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Dispute resolution in the workplace: public issues, private troubles

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ADR bulletin

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Work Choices and ADR

Dispute resolution in the workplace: public issues, private troubles*

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ADR Diary

Private dispute resolution processes could form an important supplementary channel of workplace dispute resolution in Australia. However, it is principally an option for the more sophisticated and resourced industrial actors, and has to be based on sound principles, the most important of which are legitimacy and efficacy. The model offered by Work Choices is entirely deficient on all key counts. Legislative reform and a shared enthusiasm by the workplace parties would be needed before private dispute resolution could take root in Australia.

How best should one deal with the conflict inherent in workplace relationships, particularly the relationship between employer and employee? In today's Australia, two longstanding institutions of dispute resolution — collective bargaining and the statutory umpire — have been placed under siege by both the march of globalisation and the crimping designs of Work Choices. In effective terms, the 2006 legislation deals with conflict, in the main, by suppressing it (via the expedient of employee disempowerment), but then also by accommodating employee interests through two new paternalistic devices: the Fair Pay Commission and — the focus of this piece — funded private dispute resolution.

Private dispute resolution should represent an important (but distinctly subsidiary) avenue of managing workplace conflict. Regrettably, Work Choices has dealt the option a damaging and perhaps lasting blow, through a particularly unhappy combination of deficient policy and ulterior motive. Where does Work Choices fall short, and how could things be different?

The case and place for private dispute resolution

Employment is a phenomenon so widespread and so fundamental to our individual and collective well-being that it needs to be supervised by a ubiquitous and fair system of workplace justice. Only a public grid of courts, tribunals and forums can provide the necessary infrastructure for such a system, bearing in mind the need for comprehensiveness, accessibility, affordability, effectiveness, and especially legitimacy.

But there is, or should be, an important supplementary role for private dispute resolution as well. Consenting workplace adults (employers, employees and their representatives) can craft a customised dispute resolution process to match their particular needs. It can serve as an organisation's uniquely-contoured safety net, underpinning the full range of employee engagement channels, from communication through information-sharing and consultation to negotiation.

In short, a private process offers the most adaptive and attuned option. It brings some other benefits as well: privacy, informality, speed and a focus on

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substance rather than form. These can make it cost-effective even where it is not publicly subsidised, as one sees from the experience for example, of the United States, Canada and South Africa. It is essentially an option for the larger and more sophisticated actors on the workplace scene to plan, negotiate (on relatively equal terms), develop and sustain. Without judicious public oversight, and probably funding, it is not a scheme for the ordinary employing and working public.

What are the prerequisites for a successful private dispute resolution system? Apart from the standard ADR goals of speed, informality and affordability, a worthy workplace dispute resolution formula should also embody certain key procedural and substantive qualities:

- *Legitimate process* — The dispute resolution system must be the product of consent (a negotiated agreement, better still, a problem-solving engagement) between the key parties whose interests are at stake: employees and their representatives and employers.
- *Legitimate substance* — The features of the system must be objectively fair and, equally important: they must support effective and efficient business management.
- *Scope* — The system must be able to cover the full range of interests of legitimate concern to a party and the attendant issues that give rise to

conflict in the workplace.

- *Powers* — The system must be able to bring the full portfolio of ADR processes to bear, from mediation to arbitration and everything else in between, as appropriate to the resolution of the issue at hand.
- *Independence* — The facilitators, mediators and arbitrators of any conflict resolution scheme and any organisation carrying them must be seen to be manifestly independent and without any conflicts of interest in relation to the parties or subject-matter. The appointment of resolvers must be the product of either general or specific consent.
- *Professionalism* — While dispute resolution styles may vary according to personalities and individual strengths, the users of services are entitled to know that the providers work under an ethically sound governance structure, have experience, and are competent in their field.
- *Co-ordination and integration* — Any dispute resolution process should be compatible with the wider system of workplace regulation and agreement-making applicable to or adopted by the parties. The statutory and private dispute resolution systems should ideally complement, but in any event not undermine, one another.

ADR under Work Choices

A moment's reflection reveals that private dispute resolution under Work

adracadadra!

