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WORKING PAPER SERIES

The Rhetoric and Reality of
Workplace Mediation

Bernadine Van Gramberg

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THE RHETORIC AND REALITY OF WORKPLACE MEDIATION

Bernadine Van Gramberg

Abstract

Three mediator dilemmas emerging from the critical literature on alternative dispute resolution were explored in this study of workplace mediation. The study found that most surveyed practitioners and industrial relations experts believed that mediators would take measures to circumvent the dilemmas, should they arise. These measures include applying appropriate standards and laws to ADR decisions; balancing power between disputants; and not exercising bias in order to obtain future work. In other words, the skills and attributes of ADR practitioners were represented by the surveyed population as being vital to delivering key qualities of mediation such as fairness and independence. However, three case studies of workplace mediation demonstrated that these normative traits were not met by the reality of mediator practice. The study raises training and accreditation issues for workplace mediators and questions the quality of workplace justice resulting from dispute resolution outcomes.

Introduction

Whilst tribunal-based alternative dispute resolution (ADR) has been a feature of Australian industrial relations since 1904, private ADR emerged on the industrial relations landscape in the late 1980s in response to a number of political and economic factors. For example, the decentralisation of wages setting has arguably given rise to ADR practitioners who facilitate enterprise negotiations; and the expansion of human resource management policies and practices with their focus on the individual worker, direct communication and rejection of traditional third parties such as unions, employer associations and tribunals not only complement the political and economic changes but have likely created an environment conducive to fostering private ADR (Van Gramberg 2002a; 2002b; 2002c).

Research on workplace ADR in Australia is limited and has tended to be theory based (Provis 1997); model based (Fells 1999); or tribunal-based (Provis 1995; Meredith, 2001). In other words, previous research has focused on either the normative role of the practitioner or the theoretical stages in the ADR process. This literature creates a series of expectations of the ADR process as well as of practitioner behaviour. Certainly, much of the large international (mainly US) literature on ADR has been influential in fostering a movement supportive of ADR techniques over the techniques associated with courts and tribunals (see for instance, Reith 1998; Westwood 1998; Rimal 1999; and Pope & Bush 2000).

On the other hand, ADR critics, especially those focussing on mediation, have raised concerns regarding its practice. Some have pointed to difficulties mediators have maintaining impartiality when faced with a need to balance power between disputants (Cooks & Hale 1994); the potential hazard of an ADR practitioner dominating the process (Tillett 1991); the possibility of a practitioner (inadvertently or not) acting for the party who pays for the services (Astor & Chinkin 1992); and the potential for unfairness created by a passive facilitator who allows a stronger party to dominate the resolution (Ingelby 1991).

The present study seeks to explore the possible gap between mediation rhetoric and the reality of its practice by contrasting the prevailing expectations of mediator behaviour against the actual behaviour of mediators in three case studies.

Methodology

Interviews with key industrial relations personnel and a survey of ADR practitioners were conducted to gauge their understanding of the expected behaviour of mediators handling workplace disputes. Together with the academic literature on mediation, these expected behaviours form the rhetoric of mediation. Semi-structured interviews were conducted with 5 Australian Industrial Relations Commission (AIRC) members, 8 union officials and organisers and 4 employer association representatives. A survey of 1710 Australian ADR practitioners was conducted in 2001 which yielded 302 responses, a 17.7 per cent response rate. However, of these respondents, only 156 were from ADR practitioners who conducted at least some part of their business in the workplace. This much smaller population, representing a 9.1 per cent return rate, though small, is arguably a representative sample of the, as yet, emerging workplace ADR professional.

Three case studies examined the recent application of an ADR technique by a private practitioner in the workplace. The selection of the case studies emerged from a survey of Victorian employers (Van Gramberg 2002). Of the 129 respondent employers, 27 volunteered to be interviewed and of them, 3 accepted the researcher's request to interview the participants. The three case studies are described below.

