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## **Abstract**

[extract] This article falls into four main parts. By way of background and in order to provide a context within which to analyse the model [dispute resolution] procedure [for AWAs], the article begins with a brief description of the dispute resolution system which has dominated Australian industrial relations at the federal level for most of this century. It also provides an overview of some of the recent legislative reforms in federal industrial relations, in so far as they are relevant to AWAs. The second part of the article outlines a range of principles which serve as guidelines in the process of designing dispute resolution systems. The system created by the model procedure for AWAs is critiqued in the third part of the article. Since the model procedure operates within the legislative framework of the Workplace Relations Act, the next part of the article examines the capacity of industrial relations institutions such as the Employment Advocate and the Australian Industrial Relations Commission to remedy the deficiencies in the model procedure. It concludes that the capacity of these institutions in this regard is limited. With these limitations in mind, some suggestions for improving the model procedure are offered.

## **Keywords**

AWA, Australian Workplace Agreement, dispute resolution, dispute systems design

## THE MODEL DISPUTE RESOLUTION PROCEDURE FOR AUSTRALIAN WORKPLACE AGREEMENTS: A DISPUTE SYSTEMS DESIGN PERSPECTIVE

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### Introduction

The *Workplace Relations Act 1996* (Cth) requires Australian workplace agreements (AWAs), which are entered into by employers and individual employees, to include a dispute resolution procedure as a prerequisite for filing and approval of the agreement.<sup>1</sup> If an AWA does not, it is deemed to include the model dispute resolution procedure prescribed by Subregulation 30ZI(2) of the *Workplace Relations Regulations 1996* (Cth). The prescribed model procedure utilises a systems approach to dispute resolution, that is, it provides for a series of procedures to be used by the parties in an attempt to resolve any dispute that arises between them.<sup>2</sup> Specifically, the procedure provides for multiple-step negotiations at the workplace level, to be followed by mediation at the option of either party if a dispute remains unresolved. While this represents an improvement on clauses which provide for an individual dispute resolution procedure,<sup>3</sup> the system created by the model procedure for AWAs is crude.

A number of principles for the design of dispute resolution systems have been formulated in the last decade. Many of these design principles have been disregarded by the drafters of the model procedure. As a result, it does not provide a

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1 *Workplace Relations Act 1996* (Cth), s 170VG(3). This is one of a number of prerequisites for filing and approval of AWAs. They must be filed with and approved by the Employment Advocate: ss 170VN, 170VO, 170VPA and 170VPB.

2 Use of dispute resolution clauses in industrial awards and agreements was commonplace by the 1980s. Although it is difficult to generalise, clauses usually provided for a series of responses in the event of a dispute. They commonly provided for an employee to take the disputed issue up with his or her immediate supervisor; then, if the dispute was unresolved, for the employee to notify a duly authorised representative of his or her union who would attempt to settle the dispute; and if the matter was still unresolved, for notification to the relevant industrial tribunal: McCarthy P, *Developing Negotiating Skills and Behaviour*, CCH (1989) at 110-113; Macken JJ and Gregory G, *Mediation of Industrial Disputes*, The Federation Press (1995) at 12-13; and CCH, *Australian Labour Law Reporter* at paragraphs 34-203 to 34-204.

3 It is sometimes difficult to anticipate the sorts of disputes that may arise and the procedures most suitable for their resolution. If a dispute resolution clause provides for use of a single procedure such as mediation, it may subsequently prove unsuitable for particular disputes which arise. To address this problem, many standard dispute resolution clauses now utilise a systems approach to dispute resolution. For example, see the *Australian Commercial Disputes Centre Dispute Resolution Clauses for Commercial Contracts and Employment Agreements* (1995), and in particular, the Board of Dispute Avoidance Clause (Clause 7) which makes provision for consultation, informal negotiations, mediation, and if a dispute is still unresolved, expert determination which results in a final and binding decision.

comprehensive framework for efficient and constructive dispute resolution between the parties to an AWA. In many instances, the parties are left without constructive options for dispute resolution.

This article falls into four main parts. By way of background and in order to provide a context within which to analyse the model procedure, the article begins with a brief description of the dispute resolution system which has dominated Australian industrial relations at the federal level for most of this century. It also provides an overview of some of the recent legislative reforms in federal industrial relations, in so far as they are relevant to AWAs. The second part of the article outlines a range of principles which serve as guidelines in the process of designing dispute resolution systems. The system created by the model procedure for AWAs is critiqued in the third part of the article. Since the model procedure operates within the legislative framework of the *Workplace Relations Act*, the next part of the article examines the capacity of industrial relations institutions such as the Employment Advocate and the Australian Industrial Relations Commission to remedy the deficiencies in the model procedure. It concludes that the capacity of these institutions in this regard is limited. With these limitations in mind, some suggestions for improving the model procedure are offered.

Although the focus of the article is upon the model AWA procedure, its content is of broader relevance. Alternative dispute resolution procedures are not a new feature in federal legislation,<sup>4</sup> but the *Workplace Relations Act* traverses new ground in providing a 'model' dispute resolution clause which may be included in agreements by design, or by 'default' should the parties neglect to include one in their agreement. The design principles discussed in the article are of generic application. They provide useful benchmarks against which to assess the effectiveness of any dispute resolution clause, especially one that is included in an agreement by legislative intervention.

## **Australian Workplace Agreements (AWAs): The Background**

The Commonwealth Parliament passed the first federal industrial relations legislation in 1904,<sup>5</sup> relying on the industrial relations power of the Commonwealth.<sup>6</sup> It created a system of compulsory conciliation and arbitration of interstate industrial disputes by a permanent independent tribunal (the Australian Industrial Relations Commission or its predecessors) with the power to make binding and legally enforceable awards.<sup>7</sup> The

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4 The history of conciliation and arbitration in Australia has its origins in the industrial relations power of the Commonwealth parliament, s 51 (xxxv) of the *Constitution of the Commonwealth of Australia*. Other Commonwealth Acts which provide for use of conciliation include the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). A number of Commonwealth Acts provides for referral of disputes to mediation, for example, the *Federal Court of Australia Act 1976* (Cth), the *Administrative Appeals Tribunal Act 1975* (Cth), and the *Native Title Act 1993* (Cth). The *Family Law Act 1975* (Cth) provides a comprehensive regime for 'Primary Dispute Resolution', which includes mechanisms such as counselling, mediation, arbitration, and conciliation: *Family Law Act 1975* (Cth), s 14.

5 *Conciliation and Arbitration Act 1904* (Cth).

6 *Constitution of the Commonwealth of Australia*, s 51 (xxxv).

7 Conciliation and arbitration are the only procedures available to the parliament under s 51 (xxxv) of the Constitution. However, the parliament had a discretion as to whether to make participation in those procedures voluntary or compulsory: Creighton WB, Ford WJ and Mitchell RJ, *Labour Law: Text and Materials*, The Law

legislation also established a system of voluntary registration of employer and employee organisations, and gave employee organisations the right to represent groups of employees and to be heard in proceedings before the tribunal. This broad framework remained intact for ninety years. It was a legislative arrangement which placed primary responsibility for regulating terms and conditions of employment (with awards being the principal means of regulation) upon tribunals and registered organisations of employers and employees, that is, upon third parties, rather than those most directly involved in the employment relationship.

By the late 1970s and 1980s there was mounting pressure for industrial relations reform.<sup>8</sup> Centralised regulation of employment conditions and ‘collective determination of conflicts’<sup>9</sup> through the conciliation and arbitration system resulted, according to the critics, in inflexibility in the labour market, inefficiency, and lack of competitiveness. Although the conciliation and arbitration system was never intended to supplant resolution of disputes by the parties, some commentators argued that the system was too accessible<sup>10</sup> and that many disputes were referred to arbitration too early, pre-empting bargaining between the parties.<sup>11</sup> Arbitration per se has been criticised for its tendency to focus on the application of rules, rather than problem solving and amicable dispute resolution, and for its failure to enhance mutual understanding between the parties to the employment relationship.<sup>12</sup>

In response to the pressure for reform, efforts have been made in the last decade to move from a centralised system of regulation through conciliation and arbitration to a decentralised system based on bargaining at the enterprise level. Legislative initiatives in recent years include the introduction, in 1992, of a specific and detailed framework

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Book Company (2nd ed 1993) at paragraphs [20.1] to [20.3]. It chose to make participation compulsory. Compulsory conciliation and arbitration in industrial relations has two elements: first, the parties are compelled to submit unresolved disputes to the tribunal for conciliation, to be followed by arbitration in the event that conciliation is unsuccessful; and secondly, the parties are bound by the decision of the arbitrator. If necessary, court action can be taken to enforce the arbitrator’s decision.

- 8 For early criticism of the industrial relations system, see for example Donn CB, ‘Australian Compulsory Arbitration - Some Proposed Modifications’ (1976) 18 *JIR* 326 at 330 and Niland J, ‘The Case for More Collective Bargaining in Australia’ (1976) 18 *JIR* 365. For a discussion of the wider political and socio-economic pressures for reform, see Ronfeldt P, ‘The Workplace Relations Acts: The implications of the new workplace bargaining arrangements’ in Lee M and Sheldon P (eds), *Workplace Relations: Workplace Law and Employment Relations*, Butterworths (1997) 61 at 62; Nolan DR, ‘Examining the Australasian Labour Law Reforms’ in Nolan DR (ed), *The Australasian Labour Law Reforms*, The Federation Press (1998) 1 at 1-4; Dabscheck B, ‘Australian Labour Law Reform: Consequences and prospects’ in Nolan DR (ed), *The Australasian Labour Law Reforms*, The Federation Press (1998) 227 at 227; and Macken JJ and Gregory G, above n 2 at 15.
- 9 Frazer A, ‘Trade Unions under Compulsory Arbitration and Enterprise Bargaining: A Historical Perspective’ in Ronfeldt P and McCallum R (eds), *Enterprise Bargaining, Trade Unions and the Law*, The Federation Press (1995) 52 at 81.
- 10 Creighton W B, Ford W F and Mitchell R J, above n 7 at paragraphs [20.7] to [20.8]; and McCarthy P, above n 2 at 119.
- 11 Donn CB, above n 8 at 327 and 333, McCarthy P, above n 2 at 119; and McCarry G, ‘From Industry to Enterprise, From Award to Agreement: Federal Laws and Workplace Change in Australia’ in Nolan DR (ed), *The Australasian Labour Law Reforms*, The Federation Press (1998) 52 at 52 and 68-69. This tendency was reduced somewhat by the Commission’s practice of declining to arbitrate until the parties had complied with dispute resolution procedures in awards and agreements (a practice which was given legislative endorsement by s 92 of the *Workplace Relations Act* 1996 (Cth)), and by the requirement that conciliation be attempted before arbitration could commence. However, there is evidence that conciliation was often viewed as pro forma, a ‘lead-up process to the making of an award’ in arbitration: Macken JJ and Gregory G, above n 2 at 5.
- 12 Donn CB, above n 8 at 327; and Niland J, above n 8 at 372-374.

for the making of enterprise-based certified agreements between employers and unions. In 1994, a ‘non-union’ stream of enterprise bargaining in the form of Enterprise Flexibility Agreements (EFAs) was made available, enabling employers and groups of employees to negotiate employment conditions without union involvement.<sup>13</sup>

The most significant reforms were effected by the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) which, in keeping with its principal object,<sup>14</sup> renamed the *Industrial Relations Act 1988* (Cth) as the *Workplace Relations Act 1996* (Cth).<sup>15</sup> The Act purports to shift primary responsibility for determining employment matters from third parties to employers and employees at the workplace or enterprise level. In addition to extending the framework for certified agreements,<sup>16</sup> the Act introduced a new form of agreement, the Australian workplace agreement (AWA) which enables qualified employers,<sup>17</sup> for the first time in the history of Australian federal industrial relations, to negotiate and settle employment conditions directly with individual employees.<sup>18</sup> In order to encourage the parties to an AWA to resolve disputes themselves (and in effect, to make them responsible for reviewing and renewing their agreements), section 170VG(3) of the Act requires AWAs to include a dispute resolution procedure as a prerequisite for filing and approval of the agreement. The Act does not prescribe the form that the dispute resolution procedure must take, nor does it set out the essential elements of an effective dispute resolution procedure

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13 These changes were affected by piecemeal amendments to the *Industrial Relations Act 1988* (Cth): see generally Wallace-Bruce NL, *Employee Relations Law*, LBC Information Services (1998) at 76-77. On the use and operation of Enterprise Flexibility Agreements (EFAs), see Coulthard A, ‘Non-Union Bargaining: Enterprise Flexibility Agreements’ (1996) 38 *JIR* 339-358.