New and Expanding Networks

We are delighted with the initial success of our recent collaboration with **LEADR** and **ADRA** to broaden the readership for **ADRB** by bringing it to the attention of their members and offering first time subscribers an attractive discount.

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Choices falls at every hurdle.

- It is *an imposed system*, and the lack of engagement has cost it its legitimacy and efficacy.
- There is *no standardised or indeed effective quality control* over the dispute resolvers. Instead of setting out to institutionalise all manifestations of workplace conflict, the Act simply refuses to countenance prime elements such as unfair dismissal and workplace access disputes.
- Its purposely *limited remedies* serve to dilute, distract and subvert rather than solve.
- Bureaucracy has *stifled accessibility*, and an atomised and individualised approach to the funding of dispute resolution has failed to achieve any appeal amongst potential disputants or resolvers.

The critique could continue at some considerable length (those who want to reflect independently should read up on the Department of Employment and Workplace Relations' ADR Assistance Scheme: see <www.workchoices.gov.au>), but the obvious requires no further statement — the failure of take-up demonstrates the poverty of private ADR under Work Choices.

Looking ahead

If there is indeed to be the emergence of a credible and effective private ADR stream, it will have to be off the back of three developments.

First, a facilitative legislative environment will need to be created, one which sets up and fosters the options and meets the standards, provides for enforcement where appropriate, aligns the public and private streams, and makes financial sense.

Second, imaginative employers and unions (or other employee representatives) will need to work together to build the necessary institutions and processes. This could be done through replicated, organisationally-specific initiatives. However, the economies of scale suggest that a bolder, broader-based venture might be a more successful way to go.

Third, a new cadre of private, independent, knowledgeable and professional dispute resolvers, accountable to the parties and the public, will need to be grown. The talent reserves are there, but not the framework.

Signs of such developments are glimpsed, fleetingly, on the workplace horizon. But for the moment at least, the advocates are thin on the ground,

and the general ranks largely unwitting or indifferent. ●

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Endnote

*With apologies to C Wright Mills' *The Sociological Imagination*.

developments in ADR

- A recent survey by the **International Institute for Conflict Prevention & Resolution** found that arbitration ranked third behind mediation and early case assessment as the most preferred form of alternative dispute resolution. The study found that the overwhelming majority of US-based attorneys who were surveyed considered mediation as the most effective way to resolve disputes outside of court citing cost savings and speed as primary reasons. To read the report visit <http://lawprofessors.typepad.com/law_librarian_blog/files/cpr070420_survey.pdf>.
- Four top UK litigators launched their own mediation chambers on Monday, 18 June. The panel, which has been known as **Independent Mediators** since late 2006, has now transformed itself into a consolidated establishment to compete with CEDR and other established players in the UK. The move was based on the dramatic increase in the number of cases being resolved in mediation in the UK.
- Seeking to become a **Pacific hub for dispute resolution, Hawaii** is considering a declaration to urge the US government to relax its visa restrictions on both foreign mediators and parties seeking to mediate. The declaration notes the great diversity of Hawaii's residents and the shortage of skilled mediators who speak a foreign language, as well as the benefits of mediation in resolving disputes.
- Facing a potential 'meltdown' of the **Toronto** court system (which is the third largest in Canada), Justice Warren Winkler enhanced mediation programs in the region by introducing a three-phase mediation system to encourage parties to settle, and created specialised pools of judges to mediate in specific areas. For more information see Keith Seat's Mediation News at <www.mediate.com/adrnews>.
- From 1 July 2007, the **Shared Parenting Act** (Cth) will demand that separating parents who wish to apply to the court for a parenting order (and have not previously applied), will need a certificate from a registered family dispute resolution provider which confirms that an attempt at family dispute resolution was made. A new accreditation system for family dispute resolution practitioners is also being phased in from 1 July 2007.
- The **Australian Mediation Association** (AMA) will be launched on 1 July to coincide with the introduction of the mandatory family law mediator provisions. Founded in response to the growing demand from the public, private and Government sectors to engage ADR, the AMA will provide private mediation services, consulting services, and education in mediation, communication and negotiation. Of particular relevance to the AMA's establishment are the mandatory mediation provisions of the Family Law Act. For more information go to <www.mutualmediations.com> or contact Callum Campbell at <callum@mutualmediations.com>. ●