65] S Raines, *Conflict Management for Managers: Resolving Workplace, Client and Policy Disputes* (Jossey-Bass, San Francisco, 2013) pp 229-230.

Disputes can be resolved in three basic ways: through a resort to power, rights and interests. Power is the ability to assert one's preferred outcome onto others. In workplace settings power is used to resolve disputes through mechanisms such as strikes – in which the organization and the union seek to show they are more powerful than the other. Workplace violence or the threat of violence is also a way that individuals in dispute try to assert and display their power over others. Rights are established through law, union contracts or official policies. Contests over rights are often played out in the courts, the EEOC, or through union grievance arbitration. Interests ... are the needs and desires of individuals and groups. They are addressed through negotiation, mediation and other processes in which all parties seek to reach agreements that meet each other's needs without resorting to the coercion of power-based approaches or the use of an external decision maker with rights-based approaches. In terms of costs, power-based approaches tend to be the most expensive, then rights-based approaches, and finally, interest-based approaches. Interest-based approaches also hold the possibility of addressing the underlying causes of the dispute more thoroughly than the other two approaches.

Unfortunately, hierarchical organizations tend to use power and rights-based approaches to solve problems. They do so out of the perception that it is more efficient for a boss to enforce his or her decisions on subordinates than it is to learn about the needs and interests of each person and design more tailored solutions. This approach works in many cases but some will generally fall through the cracks and receive a solution or decision that just doesn't fit or is inappropriate given the specific circumstances. Research has shown that interest-based approaches are more cost effective, satisfying, long lasting and sustainable for recurring problems in ongoing relationships, such as those in workplace settings.



[10.70] Raines point, that an interests-based approach is more beneficial than a power or rights based approach, is supported by comments made by the Victorian State Services Authority (extracted at [10.75]).

Developing Conflict Resilient Workplaces

[10.75] State Services Authority, *Developing Conflict Resilient Workplaces: A Report for Victorian Public Sector Leaders* (State Government of Victoria, Melbourne, 2010) p 9.

Some organisations have found hard evidence to support the benefits of this new approach.

One organisation saved \$50,000 a month by changing its conflict management model to one that focused on alternative dispute resolution processes.

Difficult cases were addressed using conflict coaching and mediation – this resulted in cases being resolved more quickly, used fewer resources and lowered the risk of expensive litigation.

The organisation estimated a related risk reduction of \$150,000 a month. ...

An approach based solely on "rights" and formal grievances ... can create particular ways of thinking about conflict and personal responsibility:

- The "arms length" approach can easily reinforce the idea that someone else is responsible for the cause of the problem, and someone else is responsible for fixing the problem.
- Often, affected parties are not directly involved in the "resolution" process.

Developing Conflict Resilient Workplaces cont.

- Because of the focus on “rights”, underlying and systemic issues are not always addressed.

Paradoxically, this means that the current systems used in the sector are both underused and overused: *underused*, because people avoid what they perceive to be an unfair, cumbersome system that might bring negative consequences; and *overused*, because we know that unresolved conflicts are clogging the system.



[10.80] Roche and Teague, in the following article, discuss the growth of ADR processes in a workplace context, both in relation to judicial and non-judicial conflict resolution processes.

ADR in work and employment disputes

[10.85] W Roche and P Teague, “The Growing Importance of Workplace ADR” (2012) 23(3) *International Journal of Human Resource Management* 447 at 447-451.

The term ADR, as applied to the world of work, originated in the USA, where it was used to denote procedures and mechanisms for conflict resolution that provided either alternatives to litigation or resort to administrative tribunals established under statute in such areas as equal opportunities and employment discrimination. The term also came to be associated with specific sets of procedures and mechanisms in non-unionized [448] employments such as workplace mediation, fact-finding, ombudsmen, arbitration and review panels comprising managers or peer employees. These mechanisms are sometimes bundled together in integrated “conflict management systems” in which multiple forms of ADR, or the so-called “interest-based” practices, take precedence over “rights-based” fallback procedures, such as formal grievance processes.

Procedures such as these, whether made available discretely or in systems, have become more common also in unionized employments, particularly in the US public sector. Used in this sense, the term ADR was typically used to denote ways of handling conflict and disputes involving individual employees and often in the context of grievances and disputes surrounding individual employment rights.

More recently, the term has gained currency to also denote forms of dispute resolution that operate in conjunction with judicial processes. Here, again the focus has been mainly on forms of ADR concerned with individual grievances, but collective conflict and specifically disputes that arise in connection with collective bargaining also fall within the scope of this definition.

These forms of ADR, which seek to eschew or postpone formal judicial or quasi-judicial hearings, may involve judges or other court-appointed officers or external experts. Thus, a distinction is now recognized between “judicial ADR” and “non-judicial ADR” – the latter covering mechanisms of conflict resolution in the workplace, and sometimes extending to mechanisms of long vintage that fall outside the purview of legal regulation.

The term ADR is also now being applied to innovations in conflict management and resolution involving collective conflict in the workplace. Of importance here are innovations in collective bargaining and associated new dispute resolution mechanisms, such as “interest-based bargaining”, “collective mediation”, fact-finding, the early facilitation of negotiations by an independent conciliator (a practice sometimes referred to as “assisted bargaining”, brain storming and related problem-solving techniques, mediation by a party who may also be empowered to arbitrate (“med–arb”), mini-trials, proper arbitration and the proactive handling of change management. Some of these techniques may also be applied to group-based conflict in non-unionized firms, although such firms, especially of US origin, may resist recognizing conflicts as a group phenomenon in any respect and may seek to disaggregate them into individual grievances and deal with them only on that basis. Conflict

ADR in work and employment disputes cont.

management systems encompassing multiple forms of group or collective ADR are also contemplated in the literature, although less commonly than in the case of systems of this kind that address individual employment conflict.

The emergence of various forms of ADR in unionized firms aligned with collective bargaining provides a contrast not only with resort to courts but also with longstanding dispute resolution processes, based on linear, multi-step stages that commonly culminate in resort to external third-party agencies or again to the courts. ... [449]

Non-judicial and judicial conflict resolution practices

Non-judicial workplace conflict resolution practices		
	Conventional	ADR
Individual disputes	<ul style="list-style-type: none"> • Multi-step grievance & disciplinary procedures with provision for outside arbitration (grievances) following an impasse • Resort to Employment Tribunals & litigation in courts 	<ul style="list-style-type: none"> • Open-door policies • "Speak-up" & related systems • Ombudsman • External and internal mediators • Review panels of managers and peers • Arbitration • ADR-led conflict management systems
Collective disputes	<ul style="list-style-type: none"> • Multi-step disputes and grievances procedures, usually with provision for external conciliation and arbitration or adjudication following an impasse 	<ul style="list-style-type: none"> • "Assisted bargaining/mediation within procedure to avoid impasse" • "Brainstorming" & related techniques • "Interest-based bargaining" with facilitation • Fact-finding • Arbitration, "mini-trials" & "med-arb" • Intensive communications surrounding change management • ADR-led conflict management systems
Individual & collective disputes	<ul style="list-style-type: none"> • Resort in rights-based disputes to litigation in courts or to adjudication in quasi-judicial administrative agencies with delimited statutory jurisdictions 	<ul style="list-style-type: none"> • Pre-judicial mediation and adjudication processes or judicial and expert mediation under judicial process, with final-state resort to formal hearings by courts or administrative agencies

[The] figure represents the main conceptual domains of ADR in its current usage in the world literature.

Trends in ADR and their antecedents

Virtually, all commentaries in the literature point to a sharp rise in recent decades in the incidence of ADR practices focused on resolving individual employment grievances and disputes. Notwithstanding this, it is also commonly observed that rates of resort by employees to particular forms of ADR are modest overall. Some of the factors responsible for this trend are also well identified, in particular, an

ADR in work and employment disputes cont.

expansion in the volume of legislation conferring employment rights on people at work allied with a commensurate growth in people's determination to vindicate these rights. The result of these underlying developments has been a rise – dramatic in some countries – in the volume of cases referred to administrative and industrial tribunals and the courts, and a ratcheting up of the costs involved in the administration of tribunals and courts dealing with employment disputes. These costs fall both on states and on the litigants involved in disputes. A formalization of legal processes and a growing trend towards legal representation are widely reported. Damages awarded can also be substantial, especially in the USA ... As Colvin outlines, the "Gilmer" and "Circuit City" judgments of the US Supreme Court have significantly contributed to the growing use of non-judicial ADR by allowing employers to specify in employment contracts that workplace dispute resolution processes must be used to settle any employment disputes that may arise. Another factor behind the rise of individual employment claims and [450] disputes and the growing use of ADR is the decline in unionization and union power in workplaces. As a consequence of declining unionization, a growing number of employees may have little choice other than to pursue workplace grievances, even grievances that may essentially be collective in genesis and nature, as individual claims. In some countries, especially the UK, it is observed that the decline in unionization and collective bargaining has been associated with the transference of workplace conflict from strikes and other collective expressions of conflict to a range of individual manifestations of conflict. On the management side, the advent of human resource management (HRM) as an influential paradigm is also seen to be an important influence on the growth of ADR mechanisms of various kinds for handling individual conflict. Innovative forms of dispute resolution may indeed represent an extension into the realm of conflict management of the basic principles and postulates informing HRM policies more generally in firms. A strategy of engaging in "union substitution" also sometimes seems to be a potent influence on the use of individual forms of ADR, especially in the USA.

The advent of collective forms of ADR reflects somewhat different, even though sometimes, overlapping sets of influences. There has been a secular decline in levels of industrial conflict and especially in the volume of strike activity in many countries. Therefore, the emergence of innovative mechanisms to resolve collective conflict and disputes is not related to concerns about industrial conflict and its consequences. Collective agreements in some countries, for example, the UK and Ireland, are not generally regarded as legally binding, and so no financial penalties arise in the event of breaches of collective contracts. Even in countries where collective bargaining agreements carry legal force, sanctions or penalties have not been reported as an influence on innovations in conflict resolution. The key factor behind the growth in collective ADR is the search for speedier and more flexible forms of dispute resolution than that available through traditional dispute and grievances procedures, or through established forms of external conciliation, adjudication and arbitration. Related to this is a growing concern on the parts of employers, embraced with varying degrees of enthusiasm by unions, to foster a more co-operative climate of employment relations. This objective is seen to be well served by moving away from traditional procedures for conflict resolution, which may be viewed as an institutional expression of low trust and adversarial postures on both sides. Such developments may reflect deeper forces such as globalization and growing economic openness, new competitive priorities focused on innovation and quality enhancement and allied innovations in manufacturing technologies, service delivery and work organization. The rise of employer–union workplace partnership initiatives, reported as a significant trend in some Anglo-Saxon countries from the 1990s, has also been associated with the advent of new forms of collective ADR like interest-based bargaining, problem-solving, fact-finding and mediation. Again the growing influence of HRM may sometimes be an important underlying influence on the adoption of collective forms of ADR. Roche and Teague's research, in the case of Ireland, focuses on the impact of commitment-oriented HRM on the prevalence of ADR. In contrast, in the Japanese case, Benson's paper in this special issue sees the

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rise of new approaches to conflict management as related in part to the shift by Japanese employers towards a harder form of HRM. Some contributors also suggest that innovative forms of negotiating, such as interest-based bargaining, better reflect the work and employment [451] preferences of professional and service employees, who make up a growing section of the workforce.

The advent of innovations in collective dispute resolution at workplace level has provoked a response in some countries from state agencies responsible for providing third party dispute resolution services. New approaches to assisting disputants have emerged. Thus, the Federal Mediation and Conciliation Service in the USA can provide conventional or ADR-based facilitation in disputes, while the ACAS in the UK also provides a range of non-traditional modes of assisting the parties to disputes or involved in significant change initiatives. The Labour Relations Commission in Ireland also provides advisory services and early intervention and facilitation benefits to its clients. Changes and innovations in the role of state dispute resolution agencies may also reflect legislative changes and associated shifts in bargaining levels and arrangements ...



INTERNAL CONFLICT MANAGEMENT/RESOLUTION PROCESSES

[10.90] This section of the chapter provides an introduction to a range of dispute resolution processes used within organisations to deal with workplace conflict. Most of the processes are interest-based, however some are power- or rights-based, and some may have elements of all three approaches depending on how they are implemented. Organisations usually utilise a combination of processes and these may be part of a consciously designed interactive system (see [10.210]-[10.235] in relation to Integrated Conflict Management Systems) or as a more ad hoc combination or range of process choices.

The Fair Work Commission provides guidance as to best practice in a workplace dispute resolution process.

What are the Features of a Good Dispute Resolution Process?

[10.95] Fair Work Commission, *Effective Dispute Resolution Guide* (Commonwealth of Australia, 2013), <http://www.fairwork.gov.au/resources/best-practice-guides/pages/effective-dispute-resolution.aspx>.

A best practice dispute resolution process should:

- be simple
- allow appropriate stages so that matters can, wherever possible, be resolved at the workplace
- encourage parties to agree on a process that suits them if the dispute reaches the Fair Work Commission, and
- provide the Fair Work Commission with the necessary discretion and power to ensure settlement of the dispute if the dispute remains unresolved after the early stages of the dispute resolution procedure have been attempted.

Best practice dispute resolution outcomes should be:

- quick – the issues should be resolved quickly rather than allowing them to escalate through inaction
- fair – all relevant parties should be consulted so that all sides of the story are taken into account
- handled sensitively – disputes should, where possible and appropriate, be resolved in a confidential context in order to minimise impact on employees not affected by the dispute, and
- transparent – the procedure should be made known to every employee.

What are the Features of a Good Dispute Resolution Process? cont.

Dispute resolution procedures should not interfere with the continued operation of the business where possible. Any dispute resolution clause in an agreement, contract or policy should require that work is to continue normally during the dispute resolution process subject to any reasonable concerns about health and safety.

Generally, the FW Act does not authorise employees to stop performing work while a dispute is being resolved.

Checklist for Dispute Resolution Best Practice

Employers working at best practice will:

- ensure they have a simple, quick, fair, confidential and transparent dispute resolution procedure in place, whether it be included as part of a modern award, enterprise agreement, company policy, employment contract, or other industrial instrument
- ensure employees are made aware of the applicable dispute resolution procedures.

Where a dispute has arisen:

- work towards solving the problem and maintaining healthy working relationships
- determine which dispute resolution procedure applies
- comply with the correct procedure quickly and fairly
- use best efforts to resolve the dispute at the workplace, and
- where this is not possible, refer the dispute to an independent mediator or arbitrator such as the Fair Work Commission with the power to deal with the dispute.



[10.100] Internal conflict management and resolution processes vary in levels of formality, in relation to those who participate, and as to what outcomes are possible.

Some commonly used internal conflict management and resolution processes include: negotiation, a managerial open-door policy, performance management, peer-review, voluntary voice/collective bargaining arrangements, internal ombuds, conflict coaching, mediation, formal grievance/complaints mechanisms, and investigation/fact-finding processes. Each of these processes is introduced in the extracts that follow.

Negotiation

[10.105] Many workplace conflicts are resolved through direct negotiation between the people in conflict. Negotiations may be very informal (eg, a chat in the staff room) or more formally structured (eg, enterprise bargaining negotiations). Most conflict management policies around staff grievances or complaints have, as their first step in the process, the requirement that employees in conflict first try to resolve the matter themselves through direct communication before implementing further processes involving management.

Negotiation in the workplace can utilise power-based approaches to conflict resolution (the stronger or more senior person wins) or more interest-based approaches (where resolution aims to address everyone's needs and concerns).

Open-door policy

[10.110] An open-door policy is related to both negotiation and grievance processes, in that it provides an accessible means for an employee to raise his or her conflict issue with a senior staff member for the purpose of negotiating an outcome or making a formal grievance. In

some senses, this is more an entry pathway to a conflict resolution process rather than a process itself. In the following extract ([10.115]) Van Gramberg introduces the open-door technique and identifies some potential issues with it as a conflict resolution tool.

Managing Workplace Conflict

[10.115] B Van Gramberg, *Managing Workplace Conflict: Alternative Dispute Resolution in Australia* (Federation Press, Sydney, 2006) pp 52-53.

The open-door technique is often used as the first step in the workplace dispute resolution procedure... and is a popular management technique for grievance resolution involving a manager making [53] him or herself available at any time for an employee who wishes to raise an issue. Comprising essentially of an informal, unstructured and ad hoc form of dispute resolution the open-door policy could be argued to present a powerful symbolic gesture of access to management.

However, the policy has been criticised as simply proffering "lip service" and has been argued to be more suitable for white collar employees, who are more accustomed to dealing with management than blue collar, or lower level workers ... It has been described as inappropriate for a number of workplace disputes. For instance, this method may make the employee raising the complaint highly visible to his or her co-workers, which could act as a disincentive to raise sensitive matters such as sex discrimination claims. The method has also been criticized as potentially leading to employees feeling reluctant to confront their supervisor on their own... In particular, employees have reported reluctance to raise claims due to a fear of reprisal, especially if they are using the open-door policy to bypass their own supervisor... Often the desired outcome of a dispute is a neutral opinion and most employee disputants would probably not want the third party to be a supervisor or manager with whom they are familiar.

