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The emergence of private ADR in Australian workplaces.

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THE EMERGENCE OF PRIVATE ADR IN AUSTRALIAN WORKPLACES

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ABSTRACT

This paper examines the emergence of private alternative dispute resolution (ADR) in Australian workplaces through two surveys and three case studies. The surveys demonstrate the uptake of private ADR has been slow although most practitioners describe their business as growing. The case studies illustrate deficiencies in the conduct of ADR including breaches of ADR process, ethics, justice and misuse of power. In the light of the apparent growth in private ADR, the cases raise questions regarding training and standards for workplace ADR practitioners.

INTRODUCTION

The emergence of alternative dispute resolution (ADR) in Australia in the 1980s (particularly in the jurisdictions of equal employment and family law) prompted the establishment of the National Alternative Dispute Resolution Advisory Council to provide the federal Attorney-General with a national definition of ADR and its various techniques (NADRAC 1997). The definitions apply to private ADR providers as well as tribunals and fall into three categories. These are, first, the facilitative procedures of facilitation, mediation and conciliation, which are characterised by the third party assisting the disputants to negotiate a settlement but do not include a role for the third party to determine the outcome. The second category of ADR techniques, termed advisory ADR, include fact-finding, evaluation and mini-trial and are characterised by the third party taking an investigative role and, where requested, making a determination. The third category, the determinative techniques, include private arbitration, advisory arbitration, med-arb and co-med-arb. These more formal processes are characterised by the third party conducting a hearing and making a determination.

Whilst tribunal-based 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 (Van Gramberg 2002). First, the decentralisation of the industrial relations system, making wages bargaining at workplace level the principal method of wage determination, providing opportunities for consultants practicing in facilitation of negotiation. Further, the importation and implementation of HRM policies and practices with their focus on the individual worker, direct communication and rejection of traditional third parties such as unions, employer associations and the AIRC not only complemented the political and economic changes but also created an environment conducive to fostering private ADR.

This study sought to explore the emergence of private workplace ADR.

THE SURVEYS AND CASE STUDIES

(i) The employer survey

A survey of 550 medium to large Victorian businesses were surveyed in 2000 to determine the level of prior use, support and demand for private mediation. A total 129 responses (23.5 percent) were received. Of the respondents, 35.2 percent identified themselves as manufacturers, 11.7 percent as government administration and 9.4 in Health and Community Services. The remaining respondents were scattered across the industry groupings and all industries were represented. The distribution of industries in the survey was similar to that found in the 1995 AWIRS and thus, whilst being a small sample, it was taken to be representative of the industry distribution of Australian workplaces.

(ii) The Survey of ADR Practitioners

A national survey of ADR Practitioners was conducted to investigate whether there has been a growth of ADR services offered to Australian workplaces; the nature of the services offered (types of ADR); and the implications for the traditional industrial relations actors if private ADR services should expand in the future. The database consisted of the mailing list for the 4th National Mediation Conference supplemented through an internet search for mediation providers. The final list of 1710 names represents a wide net which may, arguably, be described as being close to a representative group of Australian ADR practitioners. The 302 responses received represented a 17.7 per cent return rate. However, many respondents practiced ADR solely in jurisdictions outside the workplace so were removed from the analysis leaving 156 responses from practitioners who conducted at least part of their business in the workplace. This much smaller population, representing a 9.1 per cent return rate, whilst small, is arguably a representative sample of the, as yet, emerging workplace ADR professional.

(iii) The Case Studies

The recent application of ADR by a private practitioner in the workplace was the event under investigation in this study. The selection of the case studies emerged from the employer survey. Three employers responding to the employer questionnaire volunteered their cases for further investigation.

THE FINDINGS: THE EMERGENCE OF PRIVATE WORKPLACE ADR

A total of 69 of the 129 respondent employers indicated they had utilised mediation in the past. Table 1 demonstrates that external mediators tended to be from employer associations (16.8 percent); unions (12.9 percent) and legal firms (12.9 per cent). Retired tribunal members were also employed as mediators (8.9 per cent). Other (less used) sources of mediators comprised academics, consultants with management backgrounds, consultants with government backgrounds and psychologists. Only one respondent nominated the use of a dedicated mediation consultant, possibly indicating that workplace mediation is not as yet a full time occupation.

Internal mediation by the HR manager was cited as the most prevalent form of workplace ADR by employers, with 33.7 per cent indicating this was a role performed by their HR manager. Given that 69 of the 129 employer respondents had utilised mediation in the past, and of that number, only 23 (18.0 per cent) had engaged an external third party, it suggests that external

third parties engaged to resolve workplace disputes is as yet a relatively uncommon occurrence in the workplace.