14 The principal object of the Act is ‘to provide a framework for cooperative workplace relations’: *Workplace Relations Act 1996* (Cth), s 3. For a discussion on the objectives sought to be achieved by the *Workplace Relations Act*, see generally the *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* by the Senate Economics References Committee, Parliament of the Commonwealth of Australia, Canberra, paragraphs 4.153 to 4.165.

15 Unless otherwise stated, all further statutory references in this article are to the *Workplace Relations Act 1996* (Cth), hereafter referred to as ‘the Act’.

16 Two kinds of certified agreements (CAs) are available. Division 3 agreements are made between an employer and a trade union for the purpose of preventing or settling an interstate industrial dispute or situation (this type of agreement is essentially the CA which was made available in 1992). Division 2 agreements may be made between qualified employers and unions or directly with a valid majority of employees without the need for an interstate industrial dispute (this type of CA is ‘the lineal descendants of enterprise flexibility agreements’: Creighton B and Mitchell R, Editorial (1997) 10 *AJLL*). Generally see McCallum R, ‘Individuals and Agreement-Making: The Legal Options’, Proceedings from “*New Rights and Remedies for Individual Employees: Implications for Employers and Unions - Fifth Annual Labour Law Conference*”, Sydney, May 1997 at 6-7; and Wallace-Bruce NL, above n 13 at 77-88.

17 There are constitutional limitations on access to AWAs. The Act derives its constitutional power with respect to AWAs from the corporations power (s 51(xx)) of the Australian Constitution), the power with respect to interstate and overseas trade and commerce (s 51(i)), the public service power (s 52(i)) and the territories power (s 122). As a consequence, AWAs are not available unless the employer is a constitutional corporation or the Commonwealth; the employee is employed in a Territory; or the employee is a waterside or maritime worker or a flight crew officer employed in relation to interstate or overseas trade or commerce: s 170VC of the Act. AWAs are also available in Victorian workplaces as a result of that state’s referral of its industrial relations powers to the Commonwealth Parliament.

18 S 170VF. An AWA can be negotiated and made with employees on a collectively basis but it must be signed by each employee: ss 170VE, and 170VO(1)(a). As to the effect of AWAs, see ss 170VQ and 170VR. As a general rule, AWAs operate to the exclusion of any federal award, and State award or State agreement that would otherwise apply and they prevail over State laws (with some exceptions) and Commonwealth law to the extent of any inconsistency. As to the relationship between AWAs and federal CAs, see s 170VQ(6).

as a benchmark for assessing the procedure adopted by the parties.<sup>19</sup> Parties to an AWA may draft a customised dispute resolution clause, they may adopt one of the standard clauses promulgated by various professional dispute resolution associations,<sup>20</sup> or they may adopt the model procedure for AWAs. If an AWA does not in fact contain a dispute resolution procedure, it is deemed to include the model procedure prescribed by Subregulation 30ZI(2).<sup>21</sup> The model procedure reflects the general theme of the Act in emphasising dispute resolution at the workplace level. Perhaps in response to the criticisms of arbitration, the model procedure includes mediation, a procedure which is renowned for focusing on problem solving and promotion of mutual understanding between the parties, rather than on the application of rules.

Neither unions nor employer organisations are given an assured role in the making and operation of AWAs. The role of unions has been significantly reduced.<sup>22</sup> They have no 'as of right' access to negotiations in respect of an AWA and no role whatsoever in the process of approving an AWA. Nor do they have a 'right' to represent an employee in any dispute which arises in connection with an AWA. Unions have the ability to act as the bargaining representative for individual employees in negotiation and in dispute resolution, but they may only do so at the request of an employee.<sup>23</sup> Employer organisations are in the same position.

To some extent, the parties to the employment relationship are now compelled to negotiate their differences directly. The Act has made arbitration by the Australian Industrial Relations Commission less accessible than it was previously. In carrying out its functions under the Act, the Commission must now proceed 'so far as possible' by

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19 In contrast see the Australian Standard on Complaints Handling AS 4269-1995, published by Standards Australia in 1995, which sets out 'the essential elements of an effective complaints handling process' as the minimum standards to be satisfied by a complaints handling process (Section 2) and lays down guidelines for implementation of those essential elements (Section 3). The Standard also provides a list of the 'fundamental characteristics' of a dispute resolution system (Section 5).

20 Various professional associations and organisations which provide dispute resolution services in Australia (such as the Australian Commercial Dispute Centre, Lawyers Engaged in Alternative Dispute Resolution, and the state law societies) have drafted standard dispute resolution clauses for use in agreements.

21 The model procedure for AWAs is set out in Schedule 9 of the *Workplace Relations Regulations* 1996 (Cth). CAs are also required to include dispute settling procedures: s 170LT(8). However, there is no model clause provided in the regulations in the case of CAs. Consequently, there is less danger of parties to a CA intentionally adopting the model procedure because it is described as a 'model' and no danger of them adopting it by default because of failure to provide a dispute resolution procedure in their agreement. It is outside the scope of this article to compare AWAs and CAs in detail. Suffice it to note that the parties to a CA are in a less vulnerable position than are the parties to an AWA. On the differences between AWAs and CAs, see Naughton R, 'New Approaches to the Vetting of Agreements', Proceedings from "*New Rights and Remedies for Individual Employees: Implications for Employers and Unions - Fifth Annual Labour Law Conference*", Sydney, May 1997 at 15 and 17-18; and Grozier D, 'Individuals and Agreement Making', Proceedings from "*New Rights and Remedies for Individual Employees: Implications for Employers and Unions - Fifth Annual Labour Law Conference*", Sydney, May 1997 at 13.

22 On the changing role of unions and the implications for employees, see Ronfeldt P, above n 8 at 63-64 and 66-69; McCarry G, above n 11 at 55; Wallace-Bruce NL, above n 13 at 200-211; Frazer A, above n 9 at 52; and Naughton R, 'Sailing into Uncharted Seas: The Role of Unions Under the Workplace Relations Act 1996 (Cth)' (1997) 10 *AJLL* 112. For a discussion of the status previously enjoyed by unions in the process of negotiating and formalising an EFA, see Coulthard A, above n 13 at 350-351.

23 S 170VK.

conciliation, with arbitration being used only 'as a last resort'<sup>24</sup> and then only in relation to a limited list of matters.<sup>25</sup>

Enterprise bargaining has been explained 'as a process whereby an employer and its employees negotiate without the intervention of a third party as to the terms and conditions of employment that are to apply to that enterprise'.<sup>26</sup> The term 'third party' is used to embrace unions, employers organisations and even tribunals. Proponents of enterprise bargaining assert that the recent reforms will enhance labour market flexibility and responsiveness, and lead to higher productivity, greater efficiency, and more competitive working arrangements.<sup>27</sup> Some authors are more cautious, warning that enterprise bargaining is not a panacea and that it needs to be 'underpinned by award minima and supported by a conciliation and arbitration process'.<sup>28</sup> As to the need for award minima, an AWA must pass the 'no-disadvantage test' in order to be approved by the Employment Advocate.<sup>29</sup> This article looks at the need for procedures such as arbitration to support enterprise bargaining. Parties should be encouraged to resolve disputes themselves. But on occasions, they are neither able nor willing to do so. Procedures such as arbitration are needed as backups for those occasions. Arbitration is not incompatible with a system of enterprise bargaining. From a dispute systems design perspective, direct negotiation between the parties to the employment relationship and arbitration (and other procedures like it) are necessary components of a single system.

## Dispute Systems Design

### The goals and theoretical framework

Dispute systems design (DSD) involves the design and implementation of a dispute resolution system,<sup>30</sup> that is, a series of procedures for handling disputes, rather than an individual procedure.<sup>31</sup> A system operates as a series of safety nets. If one procedure fails to resolve a dispute, another procedure is waiting.

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24 S 89(a). Under the *Industrial Relations Act* 1988 (Cth), the Commission could proceed 'so far as possible' by conciliation and 'where necessary' by arbitration.

25 The Act introduced s 89A which provides an exhaustive list of matters about which the Commission may make awards.

26 Wallace-Bruce NL, above n 13 at 73.

27 These aspirations are reflected in the object section (s 3) of the Act.

28 Wallace-Bruce NL, above n 13 at 74.

29 S 170VPB. To pass the 'no-disadvantage test', the agreement must not result, on balance, in a reduction in the overall terms and conditions of employment of the employee when compared with the relevant or designated award: s 170XA. Some commentators claim that the effectiveness of the test and the relevance of awards as instruments to protect employees will be eroded over time: for example, Dabscheck B, above n 8 at 236; and Lee M, 'Bargaining Structures under the Workplace Relations Acts' in Lee M and Sheldon P (eds), *Workplace Relations: Workplace Law and Employment Relations*, Butterworths (1997) 29 at 41-42.

30 The word 'dispute' is used here to embrace concerns, claims, grievances and complaints, all of which have the potential to escalate into disputes when they are unsatisfied or rejected and pursued. As to the meaning of 'dispute' in industrial relations, see Creighton WB, Ford WF and Mitchell RJ, above n 7 at 355-371, and particularly at 357, where the authors note that the essential characteristic of a dispute is 'disagreement'.

31 This is the most common conceptualisation of a dispute resolution system. Generally see Ury WL, Brett JM, and Goldberg SB, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, Program on Negotiation, Harvard Law School (1993) at 21; Murray JS, 'Dispute Systems Design, Power, and Prevention' (1990) 6 *Negotiation Journal* 105 at 106; Kolb DM and Silbey SS, 'Enhancing the Capacity of Organizations to

The central goal of DSD is to reduce the costs associated with dispute resolution, where costs are measured by reference to four broad criteria: transaction costs (such as the time, money, and emotional energy expended in disputing), satisfaction with procedures and outcomes, long-term effect of the procedures and outcomes on the parties' relationship, and recurrence of disputes.<sup>32</sup> DSD also aims to prevent disputes by improving the parties' capability to negotiate differences at a pre-dispute level (that is, before differences escalate into disputes) and their ability to learn from disputes that do occur with a view to reducing the likelihood of similar disputes recurring.<sup>33</sup>

DSD is based on three inter-related theoretical propositions.<sup>34</sup> The first is that dispute resolution procedures can be categorised according to whether they are primarily interest-based, rights-based or power-based in approach.<sup>35</sup> The second is that interest-based procedures have the potential to be more cost effective than rights-based procedures, which in turn may be more cost effective than power-based procedures.<sup>36</sup> The third proposition is that the costs of disputing may be reduced by creating 'interest-oriented' systems, that is, systems which emphasise interest-based procedures.<sup>37</sup> Each of these propositions is discussed in more detail below with reference to the dispute resolution procedures traditionally adopted in Australian industrial relations.

### *Categories of dispute resolution procedures*

It is important to note at the outset that DSD is based on categorisation of dispute resolution *procedures*, not categorisation of *disputes* (although some allowance can be made for different types of disputes in the design of a system), and that the terms 'interests' and 'rights' are used to describe particular approaches to dispute resolution.<sup>38</sup> Interest-based approaches focus on the underlying interests of the parties with the aim of producing solutions which satisfy as many of those interests as possible.<sup>39</sup> The meaning of the term 'interests' in this context has its origins in negotiation theory. It is generally accepted that parties in negotiation typically adopt

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Deal with Disputes' (1990) 6 *Negotiation Journal* 297 at 297; and McKinney M, 'Designing a Dispute Resolution System for Water Policy and Management' (1992) 8 *Negotiation Journal* 153 at 155.

32 Ury WL, Brett JM and Goldberg S B, above n 31 at 42; and Murray JS, above n 31 at 106.

33 Kolb DM and Silbey SS, above n 31 at 300.

34 For a more detailed discussion of the goals and theoretical framework of dispute systems design, see Wolski BD (subtitle author), *The Laws of Australia, 13.6 Dispute Systems Design*, LBC Information Services (1997) at paragraphs [9] to [11].

35 Ury WL, Brett JM and Goldberg SB, above n 31 at 4-9 and 169; and Boule L, *Mediation: Principles, Process, Practice*, Butterworths (1996) at 64-65.

36 Ury WL, Brett JM and Goldberg SB, above n 31 at 4 and 10-15; and Boule L, above n 35 at 65.

37 Ury WL, Brett JM and Goldberg SB, above n 31 at 18.

38 In Australian labour law, a distinction has traditionally been drawn between 'interest' and 'rights' disputes. A dispute of interest is created in the process of procuring an agreement or award. It is essentially concerned with the creation of future legal rights and obligations. Rights disputes involve problems over the application, interpretation and enforcement of agreements and awards, that is, they are concerned with existing rights and obligations: see McCarthy P, above n 2 at 27-29 and Gunningham N, *Industrial Law and The Constitution*, The Federation Press (1988) at 11-12.

