



## **WORKING PAPER SERIES**

ADR and Workplace Justice: Just  
Settlement?

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# ADR AND WORKPLACE JUSTICE: JUST SETTLEMENT?

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*Alternative Dispute Resolution has been deployed by an increasing number of workplaces since the late 1980s in Australia. Dispute resolution processes not only aim to settle disputes but, presumably, to also deliver justice. This article describes the findings of three case studies in which ADR professionals were engaged to resolve a workplace dispute. It was found that whilst ADR was generally effective in achieving consensual settlement of the matter, and satisfying disputants' feelings of procedural justice, it, paradoxically, failed to deliver distributive justice for the weaker disputants. The implications for workplace ADR practitioners is discussed.*

## Introduction

The concept of workplace justice is of key interest to employees. It is argued that, in the employment relationship, as employees have ceded authority to their managers, they are aware that decisions made by those in power may be exploitative or motivated by ulterior motives (Lind & Tyler 1988). Employees deal with this dilemma by measuring decisions against their own principles of fairness. Decisions which pass their 'fairness' test are more likely to be accepted by them and the authority making the decisions is more likely to be obeyed in the future. These needs for justice are embodied in the concept of due process which is a requirement not only of the formal legal process but also of the workplace:

Whether the individual in question is a worker receiving tasking orders, an employee being ordered to accept a particular resolution of a dispute in his or her section, or a corporate executive deciding whether to accept an arbitrator's non-binding judgement on an interorganizational dispute, perceptions of fairness will be used as a short cut to deciding whether to accept the authority's decision or reject it (Lind et al 1993).

Research into justice in the workplace has emphasised three main types of justice: procedural, distributive and interactional. Procedural justice focuses on the means or process entered into by the employer and employee to determine the decision while distributive justice focuses on the ends or outcomes (Tremblay et al 2000). Interactional justice (Bies & Moag 1986), is concerned with the level of respect and dignity afforded the disputants within the decision making process. These key elements in workplace justice ensure that firstly, there is an opportunity to participate in the process; secondly, that participants have a sense of control over the process; and, thirdly, that they are treated with respect by the third party. Clearly in order for these indicators to be satisfied there is also a need for the decision maker to be neutral and independent of the disputants (Hunter et al 1995). The indicators of workplace justice are outlined in Table 1.

**Table 1. Indicators of workplace justice**

<b>Procedural Justice</b>	<b>Distributive Justice</b>	<b>Interactional Justice</b>
Employee to be presented with the charge explained in full	Equity, Equality and/or Needs principles must apply	Disputant is afforded respect and dignity
Opportunity to present a defence to the charge	Perceived fairness of a positive outcome by disputant	Disputant perception that decision maker was neutral and trustworthy
Process must allow for a neutral decision maker	Perceived fairness of a negative outcome by disputant	Disputant is afforded an explanation and justification for outcome
A clear, rational explanation must be provided for the decision		
Right of appeal		
Process must be time-efficient		

Source: Adapted from Tremblay, Sire & Balkin 2000.

Workplace justice is complicated by the fact that the workplace environment is ruled by technical and economic considerations and often dominated by pressures to deliver profits to shareholders. This places managers in an invidious situation in which there are likely to be limitations on the interpretation and action of corporate concepts such as ethical codes or workplace justice. At the same time, to adhere to the principles of workplace justice is to ensure that corporate goals do not override individual liberties or human needs (Esquith 1997). Arguably then, applying the principles of workplace justice to the resolution of employment disputes is the role of the ADR practitioner.

## **ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE**

Alternative Dispute Resolution has been deployed by an increasing number of workplaces since the late 1980s in Australia. Leading the growth in workplace ADR are practitioners from employer and legal backgrounds, and to a lesser extent, psychologists, social and community workers. ADR in Australian workplaces is applied almost exclusively to interest disputes such as personality conflicts, disciplinary matters and to facilitate enterprise negotiations (Van Gramberg 2003).