The Dilemmas

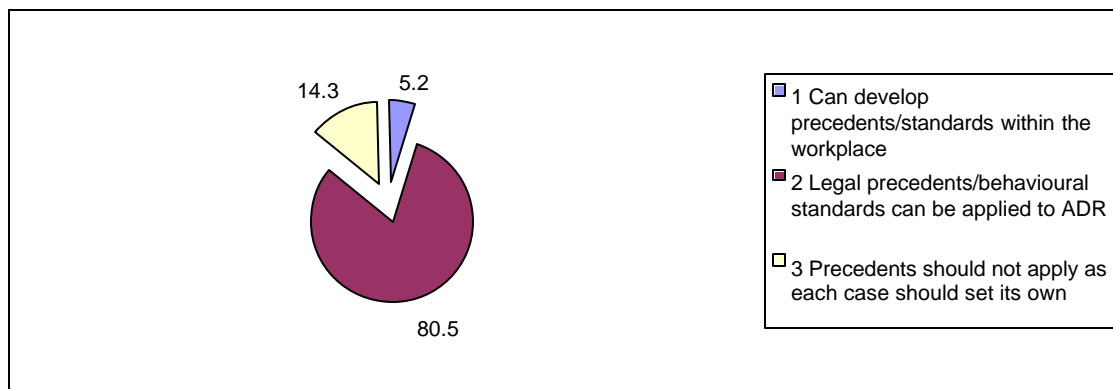
Three typical dilemmas associated with mediation were explored in order to ascertain expected mediator behaviour by asking surveyed ADR practitioners, first, whether they agreed with the dilemma and, second, to make a comment or suggestion relevant to the dilemma. The three dilemmas (the precedents and standards dilemma, the power balance dilemma and the bias dilemma) are detailed below.

- (i) *ADR is an individual method for resolving disputes and no precedents or standards can be developed.*

The precedents and standards dilemma holds that in the absence of precedent implies that 'like' disputes may produce 'unlike' results and has led to the criticism that the inconsistency of outcomes in mediated disputes results in injustice for some disputants (Ingleby 1991). In the absence of universal standards, decisions may rely on factors such as relative power. Further, as mediation results in a private, negotiated settlement it may create a motive for certain parties to continue to use the private system rather than the public formal system. The advantage gained by the repeat user is not limited to secrecy or preservation of reputation (Thornton 1990). This is because the repeat user has greater opportunity, than a disputant participating for the first time, to gain experience and expertise in the ADR process which may contribute to negotiating favourable resolutions (Bingham 1987).

The present study showed that practitioners and expert interviewees believed that there is little danger arising from the absence of precedents arising from private ADR proceedings. Indeed, 71.6 per cent of practitioners disagreed or strongly disagreed with the statement. The responses of the 77 practitioners who provided suggestions for how ADR practitioners might handle this dilemma are summarised in Figure 1, which shows that 80.5 per cent indicated that the absence of precedents and behavioural norms in private ADR is not a concern as mediators will ensure that dispute resolution will comply with any relevant standard or behaviour, law or precedent. A much smaller group (14.3 per cent) argued that precedents should not apply, given the individual nature of mediation. A few practitioners (5.2 per cent) believed that ADR could develop precedents and standards in the particular workplace in which the dispute is being resolved.

Figure 1 Practitioner explanations for why precedents are unnecessary in ADR



Source: ADR practitioner survey

The employer interviewees indicated that an important positive aspect of ADR was that it is private and it does not create precedents. However, like the ADR practitioners, employers believed that, where necessary, mediators will act to ensure the relevant laws and precedents are applied in the final outcome:

I can only say it would be naïve if ADR practitioners worked at trying to resolve disputes without using legal precedents or relevant legal precedents (employer association representative 16 June 2001:2).

The inescapability of applying precedents was also a point made by some members of the AIRC interviewed:

If you went into a neighbourhood setting and there was a conflict over noise levels then precedents would be all around you. People would immediately seize upon certain prescribed and prohibited noise levels as an example of the reasonableness of their position and it is impractical for a mediator to say there are no rules or we don't have any precedents here (AIRC member 30 April 2001:6).

On the other hand, the danger of a system operating privately was noted by one AIRC member who explained that over time standards and precedents may diminish in a private system:

By definition you do dilute standards because you distil consistency
(AIRC member 18 April 2001, p. 8).