39 Fisher R and Ury W, *Getting to Yes: Negotiating an Agreement Without Giving In*, Business Books Limited (2nd ed 1991) at 4.

one of two major approaches, positional bargaining or interest-based bargaining.<sup>40</sup> Positions are specific solutions adopted by parties to meet their needs or interests. In positional bargaining, parties advocate and bargain incrementally over specific and usually extreme solutions. In interest-based negotiation (and other interest-based approaches to dispute resolution), attention is given to the needs or interests of the parties, that is, the reasons why parties have adopted a particular position rather than to the position itself.<sup>41</sup> Many authors now advocate an interest-based approach to negotiation.<sup>42</sup> Mediation, which is essentially a form of assisted negotiation, tends to be interest-based in approach.<sup>43</sup> It has been defined as a process aimed at producing a consensual settlement that accommodates the needs or interests of the parties.<sup>44</sup> Although positional negotiation is encountered in mediation, mediators generally have a procedural bias toward interest-based negotiation.<sup>45</sup>

Rights-based approaches involve a determination of who is 'right' according to some independent and objective standard such as precedent, business customs, socially accepted standards of behaviour, terms of contract or applicable rules and principles of law. Adjudication has been described as the prototypical rights-based approach to dispute resolution.<sup>46</sup> Arbitration and litigation, which are both forms of adjudication,

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- 40 Moore C W, *The Mediation Process: Practical Strategies for Resolving Conflict*, Jossey-Bass (1991) at 35 and 37-39; Henderson S, *The Dispute Resolution Manual*, DataLegal Publications (1993) at 76; Astor H and Chinkin C, *Dispute Resolution in Australia*, Butterworths (1992) at 82-83; and Boulle L, above n 35 at 48-49. The term 'interest-based' was popularised by Fisher and Ury in their book *Getting to Yes: Negotiating an Agreement Without Giving In*, above n 39, in which the authors advocate interest-based negotiation as opposed to positional negotiation. Different terms have been used to describe these two opposing approaches, for example, integrative vs. distributive [Raiffa H, *The Art and Science of Negotiation*, Harvard University Press (1982) at 33], cooperative vs. competitive [Pruitt DG, *Negotiation Behavior*, Academic Press (1981) at 15], problem-solving vs. share-bargaining [Karrass CL, *The Negotiating Game*, Thomas Y Crowell Publishers (1970) at 127], and win/win vs. win/lose (which is commonly cited).
- 41 Interests are of three broad types: substantive, procedural, and psychological. Substantive interests are the needs that a person has for particular tangible objects such as money and assets. Procedural interests refer to the preferences that a party has for the way in which differences are discussed and the manner in which the bargaining outcome is implemented. Psychological interests are the emotional needs of a party, such as the need for respect. Generally, see Moore CW, above n 40 at 37; Boulle L, above n 35 at 9; Tillet G, *Resolving Conflict: A Practical Approach*, Sydney University Press (1991) at 19; and Boulle L and Mack K (subtitle authors), *The Laws of Australia, 13.1 Overview of Dispute Resolution*, LBC Information Services (1997) at paragraph [12].
- 42 See for example, Henderson S, above n 40 at 78-84; Astor H and Chinkin C, above n 40 at 83-86; Boulle L, above n 35 at 50-51; and McCarthy P, above n 2 at 34 and 45 where the author applies Fisher and Ury's principles to bargaining in the industrial relations area.
- 43 Fisher and Ury's principles of interest-based negotiation, outlined at 11-12 of their text *Getting to Yes: Negotiating an Agreement Without Giving In*, above n 39, are reflected in many facets of mediation terminology, training and practice.
- 44 Folberg J and Taylor A, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Giving In*, Jossey-Bass (1984) at 7. Folberg and Taylor's definition is widely used in Australian dispute resolution literature, see for example: Brooks B, 'Dispute Resolution: Negotiation in Industrial and Employment Areas', *Proceedings of the National Conference 1993, Australian Dispute Resolution Association Inc*, 58 at 58; Condliffe P, *Conflict Management: A Practical Guide*, TAFE Publications (1991) at 113; Henderson S, above n 40 at 31; Astor H and Chinkin C, above n 40 at 60; Boulle L, above n 35 at 4; and Dewdney MS (subtitle author), *The Laws of Australia, 13.2 Mediation and Conciliation*, LBC Information Services (1997) at paragraph [3].
- 45 Boulle asserts that only interest-based negotiation is 'compatible with the philosophical underpinnings of the mediation movement': Boulle L, above n 35 at 53. Generally see Charlton R and Dewdney M, *The Mediator's Handbook: Skills and Strategies for Practitioners*, LBC Information Services (1995) at 48; Moore CW, above n 40 at 38-39; Henderson S, above n 40 at 25; Boulle L and Mack K, above n 41 at paragraphs [12] and [13]; and Macken JJ and Gregory G, above n 2 at 40.
- 46 Ury WL, Brett JM and Goldberg S B, above n 31 at 7.

are generally considered to be rights-based procedures.<sup>47</sup> Arbitration in Australian industrial relations falls into the rights-based category. It is characteristically rule oriented - arbitrators are concerned with the development and application of principles and rules 'to provide reasonable consistency and predictability to the decisions of the tribunals'.<sup>48</sup> It is recognised as a form of adjudication in which an independent tribunal makes a binding and legally enforceable determination of matters in dispute.<sup>49</sup>

Power-based approaches are characterised by use of power (defined here as 'the ability to coerce someone to do something he would not otherwise do')<sup>50</sup> and often involve an exchange of threats, acts of aggression, and/or the withholding of benefits that derive from a relationship. Strikes and lock outs are examples of power-based approaches; voting is another example.

Some dispute resolution procedures, notably negotiation and mediation, often involve a mix of approaches. Satisfaction of interests frequently takes place within the context of the parties' rights. In practical terms, this means that the bargaining range within which to negotiate may be fixed by reference to the possible outcome if the matter was to be determined in arbitration or litigation. However, even when parties bargain in 'the shadow of the law', there is general recognition that legal issues 'do not necessarily coincide with or rank higher than personal needs and interests'.<sup>51</sup> Arbitration is less likely to involve a mix of approaches. In practice, arbitrators may arrive at compromise solutions but they are rarely in a position to take into account the personal needs, interests, and preferences of the parties.<sup>52</sup> So despite the mix of approaches in some procedures, each procedure tends to have a dominant focus on either interests, or rights, or power.

Conciliation tends to be rights-based in approach. Mediation and conciliation both suffer from definitional uncertainty,<sup>53</sup> a problem which is compounded in industrial relations by the fact that neither procedure is defined in the Act (conciliation is not even defined in the Australian Constitution). The two terms are sometimes used interchangeably. The lack of definitional clarity and blurring of the distinction between mediation and conciliation is illustrated in the following description of conciliation:

Conciliation, as the term is used in the context of the federal system, involves the intervention of an independent third party with the aim of assisting the disputing

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47 See Boule L and Mack K, above n 41 at paragraphs [10] and [11] for a discussion of the general procedural characteristics of arbitration and litigation.

48 Donn CB, above n 8 at 327.

49 As to the meaning of 'arbitration' in Australian industrial relations, see Creighton WB, Ford WF and Mitchell RJ, above n 7 at paragraphs [20.10] to [20.12] and [21.31] to [22.11]. Also see Niland J, above n 8 at 379; and Wallace-Bruce NL, above n 13 at 25-26.

50 Ury WL, Brett JM and Goldberg SB, above n 31 at 7.

51 Charlton R and Dewdney M, above n 45 at 47. Also see Brooks B, above n 44 at 58.

52 Bilder RB, 'Some Limitations of Adjudication as an International Dispute Settlement Technique' (1982) 23 *Virginia Journal of International Law* 1 at 4; and O'Connor P, 'Alternative Dispute Resolution: Panacea or Placebo?' (1992) 58 *Arbitration* 107 at 107.

53 See Boule L, above n 35 at 3-30 for a discussion of some of the unresolved definitional issues pertaining to mediation. Also see Astor H and Chinkin C, above n 40 at 61 who argue that 'there is no accepted understanding in Australia of what constitutes conciliation'.

parties to reach agreement. Some intervention by a third party, irrespective of whether he actually mediates or not, would seem necessary to constitute conciliation.<sup>54</sup>

Mediation and conciliation are both forms of assisted negotiation in which a third party<sup>55</sup> undertakes a range of interventions to assist parties in dispute to reach an agreement. In neither case does the third party have the power to impose a decision upon the parties.<sup>56</sup> It is suggested however that conciliators generally play a more interventionist role than mediators (this is almost certainly the case where mediation and conciliation are both provided for).<sup>57</sup> Where an industrial dispute is referred to the Commission for conciliation, a commission member is obliged to do 'everything that appears to the member to be right and proper to assist the parties to agree on terms for the prevention or settlement of the industrial dispute'.<sup>58</sup> Commission members may undertake an evaluation of the case, express a view as to the merits or otherwise of each party's position, offer advice, and make recommendations for resolution.<sup>59</sup> While mediation practice is varied, most mediators are reluctant to express personal opinions as to what constitutes a reasonable settlement or to express a view as to the merits of each party's position.<sup>60</sup>

There is another related feature of conciliation which sets it apart from mediation. Conciliation is generally provided by public agencies and conducted in a statutory context with legal rules and standards which conciliators are obliged to advocate.<sup>61</sup> Although conciliators cannot make binding determinations, it appears that they can make recommendations as to who is 'right' according to applicable rules and principles of law.

### *Cost effectiveness of dispute resolution procedures*

Interests, rights, and power procedures generate different costs and benefits. Costs and benefits are measured by reference to the four criteria mentioned above, that is,

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54 Cupper L, 'Legalism in the Australian Conciliation and Arbitration Commission: The Gradual Transition' (1976) 18 *JIR* 337 at 339. For a debate as to the differences and similarities between mediation and conciliation, see Astor H and Chinkin C, above n 40 at 61-64; and Wade J, 'Mediation - The Terminological Debate' (1994) 5 *ADRJ* 204.

55 In dispute resolution literature, the term 'third party' refers to third party interveners such as mediators, conciliators, and arbitrators. The term does not include trade unions and employer organisations.

56 Boulle L, above n 35 at 3 and 8; McCarthy P, above n 2 at 127; Macken JJ and Gregory G, above n 2 at 7; and Astor H and Chinkin C, above n 40 at 61.

57 Boulle L, above n 35 at 220-221; and David J, 'Designing Dispute Resolution Systems', Proceedings from the *Second International Mediation Conference*, Adelaide, 18-20 January 1996 at 66. This view is not shared by Condliffe who argues that conciliation is less interventionist than mediation or Macken and Gregory, although Macken and Gregory concede that conciliators in labour relations are more interventionist, with conciliation having overtones of expert appraisal: see Condliffe P, above n 44 at 24 and Macken JJ and Gregory G, above n 2 at 40.

58 S 102(1).

59 For a discussion of the powers and procedures of the Commission in dealing with industrial disputes by conciliation, see Dewdney M S, above n 44 at paragraphs [96] to [98] and [126]. Also see Boland R, 'The prospects for mediation having a formal role in Australia's industrial relations system' (1998) 1 *The ADR Bulletin* 17 at 20; McCarthy P, above n 2 at 126-132; Macken JJ and Gregory G, above n 2 at 5 and 40; CCH, *Australian Labour Law Reporter* at paragraph [3-120]; and Astor H and Chinkin C, above n 40 at 61-64.

60 Charlton R and Dewdney M, above n 45 at 11; O'Connor P, above n 52 at 111-112; and Naughton P, 'Alternative Forms of Dispute Resolution - Their Strengths and Weaknesses' (1990) 56 *Arbitration* 76 at 77.

61 Boulle L, above n 35 at 67; and Dewdney MS, above n 44 at paragraphs [90] to [91].

transactions costs, satisfaction with procedures and outcomes, long-term effect on the parties' relationship, and recurrence of disputes. A comparative analysis of the costs and benefits generated by the three different approaches leads to the fundamental proposition on which DSD theory is based, namely, that 'in general, reconciling interests costs less and yields more satisfactory results than determining who is right, which in turn costs less and satisfies more than determining who is more powerful'.<sup>62</sup> On the basis of this proposition, the costs associated with dispute resolution would be reduced and the benefits of disputing would be increased if all disputes were resolved using interest-based procedures such as negotiation and mediation. However, it is neither possible nor desirable to resolve all disputes in this manner. Rights and/or power procedures may be necessary where the parties are unable or unwilling to use interest-based procedures. There are also a number of instances, such as in cases concerning a significant question of public policy, where a rights-based procedure such as litigation is considered more desirable from a societal perspective than an interest-based procedure.<sup>63</sup>

The costs associated with dispute resolution procedures can be further refined. Within each category of interests, rights and power approaches, there are low and high-cost procedures.<sup>64</sup> Interest-based negotiation which takes place between the parties alone has the potential to be a low-cost procedure. Interest-based mediation is generally a higher cost procedure. Expedited arbitration may provide a less costly way to determine rights than full scale arbitration, which in turn may cost less than litigation. Power-based approaches can also be arranged from low to high-cost. Voting can be a low-cost power procedure. Limited strikes and symbolic strikes are relatively low-cost power contests; full strikes and lock outs are high-cost.

