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## WORKING PAPER SERIES

Exploring Avenues for the Growth of Private  
Alternative Dispute Resolution in Australian  
Workplaces

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## **Abstract**

Many alternative dispute resolution (ADR) schemes emerged in Australia during the 1980s in a wide range of jurisdictions. Conciliation or mediation are included as a compulsory first step in dispute resolution in family law, consumer law, residential tenancies, and equal employment opportunity. In the federal and supreme courts, mediation is offered to disputants where cases have been backlogged and there is agreement between the disputants to proceed to mediation (Limbury, 1991). Tribunal-based ADR in Australian industrial relations represents an exception to these relatively recent developments as state and federal industrial tribunals have traditionally practised conciliation and arbitration. Instead, a more individualised form of ADR is emerging in the Australian workplace with mediation as a private alternative to the publicly funded system. This paper traces the development and opportunities for growth of private ADR as it has emerged in Australian workplaces through an examination of a range of contributing factors such as the legal and political environment; the decline of unionism; the growth of individual contracts; and the growth of management consultants. The article draws upon on academic literature; a survey of 129 employers across Victoria conducted by the author in 2000 and the analysis of 2000 dispute resolution clauses from federal Enterprise Agreements certified between 1999 and 2001.

## **The survey: Employer Demand for Mediation**

A survey carried out by the author in 2000 was designed to explore the level of demand for private mediation amongst Victorian employers. The sample of employers was drawn from the Victoria University alumni list, subscribers to university publications and a range of large public and private sector companies drawn randomly from an internet search. A total of 550 questionnaires were sent to employers in Victoria resulting in 129 responses (23.5 percent).

## **What is Alternative Dispute Resolution?**

The definition of alternative dispute resolution is crucial to the understanding of the processes and how they are used. First, ADR is considered as being alternative to the formal judicial system. Technically, under this definition, formal tribunal processes are also ADR as they are non-judicial in nature. Many disputes are resolved through bargaining in the 'shadow of the law' through statutory schemes which allow for non-judicial mechanisms of resolution such as conciliation and arbitration. The Victorian Attorney-General described ADR as those dispute resolution processes which have a certain formality attached to them but which do not include judicial determination (Attorney General, Victoria, 1990:5). This definition includes as ADR, the third party processes such as arbitration, conciliation, mediation, fact-finding and the use of an agreed expert. It excludes bilateral negotiation and resolution through mechanisms such as fighting or harassment.

Some definitions of ADR such as that of the Australian Commercial Dispute Centre confines the processes to "basically structured informal negotiation processes with the assistance of an independent third person" (Newton, 1987, p562). The problem with this definition is that many avenues of ADR are in fact quite formal, such as those undertaken in court-annexed schemes and those which take place in statute-established tribunals. Another more inclusive definition of ADR was provided by Rickert (quoted in Charlton and Dewdney 1992, p68) incorporating three pillars to the definition of ADR: "all forms of dispute resolution other than litigation; dispute resolution processes that leave the form and content of any settlement to the parties; and non-litigious processes with the intervention of an outside party".

In this paper, a distinction is made between the traditional ADR provided by tribunals and that provided by internal staff such as human resource managers from the ADR provided by privately hired consultants. Thus, the focus here is on the growth in Australian workplaces of privately hired individuals who offer a range of ADR processes such as mediation (Folberg and Taylor, 1984; Bay, 1994; Boule, 2001), facilitation (Astor and Chinkin, 1992; Kuenzel, 1996; Purcell, 1994; and Kessler), fact-finding (Blackard, 2001) med-arb (McDermott & Berkely, 1996), and private arbitration (Mesch & Dalton, 1992).