The three broad categories of conflict resolving techniques were defined in 1997 by the National Alternative Dispute Resolution Advisory Council (NADRAC 1997). These are, firstly, the facilitative procedures of facilitation, mediation and conciliation, which have a wide application both in the workplace and in a number of other areas such as equal employment opportunity, family law, neighbourhood disputes and landlord-tenant disputes. They are characterised by the third party assisting the disputants to negotiate a settlement and do not include a role for the third party to determine the outcome.

Advisory ADR techniques including fact-finding, evaluation and mini-trial make up the second category and are characterised by the third party taking an investigative role and, where requested, making a determination. The third category is the determinative techniques of 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.

The attributes of ADR have been influential in the rationale for their use and have largely driven the growth of ADR in Australian workplaces. Proponents of ADR report that it is cost effective; it assists in the ongoing relationships of disputants; it allows greater control over the resolution of the dispute and consequentially, results in heightened commitment to the resolution; it is private; and it replaces the adversarial proceedings of the formal legal system with cooperative dispute resolution (Boulle & Nesic 2001; Bush & Folger 1994). While much of the literature on ADR is positive, there exists a significant body of research describing the inherent problems and dilemmas within ADR by questioning whether genuine mutuality between the disputants is possible; whether dispute outcomes can actually be consensual; whether neutrality of the third party is achievable; whether the ADR process is as logical and systematic as the models imply; and whether the privacy of ADR acts to protect repeat offenders and the reputations of powerful disputants (Cooks & Hale 1994; Tidwell 1994; Astor & Chinkin 1992; Van Gramberg 2001).

## **THE CASE STUDIES**

In order to determine the extent to which workplace ADR delivers workplace justice, three case studies were undertaken in firms from diverse industries. The cases were sourced from a survey of 550 Victorian employers on the topic of workplace ADR (Van Gramberg 2001). The cases were conducted in 2001 through a series of detailed, semi-structured interviews with all those involved in the resolution of a workplace dispute in which an external ADR consultant was engaged as a third party. The case studies compare and contrast the process and outcomes of the ADR session with the indicators of workplace justice.

### **CASE 1: METALS**

Metals, a unionised manufacturing plant, illustrated the use of fact-finding<sup>1</sup> to resolve a rostering dispute. The central theme raised in this case was the misunderstanding by the parties of the ADR process conducted by the externally engaged consultant. The managers and shop steward, who had discussed the matter with the ADR consultant, were clear that the process was fact-finding, but the employees believed it would be mediation. The discrepancy was significant as the employees were concerned that the supervisor, with whom they were in dispute, was not present during the ADR process to answer to their concerns. The ADR consultant did not indicate to the employees the process he would use and, ultimately, he conducted a negotiation as an advocate for management, with the purpose of gaining employee acquiescence with management's decision. Further, the process brought together a group of 18 blue-collar workers from non-English

backgrounds and generally with poor spoken English; with only their shop steward as their 'voice'. The employee focus group interviewed stated that many workers did not raise their concerns because of their poor English, the embarrassment of raising personal issues front of their fellow workers and not wanting to interfere with the issues raised by the shop steward.

## **CASE 2: ENERGYCO**

EnergyCo was a small technical firm about to embark on negotiations towards a new enterprise agreement.<sup>2</sup> As its management was inexperienced in the process of putting together an enterprise agreement, it obtained agreement with the union to engage a facilitator<sup>3</sup> to assist the negotiating teams through the bargaining process. Whilst described as facilitation, the case study demonstrated that the third party oscillated between management advocacy and facilitation in bringing the negotiating teams to a final agreement. Specifically, the third party negotiated employee acceptance with management's wishes on several key agenda items, but also took a facilitative role in handling conflict as it arose during the bargaining process, managing emotions and maintaining the civility of proceedings. The fluidity of process undertaken by the third party demonstrated his lack of neutrality, and, perhaps lack of understanding of the process. Further, he was the former human resources manager of EnergyCo, which clearly demonstrated his lack of independence from the parties. Of particular concern was the promulgation of misleading financial information, put forward by management as an ambit claim. This information, unquestioned by the facilitator (despite his familiarity with the true financial state of the firm), indicated the possible collapse of the company and formed the basis of the employee team's concession making.

