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WORKING PAPER SERIES

**Facilitation in the Workplace:
Two Exploratory Case Studies**

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The process of decentralisation of industrial relations in Australia has led to an increased focus on industrial relations negotiations and dispute resolution at individual workplaces and away from industrial tribunals. Since the advent of enterprise bargaining in 1991, agreements are increasingly negotiated at the workplace rather than head office level. At least 60 percent of agreements were negotiated at workplace level in 1995 compared with only 22 percent in 1994 (Bain, Crawford & Mortimer 1996). Continuing the decentralising trend the *Workplace Relations Act 1996* (the WRA) further decreased the role of the Australian Industrial Relations Commission (AIRC) in preventing and settling industrial disputes. For instance, the objects, inter alia, of the WRA provided for:

ensuring that the primary responsibility for determining matters affecting the relations between employers and employees rests with the employer and employees at the workplace or enterprise level
(3(b))

Workplace-level bargaining has been linked to an increased level of workplace disputation which is generally associated with the negotiation phase of agreement¹. This “reflects the fact that industrial action is a sub-set of bargaining activities and, by its very nature is most likely to occur in workplaces or industries where bargaining of some sort is occurring”(DIR 1996). In recognition of the inevitability of grievances arising out of bargaining, industrial relations legislation since 1988 has required certification of agreements to be contingent on the inclusion of a grievance procedure². Importantly, grievance procedures remove the ability of parties to refer disputes to the Commission in the first instance, necessitating at least an attempt at resolution at the workplace-level.

Reflecting the increase in workplace dispute resolution, the number of disputes reaching the Commission has been declining over time. Bain, Crawford and Mortimer reported the establishment of “consultative committees, grievance procedures, enterprise bargaining and enterprise agreements at the workplace level has shifted the focus almost exclusively to negotiation” (Bain et al 1996, p. 311). Similarly, Emery observed that “conflicts still abound at the plant level but the striking thing about the social climate is that the traditional antagonists accept a new responsibility for sitting down together to search for win-win solutions” (Emery 1996, p.30).

Whilst the majority of workplace disputes are handled internally through bilateral negotiation, many organisations in Australia utilise external third parties to facilitate the resolution process. The Australian Workplace Relations Survey (AWIRS 95) found that 57 percent of workplaces used “external advisory services”. Such services were typically used in larger workplaces and were slightly more prevalent in the public than private sector with workplaces employing specialist managers more likely to call on the services of external consultants. Of enterprises with more than 500

¹ This action refers to low level disputation such as placing bans and holding stop-work meetings. In general, strikes have been decreasing over time in Australia. See Department of Industrial Relations Annual Reports 1995 and 1996.

² Section 115(8) of the Industrial Relations Act 1988, and later, Section 170MC(c) of the Industrial Relations Reform Act 1993. The current provision in the Workplace Relations Act 1996 is Section 170LT(8).

employees, 66 percent utilised law firms and 44 percent utilised management consultants. Whilst Occupational Health and Safety and training were the most called-upon services, consultants were utilised for agreement making in 29 percent of workplaces using external consultants (Morehead, Steele, Alexander, Stephen & Duffin 1997).

The Rationale for ADR in the Workplace

ADR allows workplaces to resolve internal disputes directly between the parties concerned. Disputants are said to have greater control over the resolution of their dispute, arguably with more satisfying results. The process is designed to promote a creative, problem-solving interchange between the disputants with the mediator clarifying points, asking questions and practising reflective listening. Hawkins and Hudson described the process as not about blame and responsibility for the past, but rather problem-solving with a future orientation (Hawkins & Hudson 1991).

The parties to a mediation session enter voluntarily and maintain full control over the type and amount of information exchanged as well as the outcome of the mediation. Parties may decide to discontinue the process at any stage and are free to do so. Mediation demands active participation by the parties. Thus, they "own" their dispute, the way it is handled and the outcomes they generate. Faulkes reported that ADR is vitally concerned with the rights of the parties in the dispute:

right to own and manage your own dispute
right to make decisions based on your needs, your criteria, your ideas
right to enter into or exit from dispute resolution processes
right to access to dispute resolution processes
right to high quality service
right to dispute resolution processes that will not embroil you in escalating litigation."(Faulkes 1996).