## **Antecedents of workplace ADR in Australia**

In many respects ADR is a traditional dispute resolution tool. For instance, conciliation and arbitration appear in the Australian Constitution as the means of resolving interstate disputes<sup>1</sup>. For the past two decades, a number of federal and state Acts of Parliament have encouraged the use of conciliation or

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<sup>1</sup> S51(xxxv) of the Australian Constitution gives the federal government the power to make laws with respect to 'conciliation and arbitration for the prevention and settlement of interstate industrial disputes'

mediation. For instance, the federal legislation include the *Workplace Relations Act 1996* (the WRA); *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984*; and the *Human Rights and Equal Opportunity Commission Act 1986*. State versions of anti-discrimination legislation contain as a common element, the recognition that a dispute involving complaint of discrimination should, where possible, be resolved other than by a formal adversarial hearing. Other jurisdictions utilising mediation and conciliation include:

*(i) The Commercial Arbitration Act 1984*

This Act, which is identical in each of the states to ensure uniformity of approach, allows for mediation of commercial disputes.

*(ii) Small claims*

Most Australian jurisdictions allow for special arrangements to resolve small claims, often within the court system. Small Claims Courts and Tribunals provide an informal forum through the use of mediation without the need to observe rule of evidence (Skehill, 1991).

*(iii) Family Court*

The Family Court of Australia was established in 1976 on the basis that family law disputes should be resolved by mediation wherever possible. The mediation offered by the court is co-mediation, with both a mediation-trained counsellor and registrar who offer a conference where they, as neutrals, assist parties to systematically isolate the issues in dispute, develop possible options taking into account the needs of the family and finally reach a mutual agreement. Mediators may put forward alternatives for consideration but do not actively promote any of these (Nicholson, 1991).

*(iv) Court Annexed ADR*

The Federal court has been involved in court-annexed ADR since 1987 using registrars of the court with experience as solicitors in litigation. Mediation conferences are held in an informal manner and the settlement rate is reported at about 70 percent (Skehill, 1991)

*(v) Community and Neighbourhood Justice Centres*

These centres mediate in disputes between neighbours and others within a particular geographical area. Participation is reported as being voluntary and success is high (Cameron, 1990).

These statutory ADR schemes have grown in popularity as ADR is said to satisfy a two-fold need: first, to provide a more expeditious and less costly means for citizens to resolve their conflicts (Mackie, 1991); and second, to alleviate the overcrowding of court lists (Limbury, 1991). In recent years, a growth of interest in the use of privately provided ADR to resolve disputes has been driven by research claiming ADR to be a different way of responding to conflict, in terms of being an alternative to adversarial transactions which typify traditional, formal dispute resolution processes (Astor and Chinkin, 1992, Folberg and Taylor, 1984). ADR has been seen as the efficiency solution to the cumbersome, elitist formal justice system as it is not encumbered with the onerous obligations and standards of the latter (Menkel-Meadow, 1985). It has been said to enhance the ongoing relationship of the disputants, educate them to deal better with future conflicts; and the private nature of the proceedings is said to protect both reputations and privacy (Limbury, 1991; Power, 1992; Wissler, 1995).

## **Political and legal factors influencing the growth in private ADR**

### *(i) Promotion of ADR by Government*

Though it failed to secure its 'second wave' of amendments to the WRA in 1999, the government demonstrated its clear intention to shift the locus of dispute resolution further away from the AIRC by restricting the compulsory conciliation function and increasing the scope for private mediation (Van Gramberg, Teicher & Griffin, 2000). The Minister for Employment, Workplace Relations and Small Business held a number of press conferences and released several discussion papers promoting private mediation services outside the AIRC arguing that 'mediation can offer a more confidential, user friendly, non adversarial and accessible system, providing savings in costs and time involved in attending hearings away from the workplace' (Reith 1998b, pp 6-7; see also 1999a, 1999b, 1998a, 1998c). The outcome of mediation, the signed contract, would have been enforceable by the courts or a return to mediation, but not by recourse to the dispute resolution processes offered by the AIRC.

Under the proposals, free dispute resolution would have been replaced with a \$500 fee for voluntary conciliation in order to offset any competitive advantage which the AIRC would have otherwise enjoyed over private providers. The proposals reflected the government's agenda of privatising government services in line with the dominant economic rationalist argument that governments should transform their role from 'rowing' or providing services to 'steering' or providing policy direction to private providers (Osborne & Gaebler, 1982). It is likely that the government's enthusiastic promotion of private ADR acted as an early impetus for private providers such as law firms to expand their services to include mediation.