Problems also arise when the manager is implicated in the employee's grievance. To avoid this some organisations offer employees a "hot line" to speak anonymously to an internally employed adviser or other senior manager who listens to the problem, provides advice and even undertakes a mediation role if required. In this way the open-door model may sit well with an internal ombuds model ...

Clearly, there are limitations in the operation of the open-door policy. However, this should not detract from the fact that, with training in the role of grievance handling, particularly in the concepts of workplace justice ... the open-door policy, along with a strategy of "management by walking about", is an effective mechanism for drawing out employee grievances before they become major issues. This is because the open-door policy is flexible enough to deal with a wide range of disputes from interpersonal conflicts and disagreements (interest disputes) to more formal, rights-based disputes ... Further, performed well, the open-door policy should contribute to an employee's sense of being afforded interactional justice (the sense of fairness from being treated with dignity and respect) which has been linked with employee loyalty, job satisfaction and satisfaction with the outcome of the dispute ...



Performance management

[10.120] Performance management provides a forum for supervisors to address performance issues with staff members through the provision of feedback and improvement planning. Managed well, performance management can be a constructive way to deal with conflict between a supervisor and a staff member about appropriate behavior or levels of performance. However, when performance management is not constructive or does not occur at all, conflict between staff members and their employees can fester and escalate. Frequently, other dispute

resolution processes are implemented as a result of conflict that could have been avoided or managed more effectively had appropriate performance management been conducted earlier.

Managing Workplace Behaviour

[10.125] J Hor, *Managing Workplace Behaviour: A Best Practice Guide* (CCH, Sydney, 2012) pp 201-202.

Performance management is often a particularly difficult area for employers. Managers regularly fail to raise performance issues, or do so indirectly, such as by removing an employee from particular work to avoid unpleasant discussions. Employees who are performance managed sometimes claim that they are being bullied or that, if termination results, they have been discriminated against on a prohibited ground. To ensure the efficient operation of a business and to avoid claims of bullying or harassment from affected employees, it is essential for employers to implement performance management in accordance with "best practice" procedures and educate staff in how the system will run; setting out what behavior is and is not bullying or harassment. [202]

The key elements of an effective performance management system include the following:

- Clearly articulating the performance standards required from employees
- Communicating those standards to employees via a targeted education program
- Having an assessment procedure in place to determine if the standards are being met
- Communicating with employees in a timely manner when they are not meeting the required standards, and
- When employees fail to meet the required standards after participating in a fair performance management process, terminating their employment.

Generally, if performance feedback is given on a regular basis as part of a system and delivered in a respectful manner, it is less likely to be considered a form of harassment or bullying. Similarly, roles and responsibilities should be clearly defined, so that all staff understand what is expected of them.



Formal complaint/grievance

[10.130] Most organisations have some kind of employee complaint or grievance policy and procedure. In the following extract, Hor sets out the usual components of such policies and procedures.

Managing Workplace Behaviour

[10.135] J Hor, *Managing Workplace Behaviour: A Best Practice Guide* (CCH, Sydney, 2012) pp 122 and 204-205.

Grievance policy

Grievance policies generally set out how an organisation will deal with grievances in the workplace. All employers should have a grievance policy in place which addresses the following clauses.

Policy statement: From time to time an incident may occur that results in an employee feeling aggrieved. This policy sets out the options available to employees in this situation to try and resolve the issue and also sets out the steps that will be taken by the Company when a grievance has been raised. As not all situations are the same, the policy may need to be varied to suit the situation.

What is a grievance?: A grievance can include an issue, difficulty or complaint made by an employee relating to the workplace. A grievance may relate to an act or omission, or a particular situation or decision that a person considers to be unreasonable, unwarranted or unjust.

Managing Workplace Behaviour cont.

Confidentiality: The Company aims to address all grievances in a confidential manner. The Company will act so that only the people directly involved in resolving the grievance have access to the relevant information. However, from time to time it may be necessary to share information with other parties (such as managers and supervisors).

Grievance process: If a grievance arises, it will be dealt with in accordance with the following process. While the Company will endeavor to follow this process in all circumstances, there may be situations where it is necessary to deviate from this process depending on the specific circumstances of the matter and seriousness of the grievance.

Stage 1 (informal resolution): If a grievance arises, it is suggested that the parties to that grievance attempt to resolve the issues directly with one another. This should be done in a respectful manner and all parties are to be professional. While an informal resolution is recommended, the Company understands that this may not be appropriate in all circumstances.

Stage 2 (discussion with a manager or supervisor): If informal resolution is not successful, the employee raising the grievance is encouraged to discuss the issue with their manager or supervisor. Once a manager or supervisor is notified of an issue in accordance with this policy, the manager or supervisor must talk to all parties involved to ascertain the facts.

Stage 3 (resolution): If the parties reach a resolution, this resolution should be confirmed between the parties. If a resolution cannot be reached, the parties are to discuss whether there is any other method of resolution that can be explored.

Disciplinary action: If, as a result of the grievance process, a person is found to be in breach of the Company's policies, disciplinary action may result. Disciplinary action includes, but is not limited to, a warning, improvement program, termination of employment with notice or summary dismissal. [204]

Grievance procedure

A part of effectively dealing with issues that arise in the workplace is a grievance (or complaints) procedure. A grievance procedure is aimed at resolving disputes internally to ensure the well-being of employees, without the involvement of an external court or tribunal which could be costly and result in adverse publicity. A grievance procedure does not, however, prevent an employee from making a complaint to an external court or tribunal at any time.

In the context of workplace behavior, a grievance procedure can form part of a workplace behaviour policy or can be a stand-alone procedure.

The desirable components of a grievance procedure include:

- **Coverage:** identifying the types of grievances the procedure covers (eg discrimination, harassment)
- **Resolution:** offering a range of options for resolution, including informal and formal
- **Confidentiality:** all grievances will be treated confidentially and those employees who are aware of grievances must maintain confidentiality
- **Impartiality:** those involved in investigating and making a decision in relation to a grievance will remain impartial throughout the process and will apply the principles of natural justice
- **Timing:** the grievance will be dealt with as quickly as possible
- **Treatment of documents:** specify what documents may be collected, how they will be kept and who will have access to them
- **Disciplinary action:** if a complaint is substantiated, disciplinary action may result, such as counseling, a written warning or termination of employment
- **No victimization:** a statement that employees will not be victimized for making a complaint (regardless of against whom the complaint has been made), and

Managing Workplace Behaviour cont.

- *Consequences of making a false, frivolous or vexatious claim:* a statement that employees who make such a claim will be subject to disciplinary action, which may include the termination of their employment. [205]

Informal and formal resolution options

There are a number of options, both informal and formal, for dealing with grievances which can be offered to employees. Informal procedures tend to focus on resolution of a complaint rather than proving whether or not particular conduct occurred. Informal procedures might include the following options:

- The employee approaching the offending person themselves
- Requesting advice or assistance from the employee's supervisor or other nominated contact person, such as a human resources representative
- The employee asking their manager or other more senior person to approach the alleged offender, and
- Organizing a mediation between the relevant persons to try to resolve issues.

The informal approach is most often used when the allegations are of a less serious nature or where the person making the complaint wants to protect an ongoing working relationship with someone.

A formal complaints procedure involves following a specified process and seeks to determine whether a complaint can be substantiated. If it is substantiated, disciplinary action, such as termination of employment, may result. The components of a formal complaints procedure commonly include:

- A process for making a complaint (such as a written or oral complaint to a specified person)
- An investigation of the allegations (which should be carried out by an impartial person)
- A finding as to whether or not the alleged conduct is likely to have occurred
- A decision as to what action, if any, should be taken as a result of the finding (such as disciplinary action if the allegations are found to be substantiated), and
- Adherence to "natural justice" throughout the process...

A formal procedure is commonly used where:

- The employee chooses to utilise it, either as a first step or where informal attempts at resolution have been unsuccessful
- The allegations are of a serious nature, or
- There is a disagreement between the parties as to what occurred.



[10.140] Hor notes that, as mentioned above, the usual first stage is to direct people in conflict to try to resolve the matter themselves (ie. through direct negotiation). However, what Hor does not explicitly consider is that generally speaking, if the disputants had been able to do so, they would not need to refer to the grievance process. One step that is missing in Hor's account, but that can make a significant difference to resolving grievances in the workplace, is a stage in between Hor's stages 1 and 2 that provides for some supported conflict resolution (eg, independent conflict coaching or mediation) prior to the formal grievance process being implemented.

Conflict coaching

[10.145] Conflict coaching (also called conflict management coaching, see Chapter 5) is becoming more popular in Australian workplaces as a way to support employees to manage

their own conflict. One of the problems with a grievance process that incorporates a first stage directing employees to try to resolve their conflict themselves before lodging a formal grievance, is that if the employees had been able to resolve the conflict themselves they wouldn't need to interact with the grievances procedures. What is often lacking in between these two steps is support for employees to assist them to be able to resolve the conflict without having to make a formal grievance. Conflict coaching is a service that can address this need.

In the following extract ([10.150]), Jones and Brinkert introduce conflict coaching and how it can be used to support conflict resolution in the workplace context (as part of Organisational Dispute System Design, “ODSD”).

The Role of Conflict Coaching in Leveraging Dispute Systems

[10.150] T Jones and R Brinkert, *Conflict Coaching: Conflict Management Strategies and Skills for the Individual* (Sage Publications, Los Angeles, 2008) pp 234-242.

We suggest that conflict coaches can fulfill six functions in this regard: investigation, explanation, preparation, selection and timing of system access, reflective analysis, and future planning.

Investigation

The coach can begin by helping [the employee] investigate the current state of internal and external dispute resolution options available to her. Many organizational members are unaware of their organization's dispute resolution policies, procedures and systems (if they exist). A recent study of MBA students representing a wide variety of fields suggests that most do not [235] know about the potentials for ODSD and are wary of using the traditional HR procedures of which they are aware. ... [236]

One of the reasons that a conflict coach is potentially so helpful in the investigation function is that he or she knows about ODSD and can direct a client to seek commonly used processes and commonly developed policies.

...

Explanation

What is the difference between mediation and arbitration? What is early-neutral evaluation? What does an ombudsman do? How can fact-finding help me or hurt me? If you've worked with clients in designing and using ODSD, these are questions you've heard before. Many conflict consultants are all too familiar with the general lack of information that the public has about dispute resolution and possible processes. Thus, an important role for the conflict coach is to explain ADR to the client. Essentially, the coach can provide a primer on common ADR processes by explaining the nature of the process, the advantages and [237] disadvantages of the process, and the resources (time, money, and expertise) needed to engage the process. The conflict coach can also explain how internal versus external processes work, for example, the differences between using an internal mediator and using an external mediator provided by a government agency or community mediation center. ...

Preparation

Most of us learned about the idea of a coach in the context of sports. A coach was someone who taught you skills and techniques to be used in a sporting event or contest. The coach was the person who knew which skill was most critical for a certain level of performance.

In just the same way, a conflict coach should help prepare a client to get the optimum from whatever dispute resolution process is being used.

The Role of Conflict Coaching in Leveraging Dispute Systems cont.

...

- [238] [preparing for ombudspersons]
- [239] [preparing for mediation]
- [240] [preparing for arbitration]

Selection and Timing of System Access

When the client understands the nature of the ODSD and has talked with the coach about the components of the system, the coach and client will eventually come to key questions: [241]

1. *What level of intervention (ombudsperson, mediation, arbitration, fact-finding, litigation, etc.) is most beneficial for the client at this point in the conflict? ...*
2. *At what point is it optimal for the client to engage the dispute system? ...*
3. *How can conflict coaching be best coordinated with active interventions in process through the dispute system? ...*

Reflective Analysis

As Louis Pandy (1967) noted in his famous essay on conflict, one of the most important stages of the conflict process is the conflict aftermath, in which a sophisticated conflict manager reflects on his conflict behavior and analyzes how well he managed the conflict. Reflective analysis is [242] very helpful when clients are evaluating how well they engaged and used organizational dispute systems. Conflict coaches can guide clients through reflective analysis as they complete various stages of the dispute system or after the entire experience. Reflection can lead to an assessment of better options for the future...

Future Planning

This is straightforward. The conflict coach helps the client look at possible next steps and chart a course for future action.



Mediation

[10.155] Mediation is now a commonly used form of dispute resolution in the workplace. The mediator may be someone internal to the organisation (more or less removed from the parties in dispute, depending on the size of the organisation and its policy) or an externally appointed mediator. Bennett explores some of the benefits of using mediation in workplace conflicts (at [10.160]).

The Role of Mediation

[10.160] T Bennett, "The Role of Mediation: A Critical Analysis of the Changing Nature of Dispute Resolution in the Workplace" (2012) 41(4) *Industrial Law Journal* 479 at 481-482.

Discussions with respondents revealed a number of key drivers for introducing mediation into the organisation. The perceived need to introduce a system that preempted disputes becoming more formalised was particularly significant ... Respondents in general consistently cited the potential of mediation to reduce the costs of disputes and, crucially, as a more effective means of repairing damaged relationships in the workplace. With respect to costs, this was seen in terms of time and the emotional distress of the disputants going through the formal process, which at its extreme could lead to a costly employment tribunal hearing.

606 [10.155]

The Role of Mediation cont.

The main reported causes of disputes were breakdowns in relationships, poor management and communication problems. Grievances were the predominant type of cases dealt with through the mediation services, particularly in the public sector. A key strength of mediation for all interviewees was the opportunity through facilitated questioning and discussion to change when possible the perceptions of the parties with the aim of also changing their long-term attitude and behaviour. The following contribution captures this shared conviction well:

If it is a new manager who is not experienced, you know just, "Get on with it. Get on with it" [to their staff]. You can change new behaviour fairly effectively in mediation because it allows them to realise, "You know, I didn't realise someone else took it in that way" (Mediator).

Performance management cases also figured in the process, albeit to varying degree. The most typical type of performance management case was managing a return from absence. Most interviewees reported that a supportive return to work strategy supplemented by mediation was highly effective in addressing the issues that caused the absence to originally occur. Interestingly, despite mediation's perceived utility in addressing harassment and bullying, few of the respondents reported such cases being dealt with through mediation. Rather, it was generally felt by those interviewed that the increased complexity of the cases, and "victims" greater reluctance to [482] face the "perpetrator" meant that in reality grievance and discipline procedures were seen by most as more appropriate.



Peer review

[10.165] Peer review is a relatively unusual process for workplace dispute resolution, but is sometimes incorporated into a workplace conflict management system. Van Gramberg (at [10.170]), explains how peer review works and some of its strengths and problems.

Managing Workplace Conflict: ADR in Australia

[10.170] B Van Gramberg, *Managing Workplace Conflict: Alternative Dispute Resolution in Australia* (Federation Press, Sydney, 2006) pp 54-55.

The process is triggered when a disputant believes that the workplace grievance procedure has delivered him or her an unacceptable or unfair outcome. In other words, peer review can only take place following the failure of the employee to deal with the matter with his or her immediate supervisor, or the exhaustion of the grievance procedure ...

Peer review provides an opportunity for employees to have their case heard by a panel of peers from the same workplace. The panel is generally constructed giving employee representatives a majority over management representatives, commonly with a ratio of three to two, in an effort to balance the power inequality in the employment relationship and to ensure a fairer hearing for the employee ... Employee members may be selected by ballot and managerial members are often appointed by executive management. In some cases, employees may exercise a veto over the inclusion of a particular manager and in others the employee grievant may choose at least one of the managers on the panel ... Training is a crucial component of peer review as panel members are required to maintain the confidentiality of the process and must have a sound understanding of the principles of workplace justice ...

The panel listens to the arguments and evidence presented by the disputant and by a management representative and may clarify issues by asking questions during the hearing. Each member of the panel then nominates, through secret ballot, a particular course of action to resolve the dispute. A binding decision is issued on a course of action to resolve the problem based on majority rule. Peer review has been hailed to be cost-effective because it avoids union and other third-party intervention.

Managing Workplace Conflict: ADR in Australia cont.

Further, it is said to promote enhanced levels of trust and commitment on the part of employees involved in the process both as disputants and as panel members: "these employees generally come out of the experience with a better understanding of due process, the complexity of issues facing managers and that management will deal with them in good faith" ... The use of such committees has been reported in the United States for issues including discipline, occupational health and safety, promotions, transfers and performance reviews ...

The problems associated with peer review processes are that employees are selected and trained by management and it has been argued that complainants may face a biased system from the outset ... Further, the lack of power and authority of such panels is problematic. In the first instance they usually have limited ability to change systemic processes. Thus, the resolution of a dispute arising over the implementation of a workplace policy will stop short of altering the policy as that is outside the scope of the peer review panel. Secondly, power differences may be problematic due to the choice [55] of management representatives on the panel. Thirdly, the absence of unions on many panels may result not only in power imbalances but also be indicative of an agenda to marginalize the role of unions in the workplace.