Union interviewees were more critical regarding the absence of precedent in ADR. While some acknowledged there may be benefits in private dispute resolution delivering greater differences in outcomes at a local level for particular cases, most expressed concern that the norms created in negotiated settlements would tend to be those of the stronger party:

What you end up with is different standards for people appearing in the process – the level of education, the level of confidence, the ability to articulate. Even though you and I may have had exactly the same problem, but I can articulate and I don't get embarrassed and I am confident in talking, may well mean that I get a different outcome and maybe even a better outcome than somebody else - particularly if there are no representational rights. It is one reason people use unions because they know how to talk to the boss or the Commission (union representative 8 May 2001:5).

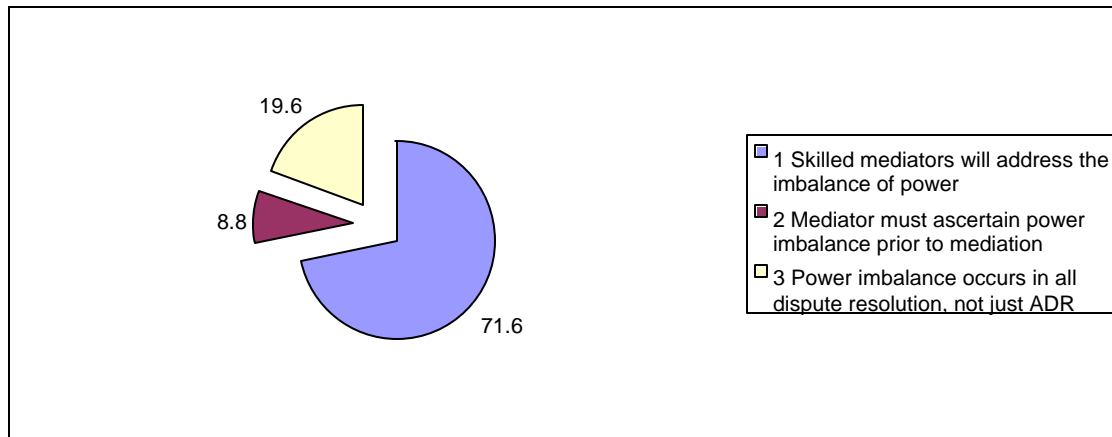
(ii) *In ADR, a powerful party can bargain hard and win concessions from a weaker party*

The power imbalance dilemma holds that the disparity of power between some employees and their employer can lead to unfair control over the process by the stronger party. The essence of this dilemma is that mediators who intervene to rectify power imbalances may be accused of bias by acting on behalf of the weaker party. On the other hand, the failure to balance power may result in the maintenance of the power imbalance and of the status quo: 'if two unequal parties are treated equally the result is inequality' (Astor & Chinkin 1992:107).

When respondents were asked to consider if power disparity between disputants might lead to unfair outcomes, nearly half (49.0 per cent) agreed. A large minority of 34.2 per cent disagreed that powerful parties have an advantage in ADR, and 16.8 per cent remained neutral on the issue. Ironically, having clearly stated that power is a problem in ADR, of the 102 respondents who provided further explanations for their answer, 71.6 per cent suggested that mediators can address the balance of power through the use of skilled questioning (Figure 2).

A smaller group of 19.6 per cent dismissed problems associated with power arguing it is a reality of all dispute resolution and not just ADR. Only 8.8 per cent of practitioners suggested that mediators should ascertain power imbalance prior to ADR with a view to discontinuing or recommending another process.

Figure 2 Practitioner explanations for dealing with power imbalances



Source: ADR practitioner survey

The mixed response from the practitioners surveyed was also reflected by the expert interviewees. There was general agreement amongst the 17 interviewees that, in ADR powerful parties have an advantage in decision making processes based on negotiation. However, most disagreed that neutrality was equivalent to passivity, advocating an active role for the ADR practitioner to avoid the powerful party dominating:

I don't believe they must be neutral. I believe they must be working for a just outcome. In some cases that will mean they are neutral. In others, it may be that they are pushing the solution that neither party has put forward. And certainly, there is no good in a powerful party winning concessions from a weaker party purely because one is more powerful. The whole point of dispute resolution should be just dispute resolution (union representative 9 May 2001:5).