### *(ii) Decentralisation and workplace disputation*

Another political factor contributing to the potential for growth of ADR was that both conservative and Labor governments decentralised wages bargaining to the level of the individual workplace. One consequence of this policy has been that removing the centrality of the AIRC has increasingly placed responsibility for workplace relations with the parties to the employment relationship (Waring, 1999). It is argued here that decentralising industrial relations has played a role in the growth of private ADR consultants as it is linked to the relocation of conflict resolution from AIRC-based processes to the level of the workplace, such that it is open to managers to draw on the expertise of private third parties.

The move towards the decentralisation of Australian industrial relations was largely prompted by the persistence of criticisms that the entrenched use of the formal tribunal system inhibited the development of a decision-making relationship between employers and employees. An early critic of the tribunal system argued that 'by definition, employee participation in decision making, or even industrial democracy ... is a decentralist concept. The development and application of schemes of employee participation in this country have been painfully slow' (Brown, 1986, p 130). Some years later, the BCA-sponsored report by Hilmer, McLaughlin, MacFarlane and Rose (1991) revealed evidence that, despite the presence of the Australian Industrial Relations Commission (AIRC), by 1990 workplace level conflict resolution was already a growing feature of Australian workplaces. The report strongly advocated a formal shift to workplace-level bargaining. Other proponents of decentralised dispute resolution emphasised the gains to be made from a better understanding of each party's true position under workplace dispute resolution and claimed genuine attitudinal change towards resolving conflict would result (Niland, 1978; Romeyn, 1994).

The drive to enhance productivity and efficiency especially through the removal of restrictive work practices led to a series of AIRC national wage decisions which gradually lowered the level of wage setting to the workplace, culminating in the 1991 Enterprise Bargaining Principle decision. The enterprise-level wages bargaining system allowed employers and employees (whether union members or not) to negotiate at the workplace for terms and conditions of employment, provided these did not undercut the provisions in the existing award. This was accompanied by an acceptance by the AIRC itself that primary responsibility for dispute resolution lay also with the parties:

The primary thrust of the principles of recent years has been the continuing application of the structural efficiency principle, the encouragement of improved efficiency and productivity and the devolution of prime responsibility for dispute outcomes to the immediate parties involved (AIRC, 1993, pp 17-18).

A feature of the WRA was the decreased reliance on the AIRC for the prevention and settlement of industrial disputes. 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 (section 3(b) WRA)

The process of decentralisation led to an increased focus on industrial relations negotiations at the workplace. Agreements were consequently negotiated at the workplace rather than at head office level. For instance, Buchanan, Van Barneveld, O'Loughlan and Pragnell (1997) reported that 60 percent of agreements were negotiated at the workplace level in 1995 compared with only 22 percent in 1994.

Accompanying the shift to workplace negotiations has been the inevitability for the parties at the workplace to deal with conflict. Workplace-level bargaining has been linked to an increased level of workplace disputation that is generally associated with the negotiation phase of agreement (Department of Industrial Relations, 1995; 1996). 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' (Department of Industrial Relations, 1995, p 85). Indeed, the number of working days lost (which had been falling for over two decades) rose by 24 per cent in 1999 to 650,500 since the previous year. Over the same period, the number of employees involved in industrial disputes (either directly or indirectly) increased by 32 per cent (Australian Bureau of Statistics, 2001 Cat 6321.0). In recognition of the inevitability of grievances arising during the life of an agreement, industrial relations legislation since 1988 has required certification of agreements be contingent on the inclusion of a grievance procedure<sup>2</sup>. The current provision of the Workplace Relations Act is Section 170LT(8) which sets out the following terms:

- (8) The agreement must include procedures for preventing and settling disputes between:
  - (a) the employer; and
  - (b) the employees whose employment will be subject to the agreement;

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<sup>2</sup> Section 115(8) of the Industrial Relations Act 1988, and later, Section 170MC(c) of the Industrial Relations Reform Act 1993.

about matters arising under the agreement.