Citizens are said to be 'dignified' by being allowed to participate in the resolution of their own disputes. She stated that participation through problem solving makes the client a "doer" and "responsible for his choices", whereas the traditional model encourages "passivity, dependence and an absence of responsibility for choices"(Power 1992, pp.214-225).

The traditional classification of third-party processes of dispute resolution has hinged on the extent to which the third party intervenes in order to achieve settlement. Thus, the concept of a dispute resolution continuum (David 1986, p.27) describes a spectrum of increasing degrees of prescription and authority exercised by the third party as one moves from informal third party processes (facilitation, fact-finding), to more formal processes of mediation, conciliation, and arbitration. The workplace case studies examined here utilised facilitation.

Facilitation

Facilitation in Australia was described by Astor and Chinkin as the use of a "third person ... to assist [the disputants] in establishing agreement on a common course of conduct in an attempt to resolve the dispute"(Astor & Chinkin 1992, p.65). The essence of facilitation is supervised negotiation (Chaykin 1994). The process relies on

the parties reaching a voluntary, uncoerced agreement and parties may withdraw from the process at any time (VLF 1994). Often referred to as facilitative mediation the process is based on mediation³ and characterised by its non-evaluative nature. In this sense, the facilitator refrains from proffering suggestions, advice or opinion, simply providing a stabilising influence ensuring each disputant has adequate opportunities to vent anger and express concerns. Third party neutrality is thus associated with the non-interventionist nature of the process.

Neutrality, however, can be problematic in ensuring the fairness of a decision. There is a conflict between the neutrality or disinterest of the mediator in the process of resolving the dispute and the interest the mediator holds in the fairness of the outcome of the dispute (Thirgood, 1999, pp 142-152). Impartiality is sometimes referred to as the mediator being equidistant from the parties, reflecting the standard that the mediator does not act for or against any one party. Cooks and Hale (Cooks & Hale 1994) argued that mediators have a responsibility to assist the parties to come to an informed decision. Even to clarify their case raises issues of the relative power balance between the parties, their interpersonal skill, dispute resolution skills and their ability to articulate the problem. The mediator in assisting a party may fall foul of the equidistance rule "in contrast to impartiality where neutrality is understood as the ability to suspend judgement, equidistance is the active process by which partiality is used to create symmetry"(Cooks & Hale).

Case Studies in Facilitation

In this exploratory study, two forms of facilitation used to assist enterprise bargaining at workplace-level were examined. Semi-structured interviews were held with the industrial relations manager (IR manager) of a municipal council and the human resources manager (HR manager) of a manufacturing plant who had been directly involved in the facilitation process. Their views are taken to represent those of 'management' in each of the cases. In the first case, facilitation was undertaken in the manner Astor and Chinkin (1992) defined the process: as a primer intended to set the conduct of future negotiations. In the second case study, the facilitation process was an ongoing technique of moderating negotiations, managing emotions and encouraging the parties to reach agreement.

CASE 1: LAUNCHING ENTERPRISE BARGAINING NEGOTIATIONS THROUGH FACILITATION IN LOCAL GOVERNMENT

The Council

The Industrial Relations Manager of an inner Melbourne Council was interviewed for this case study. The Council, an amalgamation of three municipalities, employed 600 staff directly and 100 under contract at the time the facilitation process was utilised. Two business units had been tendered to private providers and another nine were scheduled for competitive tendering over the following two years.

³ Folberg and Taylor's (1984) authoritative study defined mediation as: "the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs"

The Enterprise Agreement

In April of 1995 the Council embarked on its first enterprise agreement. The ‘umbrella’ agreement was to replace a myriad of over-award agreements and awards, which offered different terms and conditions for staff from the three regions who would eventually have to work together. As the workforce was unionised, management and unions jointly decided on pursuing a certified agreement under the *Industrial Relations Reform Act 1994*.