## **CASE 3: INFOTAINMENT**

Infotainment is a non-unionised government facility operating a popular tourist attraction. The case detailed an interpersonal dispute between members of a work team which led to a stress claim by the team's grounds person. Following the breakdown of relations between the two supervisors (a coordinator and operations manager) and the grounds person, and with a view to returning the employee back to work, Infotainment management engaged a mediator.<sup>4</sup> The ADR practitioner had a clear conflict of interest as she was both friend to, and co-worker of, the grounds person's advocate. Her briefing, from both Infotainment management and the grounds person's advocate, was to secure the return to work of this disputant. In her pursuit of this agenda, she conducted a process which denied the supervisors the opportunity to answer the allegations made against them by the grounds person. Despite the clear lack of consensus evidenced by an angry walkout by the supervisors, a written draft agreement was presented to the group for sign-off. The mediator made it clear that the matter had to be settled immediately as she had to leave for another mediation elsewhere. The supervisors initially signed the document (which had been prepared by an Infotainment manager who had sat outside the mediation room) but then retracted their signatures, bringing the mediation to an unsuccessful close.

## ADR and Procedural Justice

Procedural and interactional justice are important precursors of disputant satisfaction and those disputants afforded these justice indicators were found, in US research, to be more inclined to accept the outcome of the dispute even when that outcome was disadvantageous (Tyler 1988, 1991). The case studies reported here confirm Tyler's US findings, as employees at both Metals and EnergyCo equated procedural justice with acceptance of the outcome, despite rating the outcome as unfair. Employees' perceptions of justice were enhanced through the operation of a number of factors including the opportunity to state their case in the dispute resolution process; the legitimisation of the third party and the construction of reality and organisational norms which generally go unquestioned.

The employee representative on the bargaining unit at EnergyCo linked a fair process with the opportunity to express one's case:

I think the process that I experienced was fair. There were the opportunities to present opposing wishes. As long as you've got the opportunity to present what you've got in the back of your mind, that's fair.<sup>5</sup>

Despite their reluctance to participate in the fact-finding session in Metals, the symbolic gesture of participation was seen as vital to a fair process. One Metals employee explained:

In my opinion, [ADR] was fair because everybody can have their say and can discuss in a meeting or in private, after the meeting, and was like an open process, an ongoing process.<sup>6</sup>

The acceptance of the outcome, is, as Bies and Tyler (1993, p. 355) suggested, an artefact of the perception of fair process: 'if an employee receives an unfavorable outcome or loses a dispute, but believes that the decision-making process was fair, the decision will be perceived as more legitimate and the employee will be less likely to challenge the decision-making authority'. In both Metals and EnergyCo, employees felt that despite their inabilities to communicate, the process they experienced was fair and they voiced their willingness to accept the unfavourable outcomes.

In contrast, the supervisors in Infotainment believed the mediation process afforded them was unfair based on a lack of opportunity to voice their concerns. The coordinator felt that the process was flawed 'in having the time limit and saying this has to be finished today and we've got to get [the grounds person] back to work'.<sup>7</sup> He also felt the process was unfair because he was consistently prevented from venting his feelings and was given inadequate opportunity to provide a defence to the allegations made by the grounds person: 'he made allegations about our conduct and that was never resolved. He virtually called [the operations manager] a liar and that was not resolved and he didn't have to prove that'.<sup>8</sup>

## ADR and Distributive Justice

The cases revealed an interesting distinction between disputants' perceptions of procedural and distributive justice. Despite their general agreement that the process of facilitation at Metals was fair, it was clear that the employees and their shop steward did not consider the final outcome of the dispute to be fair. When asked to explain, the shop steward suggested that management had implemented a pre-arranged solution using the facilitator as a conduit between themselves and the employees:

The employer in this instance, took a fair approach to solve the problem. [But] I believe the facts they had at hand would have proved to them personally that their decision, their actions afterwards were incorrect... they chose to follow those decisions and inadvertently did not give the employees the justice they deserved out of it.<sup>9</sup>

