Workplace Dispute Resolution Procedures in Australia

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ABSTRACT

This thesis examines the resolution of workplace disputes through the use of formal dispute and grievance resolution mechanisms in Australia, including the evolving legal and policy framework.

A series of research questions are posed, including whether legally mandated dispute settlement procedures are used effectively, and why organisations have developed their own internal grievance procedures.

Previous research on both union and non union dispute resolution procedures is considered, especially from the United States and the United Kingdom, together with relevant developments in both these countries. Relevant findings from related areas of study such as organisational justice and high performance work systems are also discussed.

The legislation in Australia governing workplace dispute resolution is analysed, including how this legislation has evolved since the 1990s, reflecting a shift from a highly centralised system based on compulsory conciliation and arbitration to one where the focus is on the enterprise. The relevant recommendations of the Hancock and Niland reports are examined.

The current system under the *Fair Work Act* 2009 is considered, including the role of the Fair Work Commission. Trends in the number of dispute applications to the Commission, the nature of dispute settling procedures in enterprise agreements, the identity of parties filing disputes with the Commission and the way in which disputes are dealt with by the Commission are all analysed, using a range of data sources.

This leads into a broader consideration of the approach taken by different organisations to the general issue of workplace conflict management, drawing in particular on an analysis of seven case studies of large organisations in the public, private and not-for-profit sectors. A typology of different approaches to workplace conflict management is developed. A model is then developed to explain the factors that lead to the adoption of different approaches, and the consequences that flow from each approach.

The thesis concludes with a discussion of the implications of the research for management, unions, the Fair Work Commission, policy makers and researchers.

Contents

Chapter One: Introduction

Workplace conflict

Conflict exists when two or more parties who are interdependent disagree about something (Masters & Albright, 2001). Conflict is an inevitable feature of any workplace in a modern industrial society (Barbash, 1984). Perhaps the most fundamental conflict is that between capital and labour, in other words between those who own (or control) the means of production and those whose labour and/or knowledge produces goods or services. One way this can be expressed is in terms of the share of income going to wages and salaries compared to that going to profits. Even in public sector organisations, there is a conflict between the interest of employees in better pay and conditions and the interest of the employer in containing costs, even if those costs are ultimately borne by the taxpayer.

As well as conflict over the distribution of rewards, conflict also often arises in relation to how workplaces are organised and between those who command (managers) and those who take orders (employees). Management generally wants to have the final say over issues such as work time arrangements, the level of supervision involved and the pace at which work is performed, while employees have their own – often conflicting – interests over each of these issues. Conflicts can also arise over matters such as occupational health and safety, allegations of favouritism or discrimination, redundancy and redeployment, discipline (including dismissal), performance management and access to conditions such as annual, long-service and personal leave.

Certain features of the employer – employee relationship are particularly conducive to conflict. Employees receive both tangible and intangible rewards in return for selling their labour and/or knowledge, which is then used largely at the employer's discretion. It is in the nature of the employment relationship that the contract cannot fully specify the rights and responsibilities of either party. As a result, there is a relatively high level of uncertainty, increasing the prospect of divergent goals and interpretation of the relationship. The employment relationship is also a continuing one, which means that there are more or less constant pressures on, and opportunities for, both parties to seek to adjust the exchange in their favour (Dix, Sisson, & Forth, 2009).

Not all workplace conflict is ‘top-down’ or ‘bottom-up’; conflict can occur between peers. Conflicts in the workplace can arise through simple misunderstandings or incompatible personalities. Workplaces are made up of people – and some people find it difficult to get on with each other. Interpersonal conflicts can arise based on rivalry between people, for example in relation to limited promotional opportunities. Conflict can be ‘value-related’, that is it may arise between people who do not share a common view due to differences of culture or ideology or simple attitudes about what is appropriate behaviour in the workplace. Conflict can be ‘information-related’, where, for example, people apply different meanings from the same information, or use information from different sources. Conflict can also be caused by structural problems, for example, where reporting lines are absent or not clearly defined, thus

creating tension between people. It is quite common for all these different types of conflict to converge or overlap (Condliffe, 2008).

Workplace disputes

A distinction can be drawn between conflicts and disputes. 'Conflict' is the wider concept and may be overt or covert. A disagreement by one or more employees with a management decision may be only informally expressed through mechanisms such as absenteeism, sabotage, withholding effort, shirking and so on. To call something a 'dispute' on the other hand is to imply a level of formalisation. Industrial action, whether in the form of strikes, lockouts, bans or limitations, is the most obvious example of a workplace dispute. However, other types of workplace dispute include making (and rejecting) specific demands or lodging a formal grievance. The legal system largely focuses on disputes; however, the broader notion of conflict is important when considering workplace dynamics.

Workplace disputes have a number of different dimensions.

One distinction that can be drawn is that of disputes over 'interests' and those over 'rights'. 'Interest-based' disputes concern the creation of new rights (and obligations). In the Australian context, the archetypal interest dispute would be about the negotiation or renegotiation of an enterprise agreement or the making or variation of an award. 'Rights disputes', on the other hand, concern the interpretation or application of existing rights. These rights might typically arise under an award or agreement, but they can also exist under a piece of legislation or an organisational policy.

The distinction between 'rights' and 'interest' disputes is important when considering different forms of dispute resolution. 'Rights' disputes can usually – at least in principle – be resolved through a process of determination, that is, where a third party, such as a court or tribunal, decides that someone's rights have or have not been breached. Such a determination may be accompanied by a penalty or some form of restitution. 'Interest' disputes, on the other hand, more readily lend themselves to resolution by mechanisms such as negotiation and mediation or conciliation (Fisher, Ury, & B, 1991).

While the distinction between 'interest' and 'rights' disputes is useful, it is important to be aware that some disputes can have both an 'interest' and a 'rights' component. For example, an employee may allege that he is being bullied by his supervisor in the application of performance management. If the alleged bullying affects the employee's psychological health, there may be a claim that the 'rights' of the employee – for example, his right to a safe workplace under workplace health and safety legislation – have been breached. However, the resolution of the dispute – perhaps as a result of mediation – may involve an arrangement whereby the employee is allocated a new supervisor or a modification is made to the performance management system. There may or may not be a determination that anyone's rights have been breached. Thus what started out as a 'rights' dispute is solved by an interest-based mechanism.

Another way of distinguishing between disputes is between those that are 'collective' compared to those that take an 'individual' form. Workplace collective disputes generally involve a union or unions (or some other type of employee association) acting on behalf of

their members, even though in principle a number of employees may band together to express shared concerns without a union or employee association. Individual disputes typically concern a grievance on the part of an individual employee. Such employees may still be represented by a union or employee association; they may, however, also be represented by a lawyer, friend or colleague. In many cases, the employee in an individual dispute simply represents him or herself.

Collective disputes involving strikes and other forms of industrial action, apart from occasional annual spikes, have declined sharply in virtually all advanced industrial countries since the 1980s (Dix, Forth, & Sisson, 2008) (Gall, 2013). Australia has seen a particularly dramatic fall in the number of working days lost as a result of industrial disputes, from more than four million working days in 1982 to only 131,000 in 2013, despite the very considerable growth in the size of the work force over that period (Australian Bureau of Statistics, 1983, 2014)

However, while overt, collective, disputes have declined, it is not clear that the overall level of conflict – or indeed disputation – has fallen; employees may be engaging as much or more in covert forms of resistance to management policy instead (Van den Broek & Dundon, 2012). Moreover, the decline in collective disputation has been accompanied by a rise in individual employment rights (Colvin A. , 2012) (Colvin A. J., 2014). The level of disputes over individual employee rights is hard to measure, although one could examine applications made for which there is a specific statutory remedy (for example, in Australia, unfair dismissal). There is no doubt, however, that the scope for making these types of claims, and their overall number, has increased greatly since the 1990s, both in Australian and many other Western countries. Schneider has drawn attention to the substantial increase in applications made to UK employment tribunals and German labour courts (Schneider, 2001). The President of the Fair Work Commission in Australia has commented on the dramatic growth in the number of individual, as opposed to collective, disputes that his institution now deals with (Ross, 2014).

Yet such data captures only part of the picture. Relatively few employees pursue statutory remedies against their existing employer (Hamberger, 2014) and many types of conflict do not fall within categories covered by legislation. Employees may complain that they were unfairly treated in an annual performance appraisal or that they were unfairly treated with regards to the allocation of overtime or work at times that attracts penalty rates, thus reducing their income. Employees who claim that they had their roster changed at short notice or were asked to work at a pace that was unreasonable may have no legal remedy available, but may still lodge a grievance with their employer. Such disputes will *ipso facto* not be captured by court or tribunal statistics. The same goes for many workplace disputes engendered by ‘peer-to-peer’ conflict, such as claims by employees that they are being bullied or harassed by their co-workers (though a limited anti-bullying jurisdiction came into force in Australia on 1 January 2014).

The implications of workplace conflict

The consequences of workplace conflict can be considerable; at a national level, it can undermine economic prosperity and social stability. The widespread strikes that took place during the 1890s were described by Australia's second Prime Minister, Alfred Deakin, as involving:

> *'loss of life, liberty, comfort and opportunities of well-being.'*

On a more day-to-day level, workplace conflict can undermine organisational performance and reduce the quality of working life. Conflict may create stress for individuals, their families, communities and society, and can impose high costs on employers. A large amount of management time is spent dealing with workplace conflict. Conflict can lead to loss of productivity, a rise in accidents, diminished corporate reputation, high turnover, absenteeism, strained loyalty, distrust, sabotage, resentment, uncivil climate, decreased communication and even violence, even before one considers the direct costs of any legal liability. Conflict may also damage the health of workers (Kieseker & Marchant, 1999).

Globalisation and deregulation in the latter part of the twentieth century and the beginning of the twenty-first has meant that the effectiveness of many organisations is more dependent than ever on a committed, well-trained, well-organised workforce. Conflicts that remain unresolved or do not surface in a productive fashion severely compromise organisational effectiveness and the quality of the goods or services produced. Turnover of employees due to conflicts can be regarded as an unproductive waste of talent and organisational resources (Lipsky, Seeber, & Fincher, 2003).

At the same time, it should be remembered that not all workplace conflict is harmful. Some level of disagreement is conducive to innovation. For example, in workplaces that encourage a high level of worker participation in decision-making, individuals expressing their views over issues such as work coordination and task integration may be beneficial to firms – even when those views are in conflict with management or co-workers (Lewin, 2007).

While a certain amount of workplace conflict is inevitable, and may even be desirable, there is nothing inevitable about any one particular level of conflict. While there are some inherent conflicts of interest between employers and employees, there are also shared goals.

All other things being equal, most employers and employees would prefer to work in a harmonious environment and, in general, both have an interest in the prosperity and success of the organisation, especially where there is a fair sharing of any gains. Employers and employees, alongside their representatives, can often negotiate work arrangements, practices and processes that allow both parties to advance their core interests in a mutually beneficial manner (Guest & Peccei, 2001).

Simply seeking to repress conflict is unlikely to be successful. However, there is often scope for the level of conflict to be reduced and managed. Even inherent conflicts, such as those over the distribution of income between wages and profits, can be dealt with more or less harmoniously so that they do not dominate the employment relationship (Cutcher-

Gershenfeld, 1991). The challenge is to find an effective system for dealing with workplace conflict and resolving disputes.

Conflict resolution in the workplace

There is a range of approaches to deal with workplace conflict and disputes. In systems of collective bargaining, the bargaining process itself seeks to reconcile the competing claims of management and unions and to maintain employment relations stability within the organisation. Formalised dispute settlement procedures (DSPs), which are usually embedded in collective agreements, operate to address workplace disciplinary and grievance matters arising in respect of individual employees, as well as disputes that arise between managers and groups of employees (Lewin & Peterson, 1999) (Budd J. , 2010). With the decline in the incidence of collective bargaining in many western countries, the significance of dispute settlement procedures in collective agreements may have been reduced but it has far from disappeared.

However, in addition to DSPs in collective agreements, organisations may adopt their own ('non-union' or 'internal') grievance procedures. In relation to grievances affecting individuals or disputes affecting groups of employees, these procedures normally involve several formal steps. In some cases, the first of these may require employees to put in writing a grievance or to register a dispute. Alternatively, employees may be encouraged to raise their concerns directly with their own supervisor before putting it in writing. In some cases – even under these internal grievance procedures – the individual employee may be represented by a union workplace delegate, or even by a full time union official (or by a friend, family member or lawyer) (Hamberger, 2012).

Under these procedures, unresolved grievances usually travel up the organisational hierarchy. Thus, a dispute affecting one or more employees is commonly addressed initially, at a first stage of procedure, by engagement between the employee or employees immediately affected and management at the relevant level. On the management side, progressively higher levels of managers become involved if the grievance or dispute is not resolved at the first or intermediary stage of the procedure. The last stage of the procedure may involve a formal adjudication of the grievance or dispute (Roche & Teague, 2011). Some procedures place a greater emphasis on investigation – usually by a person appointed by management – than on dialogue. Procedures can also vary to the extent they involve independent external agencies (such as mediators or arbitrators from outside the organisation, or industrial tribunals).

Multi-step procedures, usually with arbitration as the last step, became standard in US labour agreements in the post-war period (Lewin & Peterson, 1988). With the decline in private sector unionism that commenced in the 1980s, the incidence of this model also declined. However non-union firms increasingly adopted one or another type of grievance procedure, often involving arbitration and/or mediation (Lewin D. , 2008 ; Colvin, Klaas, & Mahoney, 2006). A major reason why non-union firms adopted these procedures was as an alternative to the litigation of workplace disputes (Lewin D. , 2008). The term Alternative Dispute Resolution (ADR) was adopted in the US to denote procedures and mechanisms for conflict

resolution that provided either alternatives to litigation or resort to administrative tribunals established under statute in such areas as equal opportunities and employment discrimination.

ADR has also has gained currency to denote forms of dispute resolution that operate in conjunction with judicial processes. Here, the focus has been mainly on forms of ADR concerned with individual grievances. These forms of ADR, which seek to eschew or postpone formal judicial or quasi-judicial hearings, may involve judges or other court-appointed officers or external experts.

The term 'ADR' has also been used more broadly to connote innovations in conflict management and resolution in the workplace. These include new dispute resolution mechanisms such as interest-based bargaining, collective mediation, fact-finding, and the early facilitation of negotiations by an independent conciliator, brainstorming and related problem-solving techniques, mediation, mini-trials, arbitration and the proactive handling of change management (Roche & Teague, 2012). Most of these mechanisms place the emphasis on resolving conflict through cooperative problem-solving rather than the more traditional, adversarial approaches (van Gramberg, 2006).

ADR has been described as 'a stop on the way to the creation of more complete and integrated conflict management approaches that followed closely on the heels of the ADR movement.' This more integrated approach goes beyond merely managing disputes to an attempt to channel conflict in productive directions, transforming the organisation, not just a set of processes (Lipsky, Seeber, & Fincher, 2003).

The goals of workplace conflict resolution

Different stakeholders – both within and outside the workplace – want to achieve different goals from workplace conflict resolution, depending on their particular interests. However, one can take a broader, societal perspective as well. This goes beyond the interests of any particular stakeholder and considers the 'public interest'. Budd has described three broad societal goals for employment-efficiency, equity and voice (Budd J. , 2004). As will be discussed later in this study, these goals can also be used as criteria with which to assess systems for workplace conflict resolution.

The Australian context

For much of its history, Australia has relied heavily on a system of compulsory conciliation and arbitration to deal with workplace conflict. Industrial arbitration has been described as the third element of 'the Australian Settlement.' (Kelly, 1992) The reliance on permanent and independent tribunals, funded from the public purse and established under both federal and state legislation, reflects an approach to the regulation of industrial conflict that at the time was virtually unique among industrialised societies. Where there was a dispute, the tribunals were empowered to summon representatives of the parties to conciliation conferences in order to encourage a negotiated resolution. If this could not be achieved, they could hear arguments from each side and then resolve the matters in dispute by a formal process of arbitration. The tribunals' decisions would take effect as legally binding awards, instruments that had the

force of statute. The tribunals could be called upon to resolve a wide range of disputes, ranging from minor workplace grievances to the establishment of minimum wages and conditions across entire industries and occupations. In theory, the processes of conciliation and arbitration were to be used only as a last resort. In practice, however, unions routinely notified disputes to the tribunals, using them not just to force management to the bargaining table, but to establish an elaborate network of rights and protections for members and non-members alike (Creighton & Stewart, 2010).

Since the late 1980s, there has been a gradual reduction in the reach of the arbitration system. While many of the institutions have remained in place (even if their names have changed), the role of tribunal-determined awards, and more generally that of 'third parties' external to the enterprise, including unions, has became less significant (Giudice, 2014). As part of this trend, Australian industrial relations legislation has since the 1980s promoted the establishment and use of workplace-based dispute settlement procedures (van Gramberg, 2006) (Hamberger, 2012). Such procedures were promoted as a way of encouraging the parties to accept responsibility for their own industrial relations (Hancock, Polites, & Fitzgibbon, 1985). Nevertheless, and despite these changes, the role of the industrial tribunals, especially the federal tribunal – now known as the Fair Work Commission – remains important (Creighton & Stewart, 2010).

Research questions

Much of the theoretical and empirical research about workplace dispute and conflict resolution has emanated from the United States (Lewin D. , 2014) (Colvin A. J., 2003; Lipsky, Seeber, & Fincher, 2003; Bemmels, 1996). There has been a particular paucity of research in Australia. The reasons for this are not entirely clear. Most academic analysis of the resolution of workplace conflict in Australia has focussed on industrial tribunals, as well as on trade unions and employer associations (Isaac & Macintyre, 2004). Perhaps this is not surprising given the role that compulsory conciliation and arbitration played until the 1990s. However, even this research has tended to be relatively non-theoretical, with the focus being either on legal and constitutional issues, or on macro-economic issues, such as the impact of the system on inflation and unemployment. There has been very limited consideration of how the system has operated at the workplace level. Partly this has been due to a lack of data – the last major workplace survey was conducted in 1995 (Morehead, Steele, Alexander, Stephen, & Duffin, 1997). Even this survey only included very limited data on workplace dispute resolution.

The most important research in Australia on workplace dispute resolution in Australia has been undertaken by van Gramberg. However, the main focus of this work has been on the role played by 'consultants in conflict', ADR practitioners brought in to organisations to help resolve workplace disputes. As van Gramberg's own work makes clear, the use of private ADR consultants remains far from widespread, even if it is growing (van Gramberg, 2006).

The traditional focus of research in Australia has been on the role of industrial tribunals. While their role has diminished, they continue to play a significant role in Australian

workplace dispute resolution. They are allocated substantial resources[1] and are given significant legislative powers. However, most of the research concerning the tribunals has focussed on their arbitral role, whereas most of the work of the federal and state tribunals involves conciliating disputes at the workplace (including individual employee) level. This lack of a workplace focus in the research can clearly be seen by examining the references in the semi-official book published to mark 'the first 100 years of federal conciliation and arbitration'. (Isaac & Macintyre, 2004).

This study seeks to help fill this lacuna in research in Australia by examining the resolution of workplace disputes through the use of formal dispute and grievance resolution mechanisms at the enterprise level. This then leads into a broader consideration of the approach taken by organisations to the general issue of workplace conflict management. It also includes an examination of the evolving role of the Fair Work Commission and considers the evolution of the legislative framework since the 1980s. The research focuses primarily on larger organisations (that is, for the purposes of this research, those with more than a thousand employees) and, partly because of the lack of prior data, a qualitative approach has been adopted (though some quantitative surveys have been conducted).

When the research commenced, the initial focus was on the operation of formal dispute settlement procedures (DSPs) in enterprise agreements. Under Australian legislation, enterprise agreements cannot be registered legally unless they contain such procedures. Yet, despite the strong statutory promotion of such procedures, there has been almost no research into their use or effectiveness. This initial focus led to the first research question to be addressed in this thesis.

1. Are DSPs being used effectively?

Once some initial empirical research into workplace dispute resolution in Australia was conducted, it became clear that as well as DSPs, organisations had developed their own internal workplace grievance procedures (Hamberger, 2012). The research conducted for this thesis indicates that in many cases these internal grievance procedures are at least as significant – if not more so –than the legally-mandated dispute settlement procedures in enterprise agreements. This then led to the next question:

2. Why have organisations developed their own internal grievance procedures?

As the research progressed, it became clear that even though the adoption of internal grievance procedures (alongside DSPs in many cases) was relatively standard (at least in larger organisations) this masked quite a variation in approaches to the resolution of workplace conflict. This prompted the question of what characterises each of these different approaches, as well as raising the issue of what prompted different organisations to adopt different approaches. Thus the next question is:

3. What are the different approaches to workplace conflict resolution adopted by large organisations in Australia, and what factors have led organisations to adopt these different approaches?

[1] The annual budget for the Fair Work Commission for 2013-14 is just under $140 million.

Clearly it is important to consider what implications each of these different approaches has for different stakeholders. More specifically, it is appropriate to ask:

4. What are the implications for management and unions arising from these different approaches to workplace conflict resolution (and the research more generally)?

This study also provides an opportunity to re-examine the role the Fair Work Commission (FWC) plays in contemporary workplace conflict resolution, both in relation to disputes referred to it for resolution, and more broadly (for example, by performing a more proactive, educative role).

5. What are the implications of the research for the Fair Work Commission?

While DSPs are creatures of public policy, internal grievance procedures appear to have developed largely outside any explicit public policy framework. This prompts the broader question:

6. What implications arise from the research for workplace relations policy, viewed from a public interest perspective?

Finally, the limitations of the study need to be acknowledged. The qualitative nature of the study means that caution must be taken in generalising from some of the findings. Moreover, much of the data relates only to large organisations. The last question is:

7. What direction should future research take in the area of workplace dispute resolution in Australia?

Structure

Chapter Two provides a review of the literature relevant to the issue of workplace dispute resolution. This includes an outline of the development of workplace dispute procedures in the US and the UK. This outline is useful in providing both a comparative perspective for Australian as well as a framework for the American and British research. Using the (predominantly overseas) literature, it then discusses the goals of workplace dispute resolution, in the context of voice, equity and efficiency (Budd J. , 2004). This includes a consideration of such concepts as organisational justice and high performance work systems. The chapter outlines a new theoretical paradigm (which is primarily based on US research): 'Conflict Management Systems'.

Chapter Three provides an overview of the evolution of the policy and legal framework in Australia concerning workplace dispute resolution prior to the introduction of the *Fair Work Act 2009*. The rise and decline of compulsory arbitration is examined. The primary focus is on developments since the 1980s, including the promotion of enterprise-level dispute settlement procedures designed to reduce the reliance on industrial tribunals. Consideration is given to the limited success of attempts by the Howard Government to promote the use of ADR – especially private mediation.

Chapter Four discusses the research methods used in the study.

Chapter Five considers workplace dispute settlement under the current legislative framework, namely the *Fair Work Act 2009.* As well as examining the legislation itself and some of the relevant case law, this chapter uses a range of data to consider how the legislation is operating in practice. This includes investigating the parties to dispute applications to the Fair Work Commission, which organisations have the most disputes referred to the Commission, and how those disputes are dealt with. It contains the findings from analyses of dispute settlement procedures contained in enterprise agreements and of disputes filed with the Commission. The chapter also includes the results from a series of interviews held with members of the Commission about the types of disputes they deal with and how they handle them.

Chapter Six outlines the findings from seven case studies of workplace dispute resolution in large Australian organisations.

Chapter Seven uses the findings from the research discussed in the previous chapters to develop a model of workplace conflict resolution in Australia. This theoretical model is compared to the Conflict Management Systems paradigm, which has been developed mainly based on US research. Chapter Seven also includes the answer to research question three referred to above concerning the different types of approaches to workplace conflict resolution.

Chapter Eight draws the findings from the previous chapters together and provides responses to each of the remaining research questions referred to above. It concludes with a discussion of possible lessons arising from the research for management and union strategy, for public policy and the direction of future research.

Chapter Two: Workplace dispute resolution: A discussion of developments in the US and the UK, previous research and theoretical frameworks

The goals of workplace dispute resolution

Much of the debate over workplace relations in recent years has focussed on its economic impact – including on wages, unemployment and productivity. However, as Budd (2004) has pointed out, work is not simply an economic transaction. Respect for the importance of human life and dignity requires that fair treatment of workers should be a fundamental standard of the employment relationship, along with the democratic ideals of freedom and equality. Moreover, the importance of self- determination for both human dignity and democracy mandates employee participation in decisions that affect workers' lives. Budd identifies the three objectives of the employment relationship as equity, voice and efficiency.

Budd and Colvin have shown how this analysis of the objectives of the employment relationship can be extended to provide a valuable set of metrics for evaluating and comparing systems of workplace dispute resolution (Budd & & Colvin, 2008). The authors note that there has been a lack of good metrics for assessing both grievance procedures in unionised workplaces and non union workplace dispute resolution procedures. The use of Budd's framework on the other hand provides '*a rich analytical framework in which researchers, practitioners, and policy makers can analyze and compare dispute resolution systems along the dimensions of efficiency, equity and voice.*'

Equity, according to Budd, involves personal treatment that respects human dignity and liberty; this includes protection against arbitrary dismissal and favouritism. It incorporates concepts such as procedural fairness, equal opportunity and more generally being treated with respect. It is consistent with a Kantian approach to ethics where every person is treated as an end in him or herself, and not merely as a means to be used arbitrarily by others (Kant, 1785). I would add that the notion of a fair distribution of resources – including a fair return for one's labour – is also intrinsic to the concept of equity.

Assisting in the achievement of equity is one of the fundamental goals of effective workplace dispute resolution. Workplace dispute resolution can help achieve this goal, both directly by, for example, correcting unfair managerial decisions, and indirectly by, for example, deterring managers from acting unfairly. Equity provides a standard of fairness and unbiased decision making. Outcomes in an equitable system are consistent with the judgement of a reasonable person who does not have a vested interest in either side, and are supported by objective evidence. Equity also requires that requires that the outcomes provide effective remedies when rights are violated. Individuals in similar circumstances should receive similar treatment and face similar, though not necessarily identical, resolutions.

Equity is also an important consideration in the process used to resolve workplace disputes. The process itself may be more or less equitable, particularly by operating with 'procedural fairness' or in accordance with the dictates of 'natural justice.' An equitable system treats the individual participant with respect, sensitivity, and privacy. Equity can also include the

existence of safeguards, such as the ability to appeal decisions to a neutral party, and transparency to prevent arbitrary or capricious decision-making and enhance accountability. An equitable distribution resolution system also has widespread coverage independent of resources or expertise and is equally accessible irrespective of gender, race, national origin, or other personal characteristics.

Budd describes his second objective – voice – as 'the ability to have *meaningful* input into decisions.' (2004, p. 23) Voice emphasises the element of self-determination in the employment relationship. While voice has an effect on efficiency, and can also be seen as related to treating people equitably, for Budd it is an objective in its own right. He sees voice as closely related to democracy. He holds that the ability to exercise voice in the workplace is as much a human right as the right to have a say in who forms the government of one's country. An effective system of dispute resolution – by enabling employees to express their grievances and have them dealt with effectively – can provide an important mechanism for the exercise of voice in the workplace.

The voice dimension of dispute resolution systems captures the extent to which individuals are able to participate in the operation of the dispute resolution system. This dimension includes important aspects of due process such as having a hearing, presenting evidence in one's defence, and being assisted by an advocate if desired. Voice can also include the extent to which individuals have input into the construction of the dispute resolution system and into specific resolutions.

Budd and Colvin note that:

> 'A dispute resolution system can be equitable (by producing unbiased outcomes) but lack of voice, or can include voice but be inequitable. For example, a system in which a neutral, just decision maker decides disputes unilaterally could have a significant measure of equity, but lack voice. This distinction becomes particularly important in analyzing dispute resolution systems in non-union workplaces where the question arises of how to categorize the benevolent paternalistic employer who treats employees very well, yet retains strong control over the process and outcome of any complaints or disputes.' (Budd & & Colvin, p. 464)

Efficiency, as Budd notes, is the effective use of scarce resources. It is closely associated with the business objective of maximising profits and with economic prosperity more broadly. Economically efficient organisations provide jobs, are able to offer good pay and conditions of employment, pay taxes to the government and dividends to shareholders. The way in which organisations resolve workplace disputes can have both direct and indirect effects on their efficiency.

An efficient dispute resolution system is one that conserves scarce resources, especially time and money. Systems that are slow and take a long time to produce a resolution are inefficient; systems with a shorter timeframe that produce a relatively quick resolution are efficient. Similarly, dispute resolution systems that are costly are inefficient. Costs can stem from various features of dispute resolution system such as the need for highly paid experts or the involvement of numerous participants. For workplace dispute resolution systems, another aspect of efficiency is the extent to which the system fosters productive employment.

Preventing strikes or providing unconstrained managerial decision-making is elements of dispute resolution systems that promote this aspect of efficiency. Costs might also be non-financial. Disputants may suffer psychological costs and disrupted social relations. These non-financial costs may, in turn, negatively affect organisational efficiency and individual careers.

More broadly, effective workplace dispute resolution systems may lead to greater economic efficiency by encouraging better management practices and increasing employee engagement.

Equity, voice and efficiency are three separate goals. Each is legitimate in its own right and none should be subordinated to the others. Where there is a conflict between the different goals, a balance needs to be struck. It should also be recognised, however, that the goals of equity, voice and efficiency can often complement each other.

Before discussing these three goals further, it is useful to discuss how workplace dispute resolution systems have developed in the US and the UK. This provides an important context to the discussion that has taken place in the literature on workplace dispute resolution.

The development of grievance procedures in the United States

As previously noted, much of the relevant research on workplace dispute resolution comes from the US. There is also some evidence (as will be made clear later in this study) that developments in the US have had a direct influence on managerial strategy in at least some large Australian organisations. Before further considering the existing literature on workplace dispute resolution, it is useful therefore to provide a brief outline of the development of workplace dispute resolution in the US.

A central element of US-style collective bargaining as it developed during the twentieth century is the arbitration of workplace grievances that arise during the term of a collectively bargained labour contract. Prior to World War II, it was common practice to use mediation when the parties were unable to resolve a grievance that arose during the life of a labour agreement (Fleming, 1965). However, during World War II, the War Labor Board was created to establish mechanisms that would minimise the effects of strikes and other forms of workplace conflict on industrial production. Since most strikes were technically illegal during that time, it was considered necessary to develop mechanisms to address employee grievances that arose while labour agreements were in force. This led to the development of grievance arbitration. If labour and management could not resolve their differences, then members of the War Labor Board would render decisions on the issues in dispute (Lewin & Peterson, 1988).

Since World War II, collective bargaining agreements in the United States have almost invariably included a grievance procedure to deal with disputes about the proper interpretation or application of the agreement. These procedures usually define the subject matters that may be the subject of a grievance, specify a series of steps and time limits to regulate the processing of grievances, provide union assistance to grievants, and culminate in arbitration by an outside arbitrator jointly selected by the union and the employer. They are explicitly formalised dispute resolution procedures and they ensure that employees and their unions play an equal role with management in the handling and resolution of grievances.

Lewin and Peterson (1988) studied the dynamics of grievance procedures in four unionised industries and sectors during the early 1980s. They used the term 'grievance' to refer to any alleged violation of the labour agreement between the parties where the grievance takes a written form and where it pertains to written contract language. Several measures were used to judge grievance procedure effectiveness, including the grievance rate, the level of settlement, the speed of settlement, the arbitration rate, the percentage of grievances settled in favour of one or the other party, and the parties' perceived equity of grievance settlement. *Inter alia*, they found that the more adversarial the labour relationship, as judged by the parties themselves, the higher were the grievance rates, arbitration rates and the level of grievance settlement, the slower was the speed of settlement, and the lower was the perception by both management and union officials of the equity of grievance settlements.

Lewin and Petersen found that grievance procedures were sometimes used to influence collective bargaining, such that the grievance procedure could be properly conceptualised as part of the negotiating process. In all the organisations studied, certain notably contentious grievance issues were later interjected into the collective bargaining process. This meant that collective bargaining in each of those organisations was not a periodic once-every-three-years event but was instead a continuing process. Grievance activity was greatest during the period immediately preceding the negotiation (or renegotiation) of a labour agreement. Unionised workers signalled their discontent with one or another condition of employment or the contract itself by filing more grievances than normal.

Lewin and Petersen found that grievance procedures appeared to provide useful information for the reappraisal and sometimes redesign of employee relations policies and practices. Each of the four organisations studied had one or more experiences with grievance filing and settlement in the early 1980s that led to the restructuring of policies dealing with technological change, job design, promotions, performance evaluations, job assignments, work load, workplace safety and employee transfers. In addition, in three of the four organisations, new supervisor and management training and development programs had been undertaken in direct response to issues raised in the grievance procedure.

In contrast with unionised workplaces, for the vast majority of non-union US workplaces in the period following World War II, dispute resolution consisted of little more than the exercise of managerial discretion, and the few procedures that were established in non-union workplaces often fell into disuse. However, during the 1970s, 1980s and 1990s there was considerable growth in both the number and complexity of dispute resolution procedures in non-union workplaces (Colvin, 2003).

A survey of 195 private firms conducted in late 1991 found that 57 per cent had adopted a formal non-union grievance procedure (Feuille & Chachere, 1995) and that larger firms were more likely to have adopted such a procedure. Such procedures were also more likely to have been adopted by firms that had formally adopted a larger number of other employee-oriented HR policies. Only around one half of the procedures permitted employee representation, and only a very few allowed the employee to be represented by an outsider (such as a lawyer). Most firms left the final decision in the hands of line management. Only 6 per cent provided for 'peer review' where a majority of the review panel were non-supervisory employees, and only 4 per cent provided for a decision by an outside arbitrator. The results suggested that employers viewed these procedures as internal complaint processing mechanisms under

managerial direction, rather than as adjudicatory procedures designed to give grievants an equal voice with management in the handling and resolution of grievances. In other words, while many firms were willing to provide their employees with formal remedial voice mechanisms, few of these firms were willing to relinquish significant process or decision control.

Lewin (2007) confirmed the growing incidence of ADR procedures in non-union firms, a widening scope of employment-related issues covered by these procedures and an expansion of the steps included in these procedures. However, he noted that while arbitration was the final step in all but a handful of union firms' grievance procedures, it was estimated to be the final step in only roughly one-sixth to one-third of non-union firms' dispute resolution procedures. Other non-union dispute resolution procedures, however, provided peer review, mediation or an ombudsman or combinations thereof, so there was both more experimentation with various dispute resolution practices in non-union than union firms, and a smaller gap between non-union and union firms' procedural approaches to conflict resolution than when arbitration alone was considered. He concluded that, taking into account the rising incidence of dispute resolution procedures in non-union firms, combined with the downward trend in union density, there would be more non-union workers in the US than union workers covered by dispute resolution procedures.

Lewin asked why the incidence of dispute resolution procedures had grown so substantially in non-union firms. One explanation was the 'union substitution' explanation, whereby companies adopted grievance procedures as a response to the threat of unionisation. However, such pressure would have reduced with the continuing long-term decline in unionisation.

Another explanation – the 'litigation threat explanation' – referred to decisions of the Supreme Court such as in *Gilmer* and *Circuit City*. In *Gilmer v. Interstate/Johnson Lane Corp*, 500 US 20 (1991), the Supreme Court held for the first time that a dispute based on a statutory employment right was subject to arbitration. Following *Gilmer*, the US courts have held that the full range of employment laws, including Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Americans with Disabilities Act, are subject to arbitration clauses contained in the employment contracts of non-union employees. This shift in the law was reaffirmed by the Supreme Court in its decision in *Circuit City Stores, Inc v. Adams*, 532 US 105 (2001), which rejected attempts to limit the scope of *Gilmer* based on alternative readings of the employment clause exclusion contained in the *Federal Arbitration Act.* This created an incentive for employers who might otherwise fear employee litigation to adopt ADR procedures (or at least those involving arbitration).