[10.175] Many larger organisations or industries now have an internal ombuds whose role is to support people in conflict to identify appropriate dispute resolution processes, to investigate grievances, and sometimes to conduct mediation or conciliation between the parties in conflict. Van Gramberg explains that the ombuds provides both rights and interest based conflict resolution.

Managing Workplace Conflict: ADR in Australia

[10.180] B Van Gramberg, *Managing Workplace Conflict: Alternative Dispute Resolution in Australia* (Federation Press, Sydney, 2006) pp 56-57.

The use of an ombuds is common across industries such as telecommunications and insurance. Based on a Swedish concept, the position of internal ombuds has developed in organisations as diverse as universities, municipal councils and large corporations in the United States... An internal ombuds is responsible for the explanation of company policies and procedures, provision of advice on alternative courses of action, investigation of claims, referral to appropriate contacts, arranging meetings and sometimes mediating the dispute. It is particularly suited to instances where disputes are complex or involve a number of parties and the facts around the matter are [57] contested. Investigation by the internal ombuds consists of a fact-finding exercise in which the investigator is given access to documentation and may interview personnel relevant to the claim ...

Because the internal ombuds operate through a complaints and investigation process, the model is said to be suitable for both "rights" and "interest" disputes which arise in the workplace ... Generally, employee committees or unions are not involved in this type of dispute handling process. The internal ombuds complaints system must be operated independently of the person responsible for the original (disputed) decision, if the system is to have the confidence and support of complainants.



Investigation/fact-finding

[10.185] Where a grievance or conflict is not resolved through informal processes, and a formal complaint is made, the next step is usually a formal investigation and fact-finding process. The investigation may be conducted by an internal or an external person, depending

on the organisational policy and the particular circumstances. In the following extract Hor suggests the essential conditions for an investigation and provides a suggested investigation process.

Internal or External Investigation

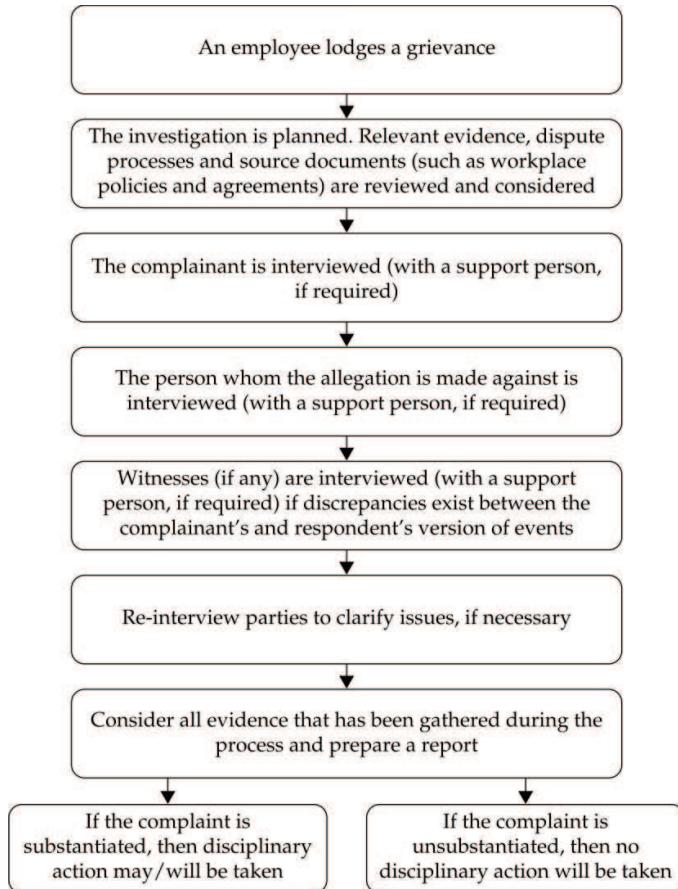
[10.190] J Hor, *Managing Workplace Behaviour: A Best Practice Guide* (CCH, Sydney, 2012) pp 206-207.

An important issue for determination is whether an investigation will be conducted internally or externally. For some organisations, such as a very small business with limited resources, an external investigation will be financially draining. In other instances, it will be appropriate to appoint an external investigator, such as when the allegations are of a serious nature or there is no employee with the necessary training and skills to conduct an investigation.

When conducting the investigation, it is essential that:

- There is no actual or perceived bias
- The investigator is clear on the scope of the task (ie whether they are simply conducting a factual investigation into whether something occurred or whether they are required to make recommendations)
- The investigator has the necessary training and skills to conduct the investigation, and
- The investigator does not have a conflict of interest, such as being the direct manager of either the complainant or the respondent.

Figure 8.1 (following) sets out a suggested investigation process.



Internal or External Investigation cont.

————— SOR —————

Conciliation /arbitration

[10.195] Conciliation or arbitration may be provided as part of an internal conflict resolution system (with either an employed or external contractor conducting the process), but these processes are mostly used through external tribunals (eg, Fair Work Australia or the Human Rights Commission) after a formal complaint has been lodged. External conciliation and other related processes are discussed in more detail later in this chapter.

Voluntary voice/collective bargaining

[10.200] Voluntary voice or collective bargaining processes facilitate conflict between employers and groups of employees. These are processes, such as consultative committees that are voluntarily engaged in by all concerned (as compared with mandatory processes required through industrial relations legislation, discussed later in the chapter).

Managing Workplace Conflict: ADR in Australia

[10.205] B Van Gramberg, *Managing Workplace Conflict: Alternative Dispute Resolution in Australia* (Federation Press, Sydney, 2006) p 55.

Voluntary voice systems of dispute resolution include collective bargaining and non-union grievance systems. These can be differentiated from mandated voice systems which include formal mechanisms for co-determination (usually between employers and unions), and the use of legislated protection for employees and industrial tribunals ...

The best-known example of voluntary voice is the system of collective bargaining where unionized employees bargain with management over terms and conditions of work or over workplace disputes. The voluntary nature of the process arises from the choice of employees to be represented by a union. Formal dispute resolution procedures in such a system allow employees to file complaints or challenge management decisions over matters covered by the collective agreement. Such dispute procedures have been said to decrease employee turnover and enhance firm performance by signaling problem areas to management for action and monitoring ... In Australia a large number of disputes are resolved through voluntary voice mechanisms, normally in the form of the workplace consultative committee handling matters of dispute arising from the terms of the enterprise agreement ...



Dispute Systems Design/Integrated Conflict Management Systems

[10.210] With such a range of conflict management and resolution processes available to organisations, it is important that, where multiple processes are to be used, the relationship and pathways between the processes is clear for all concerned. The concept of Dispute Systems Design (DSD) refers to the purposeful arrangement of all dispute resolution processes within an organisation, as explained by Raines in the extract below ([10.215]).

Conflict Management for Managers

[10.215] S Raines, *Conflict Management for Managers: Resolving Workplace, Client and Policy Disputes*, (Jossey-Bass, San Francisco, 2013) p 227.

The term *dispute systems design (DSD)* refers to the strategic arrangement of dispute resolution processes within an organization. Disputing systems are commonly defined for internal employment disputes or disputes with external stakeholders such as clients, customers or regulators (eg, EEOC complaints within a federal agency or environmental enforcement cases with polluters). The goal of DSD processes is to track and reduce the occurrence and costs of disputes that can reasonably be predicted to occur within an organization and between the organization and external audiences such as customers, vendors, and regulators. Instead of treating each dispute as a unique, one-time event, a DSD approach seeks to identify the sources of recurring disputes, take preventative steps to avoid such disputes when possible, and take a problem-solving approach to efficiently resolve those disputes that cannot be avoided. All organizations have dispute systems, either by design or by accident. By working to prevent and efficiently resolve disputes, organizations can enhance their reputations, improve their products and services, and reduce the costs of conflict.



[10.220] Constantino and Merchant (1996) propose six key principles of dispute system design:

1. Focus on interests
2. Provide low-cost processes to secure rights

3. Provide loop-backs to interest-based procedures
4. Learn from each dispute
5. Try low-cost processes first
6. Ensure organizational members have the skills, knowledge and resources necessary to make the system work

The State Services Authority of Victoria recommended workplaces develop and implement an integrated conflict management model, and provided some guidance for doing so in its report, extracted below.

Developing Conflict Resilient Workplaces

[10.225] State Services Authority, *Developing Conflict Resilient Workplaces: A Report for Victorian Public Sector Leaders* (State Government of Victoria, Melbourne, 2010) pp 10-12, 19.

3. Building conflict resilient workplaces

A conflict resilient workplace does not rely solely on formal dispute processes, but emphasises positive relationships and strong communication so that conflict is managed early, at the lowest possible level by the people directly involved, and with the most appropriate response.

It uses conflict management systems that integrate strong diagnosis ("what is the cause of the problem?") with appropriate decision making about the best response ("is this best managed through adjudication by a third party, or can we resolve this better through mediation, a courageous conversation or facilitation?").

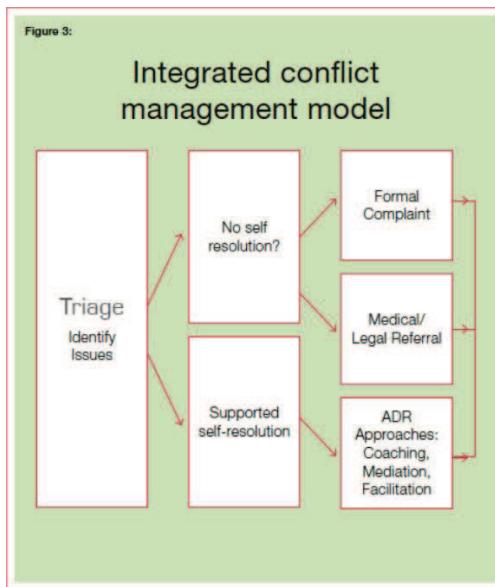
A practical and achievable first step for sector organisations is to build an integrated conflict management model.

3.1 An integrated conflict management model

Each workplace has its own cultures, processes and traditions: this means conflict management systems will inevitably look different in every organisation. However, as Figure 3 shows, an integrated conflict management model has two key features.

First, it is always underpinned with a strong intake assessment system (triage, see Figure [below]) when issues are raised. Second, it encourages alternative dispute resolution (with a strong focus on interests and needs of the people involved) approaches. [11]

[12] The model retains a place for formal grievance processes – but they are used only for specific disputes suited to formal complaints, or as a safety net.



Developing Conflict Resilient Workplaces cont.

An integrated conflict management model

- Provides early intervention through a triage or collaborative intake assessment system with multiple entry points for ease of access.
- Identifies root causes of problems in addition to symptoms, and shares this information to create change.
- Uses alternative dispute resolution methods (feedback, conversation, mediation, facilitation) that preserve workplace relationships by;
 - addressing the needs and interests of parties – not just their rights; and
 - encouraging self resolution, rather than emphasising a formal process.
- Incorporates preventative actions such as training and awareness raising.

Where does this leave formal grievance processes?

Putting resources into alternative dispute resolution models does not do away with the need for grievance structures.

For example, certain situations demand formal processes be used: allegations of criminal or serious misbehavior; situations where there is a lack of good faith and parties won't cooperate; situations where public policy, procedural or legal issues arise, or where the welfare of individuals is threatened.

There is widespread acceptance, and a legal requirement, that organisations must have fair and effective systems for handling grievances. If someone claims that a law, standard or guideline has been breached, there must be an effective and fair system to test that claim. If a grievance handling system is not perceived as procedurally fair, it will itself generate grievances, and become part of the problem.

A conflict-resilient workplace uses adjudicated grievance processes when they are necessary; but prevents conflict escalating into formal grievances when early resolution is possible. [19]

Figure [below] depicts a conflict resilient workplace...

Figure 6: The conflict resilient workplace pyramid



Developing Conflict Resilient Workplaces cont.

This diagram reflects an environment that is no longer dominated by a heavy reliance on grievance procedures. At the top of the pyramid (grievance procedures) formal processes are employed only in respect of allegations of criminal or serious misbehavior; where there is a lack of good faith; situations where public policy, procedural or legal issues arise, or where the welfare of individuals is threatened. The next stage denotes activity in an integrated model (of formal and alternative dispute resolution practices), characterised by intake assessment practices and an acknowledgment that responsibility for solving conflict is one shared between people involved (collaborative problem solving). Methods used for resolving interpersonal conflicts are ...: feedback, conversation, mediation and facilitation. Typically the focus in this area is focused on preventing things from going wrong.

The pyramid's foundation level signifies that the shift in culture is characterised by one where the dominant focus is on constructive communication (building and strengthening relationships) to help things go right.



[10.230] In the following extract, Gadlin provides a comprehensive overview of the concept of integrated conflict management systems, including their elements and the history of their development in the workplace dispute resolution field.

Bargaining in the Shadow of Management

[10.235] H Gadlin, "Bargaining in the Shadow of Management: Integrated Conflict Management Systems" in M Moffitt and R Bordone, Eds. *The Handbook of Dispute Resolution* (Jossey Bass, San Francisco, 2005) Ch 23, pp 371-378.

[371] The core idea of integrated conflict management systems (ICMS) is to apply the techniques and sensibility of interest-based negotiation to the identification, prevention, management, and resolution of conflict within organizations. In this chapter, I explore the basic concepts and practices of ICMS, trace their development from early experiments in mediating workplace grievances, explore the connections between ICMS and the changing nature of the workplace, and critically examine their role in transforming notions of workplace management in contemporary society.

The Elements of ICMS

Systems for managing organizational conflict emerged in the 1990s from the infusion of alternative dispute resolution (ADR) with the principles of organizational development. In this approach,

Bargaining in the Shadow of Management cont.

organizational policies and practices are designed to support an open and “healthy” workplace climate in which diversity flourishes and conflict is tamed. It represents a considerably more expansive orientation toward workplace management than traditional approaches, which are dominated by legal risk management and after-the-fact conflict resolution. ICMS employ a coordinated set of easily accessible organizational mechanisms to identify conflict in its earliest stages, manage it [372] carefully to prevent escalation, and resolve it efficiently to maintain positive workplace relations. In ICMS, the resolution of individual disputes is used to identify root causes of conflict and to uncover systemic problems in an organization. Collectively, the dispute resolvers have the responsibility to inform management about systemic problems so that the practices, procedures, and policies that sustain such problems can be altered appropriately.

Those working in the field agree that there are five structural characteristics of integrated conflict management systems:

- *Broad scope.* All people (managers as well as employees) within the workplace should be able to use the system to address any concern, including those for which there are not, and probably cannot be, relevant rules, policies, or laws.
- *Open culture.* The organization should welcome and support diversity of people and ideas. Difference, dissent, and disagreement are tolerated, and the organization works to resolve issues and tensions at the lowest possible level.
- *Multiple access points.* Anyone in the organization should be able to readily identify and contact a trustworthy, knowledgeable person in the organization to assist in addressing his or her concern. At least one channel within the organization should offer confidentiality to personnel.
- *Multiple options.* An organization should provide both rights-based and interest-based options for addressing grievances, complaints, conflicts, and problems. Formal and informal means for addressing issues ought to be complementary.
- *Coordinated support structures.* The various options and access points should be integrated and should feed back into the day-to-day management of the organization. Managerial practice ought to be informed by the same interest-based sensibility that infuses the mechanisms for addressing the ICMS.

In theory, integrated conflict management systems represent more than a complex approach to addressing grievances and conflicts within organizations; they are an expression of a very particular management philosophy and organizational vision. Central to this philosophy is a commitment to fairness, openness, and mutual accountability among all who work in an organization – managers and employees alike. The key design elements of ICMS are intended to assure employees and managers that they can raise issues or bring forth grievances without fear of reprisal or ostracism and with the realistic expectation that matters will be addressed fairly.

[373] Toward this end, intergrated conflict management systems require that

- Participation in the various conflict management processes is *voluntary*. Employees select which of multiple options, if any, they wish to pursue. These must include both rights-based and interest-based options, and there ought to be no penalty for selecting one over the other. All options should be equally well managed and have equal credibility among employees and managers.
- The overall system includes at least one *confidential* channel, to which people can come without fear that their identity will be disclosed and without worry that the issues they raise will be reported to others or acted on without their knowledge and permission. The intent is to create conditions in

Bargaining in the Shadow of Management cont.

which people are more likely to raise issues that might never be brought to the organization's attention otherwise. Except when there is imminent risk of serious harm, there ought to be no limits to confidentiality.

- At least one option to pursue issues involves *impartial third-party neutrals*, whether they are identified from within or outside of the organization. Most commonly ombuds, mediators, or arbitrators play this role; some systems use more than one of these. In addition, peer panels for handling grievances or early neutral evaluation processes are used to assess complaints or conflicts.
- Organizational policies, strongly supported by top management, *prohibit explicit or implicit retaliation or reprisal* for good faith participation in any of the options available in the system.