#### *'Interests-oriented' dispute resolution systems*

DSD postulates that interest-based procedures have the potential to be the most cost-effective but recognises that rights and power-based procedures are necessary and desirable components of a dispute resolution system. In order to reduce the costs of handling disputes, dispute systems designers endeavour to create systems that are 'interests-oriented', that is, systems that promote the resolution of disputes through use of interest-based procedures wherever possible but that also provide 'low-cost ways to determine rights or power for those disputes that cannot or should not be resolved by focusing on interests alone'.<sup>65</sup>

#### **Dispute systems design principles**

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62 Ury WL, Brett JM and Goldberg SB, above n 31 at 4.

63 Ibid at 16-17 and 171. As a general rule, interest-based procedures are conducted in a private and confidential forum. Litigation takes place in public. It provides opportunity for public scrutiny and review, allows public articulation of appropriate standards, and is more likely to lead to systemic change: Bartunek JM, Kolb DM and Lewicki RJ, 'Bringing Conflict Out From Behind the Scenes' in Kolb DM and Bartunek JM (eds), *Hidden Conflict in Organizations*, SAGE Publications (1992) at 209-228 and see generally Fiss O, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073.

64 Ury WL, Brett JM and Goldberg SB, above n 31 at 8 and 18.

65 Ibid at 18.

A number of principles for the design of low-cost interests-oriented dispute resolution systems has been formulated in the last decade.<sup>66</sup> Twelve of these principles are outlined below.<sup>67</sup> Although the term ‘principles’ is used to describe them, they are not immutable. Design implies custom-tailoring. The principles should be adapted to meet the needs of users of the system, the resource constraints of the particular enterprise, and the wider legislative environment within which the system operates. However, some of them are now regarded as fundamental to the design of an effective dispute resolution system.

### *Scope of the system*

The extent of application of a dispute resolution system needs to be clearly stipulated. This entails defining what is meant by the term ‘dispute’ and specifying whether the system will deal with all disputes that might arise between the parties or only with more limited sub-categories of disputes. If the system is restricted to sub-categories of disputes, criteria for selection of cases need to be established and publicised. For example, a system might deal only with certain types of disputes (for instance, those involving discrimination),<sup>68</sup> or only with disputes involving up to a specified amount of money,<sup>69</sup> or only with those filed within a given period of time.

The relationship of the system to external avenues of redress should also be clearly defined. Parties must know if they are obliged to exhaust avenues within the system before they can seek outside redress from a court or other agency.<sup>70</sup>

### *An accessible system*

A dispute resolution system must be accessible to persons who need to use it.<sup>71</sup> Accessibility is enhanced if there are multiple points and means of access to the system. Parties are more likely to use a system if they have some choice of persons to whom they can go to make a complaint and if they can gain access to the system through a variety of means, some of which are simple and informal, such as person-to-

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66 These principles are scattered throughout numerous articles published in the United States and Australia and in the two major American texts on dispute systems design, of Ury WL, Brett JM and Goldberg SB, above n 31, and of Costantino CA and Merchant CS, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations*, Jossey-Bass (1996). There are no Australian texts on the subject known to the author.

67 For a more detailed discussion of the principles of dispute systems design, see Wolski BD, above n 34 at paragraphs [32] to [50].

68 Generally, see Dicker L, ‘Conflict Resolution in a Large Complex Public Organisation: The New South Wales Department of School Education’, *Proceedings of the National Conference 1993*, Australian Dispute Resolution Association Inc, 91-100.

69 For example, the Australian Banking Industry Ombudsman Scheme only handles complaints lodged by individual users of bank services and is limited to awarding damages of up to \$100,000 on any one matter: McDonald G, ‘The Banking Industry Ombudsman’s Scheme’ (1994) 1 *CDRJ* 85 at 86.

70 Although use of procedures such as mediation and arbitration may be made a condition precedent to commencement of court proceedings, it is unlikely that parties can forfeit the option of going to a competent court. Courts in Australia have held that dispute resolution clauses which attempt to oust the jurisdiction of the court are unenforceable: see the authorities cited in Boulle L, above n 35 at 267-269 and in n 125 below.

71 Australian Standard on Complaints Handling, above n 19, Clauses 2.6 and 5.4(f); Costantino CA and Merchant CS, above n 66 at 129 and 209; and Singer LR, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*, Westview Press (2nd ed 1994) at 104.

person or via telephone.<sup>72</sup> It is also desirable to include at least one means of access which allows parties to remain anonymous.<sup>73</sup>

Information on how the system works and the points and means of accessing it should be readily available to all parties. The information must be in terms that are plain and easy to understand and it should accommodate the needs of a diverse and multicultural population.<sup>74</sup>

### *Procedures for prevention and resolution of disputes*

An effective system aims to prevent disputes from arising; and it resolves disputes that do arise by reconciling interests, by determining rights, and if necessary, by testing the relative power of the parties.<sup>75</sup> There are a number of procedures that can perform these functions and which might be considered for inclusion within a system. Some of the options available are listed in Appendix A. They are considered in more detail below.

Procedures aimed at prevention of disputes may be incorporated at both the pre-dispute and post-dispute levels of a dispute resolution system. Notification and consultation procedures,<sup>76</sup> informal counselling, and informal third party intervention in the form of shuttle diplomacy might be used at the pre-dispute level, before differences escalate into disputes. At the post-dispute stage, it is advisable to incorporate procedures for systematically recording and analysing complaint and dispute data. The data can be used to identify and rectify systemic and recurring problems and to prevent future disputes.<sup>77</sup>

When disputes do arise, interest-based procedures should be available as a first option. Early use of interest-based procedures may be emphasised and encouraged by providing: a structured framework for negotiation (stipulating who negotiates and when, and what is to happen if negotiations are unsuccessful); multiple levels of

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72 Australian Standard on Complaints Handling, above n 19, Clauses 3.5(iv) and 3.6(d); and Flint D and Mo J, 'The Australian Press Council: A Pioneer in Alternative Dispute Resolution' (1995) 2 *CDRJ* 1 at 13.

73 Some people will only raise their concerns if they can do so anonymously: Zinsser JW, 'Employment Dispute Resolution Systems: Experience Grows But Some Questions Persist' (1996) 12 *Negotiation Journal* 151 at 163; Rowe MP, 'The Post-Tailhook Navy Designs an Integrated Dispute Resolution System' (1993) 9 *Negotiation Journal* 207 at 208; Westin AF and Feliu AG, *Resolving Employment Disputes Without Litigation*, The Bureau of National Affairs Inc, Washington (1988) at 20-21; and Singer L R, above n 71 at 103.

74 For suggestions on ways in which to publicise a system, see the Australian Standard on Complaints Handling, above n 19, Clause 3.5 and 3.6; McDonald G, above n 69 at 89-90; David J, above n 57 at 68; and Weise RH, 'The ADR Program at Motorola' (1989) 5 *Negotiation Journal* 381 at 383-384.

75 Some systems also incorporate measures for containment of unresolved disputes. A dispute is considered to be unresolved if a party refuses to accept and abide by official system outcomes. The main purpose of containment is to prevent unresolved disputes from escalating into violence. Expulsion from the community and incarceration are both forms of containment: Ury WL, 'Conflict Resolution among the Bushmen: Lessons in Dispute Systems Design' (1995) 11 *Negotiation Journal* 379 at 387-388.

76 See Ury, Brett and Goldberg's discussion of 'notification and consultation procedures' which require, first, that interested parties be advised in advance of intended action, and secondly, that they be given an opportunity to discuss proposed action and to negotiate points of difference: Ury WL, Brett JM and Goldberg SB, above n 31 at 61-62.

77 Rowe MP, 'The Corporate Ombudsman: An Overview and Analysis' (1987) 3 *Negotiation Journal* 127 at 131; and Ziegenfuss JT, *Organizational Troubleshooters: Resolving Problems with Customers and Employees*, Jossey-Bass (1988) at 162.

negotiation, beginning with the parties to the dispute, and moving to progressively higher levels with more senior negotiators involved at each step;<sup>78</sup> and mediation to assist parties where they are unable to resolve disputes themselves.

Low-cost rights and power procedures should be incorporated into a system to serve as back-ups if interest-based procedures fail.<sup>79</sup> Low-cost rights and power procedures are necessary to provide a known end point to the system and a definitive decision for disputes that have not been resolved by interest-based procedures.<sup>80</sup> (Even if interest-based procedures are successful, the outcomes produced may need to be monitored and ultimately enforced by recourse to rights-based procedures.) Low-cost procedures for determination of rights include expert appraisal and arbitration (which may take an expedited form). Separate fact-finding or investigation procedures may be established. Low-cost power procedures include voting, and limited and symbolic strikes which allow the parties to test their relative strength but limit the destructiveness of the tactics used.<sup>81</sup> In some circumstances, a set of binding 'rules of conflict'<sup>82</sup> that differentiate legitimate and non-legitimate power tactics may need to be promulgated.

### ***Loop-back procedures***

If interest-based procedures fail to resolve a dispute, parties would normally look to rights or power-based procedures as their next option. However, they can be encouraged to revert or 'loop-back' from a rights or power-based option to an interest-based option by the use of 'loop-back procedures' inserted between interest-based procedures and rights and power procedures.<sup>83</sup> There are a range of loop-back procedures which may be utilised. Loop-backs from a rights-based contest such as arbitration or litigation might take the form of conciliation, advisory arbitration, early neutral evaluation (ENE), or advisory expert appraisal.<sup>84</sup> Procedures such as these provide the parties with information about their rights and the likely outcome of a rights contest. The parties may use the information as the basis for further and more constructive interest-based negotiations. Loop-backs from power-based contests include cooling-off periods, crisis negotiation procedures (such as a negotiation hotline), and intervention by third parties such as the police.<sup>85</sup> These procedures allow time for emotions to cool and more rational decisions to be made.

### ***A low-to-high-cost sequence of procedures***

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78 Rowe MP, 'Options, Functions, and Skills: What an Organizational Ombudsman Might Want to Know' (1995) 11 *Negotiation Journal* 103 at 108; and Ury WL, Brett JM and Goldberg SB, above n 31 at 42-46 and 49.

79 Ury WL, Brett JM and Goldberg SB, above n 31 at 56.

80 Ury WL, Brett JM and Goldberg SB, above n 31 at 56; Westin AF and Feliu AG, above n 73 at 13, 15 and 280; Ziegenfuss JT, above n 77 at 39; and Zinsser JW, above n 73 at 154.

81 Himes JS, *Conflict and Conflict Management*, University of Georgia Press (1980) at 223.

82 Ibid.

83 Ury WL, Brett JM and Goldberg SB, above n 31 at 52.

84 Ury WL, Brett JM and Goldberg SB, above n 31 at 53-54; and Costantino CA and Merchant CS, above n 66 at 38-41.

85 Ury WL, Brett JM and Goldberg SB, above n 31 at 54-55.

In order to reduce the costs of handling disputes, procedures within a system should be arranged in graduated steps in a low-to-high-cost sequence.<sup>86</sup> A basic system might consist of a prevention procedure (for example, a notification and consultation mechanism), interest-based procedures (for example, negotiation followed by mediation if the parties are unable to resolve the dispute themselves), a loop-back procedure (such as advisory arbitration), and a low-cost rights-based procedure (such as arbitration). This sequence is depicted in Appendix B.

### ***Loop-forward procedures***

'Loop-forward' procedures may be incorporated within a system. Loop-forward procedures are mechanisms which allow parties to move directly to a rights or power-based procedure without going through all of the earlier interest-based options.<sup>87</sup> They allow for the fact that some disputes are more appropriately dealt with by rights or power procedures. A loop-forward to a low-cost rights or power procedure might be appropriate where a party refuses to negotiate,<sup>88</sup> where the parties are unable to establish a range within which to negotiate, where the parties are opposed on fundamental values, or when the matter involves a question of public importance.<sup>89</sup>

### **Multiple parallel options**

Systems may provide multiple options for handling disputes, some of which are available simultaneously or in parallel.<sup>90</sup> Provision of a number of interest-based options at the point of entry to a system may minimise use of the more formal rights and power-based options at the other end of the system.<sup>91</sup> For example, parties might be given the opportunity to use informal negotiation, informal counselling, shuttle diplomacy and/or mediation. Options may be more limited and standardised towards the end of the system.

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86 Ibid at 62.