Table 1. Background of Mediators utilised by respondent employers

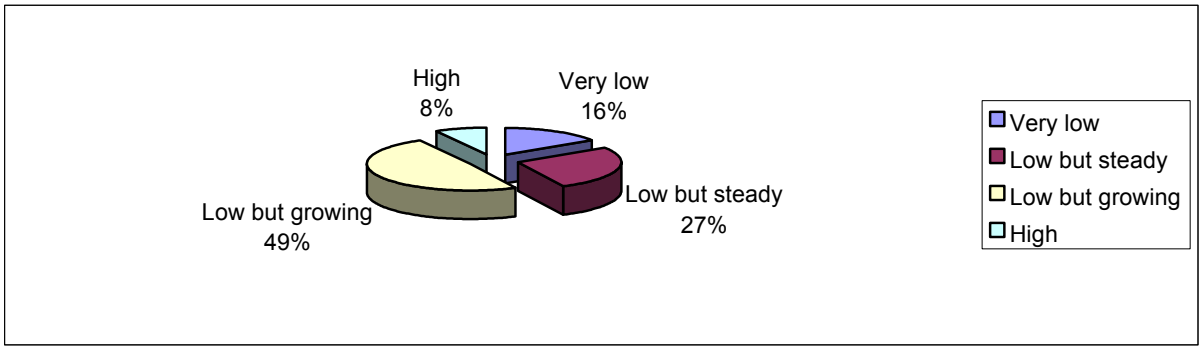
Background of Mediator	Percentage of workplaces which used a mediator (n=69)
Lawyer	12.9
Employer Association Rep	16.8
Union Representative	12.9
Ex-tribunal	8.9
Academic	1.0
HR Manager**	33.7
Other	13.8
TOTAL*	100.0

Source: Employer survey
*Respondents were able to select more than one category for their mediators.
** HR managers listed here were not external third parties, but employees of the firm

Practitioner views on whether there has been a growth in ADR
Some 115 (74.2 per cent) of the 155 respondents indicated that there has been a growth in workplace ADR since 1996. Of the remaining respondents, only 4.2 per cent felt there had been no growth in private ADR while 21.3 per cent were unsure as they had only recently commenced their practice. Despite their uncertainty, this group, arguably, must anticipate growth given they have chosen to establish businesses providing workplace ADR.

When asked to gauge the extent of the growth in workplace ADR, nearly half the respondents (49 per cent) indicated it was low but growing. A further 27 per cent measured the rate at low, but steady. Only eight per cent of respondents felt that there was a rapid growth in ADR (Figure 1). Care should be exercised here as different respondents may gauge the growth of ADR differently, depending on their individual interpretation of the gradations provided.