It should be noted that these four requirements of ICMS supplement one another. Policies offering protection against reprisal may help overcome reluctance to come forward, but the realities of organizational life are such that in actuality it is difficult to protect people from the various ways in which managers or peers can punish someone from coming forward with a complaint, criticism, or negative information. For this reason a confidential neutral such as an ombuds can work to identify the options within an integrated conflict management system to minimize the chances of retaliation or reprisal. Ombuds are not limited to a single mode of working with those who contact them. Depending on circumstances and the preferences of the person coming forward, the ombuds might help a person assess the organization's rights-based and interest-based options for addressing the concerns, coach a person on handling a conflict in a non-adversarial way, help the individual clarify his or her real interests, serve as an informal channel of communication among parties with a damaged relationship, or mediate or facilitate a discussion between disputing parties.

[374] The other features of ICMS differentiate them from managerial approaches that focus only on managing legal liability or resolving conflicts to save time and money. Foremost is the idea of upward feedback. In ICMS, conflicts, concerns, grievances, and complaints that are brought forward are considered a valuable source of information about the organization. They help identify workplace climate, managerial practices, policies or procedures that might be contributing to low morale, the generation of grievances, or the emergence of conflicts. All ICMS have mechanisms for gathering information (while protecting confidentiality) and reporting to management about areas in need for change. Indeed, to identify localized or pervasive sources of discontent and conflict within the organization and to make recommendations for addressing them is intrinsic to the ombuds role.

Almost as important in ICMS is the emphasis on proactive measures such as internal education to provide members with the skills, techniques, and motivation to reduce conflict and improve workplace relations.

The History and Development of ICMS

It was in the late 1950s that the idea of designing approaches for addressing conflicts and complaints within organizations began to attract attention. Writing about corporate ombuds, Isidore Silver referred to several publications on management that suggested that managerial power ought to be tempered by considerations of justice. Silver argued that adaptations of the Scandinavian ombudsman role could serve as the core of a system for addressing "the 'communications gap' which creates organizational conflict." Silver maintained that employees deserve just treatment, and those then-current corporate systems for handling complaints and conflicts were neither just nor effective. By the 1980s there were recurring discussions of effective systems for managing employee concerns, especially in nonunion environments. However, the term *justice* had disappeared from those discussions, which focused instead on effectiveness and cost savings.

In 1988, William Ury, Jeanne Brett, and Stephen Goldberg published *Getting Disputes Resolved*; its goal was succinctly stated in its subtitle, "Designing Systems to Cut the Costs of Conflict." The authors,

Bargaining in the Shadow of Management cont.

accomplished and respected practitioner-academics in the growing area of conflict resolution, synthesized the work and thoughts of disparate scholars, managers, and consultants who had been experimenting with new ways to address disputes in workplaces, organizations, schools, communities, and government agencies. At the core of their approach was the recognition that “traditional” approaches to addressing grievances, lawsuits, strikes, long-term animosities, and failed relationships were costly, inefficient, and frequently unsatisfying to the disputants. The approach [375] they offered promised to reduce the costs of conflict, to transform its destructive capacity into improved relationships among disputants, and to increase productivity and performance. Key to their approach was early identification and intervention in workplace conflicts that otherwise escalate.

For many readers, their argument made enormous sense. Organizations have an impressive capacity to generate and nurture conflicts and enmity. Anyone who has worked within large organizations knows firsthand how disputes and rivalries among peers, and complaints against management, can consume significant amounts of time and energy, undermine morale, increase stress, detract from mission, and generally render an organization dysfunctional. Ironically, the formal procedures in place for addressing conflict often make matters worse. Most organizations’ complaint or grievance mechanisms are distrusted by the very people encouraged or required to use them. Generally, formal procedures are excruciatingly slow and debilitating for those who use them. Often parties to a formal grievance or complaint procedure must continue to interact and work together even while they are set against each other, awaiting a decision on their dispute. Equally important, because many organizations have no mechanisms for addressing issues for which there are not and cannot be formal rules or regulations, people often have to squeeze their dissatisfactions into the formats required by formal processes just to voice their dissatisfaction. For example, in many federal workplaces employees routinely use the Equal Employment Opportunity (EEO) complaint procedure to address issues not even experienced as discrimination, simply because that is a way to get the complaint heard. Interestingly, some federal agencies adapted to this phenomenon by incorporating mediation programs into the EEO process. Originally REDRESS – the postal service’s mediation program – only allowed employees to get to mediation by formulating their concern as an EEO complaint even if the issues had nothing to do with discrimination.

In *Getting Disputes Resolved*, Ury, Brett and Goldberg differentiated among power, rights, and interests as bases for resolving disputes. They argued that structuring dispute resolution systems around the satisfaction of interests of the disputing parties could benefit both employees and managers more than could determinations of who is right or even assertions of power. The authors supported their framework by providing four criteria for comparing the three different bases for resolving disputes: transaction costs, satisfaction with outcomes, effects on the relationship, and recurrence of the dispute. Drawing from repeated successful experiences of dispute resolution consultants and practitioners, they illustrated the advantages of an interest-based approach by comparison with approaches based on power or rights.

It is worth noting that many case examples in *Getting Disputes Resolved* come from strikes and other bitter labor-management disputes; the authors described interventions that carefully balanced the concerns and perspectives [376] of both management and labor. However, the conceptual framework of dispute systems design is formed almost exclusively around the concerns of managers: cutting costs, enhancing productivity, and containing conflict. The subtitles from a range of books about dispute resolution in organizations tell all: “Lessons from American Corporations for Managers and Dispute Resolution Professionals,” “Designing Systems to Cut the Costs of Conflict,” “A Guide to Creating Productive and Healthy Organizations,” “Bargaining for Cooperation and Competitive Gain.” The title of Slaiceu and Hasson’s book makes the same pitch: *Controlling the Costs of Conflict: How to Design a System for Your Organization*.

Bargaining in the Shadow of Management cont.

The books that followed *Getting Disputes Resolved* expanded the scope of the interventions beyond the creation of interest-based programs for resolving conflicts. By the time of Constantino and Merchant's *Designing Conflict Management Systems*, writing in the field was geared toward showing managers how to create an organizational environment that guides people in the organization to assume cooperative stances, adopt problem-solving techniques, and take into account the motivations, needs, and interests of those within their organizations, even when they are in conflict. Like an advertisement that promises to transform a consumer from an unappealing misfit into the adored life of the party, integrated conflict management systems promise to transform the workplace from a dysfunctional cauldron of grief, strife, and competition into a benign workplace of cooperative employees and thoughtful managers. They offer a path to the utopian organization in which employees and managers translate potential strife into collaborative problem solving, in which managers welcome employee input and respond sensitively, and in which professional rivalries and interpersonal, racial and gender animosities can be brought comfortably to the surface where they are skillfully managed to maintain a harmonious workplace. Ironically, the "capitulation" to a management perspective on organizational life is obscured by the emphasis, especially in recent iterations of the ICMS ideology, on voluntary choice of options, stakeholder participation, empowerment, and confidentiality, features not emphasized in *Getting Disputes Resolved*.

Starting from the observation that traditional ways of "managing" conflict – avoidance, denial, and containment – do not actually serve the managerial needs of organizations, dispute system designers argued that the key advantage to the interest-based approach was its ability to address the motivations and interests of disputing parties. Central to such an approach is the belief that for many issues, cooperative problem solving could replace formal (rights-based) and informal (power-based) fighting as a way of resolving differences. However, dispute resolution experts and consultants soon recognised that the way grievances and conflicts are handled in an organization both reflects the culture of the organization and contributes to it. With this recognition, system design grew from the application of ADR to organizational mechanisms for addressing [377] conflict *after the fact* into an approach to addressing conflict both *before* and *after* it occurs. This approach has implications for every aspect of the way an organization is run.

Once conflict transformation was linked with the transformation of organizational cultures in the form of ICMS, the goals of dispute systems design quite naturally evolved from resolving conflict to managing and preventing conflict. Certain similarities in the dynamics of, and conditions that lead to, particular types of conflict were detected. Having identified organizational and interpersonal factors contributing to the emergence, maintenance, and escalation of conflict, many conflict resolvers quite naturally began to think about features of organizational culture that support destructive conflict. Seen from this perspective, power- and rights-based orientations reinforce competition, rivalry, and antagonism between people with differing perspectives and concerns. By comparison, an interest-based, problem-solving orientation – and the concomitant shift it induces in how one views those with whom one differs – can help transform conflict and difference into a basis for a collaborative and collegial organizational culture.

More important, once the spotlight was turned to organizational culture, more attention was directed to all aspects of organizational life not covered by policies, grievance procedures, or even interest-based mediation programs. Under ICMS, any aspect of organizational life that could give rise to tensions, differences, or conflicts should become the focus of managerial attention. Preventing conflict, or guiding it into forums that tame it and transform differences into a resource for maintaining or increasing productivity, becomes the primary goal of the system. Resolution, while necessary and important in certain conditions, comes into play only when the benevolent, therapeutic

Bargaining in the Shadow of Management cont.

embrace of the conflict managers and those they tutor fails to contain the disruptive forces within the organization. Within ICMS all systems are oriented toward identifying “the root causes of conflict and address[ing] them through systemic change.”

In 2000 a task force published design guidelines for ICMS (SPIDR). Written by leading advocates and practitioners in the field, the guidelines represent a consensus about the most important principles for ICMS. The document offers aspirations for a managerial utopia sensitively responding to the concerns of everyone in the organization. It describes a workplace that “encourages,” “fosters,” and “welcomes” “diversity,” “dissent,” and “resolution.”

At the core of these guidelines is the overarching and somewhat radical idea that conflict is inevitable and natural. And because it is natural it is manageable, and because it is manageable, conflict is welcome.

Most significantly is the idea of integration. The various components of ICMS must be carefully integrated so that they all function to manage conflict constructively, establish norms, and shape personal and professional interactions [378] within the organization. While the pioneers of dispute systems design promoted interest-based approaches as a superior alternative to power- and rights-based approaches, current ICMS advocates envision an organization in which the three approaches are smoothly integrated; formal and informal processes are coordinated and complement each other. In addition, the ICMS notion of integration means that the responsibilities of those whose domain is organizational compliance with laws and regulations must be integrated with the responsibilities of those who manage the informal, neutral dispute resolution programs.



Potential problems with internal conflict resolution

[10.240] There is much written about the potential problems of internal workplace conflict resolution processes. Issues include whether or not management use such processes for the right reason, and also the neutrality/impartiality of internal dispute resolution process facilitators. Some of these concerns are raised in the following articles.

The Rhetoric and Reality of Workplace ADR

[10.245] B Van Gramberg, “The Rhetoric and Reality of Workplace Alternative Dispute Resolution” (2006) 48 *Journal of Industrial Relations* 175 at 187-188.

Is Private ADR a Tool for Gaining Compliance with a Managerial Agenda?

The blurring of the ADR practitioner role with that of management consultancy (resulting in loss of neutrality) may arise because ADR practitioners with management backgrounds, lead the growth in private ADR. As management consultants, they may perceive the employer to be the client; identify themselves primarily as management advocates; have greater sympathy with management issues; or see future work dependent on satisfying client demands. In his study of management consultants, Williams similarly noted that “consultants are not objective, they look to please clients, attempting to secure the next piece of work”.

In turn, employers also use consultants to serve their own needs; for instance, a consultant may be used to reinforce and legitimize a managerial decision. Indeed, the hiring of a consultant is itself a management mandated intervention. As such, the consultant brings with him or her, an aura of power. The presence of an ADR practitioner in the workplace is thus symbolic of authority and, arguably, practitioners need to be aware of their symbolic role in the workplace, as their use by management may not be consistent with the goals and values of their profession. In other words, ADR

The Rhetoric and Reality of Workplace ADR cont.

practitioners may unintentionally be used as an instrument of managerial power, while giving non-managerial disputants the impression that management is actually stepping back from the decision making process. The symbolic role of the ADR practitioner in structuring the attitudes of the disputants is an area which may be amenable to future investigation by action research with the aim of informing ethical codes of practice and self-awareness of the impact of the ADR practitioner.

Is ADR a Better Tool for Achieving Dispute Settlement than for Delivering Workplace Justice?

The principle of due process is to guarantee disputants fair treatment in decision making by limiting the arbitrary actions of those with the authority to rule. The key elements in due process are, first, that there is an opportunity to participate in the process; second, that participants have a sense of control over the process; and, third, that they are treated with respect by the third party who is perceived as neutral.

The cases revealed that resolution was achieved without resort to tribunals or courts. However, the imbalance of power in the work relationships and the lack of practitioner neutrality limited the opportunity of the weaker parties to have their issues considered to an equal extent in the decision making, leading to unfavourable (and at times, unjust) outcomes for the weaker parties. In light of these findings, the suitability of private ADR for workplace disputes is an issue for future research, particularly as private mediation is already installed as the "model" grievance procedure clause for Australian Workplace Agreements (AWAs) and collective agreements.

Does Private ADR Offer the Opportunity for Both Employers and Union Representatives to Abrogate their Responsibility to Deal with the Conflict Themselves?

The cases revealed that employers and unions were able to extricate themselves from the dispute resolution process through the hiring of a consultant. Certainly, the lack of dispute resolution skills by management appears to be one of the principal reasons behind the engagement of the ADR practitioner, however another possible rationale is that an ADR practitioner affords both employers and unions the ability to abrogate their responsibilities regarding the resolution of the dispute. These two issues will now be discussed.

Many of the problems identified in the three workplaces, arose, in part, from lack of employer knowledge of Australian industrial relations. In Metals, parties relied on an external practitioner because the resident HR manager was unable to deal with the work-family interface issues and allegations of discrimination arising from the dispute over the roster change. Similarly, in EnergyCo, there were no managerial staff with experience in enterprise bargaining and so a consultant was deemed necessary. Infotainment, too, featured the inability of the project manager to deal with workplace conflict, leading to the hiring of a mediator. Arguably, these sorts of issues are not special or extraordinary in the workplace, but represent the routine conflicts of workers undergoing changed work processes. The question raised here is that if ADR is used primarily to resolve minor workplace conflicts and to facilitate enterprise bargaining, then the solution may be to provide managerial staff with skills in conflict management and knowledge of industrial relations, not private ADR.

The second issue is the lack of communication between employers and employees which resulted from the hiring of the consultant. In organizational settings, communication is normally viewed as the mutual exchange of meanings between workplace actors. Where meanings are contradictory or contested, dispute resolution techniques have a role in bringing about new, shared understandings. A common image of the role of the ADR practitioner is to provide the missing link between what is intended in communicating a message and what is interpreted by the other person. A major role of communication in ADR, once the disputants understand their roles and the nature of the process, is to create understanding of the issues in contention. The case studies demonstrated that employers avoided having to communicate with angry employees and unions. By avoiding an adversarial role in

The Rhetoric and Reality of Workplace ADR cont.

the process, they ceded responsibility for dispute resolution to the ADR practitioner. It is arguable that the combination of a lack of industrial relations knowledge and conflict resolution skills combined with a reluctance to deal with negative emotions provided sufficient impetus to engage an external consultant.



Managing Neutrality and Impartiality in Workplace Conflict Resolution

[10.250] B Van Gramberg and J Teicher, "Managing Neutrality and Impartiality in Workplace Conflict Resolution: The Dilemma of the HR Manager" (2006) 44(2) *Asia Pacific Journal of Human Resources* 197 at 197-208.

The interface between conflict management and ethics in organisations occurs in a web of power relations, organisational structures and amidst the (often) conflicting objectives of organisational competitiveness and workplace justice. Human resource management (HRM) policies and practices have been pivotal in managing this interface. Key to the role of HR managers is the management of conflict and the delivery of justice in workplace decision-making which is often performed through a workplace dispute resolution procedure.

We argue that ethical decision-making to resolve conflict is challenged by the inherent nature of HRM and further exacerbated by the *Workplace Relations Amendment (Work Choices) Act 2005* (the Work Choices Act). First, we note that in an environment driven by the need for efficiency, HR managers are expected to perform a range of roles, particularly that of "strategic partner" which can be at odds with that of the "employee champion" role. Second, as representatives of the firm's interests, HR managers cannot be considered neutral mediators of conflicts between workers. It is timely to raise these concerns given the changes to industrial relations legislation which, arguably, shift the balance of power further towards employers than has previously been the case. At the same time, the changes will remove certain dispute resolution powers from the federal industrial tribunal and this will place greater pressure on HR managers to resolve conflict within the workplace. In light of these changes, we argue that the notion of an HR manager being a third party neutral in dispute resolution is problematic from the point of view of workplace justice and that a more ethical stance might entail the exercise of impartiality informed by an ethical code. ...

While well-structured dispute resolution procedures are vital to the delivery of workplace justice, a key component of due process is the role of a neutral third person or decision-maker (Hunter, Ingleby and Johnstone 1995). In order to afford the disputants a fair process, a third party must also be independent of the disputants. In practice this means that the third party (perhaps acting as a mediator or arbitrator) should not pursue the objectives of one side over the other. Given that many disputes are processed through a workplace dispute resolution procedure culminate with the HR manager, the issue of neutrality in grievance resolution is one which deserves exploration.