Colvin has noted the significant effect the threat of litigation can have on American employers. While the structure of rights protected is relatively narrow (being largely restricted to employment discrimination) the litigation-based process of enforcement of these rights produces relatively large damage awards and substantial risks and costs for employers in attempting to defend claims (Colvin A. J., 2014).

Colvin (2003) reported the results of a survey that provided support for a relationship between litigation threats and the adoption of non-union arbitration. Stronger unionisation threats on the other hand appeared to have increased the adoption of more advanced ADR procedures, such as peer review panels to review discipline and dismissal decisions.

A third explanation for the growth of non-union dispute resolution procedures is the 'high performance work systems' explanation that regards non-union dispute resolution procedures as components of HPWS designed to increase employee commitment. This is discussed in more detail later. Colvin's study (2003) provided some evidence of a link between self-directed work teams and the adoption of more advanced dispute resolution techniques, such as peer review procedures. This would be consistent with a relationship between the transfer by management of decision-making authority to employees to improve productivity and quality and increased employee expectations for involvement in other areas, such as workplace dispute resolution.

Workplace dispute resolution procedures in the UK

Until recently, there has been much less academic and policy interest in workplace dispute resolution procedures in the UK than the US, particularly in the light of the dramatic fall in the level of collective workplace disputes and the decline in unionisation. However, the resolution of individual workplace conflict has assumed an increasingly important place in policy debates over contemporary work and employment in the UK. This partly reflects a rise in the volume of employment tribunal applications. There is a growing concern not only over the implications of individual employment disputes for those involved but also over the cost of litigation and the perceived burden that this places on employers (Saundry & Wibbereley, 2014).

The traditional approach to discipline and grievances in UK workplaces was essentially voluntaristic, with a relative absence of statutory compulsion. Under the Employment Protection Act 1975, employers were obliged to include details of any workplace disciplinary and grievance procedures in the written particulars of the terms of employment of their employees. However, legislation did not stipulate the scope, extent or operation of such procedures. Moreover, those employers that did not have written disciplinary and/or grievance procedures were not under any statutory obligation to introduce them. Nonetheless, by 1998, more than 90 per cent of all workplaces operated formal grievance and disciplinary procedures (Antclif & Saundry, 2007).

Research conducted on behalf of the UK Department of Trade and Industry suggested that organisations without formal grievance procedures in place were more likely to be subject to employment tribunal applications (for example, in relation to unfair dismissal) and, once an application was made, were more likely to be unsuccessful. This provided further encouragement to implement such procedures (Hayward, Peters, Rousseau, & Seeds, 2004). Nevertheless, the spread of formal procedures failed to contain a rapid increase in employment tribunal applications from 1988 onwards, with the rate more than trebling between 1988 and 1996. This may have also reflected the poor use of procedures, even where they were in place in a formal sense (Antclif & Saundry, 2007).

The Employment Act (2002) (Dispute Resolution) Regulations 2004 established minimum statutory disciplinary and grievance procedures that employers and employees were to use in dealing with disciplinary and grievance issues. These regulations came into force on 1 October 2004 and required, *inter alia*, all employers and employees to follow minimum statutory procedures in dealing with grievances in the workplace. The regulations were

introduced because it was felt that too many issues were being referred to employment tribunals without efforts first being made to resolve them in the workplace. This resulted in a significant increase in tribunal claims and complaints that in too many cases the first time an employer learned of a workplace dispute was when it received notice that an employment tribunal claim had been filed.

The objectives of the 2004 changes were to enable the early identification of grievances, to encourage employers and employees to discuss disputes in the workplace, and to promote effective alternative ways of resolving disputes without resorting to employment tribunals. The minimum statutory procedure for workplace grievances was as follows:

> Step One: The employee sets down in writing the nature of the alleged grievance and sends the written complaint to the employer.
>
> Step Two: The employer must invite the employee to a meeting to discuss the grievance. After the meeting, the employer informs the employee about any decision, and offers the employee the right of appeal.
>
> Step Three: If the employee considers that the grievance has not been satisfactorily resolved, he/she informs the employer he/she wishes to appeal. The employer then invites the employee to an appeal meeting. After the meeting, the employer's final decision must be communicated to the employee. Where possible, a more senior manager should attend the appeal hearing.

In most cases, a tribunal would not accept a claim if the employee had not first sent a grievance letter and waited a specified period. A tribunal could increase or decrease awards by between 10 per cent and 50 per cent if either party failed to comply with the procedures.

If a dispute was not resolved in the workplace, an employee could make a claim to an employment tribunal, which could issue a legally binding judgment. Employees wishing to submit a claim to a tribunal had to fill out a prescribed claim form. The form was checked to ensure the statutory grievance procedure had been followed and that the tribunal had jurisdiction. The employer was then given 28 days to complete a response form (Gibbons, 2007).

In December 2006, the Secretary of State for the Department of Trade and Industry asked Gibbons to review the options for simplifying and improving all aspects of employment dispute resolution. Following consultation with business representatives, trade unions and others, Gibbons recommended the complete repeal of the statutory dispute resolution procedures contained in the recently passed regulations. He found:

> *'The strong consensus is that the principle behind the 2004 changes is sound: parties should be encouraged to resolve disputes at as early a stage as possible. However, there is also a strong consensus that the attempt to achieve that objective through statutory procedures has been unsuccessful and has had unintended negative consequences.'* (Gibbons, 2007)

Gibbon found that these *'unintended negative consequences'* included exacerbating disputes because they had been formalised when they would have been better dealt with informally,

and encouraging a greater use of legal advice at an early stage. Rather than formal statutory procedures, the report recommended that the government should produce clear, simple, non-prescriptive guidelines on workplace grievances. Employment tribunals would be empowered to consider the behaviour of the parties to resolve the dispute when making orders. Early resolution of disputes should be promoted by raising awareness and encouraging the provision of Alternative Dispute Resolution mechanisms – particularly mediation.

Following consultations, the Government accepted the main recommendations of the Gibbons Review and the Employment Bill 2007 – 2008 repealed the statutory dispute resolution procedures.

Prevention is better than cure: the role of Acas

Established by the UK Government in 1976, Acas (Advisory, Conciliation and Arbitration Service) is a state-funded public sector agency. It is independent of government and its impartial status is ensured by a governance arrangement that involves a tripartite council, comprising representatives of employers and employees, as well as independents. This independence and impartiality are viewed as allowing Acas to address workplace matters in a manner that can support both sides of the workplace. It deals with collective disputes, including actual or threatened strike action, and also plays a significant role in responding to conflict of a more individual nature through its telephone hotline, mediation and conciliation services. Increasingly it also seeks to prevent conflict and promote best practice through a range of services. These include publications, a website offering guidance and toolkits, statutory Codes of Practice, a comprehensive training programme for managers and finally in-depth consultancy with organisations and employee representatives (Dix, Davey, & Latreille, 2012).

The evolving role of Acas was put into a broader context by Brown (2004). He noted that underlying forces, in particular greater competition in product markets, had led in most OECD countries to falling trade union membership and diminishing strike activity. As a result, traditional dispute resolution – resolving collective disputes by judgements according to some legal code or abstract principles of justice or precedent – was unlikely to regain the significance it had through much of the twentieth century. However, this did not mean that agencies responsible for third-party intervention were becoming redundant. There was instead a growing trend towards voluntary, rather than traditional, means of settling disputes. He found that voluntary mechanisms, such as conciliation, mediation and voluntary arbitration, were considered more likely to build commitment and self-reliance for the disputants, as well as being quicker and less costly than court proceedings. Moreover the more exposed industrial relations are to competitive markets, the more voluntary procedures can be relied upon to resolve disputes.

Accompanying this shift to voluntary dispute resolution was the development of an advisory function for third-party agencies. This advisory role reflected a wider change in conception: that prevention was better than treatment.

> '*In industrial third-party intervention, the purpose of the advisory role is to move on from helping to settle disputes through conciliation, to pre-empting future disputes by encouraging good procedures and employment practices*.' (Brown, 2004, p. 453)

Brown described a similar change in the role of industrial third parties in the US, Canada, New Zealand and Ireland. He noted that no agency had thrown itself more wholeheartedly into this pre-emptive advisory work than Acas.

Brown considered whether – with the decline of industrial action and widespread collective disputation – there was a need for state-supported third party intervention at all. Could it not simply be left to the market? According to Brown, the answer was no. This was because, however much the outcomes of workplace disputes were constrained by '*harsh competitive necessity',* they were unavoidably bound up with notions of fairness and justice.

> '*Settlements that are perceived to be 'unfair' undermine employee morale and sour the employment relationship ... These third-party roles only carry credibility when those who hold them are clearly independent. They have to be seen to be independent of employers, and of trade unions, but also of governments, which often have their own agendas.'* (Brown, 2004, p. 455)

Brown noted that being independent was necessary not only for one-off conciliations and arbitrations to be successful, but was also essential for the sort of advisory and relationship-building work into which third-party intervention was moving in many countries.

The role of impartial public agencies such as Acas was contrasted with the trend in the US, which was regarded as representing, to some extent, the privatisation of workplace justice. In the US, the role of unions and collectively bargained grievance procedures has largely been replaced by procedures developed and administered unilaterally by the employer and litigation has been replaced by private arbitration.

The repeal of the statutory grievance process as recommended by Gibbons was consistent with the trend noted by Brown. Again consistent with his analysis, instead of legislation, Acas developed a Code of Practice on disciplinary and grievance procedures, together with a guide providing more detailed advice and guidance to employers and employees (Advisory, Conciliation and Arbitration Service, 2011).

The Code of Practice defines grievances as '*concerns, problems or complaints that employees raise with their employers.*' It expressly excludes grievances raised on behalf of two or more employees by a representative of a recognised trade union or other appropriate workplace representative. These, it indicates, should be handled in accordance with the organisation's collective grievance process, where one exists. The Code states that:

> '*... fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used*.'

The guide notes that:

> '*... some organisations use, or may wish to use, external mediators to help resolve grievances. Where this is the case the procedure should explain how and when mediators may be used.*'

The guide indicates that management and employee representatives who may be involved in grievance matters should receive appropriate training. Employers are advised to keep written records of any grievance cases they deal with.

The Code sets out certain principles that should apply to the grievance process to ensure that it is conducted fairly. These include:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow employees to appeal against any formal decision made.

The Code states that if it is not possible to resolve a grievance informally, employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance. Employers should then arrange for a formal meeting to be held without unreasonable delay. Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration should be given to adjourning the meeting for any investigation that may be necessary. Following the meeting, a decision should be taken on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance.

The Code advises that employees should be informed that they can appeal if they are not content with the action taken. Where an employee feels that their grievance has not been satisfactorily resolved, they can appeal. They should let their employer know the grounds for their appeal without unreasonable delay, and in writing. Appeals should be heard without unreasonable delay at a time and place that should be notified to the employee in advance. The appeal should be dealt with impartially and wherever possible by a manager who has not been involved previously in the case. Workers have a statutory right to be accompanied at any such appeal hearing. The outcome of the appeal should be communicated to the employee in writing without unreasonable delay. The guide also contains a sample grievance procedure for use in small organisations.

In 2011, the UK Government embarked on a further review of the system of workplace dispute resolution. A series of detailed proposals were set out in a consultation document by the Department for Business, Innovation and Skills and the Tribunals Service (Department of Business Innovation and Skills, 2011). The aim of these proposals was to support and encourage parties to resolve disputes earlier and where possible, without the need to take the matter to an employment tribunal. This led to a number of reforms to the tribunal system (such as a cap on unfair dismissal awards) and the introduction by Acas of 'early conciliation'. Under this model, where individuals are considering making a claim to a tribunal, an opportunity is provided for them and their employer to resolve the matter with the help of Acas before the claim is lodged and without the need for an employment tribunal. In addition, a number of initiatives have been adopted to encourage the use of mediation, for example, by making it more accessible and less costly for small business (Department of Business, Innovation and Skills, 2011).

Equity

Having looked at developments in the US and the UK, I now return to a more detailed consideration of Budd's three goals and their relationship to workplace dispute resolution.

Research has documented the strong interest that employees and employers have in fair treatment at work (Folger & Greenberg, 1985) (Greenberg, 1990).

Since the 1960s, a whole research field has developed that examines the issue of organisational justice (Greenberg & Colquitt, 2005). The field of organisational justice focuses less on what justice (or fairness or equity – the words are generally used interchangeably) should be, than on how it is perceived by individuals. '*... an act is defined as just if most individuals perceive it to be so on the basis of empirical research*.' (Colquitt, Conlon, Wesson, Porter, & Ng, 2001) Research suggests – perhaps surprisingly – that regardless of age, gender, race and education, all people tend to view justice similarly (Witt & Nye, 1992) (Cohen-Charash & Spector, 2001).

The issue of fairness can relate to several different aspects of employees' working lives. Through his work on equity theory (Adams, 1965), Adams examined the way in which employees are concerned with the fair distribution of outcomes at work such as pay and conditions, as well as more intangible matters, such as status and good quality supervision. The fair distribution of outcomes at work has come generally to be referred to as '*distributive justice*' and it has been recognised that distributive justice has potentially strong implications for organisations.

However, research has also indicated that the distribution of outcomes is not always as important as the process by which those outcomes are allocated. This led to an appreciation of the importance of '*procedural justice*' (Leventhal, 1980) (Lind & Tyler, 1988). Thibaut and Walker (1975) formally introduced the notion of procedural justice with the publication of their book summarising disputant responses to different types of legal procedures. They viewed dispute resolution procedures from both a process and outcome perspective and found

that disputants viewed a procedure as fair if they perceived that they had process control (i.e. control over the presentation of their arguments and sufficient time to present their case).

> '*This process control effect is often referred to as the "fair process effect" or "voice" effect… and it is one of the most replicated findings in the justice literature*.' (Colquitt, Conlon, Wesson, Porter, & Ng, 2001)

We see here an overlap between Budd's goals of equity and voice, with the ability to exercise voice over the dispute resolution process leading to a greater acceptance that the process is equitable.

A third dimension of justice affecting employees at work is interactional justice. On the basis of a qualitative study of treatment expectations in a corporate recruitment setting, Bies and Moag identified four criteria for fair interpersonal treatment (Bies & Moag, 1986). They proposed that the fairness of interpersonal treatment be evaluated on the basis of the extent to which decision-making authorities are truthful, respectful and considerate in communicating decisions and the extent to which they justify or explain the rationale for decisions. Interactional justice perceptions may be understood as evaluations regarding the informational and interpersonal components of decision-makers' behaviour in communicating decisions (Greenberg J. , 1993).

Just as there is a relationship between equity and voice, so can there be a link between equity and efficiency. Research strongly supports the notion that justice has important consequences for organisational efficiency. For example, when unfairly treated, people tend to have poor work attitudes (Daly & Geyer, 1995), are more likely to leave their jobs (Alexander & Ruderman, 1987), have a higher incidence of absenteeism (Colquitt, Conlon, Wesson, Porter, & Ng, 2001), are more likely to steal (Greenberg J. , 1990), have higher levels of conflict (Cropanzano & Baron, 1991) and are less likely to engage in organisational citizenship behaviours (Skarlicki & Latham, 1996). By contrast, it has been shown that when people feel they have been treated fairly, this is associated with a variety of positive responses, such as higher organisational commitment (Folger & Konovsky, 1989) (Korsgaard, Schweiger, & Sapienza, 1995) (McFarlin & Sweeney, 1992) (Moorman, 1991) and more widespread acceptance of company policy (Greenberg J. , 1994). Nevertheless, it cannot be ignored that workplace dispute resolution systems impose some costs on organisations, for example, in terms of management and employee time.

There is empirical evidence that indicates that different types of justice affect different types of outcomes. Distributive justice has been found to be a more important predictor of personal outcomes, such as pay and job satisfaction, than procedural justice (Folger & Konovsky, 1989). Procedural justice, on the other hand, is more important in affecting organisational outcomes such as organisational commitment (McFarlin & Sweeney, 1992) (Colquitt, Conlon, Wesson, Porter, & Ng, 2001). Interactional justice has been found to be the best predictor of attitudes to supervisors (Masterson, Lewis, Goldman, & Taylor, 2000). Nevertheless, aggregate justice perceptions (that is including distributive, procedural and interactional justice) have been found to have a positive effect on organisation-level outcomes. In other words, treating employees fairly translates into higher employee retention, enhanced customer service and greater organisational commitment, leading in turn to enhanced profitability and organisational competitiveness. (Simons & Robertson, 2003)

The achievement of equity was seen by the authors of the Hancock Report as the key rationale for promoting workplace dispute resolution procedures in Australia; they stated that that such procedures could provide '*an equitable means for conducting industrial relations in the workplace*' (Hancock, Polites, & Fitzgibbon, 1985)

Dispute resolution procedures may provide employees with an appeal mechanism against managerial decisions that are perceived as unfair. As well as providing a form of redress in particular instances, the availability of such an appeal mechanism may deter managers from acting in an unfair manner. More generally, by monitoring the use of grievance and dispute resolution procedures, human resource departments and/or senior management may be able to identify individual managers or particular business units that have a pattern of acting unfairly, and then take appropriate remedial action. An effective dispute resolution procedure can be expected to enhance a sense on the part of employees that they are treated fairly.

Budd and Colvin (2008) considered that outcomes in an equitable dispute resolution system would be consistent with the judgement of a reasonable person with no vested interest in either side, and they are supported by objective evidence. Individuals in similar circumstances should receive similar treatment. An equitable system would treat the individual participants with respect, sensitivity and privacy. They also suggested that an equitable dispute resolution system would involve safeguards, such as the ability to appeal decisions to a neutral party, and transparency to prevent arbitrary or capricious decision-making and to enhance accountability.

Are workplace dispute resolution procedures fair?

Most American academics generally accept that grievance procedures in unionised workplaces provide substantial voice opportunity and procedural justice protection to employees who believe that they have been unfairly treated, regardless of whether these grievants win or lose their grievances. Moreover, there is a consensus that grievance resolutions achieved through these procedures frequently provide unionised employees with favourable outcomes (Feuille & Chachere, 1995).

Budd and Colvin (2008) considered that traditional grievance arbitration, as found in unionised workplaces, rated highly in terms of equity. The threat of a binding decision by an outsider provided labour and management with the incentive to resolve grievances fairly and to respect due process. They noted that formal hearings and reliance on credible, objective evidence were central features of the US grievance arbitration system. The binding decisions by neutral arbitrators provided effective mechanisms for remedying unfair treatment in the workplace. Decisions commonly relied on past arbitration precedents and past workplace practices. As a result, there was a high degree of consistency in decision-making across cases, so workers who had similar grievances in similar circumstances tended to receive similar treatment. Such consistency, the authors noted, was an important component of equity. The main criticisms of grievance arbitration, they noted, related to the efficiency of the process. Arbitration can take a long time (perhaps a year from grievance filing to arbitrator decision) and is costly (perhaps $10,000 or more per hearing). Budd and Colvin also noted Lewin's criticism (2005) that the system was reactive and backward-looking in determining guilt or innocence, rather than forward-looking and proactive in solving problems.

By contrast Batt, Colvin & Keefe (2002) expressed concern about some non-union dispute resolution procedures, especially where they involved an abrogation of legal rights:

> '*An important danger posed by these individual employee arbitration agreements is their potential to suppress employee voice. In Gilmer v. Interstate/Johnson Lane, 500 U.S. 20 (1991), the Supreme Court deferred to employer-sponsored arbitration procedures to resolve disputes over statutory rights. Individual employee arbitration contracts often are compulsory because employees must agree to arbitration as conditions of employment at the time of hire or, in some instances, as a condition of continuing employment or future promotions or benefits…. They require that an employee submit any alleged violation of state or federal law to a company-designed arbitration procedure. By agreeing to arbitration, the employee foregoes any opportunity to pursue his or her claim in court. Both the design of non-union arbitration procedures and the decisions of arbitrators are heavily insulated from judicial review….Whether this innovation enhances or suppresses employee voice is at the centre of a major controversy. Some observers suggest that compulsory arbitration creates opportunities for due process in non union workplaces … while others suggest it represents a curtailment of employee rights.'*

In their research, Budd and Colvin (2008) examined non-union grievance procedures that included multi-step appeal procedures that (at least superficially) resembled the multi-step grievance procedures of unionised workplaces, but where at each stage of the procedure management was the decision-maker. Usually employees under these procedures did not have independent representation, nor were there formal hearings with presentation of evidence, examination of witnesses and presentation of arguments. The formal structure of such procedures and the provision of specific steps for appealing unfavourable decisions provided some equity, but the authors considered that the retention of management control over decision-making represented a major due process deficiency and was a weakness from an equity perspective. Nor did the authors consider that grievance procedures with management decision-makers offered much from an employee voice perspective. The main benefits were from an efficiency perspective.

More recently, Colvin has examined whether ADR procedures can be regarded as a key element of a new 'individual-rights-era' of employment relations that is replacing the old 'collective-bargaining-based' industrial relations system (2012). Given the decline in unionisation, he argues that it is no longer plausible to regard industrial relations in the United States as being based on a model where workplace conflicts are resolved by a combination of collective bargaining for resolving interest disputes, where government intervention is confined to offering mediation services where needed, and where grievance procedures culminate in labour arbitration for rights disputes, administered privately at the direction of unions and employers. Instead, a new employment relations system is emerging from the conjunction of expanded individual employment rights laws, employment mobilisation of these new legal rights to exert pressure on employers and the development of new ADR mechanisms to resolve conflict in the workplace.

This model asserts that a new web of rules governing employment relations has been established by an expansion of laws that provide individual employees with rights in the workplace. These include federal laws such as the *Civil Rights Act* 1964, the *Age*

Discrimination in Employment Act 1967, the *Pregnancy Discrimination Act* 1978, the *Americans with Disabilities Act* 1990 and the *Family and Medical Leave Act* 1993. To these must be added state laws, particularly those extending the prohibited grounds of discrimination. However, while Colvin acknowledges that some important new rights have been established, he points out that they are more limited than those rights applying under the old industrial relations system where detailed labour contracts governed the full range of employment decision-making. Colvin recognises that the threat of lawsuits runs parallel role to that of strikes in exerting pressure on employers to ensure fair treatment of employees in the workplace. While the incidence of litigation is still relatively low, employers face substantial risks from and threats of lawsuits.

Colvin agrees that employment arbitration is a simpler and faster procedure for resolving disputes than litigation but he also suggests that arbitration outcomes are less favourable to employees than those from the court system. Moreover, employment arbitration suffers from a lack of employee voice in the development, design and adoption of procedures, particularly in comparison to the jointly-administered labour arbitration procedures of unionised workplaces. It falls short of a strong, well-developed system of workplace dispute resolution serving the interests of both employers and employees. Rather than the development of a new individual employment rights system, Colvin sees the emergence of '*an individual rights era in which new employee rights and sources of power have arisen and have produced a divergence between different workers and workplaces in the ability to access and mobilise these rights and sources of power* (2012, p. 473).'

Van Gramberg (2006) examined the use of workplace ADR in Australia which she said had emerged to offer alternatives to formal tribunal and court-based processes. As well as processes that used non-tribunal external third parties, she included ADR processes that used internal staff. This included open-door policies, which she described as a popular management technique for grievance resolution, involving as it did a manager being available at any time for an employee wishing to raise an issue. She noted criticism of such policies as simply proffering 'lip service' and as inappropriate for certain types of workplace disputes. For instance, this method could make the employee raising the complaint highly visible to his or her co-workers, which could discourage them from raising sensitive matters such as sex discrimination claims. Employees could feel reluctant to confront their supervisor on their own; they could be reluctant to raise claims due to a fear of reprisal, especially if they were using the open-door policy to bypass their own supervisor, and they could also feel that management would not present a neutral opinion. Nevertheless, van Gramberg found that with training in the role of grievance handling, particularly in the concept of workplace justice, an open-door policy could be an effective mechanism for drawing out employee grievances before they became major issues. This was because the open-door policy was flexible enough to deal with a wide range of disputes, from interpersonal conflicts and disagreements to more formal, rights-based disputes. When performed well, she considered that an open-door policy should contribute to an employee's sense of being afforded interactional justice.

However, on the basis of a number of case studies, van Gramberg concluded that there was a gap between the normative rhetoric of ADR and the reality of ADR in practice. Specifically, she found in these cases that ADR practitioners oscillated between ADR and management

consultancy, demonstrated both conflicts of interest and a lack of neutrality, denied disputants procedural and interactional justice and were unable to deal with power imbalances. In her view, employers were effectively using ADR to legitimise their agenda and imposing their will on a trusting workforce while giving the impression that they were enhancing communication with their workers. She argued that accredited training, a code of ethics and possibly registration of workplace ADR practitioners would assist in curbing poor ADR practice.

The impact of dispute resolution procedures on employees

Lewin and Peterson (1988) found evidence of negative individual consequences resulting from grievance procedure usage and settlement. The data they collected indicated that some organisational retribution was meted out to employee grievants, especially grievants who pursued their cases up the higher ranks of the procedure and grievants who won their cases. Compared to non-users of the grievance procedure, grievance users experienced higher post-settlement voluntary turnover rates, low performance ratings and promotion rates and large amounts of work absenteeism and lateness. Negative individual consequences of grievance procedure involvement were also apparent for supervisors and managers against whom grievances were filed. Compared to supervisors and managers who are not directly involved in grievance cases, the involved supervisors and managers had lower post-settlement performance ratings, lower promotion rates and higher turnover rates, especially involuntary turnover. The authors concluded that both employees and their direct supervisors/managers ran considerable individual risks when they became directly involved in grievance activity and resolution. They noted that this helped in understanding why most grievances were settled either informally, or before initiating a grievance process or at the first step of the procedure, that is, at the stage of oral discussion between the employee and the immediate supervisor.

Walker & Hamilton (2011) reported on a study of 14 separate grievances mediated by the New Zealand Department of Labour. In all cases, the parties were unable to resolve their differences during interactions prior to external mediation. The researchers conducted interviews with all the parties involved in the dispute, including representatives and mediators, and as soon as possible following mediation. The researchers also observed the mediation sessions, and had access to such documents as the parties' submissions, pre-mediation correspondence and employers' internal dispute-handling procedures, as archival data sources. The cases selected were ongoing disputes where the parties were still in an employment relationship.

Although these were all ostensibly cases where the parties were seeking to maintain or restore their employment relationship, all but three ended with termination of the relationship. In some cases, the employment relationship was terminated at the time of mediation and the employees involved received some form of compensation as part of the mediated settlement. Other employees initially returned to work after mediation, but subsequently (usually several months later) terminated their employment as a result of the relationship problem. They typically left with no compensation, but had alternative employment arranged.

Two of the disputes where the employees continued their employment relationship on a long-term basis mainly involved a disagreement about the interpretation of the collective

agreement. These could be seen therefore as the union's dispute, rather than that of the individual employee. The third dispute was also technical in nature and did not involve the employee's day-to-day supervision relationships. The cases where employment ended involved more personalised conflicts that affected the employees' day-to-day relationships.

The three cases where employees did retain their jobs differed from the other cases in a number of ways. The employers in question had well-established dispute-resolution procedures that were widely recognised as being effective and although the disputes studied were not resolved through those channels, they were generally recognised as exceptions in otherwise effective procedures. The procedures were regularly used, and dispute action was acceptable within these organisations. The disputes in question were also depersonalised; employees could contest an issue without feeling that their employment was being jeopardised.

In contrast, among the cases where the relationship ended, there was a major 'disconnect' between the existence of official written resolution procedures and their perceived effectiveness. Employees perceived procedures as being neither safe nor credible. Procedures often required employees to take unresolved issues to another local manager, and this was perceived as potentially biased as well as involving a high likelihood of retribution; the result was that very few employees used the procedure (p. 114).

Walker & Hamilton noted that the policy behind the legislation reflected a belief that resolution was best achieved in the early stages, and close to the source of conflict. They commented:

> *'Practice, however, does not seem to have matched the hopes of policymakers in these cases.'* (p. 117)

As they themselves wrote, their findings suggested that failures within organisations may be attributable partly to deficiencies in the systems, partly to a lack of skills among individuals and, in some cases, even to the attitudes of employers who were deliberately attempting to remove employees. The dynamics involved were complex and influenced by a range of factors, including the resources and the culture within the organisation. They linked this with other research showing, for example, that self-managing teams were associated with markedly different grievance patterns. For these reasons, they considered the creation of more effective in-organisation systems was not a straightforward task, noting at the same time that the British experience suggested that simply introducing detailed legislative requirements for organisations could be counterproductive.

Walker & Hamilton found that while public debate was often focused on the nature of external forums, this could place unrealistic expectations on those systems. By the time mediation commenced, the employment relationships had significantly deteriorated to the point where the parties had adopted defensive, positional stances. In addition, formal procedures were not designed well enough to restore relationships. (p. 117)

Voice

Organisational procedures that give employees the opportunity to provide input into decisions that affect them are viewed as fairer than others (Folger & Greenberg, 1985) (Lind & Tyler, 1988). This opportunity to be heard is usually labelled as 'voice', which Greenberg & Folger (1983) viewed as a shorthand expression for the various ways subordinates in an organisation can communicate their interests upward. Procedures that allow employees to express their concerns about decisions already made, such as grievance procedures, have been described by Sheppard, Lewicki & Minton (1992) as 'remedial voice' procedures, because the focus is on employee objections, challenges or protests against organisational positions that have already been taken. Remedial voice procedures tend to focus more upon claims of unfair treatment, or injustice, than do 'preventive' voice procedures (that is, procedures that provide employees the opportunity to provide input into decisions as they are being made). In particular, grievance procedures provide an organisational process by which perceived injustices transformed into official grievances whereby the injured party (the employee) asserts or names the injustice, attributes blames and claims redress. Therefore, grievance procedures can be thought of as procedural justice channels that allow employees the remedial opportunity to seek the distributive justice they believed they were denied when the unfair treatment occurred (Feuille & Chachere, 1995).

Budd & Colvin (2008) considered the voice dimension of dispute resolution systems as capturing the extent to which individuals are able to participate in the operation of the dispute resolution system itself. This dimension includes important aspects of due process, such as having a hearing, presenting evidence in one's defence and being assisted by a representative if desired. Voice could also include the extent to which individuals have input into the construction of the dispute resolution system and into specific resolutions.

Freeman & Medoff (1984) found that unionised establishments had significantly lower quit rates than non-union establishments. This they argued was because they provided a voice mechanism through which employees could negotiate higher relative compensation and redress problems as an alternative to exit. Collective voice was seen as the only effective form of voice. Individual worker voice would be under-supplied due to potential free-rider problems and worker fear of reprisal for exercising voice individually. This voice effect was so positive that it more than outweighed the negative monopoly effect of unions. The main avenue through which union workers exercise voice is the grievance procedure which, according to Freeman & Medoff, 'provide[s] workers with a judicial-type mechanism to protest and possibly to redress unfair or incorrect decisions of their supervisors (p 104).' Employee voice exercised through the grievance procedure, in their analysis, reduces employee turnover, increases employee job tenure, enhances the training and skill of employees and improves productivity, all with consequent benefits to society.

Lewin & Peterson (1988) found that voluntary employee turnover was significantly negatively associated with two measures of grievance-handling effectiveness: grievance rates and arbitration rates. They acknowledged that these findings were consistent with the theoretical proposition that high employee turnover, or exit, was an alternative to grievance filing, or voice, in the employment relationship. However, they also noted that grievance activity had declined during the recession of the early 1980s. They considered this a '*provocative finding'*, as voluntary employee turnover, or exit, declined during recessions so

that employee exercise of voice might be thought to rise during such periods. However, their findings did not support this proposition.

Lewin (2008) criticised Freeman & Medoff for attributing the bulk of the reduction in worker quit behaviour to the presence of grievance procedures, noting that unionism affected other aspects of the employment relationship. 'Voice may well play a role in union workers' relatively low quit rates and relatively high tenure, but it is unlikely to be so dominant a role as that assigned to it by F&M.'

Batt, Colvin & Keefe (2002) hypothesised that the adoption of a wide range of non-union voice mechanisms could affect employee quit rates. They examined individual practices in relation to a 1998 data set from a nationally representative sample of union and non-union establishments in the telecommunications industry.

Amongst the practices they studied were a variety of non-union dispute resolution procedures. They noted that employers had designed such procedures, including procedures for management review of grievances, peer review and non-union arbitration, which might provide an individualised form of voice in the workplace and thereby reduce quit rates.

In their analysis, dispute resolution procedures were captured by three dummy variables, representing, respectively, any type of formal non-union grievance procedure, non-union arbitration and peer review panels. Use of the procedures was measured by a single variable consisting of the annual number of grievances or complaints per employee brought under the applicable union or non-union procedure. The average annual number of disputes was six per 100 employees.

They found that in general, the presence of a non-union dispute resolution procedure did not have a statistically significant association with the quit rate (with the limited exception of peer review procedures). '*Thus we do not find strong evidence that non-union dispute resolution procedures provide voice mechanisms that reduce quit rates in comparison to establishments lacking such procedures.*' This was in contrast to their findings with regard to certain other managerial policies that facilitate voice. In particular, they found that participation in problem solving and self-directed teams was negatively related to quit rates. The authors concluded that:

> '*If new workplace dispute resolution procedures are going to help close the representation gap in non-union workplaces, our results suggest they will need to be something stronger than the present employer-designed procedures*.'

The results indicated a positive relationship between grievance rates and quit rates. This result was consistent with research by Lewin and others in unionised settings (Lewin & Boroff, 1996), (Boroff & Lewin, 1997), (Lewin & Peterson, 1999). As the authors noted: '*One should not make the mistake of assuming that because the availability of voice mechanisms in the workplace is associated with lower quit rates, increased usage of these voice mechanisms will be associated with lower quit rates; indeed, our results suggest that the reverse is true*.'

Efficiency and high performance work systems

A variety of external and internal pressures caused many organisations in the latter period of the twentieth century to restructure their traditional bureaucratic models in search of alternatives that could increase their competitive viability. As a consequence of this restructuring, the employment practices in many of these organisations underwent drastic alterations. These included shedding traditional, hierarchical and rigid rules-based practices and the introduction of high performance work systems. (Appelbaum, Bailey, Berg, & Kalleberg, 2000)

Considerable research has been conducted into the broader issue of the relationship between human resource practices and organisational performance. Cutcher-Gershenfeld (1991) found that firms adopting '*transformational'* employee relations – those emphasising co-operation and dispute resolution – had lower costs, less wastage, higher productivity and a greater return to direct labour hours than did firms using 'traditional' adversarial employee relations practices. Arthur (1994) found that steel mini mills that embraced human resource systems based on a 'commitment' approach had a higher level of performance in areas such as labour efficiency, scrap rates and staff turnover than equivalent mini mills that used a more traditional 'control' system of human resource management. Huselid (1995) found substantial empirical support for the proposition that investment in high performance work practices (HPWP) was associated with lower employee turnover and greater productivity and corporate financial performance. The HPWP used by Huselid in his study were in the areas of personnel selection, performance appraisal, incentive compensation, job design, access to a formal grievance procedure and/or complaint resolution system, information sharing, attitude assessment, labour-management participation, training and the use of merit-based promotion.