Figure 1. ADR practitioner responses to the level of growth of ADR

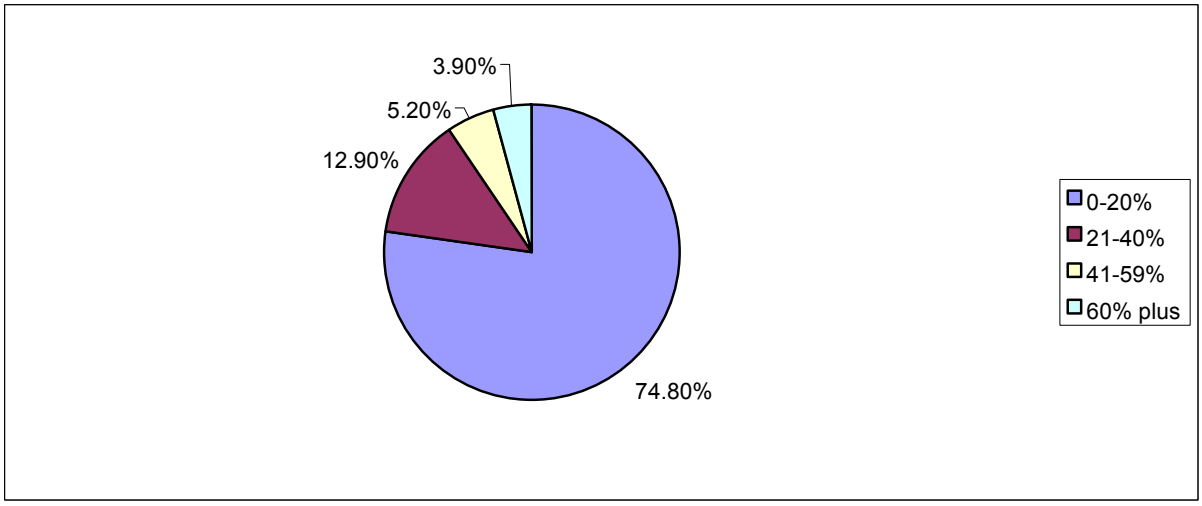


Source: ADR practitioner survey

Proportion of Workload on ADR

Despite the growth in workplace ADR, most practitioners surveyed did not have a full-time workload of workplace-based ADR. Figure 2 depicts the proportion (shown as a percentage) of ADR practitioners' total workloads spent resolving workplace disputes. For the 150 respondents to this question, the majority obtained less than 20 per cent of their workload from employment-related disputes (74.8 per cent). A small, but significant group (12.9 per cent of respondents) undertook between 21-40 per cent of their workload in workplace ADR.

Figure 2. Proportion of practitioners' workload spent resolving workplace disputes



Source: ADR practitioner survey

A further 5.2 per cent claimed that between 41 and 59 per cent of their total workload was workplace based and only 3.9 per cent indicated that workplace ADR accounts for over 60 per cent of their workload. It is clear that few ADR practitioners make their living, at this time, resolving only workplace disputes. When asked what other areas of ADR were practiced, 137 respondents indicated that they obtain dispute resolution work in avenues other than the workplace including dealing with family disputes (25.9 per cent), community disputes (22.1 per

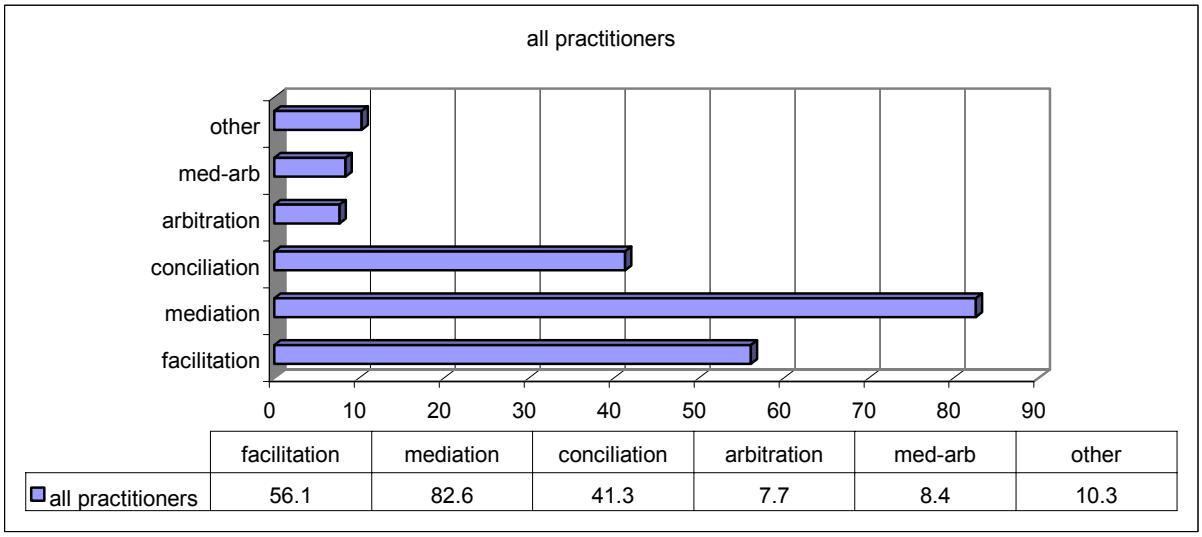
cent), equal employment opportunity disputes (12.8 per cent), landlord-tenant disputes (10.9 per cent) and small claims (10.9 per cent).

The Type of ADR

The practitioner survey responses indicated that a limited range of ADR is offered in Australian workplaces (Figure 3). The mainstay of Australian workplace ADR resides in the facilitative processes (NADRAC 1997) of mediation, conciliation and facilitation. Mediation, described in the questionnaire as 'third party assists negotiation' was the most utilised form of workplace ADR, attracting 82.6 per cent of responses.

Facilitation ('third party chairs discussion'), at 56.1 per cent was conducted slightly more often than conciliation, defined as 'third party participates in the construction of solution' (41.3 per cent). Little use appears to be made of the more interventionist processes of private arbitration (7.7 per cent) or med-arb (8.4 per cent).

Figure 3. Forms of ADR offered by Australian ADR practitioners



	facilitation	mediation	conciliation	arbitration	med-arb	other
all practitioners	56.1	82.6	41.3	7.7	8.4	10.3

Source: ADR practitioner survey

Who offers these forms of workplace ADR?