Workplace justice and the concept of neutrality and impartiality

Achieving workplace justice is a key interest and need of employees. It is argued that by entering an employment relationship, workers have ceded authority to their managers and they are aware that decisions made by those in power may be exploitative or underpinned by ulterior motives. Employees deal with this dilemma by measuring decisions against their own principles of fairness. Decisions which pass their "fairness" test are more likely to be accepted and, consequently, the decision-makers more likely to be obeyed in the future.

Individuals use the principles of balance and correctness, which are elements of both equity theory and social comparison processes, to determine if a decision or action is fair or unfair. For any particular event, an individual will compare his or her ratio of input and outcomes to another's ratio of input and outcomes. This represents the overall balance of the action. The principle of correctness assumes that individuals compare decisions to internal standards of right and wrong, consistency, accuracy, or morality. Generally, these principles are applied at three levels of analysis: outcomes (for instance, a wage rise), procedures (for instance, the nature of the bargaining process), and systems (the organisational context in which the procedures are based and outcomes distributed). In order to be regarded as just, all three levels must be evaluated by employees as fair. These common elements of a fair decision broadly align with the hallmarks of distributive and interactional justice. Procedural justice focuses on the means or process, distributive justice focuses on the ends or outcomes, while interactional justice, is concerned with the level of respect and dignity afforded the disputants. ...

Workplace justice is complicated by the fact that technical and economic considerations are typically the overriding determinants of management decision-making along with the pressure to deliver profits to shareholders. This places managers in an invidious situation in which there are likely to be limitations on the interpretation and operationalisation of corporate concepts such as ethical codes or workplace justice. At the same time, to adhere to the principles of workplace justice is to ensure that corporate goals do not override individual liberties or human needs. Key to delivering workplace justice is the HR manager acting as a neutral arbiter of workplace disputes. This raises the question of what neutrality and impartiality entail and whether either can be achieved by the firm's representative. ...

We argue that, with the increasing emphasis on the HR role as a "strategic partner", the HR manager is intrinsically a representative of the firm rather than a neutral arbiter of disputes among workers. This has important ramifications for managing fair dispute resolution in the workplace. First, we argue that taking a neutral stance in workplace disputes privileges the more powerful disputant, for instance a manager of the organisation. Second, with the exemption for many firms from a duty to dismiss employees fairly, we predict that some employees will be fearful to argue their case in a dispute, thus making it more likely for HR managers to exert the preferred outcomes of the firm. The shifting balance of power away from employees towards employers raises ethical questions for the role of the HR manager in dealing with such disputes.

Neutrality applied in these circumstances will have the effect of satisfying the shorter term goals of entrenching managerial or organisational objectives over other interests. However, we argue that longer term goals, particularly those which enhance workplace justice, are likely to be afforded through the exercise of impartiality informed by an ethical code.

EXTERNAL WORKPLACE DISPUTE RESOLUTION PROCESSES

[10.255] As well as internal workplace dispute resolution processes, there are a range of options for people involved in workplace conflict to attempt to resolve their dispute with the assistance of external bodies. External assistance may be provided by private dispute resolution services (arbitrators, mediators, conflict coaches, investigators) or by government bodies (the Fair Work Ombudsman, Fair Work Commission, Human Rights Commission).

History of industrial dispute resolution in Australia

[10.260] Australia has a long history of industrial conciliation and arbitration, specifically provided for in the *Constitution*, as explained in the following extract.

Early Industrial Conciliation

[10.265] T Macdermott and J Riley, "ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances" (2012) 38(2) *Monash University Law Review* 82 at 86-87.

FWA has inherited its concept of conciliation from a long history of Australian industrial law and practice. Under the *Australian Constitution*, the Commonwealth's power to legislate in the field of industrial relations was long considered to be restrained by the wording of s 51(xxxv), which stipulated that the Commonwealth had power to make laws for "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". On the occasions when the High Court has considered the meaning of "conciliation" (generally for the purposes of determining the validity of a federal enactment), it has been held that conciliation necessarily involves three parties. The disputants must be entitled to participate and be heard (this was affirmed in *Australian Railways Union v Victorian Railways Commissioners*), [87] and there must also be a neutral third party overseeing the parties' negotiations to ensure that the public interest was served.

The concept of conciliation originally adopted in Australian legislation necessarily involved the active participation of an impartial but knowledgeable conciliator. "Conciliation connotes the intervention of a mediator with a view to bringing the parties to agreement". The conciliator was appointed as a matter of compulsion and conciliation occurred in the very immediate shadow of compulsory arbitration, although most matters were dealt with by conciliation without the need to resort to arbitration. Until the enactment of laws permitting the conciliation and arbitration of individual termination of employment disputes, the practices of conciliation and arbitration developed in the context of attempts to settle collective industrial disputes between unions and associations of employers. Conciliators dealing with collective disputes developed expertise in particular industries, became familiar with the industrial parties in those industries, and so acquired a degree of authority that extended to the conciliation process. Although studies in the industrial context have shown that individual conciliators' styles may have varied, parties generally expected a robust approach. At a time when the tribunal had authority to move quickly to arbitration if conciliation failed, parties had every incentive to agree to a reasonable compromise in conciliation.



[10.270] Forsyth, in the next extract, observes that workplace conflict resolution in Australia has been historically conducted by public statutory bodies, rather than by private dispute resolution providers.

Traditional Australian Approach to Workplace Conflict Resolution

[10.275] A Forsyth, "Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR" (2012) 25(3) *The International Journal of Human Resources Management* 476 at 476-478.

Throughout much of its labour relations history, workplace conflict resolution in Australia has been conducted primarily by public agencies established under statute. Collective labour disputes (or interests disputes) were generally dealt with, at the federal level, by the AIRC, and by counterpart tribunals operating under state industrial legislation. As Creighton and Stewart explain: "For the 100 years following the enactment of the Conciliation and Arbitration Act 1904, the federal system featured a tribunal whose primary role was to help resolve industrial disputes by means of conciliation

Traditional Australian Approach to Workplace Conflict Resolution cont.

and, if necessary, arbitration ..." These centralised processes operated mainly in relation to the (at one time, very highly) unionised sectors of the workforce. Individual employment disputes (or rights disputes), such as those relating to unfair dismissal, have increasingly fallen within the domain of federal and state industrial tribunals as well. Claims in relation to employment discrimination and harassment have generally been brought before federal, state and territory equal employment opportunity (EEO) tribunals. The explosion of individual employment rights litigation in countries such as the USA and the UK – and the growth of what has been described in New Zealand as a "grievance industry" or "gravy train" – has not occurred to anywhere near the same extent in Australia.

For these reasons, alternative dispute resolution (ADR) as a means of resolving workplace conflicts has not developed as strongly in Australia as it has developed in countries like the USA. There, ADR has become an increasingly significant feature of the employment relations landscape, as employers and governments alike have sought solutions to the problems of the costly, congested court systems. Attempts to push Australian employers, employees and unions down an American-style ADR road have been unsuccessful. As well as the limited need for such a shift, the strong reputation and (generally) efficient operation of the public agencies referred to above have meant that the conditions for the growth of ADR have simply not been present. In any event, these public dispute resolution bodies have long practiced many of the techniques associated with ADR in other jurisdictions, such as conciliation, mediation, conferencing, assisted resolution and arbitration.



[10.280] The following extracts explore the development of workplace conflict resolution in industrial matters from the 1990s to the present, particularly in relation to conciliation. The authors note that conciliation has typically been a "robust" practice in the industrial relations context, aimed at settling the dispute and diverting the parties from expensive and time-consuming formal processes.

1997-2006: The Workplace Relations Act 1996 (Cth)

[10.285] Conciliation and arbitration were key features of the *Workplace Relations Act 1996* (Cth) and successfully resolved a large number of disputes in the period between 1996 and 2006.

Conciliation of Individual Unfair Dismissal Applications

[10.290] T Macdermott and J Riley, "ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances" (2012) 38(2) *Monash University Law Review* 82 at 87-90.

The same approach to conciliation and arbitration was adopted when the Termination of Employment provisions were enacted in the *Workplace Relations Act 1996* (Cth) ("WR Act"), as it was in operation between 1997 and 2006. The objects clause in the WR Act s 170CA(1) stated that the principal object of these laws was to establish procedures for conciliation, and if conciliation failed, compulsory arbitration (in the case of unfair dismissal) or court determination (in the case of unlawful dismissal). The legislation distinguished between these two kinds of termination of employment, essentially for constitutional law reasons. Unlawful dismissal provisions were enacted by engaging the external affairs power in the *Constitution* s 51(xxix) and relying on the ILO *Termination of Employment Convention*. Grounds for an unlawful termination were those dealt with in the ILO Convention, including discriminatory dismissals (on the grounds of race, sex, disability, etc), dismissal for temporary absence for reasons of illness or injury and dismissals without providing a minimum notice period. Unfair dismissal [88] provisions were based on the labour power (s 51(xxxv)) and the

Conciliation of Individual Unfair Dismissal Applications cont.

corporations power (s 51(xx)), and protected employees from harsh, unjust or unreasonable dismissal, including terminations effected summarily, without first following fair procedures. According to s 170CA(2), both procedures – conciliation and arbitration or determination – were to be exercised with the intention of ensuring a “fair go all round” for both employers and employees. The legislative framework clearly provided that the conciliator, as well as the arbitrator, was charged with ensuring a fair and balanced outcome to the dispute. The conciliator was not envisaged merely as a facilitator of the parties’ own negotiations. The conciliator was expected to bring expert knowledge of the law and jurisprudence on these provisions, and to steer the parties towards a just solution.

Evidence of the intention that the conciliator should play an active role in assessing the merits of an application was apparent in the mandated process for dealing with applications. An individual complainant (or a union acting on an individual’s behalf) first made an application to the AIRC under s 170CE, and the Commission was obliged to attempt a settlement by conciliation under s 170CF. If conciliation failed, the Commission was obliged under s 170CF to issue a certificate to that effect, which also stated the Commission’s assessment of the merits and its own recommendations in respect of the matter. An applicant could then proceed to arbitration of an unfair dismissal, or to court determination of an unlawful termination, depending upon the grounds identified in the Commission’s certificate and the election by the applicant under s 170CFA. Unfair dismissal matters would go to arbitration by a Commission member, however parties could (if they chose) continue with further attempts at conciliation under s 170CG(2).

Records of the outcomes of applications demonstrate the significant influence of conciliation. According to the last annual report published before the Work Choices laws changed the *WR Act* termination of employment provisions, 38 428 termination of employment matters were settled by conciliation during the years of the pre-Work Choices *WR Act* (ie, between 1996 and 2006). A further 14 103 were unable to be settled by conciliation, so a certificate was issued. So about 73% of matters were settled by conciliation, without the need to proceed further. Of the cases that progressed beyond initial conciliation, by far the greatest number (13 728) were certified as “harsh, unjust or unreasonable” terminations. This suggests that initial conciliation is likely to have settled the unmeritorious or marginal claims. Of the applications going forward, 2354 lapsed (by the applicant electing not to proceed), 8523 applications were withdrawn, settled or discontinued between conciliation and arbitration, and only 2771 applications proceeded to arbitration. Of these, 1220 resulted in compensation orders, and only 260 resulted in reinstatement orders. Clearly, conciliation played the major [89] role in dealing with these applications, despite the publicity often surrounding the few arbitrated matters.



Work Choices 2006–2007

[10.295] The Work Choices laws expanded the Australian Industrial Relations Commission’s (AIRC) jurisdiction but introduced a number of exemptions that resulted in fewer cases going to conciliation. However, of those matters that did go to conciliation, 75% were settled.

ADR and Industrial Tribunals

[10.300] T Macdermott and J Riley, “ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances” (2012) 38(2) *Monash University Law Review* 82 at 89.

The Work Choices laws made substantial changes to the eligibility rules for bringing unfair dismissal claims, but no significant changes to the process for progressing applications, beyond perhaps the introduction of *WR Act* s 648, which permitted the Commission to decide applications on the papers,

ADR and Industrial Tribunals cont.

without a hearing. The Work Choices laws overrode State industrial relations systems for all incorporated private sector employers. This had the potential to expand the federal Commission's jurisdiction considerably. On the other hand, Work Choices introduced an exemption for "small business" employers, with a threshold of 100 employees, and also exempted any applications brought when an employer could show "operational reasons" for the dismissal. These changes had the effect of reducing the number of applications. In the final year of operation of the *WR Act*, there were a total of 7994 termination of employment applications to the AIRC. Conciliation remained the principal mode of resolution of these matters. Of the applications conciliated, 75% were settled by conciliation, and only 95 applications proceeded all the way to a concluded arbitration. Of those, 22 resulted in an order for compensation, and 14 resulted in reinstatement orders.



[10.305] As Forsyth points out, the Work Choices reforms proved to be deeply unpopular in the Australian community, and contributed to the Coalition Government's election loss in November 2007. The new Labor Government implemented a new scheme pursuant to the *Fair Work Act 2009* (Cth) (FWA).

Fair Work Scheme

[10.310] The AIRC was criticised on the basis that its dispute resolution services were unnecessarily formal, adversarial and expensive. The new scheme emphasised conciliation (or "conferences") as the preferred dispute resolution option and allowed for other processes such as mediation.

The FWA established the Fair Work Commission (FWC), an independent national workplace relations tribunal. The FWC makes decisions about the national minimum wage and can create and change modern awards. The FWC also resolves workplace related disputes, initiated by individuals or organisations, about many workplace matters, including unfair dismissal, industrial action, equal pay, transfer of business, right of entry and enterprise bargaining.

The FWC website explains that the FWC can assist in dispute resolution by providing services including conciliation, mediation and arbitration.

How can the Fair Work Commission Assist in Dispute Resolution?

[10.315] FWC, "How can the Fair Work Commission Assist in Dispute Resolution?", <http://www.fwc.gov.au/index.cfm?pagename=disputeabout>

Members of the Fair Work Commission (the Commission) are experienced in a wide range of alternative dispute resolution techniques including conciliation, mediation and arbitration.

They are skilled in helping employers and employees resolve workplace disputes and can suggest means of resolving differences that may not have been immediately apparent to those directly involved.

They are also impartial and have a sound knowledge and understanding of the relevant legal and industrial issues.

Depending on the circumstances, the Commission can exercise statutory powers that enable disputes to be resolved on a final basis.

Who can seek assistance from the Commission?

In general, the Commission can assist in resolving disputes involving employers, employees and unions and employer associations who are covered by the national workplace relations system.

How can the Fair Work Commission Assist in Dispute Resolution? cont.

These include:

- any employer that is a constitutional corporation
- any employer in Victoria or the territories
- the Commonwealth (including any Commonwealth authority)
- any employee of one of the above types of employers
- a registered union or employer organisation.

What types of disputes can be referred to the Commission?

The main types of disputes that can be referred to the Commission are:

- disputes under the terms of an award or a collective or enterprise agreement
- bargaining disputes, and
- disputes arising under the general protections provisions of the *Fair Work Act 2009*.



[10.320] Section 576 of the FWA sets out the function of the FWC and its power to deal with disputes. Section 595(2)(c) provides that the FWC may deal with a dispute by mediation or conciliation, and s 595(3) provides that the FWC may deal with a dispute by arbitration.

Fair Work Act 2009 (Cth)

[10.325] *Fair Work Act 2009 (Cth), ss 576, 595*

576 Functions of the FWC

- (2) The FWC also has the following functions:
- (aa) promoting cooperative and productive workplace relations and preventing disputes;
 - (a) dealing with disputes as referred to in section 595;
 - (b) providing assistance and advice about its functions and activities;
 - (c) providing administrative support in accordance with an arrangement under section 650 or 653A;
 - (ca) mediating any proceedings, part of proceedings or matter arising out of any proceedings that, under section 53A of the *Federal Court of Australia Act 1976* or section 34 of the *Federal Circuit Court of Australia Act 1999*, have been referred by the Fair Work Division of the Federal Court or Federal Circuit Court to the FWC for mediation;
 - (d) any other function conferred on the FWC by a law of the Commonwealth.

...

595 FWC's power to deal with disputes

(1) The FWC may deal with a dispute only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.

(2) The FWC may deal with a dispute (other than by arbitration) as it considers appropriate, including in the following ways:

- (a) by mediation or conciliation;
- (b) by making a recommendation or expressing an opinion.

(3) The FWC may deal with a dispute by arbitration (including by making any orders it considers appropriate) only if the FWC is expressly authorised to do so under or in accordance with another provision of this Act.

(4) In dealing with a dispute, the FWC may exercise any powers it has under this Subdivision.

(5) To avoid doubt, the FWC must not exercise the power referred to in subsection (3) in relation to a matter before the FWC except as authorised by this section.



[10.330] Despite the broad dispute resolution powers set out in s 595, the FWC's role is constrained to a certain extent by other legislation, as explained by Forsyth below.