Similarly, an employer representative commented:

A mediator can be neutral but also very strong. That is one of the keys to the system working that a mediator is able to say something to the bullying or stronger party and question why they took that position (employer association representative 14 May 2001:9).

AIRC members, like the other industrial relations interviewees, described an active role for the ADR practitioner when dealing with a power disparity:

If the power relationship is uneven then there has to be a way in which any bullying tactics must be brought to their attention and disadvantages have to be brought to their attention and also to the other side's attention. A private ADR practitioner is there to assist both parties (AIRC member 5 July 2001:8).

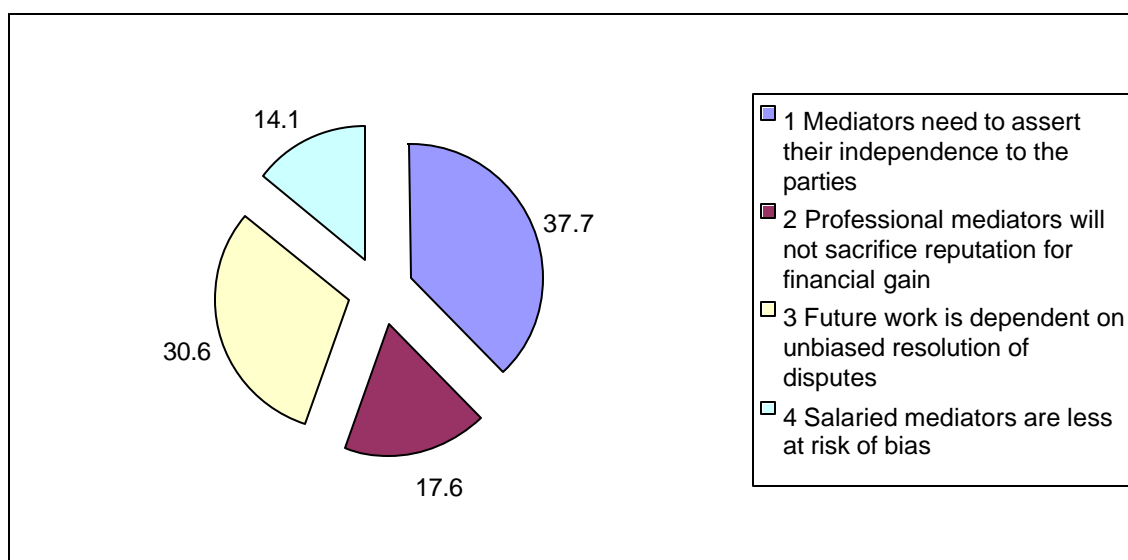
- (iii) *ADR practitioners are paid by employers. This means they will favour the employer's case in order to win future work*

The bias dilemma holds that ADR practitioners will seek to please the client, often the employer. Research on the expansion of private ADR in Australian workplaces has shown that practitioners from employer backgrounds lead the growth (Van Gramberg 2002a). According to these practitioners, 43.8 per cent spend more than 21 per cent of their total workload resolving workplace disputes. They are engaged by employers, generally through word of mouth, and also provide a range of other management consultancy services (Van Gramberg 2002c). The essence of the bias dilemma is that firstly, these practitioners may be motivated to satisfy an employer's goals in order to obtain further work; and secondly, that as management consultants, they align themselves with the employer's goals.

Survey respondents generally disagreed that ADR practitioners were likely to favour the employer's case in order to win future work (69.7 per cent). Only 7.7 per cent of practitioners agreed with the contention and a further 19.4 per cent remained neutral on the issue.

Figure 3 shows that, of the 85 practitioners who provided explanations for how mediators might avoid this dilemma, 37.7 per cent suggested that mediators should assert their independence to the disputants in order to dispel any belief of partisanship. A further 30.6 per cent claimed that future work would be curtailed if practitioners were seen to be biased and that would act as a deterrent to practitioners acting with bias. A smaller minority of 17.6 per cent believed that professional practitioners would not sacrifice their reputations for further work. Finally, another small group of 14.1 per cent suggested that ADR professionals should be salaried in order to prevent this dilemma from occurring.