The form of ADR was linked to the professional background of the practitioner. Figure 4 provides a perceptual map which illustrates these relationships. Perceptual mapping is a statistical technique which allows for the correlations between variables to be visually appraised by their relative proximity to each other. The mapping process automatically weights the variables, so that the observable links in Figure 4 between professional groups and the form of ADR practiced takes into account that some professions responded to the questionnaire in greater numbers than others. The two axes of the map, horizontal and vertical are drawn from the cross-tabulation of the raw data of the questions under analysis. The position of the axes, and their scales, is unique to each plot so it is not appropriate to compare the absolute positions of data from one chart to another, although it is appropriate to compare relative positions and

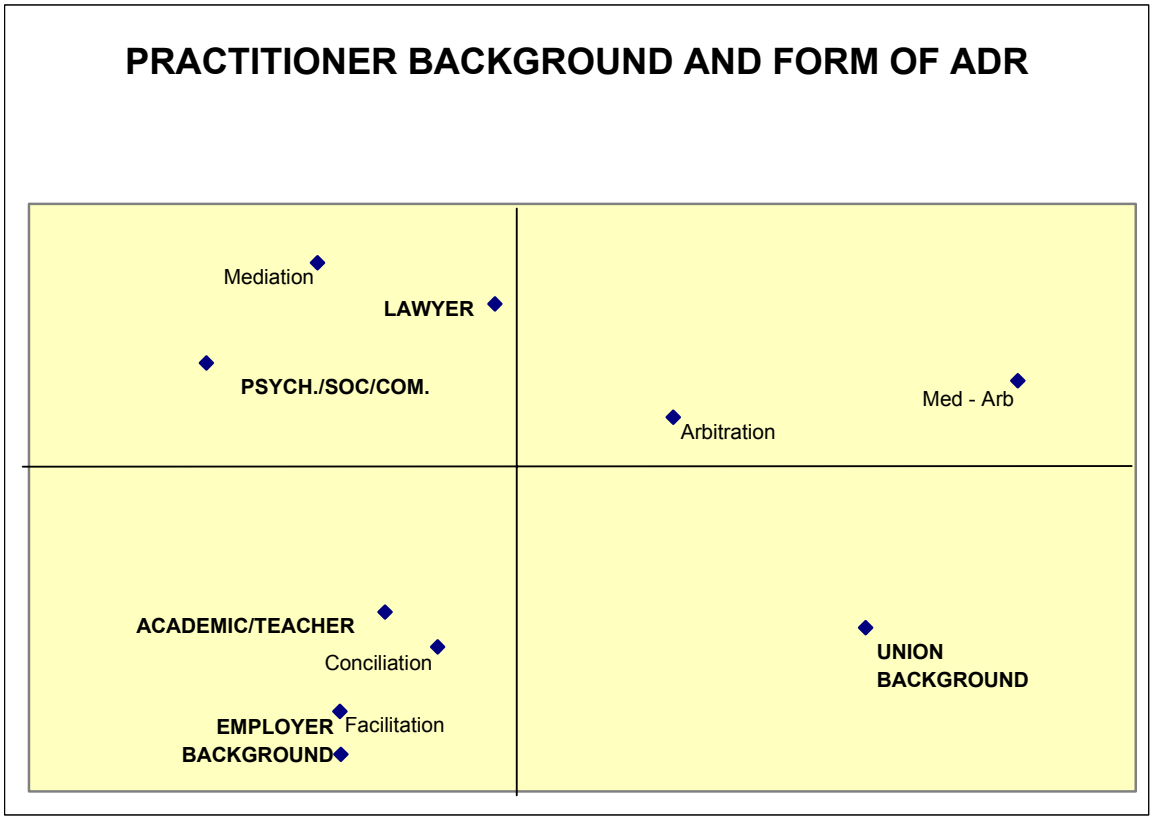
proximity. It should also be noted that the axes are drawn to different scales in order to maximize the shape of the page.

For clarity, some professions were grouped together. This was possible where groups demonstrated such similarities in their response to this question as to be statistically indistinguishable from each other. The merged groups comprised practitioners from the following backgrounds: psychologists, social workers and community workers (Psych/soc/com); academics and teachers (academic/teacher) and practitioners from employer or managerial backgrounds such as employer association staff, HR managers and ex-general managers (Employer background). It was found that the main types of ADR were very much related to particular professions.

Practitioners with employer backgrounds were linked more closely with facilitation and conciliation. While facilitation is considered a largely 'hands off' role for the third party, conciliation allows the third party considerable leeway for intervention including making suggestions. That practitioners from employer backgrounds oscillate between the two forms of ADR indicates that their experience in workplace matters provides them with the ability to supervise negotiations between disputants, and to make suggestions and take a more active role in the ADR process.