Dispute Resolution under s 595 of the Fair Work Act

[10.335] A Forsyth, "Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR" (2012) 25(3) *The International Journal of Human Resources Management* 476 at 480.

FWA (Fair Work Australia) is given a general dispute resolution role by s 595 of the *Fair Work Act*, which provides that the tribunal may deal with disputes where it is expressly authorised to do so under other provisions of the legislation. As indicated above, FWA is able to deal with matters relating to (for example) collective bargaining, general protections and union right of entry. FWA may deal with disputes arising under these other parts of the *Fair Work Act* as it considers appropriate, including through mediation, conciliation, making a recommendation or expressing an opinion. However, FWA may only arbitrate these types of disputes where this is expressly allowed by the relevant provision of the legislation. For example, FWA can only arbitrate in collective bargaining disputes where all of the parties involved agree, whereas it can arbitrate in right of entry disputes whether the parties agree or not. When dealing with disputes under s 595, FWA may exercise the powers discussed above (such as ordering the attendance of persons and witnesses, the production of documents, etc). However, these powers are not "at large" when FWA is conducting dispute resolution under s 595. Rather, the powers are circumscribed by the specific provisions of the relevant other part of the legislation under which FWA is acting (see *Avis v Offshore Marine Services Pty Ltd* and *The Maritime Union of Australia and Vlach v Electrolux Home Products Pty Ltd*).



[10.340] Pathways of dispute resolution vary according to the type of dispute, as explained in the following extract. For unfair dismissal applications, conciliation (primarily conducted by trained mediators using telephone conferencing) is the norm and appears to be efficient, flexible and cost effective. Where the matter does not settle through conciliation, it can go to arbitration conducted by the FWC. For general protections matters, however, where a matter is not resolved through conciliation, parties must apply to the Federal Court for a hearing.

ADR and Industrial Tribunals

[10.345] T Macdermott and J Riley, "ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances" (2012) 38(2) *Monash University Law Review* 82 at 84-85.

The *FW Act* has consolidated and enhanced a number of rights in its "general protections" provisions, including rights to freedom of association, to the enjoyment of the benefit of industrial instruments, and protection from discriminatory treatment. While FWA is able to conciliate these applications, the ultimate power to adjudicate these disputes is vested in the Federal Court or Federal Magistrates Court. So whereas the conciliation of unfair dismissal applications occurs within the shadow of potential arbitration in a short time by the same body (FWA), conciliation of general protections occurs in the more remote shadow of potential court proceedings, which can occur only

ADR and Industrial Tribunals cont.

after considerable delay and expense. Many applicants find the prospect of proceeding to court too onerous and discontinue their complaints. In addition, the complexity of the statutory provisions and absence of a body of decided cases clarifying the provisions mean that the parameters for negotiation in conciliation are much less clear. Finally, the individual rights focus of the provisions means that many applications will involve individual employees (not unions) who may be unrepresented by professionally trained advocates. Many of these will be “one-shotters”, with little prior exposure to or experience of the industrial relations system. Conciliation provides an important opportunity for them to understand their rights and their prospect for success, but it may in fact be their only viable avenue of recourse, given the difficulty they face in pursuing the matter further.



[10.350] Forsyth questions the fairness of the new system, particularly the reduced capacity for legal representation combined with the activist role of FWA conciliators in a more interventionist type of conciliation.

FWA's Role in Resolving Unfair Dismissal Claims

[10.355] A Forsyth, “Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR” (2012) 25(3) *The International Journal of Human Resources Management* 476 at 482.

As discussed earlier in this article, changes were made under the *Fair Work Act* to the former process for dealing with unfair dismissal claims, in response to business concerns about the time and costs involved in defending these claims. More employees are now covered by the federal unfair dismissal system, due to the abolition of some of the sweeping exclusions from the ability to bring a claim effected by Work Choices.

Nevertheless, concerns have been raised about the fairness of the new process – particularly, the reduced capacity for legal representation in unfair dismissal cases before FWA (Fair Work Australia). The Labor Government intended to allow FWA some flexibility in the way it handles unfair dismissals, including the use of inquisitorial approaches rather than the previous method of a conciliation conference followed (if necessary) by a formal arbitration hearing.

FWA has appointed a team of specialist conciliators (who are employees, rather than members, of FWA) to play a “more activist role than would a mediator in assisting the parties to resolve an unfair dismissal application”, including the use of “reality testing” and “shuttle negotiation”.



[10.360] Macdermott and Riley discuss the pre-eminence of conciliation in the following extract, noting that despite the rhetoric of FWA changing, the traditional type conciliation process is still the norm.

The Pre-eminence of Conciliation

[10.365] T Macdermott and J Riley, “ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances” (2012) 38(2) *Monash University Law Review* 82 at 90-92.

Notwithstanding the disappearance of the language of “conciliation” from the *FW Act*, the lack of compulsion and the introduction of other dispute resolution options, the FWA members interviewed by the authors uniformly agreed that they continue to use a traditional form of conciliation when holding conferences in both unfair dismissal and general protections matters. In unfair dismissal

The Pre-eminence of Conciliation cont.

matters, members continue to see their role as one of “guiding parties toward the light” of a fair and balanced settlement. In both jurisdictions, they continue to play an active role in advising parties on the strengths and weaknesses of their case, although in the case of the general protections claims, members express greater reservation about the potential outcomes of court proceedings. The jurisprudence surrounding general protections suits is in an early stage of development, making the parameters of settlement less clear.

In the unfair dismissal context, the vast majority of applications are resolved by conciliation, or before the matter proceeds to arbitration. This “success” in terms of settlement rates, is in part attributed to the role the conciliators play in giving the parties a realistic assessment of the strengths and weaknesses of their case, in indicating potential outcomes from arbitration if the matter does not settle, in focusing the parties’ attention on options for resolving the matter, and in reality testing any proposed settlement. This can take place in a timely fashion, often only a matter of weeks after filing the application, and does not require the preparation of lengthy statements and supporting documentation. This speed and informality are important factors in facilitating resolution rather than entrenching acrimony between the parties. Finally, the fact that a matter is likely to be set down for arbitration within a relatively short time if the conciliation is not successful is also an important influence in encouraging parties to take the conciliation process seriously. Not all these factors are replicated for general protections applications.



[10.370] Recently, more conciliations are conducted by telephone, giving rise to some favourable assessments and some concerns, as discussed in the following extracts.

Workplace Conflict Resolution in Australia

[10.375] A Forsyth, “Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR” (2012) 25(3) *The International Journal of Human Resources Management* 476 at 482-483.

FWA (Fair Work Australia) has also adopted a new method in an effort to ensure early settlement of unfair dismissal claims, and to minimise cost and inconvenience to the parties: telephone conciliation. This has been a controversial initiative, with practitioners representing both employers and employees initially arguing that the dynamics of face-to-face conciliation meetings (which are conducive to achieving a settlement) are lost over the telephone. Early figures indicated that the new process had been fairly successful: 92% of unfair dismissal claims in the first nine months of FWA’s operation were dealt with by telephone conciliation, and the overall success rate of conciliation (including by telephone and face-to-face) was 81% (up from 75% in 2008–2009).

Research commissioned by FWA and released in November 2010 confirmed this favourable assessment of telephone conciliation. Based on interviews with a sample of participants in the telephone conciliation process, the research found (among other things) [483] that 78% of unfair dismissal applicants, 81% of employers and 58% of representatives of both parties agreed or strongly agreed that the process worked well, and “some 86% of applicants and 88% of respondents considered having the conciliation over the telephone was convenient and cost effective”.



Telephone Conciliations

[10.380] T Macdermott and J Riley, "ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances" (2012) 38(2) *Monash University Law Review* 82 at 93-96.

FWA has now moved to telephone conferencing as the primary method for conducting conciliations of unfair dismissal applications. Our interviewees explained that this is not an entirely new practice, as FWA's predecessor, the AIRC, made use of such a system where the geographic location of parties and the limited availability of Commission members away from metropolitan areas made face-to-face meetings too difficult to facilitate. Telephone conciliations were also trialed by the AIRC for some unfair dismissal applications in Sydney and Melbourne in 2006. Our interviews confirmed that what has been altered in the federal industrial arena is the establishment of telephone communication as the *primary* method of conciliating unfair dismissal applications since the commencement of the *FW Act*. Conciliators do maintain a discretion to hold face-to-face conferences where multiple parties are involved, and telephone conferencing is deemed inappropriate.

Telephone conciliations, as conducted by FWA, aim to provide a quick and cost effective form of dispute resolution that is relatively informal and accessible to the parties. It retains the pivotal role of the conciliator, as a third party neutral, in assisting the parties to seek to resolve their dispute, where possible, by agreement. It follows the classic model of joint sessions in which the parties each give their version of the events and endeavour to find common ground on the identified issues, as well as private sessions in which the conciliator engages with each of the parties individually to encourage them to consider the strength and weaknesses of their claims. Conciliations are generally limited to a time slot of approximately one and a half hours, to enable conciliators to complete on average three conciliations a day.

As a dispute resolution process, telephone conciliations fall within the broad church of what is categorised as Online Dispute Resolution ("ODR"). ODR includes any "processes where a substantial part, or all, of the communication in [94] the dispute resolution process takes place electronically." ODR can take a variety of forms such as "unassisted and assisted negotiation, mediation and arbitration" and can involve totally automated processes, as well as varying levels of human interaction. Telephone conciliations share some but not all of the advantages and disadvantages of ODR. While they make use of available technology to enable the parties to communicate in a convenient, time efficient and cost effective manner, they do retain an interactive and "real time" aspect that is absent in some other forms of ODR. Moreover there is a third party neutral, the conciliator, who is available simultaneously, and in the same medium, to both parties to assist with the resolution of the dispute.

What is absent in telephone conciliations is the personal interaction and visual clues that come from being present in the same space. The National Alternative Dispute Resolution Advisory Council ("NADRAC"), in looking at online ADR services as part of its "Resolve to Resolve" report in 2009, observed that:

ODR may not offer the same benefits as face to face interest-based processes where participants can reach a deeper understanding of the other person's perspective, improve their relationships, and/or learn communication techniques that may help them resolve their own disputes in future without an ADR practitioner to assist.

Telephone conciliations do not lack the human interaction that some automated dispute resolution processes do, but involve a different form of interaction; one without non-verbal cues such as facial expression, eye contact, and body language. As Gillieron states:

F2F obviously is the richest media since it allows the simultaneous perception of multiple cues. The telephone medium is less rich; while its feedback capacity is as fast as F2F, visual cues are unavailable so that the parties have to rely upon language content and audio cues to

Telephone Conciliations cont.

reach understanding. Written communication is the poorest communication medium since feedback is slow and cues are limited to what is written on paper.

This can affect the rapport that develops between the parties, which in turn may affect the parties' capacity to engage in a genuine problem solving and interests based negotiation that is the foundation of the mediation model on which [95] conciliation is based. Building trust and rapport in the process and between the parties are key aspects of seeking to achieve resolution by agreement. The medium of telephone communication puts a greater responsibility on the conciliator to work at building that trust and rapport, and to pick up on verbal cues in the absence of the opportunity to observe non-verbal communication.

The relationship that the telephone conciliator builds with the parties in the context of unfair dismissal conciliation is short lived. Unlike the conciliation of collective industrial disputes where the industrial parties may have regular interactions with a member of FWA, here the application is likely to be a one off event, with an individual applicant without prior experience nor likely to be a repeat player. Therefore the need to establish a good basis for an on-going relationship may be less critical.

An alternative argument is that the absence of face-to-face interactions may be less confronting and more empowering for some parties. For example, where a party might feel there is a power imbalance, the absence of non-verbal confirmation of this situation may lessen the power imbalance and make the telephone a more comfortable medium of communication for that party. It is also important to keep in mind that not all parties in conciliation have the skills or capacity to engage in a problem solving approach that is based on principled or interest based negotiation. Particularly where reinstatement is not a viable option, some parties will simply approach it as an adversarial bargaining negotiation in which the parties inch towards a mid-point compromise on the amount of potential compensation payable.

Many agencies and tribunals are looking at ways to make their processes more accessible and cost effective, by minimising the disruption to participants' lives and delaying the preparation of lengthy statements and materials until absolutely necessary. Inevitably some will turn to different forms of technology to facilitate this. The new telephone conciliation model has been developed to deal with a high volume of cases. Not all of these will be vigorously pursuing reinstatement. Some will simply be seeking a relatively modest amount of compensation within the statutory cap. In terms of what Sanders and Golberg call "fitting the forum to the fuss, one can see the rationale behind FWA's choice of telephone conciliation as an appropriate medium for the type of disputes involved and for the type of outcomes that are available to the parties. The use of telephone conferencing as the preferred method for conducting conciliations of unfair dismissal applications, subject to its appropriateness in the circumstances, is to a degree an inevitable [96] institutional response to the need to implement more informal and cost-effective methods of dispute resolution."

It is also early days for this model, and FWA has indicated a willingness to review the processes. FWA has plans to improve the technology it is using, by implementing a system using Skype-type technology. Although not currently proposed, this type of technology may open up the possibility in the future of using webcam technology to allow some visual input, which is lacking in the process compared to face-to-face interactions.

Finally, although face-to-face contact and the opportunity to "eyeball" participants might be the preference of some; people now entering the workforce are a generation of "digital natives". For the digital native worker, online delivery of dispute resolution may not be such a challenging prospect,

Telephone Conciliations cont.

and developing trust and rapport without face-to-face contact may not necessarily be so problematic.



[10.385] Recent changes to the system mean that conciliators are now no longer statutorily appointed members of FWA, but are mediation qualified public servants. The following extract explores the impact of the change in conciliation personnel.

New Conciliation Model for Unfair Dismissal Applications

[10.390] T Macdermott and J Riley, "ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances" (2012) 38(2) *Monash University Law Review* 82 at 92-93, 96-97.

Two principal changes have been made in dispute resolution processes applicable to unfair dismissal applications. First, conciliations are generally no longer conducted as face-to-face meetings, but usually as telephone conferences, with each party and their advisors participating by telephone. Secondly, conciliations are no longer conducted by statutorily appointed members of FWA, but are conducted by qualified FWA staff who are public servants. Each of these innovations will be examined in turn.

According to a number of our interviewees, a large part of the impetus for adopting this new conciliation model for unfair dismissal applications was the anticipated increase in volume of applications once the *FW Act* nationalised the system and removed certain jurisdictional limitations. The FWA also carried with it other workload increases for FWA members in the enterprise bargaining area, and in arbitrating over issues that rise under dispute resolution clauses in agreements. A substantial increase in FWA members was unlikely, so FWA needed to consider other means of dealing with its increasing case load. If FWA members had continued as the primary conciliators of unfair dismissal applications, the time lines for its dealing with matters would have inevitably dragged out. The federal industrial tribunal practices have on the whole provided relatively quick access to dispute resolution, without incurring the costs of preparing and filing extensive statements and evidentiary materials. The adoption of a different model of [93] conciliation can be seen in part as a measure to maintain timely access to dispute resolution. The new conciliation model was also facilitated by the removal of the statutory requirement that a Member provide a certificate that indicated the unfair dismissal application had failed to settle at conciliation, before that application could progress to arbitration. ... [96] ...

Change in Conciliation Personnel

A number of points can be made in relation to the change in personnel for conciliating unfair dismissal applications. First, this role is now being performed in a context where conciliation is voluntary, albeit one that is taken up by most employers and employees. Secondly, appointments of this nature follow the trend of other agencies that use dedicated staff rather than statutory office holders to conduct dispute resolution, for example in the case of human rights or workers compensation claims. Thirdly, the designated personnel are recruited for their dispute resolution skills, but our interviewees explained that FWA also conducts its own training seminars for conciliators in the institution's interventionist tradition, and conciliators are encouraged to maintain that activist role previously undertaken by Commission members. Despite the fact that they may have been recruited from disparate areas, staff are expected to develop detailed knowledge of the jurisdiction to engage in such an activist role.

A factor in the effectiveness of industrial conciliation has always been that the process is undertaken by a person with detailed knowledge of workplace rights and practices, and knowledge of other

New Conciliation Model for Unfair Dismissal Applications cont.

settlements and awards. FWA members are also seen as deriving added authority through the panel system and their consequent familiarity with the industry. As Provis observed:

The arbitration system has continually established and maintained standards which tribunal members refer to when they are acting as [97] arbitrators or as conciliators, and the public nature of the arbitrated standards largely frees the conciliators from the need to rely on their individual judgment. The norms to be applied in conciliation are the same as the norms that have been formulated in arbitration. There is an overlap between the processes of conciliation and arbitration, which is furthered by the fact that the same individuals act as third parties in each process.