The rationale for the use of a facilitator

At the time the Council decided to undertake enterprise bargaining, most of the management team were not yet in place and those who were, had been in the Council only a very short time. Few other councils had enterprise agreements in 1995 and it was felt by management that there were insufficient skills and knowledge in the management team to embark on the process unaided. Additionally, management felt strongly that some form of expertise in the concepts, framework and training in enterprise bargaining was essential. Managing conflict was a crucial consideration in the light of the issue of a log of claims by the unions which management felt was “exorbitant, costly and heavily process-oriented”⁴.

Management were not interested in retaining the facilitator throughout the process of bargaining but rather wanted to initiate bargaining by creating a cooperative ‘mood’ among the negotiating team: “His briefing was to bring together a disparate group to focus on a range of issues seen as important in enterprise bargaining”⁵. The facilitator was utilised only for the initial stages involving the training of negotiators, establishing the bargaining agenda and helping to build trust and confidence in the bargaining process.

Selection of the facilitator

Known to both management and the unions, the facilitator had previously been retained by one of the municipalities prior to amalgamation as an adviser on enterprise bargaining legislation. The fact that he was acceptable to both sides was a crucial consideration in his selection. Management were also satisfied that he possessed skills and experience in a notable career in the field of industrial relations.

The facilitation process

Prior to the facilitation, the consultant conducted focus group surveys randomly across the council, interviewing over 90 staff from a range of classifications. His survey results identified the ‘gap’ between current work practices, terms and conditions and employees’ vision of the future. This ‘gap’ provided a range of issues and terms for negotiating as well as providing employees with an awareness of the general process of enterprise bargaining. Additionally, “it allowed the selection of a negotiation team which was broader than the usual half dozen shop stewards”⁶. Interested parties were welcome to join the negotiating team and undergo the necessary training. As a result, the team consisted of management representatives, union representatives, union officials and employees (not associated with a union).

⁴ Interview 2. with Council IR manager

⁵ Interview 1. with Council IR manager

⁶ *ibid.*

Following the focus group surveys, the facilitator convened a two-day workshop in developing bargaining skills and setting the cooperative 'mood' for future negotiations. Importantly, he played a "problem-solving role and acted as a coach in the concepts of enterprise bargaining"⁷. The focus group results were tabled as the framework of the bargaining agenda. At first union representatives felt that the workshop was nothing more than two days off work with a consultant paid to sell the management stance. However, it was quickly conceded by all parties that the workshop was a success. Indeed the IR manager claimed it was "the most cooperative thing I had ever seen in my working career"⁸.

Difficulties and problems

The involvement of the facilitator in the early stages of agreement making represented a "stardust" phase⁹ marked by cooperation and goodwill. The only difficulty described by the IR manager was the perception by management that the facilitator was more slightly more aligned to the employees and, equally, the unions complained that the facilitator was being paid to sell a management-driven agenda. Despite this, management felt that bias was not a real issue for the negotiating team and there were no serious difficulties with the facilitation phase: "It increased the options and issues and represented broader thinking than traditional industrial relations"¹⁰.

Outcomes and plans for the future

Following the departure of the facilitator, the initial camaraderie among the negotiating team gradually disintegrated under the strain of negotiating the 'hard' issues of redundancy provisions, gratuity schemes and the many anomalies which existed across the three amalgamated entities. After eight months of negotiations the negotiating team experienced massive attrition with most of the non-unionised employee representatives becoming irregular attendees at meetings and finally not attending at all. The IR manager attributed this to the dominance of union representatives and officials over 'hard' industrial relations issues.

The industrial climate became more intense as negotiations progressed towards the end of the year. Rolling bans and work stoppages occurred and rifts started to appear within factions of the unions and with management. Additionally, with Christmas approaching many employees commenced taking annual leave placing immense pressure on the union to finalise the agreement.