Like the employer group, academics and teachers were also linked to conciliation and facilitation. However, it is unlikely that academics are used to any great extent as workplace ADR practitioners given low use of academics found in the employer survey.

Figure 4. Practitioner background and the form of ADR conducted



Source: ADR practitioner survey

Figure 4 indicates that lawyers primarily practice mediation, but to some extent engage in arbitration. Their involvement in interventionist ADR processes indicates that they are, perhaps, more equipped to make suggestions, and at times make a determination on how best to settle the dispute than practitioners from other backgrounds. On the other hand, unions were linked with the determinative processes of arbitration and med-arb. The interventionist style adopted by this group may be due to their greater exposure to, and experience in, workplace conflict than many of the other groups and, perhaps, their reluctance to move away from their traditional role in the adversarial processes. However, some care needs to be applied to the findings concerning union ADR practitioners as there were only seven respondents in this category and so it is not possible to generalise these findings. Finally, psychologists, social and community workers were linked with mediation. This finding is consistent with their use of the therapeutic model of mediation, often conducted by those in the helping professions and those experienced in counselling and listening skills.

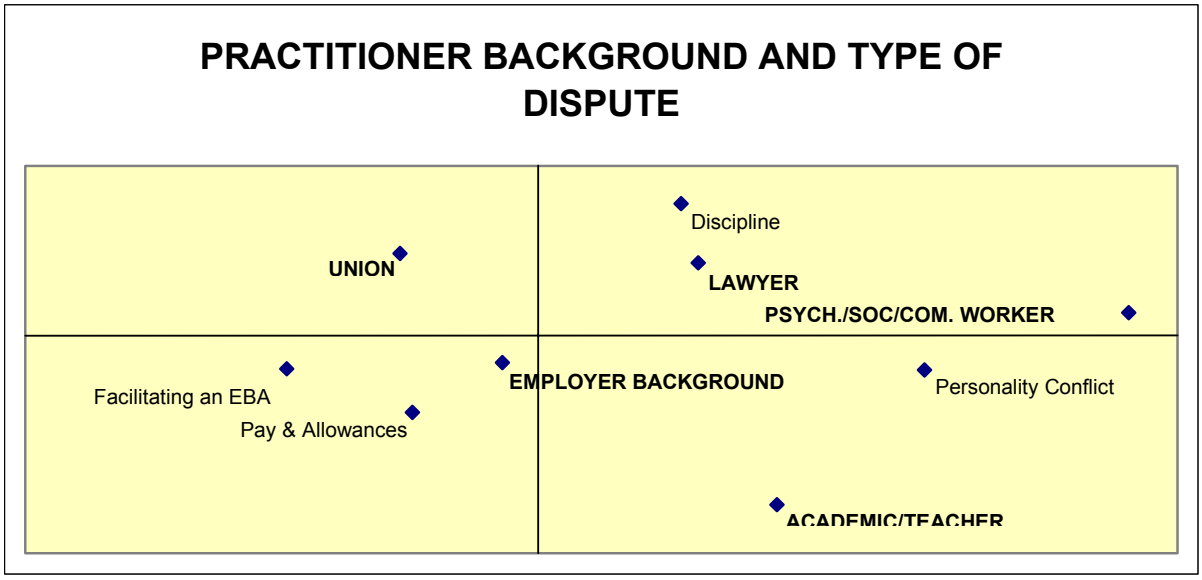
Types of Disputes resolved via ADR

Given that there was strong employer consensus that facilitative processes are better suited to interpersonal or interests disputes, rather than rights disputes, it follows that their engagement of practitioners to resolve workplace disputes would also be more heavily slanted to interpersonal disputes, disciplinary matters and facilitation of negotiations. This was tested by analysing the

workloads of ADR consultants. The ADR practitioner survey asked respondents to estimate the bulk of their workload in terms of the type of dispute resolved. Figure 5 details the types of disputes which ADR practitioners handle arranged according to their professional background. It shows that, proportionally, lawyers were more strongly associated with resolving disciplinary matters than the other groups. Their engagement is most likely on the instigation of employers wishing to avoid the unfair dismissal jurisdiction of the AIRC. From Figure 4, it is apparent that lawyers handle these types of disputes utilising mediation and, to a lesser extent, arbitration. In other words, lawyers are likely to handle disciplinary matters either by bringing the parties together to discuss their differences or by making a recommendatory ruling over the matter.

The perceptual map in Figure 5 indicates that unions are likely to be associated with the facilitation of enterprise negotiations, pay and allowance disputes and discipline. Like practitioners from employer backgrounds, unions have strong workplace experience. However, because of their low numbers in this survey, a general comment on union involvement in disciplinary matters cannot be made.