The federal statutory system for unfair dismissal has now been in place since the early 1990s. Although it has been the subject of regular statutory amendments, the broad norms and standards relating to the reasons for and circumstances of dismissals are fairly well established. A small number of cases are still arbitrated providing further guidance in the area. Conciliators of unfair dismissal applications can fairly confidently and competently work within those parameters, without the need themselves to be engaged in the arbitration process in order to help the parties evaluate the strengths and weakness of their case. The issue of having an established jurisprudence to work with distinguishes the area of unfair dismissal from that of general protections applications. In this context it is worth noting that FWA Members are still involved in the conciliation of the "new" general protections applications, even when a dismissal is involved. Whether this function will be taken on by conciliation staff at some point in the future, when the parameters of that jurisdiction become clearer, remains to be seen.



Dispute resolution clauses required in awards and enterprise agreements

[10.395] The FWA also requires dispute resolution clauses to be included in awards and enterprise agreements, as explained in the Fair Work Commission's *Effective Dispute Resolution Guide* at [10.400].

Effective Dispute Resolution Guide

[10.400] Fair Work Commission, *Effective Dispute Resolution Guide* (Commonwealth of Australia, 2013), <http://www.fairwork.gov.au/resources/best-practice-guides/pages/effective-dispute-resolution.aspx>

Dispute resolution in modern awards and enterprise agreements

Modern Awards

The *Fair Work Act 2009* (FW Act) requires that all modern awards include a term which sets out a procedure for resolving disputes between employers and employees about any matter arising under the modern award and the National Employment Standards (NES).

Every modern award contains a dispute resolution clause. Generally, the clause will provide for a process with the following stages:

- employee/s meet with their direct supervisor to discuss the grievance
- failing resolution, the matter is discussed further with more senior management
- failing resolution of the matter, the employer refers the dispute to a more senior level of management or more senior national officer within the organisation
- where the dispute remains unresolved, the parties may jointly or individually refer the matter to the Fair Work Commission, and

Effective Dispute Resolution Guide cont.

- the employer or employee may appoint another person, organisation or association to represent them during this process.

Employers should be aware of, and familiarise themselves with, any dispute resolution procedure that applies to their workplace.

Enterprise agreements

When making an enterprise agreement, the FW Act requires the parties to include a dispute resolution clause. Enterprise agreements lodged with the Fair Work Commission without such a clause will not be approved. The dispute resolution clauses in enterprise agreements must provide a process to resolve any disputes:

- arising under the agreement, or
- relating to the NES.

The FW Act requires that a dispute resolution clause in an enterprise agreement must:

- set out a procedure that requires or allows either the Fair Work Commission or some other independent person to settle the dispute, and
- allow for the representation of employees covered by the agreement when there is a dispute (for example by another employee or a union).

A "model dispute resolution clause" is available in the *Fair Work Regulations 2009* and can be used to develop a dispute resolution term in an enterprise agreement.



[10.405] Forsyth discusses (at [10.410]) the legislative requirements for dispute resolution clauses and some of the judicial interpretation as to how far they must extend.

Dispute Resolution Under Pt 6-2 of the Fair Work Act

[10.410] A Forsyth, "Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR" (2012) 25(3) *The International Journal of Human Resources Management* 476 at 480-482.

Part 6-2 of the *Fair Work Act* empowers FWA to resolve disputes that are referred to it under dispute settlement procedures in modern awards and enterprise agreements. Dispute settlement procedures must be included as terms in all modern awards and enterprise agreements made under the *Fair Work Act* (reflecting similar requirements under previous versions of the federal industrial legislation, although the precise form of those requirements has varied over the years). Where an employer and its employees are covered by both an award and an agreement, the dispute resolution procedure in the agreement takes precedence. Failure to comply with the dispute resolution procedure in an award or agreement can have significant consequences, particularly for employers. The remedies available include damages (see, eg, *Van Efferen v CMA Corporation Ltd* (Fed Crt of Aust, 2009)) and injunctions, and/or employers could face the imposition of civil penalties following an action for breach of an award or agreement occasioned by non-compliance with a dispute settlement term.

Under s 146 of the *Fair Work Act*, awards must contain a procedure for settling disputes about any matters arising under the award and the NES. A standard dispute resolution clause has been inserted in all modern awards, providing for mediation or conciliation by FWA if efforts to resolve the dispute at the workplace level prove unsuccessful. The standard award clause also allows FWA to arbitrate, if all of the parties consent to it doing so.

Under s 186(6) of the *Fair Work Act*, enterprise agreements must contain a term that requires or allows FWA, or another person independent of the parties covered by the agreement, to settle disputes

Dispute Resolution Under Pt 6-2 of the Fair Work Act cont.

about any matters arising under the agreement, and the NES; and which allows for the representation of employees for purposes of that procedure. The inclusion of a dispute settlement term that complies with s 186(6) is one of the requirements for approval of an agreement by FWA. It is clear from the terms of s 186(6) that either FWA, or some other independent person (such as a private mediator or arbitrator; see further below), may be empowered to resolve disputes arising under agreements. The *Fair Work Regulations 2009* (Cth) contain a model dispute resolution term for enterprise agreements, which the parties to an agreement may (but are not required to) adopt. The model term provides for the reference of disputes that cannot be resolved at the workplace level to FWA for mediation, conciliation and, ultimately, arbitration (whether or not the parties agree to FWA arbitrating).

In Re Woolworths Ltd trading as Produce and Recycling Distribution Centre, a Full Bench of FWA held that enterprise agreement dispute resolution clauses do not have to provide for the final arbitration of disputes. The Full Bench overturned an earlier decision of a single Commissioner, who had refused to approve an agreement because it contained a dispute clause which (in effect) allowed either party to exercise a power of veto over dispute settlement by FWA. According to the Full Bench, the dispute resolution provisions of the *Fair Work Act* allow FWA to: "deploy voluntary methods of dispute resolution without the consent of the parties to the dispute, provided the dispute is one with which it is authorised to deal, but [FWA] can only arbitrate if it has been specifically empowered to do so." Further, by providing that FWA can arbitrate disputes where the parties to an agreement have agreed that it may do so, Pt 6-2 of the legislation: "strongly implies the negative stipulation that if the parties have not agreed, [FWA] has no power to arbitrate." As a result of the Full Bench's decision, parties to enterprise agreements are free to negotiate dispute resolution clauses in agreements – including whether they wish to provide for final arbitration as part of the dispute settlement process – as long as these clauses comply with s 186(6).

Adopting a strict legal interpretation, the Full Bench arrived at the correct conclusion: there is little in the terms of s 186(6) and Pt 6-2 of the *Fair Work Act* to indicate that enterprise agreement dispute settlement terms must provide for arbitration. However, from a public policy viewpoint, the outcome is (in the author's view) an undesirable one: effective dispute resolution must have an end point, and agreement clauses that provide for arbitration as an option, or do not provide for it at all, may result in some disputes never being resolved. It is also hard to see how such clauses meet one of the key overarching objectives of the *Fair Work Act*: to provide "accessible and effective procedures to resolve grievances and disputes" (s 3(e)). With this in mind, the Labor Government's support for the employer's position in the Woolworths appeal appears somewhat peculiar. The Government favours mandatory arbitration in some contexts (the model dispute settlement term for enterprise agreements, and procurement guidelines applicable to tenderers for federal government contracts), but not in others (negotiated dispute settlement terms in agreements). Another government agency, the FWO, regards a "best practice dispute resolution process" as one that "provide[s] FWA with the necessary discretion and power to ensure settlement of [a] dispute". Overall, a very mixed message is being sent to workplace relations [482] parties as to what the Government means by the ideal of "accessible and effective" dispute resolution procedures.

When FWA is carrying out dispute settlement under Pt 6-2, it may exercise all of its powers under the *Fair Work Act* (see above) – unless these have been modified or limited by the parties in the dispute resolution clause in, for example, an enterprise agreement. FWA must not make any decision under Pt 6-2 that is inconsistent with the *Fair Work Act*, or with a modern award or enterprise agreement that applies to the parties (this is intended to preserve the integrity of the minimum safety net of employment conditions operating under the Fair Work system). Part 6-2 does not affect the right of a party to a dispute to take court action to enforce their rights or entitlements. So, for example, if the dispute is about alleged non-compliance with an entitlement under the NES, an employee could seek to activate the dispute procedure in an agreement or bring court proceedings for breach of the Fair

Dispute Resolution Under Pt 6-2 of the Fair Work Act cont.

Work Act. Or, if the dispute is about an alleged breach of a term of an agreement, an employer, employee or union covered by the agreement could invoke the dispute settlement process or seek to enforce the agreement in a court. This is an important feature of the Australian dispute resolution framework, standing in contrast to the common practice in the USA of employees being required to sign mandatory employment arbitration clauses under which they forego their rights to sue their employer.



[10.415] Macdermott and Riley provide a summary of recent developments in relation to conciliation and arbitration under the *Fair Work Act 2009* in their article conclusion below. They note that while these processes are achieving settlements, this may be because the barriers to access other avenues of justice are too high.

Recent Developments in Conciliation and Arbitration under the FWA

[10.420] T Macdermott and J Riley, "ADR and Industrial Tribunals: Innovations and Challenges in Resolving Individual Workplace Grievances" (2012) 38(2) *Monash University Law Review* 82 at 100-102. {AQ: please insert page refs into the text as they fall.}

The nature of employment relationships, and the importance of secure employment in most people's lives, necessitates effective, quick and affordable means for resolving grievances. Few employees earn enough to warrant the cost of litigation, and few can afford to remain out of work while waiting for the resolution of court proceedings. The traditional Australian model of conciliation followed by compulsory arbitration, which was originally adopted for the resolution of collective industrial disputes, has been adapted to meet contemporary needs for the resolution of individual employment disputes. The emphasis has been on a low cost and timely approach, which offers the parties access to ADR, in the form of conciliation, as a means of facilitating early resolution. That model has also come under pressure from a burgeoning case load in recent times. The adoption of telephone technology for unfair dismissal applications and the utilization of conciliation staff rather than members of FWA [Fair Work Australia] is a direct response to the increasing number of applications being dealt with by FWA [Fair Work Australia] and to its concern that applications should be dealt with in a timely manner. There is a consistency between the traditional approach to conciliation and that being undertaken in telephone conferences. The conciliator is a neutral but expert third party, willing and able to offer assistance to the parties in seeking to resolve their disputes. In [101] the unfair dismissal context, the conciliator can do this confident in the knowledge that if the parties are not able to settle the matter by agreement, a member of the same body will compulsorily arbitrate the matter within a relatively short timeframe. Because of the confidential nature of conciliation, it is not possible to comment accurately on the outcomes of the process. Reinstatement may be an outcome, although many unfair dismissal applications are resolved by settling the terms upon which the employment relationship will be severed, rather than on how to repair or restore that relationship.

In the general protections field however, the dynamic is clearly different. Conciliation of such applications by FWA is an option, but if this does not resolve the matter, FWA cannot arbitrate a solution. Where an application is not resolved by conciliation, an applicant is faced with the prospect of instituting expensive and time-consuming court proceedings, where financial resources and access to legal representation operate as a more immediate barrier than they do in ADR processes or in informal low-cost tribunal proceedings. The daunting prospect of court proceedings creates pressure on applicants either to take whatever is on offer in the conciliation process or to discontinue the

Recent Developments in Conciliation and Arbitration under the FWA cont.

matter. In addition, the current uncertainty of the law in this area makes legal representation advisable if not essential, and makes more difficult any assessment of prospects for a favourable outcome.

On the other hand, FWA's new jurisdiction to hold conferences in general protections matters does enhance its role in the management of workplace grievances while the employment is still on foot, and allows FWA to play a role in discrimination claims that might otherwise have gone to other institutions. At one level, applicants can now access the conciliation provided by FWA to seek to resolve these issues in an accessible jurisdiction and in a timely manner. It also potentially involves FWA, in its conciliation role, working with parties to try and repair or improve their relationship where there has been no dismissal. However, in the event that conciliation is not successful, there are a range of barriers to the enforcement of such rights. Consequently, the conciliation offered by FWA may prove to be the only viable avenue for some applicants to pursue their workplace rights.

While the traditional role of the federal tribunal may have shifted from conciliating and arbitrating collective disputes to dealing with a greater number of individual grievances, its conciliation role has remained central to its dispute resolution practices. The "activist" or "interventionist" approach of the collective sphere has been transferred to the context of individual applications. More recently, the conciliation model has been modified in the unfair dismissal context to accommodate a large volume of applications, but the underlying approach to conciliation prevails. General protection applications also have conciliation as an early dispute resolution option, but the absence of a determinative function means that such applications do not have the effective shadow of pending arbitration [102] that operates in the unfair dismissal context. As the law governing general protections becomes clearer, with the development of the court's jurisprudence, more settlements may emerge within these parameters. Nevertheless, settlements made only because applicants face insuperable barriers to pursuing a claim do not improve access to justice for individual applicants.



The Fair Work Ombudsman

[10.425] The Fair Work Ombudsman is an independent statutory agency with a number of dispute resolution functions, including providing assistance and advice to employees and employers, and investigating breaches of the act. The ombudsman can also represent employees and outworkers in the Fair Work Commission. The FWA sets out the functions of the Fair Work Ombudsman.

Fair Work Act 2009 (Cth)

[10.430] *Fair Work Act 2009 (Cth), s 683*

Functions of the Fair Work Ombudsman

(1) The Fair Work Ombudsman has the following functions:

- (a) to promote:
 - (i) harmonious, productive and cooperative workplace relations; and
 - (ii) compliance with this Act and fair work instruments;including by providing education, assistance and advice to employees, employers, outworkers, outworker entities and organisations and producing best practice guides to workplace relations or workplace practices;
- (b) to monitor compliance with this Act and fair work instruments;
- (c) to inquire into, and investigate, any act or practice that may be contrary to this Act, a fair work instrument or a safety net contractual entitlement;

Fair Work Act 2009 (Cth) cont.

- (d) to commence proceedings in a court, or to make applications to the FWC, to enforce this Act, fair work instruments and safety net contractual entitlements;
 - (e) to refer matters to relevant authorities;
 - (f) to represent employees or outworkers who are, or may become, a party to proceedings in a court, or a party to a matter before the FWC, under this Act or a fair work instrument, if the Fair Work Ombudsman considers that representing the employees or outworkers will promote compliance with this Act or the fair work instrument;
 - (g) any other functions conferred on the Fair Work Ombudsman by any Act.
- (2) The Fair Work Ombudsman must consult with the FWC in producing guidance material that relates to the functions of the FWC.



[10.435] The Fair Work Ombudsman receives complaints from employees and assists employers and employees to resolve their disputes through mediation conducted by a Fair Work Ombudsman Mediator. The Fair Work Ombudsman Mediation Charter explains the process of mediation through the FWO and the roles of the participants.

Process of Mediation through the Fair Work Ombudsman

[10.440] Fair Work Ombudsman Mediation Charter (2013), <http://www.fairwork.gov.au/Complaints1/FWO-Mediation-Charter.doc>

Mediation

Mediation is an informal and generally confidential dispute resolution process where a neutral person, the FWO mediator, helps the parties to a workplace complaint made to FWO (usually an employee and their employer) try to reach a negotiated agreement about disputed workplace issues.

In mediation, the focus is on reaching a mutually acceptable resolution of the complaint that will accommodate both parties' interests rather than making a decision as to who is right or wrong. Mediation is a voluntary process and the expectation is that the parties will enter into mediation in good faith with the goal of reaching an agreement.

The role of FWO Mediators

FWO mediators are professionally trained and have extensive dispute resolution and workplace relations experience. FWO mediators are independent and serve as the neutral third party ie, the FWO mediators do not take sides but instead help the parties to achieve agreed resolution of their complaint where possible. The FWO mediator does not act as a judge, provide legal advice, make a determination on who is right or wrong or impose decisions on the parties.

The role of the FWO mediator is:

- to facilitate the early resolution of workplace complaints by supporting the parties to a complaint to identify issues, discuss options, consider alternatives and achieve durable resolutions and agreements;
- to promote cooperative, harmonious and productive workplaces by enhancing communication, cooperation and understanding of the workplace issues in dispute between the parties;
- to encourage fair and mutually acceptable outcomes to workplace disputes through timely, confidential and impartial conduct; and
- to maximise flexibility and informality.

Process of Mediation through the Fair Work Ombudsman cont.

The role of the parties

The parties to a complaint should come to the mediation prepared to tell their version of what happened, prepared to listen to the views of the other side and prepared to clearly state their requirements for resolving the issues in dispute.

The primary responsibility for the resolution of disputed workplace issues rests with the parties. The FWO mediator will support the parties to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent.

The separation of mediation from other FWO enforcement activities

FWO mediators are usually members of FWO's specialist mediation unit. This ensures the mediators are independent and separated from the FWO inspectorate in the performance of their duties. The role of FWO mediators is limited to the mediation process. FWO mediators do not conduct or have involvement in any subsequent investigation of the complaint in the event that no agreement is reached at mediation.

The FWO inspectorate is not permitted to access information provided to FWO mediators during the mediation process. Disclosures or admissions made by either party during mediation are generally confidential and cannot be used by the inspectorate as evidence during the investigation process without the agreement of the parties. Similarly, documentary material provided for the mediation should not be used for other purposes such as a FWO investigation.