Colvin examined the relationship between fairness and high performance work systems (HPWS) (2006). He noted that some arguments questioned the extent of any fairness-enhancing effect of HPWS. It could be argued that HPWS did not change the underlying structure of the employment relationship and the priority given to the interests of employers in organisational decision making. There was also evidence that self-directed work teams exerted a strong self-disciplinary effect on workers within the team, suggesting that teams may simply transfer the source of unfair treatment of workers from managers to fellow team members. On the other hand, the rationale for expecting stronger fairness protections in workplaces adopting HPWS was that these systems were premised on obtaining high levels of commitment from employees, which might be undermined if management took full advantage of the flexibility to fire or discipline the workforce. In turn, if a management operating under HPWS undertook more elaborate procedures before dismissing an employee to ensure fairness, this could produce a correspondingly higher degree of caution in hiring, given the greater difficulty involved in reversing a hiring mistake. This tendency to introduce greater complexity into the hiring process under HPWS could be exacerbated by the higher levels of training and other types of workforce investment these systems required. He hypothesised therefore that one would expect to find lower levels of flexibility in both hiring and firing decision-making under HPWS, even in liberal market economies that legally permitted flexible employment practices.

To test this hypothesis, Colvin surveyed establishments in chemicals (a relatively high-wage, traditional, goods-sector industry) and building maintenance and cleaning (a relatively lower-wage, growing, service-sector industry). The results provided some limited support for the argument that HPWS could provide an alternative, management-driven path to greater fairness in employment practices compared to legislative regulation. However, he also found that the effects of HPWS were probably more limited than influences from the legal environment. The presence of self-directed teams, an alternative work practice generally considered a key component of HPWS, was associated with some indicators of greater emphasis on fairness over flexibility in employment. Establishments with self directed teams were more likely to have non-union grievance procedures, lower flexibility in firing employees and lower discipline rates. He concluded that, '*based on these findings, HPWS as currently constituted may partly enhance fairness in some organisations, but provide a more limited influence overall than the legal environment on fairness and flexibility in employment practices.'*

The displacement effect

As noted previously, while effective workplace dispute resolution can have positive organisational outcomes, it does impose some organisational costs.

Katz, Kochan & Weber (1985) contended that a 'displacement effect' was at work in grievance processing, where displacement referred to the paid employee hours required to process a grievance that could otherwise have been devoted directly to productivity. From this concept of grievance processing could be derived the hypothesis that grievance filing rates are negatively related to firm or organisational performance.

Ichniowski (1986) studied the relationship between grievance filing rates and economic performance. He used longitudinal data from nine unionised paper mills to estimate a grievance-filing productivity relationship, within a production function that included controls for other critical determinants of organisational performance. He also considered the consequences of not having a grievance procedure at all (as opposed to the effects of different levels of use of an existing procedure).

Ichniowski developed a hypothesis that when a grievance was filed, regardless of its specific cause, the contribution of labour to firm productivity could decline due to some combination of a *displacement effect* and a *worker reaction effect.* The former was the number of employee hours diverted from direct production tasks to the grievance-handling process and will be integrally related to the *institutional features* of a plant's grievance procedure. The latter was a change in employees' effort due to *behavioural responses* of workers when they perceived that the collective bargaining agreement was being administered unfairly or incorrectly.

He found that an 'average' grievance was associated with the loss of 175 hours of effective labour. However, he also found that a plant without a grievance procedure had lower productivity. While the data is hardly conclusive, this suggests that where a grievance procedure exists, the higher the number of grievances, the lower the productivity, all other things being equal. However, not having a grievance procedure at all is associated with lower productivity. While no resources were displaced as a result of having to administer the

procedure, this was outweighed by negative worker reaction effects due to the failure to resolve instances of perceived unfairness.

Workplace dispute resolution and the role of management

Effective conflict management relies heavily on the ability of management to generate trust and create good communication with employees, thereby assisting informal and speedy resolution. This places significant emphasis on the confidence and competence of managers in dealing with difficult issues and working within the emotional contexts of workplace conflict. However, there is survey evidence from Britain that conflict management and managing difficult conversations are the two skills that line managers find most difficult to apply. This reflects concerns that there is a crisis in confidence among UK line managers (Saundry & Wibbereley, 2014).

A series of eight case studies conducted for Acas and the Chartered Institute for Personnel Development (CIPD) of organisations that were introducing mediation highlighted the role of line managers in conflict resolution. One reported feature that emerged consistently from the case studies, both from those involved in HR and employee representatives, concerned the role of line managers in, and in some cases even a source of, conflict. Several interviewees commented on poor people management/personnel skills among managers. While sometimes such comments related more generally to management styles and behaviours, specific facets of the managerial skill set, most notably around communication, and with serious consequences in the form of formal complaints, were also highlighted. Since the operational and technical competencies needed to become a manager did not necessarily include people (management) skills, several of those interviewed mentioned the need for managers to be trained in people management. One consequence of this lack of skill was a general preference among line managers increasingly to replace their pragmatic approaches to conflict resolution with a rigid adherence to process and procedure. This lack of skills was often compounded by a lack of support from senior management, who in turn might not see conflict management as a priority. This led to the line managers concerned not being given the time and space to devote to dealing with conflict, because it was seen as secondary to immediate operational considerations. It also meant that key performance indicators on which managerial performance was judged rarely contained any reference to workplace conflict. (Latreille, 2013)

An earlier study (Saundry, Antcliff, & Jones, 2008) emphasised the importance of high-trust relationships between managers and employee representatives in underpinning informal processes of dispute resolution. In one case study of a large engineering business, dismissals, formal disciplinary cases and formal complaints were rare. Informal processes were seen as the most effective way to resolve grievances and minimise disciplinary sanctions. Trade union representatives were seen by managers as playing a key role in this respect. If managers wanted to get to the bottom of difficult and sensitive issues, trade unions provided a point of contact, because employees were often much more likely to confide in and be honest with their union representative. Union representatives also served as an early warning system, alerting managers to potential problems which could then be ‘nipped in the bud’. Central to

the success of such approaches were good, trusting relationships between managers, HR advisors and union representatives.

Despite the clear value of informal processes there was evidence of a trend towards greater formalisation. In some cases, line managers, especially those with less experience, tended to resort to more formal procedures because they felt more vulnerable to the possible legal ramifications of a decision and possible criticism from superiors. The shift to a business partner model of HR management also meant that some HR advisors worked remotely from the unit they supported. This tended to undermine the development of high-trust relationships.

In a more recent analysis for Acas, Saundry & Wimberley (2014) observed that in the UK a link between the strategic management of conflict and employee engagement was notably absent from managerial discourse. Instead, conflict management remained associated with the administration of disciplinary and grievance procedures and was consequently stereotyped as a low-value and essentially transactional element of the management function.

Saundry & Wimberley reiterated a number of insights from the earlier research conducted for Acas and the CIPD, particularly the importance of informal social processes that helped to identify and address conflict at an early stage and facilitate more consensual resolutions to disciplinary and grievance disputes. Essential to the success of these processes was that they were underpinned by high-trust relationships between key organisational stakeholders. However, they noted that these relationships were and are threatened by the development of centralised models of HR and the erosion of employee representation. At the same time, responsibility for managing conflict has been placed in the hands of line managers, many of whom lack both the confidence and capability to deal with difficult issues. Together, these factors have the potential to create a 'resolution gap' in British workplaces

Saundry & Wimberley emphasised the need to improve the conflict management skills of line managers. However, they also pointed out that the support of senior managers was critical in providing front line managers with the necessary self-confidence to take a proactive and creative approach to conflict. They also reiterated the crucial role employee representatives could play in helping managers identify emerging sources of conflict that could otherwise erupt into more serious disputes. High levels of trust between management and employee representatives would facilitate the use of informal resolution; where this was lacking disputes were handled by both sides in an adversarial and competitive manner.

Workplace dispute resolution and the role of unions

As previously noted, Freeman & Medoff saw the role of unions in providing a voice mechanism through which employees could redress problems as leading to greater workforce stability. Moreover, collective voice was more effective than individual worker voice because of workers' fear of reprisal if they exercised voice individually.

However, Lewin (2007) pointed out that union involvement in workplace dispute resolution might or might not be a positive.

> '*... my research and that of other scholars has shown that while it sometimes serves to "correct" the power advantage of employers over workers, workplace dispute*

> *resolution under unionism sometimes exacerbates rather than redresses employment relationship conflict. This is in part because the grievance procedure is not only a mechanism for providing voice to union members; it also serves as an additional or "extra" bargaining mechanism through which a union attempts to win "more", such as more protective work rules, more slack from supervisors, more money to settle grievances, and more influence for union representatives. Furthermore, and following the pluralist conception of the employment relationship in which conflict is endemic to all such relationships, union workers' exercise of voice through the grievance procedure can have a variety of outcomes ranging, probabilistically, from highly positive to highly negative. Ideally, and empirically, such outcomes should be compared with those that occur in non-union firms in which, following the unitarist perspective, "aberrant" employment relationship conflict is more likely to be suppressed and HRM-bundled grievance procedures are relatively little used* (pp. 317-8).'

A common perception by some of the managers interviewed by the author was that unions encourage workplace conflict. An alternative view would be that conflict in the workplace was inevitable and that the impact of unions was on how conflict was expressed and dealt with. A study conducted for the UK Department of Trade and Industry found that falling union density was associated with the greater use of litigation (Burgess, Propper, & Wilson, 2000).

Another study found that where unions were present, employers were less likely to experience adverse tribunal judgements, pointing to a possible link between improved workplace performance and effective 'voice' as provided by union representation (Urwin, Murphy, & and Michielsens, 2007).

Van Gramberg has pointed out that the introduction of more senior players, such as union officials, can provide more objectivity, thus making the resolution of disputes easier, given that those directly involved in the conflict are also those most emotionally involved. She recognised that the involvement of unions could lead to power-based threats but suggested a range of mechanisms to ward off such threats. These included cooling off periods and agreed standards or protocols to be used by those involved in dispute resolution (van Gramberg, 2006, pp. 92-93).

The recent British research cited above suggests that trade unions can play an important role in the resolution of individual employment disputes, for example, by managing the expectations of members and negotiating with managers to resolve issues or minimise sanctions. In addition, managers and employee representatives can use each other as a 'sounding board', warning each other of potential problems. However, such informal processes are dependent on the existence of high-trust relationships between employee representatives and managers. Where such relationships do not exist, workplace dispute resolution can become adversarial and tends to revert to the formal application of procedure as organisations seek to protect themselves against litigation (Saundry & Wibbereley, 2014).

'Conflict Management Systems': A new theoretical paradigm

Conflict is an inevitable part of organisational life and a strategic approach to its management can enhance employee commitment and organisational performance.

Lipsky & Avgar (2004) described the development of ADR in the latter part of the twentieth century as '*a paradigmatic shift in the practice of employment dispute resolution*' (p. 176). This ADR revolution was the product of an historic transformation of the American workplace resulting from factors including globalisation, technological change, deregulation, the decline of the labour movement, the increase in the statutory protection of individual rights and the emergence of team-based production. (Kochan, Katz, & McKersie, 1986)

Lipsky, Seeber & Fincher (2003) described the emergence of this new paradigm as one whereby organisations have moved beyond the management of disputes to the adoption of what they call 'a conflict management system'.

They make the following distinction between 'conflicts' and 'disputes':

> *'Conflicts can be seen as nearly any organisational friction that produces a mismatch in expectations of the proper course of action for an employee or a group of employees. Conflicts do not always lead to disputes; sometimes they are ignored, sometimes suppressed, and sometimes deemed unimportant enough to be left alone. Disputes are a subset of the conflicts that require resolution, activated by the filing of a grievance, a lawsuit against an organisation, or even a simple written complaint.'*

The authors noted that ADR *" ... is now firmly institutionalised in a majority of US corporations, at least for employment and commercial disputes ... few, if any, organisations that adopt the use of ADR ever go back to older methods of resolving disputes."*

However, they see ADR as a stop on the way to the creation of a more complete and integrated conflict management 'system'. ADR is just a more sophisticated method of 'dispute management', designed to bring disputes into a forum most to the organisation's advantage in order to attain lower costs, faster resolution, or simply a higher probability of a better outcome. By contrast:

> '*... the goals of a conflict management system are broader and more numerous. Conflict management systems attempt to channel conflict in productive directions, for example, not just to manage its resolution. They spread the responsibility for conflict and its resolution to the lowest levels of the organisation. Thus, they require training to be widespread. They seek to transform the organisation, not just a set of processes* (p. 9).'

The authors used the work of the Association of Conflict Resolution (ACR) to define an integrated conflict management system (Gosline, 2001). The ACR describes five characteristics of an integrated conflict management system as follows:

1. It has the widest possible scope, allowing concerns to be raised that do not necessarily involve the violation of legal rights, as well as problems that are not associated with a known individual.

2. It creates a culture that accepts conflict as inevitable and that does not send the message that those who raised concerns are themselves the problem.
3. It allows employees to access the system through a number of different avenues, for example, supervisors, human resources officers or hot lines.
4. It gives employees the opportunity to choose a problem-solving approach to conflict resolution, to seek determination and enforcement of rights, or to do both.
5. It has support structures that are capable of coordination and managing multiple access points and multiple operations, enabling the effective integration of conflict management into the organisation's daily operations (Lipsky, Seeber, & Fincher, p. 13).

Organisations that have adopted conflict management systems believe that some workplace conflict is inevitable, as those with different priorities clash in a natural way within organisations. These organisations also recognise that no matter how extensive systematic checks and balances might be within organisations, there will be some individuals who discriminate, treat employees poorly and in general are themselves a source of conflict (p. 300).

In 1997, the authors conducted a large survey of the general counsels of Fortune 1000 corporations into the use of ADR. They also conducted on-site interviews with executives, managers and attorneys in approximately 60 organisations. They found several characteristics were shared by organisations with conflict management systems. These were:

> *'A proactive approach. The organisation's approach to conflict management is proactive rather than reactive. The organisation has moved from waiting for disputes to occur to preventing (if possible) or anticipating them before they arise.*
>
> *Shared responsibility. The responsibility for conflict (or litigation) management is not confined to the counsel's office or an outside law firm, but is shared by all levels of management.*
>
> *Delegation of authority. The authority from preventing and resolving conflict is delegated to the lowest feasible level of the organisation.*
>
> *Accountability. Managers are held accountable to the successful prevention or resolution of conflict; the reward and performance review systems in the organisation reflects this managerial duty.*
>
> *Ongoing training. Education and training in relevant conflict management skills are an ongoing activity of the organisation.*
>
> *Feedback loop. Managers use the experience they have gained in preventing or result in conflict to improve the policies and performance of the organisation'* (pp. 18-19)

Lipsky, Seeber & Fincher acknowledged that 'dispute management' remains far more common than 'conflict management systems'. Most managers who had adopted ADR were attracted to it because of its potential to save time and money through more efficient dispute resolution. '*Almost none of them supported the use of ADR because they thought [ADR] was a fairer and more just means of resolving disputes*.' (p. 316).

Lipsky, Seeber & Fincher saw the forces behind the move towards conflict management systems as having the potential for an explosion in litigation, particularly in the area of employment relations, the professionalisation of human resource management, the decline of unionism and growing pressure to improve employee performance and productivity as a result of increased global competition.

Their survey of Fortune 1000 corporations found that the majority of non-union grievance procedures did not culminate in arbitration; rather, management reserved the right to make the final decision. The overwhelming majority of respondents preferred mediation to arbitration. Even those companies that used ADR did so either occasionally or rarely. The companies with the strongest pro-ADR policies tended to be the very largest companies and those that had adopted 'progressive' policies in other areas. Many pro-ADR companies, for example, were among the first to embrace Total Quality Management and team-based production systems; several were leaders in introducing high-performance work systems, most faced significant global competitive pressures and had engaged in downsizing.

In examining the reasons why some corporations did not use ADR, Lipsky, Seeber & Fincher found that ADR was sometimes viewed by middle managers as threatening, often because they made many decisions that could be the source of corporate disputes, yet they wanted their decisions to be supported by the corporation. They felt that ADR could undermine their authority (p. 106).

The authors noted that growing numbers of organisations had embraced conflict management systems as part of their approach to quality. Such organisations regarded the management of workplace conflict as a business strategy that could be analysed, mapped and quantified. They used the quality process to develop their workplace systems, including employee focus groups, monitoring of progress and statistical control, and they reported significant satisfaction through the use of this quality methodology.

The authors also noted the alignment between workplace conflict management systems and the notion of a learning organisation. In progressive organisations, the sources and nature of conflict are examined and whatever knowledge is gleaned during this process is broadly exchanged across the organisation for reflection and adjustment. In this way, learning is continuous across numerous locations using the workplace system and the workplace system becomes a learning tool.

Lipsky, Seeber & Fincher developed an analytical model of the choice of conflict management strategy. They noted that:

> *'ADR and conflict management systems seem to have arisen largely as a response to changes – some long-term and some short-term – in the organisational environment that made their use an effective alternative to conventional litigation. These environmental changes were filtered through a set of the organizations' motivations, resulting in some organizations' choice of a conflict management strategy' (p. 119).*

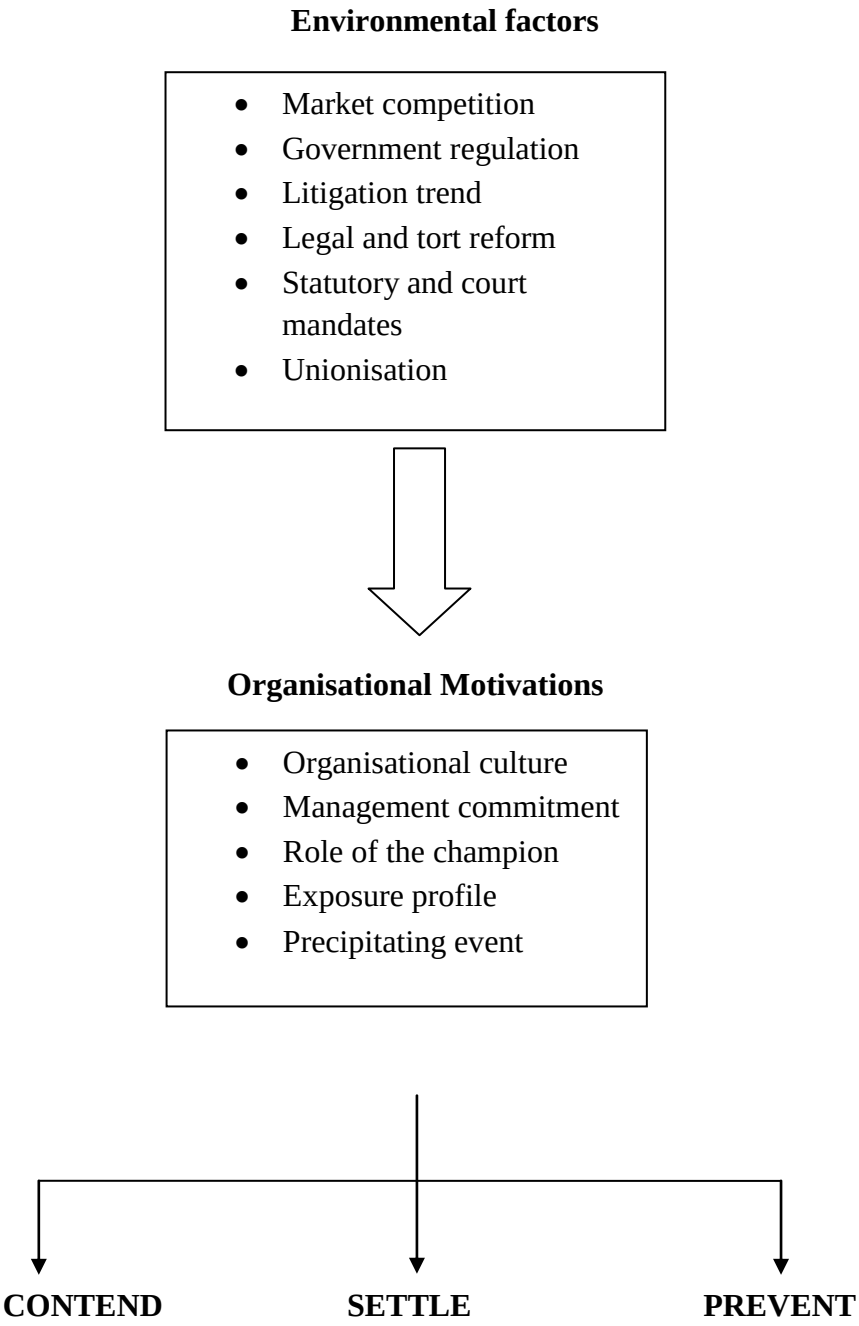
They described three conflict management strategies, which they labelled 'contend', 'settle', and 'prevent'. They noted that these categories were somewhat arbitrary but believed that this categorisation captured the most fundamental differences in organisational strategies that they had observed. The 'contend' category included organisations that preferred litigation to ADR.

The ‘settle’ category, which contained the majority of corporations in the US, used ADR primarily on an *ad hoc* basis, while the ‘prevent’ category contained organisations that used ADR in all types of disputes as a matter of policy. Many of them had developed conflict management systems, going beyond the use of particular dispute resolution techniques as a matter of practice or even policy to a comprehensive set of policies designed to prevent (if possible) or to manage conflict.

The authors developed a model in which environmental factors (market competition, government regulation, litigation trend, legal and tort reform, statutory and court mandates, and unionisation) was filtered through organisational motivations (organisational culture, management commitment, role of Champion, exposure profile, precipitating event). The dependent variable was the adoption of a conflict management strategy (p. 119).

The model is outlined the following diagram.

Organisational Strategic Approaches to Conflict Management



Chapter Three: Workplace dispute resolution in Australia from the 1890s to 2009

Compulsory conciliation and arbitration

The notion of state-sponsored conciliation and arbitration of workplace disputes is deeply rooted in Australian history. Even prior to Federation, two Australian colonies, Western Australia and New South Wales, had enacted legislation for compulsory arbitration of industrial disputes in response to a series of highly divisive strikes in the 1890s ((Mitchell, 1989). These strikes centred on three key export-related industries, namely the maritime, wool and mining sectors, and were mainly in response to a determined push by employers to pursue the principles of 'freedom of contract', that is, the right to negotiate terms and conditions of employment directly with workers on an individual basis rather than through collective bargaining with trade unions (Creighton, 2000). The strikes of the 1890s were not only highly divisive socially, they were also damaging economically. The unions suffered a serious defeat and saw their membership plunge, leading elements of the labour movement to look to government regulation to protect their rights. This, combined with a number of other factors, including an already strong Australian tradition of state intervention, supported a broad consensus in favour of compulsory conciliation and arbitration by the time of Federation (Creighton & Stewart, 2010).

The Australian constitution enacted in 1900 specifically gave the Commonwealth Parliament the power:

> *'... to make laws for the peace, order, and good government of the Commonwealth with respect to: ... conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State' (s.51 (xxxv)).*

The intention to give statutory effect to this constitutional provision was outlined in the first Governor-General's speech given to the Commonwealth Parliament (Clark, 1981) and a bill was introduced into the first parliament in 1903. However, the issue was highly contentious. Three governments failed to procure the passage of the bill and two prime ministers resigned as a direct result of unsuccessful efforts to do so. The *Conciliation and Arbitration Act* was eventually passed in December 1904 (Isaac & Macintyre, 2004).

Arbitration has been described by one of Australia's leading political commentators as '*an Australian institution based upon the most distinctive of Australian ideas, the "fair go" principle. It was Australian in its effort to restore order after the class conflict of the 1890s which neither unions nor employers wanted to repeat, in its egalitarian ethos, and in its solutions through bureaucratic legalisms.*' (Kelly, 1992)

The *Conciliation and Arbitration Act 1904* established the Commonwealth Court of Conciliation and Arbitration. This new federal institution existed alongside similar bodies that

had either been or were later established by the parliaments of each of the states. Indeed, it remains the case that all states bar Victoria still have industrial statutes that, amongst other things, provide for the conciliation and arbitration of industrial disputes (Creighton & Stewart, Labour Law, 2010). At the federal level, there has been a tribunal charged on a continuous basis with resolving industrial disputes since 1904. In 1956 a separate Industrial Court and the Australian Conciliation and Arbitration Commission were established, following the *Boilermakers* decision[2]. In 1988 the Commission was renamed the Australian Industrial Relations Commission; in 2009 it was again renamed, this time to Fair Work Australia (FWA) and in 2013 its title changed once again, this time to the Fair Work Commission (FWC).

A key feature of the conciliation and arbitration system throughout most of the twentieth century was that it was by law compulsory to notify the relevant tribunal once a dispute arose. In reality, many disputes, especially those involving minor grievances, were settled by the parties themselves without being brought before a tribunal. However, once notification occurred, the process became compulsory; both in the sense that the tribunal could compel parties to participate in its dispute resolution processes, and in the sense that the tribunal could impose a legally binding outcome. The tribunals were empowered to summon representatives of the parties to conciliation conferences in order to encourage a negotiated resolution. If this could not be achieved, they could hear arguments from each side and then resolve the matters in dispute by a formal process of arbitration. Their decisions would take effect as legally binding 'awards', instruments that had the force of statute (Creighton & Stewart, 2010).

The focus of the system was more on arbitration than conciliation. The bitter disputes of the late nineteenth century meant that trade unions were wary of agreements that could not be enforced at law. While conciliation was included in the powers given to the tribunal, it was generally understood to be a process on the path to making an award that would be enforceable under the Conciliation and Arbitration Act. (Macken & Gregory, 1995). These awards were most commonly made on an industry or occupational, rather than an enterprise, basis. Awards were often complex instruments regulating many aspects of the wages and conditions of employees across a large number of employers. However, awards usually left scope for the parties to negotiate agreements above the minimum level (Creighton & Stewart, 2010).

The role of tribunals in Australian industrial relations has historically been so strong that even where the parties to an industrial dispute have reached agreement, there has usually been recourse to the relevant tribunal to endorse that agreement.

Macken and Gregory wrote in 1995:

> *'It is frequently true in the context of bargaining in Australia that parties who have reached full agreement on an industrial issue require that the decision they have arrived at be handed down by way of an arbitrated judgement. They have "agreed" but they cannot be seen to have "agreed". All arbitrators know this full well and*

[2] The High Court, later upheld by the Privy Council, found that the same body could not exercise both judicial power (for example, enforcing its own determinations) and non-judicial functions such as settling disputes by creating new obligations between the parties (Creighton & Stewart, Labour Law, 2010)

> *ensure that their judgment conforms to the private agreement which he or she knows has been reached'* (p. 7).

Industrial tribunals were involved not only with major disputes; the resolution of even small-scale disputes tended to rely on their involvement.

> *'For generations, awards contained "boards of reference" clauses and other procedures for the unofficial but speedy settlement of industrial disputes of the "flare up" variety. Such a dispute may be over the payment of an allowance for the handling of some particularly noxious material (carbon black was a regular example on the waterfront, before containerisation); or it may involve a manning claim which requires some temporary departure from a regular manning scale as the result from some change in work practice – the range of disputes is almost endless.'* (Macken & Gregory, 1995, p. 77)

Such 'boards of reference' might include members drawn from the employer and the union sides, but would normally be chaired by a member of an industrial tribunal.

> '*The reality is that for the bulk of the 20th century most direct management/labour negotiation was undertaken against the background of conciliation and arbitration mechanisms which could be unilaterally and swiftly invoked by either party – or indeed, theoretically, by the government or the tribunal itself. This was bound to have a 'chilling effect' on employers and unions. In effect, they did not need to take ultimate responsibility for finding a solution to their disputes, since they would be aware that the matters in question could be resolved by, or at least with significant input from, a member of the tribunal.*' (Creighton & Stewart, 2010, p. 37)

One aspect of the 'chilling effect' of compulsory conciliation and arbitration was that for most of the twentieth century formalised workplace procedures to handle local disputes did not play a significant role in the Australian industrial relations system.

The origins of workplace dispute settlement procedures

The desirability of reducing the reliance on tribunals to resolve industrial disputes was recognised in 1970 with the publication by the National Labour Advisory Council (NLAC) of tripartite guidelines on 'Procedures for Dealing with Industrial Disputes'. These guidelines were designed to promote the resolution of disputes by the parties themselves, preferably at a local level. They reflected, at least in part, ILO Recommendation 130 '*Examination of Grievances*' adopted in 1967.

The NLAC guidelines provided for a graduated response to dispute resolution. Unions were to nominate accredited job representatives. Any matters affecting the employees whom they represented were first to be raised with the supervisor in charge of the work. If the matter was not resolved at this level, it was to be referred to the employer's representative, who would arrange a conference, normally within 24 hours. If this conference was not successful, the union representative was to advise the local union official and a further conference arranged between such officials as the union and employer might decide. If the matter was still unresolved, higher level representatives of each side would be called upon.

A number of things are worth noting about these guidelines. First, they assumed that unions would play a central role. This was understandable, given the very high level of union membership in Australia at that time. Secondly, no distinction was made between 'interest' disputes (that is, those relating to creating the terms of employment or the rights of the parties) and 'rights' disputes (that is, those concerning the interpretation or enforcement of the rights of the parties as set out in an agreement, award or other formal document). Thirdly, the guidelines were somewhat equivocal about reducing the role of the tribunal. In particular the guidelines provided that the parties could at any time seek the assistance of a representative of the Conciliation and Arbitration Commission or some mutually acceptable person, though they could not have recourse to the 'formal' processes of the *Conciliation and Arbitration Act* until they had endeavoured to settle their differences in full, in accordance with the procedure.

The goal of promoting dispute resolution by the parties directly affected at a local level received statutory recognition with the insertion of Section 20 into the *Conciliation and Arbitration Act* in 1972. This provision required the Commission to encourage the adoption, by mutual agreement, of procedures for the prevention or settlement of disputes.

However the adoption of such procedures was a slow process. The Report of the Committee of Review into Australian Industrial Relations Law and Systems – the 'Hancock Report' (Hancock, Polites, & Fitzgibbon, 1985) – noted that surveys conducted over the previous 15 years or so by the Department of Employment and Industrial Relations and its predecessors, and the Office of the Industrial Registrar, indicated that the incidence of formalised grievance procedures to handle local disputes arising out of the operation of federal awards had been limited, but was growing.

The Hancock Report was a high water mark in the tripartite reform of Australia's industrial relations system. Seen from one perspective, it was the last hurrah for Australia's system of compulsory and conciliation and arbitration, coming as it did just before the shift towards a more decentralised system with a much greater focus on the enterprise level. On the other hand, many of its detailed recommendations were adopted in legislative form, and their influence can still be seen today.

The Hancock Report strongly supported the use of grievance procedures. It stated:

> '*Grievance procedures are an essential part of the total processes, both formal and informal, which go to an effective industrial relations system. They can provide an equitable means for conducting industrial relations in the workplace, provide a mechanism for avoiding industrial disputation, and encourage acceptance by the parties of greater responsibility for their own industrial relations*.' (p. 571)

This can be seen as the first time in the Australian context that a clear rationale was provided for workplace grievance procedures. In short, such grievance procedures were seen as i) promoting equity; ii) providing a mechanism for minimising industrial disputation, and iii) encouraging the parties to accept responsibility for their own industrial relations.

The Hancock Report expressed concern that the incidence of formal procedures in awards and agreements was not higher. While expressing a preference for the parties to reach agreement on the adoption of procedures, the report commented:

> '*We believe, on balance, that the advantages of having grievance procedures inserted in awards and agreements as a general practice outweigh reservations about making this a mandatory requirement. Those parties who cannot reach agreement between themselves on appropriate forms of grievance procedures may be most in need of such procedures.*
>
> *We recommend, then, that the legislation provide for all awards and certified agreements to contain a procedure for the resolution of grievances as a means of preventing future disputes. The parties should be encouraged to agree upon a procedure; but if they do not, the Commission should be required to insert an appropriate grievance procedure...*
>
> *The grievance procedures we have in mind should relate specifically to local matters arising between an individual employer respondent to the award on the one hand and his employees and their union(s) on the other. They should lend themselves to speedy use.*' (p. 572)

Building on the NLAC guidelines, the Hancock Report outlined what it regarded as the essential features that should be contained in grievance procedures inserted into awards and agreements:

- that normal work be continued throughout the steps in the process (except for *bona fide* safety issues) and that the status quo at the point at which the grievance is lodged prevail until the process is completed
- that genuine efforts be made to settle the dispute as close as possible to its source and that graduated steps be provided for resolution
- that the steps be proceeded with within reasonable time limits
- that while the 'assistance' of members of the tribunal can be sought at any stage, the *formal processes* of the Commission be not available to either party while the procedures are being followed, and
- that the matters covered by the procedures be specified, with emphasis being given to mechanisms to resolve local issues arising between individual employers bound by the award or agreement, on the one hand, and their employers (sic) and their union(s), on the other. (p. 573)

The report recommended that individual employees, as well as union representatives, should be able to raise grievances.

While the report did not dismiss the notion that grievance procedures could apply to disputes over general claims to change terms and conditions of employment, it did not consider that such disputes should be subject to mandatory procedures. This was consistent with a view that grievance procedures were most appropriately used in 'rights' rather than 'interests' disputes.

Finally, the report recommended that if the grievance procedure was not observed by either side, then the Commission could intervene. Moreover, the existence of a grievance procedure

in an award or certified agreement should not detract from the right of any party to make an application to a court for an interpretation of an award.

The ‘essential features’ outlined in the Hancock Report still largely characterise disputes procedures in awards and enterprise agreements thirty years later.

The Industrial Relations Act 1988 passed by the Federal Parliament was largely based on the Hancock Report’s recommendations. A number of provisions in the legislation were designed to encourage the use of grievance procedures to settle disputes. Section 91 of the Act provided that the Commission should encourage the parties to agree on the inclusion of disputes procedures in awards. Section 92 provided that the Commission should have regard to the level of compliance with any applicable disputes procedure before exercising any of its powers in relation to a dispute. Subsection 115 (8) provided that agreements between unions and employers could only be certified if they contained a disputes procedure.

Nevertheless, while the *Industrial Relations Act 1988* encouraged the use of grievance procedures, disputes were normally referred to the Commission in accordance with s.99 of the Act. Under this section, trade unions and employers were still obliged to notify the Commission as soon as they became aware of an ‘alleged industrial dispute’ affecting them. Under s.100 of the Act, the Commission was obliged to try and resolve disputes that had been referred to it, either by conciliation or arbitration.

The 1988 Act retained a largely centralised system of industrial relations. For the most part, pay and conditions continued to be covered by multi-employer awards. Regular wage increases occurred at a national level. Enterprise-based agreements (such as those that could be certified pursuant to s.115) were the exception. However, from around the time of the Hancock Report, a gradual process of decentralisation commenced, beginning with the adoption of a two-tiered wage system in 1987, with some pay increases flowing from changes made at the enterprise or industry level.

The Australian Workplace Industrial Relations Survey conducted in 1990 gives some indication of the spread and usage of workplace dispute/grievance procedures at this time.

This survey (Callus, Morehead, Cully, & Buchanan, 1991) defined grievance or dispute settlement procedures (the terms were used interchangeably) as procedures that could involve several steps, at any of which the grievance or dispute may be settled. They could cover specific issues such as promotion or discrimination or a more general range of work-related matters. No distinction was made between dispute settlement procedures in agreements or awards, or enterprise-level grievance procedures.

The 1990 AWIRS did suggest that the formalisation of grievance handling had become more common in Australia, at least since the introduction of the two-tiered wage system in 1987 (p. 130).