Figure 5. Practitioner background and type of dispute handled



Source: ADR practitioner survey

While ADR practitioners from employer backgrounds also dealt with disciplinary matters, Figure 5 shows that they featured more prominently in facilitating enterprise negotiations, demonstrating, perhaps, their perceived expertise in agreement making. Their involvement as facilitators of enterprise bargaining negotiations (which lead to the setting of wages and conditions in the workplace) helps to explain their engagement as third parties dealing with pay and allowance disputes. Figure 4 demonstrated that these practitioners primarily utilise facilitation and conciliation. Facilitation is often associated with the chairing of negotiations between the workplace parties where the facilitator does not play an active role in the development of the enterprise agreement. Conciliation, however, is a more interventionist form

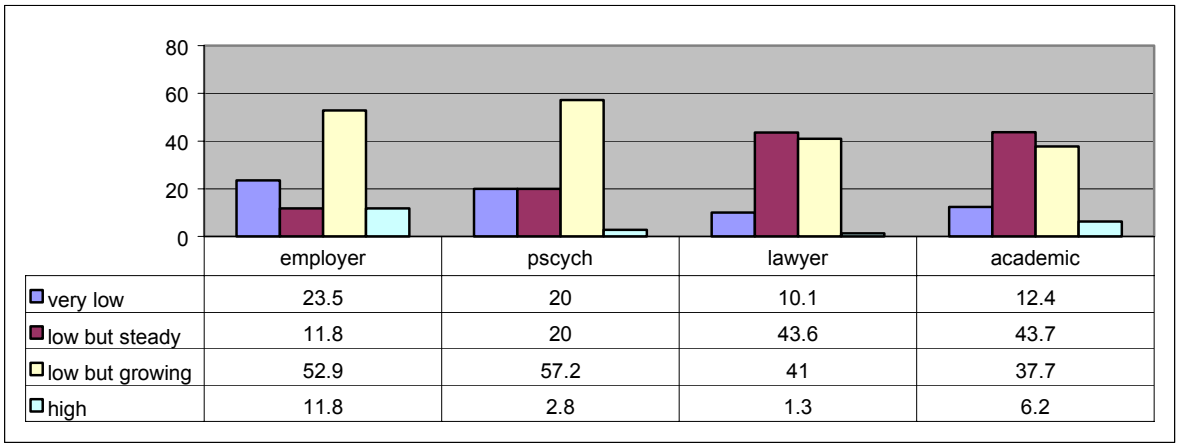
of ADR which would more likely be utilised to urge parties to come to an agreement, for instance on pay and allowance matters in dispute.

Psychologists, social workers and community workers were associated with interpersonal disputes and to some extent, with disciplinary matters. Both types of disputes often require a counselling approach and this is consistent with the findings portrayed in Figure 4 showing that these professionals tend to use mediation.

Professional background and estimation of growth of their ADR business

Two diagrams help to illustrate the extent to which certain professional groups have increased their share of workplace ADR. First, Figure 6 illustrates the relationship between each of the professional groups and their estimation of how rapidly their work has grown. As psychologists and lawyers dominated survey respondents, estimates of the growth of ADR workload have been expressed as percentages of responses for each professional group. Unions were omitted from these calculations for, although they indicated they were experiencing steady growth in ADR, there were only 7 respondents, too low for meaningful examination.

Figure 6. Rate of growth of ADR work according to professional background



	employer	pscych	lawyer	academic
very low	23.5	20	10.1	12.4
low but steady	11.8	20	43.6	43.7
low but growing	52.9	57.2	41	37.7
high	11.8	2.8	1.3	6.2

Source: ADR practitioner survey

Clearly, the growth in ADR has been experienced as an increase in business by all professional groups of ADR practitioners. However, on closer investigation, Figure 6 shows that practitioners with employer and psychology, social and community worker backgrounds, and to some extent lawyers, indicate that their work is growing. Academics and teachers too claim their work is growing. However, as some of the ADR work of teachers involves resolving disputes between students, their growth may not technically be considered as workplace ADR.