Similarly, in EnergyCo, the perception of fairness of the ADR process did not correlate to a perception of fairness of outcome, despite the acceptance of the outcome. A spokesperson for the employee bargaining team based the poor outcome on factors he believed were unrelated to the ADR process. He explained that employee choices were so constrained by the financial information provided by the company that the outcome for employees was unfair but inevitable: 'I think what would have been fair was for us to come away with more. In practical terms that wasn't possible'.<sup>10</sup> The second issue he raised was the lack of employee bargaining power which he related directly to the employees' poor result:

But the outcome - is not related to fairness – it's related to your bargaining power and negotiating skills, what's realistic and a whole lot of other stuff - being able to present whatever you want.<sup>11</sup>

Not surprisingly, the unfair process described in Infotainment elicited no support for the outcome of the dispute by the supervisors. Indeed, the coordinator and operations manager rejected the outcome and refused to attend further mediation sessions. To these two disputants, ADR was considered unsuitable as a means of affording workplace justice. The coordinator explained that, in his experience, powerful parties are better able to influence the decision they want:

I think it does leave it open to corruption and who's got the most money around to pay for a particular outcome. You'll get that outcome if you've got the money.<sup>12</sup>

Similarly, the operations manager believed that a system based on ADR would lead to the acceptance of unfavourable outcomes by weaker disputants:

I think it will lower our standards. I think we already have a problem of lowering standards. That's about all I can say.<sup>13</sup>

The recognition that dispute settlement is something different to substantive justice was recognised by many interviewees. For instance, the supervisor at Metals explained that while the formal justice system is expected to deliver justice, mediation is designed to deliver a negotiated settlement:

Mediation has nothing to do with justice. Justice system is a different system to mediation system. For the justice system involves a set of rules which you have to obey. In mediation, mediator has to be flexible. If you set rules at the beginning of mediation it is not mediation. He can get some rules to follow but that's not mediation.<sup>14</sup>

The supervisor equated a mediated dispute outcome to a compromise acceptable to the disputants. There is no place for distributive justice in this equation. This raises the question: what is the onus on the ADR practitioner to deliver justice if the disputants are satisfied with closure?

## **THE ADR PRACTITIONER AND NEUTRALITY**

In order to afford the disputants a fair process, a third party must be independent of the disputants (Hunter et al 1995). This means, in practice, that the mediator should not seek the objectives of one side over the other. In each of the three cases described, the ADR practitioners were not neutral, independent or free from conflict of interest. In all three cases they actively pursued management's objective as if they were advocates or management consultants rather than neutrals. Despite this, in the three cases they were described by all disputants as being neutrals.

In order to explain this phenomenon, it is necessary to consider the structural factors affecting the employment relationship. In a workplace setting, there is usually an ongoing, hierarchical relationship between the disputants. The resultant imbalance of power between employees and employers is reflected in the authoritative power of employers. Berger and Luckmann (1966, p. 101) observed that 'he who has the bigger stick has the better chance of imposing his definitions'. Discourse in the workplace can be said to be management-driven, and is reflected in the organisation's goals, policy and decision making (Silverman 1979). Importantly, these are shared goals, legitimated through the trust and commitment by the workforce in their management. In other words, because the employees trusted their management and the union, they accepted the facilitator and the ADR process as legitimate. It follows that despite being disadvantageous to the employees, the outcome was accepted with little questioning.

Employers may use their power covertly (through the symbolism of neutrality of the ADR consultant) in order to avoid employee resistance to employer decisions. In this scenario, the presence of the ADR practitioner may enhance the perception of fairness by conveying independence and authority. The consultant's presence can convey either his



or her independence, or act to legitimise the powerful party's agenda. Consultants 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 the other disputants the impression that management is actually stepping back from the decision making process.

ADR practitioners operating in the workplace need to be cognisant of the entrenched inequality of power, often underplayed by the normative literature surrounding ADR, but evident in the pluralist reality faced by workplace disputants. This can lead to outcomes reflecting relative balance of power. Power disparity in ADR acts to limit the opportunity of weaker parties to have their issues considered to an equal extent in decision making, leading to distributive injustice. The role of the practitioner balancing the interests of both parties is therefore paramount in pursuing workplace justice.