Confidentiality

The FWO mediators may have joint and separate sessions with the parties during the mediation. The mediation, including separate sessions with the FWO mediator, is confidential. Mediation participants are required to respect the confidentiality of the mediation by not disclosing information that is provided in the course of the mediation. FWO mediators are also bound by confidentiality obligations to refrain from disclosing to other persons, including the FWO inspectorate, what happened during the mediation, except:

- non-identifying information for necessary administrative, research, supervisory or educational purposes; or
- with the consent of the parties; or
- when required to do so by law; or
- where the information discloses an actual or potential threat to human life or safety.

Settlement Agreement

Where agreement is reached at mediation it is generally recorded in a deed of settlement which is confidential, final and binding to the extent provided by law. Should either party fail to abide by the deed of settlement, the aggrieved party may choose to take their own legal action to enforce the deed of settlement. The FWO cannot enforce the deed of settlement.

Termination of the Mediation

The FWO mediator will suspend or terminate a mediation if parties seek to misuse the mediation or reach an agreement that the mediator believes is unconscionable or illegal.



Australian Human Rights Commission

[10.445] The Australian Human Rights Commission (and State equivalents) also provides dispute resolution services in relation to workplace conflict (specifically around discrimination

and equal opportunity matters). Its dispute resolution processes include investigation and conciliation, as explained on its website and in the legislation setting up the Commission.

Complaints Information

[10.450] Human Rights Commission Website "Complaints Information", <http://www.humanrights.gov.au/complaints-information>

What can I complain about?

The Australian Human Rights Commission can investigate and resolve complaints of discrimination, harassment and bullying based on a person's:

- sex, including pregnancy, marital or relationship status (including same-sex de facto couples) status, breastfeeding, family responsibilities, sexual harassment, gender identity, intersex status and sexual orientation
- disability, including temporary and permanent disabilities; physical, intellectual, sensory, psychiatric disabilities, diseases or illnesses; medical conditions; work related injuries; past, present and future disabilities; and association with a person with a disability
- race, including colour, descent, national or ethnic origin, immigrant status and racial hatred
- age, covering young people and older people
- sexual preference, criminal record, trade union activity, political opinion, religion or social origin (in employment only)

It is against the law to be discriminated against in many areas of public life, including employment, education, the provision of goods, services and facilities, accommodation, sport and the administration of Commonwealth laws and services.

The Commission can also investigate and resolve complaints about alleged breaches of human rights against the Commonwealth and its agencies.

How are complaints resolved?

Complaints to the Commission are resolved through a process known as conciliation. This is where the people involved in a complaint talk through the issues with the help of someone impartial and settle the matter on their own terms.

Conciliation is a very successful way of resolving complaints. Feedback shows that most people find our process fair, informal and easy to understand. It also helps them to better understand the issues and come up with solutions that are appropriate to their circumstances.

Complaint outcomes can include an apology, reinstatement to a job, compensation for lost wages, changes to a policy or developing and promoting anti-discrimination policies.



About the Commission

[10.455] Human Rights Commission, "About the Commission", <http://www.humanrights.gov.au/about-commission-0>

Our Mission:

Leading the promotion and protection of human rights in Australia by:

- making human rights values part of everyday life and language;
- empowering all people to understand and exercise their human rights;

About the Commission cont.

- working with individuals, community, business and government to inspire action;
- keeping government accountable to national and international human rights standards;

We do this by:

- listening, learning, communicating and educating;
- being open, expert, committed and impartial;
- fostering a collaborative, diverse, flexible, respectful and innovative workplace.

Our statutory responsibilities include:

- education and public awareness
- discrimination and human rights complaints
- human rights compliance
- policy and legislative development.

We do this through:

- resolving complaints of discrimination or breaches of human rights under federal laws
- holding public inquiries into human rights issues of national importance
- developing human rights education programs and resources for schools, workplaces and the community
- providing independent legal advice to assist courts in cases that involve human rights principles
- providing advice and submissions to parliaments and governments to develop laws, policies and programs
- undertaking and coordinating research into human rights and discrimination issues.



Australian Human Rights Commission Act 1986 (Cth)

[10.460] Australian Human Rights Commission Act 1986 (Cth), ss 11, 31, 46PF

11 Functions of Commission

(1) The functions of the Commission are:

- such functions as are conferred on the Commission by the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* or any other enactment; and
- to inquire into, and attempt to conciliate, complaints of unlawful discrimination; and
- to deal with complaints lodged under Part IIC; ...

31 Functions of Commission relating to equal opportunity

The following functions are hereby conferred on the Commission:

- to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments, as the case may be, have, or would have, the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, and to report to the Minister the results of any such examination;
- to inquire into any act or practice, including any systemic practice, that may constitute discrimination and:

Australian Human Rights Commission Act 1986 (Cth) cont.

- (i) where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
- (ii) where the Commission is of the opinion that the act or practice constitutes discrimination, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement—to report to the Minister in relation to the inquiry;

Part IIB—Redress for unlawful discrimination

Division 1—Conciliation by the President

...

46PF Inquiry by President

- (1) Subject to subsection (5), if a complaint is referred to the President under section 46PD, the President must inquire into the complaint and attempt to conciliate the complaint.



Independent third party facilitated dispute resolution

[10.465] An employee or employer may decide to appoint an independent third party to facilitate resolution of their dispute. Services such as mediation and conflict coaching are often available through organisational Employee Assistance Programs, or can be accessed on an as needs basis from commercial providers. Referral to an independent third party can be required in an employment contract, enterprise agreement or be a voluntary decision of the people involved. The Fair Work Commission's *Effective Dispute Resolution Guide* specifically permits the use of independent third parties to arbitrate in certain circumstances:

Can Independent Persons Help With A Dispute?

[10.470] Fair Work Commission, *Effective Dispute Resolution Guide* (Commonwealth of Australia, 2013), <http://www.fairwork.gov.au/resources/best-practice-guides/pages/effective-dispute-resolution.aspx>

Where a term in an award, an enterprise agreement or a contract of employment or other written agreement refers a dispute to an independent person (other than the Fair Work Commission):

- the person may, where agreed to by the parties, deal with the dispute via arbitration and make a binding decision about the dispute
- the person must not deal with a dispute if it is about whether an employer had reasonable business grounds to refuse a request by an employee for flexible working arrangements or for an extension of unpaid parental leave beyond 12 months unless provided for in a contract of employment, enterprise agreement or some other kind of written agreement that allows them to deal with the dispute, and

Can Independent Persons Help With A Dispute? cont.

- generally, an independent third party can only assist the parties to resolve their dispute in accordance with the powers that are expressly conferred by the relevant clause of the award, agreement, or other written agreement.



[10.475] Forsyth explores the use of ADR processes in workplace disputes in Australia in the following extract, and provides some examples of employers with quite sophisticated ADR systems, particularly the Department of Defence.

To What Extent is ADR Used for Workplace Disputes?

[10.480] A Forsyth, "Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR" (2012) 25(3) *The International Journal of Human Resources Management* 476 at 483-484. {AQ: please insert pg ref [484] where it falls.}

It was explained in the "Introduction" to this article that, given the traditional role of public agencies such as the AIRC and state/federal EEO tribunals, there has been little need for the use of ADR in workplace and employment conflict resolution. Although ADR has been utilised extensively in other areas of the Australian legal system (such as family law, community justice, native title, commercial and construction disputes), there has been limited opportunity for the growth of ADR practices in the workplace context. However, as discussed above, several factors including the decentralisation of industrial relations and falling union membership have resulted in an increased role for workplace ADR since the early 1990s. In particular, the emergence of human resource management strategies involving various forms of direct employer-employee engagement provided something of a spur to the development of nonadversarial "conflict management at the level of the workplace".

Van Gramberg's 2006 study found that while the involvement of private ADR practitioners in Australian industrial relations was increasing, it was "still in its infancy". Her survey data showed that in 2001, 69 of the 129 employer respondents in the state of Victoria had utilised mediation in the past – with 12.9% of these employers using lawyers to conduct the mediation, 16.8% using employer association representatives, 12.9% using union representatives and 8.9% using former tribunal members. By far the highest proportion – 33.7% – had the mediation conducted internally by an HR manager. Van Gramberg's survey of ADR practitioners revealed a different mix among the 156 respondents, with lawyers, social workers and academics making up almost 60% of the practitioner cohort. However, very few of the ADR practitioners indicated that they had a full-time workload of workplace disputes (for example, only 3.9% of 150 respondents said that these disputes constituted more than 60% of their workload; for 74.8% of respondents, these disputes made up less than 20% of their workload). By international standards, therefore, the "ADR industry" in Australia (at least for workplace disputes) is fairly small. Van Gramberg's practitioner survey also revealed that ADR was being used mainly for interpersonal disputes, disciplinary matters and the facilitation of certain types of collective negotiations such as enterprise bargaining.

Another measure of the use of private ADR processes is provided by the incidence of such arrangements in dispute resolution clauses that form part of statutory workplace agreements. Van Gramberg's (2006) study included an analysis of 2000 federal enterprise agreements over the period 1999–2001, which showed that the number of agreement clauses providing for an external mediator or facilitator as part of the dispute resolution process increased from 4.9% in 1999 to 9.9% in 2001. However, the analysis also indicated that 96.8% of agreements in 1999 and 98.4% in 2001 designated the AIRC as the final (determinative) step in the dispute resolution process. The involvement of the AIRC in dispute resolution under workplace agreements [484] continued throughout the period of Coalition Government, even as the federal legislation increasingly provided parties (particularly

To What Extent is ADR Used for Workplace Disputes? cont.

employers) with greater freedom in the negotiation of such agreements. The ultimate expression of this freedom was embodied in the concept of "employer greenfields agreements" introduced under Work Choices. These agreements essentially allowed an employer to determine, unilaterally, the employment conditions to apply for a new business project or venture, without any employee or union involvement. Yet, an analysis of employer greenfields agreements lodged in the first 12 months of their operation (March 2006– March 2007) showed that 42.8% provided a conciliation or mediation role for the AIRC in their dispute resolution clauses, while 33.6% provided for arbitration by the AIRC. This study also showed that 37.5% of employer greenfields agreements provided some role for private ADR in their dispute resolution clauses, while 28.2% left the dispute resolution process to the employer's discretion. These results suggest an increased level of private ADR availability under a particular form of agreement under Work Choices (compared with Van Gramberg's 1999–2001 agreement data), but an ongoing role for the AIRC in dispute resolution.

There are several examples of Australian employers that have adopted quite sophisticated ADR systems in the past 10 years or so. The stand-out exponent of this approach is the Fairness and Resolution Branch of the Department of Defence, which has established eight "Fairness and Resolution Centres" and a network of "Fairness and Resolution Practitioners" around the country to handle employment grievances and inter-personal conflicts for the organisation's 110,000 military and civilian personnel. The confectionery manufacturer, Mars Incorporated, has established an internal "ombudsman" in its Asia- Pacific operations as an alternative avenue for employees to have performance management, work environment and other conflicts dealt with. The State Services Authority in Victoria has initiated a project to increase the level of non-adversarial management of workplace issues across the state public sector. These examples are consistent with anecdotal reports of an increasing propensity of employers to utilise workplace mediation, particularly for "employee on employee" conflicts. However, this trend has not been measured empirically since Van Gramberg's (2006) study, which (as indicated above) was based on survey and agreement data gathered in 1999–2001.



Outcomes of DR in the workplace

[10.485] The following extracts explore the possible outcomes of various dispute resolution processes used in the workplace. They emphasise the benefits for both employers and employees of effective conflict management systems.

The Growing Importance of Workplace ADR

[10.490] W Roche and P Teague, "The Growing Importance of Workplace ADR" (2012) 23(3) *International Journal of Human Resource Management* 447 at 452. (references omitted)

Whether assessed discretely, or bundled together in integrated conflict management systems, ADR practices are commonly associated with a range of outcomes in the literature. Mediation is found to have a series of positive effects for both employers and employees. A variety of other forms of ADR used in the USA and Australia for handling disputes involving individuals have been assessed as benefiting employees and their employers. In the case of outcomes of primary importance for employers, ADR-led conflict management systems, focused mainly on resolving individual employment conflict, have been associated by commentators with higher productivity, lower conflict-related costs, more adaptive organizations and higher organizational morale and commitment. Links with lower absence and lower labour turnover rates have also been cited, as have links between ADR-led conflict management systems in non-unionized firms and union avoidance. They have also been associated

The Growing Importance of Workplace ADR cont.

with important outcomes for employees, such as procedural and substantive justice in the workplace, higher work satisfaction and a greater capacity to resolve potentially destructive conflict.

Interest-based bargaining and associated problem-solving practices are also reported to have been positively received by employees and to have a range of beneficial outcomes for employees, employers and trade unions. Much of the relevant research draws on case studies and sometimes on paradigmatic or exemplary cases such as the US Postal Service's REDRESS mediation programme, and the partnership initiatives at Saturn or Kaiser Permanente. Cutcher-Gershenfeld (2003) on the other hand presents survey data on interest-based bargaining in the USA. Over a quarter to a fifth of union and management negotiators expressed a preference for interest-based bargaining over traditional collective bargaining, and those with experience of the technique were more likely to report that bargaining relationships with their interlocutors were improving.



International Measures of Effective Conflict Resolution Systems

[10.495] A Forsyth, "Workplace Conflict Resolution in Australia: The Dominance of the Public Dispute Resolution Framework and the Limited Role of ADR" (2012) 25(3) *The International Journal of Human Resources Management* 476 at 486-487. {AQ: please insert [487] where it falls.}

Innovations in systems of workplace conflict resolution in countries such as the USA, Ireland, the UK, New Zealand and Australia have been examined in a considerable number of academic studies in recent years. In addition, evaluations have been undertaken of the dispute resolution services provided by public agencies and (in some countries) of the national framework for workplace conflict resolution. The following discussion draws upon several of these contributions, to identify certain measures or indicators of effective dispute resolution regimes.

Fairness is almost universally considered to be a key criterion of good conflict resolution. Lipsky and Seeber (2003, pp 102-103) develop this further, by reference to the American Association for Conflict Resolution's "eight essential elements of a fair conflict management system": (1) the voluntary nature of the process; (2) privacy/ confidentiality; (3) the impartiality of "neutrals" (mediators, arbitrators, etc.), who must also be (4) adequately trained and qualified; (5) diversity in the core of neutrals; (6) the prohibition of reprisal or retaliation; (7) consistency with an organisation's collective bargaining agreements; and (8) the statutory rights of disputants are not undermined.

Fairness is also expressed in terms of workplace or "organisational justice" in a substantial stream of academic literature. On this view, dispute resolution procedures should provide for "procedural justice" (eg, information about the nature of a dispute, an opportunity to present a case, a neutral mediator or decision-maker, reasons for any decisions made and an opportunity to appeal), "distributive justice" (eg, perceived fairness of the outcome by disputants) and "interactional justice" (eg, disputants are treated with dignity and respect, and outcomes are explained whether positive or negative). [487]

...

The concern is that important societal issues, such as workplace discrimination, are shielded from public scrutiny when dispute resolution is "privatised". Australia was heading in this kind of direction under Work Choices, not only through government promotion of ADR ..., but also because both the AIRC and ADR providers were required to conduct dispute resolution in private. The AIRC was also not permitted to publish its decisions in certain dispute resolution matters, so that consistency in decision-making could not be assured and the tribunal's tradition of "public jurisprudence" was threatened ...

International Measures of Effective Conflict Resolution Systems cont.

There is, of course, another side to the debate about what makes for fair and effective dispute resolution. As Shulruf et al. have observed: "fairness is not an absolute, and different parties have different views over what is and is not fair". They found that employers in New Zealand placed a high emphasis on the quick resolution of employee grievances, with minimal cost to businesses – although, contrary to the perception of a growing "grievance industry", most employers in their study were satisfied with both dispute resolution processes and outcomes, indicating that employer satisfaction was highest where dispute resolution was carried out in-house rather than by external bodies such as the Department of Labour mediation service ... Efficiency for employers therefore emerges as another important indicator of effective conflict resolution systems.



[10.500]

Questions

1. What are the current conflict resolution methods (internal and external) in an organisation with which you are familiar?
2. What are some of the factors that impact on the cost of conflict in an organisation?
3. Workplace conflicts can be resolved using processes that are based on power, rights and/or interests. Give examples of processes that fall within each of these three categories.
4. Why is an interest-based dispute resolution process usually more effective in a workplace conflict?
5. What are the benefits of an integrated conflict management system in the workplace?
6. What are some potential problems when conflict resolution processes are facilitated by senior employees of the organisation, rather than external consultants?
7. Conciliations in the Fair Work Commission tend to be conducted primarily by telephone. What are some of the benefits and detriments of telephone conciliation in this context?
8. What kinds of dispute resolution processes can the Fair Work Ombudsman provide, and in which circumstances?
9. What kinds of dispute resolution processes can the Human Rights Commission provide and in what circumstances?
10. How can an organisation know whether its conflict resolution system is effective?