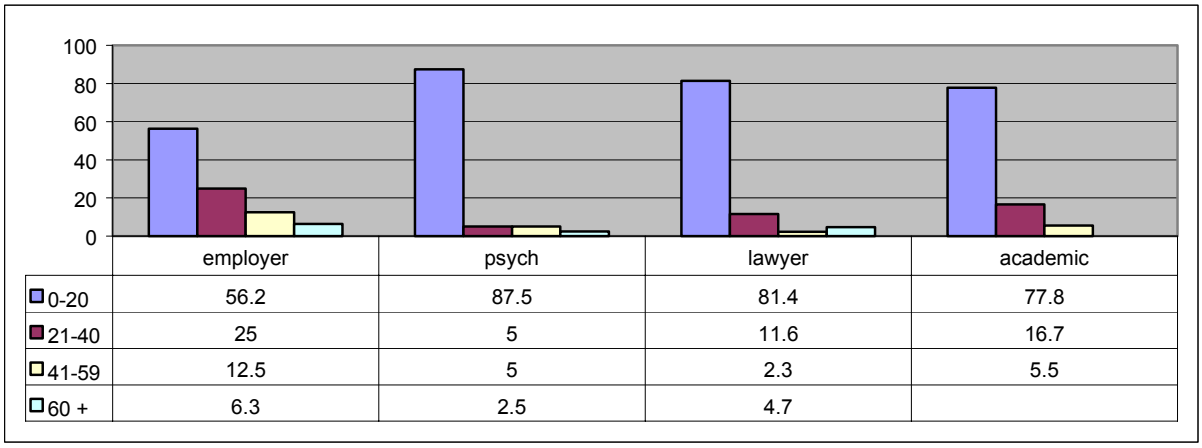
Figure 7 demonstrates the proportion of ADR practitioners' workloads spent resolving workplace disputes. Again, responses from each professional group have been expressed as percentages of total responses for that group, and unions have been omitted.

When the results in Figure 6 are compared with those in Figure 7, it is clear that while all practitioners are experiencing some growth in workplace ADR, those from employer backgrounds obtain the greatest proportion of their total workload in the workplace. According to these practitioners, 43.8 per cent spend more than 21 per cent of their total workload resolving workplace disputes.

This is far greater than the 18.6 per cent of lawyers and 22.2 per cent of academics and teachers who claim to practice more than 21 per cent of their total workload in workplace ADR. This was consistent with the findings of the employer survey (Table 1), which showed that lawyers and ADR practitioners from employer associations were the main types of ADR practitioners hired for workplace disputes.

If the growth of workplace ADR is indeed occurring, as the survey results indicate, amongst practitioners from employer backgrounds and lawyers, then this fact also informs the nature of workplace ADR. Practitioners from employer backgrounds tend to be involved in enterprise bargaining and disputes over pay and allowance (Figure 4). Given that this professional group is linked to the practice of facilitation and conciliation, it can be surmised from the findings, that the growth in workplace ADR is most likely to encompass facilitation of enterprise negotiations and conciliation of pay and allowance disputes. To a lesser extent, lawyers are also experiencing a growth in their workplace ADR business. They have been linked to the resolution of disciplinary matters (Figure 4) using mediation and to a lesser extent, arbitration.

Figure 7. Proportion of ADR practitioner's workload spent resolving workplace disputes according to professional background



	employer	psych	lawyer	academic
0-20	56.2	87.5	81.4	77.8
21-40	25	5	11.6	16.7
41-59	12.5	5	2.3	5.5
60 +	6.3	2.5	4.7	

Source: ADR practitioner survey

THE CASE STUDIES

(i) Fact finding at Metals

This case study illustrated the use of ADR to resolve a dispute over a proposed new roster in a unionised metals manufacturing plant. Unable to deal with the matter, the HR manager turned to a professional mediator who recommended fact-finding[1]. There was considerable misunderstanding by the disputants about the nature of the ADR process used. On the one hand, the managerial parties and the shop steward described the process as fact-finding and on the other, the employees described it as mediation. The third party did not indicate clearly to the disputants 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 group of employees and taking their concerns to management for subsequent decision. During the fact-finding process the facilitator assumed a role as an advocate for management. He criticised the employee's arguments and evidence and put forward management's proposition as a more sensible alternative. 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. In other words, he did not conduct a process corresponding to any known ADR technique.

The case raises the issue of training and accreditation of ADR practitioners as an emerging issue in an industrial relations environment witnessing the growth of ADR. Without adequate controls, it is likely that practitioner skills and processes will vary as will the quality of dispute resolution outcomes.

(ii) Facilitation of an enterprise agreement at EnergyCo

This case depicted the engagement of a third party by the management of EnergyCo, a privatised utility, to coach the relatively inexperienced management and employee negotiating teams through the bargaining process. Upon engagement, the practitioner described his role to management as facilitation[2]. However, the case study demonstrated that the third party took on a range of roles, which oscillated between management advocacy (where the facilitator agued 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

[1] fact-finding commences with 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 the client. The process may be inclusive of the fact-finder hearing the arguments and evidence presented by the disputants. Generally, no determination is made by the third party (NADRAC, 1997; Rome, 2000)

[2] facilitation has been described as a form of supervised negotiation (Chaykin, 1994; NADRAC, 1997).

comment (as the ex-HR manager, the facilitator was said to have a sound knowledge of the financial state of the company). Their ambit claim which indicated the possible collapse of the company formed the basis for the employee team's concession making.