This means that ADR theories need to recognise that workplace actors come from positions of unequal power and their access to information is limited by factors such as their gender, age, ethnicity and hierarchical position in the organisation. Further, workplace disputants are immersed in organisationally constructed social realities and values and are often unable to see past these constructs. Managers espouse the importance of neutral and independent ADR practitioners, but are then unable to detect bias or poor process by the practitioners they hired. Similarly, employees rate as fair, processes which have denied them distributive justice, because, presumably, they have been afforded procedural justice.

## **DISCUSSION**

The three major implications arising from the findings of this study are that first, procedural justice contributes to the acceptance of negative outcomes. Second, and conversely, procedural injustice may lead to rejection of the dispute outcome and third, the role of the ADR consultant as a neutral is vital to the delivery of workplace justice. These matters will now be discussed in light of the implications for workplace ADR practitioners.

The procedural justice artefact acts to ensure that in a workplace context, unpalatable management decisions may be imposed on a compliant workforce by utilising a process which provides opportunity to participate in the decision making. Brockner (2002, p. 60) noted the same possibility: 'Managers may gain greater support for their decisions, for themselves and for the organizations they represent by being procedurally fair, especially when the outcomes of the decisions are unfavourable'. Whilst this may or may not be the case in practice, the role of the ADR practitioner in ensuring that ADR processes are not being used for this purpose is crucial. These findings should inform current ADR theory and practice to this extent.

If satisfaction with the process brings acceptance of the outcome regardless of its fairness, then the role of justice is obscure. The implication is that satisfaction with ADR

may be based on dispute closure rather than justice. Clearly, the answer lies in the particular values held by an individual assessing the outcome. For instance, dispute closure may be viewed as an efficient means of resolving a dispute which has the consensus of the disputants and, therefore, represents good use of corporate funds in hiring the ADR practitioner. The privacy of the ADR process means that disputant satisfaction with the resolution may be the only public outcome arising from the dispute. With its emphasis on process and participation, ADR may, arguably, be better placed to deliver procedural and interactional justice than distributive justice. In other words, workplace ADR may represent a settlement tool rather than a mechanism to provide for justice.

This has important implications for the practice of ADR. For instance, many ADR schemes are evaluated through disputant satisfaction questionnaires. If, as argued here, disputant satisfaction with the outcome is an artefact of being afforded procedural justice and provides no insight into the activities of the ADR practitioner, the conduct of the proceedings or the issues which formed the rationale for the outcome, then the measure of the success of ADR is fundamentally flawed. It is argued here that the success of workplace ADR programs should not be solely determined by measurement of employee satisfaction with the ADR process.

Finally, the issue of independence of ADR practitioners is one of concern in the workplace context. Recent survey analysis shows that leading the growth of ADR practitioners are those from management backgrounds, for instance former human resource managers (Van Gramberg 2001). Virtually none of them operate solely as workplace ADR practitioners. This means that they offer a broad range of managerial services including ADR. These practitioners may find it difficult to separate the roles of neutral ADR practitioner with that of 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 by the ADR practitioner. Whilst training and accreditation solutions present themselves as being salient, another issue must also be addressed: Can workplace ADR effectively and ethically be conducted by management consultants who offer other management services?

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#### Endnotes

<sup>1</sup> 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).

<sup>2</sup> A type of collective employment agreement under the *Workplace Relations Act, 1996*.

<sup>3</sup> facilitation has been described as a form of supervised negotiation (NADRAC 1997).

<sup>4</sup> 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).

<sup>5</sup> employee representative, 9 April 2001, p.8.

<sup>6</sup> employee focus group, 29 March 2001, p. 9.

<sup>7</sup> coordinator, 11 April 2001, p. 8.

<sup>8</sup> coordinator, 11 April, p. 5.

<sup>9</sup> shop steward, 28 March 2001, p. 9.

<sup>10</sup> employee representative, 9 April 2001, p. 8.

<sup>11</sup> employee representative, 9 April 2001, p. 8.

<sup>12</sup> coordinator, 11 April 2001, p. 11.

<sup>13</sup> operations manager, 3 March 2001, p. 8.

<sup>14</sup> supervisor, 4 April 2001, p. 8.