The IR manager stated that the council would not use a facilitator for the next agreement. The decision was made partly because the format of the focus group survey was not considered appropriate for the needs of the council. The focus sessions did not provide the "meaty issues which management would now consider vital for an enterprise agreement"¹¹ reflecting the general lack of knowledge and expertise in agreement making among the workforce. Second, a facilitator was deemed no longer necessary by management as consultation and negotiation were

⁷ Interview 2. with Council IR manager

⁸ Ibid

⁹ Ibid

¹⁰ Ibid

¹¹ Interview 1. with Council IR manager

formally established in the council with fortnightly meetings taking place for the negotiating team. The council felt that whilst facilitation was no longer a priority, an external consultant would be used in the future to provide management with legal advice regarding the agreement towards its final stages. Suggestions and advice provided by the consultant would then be taken to the negotiating table by management.

CASE 2: FACILITATION OF AN ENTERPRISE AGREEMENT IN A MANUFACTURING FIRM

The Manufacturer

The Human Resource Manager of a medium-sized manufacturing firm in the metal trades industry was interviewed for this case study. Employing 130 staff, the HR manager felt the firm was too small to employ a specialist industrial relations manager. Employees were predominantly female, non-unionised and 60 percent came from non-English speaking backgrounds, although literacy levels were described as sound. The firm drew employees from the south-eastern Melbourne suburbs where it is located, contributing to a community ‘culture’ of the workplace.

The Enterprise Agreement

Prior to the enactment of the *Workplace Relations Act 1996*, the firm set its terms and conditions of employment through informal, unregistered agreements which were generally management-driven, paternalistic and rule-dominated. A permanent shopfloor committee (the committee), established for the purpose of approving the informal agreements, consisted of six employees from each of the main shop areas, the HR manager, a Line manager and the Manufacturing manager. Little negotiation took place in committee meetings, as generally, day to day issues dominated the agenda. On the advice from their employer association, management decided to pursue a non-union certified agreement under Division 2 of the WRA with the assistance of a third party neutral.

The rationale for the use of a facilitator

The rationale for using a third party hinged on the fact that none of the managers had any experience in constructing or negotiating an enterprise agreement and the committee members were not trained in negotiations. The managers felt strongly that a neutral independent person with good facilitation skills would help negotiations move smoothly and help to avoid conflict. Additionally, it was felt that a third party would help management maintain control over the process, keeping it on track and staying within agreed time limits.

Selection of the facilitator

The facilitator was one of several recommended by the employer association. Selection of the facilitator was based on the relevance of prior job roles and experience which included both union and employer association positions as well as an appointment as a tribunal member. This background was considered to constitute an “all round career and the ability to maintain independence”¹². Initially, the

¹² Interview 1. with HR manager.

employee representatives of the committee questioned the neutrality of a facilitator paid by management, but after an introductory meeting with the facilitator, they agreed to proceed. Employee representatives were asked by management whether they wanted to have a union involved in the bargaining phase but they declined.

Management's briefing of the facilitator was that the process be conducted in a fair and impartial manner: "We requested the facilitator maintain total independence and observe the set time frame which had been determined by the committee"¹³. Indeed, the issue of independence was also the reason the employer association refused to participate directly in the facilitation role. Their involvement has been to provide a list of potential facilitators to the firm.

The facilitation process

At a meeting prior to the commencement of negotiations, the facilitator requested both the management and employee representatives prepare a briefing paper listing potential bargaining issues from which discussions could be based. The facilitator explained that in the first session many of the items on the issues paper would be agreed to by both parties and that subsequent negotiations would be based on outstanding issues. Indeed, this turned out to be the case.

Throughout the meetings the facilitator's role was to chair the discussion on each of the bargaining items, ensuring clarity and understanding on each settled item before moving on to the next. At the end of each meeting a summary was written by the HR manager and distributed to each member of the committee. These working documents provided a history of items either agreed or deferred along with a concise account of discussions. Employee representatives occasionally made these summaries available to other staff members and held ad-hoc meetings to discuss progress and issues. A total of 18 hours of meeting time resulted in the signing of a two-year enterprise agreement.