The provision is mandatory and together with section 170LT(1) of the Act requires the AIRC not to certify the agreement unless it is satisfied that the terms of s.170LT(8) of the Act are met. Importantly, grievance procedures remove the ability of parties to refer disputes to the AIRC in the first instance, necessitating at least an attempt at resolution at the workplace-level: ‘increasingly, Australian Management is going to start dealing with conflict at the workplace, and not...moving it on to the Industrial Relations Commission’ (Tidwell, 1997, p 6).

**Table 1: Changes in dispute resolving mechanisms between 1990 and 1995**

	1990 (% workplaces)	1995 (% workplaces)
Specialist IR manager	34	46
Joint consultative committee	14	33
Disciplinary procedure	73	92
Grievance procedure	49	71
Formal monitoring	42	46
Training of Supervisors in IR	39	72
OH&S Committee	41	43
EE0/AAPolicy	58	67

Table 1 shows the changes in workplaces with 20 or more employees.

Source: Compiled from Morehead, A., Steele, M., Alexander, M., Stephen, K and Duffin, L. 1997. *Changes at Work The 1995 Australian Workplace Industrial Relations Survey*. Longman: Sydney.

The trend towards establishing dispute resolution mechanisms in Australian workplaces can be observed in Table 1, which shows that between 1990 and 1995 there was a significant increase in the use of specialist industrial relations (IR) managers, joint consultative committees and formal grievance procedures.

Between 1996/7 and 2000/01, the number of s99 applications to the AIRC (notification of disputes) fell from 3,696 to 2,598 (AIRC, 2001)<sup>3</sup>. Interestingly, while these s99 notifications decreased, the number of dispute notifications arising under dispute settlement clauses in certified enterprise agreements has been steadily rising from a low of 55 in 1996/97 to 403 in 2000/01 (AIRC, 2001). The failure of a number of organisations to resolve their conflicts through their internal dispute resolution policies is another likely source of growth for private ADR providers.

In order to examine whether organisations are including private ADR providers in their dispute settlement clauses, the author examined 1000 federal enterprise agreements made in 1999 and another 1000 in 2001 (Van Gramberg, PhD thesis, in progress). It was found that the formal insertion of private third parties (classified here as mediators, but is inclusive of facilitators, mediators and arbitrators) as a step in the dispute settlement procedure of the enterprise agreement occurred in 4.5 per cent of agreements in 1999 and in 10.1 per cent of agreements in 2001 (see Table 2). While this growth in the

<sup>3</sup> This has been accompanied by an increase in litigation, leading one senior member of the AIRC to observe: There is already a tendency for disputes in some industries to become more protracted and difficult to resolve...There seems to be less willingness on the part of some parties to accept the assistance of the Commission by way of conciliation and/or arbitration as a means of resolving their differences (Boulton 1999: 11).

adoption of private mediation reflects workplace policy rather than actual activity, nevertheless it represents prima-facie evidence that there is an increased acceptance of the role of private third parties in workplace dispute resolution.

**Table 2 Parties involved in workplace dispute resolution clauses**

External Party involved in dispute resolution	1999 (n=1000)	2001 (n=1000)
Mediator	45	101
AIRC	978	989
Board of Reference	4	5

Source: Van Gramberg, B. 2001 'The Growth and Nature of Alternative Dispute Resolution in Australian Workplaces' PhD Thesis in progress.

### **The fall in unionisation rates as a contributing factor to the growth of private ADR**

Decollectivisation of Australian labour law has been implemented through many provisions in the *Workplace Relations Act, 1996* (WRA) which have resulted in non-union bargaining, a negative emphasis of 'freedom of association' and by further increasing constraints on the right to strike (Ronfeldt, 1997). This has not only made it difficult for unions to operate in traditional ways but has led to a shift from representation of work interests to one of agency. In many cases this has reduced union activity to functioning as bargaining agents and providing various services. The WRA itself appears to promote the concept of a model of unionism based on the provision of services rather than on union organisation (Waring, 1999). Further, in the light of a rapid and continuing decline in union membership, many workers enter into bargaining agreements without the aid of unions (Peetz, 2001). In the absence of union and AIRC involvement in workplace bargaining, it is likely that some Australian organisations will consider hiring private mediators to resolve disputes or facilitate the negotiation and signing of workplace agreements.