87 See, for example, the system adopted by the Australian Medical Association (AMA) and the Department of Health which allows the parties to agree to by-pass mediation and proceed directly to arbitration: Street L, 'Agreed Structure for Dispute Resolution - AMA v Department of Health' (1994) 5 *ADRJ* 185; and the resolution program provided by the Australian Association of Permanent Building Societies which provides that the parties may agree to by-pass mediation and refer a matter directly to expert determination: Resolution of Disputes under the Building Society Code of Practice, Terms of Reference, May 1996, Clause 2.5. Generally see Rowe MP, 'The Ombudsman's Role in a Dispute Resolution System' (1991) 7 *Negotiation Journal* 353 at 361; and Slaikeu KA and Hasson RH, 'Not Necessarily Mediation: The Use of Convening Clauses in Dispute Systems Design' (1992) 8 *Negotiation Journal* 331 at 337.

88 Provision for protected industrial action during the bargaining period for an AWA (ss 170WB and 170WC) allows for the fact that resort to a power-based procedure might first be necessary to bring recalcitrant parties to the negotiation table and to encourage concessions and compromise.

89 These are fairly well recognised instances in which the appropriateness of interest-based procedures such as mediation is questioned. Generally, see Boulle L, above n 35 at 65; Macken JJ and Gregory G, above n 2 at 46; and Brooks B, above n 44 at 59 where the author acknowledges that mediation is not suitable for all disputes in the industrial area.

90 For a comprehensive description of a system which provides employees with multiple points of access, multiple parallel options, and with the opportunity to loop-back and to loop-forward, see Zinsser JW, above n 73, on the dispute resolution program implemented at Brown & Root in the United States. Generally, on the importance of providing multiple parallel options, see Rowe MP, above n 78 at 114; Westin AF and Feliu AG, above n 73 at 17 and 22; and Kolb DM and Silbey SS, above n 31 at 303.

91 Zinsser JW, above n 73 at 154.

### ***Mechanisms which provide flexibility***

Whenever dispute resolution procedures are chosen in advance of actual disputes, there is a danger that the procedures chosen will be inappropriate for resolution of the disputes that do arise.<sup>92</sup> Some flexibility can be built into a system to minimise this danger. Loop-forward procedures and multiple parallel options provide a degree of flexibility. Further flexibility can be provided by using a ‘convening clause’.<sup>93</sup> A convening clause provides that an independent third person or organisation is to convene a meeting between the parties, usually after direct negotiations have broken down, to assist them to choose an appropriate dispute resolution procedure.<sup>94</sup> Alternatively, the parties may simply provide that the first meeting between them is to be directed towards selecting a suitable procedure.<sup>95</sup>

### ***A choice of procedures***

Parties may be given an opportunity to choose which procedure or procedures to use.<sup>96</sup> Loop-forward procedures, multiple parallel options, and convening clauses all provide some opportunity to select the procedure considered most appropriate for a particular dispute. It is desirable to allow the parties some choice in the selection of any third party interveners.

### ***Defined procedures and procedural rules***

Dispute resolution procedures can take different forms in different contexts, so much so that a procedure which may be labeled ‘mediation’ in one system may attract a different label in another system. The procedures comprising a system must be adequately defined so that the parties are aware of what is intended by any named procedure. The rules which are to govern the operation of each procedure also need to be clearly spelled out to provide procedural certainty and a degree of uniformity. Matters to be considered include:

- the timetable to be followed in setting up and undertaking the procedure;
- mechanisms for information exchange;

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92 Astor H and Chinkin C, above n 40 at 198 and 201. Also see McCarthy P, above n 2 at 119, who recognises the need for flexibility in the design of grievance procedures.

93 Generally, see Slaikeu and Hasson on convening clauses: Slaikeu KA and Hasson RH, above n 87. The authors assert that a convening clause meets ‘the twin criteria of bringing the parties to the table in a timely manner while also offering maximum flexibility and freedom of choice in selecting a dispute resolution process’: Slaikeu KA and Hasson RH, above n 87 at 332.

94 The Dispute Resolution Adviser (DRA) system provides an excellent example of use of a convening clause: Wall CJ, ‘Dispute Prevention and Resolution Design in Hong Kong’ (1994) 1 *CDRJ* 3 and David J, above n 57 at 69-70.

95 A provision to this effect was incorporated into the system adopted by the Australian Medical Association (AMA) and the Department of Health, see Street L, above n 87.

96 Several authors place a premium on providing parties with a choice of dispute resolution options, see for example, Rowe MP, above n 73 at 210; Slaikeu KA and Hasson RH, above n 87 at 332; Slaikeu KA, ‘Designing Dispute Resolution Systems in the Health Care Industry’ (1989) 5 *Negotiation Journal* 395 at 399; and Costantino CA and Merchant CS, above n 66 at 61 and 132. In many instances, choices will be limited. Resource constraints (where resources include time, capital, facilities and trained personnel) will generally dictate the number of dispute resolution options available. There are also some matters, for example, those of a criminal nature, which do not lend themselves to choice.

- the extent of confidentiality and the way in which confidentiality is to be protected;
- provision for appointment of a third party, if one is required, and arrangements for payment of third party fees;
- standards of practice for third party interveners (including standards specifying the extent of authority and immunity of third parties).

#### *A triggering mechanism and time limitations*

The manner in which the first procedure is to be initiated (that is, the means by which operation of the system is triggered), measures for determining how each procedure is to lead on to the next, and time limits for each procedure within the system should be specified to avoid preliminary disagreements over timing, to prevent delay and procrastination,<sup>97</sup> and generally to enhance the responsiveness of the system.<sup>98</sup> In most systems, a dispute moves to a higher level in the system if it cannot be resolved at a lower level. For this reason, it is also important to provide some operating definition of the term 'resolution'.<sup>99</sup>

#### *Motivation to use low-cost procedures*

Parties need to be encouraged to take the low-cost dispute resolution path, in particular, to use the interest-based procedures which are the focal point of the system. Motivation to use interest-based procedures can be strengthened by providing continuous education and training so that the parties have the skills required to use the procedures (at the very least, they should have access to persons with those skills), and by taking measures to prevent reprisals for making a complaint.<sup>100</sup> Parties can also be encouraged to use specific procedures with appropriate cost incentives.<sup>101</sup> If parties advance to rights-based options, they can be encouraged to use low-cost procedures such as expert appraisal or arbitration, as opposed to higher cost procedures such as litigation, by making the outcome

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97 The pressure to settle created by the imposition of time limits may also increase the likelihood of a dispute being resolved: Cormick GW, 'Crafting the Language of Consensus' (1991) 7 *Negotiation Journal* 363 at 367.

98 Timeliness and responsiveness are important elements of an effective dispute resolution system: Australian Standard on Complaints Handling, above n 19, clauses 2.8, 3.6(g) and 3.8.

99 For example, in the Brown & Root Dispute Resolution Program, a matter is considered to be 'resolved' when 'the initiator of the case chooses not to move it to a later level or reinitiate any options from the earlier levels': Zinsser JW, above n 73 at 160.

100 Ury WL, Brett JM and Goldberg SB, above n 31 at 64. For suggestions on how to guarantee freedom from reprisal, see Zinsser JW, above n 73 at 155; and Westin AF and Feliu AG, above n 73 at 221.

101 Payment arrangements can create both incentives and disincentives to use a system. A cost sharing approach is favoured by many authors. For suggestions on shared-payment and subsidised payment arrangements, see Costantino CA and Merchant CS, above n 66 at 161; Zinsser JW, above n 73 at 157; Weise RH, above n 74 at 394; and Zack AM and Duffy M T, 'ADR and Employment Discrimination' (1996) 51 *Dispute Resolution Journal* 28 at 32.

advisory, as a way of reassuring the parties.<sup>102</sup> As a last resort, use of low-cost procedures might be mandated.<sup>103</sup>

### **The Model Dispute Resolution Procedure for AWAs**

The model dispute resolution procedure prescribed by Subregulation 30ZI(2) of the *Workplace Relations Regulations* 1996 (Cth) provides for multiple-step negotiation at the workplace level, including 'but not limited to':

1. negotiation between the employee and his or her supervisor;
2. and if the dispute is not resolved, negotiation involving more senior levels of management.

If the matter cannot be resolved at the workplace level, either party may refer it to mediation. If a matter is referred to mediation, the parties agree to participate in good faith. The parties have the right to appoint a bargaining representative for the purposes of negotiation and mediation.<sup>104</sup>

The clause is analysed in more detail below. A number of the design principles discussed in the preceding part of the article have been disregarded in its formulation. As a result, the clause does not provide a comprehensive framework for handling disputes.

### **Uncertainty as to the Scope of the System**

The model procedure is expressed to cover 'any matter that may be in dispute between the parties' to the agreement. The terms 'matter' and 'dispute' have not been defined. As a result, it is not clear which matters are caught by the clause nor when a matter is to be regarded as 'in dispute'.

Presumably the clause was intended to cover matters dealt with in the agreement, in which case it would extend to disputes about the application, interpretation and

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102 A commonly adopted alternative in the case of consumer and employee complaint systems is to make decisions binding on the industry or employer participant, but not on the consumer or employee, who retains the right to litigate: Bean PAD, 'A Guide to the Private Alternative Dispute Resolution Schemes' (1994) 5 *ADRJ* 200 at 202; Harris W, 'Consumer Disputes and Alternative Dispute Resolution' (1993) 4 *ADRJ* 238 at 248; McDonald G, above n 69 at 88; and Zack AM, 'Bringing Fairness and Due Process to Employment Arbitration' (1996) 12 *Negotiation Journal* 167 at 170.

103 Ury WL, Brett JM and Goldberg SB, above n 31 at 58. There are strong arguments in favour of mandatory mediation. The empirical evidence that is available suggests: that mediation is typically refused by more than 50% of those to whom it is offered; that parties forced to mediate are no less likely to settle than those who participate in mediation 'voluntarily'; and that user satisfaction rates and compliance rates are not adversely effected when participation is mandated: Kressel K and Pruitt DG, 'Themes in the Mediation of Social Conflict' (1985) 41 *Journal of Social Issues* 179 at 183-187; Goldberg SB, Green ED and Sander FEA, *Dispute Resolution*, Little, Brown (1985 and 1987 Supplement) at 127; and see Boule L, above n 35 at 256-258 for a summary of research results in Australia. However, different considerations apply in relation to rights-based procedures. For arguments against mandatory use of rights-based procedures, see Singer LR, above n 71 at 104; Costantino CA and Merchant CS, above n 66 at 131; and Zinsser JW, above n 73 at 159.

104 The bargaining representative may be a union, a workplace committee, or a solicitor: Naughton R, above n 21 at 24; Lee M, above n 29 at 41; and Wallace-Bruce NL, above n 13 at 98-103.

enforcement of an AWA, that is, to rights disputes.<sup>105</sup> I have not been able to find an author on AWAs who mentions use of the model procedure as a mechanism for resolving interest disputes, that is, disputes concerning the making of an agreement to vary, extend or terminate the AWA<sup>106</sup> or the making of a replacement AWA,<sup>107</sup> which matters may or may not be touched upon in the existing AWA.<sup>108</sup> Most commentators appear to assume that a bargaining framework similar to that provided by the model procedure, is absent in the making and renewing of AWAs.<sup>109</sup> However, there is no theoretical reason why the model procedure could not be used to resolve interest disputes.<sup>110</sup> As a matter of interpretation, the model clause does not appear to be confined to matters dealt with in the agreement. The Act requires certified agreements to include procedures for preventing and settling disputes ‘about matters arising under the agreement’.<sup>111</sup> It is significant that the same words are not used in the model procedure for AWAs. The model clause appears to be wide enough to apply to all disputes that might arise between the parties to the agreement, whether or not it concerns a matter dealt with in the agreement. All that seems to be required is that the parties who are in dispute are parties to the agreement.

As mentioned, the model clause provides no definition of the term ‘dispute’. There are simple definitions available which could have been adopted, for example, the Australian Standard on Complaints Handling defines a dispute as ‘A pursued unsatisfied complaint’.<sup>112</sup> With the model clause for AWAs, there is a real possibility that the parties may not agree that a dispute exists and that it is caught by the clause.

Nor does the clause make clear what its relationship is to be with other avenues of redress, in particular, mechanisms for enforcement of rights. Although the model clause makes utilisation of the procedure a condition precedent to commencing actions for a penalty, for damages for breach of the AWA, or for enforcement of the AWA, it is not clear whether a party is obliged to use the model procedure before

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105 There is no restriction on the types of disputes that can be dealt with in mediation. Although mediators may attempt to focus the parties on their future relationship, no distinction is made in mediation between establishment of future rights and obligations on the one hand, and enforcement of existing rights and obligations on the other. Since mediators do not have power to impose a decision upon the parties, they do not exercise either arbitral or judicial powers.

106 See the definition of ancillary document contained in s 170VA. An AWA may be varied or terminated at any time during its currency by the written agreement of the parties. The agreement must be filed with the Employment Advocate and meet certain other specified requirements: generally, see Wallace-Bruce NL, above n 13 at 105.