Figure 3 Practitioner explanations for favouring the employer in order to obtain future work



Source: ADR practitioner survey

In contrast to the opinions of the surveyed ADR practitioners, union and employer association interviewees generally agreed with the dilemma that ADR practitioners would be inclined to side with the payer of the service. One employer representative felt that merely the perception of unfairness or bias would be sufficient to sow the seeds of doubt about the process:

I suppose if employers are paying there would be a natural tendency for the employees at least to develop the view that the practitioners would be tilted. That could well be to the detriment to both parties in the long run. (employer association representative 16 June 2001:3).

In contrast to the union and employer interviewees, all but one AIRC interviewee dismissed the notion that employers would be favoured by ADR practitioners, basing their opinions on the need for mediated outcomes being satisfactory for both parties and the operation of market forces which would act to prevent biased mediators from getting further work.

The Case Studies

(i) EnergyCo

This case involved the engagement of an ADR practitioner by EnergyCo, a privatised utility, to coach the relatively inexperienced management and employee negotiating teams through the enterprise bargaining process. Upon engagement, the practitioner described his role to management as facilitationⁱ. However, the case study demonstrated that the practitioner took on a range of roles, which oscillated between management advocacy (where the facilitator argued for management's agenda and debriefed with the management negotiating team but not with the employee team) and facilitation (where, for example, the facilitator intervened in the negotiation process in order to prevent conflict) in bringing the negotiating teams to a final agreement. The fluidity of process undertaken by the third party demonstrated his lack of neutrality and independence from the parties. This was exacerbated by the fact that the practitioner was the former HR manager of EnergyCo. Of particular concern was the ability of the management team to promulgate misleading financial information without incurring the facilitator's question or comment (as the ex-HR manager, the facilitator was said to have a sound knowledge of the financial state of the company). Management's ambit claim which indicated the possible collapse of the company formed the basis for the employee team's concession making.

(ii) Metals

This case illustrated the use of ADR to resolve a dispute over a proposed roster in a unionised metals manufacturing plant. The roster, which would eliminate most paid overtime and cut 8 positions, was hotly contested by the employees. Unable to deal with the matter, the HR manager turned to a professional mediator who recommended fact-findingⁱⁱ. However, whilst management and the union understood the nature of the process, the employees believed it to be mediation. The third party did not indicate clearly to them the process he would use. As a result, the employees had an expectation

that their dispute would be resolved in the presence of their supervisor, with whom they were in dispute. Instead, the process consisted of the facilitator interviewing the employees as a large group and taking their concerns to management for subsequent decision. During the fact-finding process the facilitator assumed a role as an advocate for management, criticising the employee's arguments and evidence and putting forward management's proposition as a more sensible alternative. Further, by overly relying on the employees' shop steward to speak on their behalf, he did not adequately canvass views from employees for whom English was a second language and many reported that their issues were not raised.

(iii) *Infotainment*

This case examined the use of mediationⁱⁱⁱ to settle an interpersonal dispute between members of a work team in a non-unionised government enterprise. The issue centred upon the attempt by Infotainment management to return a grounds person back to work following the break down of relations between him and two supervisors. The case revealed four major problems associated with the ADR process conducted by an externally engaged practitioner.

First, the practitioner was not independent of the disputants. She was the friend and co-worker of the rehabilitation worker assigned to the grounds person (as his advocate). Her engagement was on the recommendation of the same rehabilitation worker who then briefed her on the case. This association with a disputant's advocate demonstrates a conflict of interest in her role as an independent third party.

The second anomaly in the conduct of ADR found in this case (and in the two previous cases), was that the mediator adhered to the objective of Infotainment management which was to return the grounds person to the same work team, rather than to negotiate other settlements. As a result, the mediator provided no opportunity to explore or brainstorm other options in the mediation session. This represents a breach in the rules of a mediation session (Charlton & Dewdney 1995). Further, a time constraint imposed by the mediator (who told disputants she was expected at another mediation session) created an urgency to sign the agreement, arguably contributing to a level of coercion which led to the signing of and then immediate retraction by the supervisors of the 'agreement'.