The survey on employer demand for mediation conducted by the author found that the presence of mediation as a step in the grievance procedure was inversely related to the level of unionisation at the workplace. In other words, it was more likely that workplaces with low unionisation rates had a formal policy on using private mediation. Thus, workplaces with less than 40 percent unionisation rates were more likely to have a mediation step in their grievance procedure (28 percent of respondents) than those with more than 40 percent unionisation (12 percent). The two variables, unionisation and the presence of a mediation step in the grievance procedure were highly correlated (.305 at the 0.01 level). This indicates that in the absence of union activity at the workplace, employers are more likely to opt for private mediation. Respondents indicated that unions may exert a chilling effect on the use of private mediation. For instance, one respondent pointed out that unions are not perceived by employers to be supportive of private mediation and 'will be reluctant to accept outcomes'. Similarly, another suggested that 'it would require a change of attitude from union officials, both delegates and organisers in the union hierarchy'.

### **The growth of individual contracts and other Informal arrangements as factors contributing to the growth of private ADR**

Private mediation was anticipated by the government to be used to resolve disputes arising from Australian Workplace Agreements (AWAs). This is reflected by the 'model' grievance procedure clause in the WRA regulations which, rather than allowing for disputes to be heard by the AIRC, provides for a private mediation step (Schedule 9, subregulation 30ZI (2)). As the number of AWAs has grown to 194, 815 since March, 1997 (Office of the Employment Advocate, 2001), it is likely that this also represents a source of growth for private mediation.

Apart from AWAs, the WRA has facilitated a shift to other types of individual and non-union arrangements. For instance, non-union certified agreements in small businesses with less than 20 employees increased from 2.8 percent of agreements in 1995 to 9.5 percent in 1999 (Reith 1999a). Additionally, informal individual employment arrangements, which are thought to overshadow the number of AWAs in the system are another source for the growth of private mediation as these contracts would not include access to the AIRC for dispute resolution. Over 40 per cent of employment arrangements fall into this category and include individual agreements, working proprietors, agreements about over-award pay and informal arrangements (ABS, 2001 Cat. No. 6303.0).

### **The availability of private ADR providers as a factor contributing to the growth of private ADR**

Third party ADR providers come from a range of backgrounds. The downsizing of businesses; availability of retired industrial tribunal members; and the widening role of employer associations and law firms have released into the labour market a range of skilled human resource management professionals, industrial relations practitioners and lawyers able to consult across a broad field of personnel matters. For example, surveys of employer associations conducted in 1993 and 1995 by Mortimer and Still (1996) confirmed that almost all provided facilitation services or had some other involvement in assisting the negotiation of enterprise agreements, and that these services were increasingly being taken up by members. Similarly, the 1995 Australian Workplace Industrial Relations Survey (AWIRS) found an increase in the use of these employer association services (Morehead, Steele, Alexander, Stephen & Duffin, 1997). In particular, AWIRS reported 23 percent of member workplaces with agreements indicated that employer associations were involved in the negotiation stages, especially in the mining, manufacturing, wholesale trade, health and community services and personal services.

Another source of private ADR providers has emerged through the shedding of managerial staff through corporate downsizing and the broadening of law firm services. This has led to a growth in the number of management consultants in the marketplace. In turn, the flat structures of many organisations have left them depleted of specific skills and expertise: 'with an abundance of clients, the consultancy business expanded dramatically in the 1980's and early 1990's as outsourcing and downsizing detached functions and services from parent organisations' (Morris 1996, p 19). Morris noted that the formation of the National Association of Personnel Consultants was an indicator of the growth of consultancy work available in the human resources area.

The 1995 AWIRS found that 57 percent of workplaces used 'external advisory services'. Such services were typically used in larger workplaces and 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 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 (Moorhead et al, 1997, p 91).