107 AWAs have a nominal expiry date of three years: s 170VH. However, once an AWA is in operation, it remains in force even after its nominal expiry date until it is terminated or replaced by a fresh AWA: s 170VJ. Generally, see Wallace-Bruce NL, above n 13 at 105-106; and McCallum RC, ‘Australian Workplace Agreements - An Analysis’ (1997) 10 *AJLL* 50 at 58-59.

108 It is submitted that the model procedure is not a mechanism for making the first AWA between the parties. Whether the model procedure is included in an AWA intentionally or by default, it will not become effective until a filing receipt is issued by the Employment Advocate (in the case of new employees) or until formally approved and an approval notice is issued by the Employment Advocate (in the case of existing employees): S 170VD.

109 Generally, on the making of AWAs, see McCallum RC, above n 107 at 54-59; Wallace-Bruce NL, above n 13 at 98-100 and 102-106; Naughton R, above n 21 at 23-24; Ronfeldt P, above n 8 at 71; and Lee M, above n 29 at 30-32 and 39-47.

110 Macken and Gregory see possibilities for use of mediation in enterprise bargaining under the *Industrial Relations Act* 1988, both as a tool for negotiating agreements and for the purposes of dispute settlement: Macken JJ and Gregory G, above n 2 at 28-29 and 71-74.

111 S 170LT(8).

112 Australian Standard on Complaints Handling, above n 19, clause 1.4.4.

being at liberty to pursue other remedies in relation to matters such as termination of employment, occupational health and safety, workers' compensation, apprenticeships, and discrimination in the workplace.<sup>113</sup>

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113 See Coulthard's discussion of this problem in Coulthard A, 'Employees' Rights Under Agreements: Dispute Settlement and the Enforcement of Rights', Proceedings from *New Rights and Remedies for Individual Employees: Implications for Employers and Unions - Fifth Annual Labour Law Conference*, Sydney, May 1997 at 31.

### **Limited access**

Access to the system created by the model procedure is limited. There is only one point of entry for the employee and that is via the employee's supervisor. The clause does not stipulate whether it is to be the immediate supervisor but that is presumably the intention. Unfortunately, many employees will be reluctant to take a complaint to a supervisor, particularly one who is involved in the dispute. There is, apparently, only one means of access to the system. It appears that face-to-face contact is envisaged, the clause providing that the 'employee and supervisor are to meet and confer'. Since either or both parties may appoint a bargaining agent, it is possible that the employee and supervisor may avoid direct personal contact.<sup>114</sup> This is not necessarily a deficiency in the clause. Many employees will be uncomfortable with face-to-face contact. However, it might have been preferable to provide other means of access to the system, such as telephone and even pencil-to-paper, and to allow an employee access via a neutral person such as a human resources officer. With only one point of entry and one means of entry to the system, many complaints will not be raised.

Employers are responsible for explaining the effect of an AWA to employees.<sup>115</sup> However, given the circumstances in which the model clause will be incorporated into an AWA, it is unlikely that employees will be provided with information on how the system works. Its existence may not even be brought to their attention.

### **Procedural gaps**

The model clause provides no mechanisms for prevention of disputes. There is no obligation on employers to establish notification and consultation procedures at the pre-dispute level or procedures for the systematic recording and analysis of data at the post-dispute level.

The clause contains two procedures for resolution of disputes, namely negotiation (which is multi-level) and mediation. These procedures have the potential to be interest-based in approach and they are arranged in graduated steps in a low-to-high cost sequence. The provisions with respect to negotiation are lopsided. Although an employee may appoint a bargaining representative, it is unfortunate that no fixed provision has been made for involvement of another person (perhaps a human resources officer or ombuds) as a representative of the employee in second level negotiations. Second level negotiations sometimes succeed because the negotiators are 'once removed' from the dispute and more objective. An unrepresented employee may also find negotiation with senior management a daunting task. It may also prove unfortunate that mediation is optional, rather than obligatory. The parties do not get a second chance at interest-based procedures, for there are no 'loop-backs' to encourage them to revert back to those procedures.

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114 This is certainly the case during the process of negotiating the terms of an AWA: see McCallum's discussion on the making of AWAs in McCallum RC, above n 107 at 55.

115 S 170VPA.

Of most significance, the clause contains no rights-based procedures, such as arbitration, to produce binding outcomes, to provide a known end point to the system and to serve as backups if negotiation and mediation fail to resolve disputes. This also means that there is no mechanism for monitoring and enforcing negotiated and mediated agreements, should it be necessary to do so.

There are also no power-based procedures in the clause itself. However, some provisions regulating interest disputes can be found elsewhere in the Act. There is provision for the parties to take protected industrial action in connection with the negotiation of an AWA.<sup>116</sup> In the terminology of DSD, this provision constitutes a loop-forward to a low-cost power procedure. Subject to the requirements of the Act, industrial action can be engaged in to pressure a recalcitrant party to negotiate. The Act also prohibits industrial action during the currency of an AWA.<sup>117</sup> These provisions constitute 'rules of conflict' that differentiate legitimate and non-legitimate power tactics.

Of less significance perhaps, multiple parallel options have not been provided. There is no real choice of options given to the parties, leaving aside the fact that mediation is optional. Apart from the provision for protected industrial action in negotiating an AWA, there is no provision for 'looping-forward'. In any event, as has just been noted, there is nothing to loop forward to.

#### **Lack of procedural certainty**

The procedures contained in the model clause have not been defined, either in the clause or elsewhere in the Act. There are no universally accepted definitions of dispute resolution procedures such as negotiation and mediation. While most people probably have some general understanding of what is meant by 'negotiation', mediation is not so well understood. It can take different forms in different contexts.<sup>118</sup> Definitions of negotiation and mediation should have been provided in the clause so that parties know what is intended by the labels.

No procedural rules, that is, rules governing the operation of each of the named procedures, have been provided with the model AWA clause.<sup>119</sup> Consequently, there are no provisions with respect to meeting times, information exchange, and confidentiality to facilitate commencement and conduct of negotiations at the workplace level. There is no mechanism for determining the appointment of a mediator (or mediators). Mediation clauses usually identify the mediator or provide some

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116 Ss 170WB-170WE.

117 S 170VU.

118 Labour mediation in the United States has developed some distinguishing features: Folberg J and Taylor A, above n 44 at 132. In time, labour mediators in Australia may also develop a distinctive approach. See Boland R, above n 59 at 22-23 where the author suggests some elements of an Australian labour mediation model.

119 Most standard dispute resolution clauses provide no more than general guidelines as to the type of procedures to be used. However, most standard clauses are accompanied by more specific procedural rules to be followed for each procedure. The drafters of the model clause for AWAs have failed to provide the more detailed procedural rules.

procedure for selection of a mediator.<sup>120</sup> The model clause does not stipulate whether mediation is to be conducted by a sole mediator or whether co-mediation is an option.<sup>121</sup> There are no guidelines as to the procedures to be followed by the mediator in conducting the mediation, for instance, authorising separate meetings with the parties. There is no provision stipulating who should attend the mediation; no framework for information exchange; no rules governing confidentiality; and no provision for documenting the agreement, if any, reached in the mediation. There is also no provision regarding payment of the costs associated with the mediation. The failure to deal with costs is no small matter. The question of 'who pays' may become one of the issues for mediation. There is ample anecdotal evidence which suggests that the success or failure of a mediation can turn on the question of who pays the costs of the mediation.<sup>122</sup>

Without the aid of a definition and a set of procedural rules, the extent of mediator authority is uncertain. It seems clear that mediators do not have power to make binding determinations and they generally lack power to give directions and to make orders. They may make certain requests of the parties, for example, they may request that the parties provide documents relevant to the dispute or that parties exchange such information as is required to allow a fruitful exploration of disputed issues and possible options for resolution. Since the model clause provides that the parties agree to participate in mediation in good faith, they may be obliged to comply with all reasonable requests made by the mediator. Unfortunately, what constitutes a reasonable request and the exact parameters of what is required by 'good faith' participation are not entirely clear.<sup>123</sup> To some extent, the question may be a moot one for mediators cannot take default measures against a party who fails to comply with a request<sup>124</sup> and they are unable to call upon the Commission for support and assistance.

The clause is a recipe for further disagreement between the parties. It may even be unenforceable for lack of procedural certainty. Courts have refused to enforce dispute resolution clauses for lack of certainty as to the conduct required of the parties. Clauses must set out with sufficient certainty the procedural framework within which the parties are to operate. This includes a mechanism for the appointment of the mediator; procedures to be followed in setting up and undertaking the mediation,

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120 It is usual for parties to agree that a nominated professional association is to appoint the mediator in the event that they are unable to agree upon the appointment. This is a service that could be offered by the Employment Advocate.

121 Co-mediation allows the teaming of persons with different skills and professional backgrounds, and a balancing of gender, class, and culture between the parties and the mediators.

122 The author has conducted several mediations in which the costs of the mediation, including the mediator's fees and those of legal representatives, have created the final impasse to settlement and has spoken to other mediators with similar experiences.

123 The *Industrial Relations Act* 1988 (Cth), as amended by the *Industrial Relations Reform Act* 1993 (Cth), required parties to an agreement to bargain in 'good faith'. Some common threads as to what constitutes good faith participation have been identified, namely, that the parties meet at reasonable times, disclose relevant information, and deal honestly (that is, without attempt to defraud the other party): Lee M, above n 29 at 46-47; and Pittard M, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *AJLL* 62 at 85-86.

124 The only coercive power that mediators can exercise is to threaten to withdraw from the proceedings.

accompanied by an appropriate timetable; procedures for information exchange; and procedures regulating evidentiary matters.<sup>125</sup>

### **Absence of a triggering mechanism and time limits**

The model clause lacks a definite triggering mechanism. In fact, there appears to be no obligation on either party to commence the procedure. Once commenced, there is very little to keep the procedure moving. Time limits for each stage have not been specified and measures for determining how each stage is to lead to the next are vague. A party may move to a higher level in the system if the dispute 'cannot be resolved' at a lower level. However, the clause does not provide an operating definition of resolution. There may be uncertainty and disagreement between the parties as to whether or not a dispute 'cannot be resolved'. The only obligation imposed on parties using the model procedure is to 'cooperate to ensure that the dispute resolution procedures are carried out as quickly as is reasonably possible'. Just what constitutes 'as quickly as is reasonably possible' and what must be done in the name of cooperation are open to interpretation and may give rise to further dispute.

The only other mechanism provided in the clause for getting the procedure started and for keeping it moving is the agreement by the parties not to commence certain actions (namely, an action for a penalty, or for damages for breach of the AWA, or for enforcement of the agreement) unless they have made a genuine attempt to resolve the dispute at the workplace level and either seven days have expired from the date when the party initiating the action gave notice that mediation was not requested or mediation was requested by either party and it has been completed. There are no definitive answers to the question of what constitutes a 'genuine attempt' to resolve a dispute and there are practical difficulties involved in establishing bona fides in procedures such as negotiation and mediation which generally take place in a private forum on a without prejudice basis. The clause provides numerous opportunities for a reluctant party to frustrate its activation and operation by inaction.

### **Lack of incentives to use low-cost procedures**

The model clause provides some incentives to take the low-cost path to dispute resolution. It provides for at least two levels of negotiation and for use of mediation, at the option of either party. As mentioned above, it also makes use of the model procedure a condition precedent to commencing an action for a penalty, or for damages for breach of the AWA, or for enforcement of the AWA.<sup>126</sup> The clause does

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125 See *AWA Limited v Daniels* (1992) ASCR 463; *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 and *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*, Supreme Court of New South Wales, Giles J, 55093/94, 28 March 1995, unreported. See generally Boulle L, above n 35 at 262-275.

126 It is not unusual for dispute resolution clauses to make use of certain procedures a condition precedent to institution of court proceedings. Courts have indicated a willingness to enforce such clauses by preventing recourse to litigation until parties have complied with the clause, providing the clause does not attempt to oust the jurisdiction of the courts. Clauses must not purport to make alternative procedures a final and exclusive alternative to litigation but rather simply provide that all disputes must first be submitted to the alternative procedures before court proceedings can be instituted: see the authorities cited above at n 125. In a similar manner, the Commission has exercised its power under s 92 and refrained from dealing with industrial disputes

nothing else to encourage use of interest-based procedures. Multiple points and means of entry to the system have not been provided; there is no mechanism to ensure involvement of negotiators with authority to settle; there are no measures to prevent reprisal for making a complaint; and there is no provision for skills training (although the parties have the capacity to appoint a bargaining agent with the necessary skills). Putting the finer points to the side, many parties (and in particular, many employees) will be reluctant to use the procedure because of the costs involved. Shared or subsidised payment arrangements may have created an incentive to use the procedure.

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until the parties have complied with dispute settlement procedures contained in relevant awards: CCH, *Australian Labour Law Reporter* at paragraph [3-110].