Generally, 49 per cent of workplaces with 20 or more employees had a formal grievance procedure of some kind, and 67 per cent of employees in the survey population were covered by these procedures. There was a positive correlation with increased workplace size. While only 39 per cent of workplaces with between 20 and 49 employees had formal grievance procedures, 86 per cent of workplaces with 500 or more employees had such procedures.

Seventy-two per cent of public sector workplaces had procedures, compared to only 40 per cent of private sector workplaces (pp. 130-1).

Differences according to organisational structure were also apparent, with 55 per cent of workplaces that were part of a larger organisation having grievance procedures, compared to only 26 per cent of 'single workplaces'. Workplaces in wholesale and retail trade (35 per cent), recreation and personal services (32 per cent), and finance, property and business services (41 per cent) were the least likely to have a grievance procedure. By contrast, those in the communications industry (82 per cent) and in public administration (78 per cent) were most likely to have them (p. 131).

It was suggested by the survey authors that the influence of an industrial tribunal was apparent from examining the reasons given for introducing grievance procedures. Just over a third of workplace managers indicated grievance procedures had been introduced as an award requirement; another third claimed grievance procedures were the result of a management initiative. The final third said procedures were the result of a management – union agreement; with a minority of these (13 per cent) saying that the agreement had been worked out by management and unions at the workplace level. (p. 131)

The 1990 AWIRS findings suggested that the legislative provisions concerning grievance procedures were not the sole or perhaps even the main reason behind their introduction at the workplace level, and that management and (perhaps to a lesser extent) unions took the initiative in their introduction.

The survey authors noted that the impact of grievance procedures could only be gauged by their use. To operate effectively, the procedures required either the commitment of local managers or, in some cases, the application and insistence of employees and the unions. Managers were asked how often the procedure was used to handle grievances. Forty per cent said rarely or never. Of the 60 per cent of workplaces that had used the procedure, 37 per cent indicated they had not been used it in the previous year. In other words, most workplaces with procedures had made no use of them in the previous year. Only 16 per cent of workplaces claimed that the procedure was used for grievance handling all the time. This low level of regular use suggests that many grievances were dealt with through more informal methods. (p. 132)

There was little difference between public and private sectors in the use of procedures. However, larger workplaces were more likely to make use of the procedure; 41 per cent of workplaces with 20 – 49 employees used the procedure all or most of the time and 45 per cent of workplaces rarely or never. By contrast, 58 per cent of workplaces with more than 500 employees used the procedure all or most of the time and only 20 per cent of such workplaces used them rarely or never. (p. 314)

In unionised workplaces, the grievance procedure was used most frequently (26 per cent of cases) for disciplinary matters. In non-unionised workplaces with a grievance procedure, they were most often used (41 per cent) to resolve personality conflicts. In only 16 per cent of workplaces was the procedure the most often used for allowance or pay grievances. (p. 132)

The evidence is that many grievances were dealt with outside formal grievance procedures – 70 per cent of managers reported involvement in handling employee grievances in the

previous year. The most frequent grievances that managers dealt with were personality conflicts (36 per cent), allowances (22 per cent) and discipline (12 per cent). When asked to identify those issues where grievance procedures were most effective, the managers answered that they found them most effective when dealing with grievances concerning individuals, such as personality conflict, discipline, promotion and discrimination. (p. 132)

The Australian Workplace Industrial Relations Survey was repeated in 1995 (Morehead, Steele, Alexander, Stephen, & Duffin, 1997). This indicated that the increased emphasis on establishing formal grievance-handling procedures had continued. In particular, the proportion of workplaces with 20 or more employees with formal written grievance procedures had increased from 49 per cent to 71 per cent. Of those workplaces with 500 or more employees, 97 per cent had such procedures (up from 86 per cent five years earlier), while the percentage of workplaces with between 20 and 49 employees with procedures had grown from 39 per cent to 63 per cent. (p. 129)

The reasons for introducing these procedures had not changed much, though there was a slight shift towards management initiative. In 27 per cent of cases, the respondents indicated the grievance procedure had been introduced as a result of an award requirement; in 45 per cent of cases it was due to management initiative, and in 25 per cent of cases it was part of an agreement between management and unions. (p. 129) This again confirms that legislative changes do not appear to have been the primary driver behind the increased uptake of grievance procedures, at least in any direct sense. (It is possible that broader changes in the legislative environment, particularly an increased emphasis on the enterprise level, as discussed later, had an indirect effect.)

There was also evidence that grievance procedures were being used more frequently. Twenty-three per cent of managers said their procedures were used all of the time to deal with grievances; 24 per cent of managers said they used them most of the time. By contrast, 83 per cent of small businesses said they dealt with each employee complaint or grievance in its own way, rather than following standard rules. (p. 130)

There was little change in the issues that grievance procedures were used to deal with – the most common continuing to be personality conflicts and discipline, issues that were and are not generally covered by awards or agreements (p. 130). Again, this was consistent with the proposition that the growing use of grievance procedures was not primarily due to changes in the legislative framework.

In summary, the AWIRS findings suggest that, in the 1990s:

- formal dispute/grievance procedures were widespread in Australian workplaces (particularly larger ones)
- they had often been established by management initiative
- many grievances and disputes were dealt with informally, though the usage of procedures was increasing, especially in larger workplaces
- the most common issues dealt with were personality conflicts and discipline.
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The shift to an 'enterprise focus' and the Workplace Relations Act 1996

During the 1980s there was a highly-charged debate about whether Australia should scrap its centralised approach to the regulation of employer – employee relations. In general, from the mid-1980s, the conservative parties supported a move away from the centralised system, while the Labor Party and the trade unions broadly supported the status quo. One of the leading academic proponents of a more decentralised system was Professor John Niland, from the University of New South Wales.

The newly-elected conservative government in New South Wales commissioned Professor Niland in 1988 to write a Green Paper on reforming industrial relations in that state. The report, formally entitled '*Transforming Industrial Relations in New South Wales*' (Niland, 1989), supported a move to a more enterprise-based system.

The Green Paper contained a discussion on grievance-handling procedures as part of its consideration of an enterprise focus. Niland wrote:

> '*The value of such procedures has come to the forefront of industrial relations thinking in Australia in the past five years…*' (Niland, 1989, p. 42)

Niland commended the NLAC guidelines and recommended that they be used as a guide in the development and review of grievance procedures in the New South Wales jurisdiction.

According to Niland:

> '*The rationale of grievance-handling procedures is that they provide greater stability in industrial relations through focusing stronger efforts on the resolution of disputes within the workplace or enterprise. They also provide employees with a guaranteed hearing, and to some extent represent an appeal mechanism.*' (p. 42)

This is broadly consistent with the rationale given for grievance procedures by the Hancock Report. Niland agreed with Hancock that grievance procedures should be used for the processing of rights disputes, as opposed to interests disputes. However, Niland went beyond the general desirability of introducing grievance procedures and considered how to make them effective. He noted that while there was widespread support for the idea of grievance procedures and many awards and agreements made provision for them, a common experience was that they did not work as designed. He commented that one widely-reported difficulty was the failure of the unions to complete all steps before engaging in strike action. Under Niland's model, industrial action about rights disputes (as opposed to interest disputes) was never legitimate. Any rights dispute that had not been resolved at the enterprise level should be referred to an arbitrator, whose decision would be, by definition, binding.

Another practical difficulty with grievance-handling procedures noted by Niland was the common tendency for '*step-jumping'* in the sense that issues would be raised part way up the ladder of dispute resolution instead of at the first level, which usually entailed contact between the employee and the supervisor. He put this down to the industrial relations specialist encouraging an open-door policy, or management at large failing to provide its frontline supervisors with sufficient authority and expertise for to employees to see them as

worthy first ports-of-call for grievance handling. Other reasons Niland saw for grievance procedures not operating effectively included: the tribunal member allowing himself or herself to get involved too early; particular individuals, both supervisors and union delegates, being temperamentally uncomfortable with the idea and style of grievance processing; decisions being inconsistent between different sections of the enterprise or workplace, or the grievance procedure simply being poorly understood by those who were expected to use it. Niland saw grievance procedures in Australia as having emerged with neither practitioners nor potential users having any clear perception of the distinction between interest disputes and rights disputes. Grievance-handling was seen in a rather mechanical sense, with no attention paid to design aspects of the procedures themselves and inadequate training provided to make them work. Niland also emphasised that an appropriate industrial relations philosophy among management was crucial to the effective operation of grievance procedure, emphasising devolution of authority and responsibility to line managers rather than industrial relations specialists. He concluded:

> '*Bringing grievance-handling procedures to work effectively would make a more positive contribution to industrial relations reform in New South Wales than any other change. But no single reform action will bring this about. Rather, the development of effective grievance-handling procedures is an intricate, difficult and inevitably time-consuming exercise. But the benefits would make it worthwhile.*' (p. 43)

Niland recommended a requirement that agreements not be filed or registered without an appropriate grievance-handling procedure being incorporated.

Niland's recommendations were broadly adopted by the NSW Parliament. In particular, the legislation that followed the release of the report – the NSW *Industrial Relations Act 1991* – provided that no awards or agreements could be made or registered unless they contained both procedures to deal with individual employee grievances and procedures to be used by employers and employees 'in connection with questions, disputes or difficulties arising under the award or enterprise agreement.'

The NSW Industrial Relations Commission was expressly empowered to deal with disputes referred to it under the terms of an award or agreement. It could also deal with individual grievances, though it had to grant leave first before dealing with any such matter. The Commission was not to deal with such disputes or grievances unless it was satisfied that any procedures in the award or agreement for their settlement had been complied with as far as was reasonably practicable in the circumstances. The Commission was to try and resolve the matter by agreement if possible, but could make a binding determination if necessary.

Particularly in the light of later developments, two features are noteworthy. First, the legislation reflected the notion that disputes/grievance procedures should be used only in relation to 'rights' disputes. Secondly, a distinction was drawn between 'grievance' procedures relating to individual employees and 'disputes' procedures relating to 'collective' matters.

The NSW *Industrial Relations Act 1991* set the pace for the introduction of enterprise bargaining in Australia. It was soon followed by changes at the Commonwealth level (following the eventual conversion of the Federal Labor Government and the Australian

Council of Trade Unions to the virtues of enterprise bargaining), which had further implications for the promotion of grievance procedures. In particular, when the Commonwealth legislation was amended in 1993 to promote an enterprise focus, it provided that certified agreements (which were generally made at an enterprise level) could not be approved unless the agreement provided for '*procedures for preventing and settling disputes between the employers and employees covered by the agreement about matters arising under the agreement*' (the new s.170MC of the *Industrial Relations Act*).

Similarly, Section 170NC of the Act provided that the newly-introduced non-union "*enterprise flexibility agreements*" could only be approved by the Australian Industrial Relations Commission if the agreement included procedures for preventing and settling disputes between the persons bound by the agreement about matters arising under the agreement.

In other words, federal enterprise agreements were now required as a matter of law to contain dispute settling procedures.

The legislation also contained a provision (s.170MH) that procedures for preventing or settling disputes in certified agreements could empower the Commission to settle disputes over the application of the agreement.

The federal industrial relations legislation was significantly recast in 1996, following the election of a Coalition government. The provisions relating to dispute-settling procedures themselves were not however greatly altered. Collective agreements still had to be certified by the Australian Industrial Relations Commission. Section 170LT (8) provided that one of the conditions for certification was that the agreement must include procedures for preventing and settling disputes between the employer and the employees whose employment would be subject to the agreement about matters arising under the agreement.

Section 170LW of the Act gave the Commission power to deal with disputes '*over the application of the agreement'.* The impact of this provision was that the Commission's jurisdiction to deal with disputes was limited only to those disputes where a clear link with a provision in the agreement could be established.

Of even greater significance, however, was the change in the overall context in which disputes procedures operated. In particular, while little restriction was made in the capacity of the Commission to conciliate any dispute referred to it, a new Section 89A significantly limited the power of the Commission to arbitrate disputes. Prior to the 1996 Act, the parties were, at least in theory, obliged – under s.99 of the Act – to take any industrial dispute to the Commission for conciliation and/or arbitration. This was irrespective of whether the dispute had been dealt with under a dispute settlement procedure or not (though the Commission had the discretion to tell the parties to 'go back' and try and resolve the matter between themselves if it felt the procedure had not been exhausted). After the 1996 Act however, if one of the parties to a dispute wanted the Commission to arbitrate the matter, it was often necessary to use the dispute settlement procedure in a certified agreement. From being (theoretically) a mechanism designed to limit access to the Commission, dispute settlement procedures were to become a mechanism to enable parties to take disputes to the Commission. Despite this, it was not until 2006 that more disputes were referred to the

Commission under the terms of a dispute settlement procedure than under s.99 of the Act (see Figure 1).

The powers given to the Commission as part of the dispute settlement procedure did not need to include the power to determine a matter finally by arbitration. This was not consistent with the approach recommended by Niland. In the United States, arbitration had traditionally been seen as the way in which the adjudicatory and due process functions of unionised grievance procedures were fulfilled. Arbitration was regarded as having the advantage of increasing perceptions of fairness and equity and promoting the acceptability of grievance decisions (Lewin & Peterson, 1988). While the failure to require arbitration as a mandatory final step in disputes procedures in Australia has been criticised (by, for example, Forsyth (2012)), it is at least arguable that compelling the inclusion of arbitration clauses in dispute settling procedures would be beyond the constitutional powers of the Australian Parliament. In *Construction, Forestry, Mining and Energy Union v The Industrial Australian Relations Commission* [2001] HCA 16, the High Court noted that a power to make a binding determination as to legal rights and liabilities arising under an award or agreement was, of its nature, judicial power. The Court noted that under the Constitution, the Commission is not allowed to exercise judicial power. Thus the Commission cannot, by an arbitrated award, require parties to submit to binding procedures for the determination of legal rights and liabilities under an award. As such determinations involve the exercise of judicial power they can only be made by a court. However, the High Court also noted that different considerations apply if the parties have agreed to submit disputes as to their legal rights and liabilities for resolution by a particular person or body and to accept the decision of that person as binding on them.

> *'Where parties agreed to submit their differences by a third party, the decision-maker does not exercise judicial power, but a power of private arbitration. Of its nature, judicial power is a power that is exercised independently of the consent of the person against whom the proceedings brought and results in a judgement or order that is binding of its own force. In the case of private arbitration, however, the arbitrator's powers depend on the agreement of the parties, usually embodied in a contract, and the arbitrator's award is not binding of its own force. Rather, its effect, if any, depends on the law which operates with respect to it.'*[3]

The High Court went on to note that the relevant provisions of the *Workplace Relations Act,* operated in conjunction with an agreed dispute resolution procedure, authorised the Commission to make decisions as to the legal rights and liabilities of the parties to the Agreement. This amounted to authorising the Commission to exercise a power of 'private arbitration'. Thus, while the Commission (or indeed any other non-judicial body or person) could arbitrate, this was only permitted where the parties have agreed to give the Commission (or other third party) this power. It was not something that could be imposed by legislation.

Forbes-Mewett et al. published a study in 2005 which drew on a series of interviews, focus groups and a questionnaire survey to analyse the views of users of the Commission's dispute resolution services under the *Workplace Relations Act 1996.* They noted that in the majority of disputes referred to the Commission the member would first try and resolve the matter

[3] [2001] HCA 16 at 31

using some form of non-arbitral dispute resolution (even where, by implication, the Commission had the power to arbitrate the matter). In a substantial minority of cases, this would lead to the dispute being resolved. Despite this preference to conciliate first, most respondents regarded the Commission's intervention as highly interventionist that is suggesting ways forward or commenting on the relative merits of each side's case. Two thirds of respondents supported this interventionist approach. This view was held particularly strongly by employer representatives and respondents with greater experience before the Commission. The authors concluded that the 'traditional form of interventionist conciliation' continued to predominate in most dispute resolution processes in the Commission because of the support of the main parties to the dispute, particularly that of employers anxious to resolve the disputes. (Forbes-Mewett, Griffin, Griffin, & McKenzie, 2005)

The attempt to promote private mediation

Consistent with what was seen as the general decline in the role of the Commission and trade unions and a growing interest in strategic HRM, there was an increased interest in the use of mediation by non-traditional actors in employment matters. For example, Van Gramberg (2006) published *Managing Workplace Conflict: Alternative Dispute Resolution in Australia* looking at the emergence of a new type of third-party dispute resolution provider whom she named *'the consultant in conflict'*.

Van Gramberg reported the results of a survey she conducted in 2001 of 550 Victorian employers from medium to large firms. Out of the 129 employers who responded, 69 (53 per cent) indicated that they had used mediation in a workplace dispute. However, just over a third (23) of these respondents was referring to mediation by one of their own HR managers. In 30 cases (43 per cent), the mediation was conducted by a lawyer or a representative from an employer association or a trade union. In a few cases, ex-tribunal members had been used. Small numbers had used psychologists or consultants with management backgrounds. In a separate survey she conducted of ADR practitioners, van Gramberg found that most believed that there had been a growth in workplace ADR since 1996. Very few ADR practitioners appeared to spend more than 20 per cent of their time dealing with employment-related disputes. When they did the main form of ADR they used appears to have been mediation.

Between 1999 and 2001, Van Gramberg also undertook an analysis of 2000 dispute resolution clauses in enterprise agreements, specifically to determine the extent to which private alternative dispute resolution consultants were included in workplace policy. She found that the insertion of a mediator/facilitator step in the dispute resolution procedure occurred in 4.9 per cent of agreements in 1999, increasing to 9.9 per cent of agreements by 2001. The inclusion of private arbitrators also increased from 1.5 per cent in 1999 to 2.4 per cent in 2001. Van Gramberg commented:

> *'Taken together, this represents a growth in private ADR (facilitative, advisory and determinative) from 6.4 per cent (64 cases) to 12.3 per cent (123 cases). Although ADR represents a minority of dispute resolution clauses in federal enterprise agreements, there has been slightly more than a twofold growth in the use of mediators and private arbitrators have increased by nearly two-thirds.'* (p. 95)

Van Gramberg found that ADR in Australia was applied almost exclusively to what she described as 'interest disputes' such as personality conflicts, disciplinary matters and facilitating enterprise negotiations, in contrasting with disputes with an issue of interpreting legal rights and obligations.

She listed the key reasons normally given for choosing private ADR (in this context, the use of private consultants rather than traditional tribunal-based processes) as: cost-effectiveness; the belief that it assisted in the ongoing relationships of disputants; that by having greater control over their disputes, disputants would be more committed to the outcomes of the dispute, that the proceedings were private and because of the failings of the formal legal system.

Van Gramberg described ADR as the dispute resolution tool of choice in an HRM regime. With its emphasis on disputants sharing a problem rather than taking sides on the dispute, the tool could, in her view, be seen as both an HRM initiative and as a means of individualising the dispute (thus avoiding precedent or uniform standards).

While van Gramberg's research is useful in highlighting some of the issues raised by the use of ADR in Australian workplaces, it must be seen in its proper context. As van Gramberg's data indicates, the use of non-tribunal third parties to resolve workplace disputes remains quite rare in Australia.

Shortly after the passage of the 1996 legislation, the federal government became active in promoting non tribunal-based mediation, commencing with the release of a discussion paper entitled '*Approaches to Dispute Resolution: A Role for Mediation?*' (Reith, 1998).

This paper acknowledged a continuing role for third parties in resolving workplace disputes but suggested a greater emphasis on mediation. This was seen as consistent with the progressive development of a less centralised, less structured and more varied system that would offer other parties more choice to develop their own workplace arrangements and culture. It drew a distinction between mediation – at least in its pure form, in which a third party works systematically through the issues, helps the parties identify possible solutions and facilitates final agreement – and conciliation, where the third party would also advise the parties on the matters in dispute, its resolution, likely settlement terms and likelihood of success at the next stage (if any).

While the paper acknowledged that some mediation took place within the Commission's conciliation processes, and discussed the option of encouraging the Commission to make greater use of mediation, the main focus was on promoting alternative dispute resolution processes outside the Commission structure. The paper was critical of the way in which the Commission operated. It referred in particular to concerns that commission hearings were held at unsuitable times, its proceedings and documentation were too formal, and legal representation was seen as essential to participate in the process.

Work Choices

The promotion of mediation outside the aegis of the industrial tribunal received legislative recognition with the passage of the *Workplace Relations (Work Choices) Amendment Act*

2005 (Work Choices), which took effect in March 2006. The overall thrust of the legislation was, *inter alia*, to reduce the role of the Commission and trade unions. However, it retained the provision that collective workplace agreements had to contain procedures for dealing with disputes arising under those agreements.

The parties to agreements had the option of developing their own procedures or using a model dispute settlement procedure provided in the legislation. Where an agreement was silent in relation to dispute settlement procedures, the dispute settlement procedure in the Act would be *'read into'* the agreement.

While the legislation required agreements to contain procedures to deal with disputes about matters arising under the agreement, it left it to the parties to decide whether their procedure should cover a wider range of disputes.

The first step in the model dispute resolution process was that the parties had to genuinely attempt to resolve the dispute at the workplace level. The explanatory memorandum to the legislation indicated that the objective was to try and resolve issues through consensus at an early stage, which would '*reduce costs, increase productivity and build better working relationships*.'

Thus the goals of cost reduction, increased productivity and better working relationships had replaced the goals referred to by Niland and Hancock, namely equity, minimising industrial disputation and encouraging the parties to accept responsibility for their own industrial relations.

If the parties could not resolve the issue at the workplace level, any party to the dispute could elect to refer the matter to an '*alternative dispute resolution process.'* An '*alternative dispute resolution process'* was one involving the parties seeking '*expert outside assistance to try to resolve their dispute.*' The alternative dispute resolution process was to be conducted by a person agreed to jointly by the parties in dispute and the parties had to make genuine attempts to resolve the dispute using that process. The Work Choices legislation provided that if the employer and the employee could not agree on who would provide the assistance under the alternative dispute resolution process, either party could notify the Industrial Registrar, a statutory official appointed under the Act. The Industrial Registrar was then required to provide all parties with information about the types of alternative dispute resolution services available. After the Industrial Registrar had provided this information, there would be a consideration period of 14 days to provide the parties with another opportunity to reach agreement about using an alternative dispute resolution process, including who should conduct that process. If at the expiry of the consideration period no agreement had been reached, either party to the dispute could lodge an application with the Commission to conduct the alternative dispute resolution process.

In practice, little use was made of this process. An examination of the Commission's records showed that between the time Work Choices came into force in 2006 and the date the relevant provisions were repealed in 2009, only 32 notifications were made to the Industrial Registrar that the parties had been unable to agree on an alternative dispute resolution process provider.

Work Choices provided that the Commission's powers to deal with disputes were essentially no more and no less than those given it by the parties to the enterprise agreement. The

Commission was required to conduct its proceedings in private (unless the parties agreed otherwise) and it was prohibited from publishing transcripts or decisions with respect to disputes conducted under a dispute resolution procedure, unless it had the consent of the parties.

The legislation was supported by the establishment in April 2006 of the Alternative Dispute Resolution Scheme. This scheme, administered by the then Department of Employment and Workplace Relations, was designed '*to facilitate genuine choice in dispute resolution*'. It provided financial assistance to eligible employers and employees choosing to use private alternative dispute resolution options other than the Commission. Under the scheme, eligible parties could receive up to $1500 of government assistance towards the cost of private alternative dispute resolution services. To ensure access to the scheme for parties in regional and remote areas, an additional $500 was available to meet reasonable travel expenses for alternative dispute resolution providers travelling to such areas to provide services. A panel of legal practitioners was also established under the scheme. Originally $1.874 million was set aside for the scheme, but by 30 June 2007 not a single application had been received (Department of Employment and Workplace Relations, 2007).

The evidence is that the Work Choices legislation did little to encourage the use of private mediators, rather than the Commission, to resolve workplace disputes. In addition to the complete failure of the Alternative Dispute Resolution Scheme, far from leading to less reliance on the Commission to resolve disputes, the number of disputes notified to the Commission under dispute settling procedures in an enterprise agreement rose nearly 20 per cent, from 956 in 2005–06 to 1142 in 2006–07, in the first full year of Work Choices (Australian Industrial Relations Commission, 2007). While this was partly a result of the abolition of s.99 of the Act, which had previously operated as a general catch-all provision allowing disputes to be referred to the Commission (at least for conciliation), it could also be seen as evidence of '*a continuing strong preference for the AIRC as a dispute resolution service provider in collective agreements.*' (Australian Industrial Relations Commission, 2007, p. 9)

Forsyth has noted that the strong reputation and (generally) efficient operation of federal and state industrial and anti-discrimination tribunals had limited the conditions for growth of ADR. He did, however, note anecdotal reports of an increasing propensity of employers to use workplace mediation, particularly for '*employee on employee*' conflicts. (Forsyth, 2012)

Chapter Four: Research methods

The research was initially focused on ascertaining the extent to which large Australian organisations are – consistent with the policy first enunciated in the Hancock Report – using dispute settlement procedures (DSPs) to resolve disputes successfully without the need for recourse to an industrial tribunal. However, because of the almost complete absence of previous research in the area, an open-minded approach was taken to allow additional research questions to emerge as data was collected. The aim was to build an empirical foundation that would enable the generation of such research questions.

A major focus of the research involved a number of case studies. Case studies were considered appropriate because answers to 'how' and 'why' questions were required, including how organisations and their employees made use of DSPs, and why one approach to workplace dispute settlement was adopted rather than another (Yin, 2003, p. 6). Case studies are a particularly good method to use in an area such as this which has previously been under-researched. Moreover, a study of contemporary practices (ruling out a purely historical method) was required, while at the same time having no scope to manipulate behaviour (i.e., ruling out an experimental approach).

While the initial focus of the research was on DSPs in enterprise agreements, it became clear early in the process of data collection that each of the case study organisations had adopted a 'dual system' of workplace dispute resolution. As well as DSPs, each organisation had implemented its own internal grievance procedures and had given them the status of organisational policies. The 'open-minded' approach allowed the consequences of this finding to be more fully explored than if the original research questions concerning the use and effectiveness of DSPs had been rigidly adhered to.

The research began with a historical overview of the development of the policy and legal framework. This was relatively straightforward and focussed on studying the key government reports in the 1980s that led to the introduction of legislation promoting the use of workplace dispute resolution procedures, and then tracing the relevant legislative developments since then. Other published material was also examined, including the results of the two AWIRS studies (Callus, Morehead, Cully, & Buchanan, 1991) (Morehead, Steele, Alexander, Stephen, & Duffin, 1997)

To gain more contemporary insight into the types of dispute settlement procedures contained in enterprise agreements an analysis was conducted of 100 randomly chosen agreements approved by Fair Work Australia in the first half of 2011. Using enterprise agreements published on Fair Work Australia's website, the survey focussed on what types of provisions the parties to the agreements had chosen to include in their DSPs. It was found that a sample of 100 agreements was sufficient to identify the main types of provisions that were used in agreements. Indeed it was found that there were only a few significant differences between different DSPs.

Tribunal records concerning disputes that had been referred to Fair Work Australia under the terms of a DSP in the 12 months to June 2011 were also examined. This involved an analysis of the Fair Work Commission's internal case management database, CMS+. While the public

website does not provide access to this database, most of the material on the website is accessible (with permission) to the public. The database allowed an analysis of the identity of applicants (i.e. unions, employers or individual employees) and whether employees were represented or not. The exercise was repeated for all dispute applications made in the 12 months to June 2013 to identify whether any trends had emerged over the period.

CMS+ was also used to measure trends in dispute applications made to the tribunal over the previous decade. A combination of information on applications, derived from CMS+, and information from the tribunal's public website was also used to analyse the proportion of applications that were resolved by conciliation, as opposed to arbitration. CMS+ was additionally used to identify the number of dispute applications that concerned particular employers (e.g., to determine who were the heaviest users of the Commission's dispute resolution services.)

Further information on how the Commission dealt with disputes was obtained from a series of semi-structured interviews with three experienced Commissioners.

The questions used in these interviews are set out in Table 1.

TABLE 1: QUESTIONS FOR MEMBERS OF FAIR WORK COMMISSION

1. Can you outline the last three disputes you dealt with that had been referred to the Fair Work Commission under s.739 of the Fair Work Act?
2. Who were the parties to the dispute?
3. Had you dealt with the parties previously?
4. What was the dispute about?
5. How did you seek to resolve the dispute (including whether it was by conciliation and/or arbitration; was it face-to-face, telephone, 'on the papers' etc; what sort of 'strategy' did you use)?
6. If it was conciliation, did you provide any form of evaluation of the issues during the proceedings?
7. Was the dispute resolved?
8. Were there any broader implications of the resolution process for the parties (for example, do you think it led to changes beyond the specific issue in dispute)?
9. Are there ways you think the Fair Work Commission could improve the way it conducts its dispute resolution role?

The questions are reasonably self-explanatory. They were used to identify the types of strategies the Commission adopts in dealing with disputes, for example conciliation versus arbitration, and 'evaluative' versus 'facilitative' conciliation. The answers to the questions also give some indication whether Commissioners see their role as extending beyond dealing with the immediate dispute that has been referred to them, and whether they vary their approach depending on the parties they are dealing with.

While consideration was given to the more extensive use of surveys (for example, by surveying HR managers in organisations directly), it was decided not to pursue this approach as it could have led to a premature 'closing off' of the relevant questions. The use of semi-structured interviews as part of a series of case studies allowed new 'conceptual categories' to emerge as data was collected, thus allowing new lines of enquiry to be pursued. (Glaser & Strauss, 1967) (Glaser, 1998). At a practical level, terminology varied from organisation to organisation; for example, terms such as 'grievance' and 'dispute settlement procedures' may have been used interchangeably) and different organisations had varying capacities to answer certain questions (for example, some organisations had much better databases than others). Unless fully understood, such complications could have seriously undermined the validity of any survey results. It is hoped that the case study findings of this research will assist in the development of future survey work in this area.

Seven case studies were completed. In choosing which organisations to study, both theoretical and practical considerations were taken into account. The sample was restricted to larger organisations, that is, those with more than 1000 employees, as these were found to be more likely to have formal human resource management procedures and enterprise agreements (Morehead, 1997). From a practical point of view, it was also decided to study only organisations whose head office was in Sydney, making it easy to access senior managerial staff. Based on the researcher's professional experience, any significant difference in the experience of large organisations whose head office was located elsewhere in Australia was considered unlikely. The researcher also chose organisations with which extensive dealings in a professional capacity also were unlikely, thereby minimising the scope for any perceived conflict of interest. In particular, none of the organisations were in industries dealt with by the FWC panel of which the researcher was and is a member.

From a theoretical perspective, there were good *prima facie* reasons to believe that the approach to employment relations might vary significantly depending on the sector to which the employer belonged. Accordingly, the sample included three private sector organisations, three public sector organisations and one not-for-profit organisation. Within each sector, individual organisations were selected from different industries. Thus, the private sector organisations were from finance, manufacturing and retail; the public sector organisations were from higher education, public transport and broadcasting, and the not-for-profit organisation was a large charity that also delivered community services funded by government.

No organisation that was approached refused to participate (though as noted below one union declined a request for an interview). The organisations were not selected based on any prior knowledge of their human resources practices, and there are no grounds for believing that they were any more or less likely to represent 'best practice' (or for that matter 'worst practice') than any other organisation that could have been asked to participate in the study.

The research for each case study consisted of at least one interview with the senior manager responsible for dispute resolution and grievance handling within the organisation, an examination of relevant documentation (in particular, copies of relevant procedures and policies) and, where appropriate, interviews with the union officials responsible for the organisation in question. More details about the interviewees are provided in Chapter Six.

All interviews were conducted in late 2009 and were all in response to requests made by telephone and email. Interviewees were guaranteed anonymity both for themselves and their organisations. All the interviewees were aware of the researcher's professional role, and in one or two cases had had limited professional dealings with him. There was no evidence that this in any way constrained their approach to the interviews; to the contrary, it may have made them more enthusiastic to share their experience and views. It may also have given them confidence that the researcher had a good general understanding of the issues involved in dispute resolution and grievance handling (beyond someone who was 'only' a PhD student). In all cases bar one, requests for interview were accepted. In two cases, the interviewees suggested the researcher speak to other managers who had a role in workplace dispute resolution, and all such suggestions were taken up. All interviewees were given a list of questions at the time the interview was requested (see Tables 2 and 3). The interviews were approved by the Human Research Ethics Committee of Macquarie University.

TABLE 2: QUESTIONS FOR MANAGERS

1. What procedures, if any, are used to process grievances or disputes?
2. How many grievances have been filed during the last 12 months?
3. Are the parties normally represented during the process?
4. Has any evaluation (formal or informal) been conducted of the costs and benefits of your grievance or dispute settling procedure?
5. Is there any formal documentation of grievances or disputes?
6. At what stage of the process do grievances or disputes usually get resolved?
7. Have you had experience with external or internal mediators?
8. What is the attitude of senior and line management to the grievance or dispute settling procedure?
9. What is the view of the union to the procedure?
10. What impact (if any) do you think formal grievances have on the workplace?
11. What is the overall industrial relations climate like within your organisation?
12. Can you outline the main features of your workforce (e.g. numbers, types of employees, industrial coverage etc.)?
13. Are grievances more common in certain parts of the workforce?
14. Are you aware of any relevant trends over time?

The questions for managers were primarily designed to elucidate information about what workplace dispute procedures existed at their organisation, how such procedures are used, and more general information about the organisation's industrial relations climate and workforce characteristics. In practice, the interviews also allowed an understanding to emerge of management's general approach to workplace dispute resolution, and how that approach fitted within its broader HR and business strategies.

The questions for union officials were designed to provide some level of confirmation about issues such as industrial relations climate, to provide information about union membership etc. and to gain a better understanding of the role that unions play with regard to workplace dispute resolution procedures in the case study organisations.

TABLE 3: QUESTIONS FOR UNION OFFICIALS

1. Can you outline the main features of your membership (e.g. numbers, types of employees, etc.)?
2. What is the overall industrial relations climate like?
3. Does your organisation represent members in relation to the both the grievance and disputes procedures?
4. Who performs this representational role?
5. Do you provide training to the relevant representatives concerning their role in relation to dispute and grievance handling?
6. What sort of liaison is there between workplace representatives and full time officials in relation to grievances and disputes?
7. How many grievances/disputes would your organisation be involved with over a typical 12-month period?
8. Are grievances/disputes more common in certain parts of the membership?
9. At what stage of the process does your organisation usually get involved?
10. What experience have you had with external or internal mediators, or other forms of dispute resolution (e.g. arbitration)?
11. What is the attitude of union members and officials to the grievance or dispute settling procedure?
12. Do you think there are improvements that could be made in the way grievances and/or disputes are handled?
13. What impact (if any) do you think formal grievances have on the workplace?
14. How do you think grievance handling/dispute resolution compares to other organisations with which you are familiar?
15. Are you aware of any relevant trends in disputes or grievances over time?

The interviews were 'semi-structured', in that while interviewees were asked all the questions that had been listed, they were encouraged to expand on their answers and provide more general comments. Follow up questions were also asked. Interviews were recorded and transcribed (with the consent of the interviewees) and generally took around one to one and a half hours.

Only one request for interview was refused, by the union official with primary dealings with the manufacturer. No reason was given, and the request was not pressed. All the interviews that took place were conducted in a friendly atmosphere, with interviewees keen to share their experiences.

Where possible, CMS+ was also examined to assess how many disputes had been referred to the Fair Work Commission under the auspices of the organisation's DSP. This could be done for all the organisations, except the one that operated in the state jurisdiction.