**Table 3. Background of Mediators utilised by respondents**

Background of Mediator	Frequency of use of mediator (n=69)	Percentage use (n=69)
Lawyer	13	12.9
Employer Association Rep	17	16.8
Union Representative	13	12.9
Ex-Commissioner	9	8.9
Academic	1	1.0
HR Manager	34	33.7
Other	14	13.8
TOTAL	101*	100.0

\*Respondents were able to select more than one category for their mediators.

In the survey conducted by the author, the professional background of mediators utilised by employers varied considerably (Table 3). External mediators tended to be from employer associations (16.8 percent); unions (12.9 percent) and lawyers (12.9 per cent). Other (less used) sources of mediators nominated by respondents comprised retired industrial relations commissioners, external HR consultants, consultants with government backgrounds and psychologists. Only one respondent nominated the use of a dedicated mediation consultant. Internal mediation by the HR manager was cited as the most prevalent form of ADR by workplaces with 33.7 per cent of workplaces indicating this was a role of their HR manager.

When respondents were asked to describe the types of matters for which mediation could be used, the spread of answers was broad (Table 4). Nearly one third of respondents (32.1 percent) considered that mediation would be suitable for resolving personality conflicts and just under a quarter (24.9 percent) indicated that facilitation of workplace negotiations was a role for private mediation. Mediation was seen to be suitable by 22.9 per cent of respondents for disciplinary matters, but only 14.1 percent considered disputes involving pay and allowances as being suitable for mediation. These responses indicate that employers feel there are a number of dispute types for which mediation or other ADR processes would be useful. Thus, it is likely that over time, as these disputes present themselves, organisations may be increasingly willing to turn to private providers.

**Table 4. Employer perceptions of the suitability of mediation for certain types of dispute**

Type of dispute	Number of responses (n=114)	Percentage of responses (n=114)
Personality conflicts	80	32.1
Pay/allowance disputes	35	14.1
Disciplinary matters	57	22.9
Facilitating workplace negotiations	62	24.9
Other	15	6.0
TOTAL	*249	100.0

\*Respondents were able to select multiple responses

## Conclusions

Formal ADR schemes in tribunals and courts in Australia are now well established. The use of private mediators in industrial relations, however, is still very much in its infancy. It would appear that Australia is witnessing the 'thin edge of the wedge' of a growing movement rather than the short-lived emergence of a management 'fad'. This paper has canvassed a number of potential avenues for the growth of private ADR and revealed a small, but actual growth in consultant activity and in policies favouring ADR consultants. A number of factors believed to contribute to the growth of consultancy in ADR were described. First, the political environment, dominated by a largely bi-partisan agenda to decentralise the industrial relations system has led to an increase of bargaining in the workplace accompanied by an increase in disputes. In particular, there has been an increase in the number of disputes referred to the AIRC as a result of the failure of the workplace dispute settlement procedure. It is argued in this paper that this represents a potential source of activity for private ADR providers, particularly for those employers who would rather not use the AIRC. Second, and related to the first, has been the policy of the Howard-led Liberal Coalition government to move away from service provision. In industrial relations, this has been accompanied by a decrease in the centrality of the AIRC in decision making and wages setting; and more explicitly through an attempt to install private mediation as a competitor to the dispute settling processes of the AIRC. Again, disputes arising through bargaining activities in the workplace are a likely source of growth for private ADR practitioners.

Third, the decline of unionism has been shown to have had a positive effect on the propensity of employers to use private mediators. Fourth, the increase in AWAs and other contract-based forms of employment which do not utilise the dispute resolution services of the AIRC for workplace disputes represent another potential source of activity for private ADR providers.

Finally, the growth and marketing of consultants in the Australia, means that most employers are aware of a range of consultancy services available to them. Whilst, as the author's survey shows, the uptake to date of these services has been slow, it has been demonstrated that employers are satisfied that mediation and other ADR processes have a place in the workplace for a range of disputes. For the time being, it is clear that the AIRC is still a dominant player. However, future moves by the government to weaken AIRC dispute resolution functions or to make it more difficult for disputes to be heard by the AIRC may tip the balance in favour of private practitioners.

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