Third, and related to the flawed ADR process, was the apparent denial of procedural justice to the supervisors. Both complained of the lack of attention given to their issues of concern. This was largely explained by the mediator's focus on the grounds person (and thus, on management's agenda).

All three cases demonstrated the reliance by disputants on the skills and experience of their ADR practitioners in ensuring a fair dispute resolution process. The case studies revealed that the disputants, in accepting the outcomes, were prepared to afford the practitioners a degree of trust and respect based on their legitimisation of their authority.

The Rhetoric and Reality of Workplace Mediation

Mediator behaviour designed to avert the three dilemmas described above (the precedents and standards dilemma, the power balance dilemma and the bias dilemma) was examined in three case studies. The results are described below and summarised in Table 1.

The precedents and standards dilemma was dismissed by the majority of surveyed practitioners and interviewees who argued that mediators would overcome the lack of safeguards associated with private nature of ADR by incorporating appropriate standards and precedents into the decision making process. This was not the case in EnergyCo where the ADR practitioner, an ex-HR manager of the same firm, was hired to facilitate enterprise bargaining negotiations. Despite the high probability that he knew the financial information tendered by management was misleading, or at least that it represented an ambit claim, he did not take any steps to suggest other standards by which the pay claim could be addressed. The resulting pay agreement, reflecting the Consumer Price Index increase for 1999/2000 of 2.4 per cent (ABS 2002), was well below the national average enterprise bargaining wage rise of 3.4 per cent in 1999/2000 (Department of Employment, Workplace Relations and Small Business 2000).

The power balance dilemma was largely dismissed by survey respondents and interviewees. The cases revealed that power imbalances were not dealt with by the three ADR practitioners. In Metals, the employees were identifiably weaker in power and resources than their management given their non-English speaking backgrounds, non-assertiveness and reliance on their shop steward to speak on their behalf. The employee focus group interviewed believed they were not adequately prepared to participate in the ADR session given their lack of training in the process and poor English which made many reluctant to come forward with concerns. In this case, the practitioner took on the role of gaining acceptance for management's pre-determined decision for the roster changes to go ahead. Whilst not in their interest, the employees agreed to the outcome, feeling that they had little choice but to do so.

The EnergyCo case study also demonstrated disparity of power between the employee and management bargaining teams. First, the composition of the management bargaining team, including a director from the company's board and the financial manager, not only represented the top echelons of the managerial hierarchy, but the presence of the financial manager, arguably legitimised the false financial information. Second, by failing to draw attention to the financial information, the practitioner not only perpetuated the power difference between the bargaining teams, but also breached neutrality and independence by acting on behalf of management.

In Infotainment, as a consequence of the close relationship between the mediator and the advocate for one of the parties, power was shifted away from the supervisors towards the grounds person. Additionally, the mediator's pursuit of management's agenda had the effect of denying the supervisors their right to procedural justice by limiting their opportunities to express their grievances against the grounds person. By so doing, the practitioner largely eliminated the issues that the two supervisors wished to have considered in the decision making process. In this case, not only did the mediator fail to act on the power imbalance, she exacerbated it by pursuing management's agenda.

The bias dilemma was disputed by 69.7 per cent of the survey respondents and most of the interviewed AIRC members. Yet, all three case studies found that ADR practitioners distinctly aligned themselves with the employer's agenda and objectives. By so doing, the practitioners actually contributed to the power imbalance against the employees. Further, in all cases, the ADR practitioners had been rewarded by repeat work in the organisation.

Despite the rhetoric that ADR practitioners would address the three dilemmas, the cases revealed this did not occur. Instead, the practitioners focused on achieving the objectives outlined by their briefing from the employer who hired them, behaving more as management consultants than ADR practitioners. The next section discusses the possible reasons for the gap between the rhetoric and the reality of mediation practice.