## Filling The Voids: The Role Of Industrial Relations Institutions

The model dispute resolution procedure for AWAs operates within the legislative framework of the *Workplace Relations Act*. Some, but not all, of the procedural gaps in the model clause might be filled by the Employment Advocate, by the Australian Industrial Relations Commission and by the Federal Court of Australia (and courts exercising federal jurisdiction).

### The Employment Advocate

The Employment Advocate<sup>127</sup> has the capacity to fill some of the procedural voids in the model clause.<sup>128</sup> The Employment Advocate is charged with providing assistance and advice to parties about their rights and obligations under the Act and about the relevant award and statutory entitlements.<sup>129</sup> The provisions are wide enough to allow the Employment Advocate to perform a preventative function (for example, serving as an informal counsellor who gives and receives information);<sup>130</sup> and a loop-back function (if negotiations are at first unsuccessful, providing the parties with information about their rights and obligations which can be used as the basis for further more productive negotiations).

The Employment Advocate can also play an important role in disseminating information on the model procedure (advertising its existence, its purpose, and how it works) and in providing suggestions as to how it might be improved. Information of this nature could be included in the information statement that the Employment Advocate is required to prepare for employers for the purpose of furnishing to employees prior to signing of an AWA.<sup>131</sup>

The Employment Advocate also has power to investigate alleged breaches of an AWA and any other complaints relating to AWAs.<sup>132</sup> In relation to some disputes at least, the Employment Advocate can carry out investigative functions.<sup>133</sup>

It remains to be seen whether the Employment Advocate will be proactive and innovative in developing these functions. But however far the Employment Advocate

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127 S 83BA.

128 The Employment Advocate is given a limited role in vetting dispute resolution clauses in the process of filing and approving AWAs. Obviously, an AWA that in fact includes or is deemed to include the model procedure would meet the requirement regarding dispute resolution procedures.

129 S 83BB(1).

130 The importance of having a two-way communication mechanism for giving and receiving information cannot be over stressed. The provision of information may itself be sufficient to solve a problem, particularly if it occurs at the pre-dispute stage: Ury WL, Brett JM and Goldberg SB, above n 31 at 48; Ziegenfuss JT, above n 77 at 36; and Costantino CA and Merchant CS, above n 66 at 102.

131 Ss 170VO(1) and 170VO(2). The Employment Advocate is required to have regard to the needs of disadvantaged employees in carrying out its functions: s 83BB(2).

132 S 83BB(1)(d).

133 There have been some expressions of concern about the potential for a conflict of interest for the Employment Advocate in carrying out the functions assigned to it: see for example, Naughton R, above n 21 at 28. This concern was shared by members of the Senate Economics References Committee to whom the Senate referred the Workplace Relations Bill for review and recommendations: see *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, above n 14 at paragraphs 4.310 to 4.311.

goes in this regard, it is an office which cannot make binding determinations. The Australian Industrial Relations Commission has power to make binding determinations, but only in very limited circumstances and only in relation to limited matters.

### **The Australian Industrial Relations Commission**

The Australian Industrial Relations Commission is not given a role in the model dispute resolution procedure.<sup>134</sup> Yet the way was clearly open for it to be given one. Section 170VG(4) provides that the dispute resolution procedure in an AWA (whether it is included under subsection 170VG(3) or prescribed by the regulations for the purposes of that subsection) may confer powers on the Commission to settle disputes concerning the application or interpretation of the AWA and the Commission may exercise those powers.<sup>135</sup> The drafters of the model clause did not make use of this provision. At present, if parties wish to confer this power upon the Commission, they must make appropriate modifications to the model clause.

The parties to an AWA may also request the Commission to make recommendations by consent under section 111AA of the Act. The section allows the Commission, in certain circumstances and subject to the fulfillment of certain conditions,<sup>136</sup> to undertake 'advisory' or 'non-binding' arbitration.<sup>137</sup> If this power is exercised, the Commission may deal with disputes that are technically beyond its jurisdiction (for example, the dispute need not be an interstate one)<sup>138</sup> and it may make recommendations in relation to matters other than the twenty allowable award matters set out in section 89A.<sup>139</sup> Although the procedure results in recommendations, rather than a binding and enforceable award or agreement, it is not entirely without teeth: by virtue of section 111, the Commission may dismiss or refrain from further hearing or from determining an industrial dispute if it appears that a party to the dispute has contravened a recommendation made under section 111AA. It may also be that parties who agree to abide by the Commission's recommendations are psychologically committed to the outcome.<sup>140</sup> At the very least, if section 111AA is used, it has the potential to operate as a loop-back procedure providing the parties with information that they may use as the basis for further and more constructive interest-based

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134 The Commission plays a minor part in vetting AWAs but only where there are concerns about compliance with the 'no-disadvantage test': ss 170VPB(3) and 170VPG. As to the requirements of the 'no-disadvantage test', see above n 29.

135 S 170VG(4). Settlement of disputes about the interpretation or application of an AWA does not necessarily involve the exercise of a judicial function, see below at n 155.

136 S 111AA(1) can be used if 'the Commission is exercising powers of conciliation in relation to a particular matter', and all the parties request the Commission to conduct a hearing and make recommendations, and the Commission is satisfied that all the parties have made a genuine attempt to agree on disputed issues and have agreed to comply with the Commission's recommendations. By virtue of s 111AA(2), the Commission is not prevented from making recommendations in other circumstances.

137 Some authors describe this procedure as 'voluntary arbitration': see the *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996*, above n 14 at paragraph 4.125; and Pittard M, above n 123 at 73 and 74.

138 Creighton B and Stewart A, *Labour Law: An Introduction*, The Federation Press (2nd ed 1994) at 99; and Gunningham N, above n 38 at 12. The Commission has a long standing practice of dealing with matters outside its jurisdiction by making recommendations with the consent of the parties: Cupper L, above n 54 at 348.

139 Pittard M, above n 123 at 74; and CCH, *Australian Labour Law Reporter* at paragraph [3-120].

140 Pittard M, above n 123 at 74.

negotiations. The major difficulty will be in encouraging the parties to use the procedure after a dispute has arisen. Dispute resolution clauses are used, in part, because it is easier to get parties to agree on dispute resolution procedures before disputes arise, rather than after they arise.

No special assistance is available from the Commission with respect to disputes that arise during the negotiation of AWAs.<sup>141</sup> A party may engage in industrial action for the purposes of negotiating a replacement AWA (as they may in negotiating the initial AWA) but this is the only leverage that can be exercised.<sup>142</sup> Employees are in a particularly vulnerable position. The general consensus is that few, if any, individual employees will be able to exercise this leverage.<sup>143</sup>

Apart from the allowances made by sections 170VG(4) and 111AA, the Commission can only deal with a dispute if it comes within its general jurisdiction to prevent and settle 'industrial disputes'.<sup>144</sup> The statutory definition of the term 'industrial dispute', contained in section 4(1) of the Act, restricts the Commission's jurisdiction to deal with disputes to those disputes that extend 'beyond the limits of any one State' and are 'about matters pertaining to the relationship between employers and employees'. By virtue of section 5 of the Act, the Commission is also vested with jurisdiction to deal with disputes and issues in certain types of employment, for example, public sector employment, but the Commission's jurisdiction in these areas is limited by section 5 to matters pertaining to the relationship between employers and employees. Many disputes that arise between an individual employee and employer in connection with an AWA, whether in relation to its negotiation, or its application and interpretation, will be local disputes lacking the necessary interstate character and many of them will be of a personal nature rather than pertaining to the relations between employer and employee. These disputes will fall outside the Commission's jurisdiction.

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141 Lee M, above n 29 at 46. In contrast, the *Industrial Relations Act* 1988 (Cth), as amended by the *Industrial Relations Reform Act* 1993 (Cth), required parties to bargain in good faith and empowered the Commission to make orders to facilitate the negotiation of EFAs, such as orders that the parties confer, set timetables, and disclose relevant information: Lee M, above n 29 at 46-47 and Coulthard A, above n 13 at 349, and 353-354. The requirement to negotiate in good faith has been removed. The Commission currently has jurisdiction to conciliate in relation to matters arising during the negotiations for a CA and in certain circumstances, following the termination of a bargaining period, must use its conciliation powers and then its arbitration powers to determine disputes: ss 170MW, 170MX. Also see Pittard M, above n 123 at 74-75, Naughton R, above n 21 at 24; and Wallace-Bruce NL, above n 13 at 99.

142 The Act makes provision for protected industrial action to be taken by the parties for the purposes of negotiating an AWA: ss 170WB and 170WC. Industrial action during the currency of an AWA is then prohibited: s 170VU. However, as Wallace-Bruce notes, 'once the AWA passes its nominal expiry date, a party will be able to engage in industrial action or effect a lock out. Presumably this will be for the purpose of a replacement AWA': Wallace-Bruce NL, above n 13 at 100.

143 While an employer cannot dismiss an employee for refusing to negotiate, make, sign, extend, vary or terminate an AWA, they may lock out the employee and refuse payment of wages for that period. Lee notes that 'a strike by a single worker is hardly likely to be persuasive': Lee M, above n 29 at 45; while Wallace-Bruce comments that 'it would be only the bravest of employees who would engage in a solo industrial action against the employer': Wallace-Bruce NL, above n 13 at 100. As to the meaning of industrial action in this context, see McCarry G, 'Industrial Action under the Workplace Relations Act 1996 (Cth)' (1997) 10 *AJLL* 133 at 134-136.

144 See s 89(a), which gives expression to the Commonwealth Parliament's industrial relations powers under s 51(xxxv) of the Australian Constitution. S 89(a) must be read in conjunction with the definition of 'industrial dispute' contained in s 4(1) of the Act.

Even if a dispute comes within the Commission's jurisdiction, there may be practical difficulties in an individual employee bringing it before the Commission. Procedures for notification of industrial disputes have not been amended to enable an individual employee to notify the Commission of the existence of a dispute. In the absence of union involvement, an employee must rely on the employer notifying the Commission of the dispute.<sup>145</sup>

The Commission is charged with preventing and settling industrial disputes 'so far as possible, by conciliation' and 'as a last resort and within the limits specified' by the Act, by arbitration.<sup>146</sup> If the existence of a dispute is notified to the Commission and it meets the threshold requirements in section 4(1), it must be referred to conciliation.<sup>147</sup> The Commission's conciliation powers are directed to the prevention and settlement of disputes by amicable agreement between the parties. Conciliators may provide the parties with recommendations for resolution of disputes, and the parties may use the information as the basis for further and more constructive interest-based negotiations. In this way, conciliation can operate as a loop-back procedure. However, there is no obligation on the parties to accept any recommendation that might be made in the course of conciliation. As mentioned previously, conciliators do not have power to impose binding outcomes on the parties.<sup>148</sup>

If a dispute cannot be resolved in conciliation, the Commission may proceed to deal with it by arbitration.<sup>149</sup> However, the Commission's arbitral powers are now limited to the twenty 'allowable award matters' set out in section 89A(2) of the Act.<sup>150</sup> It seems clear that the content of an AWA is not limited to the allowable award matters set out in that section.<sup>151</sup> It is equally clear that there are matters which pertain to the relationship between an employer and an employee in relation to which the Commission does not have power to arbitrate.<sup>152</sup>

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145 Coulthard A, above n 113 at 33; and Pittard M, above n 123 at 78. Disputes may be notified to the Commission by a registered organisation, an employer, the Minister or another member of the Commission: s 99.

146 S 89(a).

147 S 100.

148 See Boland R, above n 59 at 20-21 for a discussion of the 'deficiencies of conciliation'. It should be noted however that the majority of disputes notified to the Commission, even before the recent amendments, were settled by conciliation: see Creighton WB, Ford WF and Mitchell RJ, above n 7 at paragraph [20.7]; and McCarry G, above n 11 at 56. Even where parties are unable to reach a full settlement, they commonly reach agreement on many of the disputed issues, asking the Commission to arbitrate only in relation to outstanding matters: Creighton B and Stewart A, above n 138 at 101.

149 Arbitration cannot commence until conciliation proceedings have been completed: s 104. Conciliation is regarded as complete when the Commission member is satisfied that further conciliation is unlikely, within a reasonable time, to result in agreement by the parties: s 103(1). Conciliation may still be attempted even after arbitration has commenced: s 103(2).

150 Conciliation is not so confined - the restricted concept of industrial disputes in s 89A applies only to arbitration. In some circumstances, the Commission may arbitrate on 'incidental' matters and 'exceptional' matters: ss 89A(6) and s 89A(7) respectively. As to the operation of these sections and other mechanisms which allow a 'ballooning of matters to be included in awards', see Pittard M, above n 123 at 72-76.