The case studies led to the identification of two broad approaches to workplace dispute resolution, provisionally labelled 'strategic' and 'passive'. The intention was to test these concepts by conducting surveys of employees in two organisations with differing approaches.

Researchers in the US have noted the difficulty in obtaining comprehensive data about workplace conflict management systems (Lipsky, Seeber, & Fincher, 2003). They reported that very few organisations were willing to reveal such statistics as the number of conflicts,

type of conflicts, time to resolve conflicts, and the ultimate process of resolution, treating ‘these kinds of data as an internal secret, to be discussed, only behind closed doors with very trusted advisers’ (Lipsky, Seeber, & Fincher, 2003, p. 273).

This was not generally experienced during this research, at least with regards to the interview process. Organisations were generally willing to share data (where this was available) and provide access to formal procedures for workplace dispute resolution. However, such concerns did play a role in relation to the proposed employee surveys. While there was no difficulty in obtaining consent to such a survey by one of the organisations (the Bank) with a ‘strategic’ approach, the two organisations contacted that had a ‘reactive’ approach declined to give their consent, effectively preventing the surveys from being conducted. One explicitly expressed its concern that the topic was ‘too sensitive’. It was decided that the third organisation with a ‘reactive’ approach would be even less likely to grant permission and it was not contacted.

The survey of the Bank’s employees was conducted online via ‘Survey Monkey’, using 1,000 employee email addresses selected at random and provided by the Bank. Each employee received an email, with Macquarie University branding, directly from the author. The email invited the employees to take part in a short survey about how the Bank dealt with employee grievances. They were told responses would be anonymous and strictly confidential, their responses would not be provided to the Bank and they were also told the Bank had given its approval and encouraged their participation.

Demographic questions were asked to identify the employee’s job classification level, gender and length of service with the Bank. Employees were then asked whether they strongly agreed, agreed, disagreed or strongly disagreed with the propositions outlined in the statements set out in Table 4.

TABLE 4: SURVEY QUESTIONS FOR BANK EMPLOYEES

1. My manager generally gives me a fair hearing if I have a concern about a matter relating to my employment.
2. The Bank generally gives a fair hearing to its employees who have a concern about a matter relating to their employment.
3. If I had a concern about a matter relating to my employment I would generally feel comfortable raising it with my manager.
4. If my manager could not resolve the issue (or the issue related to my manager) I would generally feel comfortable raising it with my manager one removed.
5. If my manager one removed could not resolve the issue I would generally feel comfortable raising it with my manager twice removed.
6. If I had a concern at work about how I was being treated at work I would be comfortable seeking assistance from Human Resources.
7. If I had a concern at work that I could not resolve in formally I would seriously consider making a formal complaint.
8. I am aware of the Bank's Fair Treatment Review Process.
9. I am aware of the dispute settlement procedure in the Bank's enterprise agreement.
10. I would be comfortable seeking an Out of Line Review under the Fair Treatment Review process (that is having the matter looked at by a manager from outside my own work area) if my line managers were unable to resolve a significant concern I had about the following kinds of issues:
    a. pay or conditions
    b. disciplinary action
    c. promotion
    d. harassment or bullying by a manager. and
    e. harassment or bullying by a co-worker.

The response rate was around 15 per cent. The respondents broadly reflected the Bank's work force when considered by classification level, gender and length of service. More details are provided in Appendix B.

The conduct of the survey was separately approved by the University's Human Research Ethics Committee.

The case studies were used to develop a typology. The theory underlying the use of typologies was first systematically developed by Max Weber. Weber sought to develop systems of concepts of universal scope that did not involve 'value judgements', but did have regard to 'value relationships'. This involved the use of 'ideal types'. This has nothing to do with evaluations of any sort. Rather it allows different phenomena to be grouped through the identification of common features. This then allows for comparative analysis. (Gerth & Wright Mills, 1948) The most famous example of Weber's use of ideal types was his theory of the 'three pure types of legitimate domination': legal, traditional and charismatic. The use

of typologies such as this was designed to bring out certain features that are of most relevance seen from a broader perspective. (Mommsen, 1974).

In a similar way, while each of the case studies were different, certain features, which are important from a theoretical perspective, allowed each of the case studies to be grouped in one of three categories.

Chapter Five: Workplace dispute resolution in Australia under the Fair Work Act

The Fair Work Act

Following the election of a Labor Government in 2007, the Work Choices legislation was repealed and replaced by the *Fair Work Act 2009*. While in some respects the *Fair Work Act* took a very different approach to that of Work Choices, it does retain many features of that legislation, including some of those relating to dispute settlement. In particular the *Fair Work Act 2009* did not reintroduce any general capacity for the Commission to conciliate or arbitrate disputes.

The industrial tribunal (renamed initially Fair Work Australia [FWA] and then, from 2013, the Fair Work Commission, FWC) must approve all enterprise agreements before they can become legally enforceable. Under s.186 of the *Fair Work Act* before the tribunal can approve an enterprise agreement it must be satisfied that the agreement contains a term:

> *'(a) that provides a procedure that requires or allows FWA, or another person who is independent of the employers, employees or employee organisations covered by the agreement, to settle disputes:*
>
> *(i) about any matters arising under the agreement; and*
>
> *(ii) in relation to the National Employment Standards; and*
>
> *(b) that allows for the representation of employees covered by the agreement for the purposes of that procedure.'*[4]

The procedure must allow for disputes which cannot be resolved at the workplace level to go to an independent person (or organisation). However that person or organisation need not be the industrial tribunal. In other words the only constraint on using private mediation or arbitration as a final step is that the mediator or arbitrator must be independent of the employers, employees or unions covered by the agreement. (While this has not been judicially considered, it might, for instance, rule out the mediator/arbitrator being funded exclusively by the employer.)

Awards (now known as 'modern awards') must also contain dispute settlement procedures, although there is no capacity under procedures in awards for the tribunal to arbitrate unless both parties agree.

Sections 739 and 740 of the *Fair Work Act* deal with the powers that can be exercised by the tribunal (or other independent person) under a dispute settlement procedure. These sections make clear that the tribunal (or other person) can only exercise those powers provided by the procedure. Moreover, the tribunal cannot make a decision that is inconsistent with either the

[4] (The National Employment Standards are statutory minimum conditions of employment.)

Fair Work Act or the enterprise agreement. Finally, the tribunal can only deal with a dispute under the procedure on application by a party to the dispute.

A Full Bench of the Commission confirmed in *Woolworths Ltd trading as Produce and Recycling Distribution Centre* [2010] FWAFB 1464 that the independent person – whether the tribunal or someone else – does not necessarily have to have the capacity, even as a final step, to arbitrate the dispute. It is up to the parties to the agreement to decide whether to include scope for arbitration. This is despite the Act banning all industrial action about disputes arising during the term of an enterprise agreement (see s.417 of the *Fair Work Act).* It will be recalled that Niland specifically linked the logic of banning such action to the ability to take rights disputes to arbitration.

Forsyth (2012, p. 481) considered the general effectiveness of the dispute resolution system under the Fair Work Act 2009. He found that FWA (as the federal industrial tribunal was named at the time he wrote his article) rated highly on measures of accessibility/cost, informality, speed/efficiency, expertise, independence/impartiality, fairness and as an agent of 'social change'. For most matters, using FWA's dispute resolution services cost the parties nothing; nor was the system marred by excessive legalism (unlike in the US). Once the parties notified FWA of a dispute, depending on the urgency of the matter, it was listed for a conference or hearing fairly quickly; the provisions for appointing FWA members ensured that they had the necessary skills and experience to resolve employment and industrial relations disputes, and provisions under the Act ensured that members acted impartially. FWA applied procedural fairness and, as a body operating in the public sphere, could act to redress injustice and promote harmony more broadly.

Forsyth was critical of the lack of any obligation for dispute settlement procedures in enterprise agreements to provide for the final arbitration of disputes. He was critical on the grounds that effective dispute resolution must have an end point and agreement clauses that provide for arbitration as an option, or do not provide for it at all, may result in some disputes never being resolved. Nor, in his opinion, was the lack of a requirement to have arbitration as a final step consistent with one of the key overarching objectives of the *Fair Work Act*, namely, to provide '*accessible and effective procedures to resolve grievances and disputes.*' (Section 3(e))

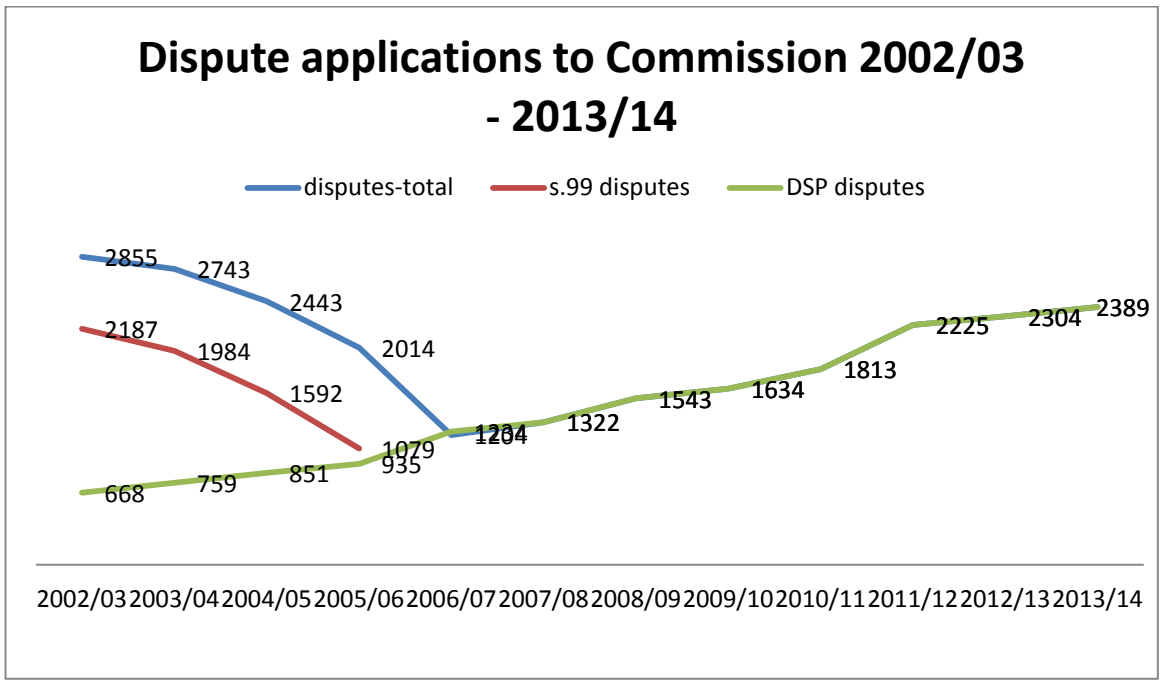
However, Forsyth did not consider whether a provision that made it mandatory for all dispute resolution procedures in enterprise agreements to provide for arbitration would be consistent with the reasoning of the High Court in *CFMEU v AIRC.* It could at least be arguable that mandatory arbitration would not amount to '*private arbitration'* and could be seen as an impermissible exercise of judicial power.

Forsyth concluded that the Australian system of workplace conflict resolution met international standards of best practice. He did, however, lament its failure to give FWA an expansive capacity to prevent disputes, along the lines of the Advisory, Conciliation and Arbitration Service (Acas) in the UK, Ireland's Labour Relations Commission and the Federal Mediation and Conciliation Services of Canada and the USA. In his view, greater attention to dispute prevention would enhance the prospect of achieving the goal of achieving more cooperative and productive workplaces (Forsyth, 2012).

Trends in the number of dispute applications to the Commission

The author examined the Fair Work Commission's case management database (Fair Work Commission, 2013) to identify trends in the number of disputes referred to the tribunal over the course of the last 11 years. The results are presented in Figure 1.

FIGURE 1



DSP disputes are those referred to the Fair Work Commission or its predecessors under the terms of a dispute settlement procedure in an award or (much more commonly) an enterprise agreement. (It is notable that in a survey conducted by the author of all dispute applications made to the Commission from January to April 2011, 94 per cent were made under DSPs in an enterprise agreement compared to only 6 per cent made pursuant to a procedure in an award.)

Figure 1 shows a steady increase in the number of disputes referred to the Commission under the terms of DSPs over the last 10 years, growing steadily from 668 in the financial year 2002/03 to 2389 in the financial year 2013/14. However, it also shows that until its abolition under the Work Choices legislation, more disputes were referred under the Commission's general conciliation and arbitration power than under the terms of a DSP. The overall pattern (taking into account disputes referred under s.99) is that the total number of disputes referred to the Commission fell quite dramatically over the first part of the decade – from 2855 in 2002/03 to 1204 in 2006/07 – and then gradually picked up to 2389 in 2013/14. Interestingly, the fall seems to have occurred under *the Workplace Relations Act* prior to the introduction of Work Choices (as the usage of s.99 fell), to have started to reverse from the first full year of the Work Choices legislation, and to have continued to climb with the introduction of the *Fair Work Act*. However, the number of disputes referred to the Commission has still not returned to the level of the early 2000s. Moreover, there is some evidence that the growth is beginning to level off.

Dispute settling procedures in enterprise agreements

The author analysed 100 randomly selected enterprise agreements registered by FWA in the first half of 2011 to assess what types of DSPs the parties had agreed to. As previously noted, the legislation gives the parties considerable scope to determine the identity of any independent third party involved in resolving disputes, as well as the powers granted to that third party.

It should be noted that under the *Fair Work Act*, if one or more unions represents employees in the negotiation process, they can apply to be '*covered'* by the agreement. Of the agreements in the sample, 75 per cent were '*union*' agreements (that is, one or more unions was covered by them), while 25 per cent were '*non-union'* agreements (with no union covered).

All the DSPs in the sample – whether union or non-union – provided, as a first step, that disputes should if possible be resolved by direct discussion between the employee or employees involved (or their representatives) and management.

Virtually all the procedures provided a role for the Commission (known at that time as Fair Work Australia (FWA)). Seventy two per cent of agreements (71 per cent of union agreements, and 76 per cent of non-union agreements) conformed to a fairly standard model whereby disputes that could not be resolved by discussion at the workplace level could be referred to FWA for conciliation, with arbitration by FWA if conciliation was unsuccessful. A further 12 per cent of agreements provided for disputes to be arbitrated by FWA if conciliation was unsuccessful, but only if both parties agreed at the time. Five per cent of agreements provided for disputes to be referred to FWA but empowered FWA only to conciliate. A small number of union agreements in the building industry in Victoria provided for disputes to be referred to the Victorian Industry Disputes Panel, a dispute resolution body set up by unions and employers in that industry. However, under the procedure, any decisions of that panel could be '*reviewed*' by FWA. A very small number of agreements provided for referral of disputes to a mutually-agreed third person (without specifying the person in the procedure).

None of the agreements analysed made provision for final binding arbitration by any person or body other than FWA. This is further evidence that where the parties to enterprise agreements have to choose an independent third party to resolve their industrial disputes, the overwhelming preference is for the Commission.

Half the agreements in the sample allowed the procedure to be used only for disputes about the agreement itself, or the National Employment Standards (NES). The other half allowed the procedure to be used for a wider range of matters. This could be expressed in a variety of ways, for example, '*any grievance, industrial dispute or matter likely to create a dispute which pertains to the relationship between the employer and any of the employees'* or '*all grievances or disputes between the employee and the employer in respect to any industrial matter*'.

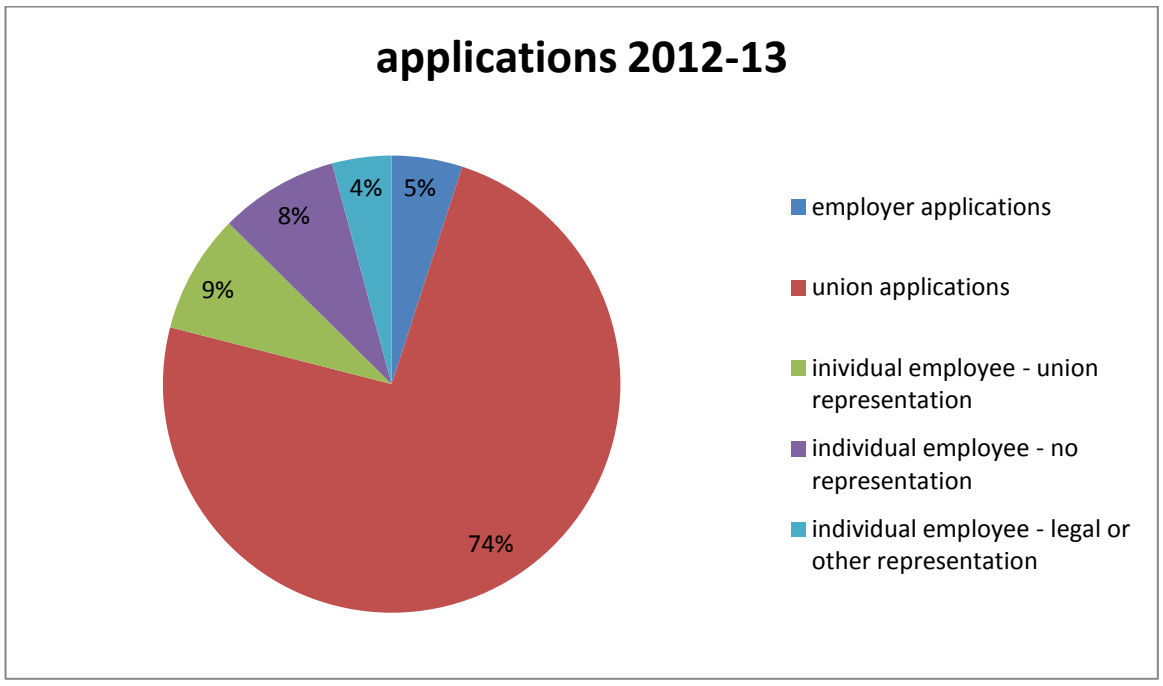
The majority of union agreements (61 per cent) contained procedures that could deal with disputes beyond the agreement and the NES. By contrast this was true of only 27 per cent of non-union agreements.

Who makes dispute applications?

The author also analysed all the dispute applications made to the Commission under s.739 during January – April 2011 were examined. Of these, 82 per cent were filed by unions, 5 per cent by individual employees with union representation, 3 per cent by employees with legal representation and 6 per cent by employees without representation. Only 4 per cent of dispute applications in this sample were made by employers.

The exercise was repeated for all dispute applications made under s.739 in the year 1 July 2012 – 30 June 2013. The pattern was broadly similar, though the number of applications lodged by individual employees (as opposed by unions) had grown from 14 per cent to 21 per cent. In 40 per cent of these cases, however, the employee was still represented by a union. A similar proportion was unrepresented, and the remainder were represented by a lawyer, a friend, relative or consultant. The results of the most recent survey are presented in Figure 2.

FIGURE 2



Which employers have disputes dealt with by the Commission?

The author also examined the applications made in the 2012/13 financial year to identify the employer with the highest number of dispute applications, whether made by a union, the employer or an individual employee. Table 5 lists the names of all the employers that had 10 or more disputes referred to the Commission in 2012 – 13, the number of disputes referred, the number of employees in each organisation, the number of applications per 100 employees,

and the industry of the organisation. (The figures on the number of employees must be treated with some caution as these figures were not always readily available and in some cases reliance had to be placed on secondary sources.) While it is not included in the table, almost all the employers had a similar pattern where the great majority of applications were made by a union. The only exceptions were Southern Health (now called Monash Health) and Melbourne Health, where most applications were from individual employees, and the Victorian Country Fire Authority, where the majority of applications were made by the employer. For the purposes of comparison, the number of applications per 100 employees in the total labour force in 2012/13 was around 0.025.[5] Thus an average rate of dispute application to the Commission in 2012/13 would have been 0.025 per 100 employees.

TABLE 5

Organisation	**Disputes**	**Industry**	**Number of employees**	**Applications per 100 employees**
Victoria Police	31	public administration and safety	17,000	0.18
Victorian Department of Human Services	26	public administration and safety	8800	0.3
Serco	23	public administration and safety; transport	5,000	0.46
BlueScope Steel	23	manufacturing	7,000	0.32
Linfox	22	transport, postal and warehousing	8,000	0.28
RailCorp	20	transport, postal and warehousing	15,000	0.13
Qantas	20	transport, postal and warehousing	30,000	0.07
Thiess	20	construction	17,000	0.18
Australia Post	18	transport, postal and warehousing	33,000	0.05
McCain Foods	18	manufacturing	1200	1.5
BHP Billiton	17	mining	19,000	0.09
Transfield	16	construction	9,000	0.18
Aurizon	16	transport, postal and warehousing	9,000	0.18

[5] In May 2014 there were 9,898,900 employees in Australia according to ABS 6306.0 Employee Earnings and Hours. I have reduced this figure by 10% to take account of employees not covered by the *Fair Work Act 2009*.

Victorian Metropolitan Fire and Emergency Services Board	15	public administration and safety	1700	0.88
DP World	15	transport, postal and warehousing	2000	0.75
Veolia	14	transport, postal and warehousing; electricity, gas, water and waste services	7,000	0.2
Southern Health/Monash Health	13	health care and social assistance	9,500	0.14
Melbourne Health	13	health care and social assistance	6,000	0.21
Eastern Health	13	health care and social assistance	8,500	0.15
Woolworths	13	retail trade	190,000	0.01
Essential Energy	13	electricity, gas, water and waste services	4,000	0.32
Ambulance Victoria	12	health care and social assistance	3,500	0.34
Toyota	12	manufacturing	4,500	0.27
Toll	12	transport, postal and warehousing	20,000	0.06
Country Fire Authority	11	public administration and safety	2200	0.5
Laing O'Rourke	11	construction	5000	0.22
Australian Taxation Office	11	public administration and safety	25000	0.04
Ergon Energy	11	electricity, gas, water and waste services	5000	0.22
GM Holden	10	manufacturing	4500	0.22
Coles	10	retail	94,000	0.01

The most obvious point to emerge from examining these 'heavy users' of the Commission's services is that they are concentrated in a relatively small number of industries. Fifty per cent

are in the two industries of transport, postal and warehousing, and public administration and public safety. This is despite these two industries accounting respectively for only 5 per cent and 6 per cent of the labour force as a whole. The other industry that is clearly 'over-represented' in this list is electricity, gas, water and waste services, with three employers in this top 30, even though this industry accounts for just over 1 per cent of the total labour force. In general, most of the organisations on the list are large employers (though the metropolitan fire and emergency services board employs only 1700 fire fighters and DP World has 2000 employees). The number of dispute applications they each have per 100 employees is 0.88 and 0.75 respectively. The employer with the highest rate of dispute applications per 100 employees was McCain Foods (at 1.5 per 100 employees). By contrast, the two retailers on the list, Coles and Woolworths, have only 0.01 dispute applications per 100 employees, a lower rate of dispute applications than the average for the Australian labour force as a whole.

To give a broader picture of which types of larger organisations do or do not use the Commission to resolve their workplace disputes, the author examined the Commission records relating to s.739 applications with regard to all the corporations that were members of the Business Council of Australia (BCA) for the financial year 1 July 2012 to 30 June 2013. The BCA is an association of the CEOs of more than 100 of Australia's leading corporations, with a combined workforce of around 1,000,000 employees. They represent a range of sectors, including mining, retail, manufacturing, infrastructure, information technology, financial services and banking, energy, professional services, transport and telecommunications. (Business Council of Australia, 2013). It is often referred to as 'Australia's top business lobby group'. While it represents most large employers in the private sector, it also includes some of Australia's biggest commercial public sector organisations (such as Australia Post and Medibank).

The records show that more than 70 per cent of BCA members had no disputes referred to the Commission under a DSP in 2012/13. Nineteen per cent had between one and five disputes referred to the Commission, 3 per cent had between six and nine disputes referred to the Commission, and only 7 per cent (nine organisations) had 10 or more (these are of course also included in the above Table 5). This reinforces the picture that even if one focuses on large organisations, the Commission's workplace dispute resolution role is mainly focussed on a relatively small subset of those organisations, particularly when one considers the private sector. (The full list is included in Appendix A).

How are disputes dealt with by the Commission?

The author examined all the Commission's arbitrated decisions (which are published on the Commission's website (Fair Work Commission, 2013)) for the financial year 2012/13. A total of 95 decisions were arbitrated in relation to disputes referred under s.739 of the *Fair Work Act*. All but four of these concerned disputes referred under DSPs in enterprise agreements (the others were referred under DSPs in awards.) There were 2304 disputes referred to the Commission in 2012/13. While the two figures are not strictly comparable (as some of the disputes arbitrated in one 12-month period would have been referred in a previous 12-month period), this suggests that only around 4 per cent of disputes referred to the Commission

ended up with an arbitrated decision. The remainder would have either been withdrawn or settled by conciliation.

This finding is noteworthy given the previous finding that most DSPs allow the Commission to arbitrate unresolved disputes. It suggests that the parties and the Commission generally prefer to resolve disputes short of arbitration. While some of the disputes not resolved by arbitration would have been withdrawn prior to their being dealt with by the Commission, it is reasonable to infer that a very large proportion of disputes are resolved in conciliation by the Commission.

Conciliation is by definition conducted 'behind closed doors' and unsurprisingly there has been little research into how it takes place. The research by Forbes-Mewett et al. referred to earlier suggests that at least under the *Workplace Relations Act 1996* conciliation conducted by the Commission was 'highly interventionist' with the Commissioner providing an assessment of each party's case and proposing possible terms of settlement (Forbes-Mewett, Griffin, Griffin, & McKenzie, 2005). It will be recalled that that research also found that most of the parties with disputes dealt with by the Commission were supportive of this interventionist approach.

There have been a number of efforts to distinguish between the concepts of 'conciliation' and 'mediation'. (Boulle, 1996) (Dewdney, 2001). However, at least in Australia, there is no generally accepted distinction, and the terms may be best used interchangeably. Both conciliation and mediation can be considered as a form of negotiation with the assistance of a neutral third-party. The key distinction is with arbitration. In conciliation/mediation the dispute is only resolved when both parties agree to the terms of settlement. Arbitration, by contrast, involves the third party imposing a solution with which one or more parties may disagree.

Whether described as conciliation or mediation, one can distinguish three broad models. Mediation/conciliation can be 'evaluative' if the mediator/conciliator gives an expert opinion on the merits of the dispute (Waldman, 1998). It can be 'facilitative' if the third party helps the parties in dispute identify and dovetail their interests (Fisher, Ury, & B, 1991) or it can be 'transformative' where the emphasis is on empowering the parties to control all aspects of the mediation. In this model the third party puts no pressure on the parties to accept a settlement, but rather helps them clarify their own interests, goals, and choices. The mediator also fosters moments of recognition in which each party reaches a better understanding or acknowledging the other's perspective (Folger & Bush, 1996). These three models of conciliation/mediation can be considered as points on a spectrum from relatively 'interventionist' (evaluative) to relatively 'non--interventionist' (facilitative and transformative).

Bingham has noted that there is limited systematic employment research comparing the effectiveness of the different mediation models in terms of participant or organisational outcomes. She does however point to a substantial and growing body of research supporting the case for mediation as compared to arbitration in the field of employment disputes. In particular mediation is seen as fairer and consistently produces high satisfaction and settlement rates among disputants, and may contribute to reduced processing time and early resolution of employment-related conflict. (Bingham L. A., 2004)

The interviews conducted with three experienced Commissioners gives a much richer understanding of the way in which the Commission deals with the dispute applications it receives, than simple statistics on the use of conciliation and/or arbitration. In each case, the author asked a series of questions about the last three disputes dealt with by each Commissioner. The interviews also gave a more detailed understanding of the types of disputes typically brought to the Commission under DSPs. The following is a summary of those interviews.

Interview with Commissioner A

Commissioner A's first dispute concerned an application by an individual employee of a financial institution. The dispute was lodged by the applicant's solicitor and the applicant was represented at the Commission proceedings by senior counsel. The employer was represented in these proceedings by its own in-house counsel, two human resource representatives and an investigator.

The dispute was in relation to a disciplinary matter, with potential for the employee to have her employment terminated.

The dispute that was brought to the Commission specifically concerned whether the investigation (which had not yet been completed) was being conducted in accordance with procedural fairness.

While the Commission had the power to deal with the dispute by conciliation, under the terms of the relevant DSP, the consent of both parties would have been required for the matter to go to arbitration. Ultimately, this issue did not arise as the matter was resolved through the conciliation process.

The conciliation conference was conducted face-to-face. There were sessions with all parties present, as well as discussions involving only the Commissioner and one of the parties.

On reviewing the material that had been sent to the employee by the employer, Commissioner A formed the view that there had been some problems with the process adopted by the investigator. She put this to the employer, who accepted her view. In particular, the Commissioner pointed out that if the employer were to make a finding based on the investigation that led to the termination of the applicant's employment, the employer would run the risk that the dismissal might be overturned in an unfair dismissal case. Commissioner A made an informal recommendation to the employer (in a private session) that the employer appoint a new investigator and ensure that the new investigator followed an appropriate process. This would set the process back only by about a week (both parties were keen to have the matter resolved quickly). The employer and the employee agreed to the recommendation. The parties then met with the Commissioner and went through any remaining concerns about the investigatory process. These were resolved between the parties, with the Commissioner essentially chairing the proceedings.

Two points to note about this case are, firstly, that even though the employer was relatively sophisticated, it still appeared to benefit from the impartial review of its investigatory process provided by the Commission.

Secondly, the Commissioner noted that it was relatively unusual, in her experience, to have a dispute brought to the Commission by an individual employee.

Commissioner A adopted an evaluative approach. She used her expertise in identifying the potential problems with the process adopted by the investigator; and she proposed a remedy. She acted however in a 'facilitative' manner in helping the parties identify and resolve any remaining issues concerning the investigation process.

The second dispute handled by Commissioner A was referred to the Commission by a union and concerned the alleged under-classification of six production employees in one particular plant. The Commissioner dealt with the matter in a face-to-face conciliation. The union was represented by an organiser, the union legal officer and two of the six individual employees. The employer was represented by a lawyer from an employer organisation, the operations manager and the human resources manager.

The Commissioner did not attempt to provide an evaluation of the issue. Rather, the matter was resolved as part of a broader dispute over the negotiation of a new enterprise agreement which itself was facilitated by Commissioner. The employer agreed to reclassify the employees and the union agreed not to pursue back pay. The Commissioner pointed out to the parties that if the matter had gone to arbitration there would have been no scope for such a compromise. Either the employees would not have succeeded in being reclassified, or they would have been reclassified and would have been entitled to a substantial amount of back pay.

The Commissioner said the plant was very highly unionised and had major disputes every three years whenever a new enterprise agreement was being negotiated. Notably, there was no personal animosity between the representatives involved in the bargaining process and the parties were very comfortable in seeking the assistance of the Commission.

In this dispute, Commissioner A took a 'facilitative' approach. Her main role was to help the parties understand the advantages to both parties of resolving the matter without going to arbitration.

Additionally, she was able to link the resolution of the specific issue to the broader dispute, which might have been difficult with a private mediator with a narrower remit.

The third dispute handled by Commissioner A was also referred by a union. The company had entered into an enterprise agreement two years earlier that for the first time provided for a review of competency standards and the classification of employees. In the industry concerned there was a well-established process for conducting such a review, involving the relevant union and employer organisation, as well as independent specialists.

While the parties had been broadly happy with the review process undertaken the union believed insufficient recognition had been given to certain competencies held by 10 employees. The dispute was notionally referred to the Commission under the disputes procedure in the award, even though the award had been incorporated into the enterprise agreement.

The union was represented by an organiser and a delegate. The employer was represented by the employer organisation, a human resources officer and a manager from the operations side of the business. The employees directly affected were not present.

Although the union was pressing for the matter to go to arbitration, the Commissioner suggested that the conciliation conference be adjourned to allow the relevant expert from the union (who was not present at the proceedings) to speak to the relevant official from the employer organisation. She indicated that in her view there seemed to be '*a slightly disjointed version of what these competencies might involve*'. As it turned out, that did resolve part of the issue; there had been a misunderstanding on the part of the union about the position of the employer. The remaining issue was resolved when the employer agreed that the relevant employees should receive some additional training and would then have their positions reclassified – as long as they passed the relevant tests.

In this case, Commissioner A played a facilitative role. She did not explicitly identify the problem or the solution; rather, she assisted the parties in adopting a process for resolving the dispute. In particular, she identified that there had been poor communication between the two parties and was able to assist them in this way to resolve the misunderstanding.

In summary, all three of the disputes were resolved through the conciliation process. Indeed, in relation to the last two disputes, the Commissioner steered the parties away from arbitration. While the Commissioner used her expert knowledge, particularly in relation to the first dispute, her main role - especially in the last two disputes - was to act as a facilitator, guiding the parties in a relatively low-key way to resolve the dispute in a manner that met their needs.

Two of the disputes concerned groups of employees, who in both cases were represented by a union and both concerned classification issues. In both cases, the employers had the assistance of an employer organisation. The third dispute concerned a disciplinary matter of a single employee, who was represented by a lawyer, and the employer dealt with the matter with the assistance of in-house counsel.

Interview with Commissioner B

The first dispute handled by Commissioner B was referred to the Commission by an individual employee. Although this employee was a union member and had sought some advice from the union, she had decided to represent herself at the Commission and, according to the Commissioner, she was quite confident and articulate. The employer was represented by an employer organisation.

The applicant was employed by a labour hire firm in the mining industry and her complaint was that she had not been treated fairly and proportionately in the context of a disciplinary process.

There had been an investigation into a bullying complaint and a number of employees, including the applicant, had been found to have engaged in inappropriate behaviour. As a sanction, the applicant had been required to move to a different shift so that she was no longer working with the alleged victim.

The conciliation conference had been conducted by telephone because the company's management and its representatives (from the employer organisation) were in Perth, the applicant was in Whyalla and Commissioner B was in Adelaide. While the Commissioner commented that this was not an ideal way of conducting the matter, it was sufficient and reasonably effective. The Commissioner indicated to the parties that while he would at least initially conduct a telephone conference, if the circumstances warranted it, he would arrange a face-to-face process, either in Whyalla or Adelaide. As it turned out, this was not necessary, as the dispute was resolved by means of the telephone conference.

The Commissioner noted that although the written application had few details, the employer had put in a very comprehensive response. The Commissioner questioned the applicant closely to identify clearly her version of events, but more particularly how she saw the matter being resolved. Her preference was to move back to her original shift. He then turned to deal with the employer, and concentrated on the solution as the applicant saw it, and what they saw as the reasons to prevent the applicant moving back to her original shift.

The Commissioner acknowledged during the interview that the parties were very reliant on his independent expertise. He made some observations about how the process should have been conducted. For example, he observed what the reasonable options would have been once it was found that misconduct had occurred (which was conceded by the applicant). He then isolated the issues down to whether moving the applicant to a different shift was disproportionate to the misconduct. He indicated to both parties that it was probable that the response that the employer had taken was both reasonable and proportionate. He told them he had formed this judgement after he had understood all the relevant circumstances.

Having formed the view that the employer had acted reasonably, he focused on how the parties could move forward. In particular he helped the parties to identify a process that would enable the applicant to return to her preferred shift, after a period of time.

The conference was conducted largely with all parties on the line at the same time; the Commissioner talked to the parties separately only right at the end of the process. This was primarily to ensure that the applicant understood what had occurred. The Commissioner was also keen to ensure that the applicant understood that she could still have the matter referred to arbitration. However, she indicated that she was entirely comfortable with the process.

Commissioner B did provide some general advice to the employer about how it might improve its disciplinary processes. In particular, he suggested that they be more transparent about the various steps in the process, and that they improve their documentation. The Commissioner thought that the employer would probably take on board these suggestions for the future.