Table 1 Dilemmas in ADR and their application to the case studies

| Nature of Dilemma | Application in Case Studies | ADR practitioner response |
|---|--|---|
| ADR is an individual method for resolving disputes and no precedents or standards can be developed (the precedents and standards dilemma) | CASE 1: ENERGYCO Misleading financial information forms the basis of the employee's decision | Practitioner fails to question the validity of the information or to encourage workers to treat it as an ambit claim. |
| In ADR a powerful party can bargain hard and win concessions from a weaker party (the power balance dilemma) | CASE 1: ENERGYCO Inexperienced workers with compliant union Management knowledge that company is not in financial crisis CASE 2: METALS NESB workers with compliant union CASE 3: INFOTAINMENT Coordinator and operations manager not able to adequately state their case | Practitioner fails to balance power. Instead advises employees to accept management's offer. Practitioner fails to balance power. Practitioner focuses on the grounds person's case and prevents other team members from expressing their concerns. |
| ADR practitioners are paid by employers. This means they will favour the employer's case in order to win future work (the bias dilemma) | CASE 1: ENERGYCO Practitioner acts as management advocate CASE 2: METALS Practitioner acts as management advocate CASE 3: INFOTAINMENT Practitioner follows management's agenda | Practitioner has been engaged for other disputes in Metals. Practitioner has been engaged for other disputes in EnergyCo. Practitioner has been engaged for other disputes in Infotainment |

DISCUSSION: ADR PRACTITIONERS AS MANAGEMENT CONSULTANTS

This study presented the findings of three case studies which demonstrated that ADR practitioners, many of them with professional backgrounds as management consultants,

are unable to separate the roles of neutral ADR practitioner from that of a management advocate. The fluidity of the roles played by ADR practitioners in the case studies led to the conduct of unrecognisable, hybrid ADR processes which arguably denied procedural and distributive justice to the disputants and demonstrated breaches of neutrality and impartiality of the ADR practitioner.

No formal requirements such as training, accreditation, a code of ethics or a code of practice are necessary to practice ADR in Australian workplaces. In light of this, it might be salient to conclude that with a mandatory regime of training and accreditation, the gap between rhetoric and reality would narrow considerably. However, the study raises a number of questions which should first be considered.

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 (Van Gramberg 2002a). 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 (2001:519) 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 legitimise a managerial decision (Kaarst-Browne 1999). 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 (Kaarst-Browne 1999). In other words, ADR 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 (Hunter *et al.* 1995).

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 in the *Workplace Relations Act 1996 Regulations* (Schedule 9 subregulation 30ZI (2)).

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 the first case, 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 the second case, there were no managerial staff with experience in enterprise bargaining and so a consultant was deemed necessary. The third case, 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 organisational settings, communication is normally viewed as the mutual exchange of meanings between workplace actors (Weick 1987). 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 (Cooks & Hale 1994). 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 process, 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 provides sufficient impetus to engage an external consultant.

Conclusions

This study described a gap between the rhetoric of ADR and its practice. In general, survey respondents and industrial relations interviewees believed that ADR practitioners are capable of incorporating precedents and relevant standards so that dispute resolution remains consistent; that ADR practitioners have the skills to identify power imbalances between disputants and deal with it accordingly; and that ADR practitioners do not favour the employers' cases in order to gain future work. The reality as gauged from the three case studies is that these practitioner skills were not evidenced and, indeed, that practitioners failed to address all three dilemmas.

Given the absence of formal requirements for workplace ADR practitioners, there is a training and accreditation argument which can be made. However, this study identified a number of issues which go beyond this immediate solution and it is suggested that further research into workplace ADR is necessary to elucidate the potential for private ADR to deliver workplace justice. These issues include investigating the appropriateness of private ADR for workplace disputes in which a power imbalance exists between disputants; the use of private ADR as a means of gaining compliance with an employer agenda; and the use of private ADR consultants as a means of avoiding difficult communications with employees.

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ⁱ facilitation has been described as a form of supervised negotiation (Chaykin 1994).

ⁱⁱ fact-finding commences with a process of identifying the personnel who need to be interviewed and the documentation necessary to determine the facts of the case. The fact-finder then presents the case to management. The process may be inclusive of the fact-finder hearing the arguments and evidence presented by the disputants. Generally, no determination on the matter is made by the third party (Rome, 2000)

ⁱⁱⁱ Mediation is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted (NADRAC, 1997).