151 McCarry G, above n 11 at 58; Ford WJ, 'Reconstructing Australian Labour Law: A Constitutional Perspective' (1997) 10 *AJLL* at 18; Pittard M, above n 123 at 85; and Lee M, above n 29 at 36.

152 See Lee M, above n 29 at 36 for a list of some of the matters 'pertaining to the relationship between an employer and employee' that are not included in the twenty allowable award matters set out in s 89A.

The Commission's ability to deal with disputes is also limited by its incapacity to exercise judicial powers.<sup>153</sup> The distinction between non-judicial and judicial functions is somewhat blurred.<sup>154</sup> In broad terms, the Commission may determine the future legal rights and obligations of the parties.<sup>155</sup> It cannot enforce existing legal rights, and it cannot impose sanctions for breach of existing legal obligations.<sup>156</sup> Those functions are judicial in nature.

### **The Federal Court of Australia**

Judicial power under the Act is exercised by the Federal Court of Australia (and courts exercising federal jurisdiction).<sup>157</sup> If a dispute is not resolved by negotiation or mediation under the model procedure and it concerns clear and definable rights under the AWA, a party to the AWA<sup>158</sup> may (if they have complied with the model dispute resolution procedure) institute court proceedings seeking a penalty, damages for breach of the AWA where the breach has resulted in loss or damage, or injunctive relief for enforcement of the AWA.<sup>159</sup> Other remedies may be available in relation to matters such as termination of employment, occupational health and safety, workers' compensation, apprenticeships, and discrimination. Where the subject matter of the dispute cannot be defined in terms of rights under the agreement, court proceedings are not an option.

### **Improving the model procedure for AWAs**

The model dispute resolution procedure for AWAs would be improved with definitions that clearly specify its scope of operation. It might be strengthened if other points and means of access to it were provided. It would definitely be improved if the procedures within it (namely, negotiation and mediation) were defined; if complete sets of procedural rules were issued; and if time limits for each stage were specified. The procedural gaps in the model procedure also need to be filled. The most glaring procedural gap is the absence of rights-based procedures to serve as backups if negotiation and mediation fail to resolve disputes.

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153 The doctrine of separation of powers which underlies the Commonwealth Constitution requires the separation of non-judicial functions from judicial functions: *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, which was upheld by the Privy Council in *Attorney-General (Cth) v. The Queen* (1957) 95 CLR 529. For a more detailed discussion on the separation of powers doctrine, including its practical implications, see Gunningham N, above n 38 at 4-13; and Creighton WB, Ford WF and Mitchell RJ, above n 7 at paragraphs [14.13] to [14.23].

154 Creighton B and Stewart A, above n 138 at 78; Gunningham N, above n 38 at 8; and Creighton WB, Ford WJ and Mitchell RJ, above n 7 at paragraph [14.23].

155 If disputes can be framed as claims for the creation of new rights and obligations, they may properly be dealt with by the Commission. The Commission may also undertake inquiries, interpret awards and agreements and otherwise give opinions as to the existing legal rights and obligations of the parties so long as it is 'part of the background against which the commission is being asked to create new rights': Creighton B and Stewart A, above n 138 at 79. Also see Creighton B, Ford WJ and Mitchell RJ, above n 7 at paragraphs [14.23] and [21.32], and Gunningham N, above n 38 at 5 and 9-11.

156 Gunningham N, above n 38 at 9.

157 See the definition of 'eligible court' contained in s 170VA.

158 Proceedings can only be brought by a party to the AWA. Frazer argues that few individual employees will have the resources to take this course of action: Frazer A, above n 9 at 81.

159 Ss 170VV, 170VW, and 170VZ respectively.

The Employment Advocate can perform a preventative function and a loop-back function, but it does not have power to make binding determinations. The Australian Industrial Relations Commission has limited capacity to produce final and binding outcomes for those disputes that cannot be resolved through negotiation and mediation under the model AWA procedure. Many AWA disputes will be outside the Commission's general jurisdiction to prevent and settle 'industrial disputes'. If a dispute falls within the Commission's general jurisdiction, the Commission's arbitral capacity is, in any event, limited and there may be matters in relation to which it does not have power to arbitrate. Since the Commission cannot exercise judicial power, a party seeking enforcement of an AWA needs to resort to litigation but they can only do so if the dispute concerns clear and definable rights under the agreement.

In light of these limitations on the powers of federal industrial relations institutions, it is suggested that the model procedure for AWAs might be improved by the insertion of provisions:

1. whereby the parties agree to request the Commission to make recommendations under section 111AA of the Act; and
2. conferring powers on the Commission to settle disputes concerning the application or interpretation of the AWA (utilising section 170VG(4)).

These provisions could be deleted at the option of the parties, if they considered it appropriate. This would not entirely cure the problems with the model procedure. There is still the need for a low-cost rights-based procedure, such as arbitration, to serve as a backup when negotiation and mediation fail to resolve those disputes which do not concern the application or interpretation of an AWA. Ultimately, the only way to cure this problem is by including arbitration (or a similar procedure) as the final step in the model clause. There is no reason why a system of private arbitration (as distinct from legislated arbitration)<sup>160</sup> could not be established for AWAs. While arbitration need not be included as part of dispute settling procedures in order to satisfy the requirements of the Act,<sup>161</sup> the Commission has indicated that the parties have the ability to include a full range of procedures in their dispute resolution clauses, including private arbitration.<sup>162</sup> Such a system would have to be supported by an appropriate legislative infrastructure similar to that which exists for private arbitration under the *Family Law Act 1975* (Cth).<sup>163</sup> If a party to an award made in private

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160 This is a useful distinction drawn by Macken JJ and Gregory G, above n 2 at 16 and 31.

161 In *Appeals by Ampol Refineries (NSW) Pty Ltd and Australian Institute of Marine and Power Engineers* (1998) 43 AILR 3-724 the Full Bench of the Commission held that it is sufficient that a certified agreement contain a procedure that has the object or purpose of preventing and settling disputes. Likewise, an AWA need only include a procedure which has the object or purpose of resolving disputes. It need not include arbitration or any other rights-based dispute resolution procedure.

162 *Media, Entertainment and Arts Alliance v Australian Broadcasting Commission* (1995) 40 AILR 3-177. The case concerned the interpretation of a certified agreement and the application of s 170MH of the *Industrial Relations Act 1988* which the union submitted was not relevantly different to s 170LT(8) of the Act.

163 The *Family Law Act 1975* (Cth) envisages two forms of arbitration, court ordered arbitration and privately arranged arbitration. S 19E(1) of that Act allows the court, on the application of a party to a private arbitration, to make such orders as it considers appropriate to facilitate the effective conduct of the arbitration. S 19E(2) provides that a party to an award made in private arbitration may register the award with the court and that, once registered,

arbitration could register the award with the court, and once registered, it had effect as if it were an order of the court, the procedure could even be used for disputes over enforcement of an AWA. In the absence of a legislative framework which recognises and enforces awards made in private arbitration, the parties to an AWA would have to agree to enter into a new agreement in terms of the award and to have the agreement filed and approved by the Employment Advocate.

## Conclusion

AWAs were intended as the primary vehicles by which to enable regulation of employment conditions at the workplace level. The model dispute resolution procedure for AWAs was conceived as a mechanism by which to encourage and facilitate dispute resolution at the workplace level, thereby enabling parties to review and renew their agreements without the intervention of third parties. Encouraging parties to resolve disputes themselves, through direct negotiation and mediation, is a worthwhile endeavour. DSD suggests ways in which to do this. DSD also reminds us that procedures such as negotiation and mediation can never stand alone since they are not certain of producing a result, even a non-binding one. They must be accompanied by procedures which produce binding and legally enforceable results, to serve as back-ups when the parties are unable or unwilling to resolve disputes themselves. At the same time, the success of procedures such as negotiation and mediation is based, in large part, on the fact that there is a rights-based system available as a last resort.<sup>164</sup>

The model procedure for AWAs goes so far as providing a tiered system of negotiation, and mediation at the option of either party, but it does little else to encourage use of interest-based procedures. Of more concern, is the absence from the clause of rights-based procedures. The absence of such procedures is surprising for their existence has long been recognised as important.<sup>165</sup> Their absence is all the more alarming when access to tribunals (and the rights-based procedures they provide) has been restricted under the Act.

To be fair, some disputes have always fallen into ‘no man’s land’. There has never been unrestricted access to tribunals (in the sense that there have always been threshold requirements to be met) and frequently, there has been no need to resort to them. Many disputes are, and always have been, handled informally through private discussion and consultation, and even negotiation and mediation<sup>166</sup> without the need to resort to a formal dispute resolution system. It is when disputes cannot be resolved informally that parties have need for an effective dispute resolution system. The model procedure for AWAs does not provide them with one.

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it has effect as if it were an order of the court. Regulations to enable the system to become fully operational have not yet been made.

164 Henderson S, above n 40 at 26; and Macken JJ and Gregory G, above n 2 at 41.

165 Creighton WB, Ford WF and Mitchell RJ, above n 7 at paragraph [20.8]; *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* by the Senate Economics References Committee, above n 14 at paragraphs 4.119 and 4.125; Macken JJ and Gregory G, above n 2 at 38 and 76; and Wallace-Bruce NL, above n 13 at 73-74.

166 Macken JJ and Gregory G, above n 2 at ix and 37.

Boland asserts that the new system forces the parties to find their own solutions.<sup>167</sup> It may, to some extent. It is more likely to increase the number of disputes in 'no man's land', leaving parties without constructive avenues for dispute resolution. Ultimately, more parties will respond to disputes by lumping them (that is, tolerating them without taking any action), avoiding them, or exiting (that is, ending the relationship),<sup>168</sup> or even by resorting to violence. The article has not made a direct contribution to the debate on whether or not employees are better or worse off under a system of individualised bargaining and dispute resolution.<sup>169</sup> The analysis undertaken here suggests that the model procedure for AWAs is deficient in many respects. In a bargaining relationship characterised by inequality,<sup>170</sup> where there are no rights-based procedures and little in the way of realistic power procedures, employees are more likely to be the ones to lump it or to exit.

Of course, employers and employees are free to draft their own dispute resolution clause.<sup>171</sup> The development of standards which set out the essential elements of an effective dispute resolution system would assist the parties in this process. Until such standards are promulgated, parties to an AWA will adopt the model procedure, often times, by default. They might intentionally adopt it because it is described as a 'model' procedure and a 'model' denotes something which is exemplary or ideal. Unfortunately, this model clause does not provide a comprehensive framework for efficient and constructive dispute resolution. Standing alone, it even runs the risk of being held void for uncertainty.

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167 Boland R, above n 59 at 1.

168 Astor H and Chinkin C, above n 40 at 27; and Condliffe P, above n 44 at 23.

169 Some commentators argue that employees will now have more direct input into and hence more control over their working conditions and that their standards of employment will improve because of increased productivity: for example, Symeou S, 'Enterprise Bargaining: An Industrial Relations Reform Aimed at Improving Individual Enterprises', *Proceedings of the National Conference 1993, Australian Dispute Resolution Association Inc*, 69 - 71 at 70. Many more authors are of the view that the Act has pushed the power balance further towards the employer and against the employee, enabling employers to proffer AWAs on a 'take it or leave it' basis: for example Lee M, above n 29 at 47; Dabscheck B, above n 8 at 238-239; Ronfeldt P, above n 8 at 70-72; and the *Report on Consideration of the Workplace Relations and Other Legislation Amendment Bill 1996* by the Senate Economics References Committee, above n 14 at paragraph 4.166.

170 Niland J, above n 8 at 383; Tillett G, above n 41 at 125; and Creighton B and Stewart A, above n 138 at 126-127.

171 Some employers have established more elaborate and comprehensive dispute resolution systems. For example, the system implemented by the New South Wales Department of School Education, described by Dicker L, above n 68 at 95, allows access by a toll free telephone number, makes provision for skills training, and includes consultation at regular meetings, joint working groups, and mediation. According to Ronfeldt, the 'more astute managers and consultants' will develop more comprehensive systems: Ronfeldt P, above n 8 at 71.

## Appendix A

### DISPUTE RESOLUTION OPTIONS

#### PREVENTION:

(at post-dispute level)

upward feedback, systems change  
recording and analysis of dispute data

#### RESOLUTION:

(power-based procedures)

'rules of conflict'  
limited and symbolic strikes  
voting

(loop-backs from power-based procedures)

intervention by third parties such as police  
crises negotiation procedures  
cooling-off periods

(rights-based procedures)

expert appraisal  
arbitration  
fact-finding and investigation

(loop-backs from rights-based procedures)

conciliation  
advisory arbitration  
early neutral evaluation  
advisory expert appraisal

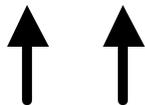
(interest-based procedures)

mediation  
multiple-level negotiation

#### PREVENTION:

(at pre-dispute level)

shuttle diplomacy  
informal counselling  
notification and consultation



**Appendix B**