This was a case where the Commissioner used his expertise to form and express a view that the employer had not acted unreasonably. However, he also helped the parties work together to establish a path for the future. The first element could be regarded as an ‘evaluative’ form of mediation, while the second element (helping establish a process for the future) was essentially facilitative.

The second dispute handled by Commissioner B had not been resolved at the time of the interview. This dispute was between a union and an employer and both parties were

represented by external lawyers. The dispute concerned the proper construction of the public holiday provision of the relevant enterprise agreement, was quite technical in nature and had potential implications for other workplaces.

The matter was initially dealt with by conciliation. However Commissioner B sensed – based on his knowledge of the parties and the presence of lawyers – that the matter was likely to go to arbitration, and was therefore circumspect about expressing an opinion about the relative merits of the parties' competing arguments. He used the conciliation conference to help establish a clear definition about what the dispute was about and explained the process that might be used to resolve the matter. The dispute was indeed referred for arbitration. The Commissioner was reluctant to have another member of the Commission deal with the arbitration, as this would pose logistical difficulties for the body. However, he asked the parties if they had a problem with him arbitrating the dispute, as he had conducted the conciliation conference. Neither party did so. The arbitration was expected to involve an exchange of written submissions and a formal hearing with witness evidence.

In the arbitration that would follow, the Commissioner would formally determine the matter. The discussions before the Commission were more in the form of preparation for arbitration, rather than mediation.

The third dispute handled by Commissioner B related to a group of employees. They were represented by their union and the employer represented itself with managers who had industrial and legal expertise. The issue concerned workplace change, and whether the employer had properly applied the consultation clause in the relevant enterprise agreement.

Based on his knowledge of the parties, Commissioner B decided the dispute could probably be resolved through the conciliation process. He had both parties explain their case with the other party present. He then tried to narrow the issues in dispute. Both parties put forward their views as to how the matter should proceed. He tried to get the parties to engage in joint problem-solving. However, this was not very successful, as the employer did not agree there was a problem. The Commissioner then spoke to both parties separately. This allowed him to identify that one particular employee, who was present (and had been through three previous restructures), was particularly upset by the process.

The conciliator indicated how he thought the general consultation process should proceed. This involved the provision of more information and the proper exploration of different alternatives, and was accepted by both parties. He also explored personal options for the employee with particular concerns. Effectively, there had been two disputes, both of which were resolved. At the end of three hours of negotiation, agreement was reached on how to deal with the general issue of consultation. There was a report back to the Commission at a later date to confirm that the parties were meeting their obligations to each other. There was also a second conciliation conference, held a week after the first one, at which the employer reluctantly agreed to make the individual employee redundant and provide her with a generous severance payment.

The Commissioner was hopeful that the employer obtained a fuller understanding of its obligations with regard to consultation.

In this case, Commissioner B used his expertise to explain to the parties the proper meaning of the obligation to consult (evaluative). He also proposed how the consultation process should be conducted henceforth (evaluative) and helped the parties identify a way of dealing with the concerns of the individual employee (facilitative). The Commissioner thus took an approach to his mediation role that combined both evaluation and facilitation.

The Commissioner noted that it was preferable for such disputes to be dealt with closer to the workplace in a way that would involve more of the decision-makers and the people directly affected. There appeared to be a systemic problem with the particular employer in understanding how to manage the process of workplace change, and the associated consultation process. While acknowledging the resource constraints of the Commission, the Commissioner suggested that it would be desirable to be involved in helping the parties jointly develop a process to consult over future changes and thus prevent future disputes.

In summary, two out of three disputes dealt with by Commissioner B were resolved through the conciliation process. In both cases, the Commissioner adopted an approach that combined both evaluative and facilitative elements. The third dispute, which went to arbitration, involved technical legal issues about the proper construction of the enterprise agreement.

The Commissioner varied his approach to dispute resolution, based on his knowledge of the parties. Where he considered it appropriate, he used a combination of facilitative and evaluative techniques.

Two of the three disputes were primarily collective in nature affecting multiple employees and the employees were represented by their union. However, in one of these disputes, it emerged there was an individual dimension and the affected employee was directly involved in the dispute resolution process. The third dispute concerned an individual employee, who represented herself.

In one case, the employer had the assistance of its employer organisation; in another, it had external legal assistance and in the third, it had no external representation.

One dispute concerned a disciplinary process, one the application of the enterprise agreement provisions concerning public holidays and the third concerned workplace change and consultation.

Interview with Commissioner C

The first dispute handled by Commissioner C was brought under the DSP in an enterprise agreement. It was brought by a union on behalf of one of its members, who had been suspended on disciplinary grounds. The employer was represented by staff from the company's HR area. The union was claiming that the employer had no legal right to suspend the employee under the terms of the agreement; however, after some discussion, an allegation also emerged that the member was being bullied by his manager.

The Commissioner gave advice to the parties that there were potential legal difficulties with the approach taken by the employer. He then went further and suggested that the employer needed to deal with the bullying allegation, even though no formal complaint had been

lodged, telling them that it was better to deal with such matters informally before they escalated. He discouraged the employer from trying to deal with the relationships issue through a formal mediation, with all parties in the room. He bluntly told them their preferred method of dealing with the issue would not work, and put forward an alternative – much more wide-ranging – approach. He told them they had two options: '*a constructive, cooperative conflict management path with a view that we're trying to develop a consensus for the future*' or a punitive approach that would lead to further conflict. Both parties were to advise the Commissioner as to what approach they would be taking.

In this case, Commissioner C went below the surface of the dispute and tried to diagnose 'the real problem'. He not only expressed a strong view of the 'merits' of the application before him - he sought to redefine the issue itself. This is a highly interventionist/evaluative approach. The Commissioner indicated this was his general approach to dealing with disputes. Conciliation in his view should involve more than an informal adjudication of the legal issues involved and should allow more innovative solutions. '*When you're conciliating, the idea is to try and allow the parties to innovate, have more flexible approaches to the solutions that they can generate and that they can be the driver of the solutions rather than you just be the author of it*.'

The second dispute was referred to the Commission by a self-represented applicant. He was highly paid and had an individual employment agreement (IEA) authorised by the relevant enterprise agreement. He had been made redundant and the dispute was about his entitlements on termination. Under the terms of the enterprise agreement, the employee was entitled to pro rata long service leave unless he was better off overall under the IEA than under the enterprise agreement.

The Commissioner, exercising his conciliation powers under the DSP, provided written advice that the employee was not entitled to pro rata long service leave as he calculated he was better off under the IEA.

There was no power to have the matter arbitrated under the DSP, though the employee could make a claim in court to enforce the terms of the agreement.

Clearly this was a strongly evaluative exercise, with the Commissioner using his expertise to provide what in effect was legal advice about an employee's entitlements.

The third dispute handled by Commissioner C involved a large employer and a union representing several hundred employees. The dispute resulted from a classification mistake made by the employer when it transferred a large number of employees to a new plant. It had inadvertently given many of the employees a promotion, which was costing the business around $250,000 a year. However, because it had confirmed the new classifications in writing under the terms of its enterprise agreement, it was bound to honour them. Other employees doing the same work, but who had not got the letter and who had been correctly classified, were being paid less and were agitating for a pay increase to bring them into line with their colleagues.

The Commissioner's response was that the employer had to comply with the terms of its enterprise agreement. This was an evaluative approach.

The Commissioner confirmed in his interview with the author that in the course of most conciliation processes he would provide an evaluation of the strengths and weaknesses of the competing arguments.

In summary, none of the disputes went to arbitration, though it was unclear whether they had been fully resolved. The Commissioner was very forthright about providing an evaluation of the rights and wrongs of the issues (in all cases essentially providing a legal perspective, and in the first dispute also providing a broader HR perspective).

Two of the disputes concerned individual employees, one who represented himself and one who was represented by a union. One of these concerned a disciplinary process, whereas the other concerned employee entitlements. The third dispute concerned classification issues and involved a union on behalf of a large group of employees.

Analysis of the interviews

The Commissioner interviews reinforced the indications from the quantitative survey that most disputes referred to the Commission were dealt with by conciliation, with only a few (one out of nine in this sample) referred to arbitration.

The three Commissioners used similar, though not identical, approaches. All of them would on occasion proffer an evaluation as to the merits of the application, though in some cases this was put more definitively than in others. Sometimes this was done more subtly, by probing the parties and helping them come to a better understanding of the strength (or otherwise) of their position. In some cases, the Commissioner would go under the surface of the dispute to diagnose a broader – or at least different – problem. Thirdly, the Commissioners – to varying degrees – worked in a facilitative way with the parties to develop a process for moving forward to resolve the problem, without necessarily indicating what the right solution was.

All the Commissioners interviewed used their conciliation role to do more than ‘facilitate’: Commissioner A provided an evaluation of the merits of the case in only one dispute, Commissioner B in two out of three and Commissioner C did this in all three. Nevertheless it is notable that in a number of instances the Commissioners used a combination of evaluation and facilitation in relation to the same dispute, providing an evaluation of some aspects of the dispute while helping the parties reach their own conclusions about other aspects.

None of the Commissioners adopted a fully ‘transformative’ approach. In some cases however the Commissioner did seek to go beyond the parameters of the immediate dispute referred to the Commission and proposed a course of action designed to improve longer term relationships. Whether this could or should be done by the Commission is an interesting issue, which will be taken up in the conclusion chapter.

Most of the disputes were brought by unions, though in two out of three cases the applicant was self-represented and in one the employee was represented by a lawyer. None of the disputes were brought by the employer.

The disputes were variously concerned with the correct classification of employees, the introduction of workplace change, disciplinary processes and employee entitlements. There

was a range of interest-based and rights-based issues. While in some cases the issues were essentially technical or legal ones, which lent themselves to a right or wrong answer, others concerned broader human resource management issues, such as bullying and workplace change. These lent themselves to the Commissioner proposing more innovative approaches that could potentially have more long-term implications for the particular workplace.

Other relevant provisions of the Fair Work Act

The provisions of the Fair Work Act 2009 dealing with dispute settlement procedures in enterprise agreements and awards are not the only provisions dealing with dispute resolution. For example, while disputes about the application of an agreement or award can be pursued under the terms of a dispute settlement procedure, there is also a separate statutory obligation to comply with any applicable enterprise agreement or award, as well as the National Employment Standards. The provisions of the Fair Work Act that impose these obligations are 'civil remedy provisions'. Employees, unions or a government agency, such as the Fair Work Ombudsman (FWO), may pursue alleged breaches through the relevant court. (An interview conducted by the author with a senior lawyer from the FWO confirmed that few of the complaints referred to the FWO are from employees about their current – as opposed to past – employer.) The courts have the power to grant injunctions, award compensation or in some cases order the reinstatement of a person, as well as to impose monetary penalties. In practice, employees and unions are reluctant to pursue matters in the court system, as opposed to using dispute settlement procedures, because of the time and cost involved. This is reflected in the relatively small number of cases brought by unions (let alone individual employees) under the Fair Work Act before the Federal Court or the Federal Circuit Court.

In contrast to the legal situation in the US, the question of whether an employee, or his or her representative, has a right to pursue a dispute through a dispute settlement procedure – even one allowing for arbitration by an independent third party – has no direct effect on the right of a party to litigate a matter before a court. Merely having the right to resolve a matter by arbitration does not limit one's right to take the matter to court, if there is an alleged breach of a statutory obligation.

However, that is not quite the end of the story. The Australian legal system generally discourages parties from having 'two bites at the cherry'. This was illustrated in the case of *Linfox Australia Pty Ltd v Transport Workers Union of Australia and Fair Work Australia* [2013] FCA 659. That case dealt with the relationship between the role of the Commission, pursuant to a DSP, in dealing with a dispute about the proper construction of certain clauses in an enterprise agreement and the ability of the Federal Court to deal with the same issue.

A Full Bench of the Commission had allowed an appeal against a decision of a single member of the Commission on the question of whether, under the terms of a particular enterprise agreement, a paid break after ordinary hours should be paid at ordinary time or overtime rates of pay. The employer maintained that the Full Bench had wrongly interpreted the enterprise agreement. The employer sought an order from the Federal Court quashing the Full Bench's decision. In addition it sought a declaration as to the proper construction of the relevant clauses in the agreement.

The Federal Court noted that:

> *'It is important to appreciate that the statutory scheme under the Act has, as its central foundation, the premise that an enterprise agreement must include a term that establishes a procedure that allows either the Commission, or another person independent of the parties covered by the agreement, to settle disputes about any matters arising under it. The Act made detailed provisions for those disputes to be settled in a private arbitration either by the Commission or a third party. However, the Act also created limitations and consequences in respect of such settlement of disputes.*
>
> *Thus, the Parliament gave effect to a well recognised function of private arbitration when it authorised parties to enterprise agreements to appoint the Commission to act as a private arbitrator as well as providing for others to act in that capacity. The High Court had found previously that function was capable of being conferred on the Commission in statutory predecessors of the Act. Indeed, s 186(6) of the Act required that an enterprise agreement must have a dispute resolution procedure that allowed the Commission, or someone else independent of the parties, to resolve disputes. This demonstrated that the intention of the Parliament was that such dispute resolution be effective and operate with the incidents of a private arbitration.'*

The Federal Court noted that the Full Bench of the Commission was the agreed appellate body under the terms of the enterprise agreement. '*That function of the Commission was not an exercise of its public law functions under the Act. Rather the Full Bench performed a function in which it acted as a private arbitrator, appointed by consent of Linfox and the Union, as parties to the enterprise agreement, in the manner provided under the Act for the conduct of appeals within their agreed private arbitral process and the making of a final decision in consequence.'*

The Court noted that the dispute settlement procedure in the enterprise agreement provided that the decision of the Full Bench on the appeal would be binding upon the parties. It went on to find that the Full Bench, when acting as a private arbitrator under the enterprise agreement, had the power to determine the dispute given to it by the parties as part of their agreement, and in a way that bound the parties in the resolution of that dispute.

The Court found that the employer's argument that an arbitrator could not construe an enterprise agreement in a way that was inconsistent with the construction that a court might give it would *'render illusory the concept of dispute resolution intended to be achieved by s 186(6) and the mechanism it required every enterprise agreement to contain.'* The consequence if the employer's contention was correct would be that every decision by a private arbitrator, including the Commission, '*would be subjected to intense scrutiny for any error of law in the construction of the subject matter of the parties' dispute, so as to give the losing party a gateway to the jurisdiction of the Court. In effect the private arbitration would be reduced to nothing more than a dry run of the parties' arguments that would resolve nothing if one of them, as might be expected, was disaffected by a result of the arbitration. Rather than being a dispute resolution procedure, the procedure would be a dispute protraction procedure.'*

The Court found that the parties had agreed that the private arbitrator, in the form of the Commission, or the Full Bench on appeal, had the power to resolve their disputes by making a decision under the dispute settlement procedure in the enterprise agreement. Any such decision would have, in effect, the attributes of a private arbitral award. As a private arbitrator, the Commission had the power to decide finally all disputed questions of fact and law.

The effect of this decision was that once a dispute has been resolved in accordance with the dispute settlement procedure in an enterprise agreement, neither party can then take the matter to a court for a 'second go'. That does not mean however that if an issue of the proper construction of a provision in an enterprise agreement has not been dealt with through the dispute settlement procedure a court would be barred from determining the matter.

The Commission's role in dealing with disputes referred to it under DSPs needs to be understood in the context of the Commission's broader responsibilities. These include both the making and varying of modern awards. The Commission also has an extensive role in regulating the process whereby enterprise agreements are negotiated. Under s.240 of the *Fair Work Act 2009*, the Commission may also, on application by one or more of the parties, assist in the negotiation of a new enterprise agreement. In 2011/12 the Commission dealt with 307 applications relating to bargaining disputes about proposed enterprise agreements under s.240 of the *Fair Work Act* (Fair Work Australia, 2012, p. 17). Generally, such disputes are dealt with by conciliation, with the Commission having the power to arbitrate only with the consent of the parties to the dispute.

The Commission has the power to issue 'bargaining orders' when it considers that one of the parties negotiating an enterprise agreement is failing to meet the 'good faith bargaining requirements' (ss.238 – 242 of the *Fair Work Act*.) In 2011/12 the Commission received 99 applications relating to this issue (Fair Work Australia, 2012, p. 17).

The Commission also has the power to make a determination that a majority of employees wish to negotiate an enterprise agreement with their employer, thereby imposing the obligation on that employer to negotiate with those employees (or their bargaining representatives) 'in good faith' (s.236 – 7 of the *Fair Work Act*). In 2011/12 there were 62 applications for such determinations (Fair Work Australia, 2012, p. 17). Some of these applications are strongly contested but in other cases they are not pursued at all, because, for example, an employer facing an application for a majority support determination may simply agree to bargain for a new enterprise agreement.

The Commission also has a general role in regulating industrial action. It may be called upon to issue orders stopping unlawful industrial action (or, in the words of the *Fair Work Act*, industrial action that is not 'protected'). Before industrial action can be lawfully undertaken, the Commission must receive an application and then order a 'protected action ballot'. In limited circumstances, the Commission may be called upon to suspend or terminate industrial action that would otherwise be lawful.

The Commission's termination of employment jurisdiction

The single largest area of the Commission's workload is that relating to termination of employment. As an example, in 2011/12 the Commission received more than 14,000 unfair dismissal applications (Fair Work Australia, 2012, p. 27). In addition, the Commission has a discrete dispute resolution role in relation to 'general protections claims', which primarily involve termination of employment (s.365 of the *Fair Work Act*). The general protections provisions in the *Fair Work Act* are intended to protect people from adverse treatment, because they have workplace rights, are exercising freedom of association rights, or are, or are not, engaging in industrial activity.

The general protections provisions also provide protection to employees, and prospective employees, from workplace discrimination based on race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. In 2011/12, the Commission received more than 2,000 such applications. The Commission's role in relation to such disputes is primarily to try to settle them by conciliation. If they are not settled, the applicant is generally entitled to take the matter to court for determination (though from 1 January 2014 the parties could jointly opt to have the dispute arbitrated by the Commission).

MacDermott and Riley considered whether the Commission's role in relation to the general protections provisions of the *Fair Work Act* involved a different dispute resolution approach from its traditional conciliation practices. They noted that the *Fair Work Act* gave the Commission a dispute resolution role where any conduct in breach of the general protections provisions was alleged, both in the pre-employment context and in continuing employment relationships (as well as where employment had been terminated).

MacDermott and Riley described the Commission's long-established practices of conciliation (and arbitration as a last resort) as perhaps one of the earliest forms of ADR. These practices were seen as 'alternative' to the expense, delay and uncertainty of formal litigation in the court system. They used the definition of ADR as '*an umbrella term for a process, other than a judicial determination, where an impartial third party assists the parties in seeking to resolve their dispute*'. They noted that the institutionalisation of ADR as a core feature of dispute resolution in the general Australian legal environment was now well established. However *'[W]ell before ADR came into vogue across the legal landscape, workplace disputes in Australia enjoyed their own distinct method of resolution, designed to accommodate the particular imperatives of employment and industrial grievances'.*

The authors noted that while conciliation and arbitration had been standard practice in Australian industrial relations for many decades, this had primarily been in relation to collective disputes. Now ADR was being used as a response to the need to balance the competing demands of growing individual rights and the resultant costs to business, by providing an affordable means to resolve such claims. Even though general protections claims are 'rights disputes' – and are generally determined by a court if the matter is not resolved by conciliation in the tribunal – the authors concluded that the parties and the Commission itself are likely to use the ADR practices they know and are comfortable with (MacDermott & Riley, 2011).

One of the most obvious consequences of the Commission's extensive and well-established termination of employment jurisdiction is that Australian DSPs and grievance procedures, in

contrast with the US, for instance, rarely deal with termination of employment matters. For example, the DSPs in the case studies discussed later generally, and either explicitly or implicitly, exclude disputes about dismissals.

Anti-bullying jurisdiction

Legislation in June 2013 to amend the *Fair Work Act* provided the Commission with a new jurisdiction to hear applications by workers who allege being bullied at work. This legislation took effect from 1 January 2014.[6] The legislation is primarily focused on employees who remain employed and is designed to stop bullying and repair working relationships. This legislation provides another significant mechanism for workplace disputes to be referred to the Commission.

The legislation was introduced following the tabling of a report by a Parliamentary committee on workplace bullying in November 2012. (House of Representatives Standing Committee on Education and Employment, 2012)

The committee noted that:

'Workplace bullying should first and foremost be dealt with by enforcement of WHS [workplace health and safety] laws. Only those laws can be used to hold employers (the legal entity, not necessarily the individual) accountable for their part in allowing workplace bullying to occur; for not effectively managing the risks of workplace bullying. And only WHS laws promote a risk management approach to workplace bullying; requiring employers to prevent, as far as reasonably possible, workplace bullying from occurring rather than responding to complaints of bullying when it is 'too late' for the targets of the bullying who have already been affected.' (p. 181)

The committee recommended that a single right of recourse for all people who had been affected by workplace bullying would address the distress and harm experienced by targets of workplace bullying, especially since they were up until then required to navigate a number of legislative and regulatory frameworks that may ultimately have given them only limited right of redress.

The committee was concerned that a court process could be arduous and difficult for individuals to navigate their way around. It specifically recommended a process that adhered to 'the same principles and practices of effective dispute resolution that Fair Work Australia already utilises and promotes for facilitating the resolution of a grievance or dispute between the parties by reaching an agreement through conciliation or mediation.'

It continued:

'However, if agreement cannot be reached an individual should have access to an adjudicative process that provides decisions on cases in a quick manner, with limited costs incurred by the parties, such as that which the Committee understands is provided by Fair Work Australia.' (pp. 188-189)

[6] Part 6-4B *Fair Work Act 2009*

The legislation defined bullying and created a right of redress for those who had been bullied at work and were at risk of further bullying. The need to establish a risk of further bullying means that in practice the jurisdiction is limited to those workers (they need not necessarily be employees) who remain at the workplace and have not, for example, resigned or been dismissed. The right that is established is the right to apply to the Fair Work Commission for an order to stop the bullying. However there is no scope for the Commission to order compensation. The emphasis is on preventing further bullying and restoring relationships.

The legislation does not prevent a person making an application to the Commission even though that person may not have used an existing internal procedure. However, in considering the terms of an order, the Commission must take into account the existence of any procedure available to the worker to resolve grievances or disputes, and any outcomes arising out of such a procedure.

An analysis of the Commission's CMS+ database indicates that in the first five months of the legislation, 286 applications were made under the anti-bullying provisions. Anti-bullying orders had only been made in one case, and that was by consent. As confirmed by an interview with the head of the Commission's Anti-Bullying Panel, the general approach of commission members has been to try and resolve applications by a mixture of conciliation and mediation, with arbitration kept as a last resort. Most matters have been dealt with relatively informally, with a mixture of phone and face-to-face conferences. In a reasonable proportion of cases, the Commission has been successful in brokering a resolution to the issue by getting the employees and managers concerned to reach agreement on a way forward. This may involve each party giving a written undertaking about their future conduct. In some cases, the Commission has established a mechanism for monitoring future behaviour.

The Fair Work Commission released statistics for the first quarter of the legislation's operation. These showed that just less than one half of the applicants for anti-bullying orders worked in businesses that had fewer than 100 employees. Applications came from a wide range of industries, with the largest number of applications coming from the clerical and educational industries, and health and welfare services. (Fair Work Commission, 2014)

The interview with the head of the Anti-Bullying Panel confirmed that most applicants were unrepresented and others were represented by lawyers or union officials.

Other legislation

In addition to the *Fair Work Act*, employees have rights at work under a range of other legislation, such as occupational health and safety and anti-discrimination. Anti-discrimination law in Australia has generally evolved separately from industrial law. At the federal level there are separate acts covering sex, race, age and disability discrimination. A separate body, the Australian Human Rights Commission, has general oversight over this legislation, while equivalent bodies operate at the state level. Breaches of these acts can lead to a range of remedies, including the imposition of penalties, by the relevant federal or state court or tribunal. In general, applications made under these statutes lead in the first instance to some form of mediation.

There is no general requirement to have a workplace grievance procedure to deal with issues covered by this legislation, though such procedures are encouraged. The Federal *Civil Dispute Resolution Act 2011* requires applicants to civil proceedings, before they take action in the Federal Magistrates Court or Federal Court, to demonstrate to the court what action they have already taken to try and resolve the matter in dispute with the respondent. While actions under the Fair Work Act are expressly excluded, this is not true of federal anti-discrimination legislation. This suggests that applicants under federal anti-discrimination legislation who fail first to pursue a matter under a workplace grievance procedure – where one exists – could have to justify that decision in court.

Similarly, the New South Wales Equal Opportunity Tribunal observed in the case of *Shaikh v Commissioner, NSW Fire Brigades* (1996) EOC 92 – 808:

> *'... it is an important principle of contemporary good management that grievances in the workplace, particularly discrimination complaints, should be resolved, whatever their nature, efficiently and quickly by available procedures established for that purpose.'*

There is the potential for a court or tribunal dealing with an anti-discrimination matter to look unkindly on a respondent who has failed to provide an effective workplace grievance procedure.

The New South Wales Anti-Discrimination Board has for many years produced Grievance Procedure Guidelines (Anti-Discrimination Board (NSW), 2007). The guidelines point out that under anti-discrimination law throughout Australia, an employer is legally liable for any incident of unlawful discrimination or harassment in the workplace, unless they can show they have taken all reasonable steps to prevent the discrimination or harassment happening in the first place. These steps include having an effective formal grievance procedure that is followed.

The guidelines acknowledge that, *'Many organisations have a grievance procedure as part of their award or enterprise agreement.'* However, they comment, *'... these procedures are often not as good as they need to be for handling the more sensitive equal employment opportunity (EEO) issues, such as sexual or other forms of harassment.'* They continue:

> *Clearly, it makes sense for an organisation to have just the one procedure capable of handling all types of workplace grievances, as it is much less confusing for all concerned. However, many organisations develop a separate procedure for handling discrimination/harassment/EEO grievances, usually because they do not want to wait until their award or enterprise agreement comes up for review before developing a procedure that will work for these types of grievances. Of course, if you develop a separate procedure you must make sure it complies with the basic steps and principles contained in the relevant award(s)/agreement(s).* (p. 7)

Chapter Six: The case studies

Overview

Seven case studies were conducted. All were large organisations and all of them had their Australian head office in Sydney. They were selected to represent a range of sectors and industries. Each case study commenced with a semi-structured interview with the senior manager responsible for workplace dispute resolution. However, largely depending on the results of that initial interview, further interviews were held with relevant union officials and/or other senior managers who could provide insights into dispute resolution within the organisation. The aim was to obtain a general picture of workplace relations in the organisation, of the approach taken by management to the issue of workplace dispute resolution, including what strategies, policies, procedures and systems were in place, and of recent experience with dispute resolution.

All the organisations had a significant level of unionisation; though in most of them union membership was below 50 per cent of the workforce. All but one organisation had one or more enterprise agreements with a union or unions, thus covering a significant proportion of the work force. The extent to which workplace relations was adversarial varied considerably, with instances of recent industrial action confined to two of the case study organisations.

All but one of the organisations operated in the federal jurisdiction. In accordance with the relevant legislation, all the enterprise agreements contained a DSP. The scope of those DSPs was largely confined to matters arising under the agreement itself and the NES. The extent to which these DSPs were used varied enormously, however, from virtually never to very regularly. All the organisations that had enterprise agreements also had additional grievance policies and procedures[7]. The one organisation that did not have an enterprise agreement had a grievance procedure. In most of the organisations, the scope of these internal grievance procedures was at least notionally distinct from that of the DSPs. In other words, the internal procedures covered issues that the DSP in the enterprise agreement did not, such as bullying, harassment and discrimination. In practice, however the distinction was less about the scope of the procedures and more about who made use of them. The DSPs were largely used by union representatives and the grievance procedures by individual workers (whether or not they were union members, which they could still be). In some organisations the internal procedure could be used to deal with any type of workplace grievance.

The DSPs generally followed a fairly standard form, with a series of steps starting at the local workplace level. As a first step, the employee with a grievance was required to raise the issue with his or her immediate supervisor. If the matter was not settled at that level, the dispute would be escalated to progressively higher levels of management. The organisation's HR department would normally become involved only with disputes that could not be involved by line managers. Employees could be – and usually were – represented by the union (whether

[7] These procedures had different names in the different organisations, but I will refer to them as 'grievance' procedures to distinguish them from DSPs in enterprise agreements.

by a workplace delegate[8] or full time official). If the dispute could not be settled with senior management, the DSP would allow for the matter to be referred to the industrial tribunal. The industrial tribunal would be empowered to try and resolve the matter by conciliation, and in most cases, if that was unsuccessful, by arbitration.

Some DSPs allowed for the option of mediation by an external person (that is, other than the industrial tribunal), usually by agreement of the parties to the dispute; however, there was no evidence that this option was ever taken up in practice.

In those organisations where significant use was made of the DSP, dispute resolution generally followed a pyramid pattern, with most disputes being resolved at 'lower' levels, and relatively few finding their way to the tribunal. Of those disputes that were referred to the tribunal, only a very small proportion ended up being resolved by arbitration. Very few matters ended up before a court, though occasionally matters would be referred to anti-discrimination or occupational health and safety bodies.

The grievance procedures were used to a significant extent in all of the organisations studied. Generally employees represented themselves, even though in most cases they were entitled to representation, and occasionally a friend, co-worker, lawyer or union official would become involved. Compared to DSPs, there was a greater variety in the design of grievance procedures. However, they all provided as a first step that the employee with the grievance should try and resolve the issue with their immediate supervisor (unless this was inappropriate, such as where the complaint directly concerned the supervisor). Compared to DSPs, there was a greater emphasis on investigating grievances, prior to attempting to resolve them through discussion. Investigations were generally conducted by HR or senior management, though in some cases external investigators (often lawyers) were engaged. Some grievance procedures provided scope for mediation, either by HR staff or an externally-engaged mediator. Unlike DSPs, mediation was actually used in practice under grievance procedures, though its effectiveness was mixed.

In contrast with the DSPs, the final step in all of the grievance procedures lay with senior management (generally the CEO or the CEO's nominee). None of the grievance procedures allowed for final determination of the grievance to be made by an external body, such as an independent arbitrator. There was, however, generally an acknowledgement that employees might have a statutory right to take their grievance to an independent body, such as the Fair Work Commission or an anti-discrimination body, and there was no suggestion that using the internal procedure involved any waiving of such rights. Nor was there any suggestion that the grievance procedure, *per se*, created any additional rights that could be enforced externally.

Grievance procedures generally made allowance for the need to treat grievances confidentially and sensitively. They all contained explicit provisions designed to protect employees who used the procedure from any retribution or victimisation. Some also contained sanctions against frivolous or vexatious claims.

While all the interviewees were asked about the number of disputes and grievances lodged in their particular organisation during the previous12-month period, the data collected has to be viewed with a degree of caution. In particular, many of the organisations did not keep

[8] That is, a fellow employee elected to undertake a union role on a voluntary, part-time basis

centralised records. Interestingly, those records that were kept were generally better for grievances than for disputes. Moreover, both DSPs and grievance procedures invariably provided for an initial informal step without anything being put in writing. None of the organisations had data about the number of these types of disputes or grievances, though many matters were (and are) undoubtedly raised and resolved at this level. All the figures referred to in this chapter refer only to disputes and grievances where the complaint has been put into written form. This is consistent with the approach adopted by Lewin and Petersen (1999). Despite the patchy records, it eventually proved possible to obtain reasonable estimates through discussions with human resources staff.

In most of the organisations studied, usage rates of both the grievance procedures and the DSPs were well below those in the US organisations studied by Lewin and Petersen (for union procedures) as well as those indicated by Ewing (1989) (for non-union procedures). In Lewin and Petersen's study, the grievance rate per 100 employees varied from 14.7 in steel manufacturing to 7.5 in retail department stores (p. 85). Ewing suggested (p. 39) that a genuine due process procedure with an investigator-type system should process one or more complaints for every 50 to 60 employees. This is equal to a rate of about 1.7 to 2 grievances per 100 employees. The lower lodgement rate of grievances in Australia may be explained (at least partly) by the more limited range of matters covered by the Australian procedures, in particular the near universal exclusion of employment termination matters.

The Manufacturer

The Manufacturer was established in 1989. While the company started in Sydney, it is now listed on both the New York and Sydney stock exchanges and its global head office is in California. An interview was held in October 2009 with the Manager, Compliance and Change ('the Manager'). The industry union applicable to the Manufacturer was approached for an interview but was not willing to participate. Relevant policy documents were also analysed, and a search of the Commission's database conducted.

In 2005, the Manufacturer moved its Sydney facility to its current newly-built premises where there were (at the time of the interview with the Manager) about 1200 employees. These could be broken down as follows: 780 were blue collar workers engaged in production and warehousing, and of these, 580 were permanent, the rest being casuals engaged through a labour hire agency. There were also 420 white-collar employees, around three-quarters of who were engineers. In average terms, there had been around a 9 per cent increase in the total workforce year on year, with engineers often sourced from overseas. There was a heavy dependency on rotation and cross-functional teamwork. Seventy per cent of the production workforce was female and the attrition rate in the production area was less than 1 per cent. The Manager commented, *'They come here and they stay'.* He put this down to the good working environment, and the generous terms and conditions of employment.

While historically the contracts of employment in the production environment were underpinned by the state metals and warehousing awards, in the late 1990s, according to the Manager, *'the organisation moved further and further away from that and moved towards common law contracts of employment as the underpinning employment rationale across the board including our production and warehouse employees.'*

There was a clear managerial preference for a direct relationship with employees and the Manufacturer has successfully resisted attempts by the main industry union to negotiate an enterprise agreement. Union membership was estimated by the manager to be about 12 per cent of the total facility work force, or about 23 per cent of the permanent blue-collar work force. The remuneration system was governed by a stand-alone classification structure designed specifically for the Manufacturer's purposes. This was seen as necessary by the organisation given the need for high levels of quality. Employees were recruited on the basis of a suite of core values and competencies around innovation and other related behaviours.

According to the Manager, the workplace culture was non-adversarial and there was an emphasis placed on ethical behaviour, team culture and affinity.

As the Manufacturer had no enterprise agreement, it was not required by law to have a DSP. However, the company had adopted what it calls a Grievance Resolution Policy. The policy applied to all the organisation's employees operating in the Asia-Pacific region irrespective of their employment status. It also applied to employees engaged through labour hire agencies.