Difficulties and problems

The HR manager identified the lack of negotiation training of the employee representatives as a significant problem in the bargaining process. Early in negotiations the employee representatives became angry, feeling they were not getting anything they had included on their bargaining list. At this point the facilitator stopped proceedings and requested time alone with the employees in order to explain the nature of bargaining: that it involves trade-offs, formulating alternatives and therefore an expectation that not everything on their bargaining list would be achieved.

Management also commented on the committee's agreement to redundancy benefits far below the figure management had been prepared to give. This was put down firstly, to lack of bargaining skills, but importantly, to the fact that none of the negotiating team had more than eight years with the firm. Management felt the team was really only interested in providing for itself and had ignored the interests of long serving employees in the firm, who would have stood to gain from better redundancy provisions.

¹³ Interview 1. with HR manager

Another problem experienced by the employee negotiators stemmed from their lack of understanding of pay and conditions and general naivety of industrial relations. They agreed to a wages settlement of four payments of \$10 per week over a two-year period. The HR manager pointed to the lack of understanding by the employee negotiators of the implication of flat pay rises on maintenance of relativities and on higher-earning employees outcomes.

Reactions and perceptions of fairness

Management were very impressed with the skills of the facilitator and felt the process was fair. They believed the facilitator remained neutral and independent throughout the process. Feedback from the employee bargainers was also positive. Employees felt that, despite not getting everything they asked for, the process was fair. Some discontent was felt among those of the wider employee population who had been hoping for a higher pay rise, however management felt confident that the majority of staff were satisfied with the process.

Outcomes and plans for the future

The bargaining process has changed the culture of the employee negotiators. They are now less reluctant to question management directives, more likely to object, argue and debate issues which come before the shop committee: “ It is as if they are continuing the bargaining process into the day to day functions of the committee”¹⁴. The HR manager reported that at a recent meeting the manufacturing manager stated he was developing guidelines for the working of overtime. This was met with an emotional, angry outburst from the employee negotiators objecting to the unilateral development of policy. In the past the proposal would have been met with acceptance. Management intends to redefine the role of the committee in the light of this change.

Additionally, management is considering two options for future enterprise negotiations. The first is to train the employee negotiators in bargaining skills to equip them better for the task. The second option is to hire the third party to be the bargaining agent of the employees rather than to take the role of neutral facilitator. Both options hinge on the observation by management that the process would have been quicker and smoother with better skills on the part of the employees.

DISCUSSION

The demise of centralised wage fixing, national - and industry-level bargaining concomitant with the fall in union membership - has opened the way for a number of mechanisms for resolving conflict in the workplace outside the traditional conciliation and arbitration system. Increasingly, workplaces utilise grievance procedures, private mediation, consultative committees, advisory arbitration and so forth. The use of these processes in labour disputes has special significance. They have developed on a world-wide scale in response to the post industrial revolutionised society which recognises that industrial conflict is inevitable in modern society and that it requires machinery for its peaceful settlement (ILO, 1980).

¹⁴ Interview 2. with HR Manager

Since the early 1980's the processes of ADR have been expanded in their use across many jurisdictions and in many countries. The reasons for this have been varied and the debate surrounding the use of the processes profound. It is relevant here to canvass some of the major issues which argue for and against the use of ADR in the context of industrial relations.

The move away from the use of the AIRC along with the ideal of settling workplace disputes between the employers and employees without the interference of third parties has been cited as the rationale for the *Workplace Relations Act 1996*. The use of private third parties in the two case studies examined, throws into question the continuing adherence to notions of equality and comparative justice and national standards as workplaces across the country implement different rates of pay and conditions in their pursuit of flexibility and efficiency. For instance, in 1970, Wooten (1970, p 134) described the essential features of the AIRC as taking "a principled approach ..throughout the tribunal's jurisdiction to provide reasonable consistency and predicability to the decisions of the tribunal. Without these characteristics decisions will appear arbitrary, capricious and unjust, and will give the parties no guide to regulating their affairs without litigation" Under those principles, there could be no case for equal work being paid at unequal rates simply because one worker happens to work in a different company.