Like the previous case, this case raises the issue of training and accreditation of workplace facilitators. It highlights the need for an ethical code of practice and an understanding of conflict of interest by ADR practitioners.

(iii) Grievance mediation at Infotainment

This case study examined the use of mediation[3] 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 supervisory grade staff. The case revealed four major problems associated with the ADR process conducted by an externally engaged practitioner.

First, the practitioner was, arguably, not independent of the disputants. She was engaged on the recommendation of her friend, the rehabilitation worker and advocate for the grounds person. Her association with a disputant's advocate presents a conflict of interest in her role as an independent third party, particularly as she received a briefing on the case from the advocate.

The second anomaly in the conduct of ADR found in this case (and in the two previous cases), was that there is a gap between the theoretical process of ADR and the actual practice conducted. Generally, a third party hired by an employer to achieve the employer's objective is regarded as a management consultant. ADR, on the other hand, should not operate to a predetermined outcome (Astor & Chinkin 1992). In this case, the objective of Infotainment management was to return the grounds person to the work team, rather than to negotiate other settlements. In other words, there was no opportunity to explore or brainstorm other options in the mediation session. This, arguably, represents a breach in the rules of a mediation session (Charlton & Dewdney 1994). Further, the time constraint imposed by the mediator created an urgency to sign the agreement, arguably a level of coercion as well as denying the coordinator and operations manager interactional justice (Tyler 1991).

Third, and related to the flawed ADR process was the apparent denial of procedural justice to the supervisory grade staff. 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). The ADR process seemed to have been framed around satisfying the needs of the grounds person required to return him back to work. The fourth issue raised by this case is the reliance on the skills and experience of ADR practitioners in ensuring a fair dispute

[3]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).

resolution process. The case study revealed that the disputants were prepared to afford the mediator a degree of trust and respect based on their legitimisation of her authority.

DISCUSSION AND CONCLUSIONS

This study reported on the findings of an employer survey into the demand for private mediation, a survey of ADR practitioners who offer dispute resolution services to workplaces and three case studies. It was demonstrated that there has been a slow growth of ADR in Australian workplaces with most ADR practitioners working fewer than 20 per cent of their total workload resolving workplace disputes. The study demonstrated that this growth is predominantly in the areas of facilitation, mediation and conciliation.

ADR in Australia is applied almost exclusively to interest disputes such as personality conflicts, disciplinary matters and facilitating enterprise negotiations. Employers surveyed indicated that they found ADR more suitable for these types of disputes. Further, the study found that there is a correlation between the professional background of the practitioner, the form of ADR they practice and the type of dispute they resolve. Practitioners from employer backgrounds are principally hired to facilitate negotiations and conciliate disciplinary matters. Lawyers are engaged mainly for mediation (and to a lesser extent, arbitration) of disciplinary matters and psychologists, social and community workers are engaged to resolve personality disputes through mediation.

No formal requirements are necessary to practice ADR in Australian workplaces such as training, accreditation, a code of ethics or a code of practice. 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 with 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. Whilst training and accreditation solutions present themselves as being salient, other issues must also be addressed.

The study raises a number of questions for future research. For instance, is private ADR a tool for gaining compliance with a managerial agenda? Employers may use ADR practitioners as a symbol of neutrality and independence in order to legitimise management decisions. The presence of an ADR practitioner can give the impression that employers are not controlling the decision making process. Instead, by taking a role as a fellow disputant, an employer appears to have no more rights or power than any other disputant.

Related to the symbolic role of the ADR practitioner, does private ADR offer the opportunity for both employers and union representatives to abrogate their responsibility to deal with the conflict themselves? Here, employers avoided having to communicate with angry employees and unions, by avoiding an adversarial role in the process, ceding responsibility for dispute resolution to the ADR practitioner.

Further, is ADR a better tool for achieving dispute settlement than for delivering workplace justice? The cases revealed that resolution was achieved without resort to tribunals or courts. However, the imbalance of power in the work relationships described, 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.

Finally, why do these weaker parties accept unfavourable outcomes? Early evidence points again to the powerful symbolism of neutrality of the ADR practitioner and the unquestioning acceptance by all disputants of ADR rhetoric which holds it to be a more peaceful means of dispute resolution than the formal adversarial system of tribunals and courts.

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