The overview to the policy stated:

> *'[The Manufacturer's] Corporate Values, responsiveness, accountability, confidentiality, sensitivity and procedural fairness are the guiding principles of this policy and its accompanying procedures. The objective is to resolve matters in a timely and responsive manner within [the Manufacturer] and as close as possible to the source, while ensuring equity and due process in that resolution.'*

The potential scope of matters that could be dealt with through the Grievance Resolution Policy was very wide. This was particularly important in the absence of a DSP. A grievance was defined as *'a formal expression (either verbally or in writing) of dissatisfaction about a work situation usually by an individual employee, but it may sometimes be initiated by a group of employees.'* The 'initial process' (described as 'Stage 1' by the Manager) was as follows:

> *'Where a decision, action or inaction gives rise to a grievance [the Manufacturer] will ensure an appropriate response (underpinned by natural justice and procedural fairness principles) to the person(s) concerned, generally, unless unforeseen circumstances arise, within two (2) working days from the time the initial grievance was raised by the employee.*
>
> *It is preferred that grievances are promptly raised by the person(s) concerned (within at least three (3) working days of the actual occurrence) so that they can be responded to and resolved.*
>
> *In raising a grievance the person(s) concerned should fully outline the details associated with the grievance and the preferred outcome they consider would resolve the matter.*
>
> *In the first instance all grievances should be verbally referred to the employee's immediate team leader, supervisor or manager unless the grievance itself relates to the immediate person in a position of authority in which case they should be referred to the next level of management applicable in the work group or to Human Resources.*
>
> *It is expected, in the majority of circumstances, that the grievance will be resolved through the application of [the Manufacturer's] core competencies (including interpersonal effectiveness, teamwork and communication and others). At the initial stage where an employee, having raised the matter with the relevant and immediate team leader, supervisor or manager, and that person has been able to satisfactorily resolve the problem at that level by understanding the alternative points of view and fully discussing his or her perspective with the relevant parties to the grievance* (sic).
>
> *Where two or more employees believe they have a common problem this may, at their request, be dealt with as a single grievance at this level.*
>
> *The time limits set out at this level should in the first instance be availed of and exhausted prior to any party escalating the matter or involving external third parties in an attempt to resolve the issue.*

> *At any stage of the grievance process an employee may choose to be accompanied by a support person of their choice (preferably within the workplace).*

The policy also contained '*additional procedures*' (described as Stage 2 by the Manager):

> *'In the event that the grievance is not resolved at the initial level referred to above or that the matter has not been responded to in the nominated timeframe the employee may refer the grievance to the next immediate manager or functional head. The manager or functional head, upon review of the matter, may consult with Human Resources to ensure that the matter is responded to in an appropriate manner.*
>
> *Parties to the grievance must be given access to all relevant information and documentation, excepting material that is exempt under Freedom of Information (FOI) or applicable Privacy Legislation.*
>
> *The nature of the complaint, the steps to be undertaken to resolve the complaint and the outcome of any meetings and deliberations should be communicated to both parties to the grievance in writing by the relevant functional manager within a three (3) day timeframe.*

The Manager indicated that most grievances were resolved by the immediate supervisor. Most complaints that were not resolved by the immediate supervisor (around 70 per cent) were resolved at the second stage (that is, by the relevant manager or functional head, in consultation with Human Resources). This generally occurred within 7 to 10 days.

The policy then provided for 'escalation' (described as Stage 3 by the Manager):

> *If the matter is not resolved by the relevant manager or functional head it shall be referred to the Human Resources Manager to determine an appropriate approach in resolution in conjunction with other relevant stakeholders.*
>
> *This process may include mediation or other conciliation processes.*
>
> *If availed of, the mediation process will provide written communication regarding the nature of the complaint and the outcomes of the mediation processes to both parties to the grievance.*
>
> *A summary of these will be provided to the Vice President Human Resources Asia Pacific and any other relevant executive at the conclusion of the process, regardless of the outcomes.*
>
> *Where the grievance is not resolved with the intervention of relevant executives an employee may seek independent advice or representation to assist in the resolution of the matter.*

About 30 per cent of grievances that were not been resolved by the immediate supervisor were dealt with at this third stage. Mediators, who could be lawyers, psychologists or

counsellors, were generally accessed from the company's Employee Assistance Program (EAP).

The manager raised a particular difficulty with the mediation process in one particular case that potentially had wider implications. An allegation had been made by a relatively senior employee against their manager. The mediator was reluctant to formally document the agreed outcomes between the two employees. As a result the Manufacturer was unable to appreciate whether the solution facilitated by the mediator was prejudicial to the company's policies or processes. The dispute between the two employees was resolved to their satisfaction, but the Manufacturer was concerned that a precedent may have been created that it would not be comfortable applying in similar circumstances.

This could be dealt with by making a representative of management a party to the mediation. Certainly the approach taken by the Fair Work Commission when dealing with bullying claims, which usually involve a dispute between co-workers, is to recognise that the employer has its own legitimate interest in the process of dispute resolution.

In this organisation, grievances that had not been resolved by the employee's immediate supervisor (that is, those that reached at least Stage 2) were documented and tracked on a grievance register. A quarterly report concerning all grievances on the register was presented to the Board of the Manufacturer. This was certainly a strong indication of the importance the organisation placed on the issue of conflict resolution. There was careful monitoring of the effectiveness of responses to grievances, and the register was used to identify emerging human resources issues. The monitoring and analysis of grievances was described by the manager as '*a very, very robust process*'.

In the 10 months prior to the interview, there had been 33 grievances at the Sydney manufacturing facility that had not been resolved by the immediate team leader, supervisor or manager (that is, had reached Stage 2 and accordingly been placed on the register). This was equivalent to a grievance rate of 3.4 per 100 employees annually.

The types of issues raised under the procedure during this period included favourable or biased treatment (for example, in relation to the distribution of overtime), sexual harassment, allegations that other employees had breached policies such as those relating to IT, and complaints about the application of disciplinary procedures.

Employees lodging grievances were usually represented, often by a union delegate (despite the relatively low level of union membership). If the grievance was not resolved at the local level, a full-time union official could become involved.

Out of the 33 grievances referred to earlier, one ended up before the Human Rights Commission. A search of CMS+ indicated that the only matter lodged with the Fair Work Commission relating to the Manufacturer in the 24 months to December 2012 was a single unfair dismissal case. This matter was withdrawn prior to conciliation.

According to the Manager, senior management considered that if a grievance had to be escalated, there had been a failure in terms of capability and deployment at the line level. Team leaders and line managers were expected to be good at people management.

There was a strong emphasis in the company on providing training to all employees who have people management responsibilities. The training covered matters such as communications and listening skills, documentation, workplace harassment, health and safety and integrity. People management training was not a once-off – it was repeated annually. In addition, line managers were assessed as part of their performance review process against core competencies such as team-based working principles, communications and so on.

Grievance tracking allowed managers and team leaders who lacked the appropriate competencies to be identified. Managers could receive additional coaching or end up being removed. Grievances were also used as a feedback mechanism to identify themes or recurrent issues within particular work groups.

When grievances were lodged, there was a big effort to deal with them quickly; even complex ones were usually resolved within 10 days. This was achieved by giving the resolution of grievances priority. The manager said *'... it's one of our mandates from a leadership point of view ... if it is allowed to fester and create a problem that affects engagement, culture, productivity. You're not always going to make them happy but at the end of the day we want an appropriate response and we want it done quickly ... grievances that don't get resolved become bigger than what they should be*.'

The Manufacturer engaged an external expert to undertake an annual diagnostics survey employee engagement and workplace culture, which were is seen as critical to commercial success. The effectiveness of the grievance handling process was considered as part of the survey and the cost of specific grievances – especially those that proceeded to external mediation or to a tribunal – was also tracked.

The grievance procedure itself was also periodically reviewed as part of the quality management system and a recent review led to a streamlining of the number of steps in the process.

The number of grievances lodged over the previous two years had been increasing at a significantly faster rate than the growth in the workforce, something that the Manager put down to an increased level of awareness and increased confidence in the process on the part of employees.

There was a close relationship between the business strategy, which focused on quality and innovation, and the HR strategy, which emphasised values such as teamwork and a high level of employee engagement and direct employer-employee relations. This was then reflected in the approach to workplace conflict resolution.

In summary, the Manufacturer had a strategic approach to conflict management. Its approach included many of the features identified by Lipsky et al as constituting a comprehensive conflict management system. There was a proactive approach with a well-used and carefully designed grievance procedure. While management retained the final say under the grievance procedure, use was made of independent external mediators. Employees were able to be represented as part of the process, including by a union. There was an emphasis on the speedy resolution of grievances. Employee engagement was regularly measured, and the role of effective conflict management in maintaining a high level of employee engagement was well understood. The responsibility for conflict management was shared by all levels of

management, with a particular emphasis on delegating authority for preventing and resolving conflict to line managers. Managers were held accountable for the successful prevention and resolution of conflict, and this was reflected in the performance review system. Education and training in relevant conflict management skills was provided to all those with people management responsibilities on a continuing basis. There was close monitoring of grievances and feedback loops in place to enable senior management to ensure appropriate remedial action was taken where necessary.

It is possible that the approach to conflict management reflected, at least partly, the influence of US head office, though this was not explored in the interview with the Manager. There was also clearly something of a competition with the union for ‘the hearts and minds’ of the staff. It is certainly possible that the Manufacturer was ‘kept on its toes’ in dealing with grievances by the fear that if it failed, the union could gain greater penetration of the work force. However, the union was not prevented from representing employees who use the grievance process; indeed this appeared to be very common.

The Bank

The Bank was a large financial institution listed on the Australian stock exchange. At the time of the interview, it had around 38,000 employees (on a full-time-equivalent basis), making it the largest organisation in the study. An interview was held in November 2009 with the Executive Manager, Workplace Relations ('the EM'). The EM was in charge of industrial relations for the Bank across Australia. The organisation had had a centralised industrial relations function since 2002; previously each business unit had handled its own industrial relations, but a centralised approach was considered better as it ensured consistency. An interview was also held with a former senior HR manager of the Bank ('the former HR manager') who was involved in the development and original implementation of the Bank's approach to workplace dispute resolution. In addition, an online survey was conducted of a random sample of the Bank's employees.

At the time of the interviews and the survey, most employees were covered by an enterprise agreement negotiated with the industry union. The EM estimated union membership at around 25 per cent of employees, which he said was much lower than it had been until only a few years previously. The EM attributed the decline in union membership to better employee relations:

> *'Well, what we're finding is more and more staff members are removing their membership, they're pulling out of becoming a member of the union because they find that the bank can deal with their issues and they're being treated fairly. Now a lot of the times when people did join up it was because there was a lack of trust in [the Bank]'*

The interview with the former HR manager made very clear the link between the Bank's approach to conflict management and its broader HR strategy. He explained that a lot of the thinking behind the HR strategy reflected the fact that some of the key people in the HR function had previously been employed by one particular large resources company. That resources company had given a great deal of thought in the early 1990s as to how to build more productive workplaces through high levels of employee engagement. Central to the HR philosophy of both the resources company and the Bank was the promotion of a direct working relationship with the employees. While employees would be free to be a member of a union and/or go to a tribunal if they thought they had been treated unfairly at work, the organisation would provide an effective internal mechanism to resolve workplace grievances without the need to go to a third party. Research was conducted into the US experience with non-union dispute resolution, including companies such as Polaroid, Kodak and Federal Express. The HR staff from the Australian resources company had been influenced by the work of David Ewing from the Harvard Business School and his book '*Justice on the Job: Resolving Grievances in the Non-Union Workplace'* (Ewing, 1989). This led to the development by the resources company of its 'fair treatment system'. A system involving a board that would consider both sides of a dispute and render a decision was considered. However it was thought that having an independent but individual investigatory process was a better fit culturally. That experience was drawn on in the approach that was adopted by the Bank when it introduced its own fair treatment system in 2002.

The aim was to create a system where employees could have confidence that they would be treated fairly at the workplace if an issue arose. It was also based on an acknowledgement that '*with all the best intentions in the world, we're all human, the systems and policies of the organisation may be well conceived but there can be problems in implementation and practice. Issues will arise that need to be resolved and mistakes will be made in the actual relationship.'*

The process was also built on the general principle that wherever possible matters needed to be resolved quickly and as close to the workplace as possible, ideally by the line managers in the area concerned, rather than HR. Line managers (both immediate supervisors and the 'MOR' (manager one removed) were therefore given explicit accountability and authority to deal with fairness in the workplace. If employees were unhappy with a decision by their immediate manager they had the right to raise it with their MOR. As a further check however, employees who felt they had received unfair treatment from their line managers had the right to an 'Out of Line Review' (OLR).

While the Bank had an enterprise agreement with the industry union, its clear preference was for employees to pursue grievances through the internal process rather than the DSP in the enterprise agreement. However, the former HR manager acknowledged that the existence of the DSP gave employees a choice and acted as a control on the behaviour and the effectiveness of the internal company system. His view was that if the organisation could not demonstrate that it was running a fair and effective procedure, it was quite appropriate for employees to have the opportunity to exercise their choice and use what he described as 'the external system' (meaning in effect the union and/or the Commission).

As at the Manufacturer, the grievance procedure at the Bank had a wide scope. The Bank's Fair Treatment Review (FTR) is described as *'an internal grievance procedure that employees may be able to utilise to review decisions, actions or behaviours they consider may have affected them unfairly.'*

Under the heading of *'Principles of an FTR'* it states:

> *'If you initiate an FTR, the reviewer will review your complaint to determine if, in their opinion, you were treated unfairly. The definition of fairness is quite subjective. What one person sees as fair, another may not.'*

The FTR policy stated that *'in carrying out an FTR, the reviewer will be guided by the following principles of procedural and substantive fairness:*

Procedural Fairness

- *Acting without bias or pre-judging the issue:*
- *Providing each party with an opportunity to present their own case; and*
- *Advising the Initiator and Respondent of the broad outcome of the Review.*

Substantive Fairness

- *The Reviewer believes that their decision, finding or recommendation is correct and that they have taken into account relevant considerations while disregarding irrelevant matters; and*
- *That any decision, finding or recommendation is supported, where the Reviewer believes this is appropriate and/or practicable, by objective or third party evidence (i.e. witnesses or documentation such as emails, diary notes and text messages).*

The FTR provided for two types of review: In Line Reviews (ILR) and Out of Line Reviews (OLR). Employees were encouraged, unless it was inappropriate, to seek to resolve their issues through an ILR *'as it encourages employees to identify their concerns with their direct Manager or M1R and discuss them with a view to seeking resolution'.*

Employees were also encouraged to raise any work issue with their manager. The policy stated that the reasons for this are:

- '*It reinforces the accountabilities of line management in regard to team employees in their reporting line; and*
- *It can help build trust between the employee and line management, thereby strengthening the relationship.'*

There was no requirement for ILRs to be initiated in writing, though the policy indicated that managers could, if they thought it appropriate, provide a written response to the employee.

If this did not resolve the issue, employees could progress resolution of their issue through successive layers of management in their reporting line.

> *'This review process can continue up to and including the less senior of the employee's Manager twice removed (M2R) or Group Executive. Should the matter progress to this stage, the decision of the M2R or Group Executive is final and no further internal review is available (this means that the employee will not be able to ask for an Out of Line Review of the issue.)*

An Out of Line Review (OLR) was an investigation conducted by a Fair Treatment Facilitator (FTF) who was not one of the employee's direct or indirect managers. FTRs were, according to the EM, '*people who have been trained within the organisation to independently review a case.'* The FTF would review the matter and make a recommendation.

An employee could initiate an OLR when:

- They had not been able to resolve their concern in an ILR; or
- It was inappropriate to raise the issue with their manager or M1R.

An employee initiated an OLR by contacting a Fair Treatment Contact (FTC), who would provide procedural information on the options available to lodge an OLR.

The policy recognised that '*there may be some instances where the usual options will not produce the most effective solutions. This may be due to time constraints or the nature of the issue. In these cases, the Fair Treatment Manager may recommend an alternative course of*

action. This may be decided on a case by case basis at the discretion of the Fair Treatment Manager.' The alternatives could include mediation, possibly by an independent third party, or escalation of the issue to a specialist area for resolution.

In the 12 months prior to the interview with the EM, three OLRs had been taken to mediation by an external person (a private consultant), with the agreement of the parties to the dispute. Mediation was however seen as a last resort.

To lodge an OLR, a completed FTR Issue Statement was required. A *'Clear Desired Outcome'* had to be documented on the FTR Issue Statement. An FTC could assist the employee identify their desired outcome. The statement should also have provided an overview of the issues *'in clear-cut, factual, non-emotional language'.*

OLRs were available only when the employee sought to have the matter resolved within the Bank. Once an employee took the matter outside the organisation (e.g. to a court or tribunal), an OLR was not available and, if commenced, ceased.

The Policy stated that:

> *'Any person involved in an FTR must maintain the confidentiality of the process. The Initiator will be informed of the recommendations that are directly relevant to them once these have been signed off by the employee's M2R. However, the Initiator will not necessarily be given a copy of the FTF's full report or be informed of what action is taken regarding other employees. We will maintain the confidentiality of the FTR except where required by law to disclose the information or where it is relevant in legal proceedings.'*

On receipt of an FTR Issue Statement by the Initiator, the FTC would send it through to the FTR Manager to assess the matter and decide whether it fitted the FTR criteria. If so, an FTF was assigned to review the FTR claim. According to the EM, the FTR Manager would find an FTF from another part of the business. *'Let's say we both worked in retail, it would have to be someone who does not work in retail and someone who does not know you and who does not know me'.* They were usually senior employees, such as the general manager of another business unit, and the work done by FTFs was on top of their normal role. There were around 120 of them in the Bank, with technical support provided by the workplace relations area. Continuing a description of the process, the FTF would then contact both the Initiator and any 'respondents' (an employee who needed to respond to the complaint) to set up separate meetings to gather any further details of the matter. The FTF would decide whether, in their opinion, it would be of assistance to interview witnesses identified by the Initiator or Respondent.

The FTF would send draft recommendations to the Initiator's M2R to be reviewed and signed off where the M2R considered the recommendations were appropriate. The FTF had also to ensure that any issues affecting the Bank's legal responsibilities (such as EEO or harassment) were referred to the Fair Treatment Manager. The M2R could elect to have further discussions with the Initiator and/or Respondent(s) before signing off the final recommendations. The workplace relations area could also give advice to the M2R. According to the EM, recommendations were invariably acted on. Individual final recommendations were presented (where appropriate) only to the relevant employees involved. The FTF was responsible for

delivering and explaining recommendations to the Initiator and Respondent(s) once they had been signed off by the M2R. Once the FTR had been signed off by the Initiator's M2R, no further review of the Initiator's claims was available.

Each Initiator could elect to complete an evaluation of their FTR process (which went on their FTR case file) on two occasions – two weeks after completion of the FTR and six months after completion. The M2R also had to consider whether a follow-up inquiry was warranted to confirm that the FTR outcomes were operating effectively, particularly where personnel changes or a business restructure had occurred.

The grievance procedure at the Bank implicitly excluded any role for union representation. Both the Initiator and the Respondent could take along a support person to the meeting held with the FTF and the policy suggested a friend, family member or partner who was removed from the matter itself. The support person was explicitly not there to perform a representative or advocacy role. The EM explained this:

> *'It's the opportunity for them to know that ... you're being treated fairly. Once they're being represented then it becomes an issue between their legal representatives and the business and HR trying to resolve the matter. Fair treatment is really there for employees who don't want representation. They're seeking an independent review and it costs them nothing. So it's really there to support them.*

The data obtained through this process was reviewed quarterly by HR, to ensure that the process was working correctly.

The system was quite resource-intensive and involved training a significant number of review managers and fair treatment contact persons. The process of conducting a review could take a relatively senior manager away from his or her normal duties for some time. For the process to work, therefore, there had to be a strong organisational support. Both the original CEO, who introduced the system, and the current CEO made clear their strong personal commitment to the system.

In the 12 months prior to the interview with the EM, there were 23 OLRs lodged (which equates to a filing rate of 0.1 per 100 employees).

The Bank had an enterprise agreement with the industry union, which of course contained a DSP. However, the only disputes that could be dealt with under the DSP were those concerning the enterprise agreement and the NES. The DSP provided that there had to be a genuine attempt to resolve the dispute in the first instance at the workplace level, usually with the affected employee's manager. If the matter could not be resolved at this level, it could be referred successively to the next two levels of management. Employees could be represented by the union at any stage of the process. If the matter could not be resolved at the workplace level, any party could refer the dispute to the Commission for conciliation. The Commission could make a binding recommendation about any matter covered by the agreement with the exception of certain matters, such as those concerning performance appraisal and performance based pay, staffing levels, the provision of additional sick leave when existing entitlements had been exhausted, consultation provisions and redundancy and redeployment. In general the status quo was to be maintained while the dispute was being dealt with.

In the 24 months to 31 December 2012, only one dispute was referred to the Commission under the terms of the DSP. This concerned one employee who was objecting to a change in her hours of work. The matter was listed for conciliation but the applicant failed to attend. When contacted by Commission staff, she said she had forgotten about the matter and wanted to discontinue her application. There was little evidence that the DSP was used much to resolve matters at the workplace level.

During the same 24-month period, there were 14 'general protections' applications and 44 unfair dismissal applications. For an employer the size of the Bank, these would be well below average.

The employee survey conducted by the author asked a number of questions about the Fair Treatment Review process, as well as about perceptions of fairness in the organisation more generally. It was important to ask these more general questions for a number of reasons. One of the goals of the FTR was to ensure that managers treated their staff fairly without the staff necessarily having to use the process. The existence of the process was designed to send a signal to staff and managers that fair treatment was an important organisational value. Moreover managers who were found by an FTR to have acted unfairly could face repercussions. Therefore the existence of the FTR process should act as an incentive for managers to treat their staff fairly.

The number of OLRs was very low (a rate of 0.1 per 100 employees a year). The survey results could help create understanding as to whether this is due to a lack of awareness of the FTR process amongst employees, or a reluctance to use it (for example, from fear of victimisation).

The survey found that 84 per cent of employees said that their managers generally gave them a fair hearing if they had a concern about a matter relating to their employment, and 85 per cent said that the Bank generally gave a fair hearing to employees who had a concern about a matter relating to their employment. These positive responses were consistent with the proposition that the Bank's FTR policy had helped motivate managers to treat employees fairly.

Moreover, the survey found that 80 per cent of employees generally felt comfortable raising a concern with their manager about a matter relating to their employment. Sixty-eight (68) per cent of employees said that if their manager could not resolve the issue (or the issue related to their manager) they would generally feel comfortable raising it with their MOR. Clearly, employees were more comfortable raising issues with their immediate supervisor than a more senior manager.

Eighty-two (82) per cent of employees said that they were aware of the Bank's Fair Treatment Review process. This would suggest that the low rate of applications was not due to a low level of awareness.

Eighty-five (85) per cent of employees indicated that they would be comfortable seeking an Out of Line Review under the Fair Treatment Review process if their line manager was unable to resolve a significant concern, such as harassment or bullying by a co-worker. The equivalent figure for harassment or bullying by manager was 82 per cent. Sixty-four (64) per cent said they would be comfortable using the OLR process about a concern relating to

promotion, 74 per cent said the same about a matter relating to disciplinary action, and 64 per cent about a matter relating to pay or conditions.

These results suggested that the great majority of Bank employees were willing to use the FTR process, if necessary. There was very little variation between the responses of employees based on their gender or length of service with the Bank.

The employee survey also suggested a much lower level of awareness of the DSP in the Bank's enterprise agreement; only 48 per cent of employees said they were aware of the DSP, compared to 82 per cent who were aware of the FTR process.

The Bank engaged Gallup to conduct an annual 'People and Culture Survey'. According to the EM, the organisation was in the 80th percentile *'which is really up there. So employee engagement is a very big thing for us as an organisation.'* He said that their scores over the last three years had been '*climbing and climbing and climbing.'*

The EM described how the goal was to increase customer satisfaction, but the means to achieving this was by engaging employees:

> *'It's about wanting people to come to work and feel they're part of something special, because if your staff aren't engaged then … there's no point in looking at trying to increase … customer satisfaction, which is something we're very big about …*
>
> *…*
>
> *At the end of the day how are your customers going to be satisfied and happy if your people aren't engaged and happy? You know, if you look after them, they will look after our customers. That's been a massive shift for us as an organisation and pretty much the banking sector.*
>
> *The focus on us is now … your people are number one and if you look after them, everything else takes care of itself … we're noticing that … our customer satisfaction scores are going … as our employees are getting engaged, so is our customer satisfaction.'*

The CEO had said that getting to number one in customer service would start by treating the people within the organisation fairly.

There had been a large investment by the Bank in providing leadership training for its line managers. This had a focus on 'treating people right' and empowering line managers to resolve matters. Managers were increasingly being selected for their people skills.

Mechanisms such as the FTR were being used to identify and resolve issues. Managers who were found to behave inappropriately were dealt with. In about 30 per cent of cases, a grievance against management was upheld. *'So what happens there is, management are spoken to, additional training is offered, if it's serious they could be marched off the premises.'*

Interestingly, the employee survey results from middle managers were somewhat less positive than those for more junior employees. For example, while 91 per cent of lower level

employees agreed with the proposition that the Bank generally gave a fair hearing to its employees concerned about matters relating to their employment, the equivalent figure for middle managers was 78 per cent. While a similar pattern existed for most of the other attitudinal responses, one would need to be cautious about drawing strong conclusions from these figures. Nevertheless, it is worth noting that the kind of approach to workplace dispute resolution and HR more generally adopted by organisations such as the Bank undoubtedly puts added pressure on line managers. In particular, they have to take more responsibility for dealing with workplace conflict, and are more likely to be held accountable for poor people management. At times this might leave them feeling a bit like 'the meat in the middle of the sandwich', compared to organisations where conflict-management is left to the HR department or senior managers.

While the Bank was a much larger organisation than the Manufacturer, its approach to HR had certain similarities. In both there was a clear link between business strategy, which emphasises customer focus, and HR, with its emphasis on a high level of employee engagement. This was then reflected in the approach to conflict resolution, including minimising any role for third parties.

The Bank's clearly strategic approach to conflict resolution had all the key elements of a comprehensive conflict management system. There was a proactive approach to disputes, responsibility for conflict management was shared by all levels of management, the primary authority for preventing and resolving conflict was delegated to line managers, managers were held accountable for the successful prevention and resolution of conflict, there was a large investment in training in people management skills, and there were effective feedback loops with systems in place to analyse data about disputes and grievances and use them in improving the policies and performance of the organisation.

The Bank clearly preferred to avoid involving third parties (such as unions or the Commission) in dispute resolution, though the role of such bodies was at the same recognised as 'a control' on the effectiveness of the Bank's own internal processes.

The Retailer

The Retailer is a publicly-listed Australian company with around 8,000 employees. At the time of the interview, most were sales staff employed in stores around the country, but there were also about 750 head office executives, 100 clerical employees and around 30 warehouse employees. The workforce was predominantly female. There was an agreement with the industry union that covered the great bulk of employees, though only about 20 to 25 per cent of employees were actually union members.

An interview was held in December 2009 with the Employee Relations Manager ('the ERM') who said that he had primary responsibility for industrial relations across the company nationally. He described himself as 'in-house legal employment law counsel.'

The ERM described relations between management and the union as good, to the extent that the CEO could speak directly to the National Secretary of the Union.

Ostensibly, any dispute or grievance arising in a store could be raised under the DSP, rather than, for example, being restricted only to disputes concerning the agreement or the NES. Concerns had first to be raised with an immediate supervisor and if the matter could not be resolved at this level, it could then be referred to senior store management. Employees could seek the assistance of the union at this stage and during any later stage. If the matter was not resolved with senior store management, it was then referred to employee relations at head office. Should the matter remain unresolved, any party could refer it to the Commission for conciliation and/or arbitration and the status quo was be maintained while the matter was being resolved under the procedure. There was a general obligation on the parties to reply promptly on issues raised for discussion and where a prompt reply was not possible, a timetable for reply was to be provided.

However, according to the ERM, the DSP was virtually never used in any formal sense. Instead, issues between the union and the Retailer were '*pretty much worked through by conversation.'* There had been only one instance where the DSP had been formally invoked in the 12 months prior to the interview with the ERM. This led to the implementation of the status quo provision but the dispute was resolved before it got to the Commission. '*It's the nature of [the Retailer] and the nature of [the union] to try and foster a relationship where we can approach each other and things can be resolved.'*

Rather than using the DSP, matters were resolved informally. The most common source of disputation was rostering. According to the ERM '*I think it works in ... a de facto sense in that I don't think people go "I'm going to apply the EBA dispute resolution". It is just to some extent a natural course of action where they speak to their line manager, that doesn't work and they either go to the union or they come to HR. ... So if they go to the union, we don't say well first of all, have you spoken to your line manager. We don't dictate[how] people actually go through the process.*

The Retailer also had an internal 'Employee Harassment and Discrimination Resolution Procedure', which in contrast to the DSP, was used fairly extensively.

The first step under this procedure was to 'decide what it is you do not like that the other person is doing to you.' The second step was to tell the other person that you did not like what they were doing and ask them to stop – either orally or in writing. Step three was to 'seek help'. If the employee was uncomfortable with approaching directly the person with whom they were unhappy, they could go straight to this step. This involved going to the Human Resources Manager of the store or division for assistance in resolving the issue, discussing what happened and what action could be taken to resolve the matter. Grievances could be escalated through line management, the union (though this would be relatively rare) or increasingly via an HR hotline. The matter was kept confidential. The procedure stated that:

> *'It is your HR manager/Senior Manager/Employee Relations Manager/HR Remuneration & Benefits Manager's responsibility to investigate the matter confidentially. If HR is unable to help, approach the senior manager for your store or division. If they are unable to help, approach the Employee Relations Manager, the HR Remuneration & Benefits Manager [the company's EEO co-ordinator] or your Union.* You are also entitled to make a complaint direct to the relevant State tribunal or the Commonwealth Human Rights and Equal Opportunity Commission.*

According to the ERM, around 50 grievances a year (equating to 0.6 per 100 employees) would reach Step 3. These cases were tracked and reported on regularly to relevant managers.

Step 4 of the procedure stated that the store manager contacted (i.e. the) should first attempt to resolve the matter through conciliation (external conciliators/mediators were not used). In some cases, the ERM might become directly involved in the conciliation. If this was unsuccessful, then an investigation was conducted. According to the ERM interviewed, conciliation was not always used. *' … because it depends on the nature of the complaint and how the parties are whether that's going to be constructive in the first instance. So what can occur is an investigation occurs and then conciliation will be an outcome of the investigation.'* Parties often declined the opportunity to conciliate. This occurred in one case where there was too much vitriol between the parties for conciliation at first. However, the investigation helped the issues to be identified and narrowed, and assisted both parties to understand the deficiencies in their own behaviour. Once both parties felt they were listened to and their concerns taken seriously, they were then more willing to engage in conciliation.

The policy stated that the person conducting the investigation had to be the HR manager responsible for the store or division or the senior manager for the business unit if the HR manager was unavailable or was the alleged harasser (again, external investigators were not used). The procedure required that the HR Manager or Senior Manager must:

- notify the person complained against in writing of the allegations, and inform them of their rights to legal or union representation during the investigation
- start the formal investigation and interview the alleged harasser and other relevant witnesses (the number of witnesses may be limited by the need to balance the investigation with maintaining confidentiality and minimising disruption to the workplace)

- within 7 days of completing interviews, decide whether the complaint was substantiated. Discuss the results of the investigation with the Employee Relations Manager or EEO Co-ordinator (HR Remuneration & Benefits Manager) and the senior manager of the business unit
- remain impartial while conducting the investigation.

In addition, the action to be taken had to be decided by the Employee Relations Manager or the EEO Co-ordinator and the senior manager for the business unit.

Around 10 matters were formally investigated each year.

The procedure stated that if the complaint was substantiated, the complainant could expect one or more of the following courses of action to be taken by the company in order to resolve the matter:

- an apology from the person complained against
- an undertaking from the person complained against that the behaviour will stop
- a formal warning from management to the person complained against that continuing the same conduct will not be tolerated, and if repeated could result in dismissal
- disciplinary action for the person complained against including dismissal or other appropriate actions
- compensation to the complainant for financial loss suffered as a result of the harassment, including medical or counselling fees.

Once a resolution had been decided the manager would conducted follow-up interviews with the complainant and the alleged harasser to inform them of the decision and the reasons for it. The resolution was put in writing and a copy given to each party, with a copy on the complaint file.

Most complaints under the harassment policy were about the actions of managers. They could deal with ‘performance recovery’ issues, or complaints of victimisation about matters such as rostering. A small minority would be ‘peer-to-peer’ complaints.

The most difficult complaints could take up to three months to resolve, though most were resolved within 14 to 21 days.

While the Retailer’s harassment procedure allowed for legal or union representation, it was essentially a process controlled by management. Any conciliation and/or investigation was conducted by a senior manager and the outcome was decided by the Employee Relations Manager or the EEO co-ordinator, and the senior manager from the business unit concerned. There was no appeal to any outside body (though the capacity to take complaints to, for example, the Human Rights Commission, was acknowledged.)

The ERM said that the harassment and discrimination procedure was introduced partly in response to an increase in stress-related worker’s compensation claims. Any claim of bullying or harassment was potentially a workplace incident under workplace health and safety laws.

To mitigate the risk to the employer, it was important to investigate and document such allegations and failing to investigate – even where it was felt the allegation has no merit – could be regarded as exacerbating the injury.

Most claims in the company did not lead to a finding that actual harassment occurred; rather it was often a case of interpersonal conflict. Nevertheless, even where complaints were not upheld, the reason for the person's complaint could still often be addressed to their satisfaction.

Most employees pursued their complaints without any representation; in fact, the union was involved in fewer than 20 per cent of cases and employees would be represented by a lawyer even more rarely (fewer than 5 per cent of cases).

According to the ERM, senior management was very supportive of the harassment and discrimination procedure, as it minimised the risk of external litigation. The procedure also sometimes acted as a way of identifying where managers were failing to apply policies (e.g., about returning part time after maternity leave) properly. He denied that it was used to monitor line managers; however, it ensured that managers were aware of how employees should be treated.

The regular reports on complaints were used to identify issues that might need addressing in particular workplaces. For example, two complaints of sexual harassment from one particular workplace suggested that there might be a concern with the workplace culture; the response was a briefing of all management and employees on sexual harassment. In another case, a manager who was a strong performer failed to gain promotion because he had had a number of complaints made against him. While there was no formal tracking, patterns could be identified and lead to pre-emptive actions, such as coaching sessions.

All sales managers underwent a foundations-of-management course, which included people management issues, performance recovery, the enterprise agreement and sexual harassment.

The HR strategy was to ensure that line managers knew when to refer to head office for advice. '*... there are rules and there is a need to maintain consistency because precedents flow on and before we know it, there's no consistency throughout the business.*' The autonomy for lower-level managers was quite low, and the emphasis was on consistency.

According to the ERM, the dispute resolution process could be part of a healing process; it could also act as a release valve in interpersonal conflicts.

The ERM felt that employees were generally more willing to claim harassment or bullying, and the number of complaints under the procedure was on the rise. Moreover, issues which would have traditionally been industrial disputes (for example, rostering or shifts) were now characterised as victimisation – perhaps because the harassment and discrimination procedure was more a recourse for non-unionised employees.

An examination of publicly-available tribunal records showed that in the 24 months to 31 December 2012, no disputes were referred to the tribunal under the DSP. There were, however, 15 applications in relation to termination of employment (equivalent to a rate of 0.1 per 100 employees a year).

While little formal use was made of the DSP, because of its good relationship with the union, the Retailer appeared to be successful in resolving disputes at the enterprise level, without recourse to an industrial tribunal.

The Retailer had some of the elements of a comprehensive conflict management system, but less emphasis on devolving responsibility for conflict resolution across the organisation than do the Manufacturer or the Bank. There link between business and HR strategies worked in a different way than it did with the other two private sector organisations; there was a much greater emphasis on consistency and control than on employee engagement.

The Retailer's grievance process was focussed primarily on interpersonal matters, though some matters that might have traditionally been seen as 'industrial' in nature were now coming within its ambit, and it was being used with increasing frequency. There was no scope for external mediation or arbitration and employees were generally unrepresented. Consistent with the general HR strategy, the grievance process was used to some extent by senior management as a control mechanism vis-a-vis line managers to promote consistency in policy application. HR was also involved at a relatively early stage of the grievance handling process – potentially even before local line management. Most grievances were resolved quite quickly, though a small number could take up to three months. Some relevant training was provided to line managers, who were to some extent held accountable for problems in their areas, and grievances were actively monitored, though feedback loops appeared to work in a relatively ad hoc manner.