ADR is considered disempowering when disputants do not possess the same level of bargaining power as each other. In an employment relationship, employees, especially unrepresented employees, may face power disparities in the form of inadequate knowledge and skills at the bargaining table compared with an employer. Additionally, the employment relationship is inherently one of power and control by the employer over the employee. In a study comparing the advantages of centralised versus decentralised industrial relations systems, Rowe (1982) cited the National Employers Industrial Council's report of the Working Party Examining Industrial Relations systems: "the protection of the public interest is given subordinate consideration (in a decentralised system of bargaining), and the outcome of bargaining generally depends on the economic strength of the parties" (1983:246).

Evidence from the case studies

Chief Justice Hewart in *R. v. Sussex Justices; ex parte McCarthy*¹⁵ observed: "It is... of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". Both the case studies show that ADR certainly gives the impression that justice is being seen to be done. In the two cases presented here, employees were consulted and their views on enterprise bargaining were taken seriously. The third party was jointly appointed by management and employees and was seen to be an independent facilitator who systematically addressed each party's needs and facilitated discussion until agreement was reached. At the end of the process management obtained feedback from staff that they felt the process was fair.

Notions of fairness are powerful predictors of success of the negotiated agreement. Participant satisfaction with the conduct of the process has been observed to be a more important determinant in the effectiveness of the resolution than the outcome itself

¹⁵ (1924) 1KB 256

(Masterson, Lewis, Golman & Taylor 2000). However, the manufacturer's case study raises a deeper question: is perceived fairness equivalent to justice? In this case, employees agreed to pay and conditions which, they subsequently discovered, were inadequate. Indeed the issue of redundancy payments will be back on the bargaining agenda for the next agreement in the next round of negotiations, as employees realised they had agreed to something less than satisfactory. Whilst such an outcome is likely in any enterprise negotiations, the presence of the third party raises issues of the role of the facilitator in maintaining neutrality and balancing power.

The concept of a third party maintaining neutrality has been described as at odds with balancing the power in a mediation between parties in dispute: an attempt to allow for a power imbalance renders the facilitator no longer neutral. Indeed, a facilitator who intervenes to rectify a perceived power imbalance may be seen as being biased by the other party. Tillett argued that mediation is "inherently unfair" unless both parties are of roughly equal personal professional status (Tillett, 1991). The irony of maintaining neutrality is that if the power imbalance goes unchecked, the result may be the maintenance of the power imbalance and thus, of the status quo: "if two unequal parties are treated equally the result is inequality" (Shaw, 1997, p 390). Further, facilitators who intervene to advise a disadvantaged party of the folly of agreeing to certain terms and conditions proffered by the other party will have breached the rules of facilitative mediation which require the third party to abstain from making suggestions or otherwise interfering with the negotiation process.

Shaw argued that employees acting collectively can potentially gain bargaining power in a workplace negotiation, stressing: "this is not only relevant to the determination of wages and conditions of particular workers, but goes also to the opportunity for employees to influence the decisions made about the workplace, and the opportunity to play a broader political role in the community"¹⁶. The Council case and the Manufacturing case also illustrate the difficulty non-unionised employees have in influencing workplace decisions in a real and informed sense. In the first case, employee negotiators demonstrated heavy attrition throughout the negotiating process and finally stopped attending meetings as issues became less and less directly relevant to them. In the second case, employee negotiators agreed to inadequate terms and conditions of employment. Both cases highlighted the lack of 'representativeness' of non-unionised employees, their lack of interest in issues which do not directly affect them, and in the second case, a lack of general knowledge of industrial relations issues. Importantly, both cases point to the consequences of third party activity.

Whilst the current paper presents only a preliminary exploration into the use of third parties for resolving workplace disputes, and does not purport to extrapolate these results across workplace bargaining in general, the issue of the role of the third party in an environment when, there is power disparity between the parties in the employment relationship is one which begs further investigation.

¹⁶ Shaw, J. W. 1997 In Defence of the Collective: New South Wales Industrial Relations in the 21st Century. *Journal of Industrial Relations*, September 39(3):388 – 405, at 390

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