The Charity

The Charity was a not-for-profit organisation and a sub-division of an international faith-based organisation, covering New South Wales, Queensland and the ACT. It had a very diverse range of activities, ranging from small manufacturing, through cafes, crisis and supported accommodation, youth support, counselling, and drug and alcohol rehabilitation, and it had around 4,000 employees. An interview was conducted in November 2009 with the workplace relations director ('the HR manager').

According to the HR manager, because of its diverse range of activities, the Charity had historically been covered by a large number of different state and federal awards. About 20 to 25 per cent of the work force was under enterprise agreements, the main one being in the aged care sector, and all these agreements were with unions. Union membership, however, was very low. The main unions the Charity dealt with were those representing nurses, the ASU (representing clerical staff), and the Australian Workers Union and the Liquor, Hospitality and Miscellaneous Workers Union (AWU and LHMU), which represented mainly blue-collar staff). The HR manager described the industrial relations environment as *'fairly good.'* He thought many of the unions the Charity interacted with understood that the not-for-profit sector provided a community service. He thought that as a consequence, they understood that '*we're fairly stretched and we try to do as much as we can with as little as we've got.*' He thought that the unions understood that they would not genuinely set out to treat their employees less favourably than either they needed to do in accordance with their legal obligations, or that they should do as '*a good, moral employer*.'

The HR Manager said that many of the issues he dealt with tended to be *'personality clashes'*. While there would occasionally be an issue over the interpretation of an award or agreement, most disputes reflected personal circumstances.

The aged care enterprise agreement applied to disputes about any matter arising in the employment relationship apart from the actual termination of an employee and the parties could appoint a representative for the procedure. The parties had first to attempt to resolve disputes at the workplace level, including, but not limited to, the employee and his or her supervisor discussing the matter and, if the matter was still not resolved, discussions involving more senior levels of management, as appropriate. If the dispute could not be resolved at the workplace level, either party could refer it to the Commission, which had the power to do all such things necessary for the just resolution of the dispute, including mediation, conciliation and arbitration. The Commission, however, could arbitrate disputes about workload management only with the agreement of both parties.

According to the HR Manager, in around 2001 a state government health and safety inspector, who was dealing with a workplace health and safety issue at one of the Charity's facilities, asked what the procedure was for people to lodge a grievance or raise a concern with the organisation. The answer was that the Charity would follow the relevant award process. The inspector suggested that the Charity would be able to deal more effectively with disputes if it had its own procedure, with more focus on the local workplace, rather than that contained in

the award. His advice was that the incident he was investigating might have been averted if the Charity had had a good grievance handling process in place. While the initial procedure the Charity developed was just for the facility in question, at the further suggestion of the inspector it was adopted for the entire organisation. This led to the development of the first grievance and complaint handling policy for the organisation, which has been refined and modified a few times since.

The Charity had an HR policy entitled 'Grievance Policy and Procedures'. The policy document commenced with an acknowledgement that in such a diverse organisation *'it is inevitable that grievances will arise. It is important that grievances be dealt with confidentially and expediently, in a manner that is as unbiased as possible, and that no victimisation occurs against anyone for complaining or assisting a complainant.*' The policy had as its stated objective the provision of *'a mechanism for fair, effective and open response to handling grievances which cannot be resolved without intervention.'*

Despite the presence of DSPs in the Charity's enterprise agreements, it appeared that it was 'the Grievance Policy and Procedures' that were generally followed when it came to dealing with workplace grievances and disputes. The Grievance Policy and Procedures was attached to all letters of appointment and forms part of every employee's conditions of employment. The policy acknowledged that some awards contained grievance procedures and stated that '*in the first instance reference is to be made to these, and those procedures followed. In the absence of a procedure under an Award, the following will apply.*' However, the HR Manager believed that the Grievance Policy exceeded award standards and the Charity was more than happy to rely on the policy as opposed to referring people '*to just go to the award*'.

The definition of 'grievance' in the policy was very broad, encompassing *'an expression of dissatisfaction with the policies, procedures, officers, employees or volunteers or lay workers or client, the service provision or decisions made.'*

The policy stated that:

'*Grievances should in the first instance be resolved at the level where the problem has occurred. Should this prove unsuccessful, either party has the right to decide whether they want formal or informal resolution procedures followed. At all stages during the process, the staff member dealing with the grievance is to keep their management informed and updated as to the progress of the grievance and any resolution agreement.*'

The policy included the following principles:

- *'Any staff member, volunteer or client has the right to lodge a grievance and have it handled promptly and equitably, without fear of recrimination.*
- *The grievance policy should be seen by staff, volunteers, and clients to be a positive and productive mechanism.*
- *All staff, volunteers, and clients have the right to make a grievance.*
- *The staff and volunteers will work together as valued colleagues.*

- *The Grievance policy and procedures should be fair and just and be applied equally to all parties regardless of their role.*
- *As far as possible, normal work activities will continue whilst the grievance process is being pursued.*
- *Any party to a grievance should be given the opportunity to have a support person of their choice present during any interviews. The observer's role is to observe the proceedings, not to participate in the interview. However, if this person represents a conflict of interest to the matter, [the organisation] reserves the right to request another support person be present.*
- *This Policy may be modified to suit the individual needs of centres and sites (following consultation with Head Office or the Workplace Relations Department) however, the fundamental principles of this Policy need to remain intact.*

According to the HR manager, employees were always encouraged to have a support person, whether a co-worker, family member, lawyer or union representative, and most people did so. Unions were involved in around 10 – 15 per cent of all grievances, usually involving a full-time official; there had also been an increase in the representation by lawyers.

The policy stated that at any stage of the grievance process, *'a person with a grievance may seek information on the nature of his/her grievance by communication with [the Charity's] Contact Officer who will provide appropriate information to assist the complainant in his/her matter.'*

The HR manager indicated that the role of contact officer had been created so that someone who had concerns or issues could raise the matter and seek some advice or guidance as to how best to have that matter dealt with or the processes that they should follow. The contact person at the time was a member of the HR team and the arrangement was seen as working well. The HR manager also mentioned that the Employee Assistance Program could give employees independent advice or guidance on a range of issues. He also said that employees would generally be referred to the internal Grievance Policy, rather than the DSP in the relevant award or enterprise agreement.

The Charity's policy indicated that an aggrieved person should, if possible, speak to the person with whom who they were having a difficulty and explain their concerns. Should the matter not be resolved then, the aggrieved staff member was to initially contact the staff member they felt most comfortable with and who in their opinion was the most appropriate person to assist in resolving the grievance. They were to arrange to talk to the offending person again giving them the opportunity also to have a support person. The procedure provided that if a resolution was agreed upon at the conclusion of this discussion, both parties were to document the agreed steps to resolve the conflict and the time frame for such steps. This was also communicated to the department/site manager. If it was possible to resolve the matter without identifying to the manager the source of the grievance, this was to be done. '*If however at the Manager's discretion a satisfactory resolution is dependent upon the identification of the source of the grievance, this should be done and the aggrieved person advised.*' This was described as the informal grievance process.

If the informal process failed to resolve the matter or should a resolution not be reached within one month of the initial notification of the grievance, the matter was escalated to the formal grievance procedure.

Formal grievances were lodged by completing a prescribed form given either to the employee's direct manager or the Contact Officer, with details of the grievance and a suggested remedy. The recipient of the complaint was to make an initial investigation if appropriate to evaluate the validity of the grievance by obtaining relevant information from staff, the complainant and if necessary, other staff, volunteers or clients. If the complaint was received by the Contact Officer, he or she was to discuss with the complainant possible actions to resolve the matter. The Contact Officer was to appoint a suitable person to conduct this initial investigation.

If the initial investigation suggested that there may be some substance to the complaint, the person against whom the grievance had been lodged was notified and a more detailed investigation conducted. If there was no substance, the complainant was advised.

An interview was then scheduled involving all relevant parties, chaired by the relevant manager. If the complaint was against the manager, the meeting was chaired by someone from HR. The investigator was to complete an investigation of the matter by obtaining relevant information from staff, the complainant and, if necessary, other staff/clients, and make recommendations for resolution. Any resolution should contain a time-frame of events. There should be a review scheduled shortly after the expected implementation of the resolution plan to evaluate the results and determine if the grievance had in fact been resolved. While it was not entirely clear from the policy document, it appeared that if the recommended plan of action was acceptable to the complainant, it was then implemented. However, should the complainant remain unsatisfied with the resolution at this stage, he or she could take the matter to the senior manager in charge of the district. This senior manager was provided with all the grievance information and could either carry out yet another investigation, or make a determination based on the facts of the case provided to them. According to the HR manager, the senior manager referred to above would usually seek a recommendation from the workplace relations director and the resulting decision was final.

The policy stated that if the complainant remained unsatisfied, they should pursue further grievance resolution measures through an appropriate external agency, for example, their union or a relevant government agency.

It also stipulated that all grievances should be resolved, whenever possible, within a maximum period of three months. Further, if a grievance was substantiated, the following actions might be appropriate:

- *a written apology and/or*
- *an official warning and/or*
- *counselling and/or*
- *demotion and/or*

- *dismissal.*

Vexatious complaints could lead to disciplinary action against the complainant up to and including dismissal.

The Charity did not maintain a central database of grievances. However, the HR manager estimated that in a typical year between 10 and 20 grievances (a rate of 0.25 to 0.5 per 100 employees) would come to the HR area. He said the Charity was working to improve its collection and analysis of grievance information in order to identify any patterns and develop better practices. He also thought that the number of grievances was on the rise, partly due to greater awareness and partly due to increased pressure on employees. Only a couple of grievances a year would receive a final determination by a senior manager.

In the 24 months to 31 December 2012, no matters were referred to the Commission under a DSP and the HR manager said that only a small number of matters would end up before bodies such as the Human Rights Commission. An analysis of the Fair Work Commission's database indicated around 30 unfair dismissal and general protections applications were made during this period. This would represent a higher than average number of such matters for an employer the size of the Charity.

The Charity had used mediation, both with external mediators and trained internal staff, and the success rate of this approach had been, according to the HR manager, 'reasonably high'. Sometimes mediation took place because a tribunal required it, but the Charity also chose to engage a third party mediator a couple of times a year to help resolve an issue.

Training had been provided to managers on how to fulfil the requirements of the grievance policy, though the HR manager acknowledged that not all had received it.

The HR manager also said that the Charity was planning to introduce a comprehensive grievance database, the purpose of was not just for record keeping but also for continuous improvement, including the identification of particular issues where more training might be needed. The HR manager saw the grievance policy as an effective and fair way to deal with issues that present in the workplace, as a release mechanism and to help meet legal obligations. His view was that if the grievance policy did not exist, more matters would end up before industrial tribunals or other external bodies. The trend was for an increase in individual grievances, whereas a few years previously there would have been more union issues.

It could not be said that the Charity had a comprehensive conflict management system. In particular, effective monitoring and feedback mechanisms were absent, though they were working on this. Line managers were not systematically held to account for conflict management and training in conflict management was patchy. The internal grievance policy, rather than DSPs in awards and agreements, was used to resolve matters. The HR manager recognised the need for a more systematic approach to dispute resolution and was planning to introduce a proper mechanism for monitoring and analysing grievances.

The University

At the time of the interview, the University had around 9,000 employees, around one third of whom were casuals. There were about 2,500 academic and research staff (who were covered by one enterprise agreement) and about 3,300 professional, technical and administrative support staff (covered by a separate agreement). The interview was conducted with the Manager, Industrial Relations ('IR manager'). According to the IR manager, around 20 per cent of the workforce belonged to a union, a large drop from a few years earlier.

Based on the interview with the IR manager, relations with the unions were not good. The position of the Vice-Chancellor was that unions had a right to look after the industrial interests of their members, but should have no say in the running of the University. While the university would consult the unions over policy, the focus was on consulting the staff directly. It is to be noted that reforms under the previous, conservative, government had been used to reduce union influence. At the time of the interview, a new agreement was being negotiated and some industrial action had occurred, though based on the interview with the IR manager, it did not appear to have strong support from employees. According to the IR manager, the University had had *'very little industrial chaos or industrial disputes over the last three years'*, though there had been a significant dispute in 2006/7. The matter was dealt with by the Commission, which had come down on the side of the employer. (Further industrial action accompanied enterprise bargaining in 2010).

The philosophy of the University, according to the IR manager, was to resolve complaints in the workplace.

> *'That's our principal goal because we take the view that we pay managers a lot of money to manage their staff and if there's going to be complaints, we want them managed informally and expeditiously … once a complaint goes outside the area, sometimes it becomes a little uncontrollable, particularly if a solicitor or legal representative is involved and sometimes they can wind the employee up. We've had some complaints end up in the Human Rights Commission or the Anti-Discrimination Board or WorkCover or something like that, and we try to avoid that.*
>
> *Of course, it's not only time-consuming, it affects our reputation, could end up in the press so we like to get things fixed up… So that's why we like it done as informally as possible….*

The manager noted that the cost of complaints was 'huge'.

> *'It's not just financial costs either, it's morale and that's why the costs are not only financial because sometimes you can have four or five people involved in all this, trying to resolve a complaint and it's just removing that time of the manager to areas which are just non-productive.'*

According to the IR manager, values and behaviours were included in managers' key performance targets, and there were negative consequences for managers who do not behave well in the workplace. He described this strategy as *'the preventative medicine approach'.*

While formal complaints were registered, no systematic analysis was conducted. However, if a trend was noticeable, the HR team would probably discuss it with senior management from the area concerned.

Both enterprise agreements contained very similar DSPs. The DSPs could be used to deal only with disputes regarding the interpretation, application or operation of any provision of the agreement (or the NES). All disputes were to be notified (either by the union or the employee) in the first instance to the Director, Human Resources, in writing, with details of the dispute and the resolution sought.

The employee and/or the union and representatives of the University had to meet within five working days of the dispute notification to try to resolve the dispute, unless the parties agreed in writing to a different time frame. Where the dispute related to a single employee, both that employee and the employee's supervisor would normally attend the dispute meeting.

If this meeting did not resolve the dispute, the employee or the Union would refer the dispute, in writing, to the Director, Human Resources, within five working days. There would then be a second meeting within a further five days (unless the parties agreed in writing to a different time frame).

If this second meeting did not resolve the dispute, either of the parties could refer the matter to the Commission for resolution by mediation and/or conciliation, or, where these did not resolve the dispute, by arbitration.

The DSP specified that if an application for arbitration was made, the Commission could exercise any of its powers under the Act and its decision had to be implemented by the parties, subject to either party exercising a right of appeal against that decision.

In general, the University would not change work, duties, staffing or organisation of work subject to the dispute while the procedure was being followed.

In the 24 months to 31 December 2012, five matters were referred by the University to the Commission under the terms of a DSP.

All the cases were brought by a union or an individual employee represented by a union. Two cases concerned the appropriate classification of one or more particular positions. One concerned the amount of paid parental leave to which an employee was entitled. In another, a union was seeking access to certain information to make a submission concerning a particular workplace change proposal. The remaining dispute related to compliance with a provision in the agreement concerning workload. Four out of the five disputes were resolved through conciliation in the Commission; in two of those cases, the Commission issued a recommendation. The remaining, fifth, dispute was not resolved by conciliation and was referred for arbitration.

The University also had an internal staff complaint procedure, which specifically excluded disputes regarding the interpretation, application or operation of the University's enterprise

agreements. In these circumstances, the DSP in the enterprise agreement was used. Findings of unsatisfactory performance, misconduct or serious misconduct, or a recommendation or decision to take disciplinary action (including dismissal) were also excluded. The staff complaint procedure – with these exceptions – could be used to deal with any type of problem, concern or grievance about work or a work environment. This could include the conduct of another staff member (including interpersonal conflict), discrimination, harassment or bullying, workplace safety and the application of policies and procedures.

Complainants were encouraged to resolve their concerns directly with the other party; if the complainant was uncomfortable with this, or it did not resolve the problem, he or she could make a complaint, to the complainant's immediate supervisor. If the complaint was about the supervisor, it should be made to the next most senior manager, who would either handle it or refer it to another manager at an appropriate level. Complaints could be made verbally or in writing. As well as detailing the complaint itself, the complainant had also to state whether they wished the complaint to be dealt with formally or informally and state the remedy or outcome they were seeking. A sample complaint form was provided, but its use was not mandatory. The complainant could seek advice about whether an informal or formal process would be more appropriate from a University Complaint Officer, human resources consultant or their own representative.

The procedure stated that the informal process was suited to less serious issues, such as interpersonal conflict or the application of University policies or procedures. It might also be appropriate where the parties were likely to continue working together. The formal complaint procedure was suited to more serious issues, such as sexual harassment, discrimination or other unlawful conduct. It could also be appropriate for sensitive matters or where there was a high level of factual dispute. Complaints to be dealt with under the formal procedure normally had to be made in writing and copied to the Director, Human Resources, who recorded the complaint on a central register.

Informal complaint procedures were conducted by the complainant's supervisor, normally within 21 days. The focus was on finding a resolution acceptable to all parties. For example, the supervisor might meet both parties separately or together to discuss the issues and explore possible resolutions, or arrange mediation or conciliation.

If a formal complaint had been made, or if the informal process had not resolved the issue, the matter was dealt with through the formal complaint procedure. This is normally conducted by the Head of School or Head of Department, or another manager at that level or above. If the matter was serious or complex, it could be referred directly to the Deputy Vice-Chancellor (Academic). In some cases, according to the industrial relations manager, a matter could be diverted and dealt with under the misconduct provisions of the enterprise agreement. In these cases, an external investigator could be engaged.

A preliminary inquiry was normally conducted within a month. Following this inquiry, the Head of School, Department Head or Deputy Vice-Chancellor (Academic) would consider the information gathered and determine the next steps. If there was no *prima facie* case, if it was not serious enough, or if there was little factual dispute, the matter would not proceed to a formal investigation and a decision concerning outcomes could be made at this stage.

If the matter proceeded to a formal investigation, the Head of School, Department Head or Deputy Vice-Chancellor (Academic) referred the matter to an investigation officer. This was someone appointed by the University and could be an official of the University or a person from outside the University. The complainant and respondent had an opportunity to comment on the proposed investigation officer prior to the University confirming their appointment. The role of the investigation officer was to collect information about the complaint and make findings about whether the factual allegations were substantiated. The investigator focussed on determining the facts but did not decide the outcome. Formal investigations would normally be conducted within two months. Outcomes were decided by the Head of School etc., who was responsible for advising the parties. The policy document listed some possible outcomes:

- the parties get a better understanding of the issue
- an apology
- a change in working arrangements
- a commitment to change behaviour
- guidance, counselling or warnings are issued or disciplinary action is taken (in accordance with the relevant industrial instrument).

A determination of outcomes should normally have occurred within 14 days. Appeals were permitted, but only on procedural matters, not on merits. Appeals were referred to a member of the executive team who had not been involved in the matter up until then. The appeal should take no longer than 21 days.

All persons handling complaints had to maintain confidentiality, adhere to procedural fairness (i.e. give each party the opportunity to present their side of the story, and give the respondent an opportunity to respond to the allegations against them), act impartially, comply with timeframes, keep records and give reasons for their decisions, which in relation to formal complaints should be in writing.

According to the IR manager, there were between six and 12 formal complaints a year (a rate of between 0.7 and 1.3 per 100 employees a year) and around 120 informal complaints a year. These could be about matters such as start and finish times, poor air-conditioning, *‘anything and everything’.*

Informal complaints were normally resolved within around 21 days; formal complaints normally took around a month.

The IR Manager indicated a general reluctance by managers to get involved in dealing with complaints; they saw them as distracting them from their core functions.

Employees were usually represented in relation to formal complaints, split roughly 50/50 between unions and lawyers. Formal complaints were often about family responsibilities, for example, access to parental and carer’s leave, flexible working hours or working on weekends. Mediation would sometimes be used in relation to formal complaints and occasionally lawyers would be used to conduct investigations.

According to the IR Manager, the principal goal was to have complaints resolved in the workplace '*... because we take the view that we pay managers a lot of money to manage their staff and if there's going to be complaints, we want them managed informally and expeditiously.'* When matters ended up in the Human Rights Commission or Work Cover they became not only time-consuming but could also have adverse reputational effects. Complaints not only had financial costs but were damaging to morale.

Managers were encouraged to seek advice from human resources. However, unless the matter was very serious, HR staff did not generally attend meetings, as that could ratchet up the formality.

It is worth noting there that HR ran training for managers and supervisors on managing workplace and discrimination grievances. Unfortunately, managers had to volunteer to do the course and the experience was that some managers who needed it most did not attend.

There was no formal analysis of trends with regard to grievances and disputes. The IR Manager would, however, talk to senior department heads if particular complaints recurred.

At the time of the interview, a system had recently been introduced where managers had behavioural requirements written into their performance contracts. The IR manager hoped that putting behavioural expectations in managers' Key Performance Targets would prevent problems in the future.

The University cannot be said to have had a comprehensive conflict management system. While training of managers in conflict resolution was conducted, it was voluntary and patchy. There was no systematic analysis of grievances and feedback was informal and limited. On the other hand, there was some effort to make managers responsible for preventing and resolving conflict.

The Commonwealth Government Agency

The Commonwealth Government Agency was a national public sector organisation established under its own Act of Parliament. At the time of the interviews, it had around 5,000 employees. About 17 per cent of these were employed on a casual basis, about 10 per cent on fixed term contracts and the remainder had 'ongoing' contracts. A joint interview was conducted in November 2009 with two managers, respectively the head and former head of industrial relations (i.e., the current and the former IR managers).

At the time the interviews were conducted, most employees were covered by an enterprise agreement which had been negotiated with two unions. Union membership was relatively high, at well over 50 per cent. According to the managers interviewed, even employees who were not union members tended to be '*union sympathisers*'.

The industrial relations climate, according to the former IR manager, had significantly changed in recent years.

> *'It used to be a lot more collective and fairly active up until probably 4 – 5 years ago. What we're seeing, and I think it's a general trend throughout the world really, is less collective issues brewing. We have consultations over work practice changes and so on and that certainly is continuing, but in terms of grievances and disputes a lot of it now is very individual-based.'*

However, even where a grievance concerned an individual matter, the case would often be run by, or with the assistance of, the union. This was particularly likely if the issue was consistent with the union's broader agenda (e.g. fixed term contracts).

The former IR manager said industrial relations overall were no longer adversarial, which he attributed in part to the current union leadership. In most work areas, relations were *'pretty good'*, though there were some parts of the organisation where relations were poor.

In November 2009, the official from the larger of the two unions, the one with primary responsibility for members employed by the Commonwealth Government Agency, was also interviewed. He agreed that industrial relations varied greatly in different parts of the organisation. In some areas there was a high level of union density '*and there's just an expectation that management will work with us and talk to us, and often rely on our advice as well. Often we're here to actually sort things out.'* In other areas, the conduct of industrial relations was much more aggressive. HR in particular tended to just say '*no*', and rely on the Commission to back it up.

The agency's enterprise agreement purported to make a clear distinction between 'personal grievances', which were subject to the Workplace Behaviour Policy, and disputes subject to the DSP. In practice, many of the matters that were dealt with under the DSP could also be loosely characterised as personal grievances.

The DSP was intended to be used for all disputes in relation to any matter arising under the enterprise agreement (the NES), the application of the agency's recruitment and selection guidelines, and the application of its performance management guidelines.

Under the terms of the DSP, the parties to a dispute must first try to resolve the dispute at the workplace level, by discussions between the employee(s) and relevant supervisors and/or management.

If discussions at the workplace level did not resolve the dispute, a party to the dispute could refer the matter to the Commission. The Commission was to attempt to resolve the dispute as it considered appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation. If the Commission was unable to resolve the dispute through these mechanisms, it could arbitrate the dispute and make a determination that was binding on the parties. Disputes concerning selection decisions could only be referred to the Commission on the grounds of non-observance of due process, unlawful discrimination or patronage or favouritism by a selection committee. Appeals to the Commission on merit were not permitted. On receipt of an application for a dispute resolution process in relation to a selection decision, the Commission was to establish a selection committee assessment panel. The panel was to be comprised of three people: an independent chairperson nominated by the Commission, a person nominated by the agency and the appellant's nominee, who had to be from outside the appellant's work area.

In relation to appeals concerning appraisal ratings, or a salary outcome of an appraisal, an employee could seek an internal review. If the employee was dissatisfied with the outcome of the review, they could appeal. The appeal would be considered by a panel comprising a management nominee, a nominee of the appellant and a chairperson mutually agreed between the agency and the appellant, who was from outside work area and had been trained or was experienced in assessment procedures. There was limited scope for further appeal to the Commission.

An analysis of publicly available records indicates that 11 disputes were referred to the Commission under the DSP in the 24 months to December 2012. Three concerned an alleged failure by the commonwealth government agency to consult in relation to a major workplace change in particular business units (as required by the enterprise agreement). These appeared to have been resolved by conciliation (sometimes involving a number of conferences and ‘report-backs’). The other disputes concerned grievances by individual employees. Three were appeals from appraisal decisions, one of which was dealt with by arbitration. The other two individual employee grievances concerned a selection process, which was resolved by a recommendation of the Commission, and an allegation of bullying and harassment. This was referred for arbitration. The remaining disputes related to the application of a disciplinary process in relation to alleged misconduct and the application of the redundancy provisions in the agreement in relation to particular employees. One of these matters led to a formal hearing to confirm whether the Commission had the power to deal with the dispute.

The Workplace Behaviour Policy contained a complaints resolution procedure that could be used to deal with issues of bullying, harassment and discrimination. However, the procedure could be used in relation to any act, behaviour, omission, situation or decision that had an impact on an employee which he or she thought was unfair or unjustified. The policy specifically stated that the complaint resolution procedure could be used to deal with issues such as:

- interpersonal conflicts and difficulties

- rostering and/or working hours
- staff development and training
- misuse of corporate resources
- supervision
- leave approval and allocation
- general work environment and
- requests for flexible working arrangements.

The main exceptions included disputes that were in the process of being, or had been dealt with, under the DSP, as well as recruitment and selection decisions and performance management decisions that could be appealed under the enterprise agreement or the Act governing the organisation, and misconduct or serious misconduct proceedings and decisions.

The union official said he was not sure what the difference really was between the DSP and the grievance procedure. He suggested: *'One is the clause for me to use, and one's the clause for members to use. That's really what it's about.'* In practice, there was clearly a level of overlap.

The complaint resolution process had four steps:

1. Where appropriate employees should raise the issue with the other person directly.
2. If step 1 was unsuccessful, or inappropriate, the employee could initiate an 'informal process' with their manager, their next level manager, or the state or territory HR team. A facilitator was appointed who may be a manager, a senior member of staff, an HR manager or advisor or 'other suitable person'. The facilitator would meet with the complainant (where practical, within five days of the complaint being made). The facilitator would seek to resolve the issue informally, for example by mediation. Outcomes could include agreements on future conduct, apologies and changes to decisions, training or procedures.
3. If the issue could not be resolved informally, or if the facilitator believed that the informal process was inappropriate, then the complaint could be put in writing and a formal process initiated. The formal resolution process was overseen by HR and could include actions such as a formal investigation, a case appraisal, formal mediation, negotiation and/or determination of appropriate outcomes. Any investigations would be carried out by a person who was trained and competent in workplace investigations and who had no prior involvement in the complaint. Generally the investigator was be an HR team member, although an external person or firm (e.g. a law firm) could be engaged. The investigator produced a written report of their findings and the relevant manager would then determine the most appropriate course of action. Possible outcomes of a formal resolution referred to in the policy document included changing a decision, changing the work environment or requiring an employee to attend training (e.g. in relation to bullying).
4. If an employee was unhappy with the resolution, they could appeal to the director of HR within 14 days of the decision. The appeal would be conducted by a reviewer who will consider the process and/or the decision that was made. In reviewing the merits of the decision, the reviewer would consider only the information that was available to

> the decision-maker at the time of making the decision. In reviewing the procedural fairness of any formal resolution process, the reviewer would consider the process followed and the principles of procedural fairness, including providing the parties with a reasonable opportunity to respond to the allegations, making any decisions on the evidence available and ensuring that the decision-maker was free from bias. The reviewer presented their report to the Director of Human Resources (or delegate) who could confirm the original findings and/or decision or overturn the findings and/or decision and make new findings and decisions. The decision of the Director of Human Resources or delegate was final. All parties were expected to accept and implement the decision. There were no further appeal mechanisms within the organisation.

Complainants were usually accompanied by a support person. This would often be a union representative or a lawyer, and union representation was more common than legal representation. Some people started with no representation, but then obtained some if the matter was not facilitated in a manner they were happy with. The union could assist by providing advice before a meeting, sending a delegate or organiser along or sitting in on the meeting by phone. The union provided training to its delegates to deal with disputes and grievances.

Mediation could be conducted by the state HR manager if it was a fairly simple dispute between a supervisor and an employee. If it was more complex, an external mediator would normally be used – often sourced from the organisation's employee assistance program (EAP) provider. Mediation was more likely to be used for matters such as bullying, or a breakdown in relationships, while claims of harassment would normally go to an investigation. This was partly because with discrimination and harassment, issues of vicarious liability could arise and it might be necessary to investigate because of legal issues.

Investigations were often done in-house by state HR managers, as sourcing independent investigators was described as very expensive ($50,000 – $100,000). Also, the current industrial relations manager indicated that the organisation preferred to keep the experience in-house because the more they trained their state HR managers to deal with them, the better they became at dealing with disputes. In addition, external investigations could take six months, which was contrary to the philosophy of resolving matters as quickly as possible. The time taken to resolve matters could vary from one day to two years. However, in-house investigations normally took around four weeks. The union official indicated that they did not see external investigators paid for by the organisation as independent. *'... when they bring people in, they pay huge amounts of money, and they've bought the report, in essence. Our members therefore don't have confidence in the process.'*

The current and former IR managers indicated that the DSP ran faster, more expeditiously and efficiently than grievances. This was partly because of their nature – issues about the application of the agreement usually had a definite answer. However, there was also a belief on the part of employees that they could really get a result from the DSP, whereas they saw the grievance process as *'just a management talk'.* In other words, they had little faith that the internal process would be fair. Moreover, the grievance process was often delayed, which also undermined management confidence. The Commission, on the other hand, was seen as an independent and quite efficient way to deal with workplace disputes.

The former industrial relations manager commented that over the years a number '*of individual disputes with harassment or discrimination type underlying factors'* had gone to the Commission *'and they've been pretty hard to unravel. The Commission's conciliation process, and this will depend a lot on the individual member's skills and aptitude in this regard, can actually work quite well as a mediator in some respects, they're in a really good position to be able to do that.'*

The current industrial relations manager said that without the steps in the DSP for resolution at the workplace level, disputes would end up straight in the Commission, *'which isn't actually a bad place to be … We spend an inordinate amount of time dealing with someone who is never going to be satisfied with the process and we end up in court anyway, so we could have got there about a year earlier.'*

In the union official's view, most of his members had very little knowledge about the grievance procedure. One of the criticisms he had of the policy was that the grievant had no say about how the grievance was handled; it was up to management to decide whether there would be an investigation or mediation, *' You could end up in mediation with somebody you don't want to talk to'.*

The union official would often give members advice about personal grievances. This could include advice not to lodge a grievance because the allegation lacked substance, or that their issues would be better dealt with through an informal chat with their manager.

The union official also argued that the grievance resolution process should be changed from an investigation-based model, which he saw as inappropriately based on the approach applied to misconduct matters, to a model based on adjudication.

In his view, the overwhelming majority of grievances involved reviews of management decisions, rather than employee – employee conflict. He considered that in the majority of cases, the grievance could only be effectively dealt with by giving the employee the opportunity to explain their case and to be heard. This approach obliged the employee with the grievance to advocate his or her best case actively, rather than have their matter investigated. A process that required an employee to analyse his or her own grievance and explain their issue in their own terms was more likely to resolve the grievance than the more passive process which relied on another party investigating the claim. Investigations were best suited to matters that required establishing fact, whereas grievances were more likely to deal with issues of interpretation and application.

The union official also expressed concern that the complaint resolution process was widely viewed amongst his members as lacking in independence. That issue would have to be addressed before employees could develop greater confidence in the system.

The union official proposed that grievances be dealt with through a formal process in which:

- all parties should have a fair opportunity to be heard, present evidence and call witnesses
- all parties should be made aware of all relevant information
- all parties should be made aware of any allegations made against them or adverse material that may be relied upon and

- all parties may be represented in the hearing.

The adjudicator would then make any necessary findings of fact and provide a recommendation. A copy of the recommendation would be provided to the complainant and if the decision-maker did not follow the recommendation, they would need to provide written reasons.

The union official suggested that in more serious cases, an external adjudicator might be needed to ensure the perception of independence and he proposed a panel of agreed people (such as retired commission members) from whom management would be free to select.

The official also acknowledged that where the grievance involved employee – employee conflict, mediation would generally provide a better method of resolution. While he supported greater scope for independent adjudication of grievances, he was reluctant to have matters dealt with by the Commission. He described the Commission as having become less user-friendly, with more matters requiring written submissions. He said the preparation time to run a case was very extensive and the only matters he would take to the Commission under the DSP would be those that had broad application to a large number of employees. He tended not to run individual grievances at the DSP because *' ... I don't have the time or resources to put into running a three-week case on an individual who's been badly treated at work.'*

The union official considered that a lot of his members would be frightened if he took a matter to the Commission. '*It's seen as you going to court .... You go into a big building, there are big desks, there are people that take records and put it on transcript. It's frightening and intimidating.*'

Line management at the Commonwealth Government Agency tended to think that HR took grievances too seriously. Line managers found the whole process burdensome and time consuming, giving *'too much voice'* to the complainant. The answer HR gave was that if a complaint had been made it had to be taken seriously. According to the managers interviewed, executives within the organisation tended not to think about grievances unless a particularly big case blew up in their patch.

In summary, there was no comprehensive conflict management system at the Commonwealth Government Agency. There was no evidence that employee engagement was measured or that there was a clear, integrated HR strategy. The approach to dispute resolution was reactive, with the main focus on limiting legal liability. There was limited confidence on the part of employees and management in the organisation's internal complaints resolution process and relatively heavy use of the industrial tribunal and external law firms. There was also little evidence of training line managers in conflict prevention and resolution, nor did they appear to be held accountable for their performance in this area. There was no systematic monitoring of grievances and there were no feedback loops.

The State Government Agency

At the time of the interviews, the State Government Agency had around 4,700 employees (about 4,000 blue collar workers, and 700 salaried and senior officers). Interviews were held in November 2009 with the Employee Relations Manager ('ER manager'), two managers from the Equity and Diversity area ('E&D managers') and the senior union official responsible for members employed by the organisation.

Blue-collar union membership in the agency was close to 100 per cent and employees were largely covered by three NSW consent awards (which were in effect enterprise agreements made under state legislation). The industrial relations climate was described by the union official as '*very tense*' and by the HR manager as adversarial. In the years prior to the interviews, there had been some fairly prolonged disputes over managerial prerogative with regard to issues such as rostering. These had largely been resolved through arbitrated outcomes in the NSW Industrial Relations Commission. However, the union official said that management had generally become less willing to consult the union and the ER Manager complained that there was a very '*rights-driven environment'*.

The agency made a clear distinction between 'grievances' and 'disputes'. 'Grievances' were dealt with under the Grievance Resolution Procedure, which was a policy rather than part of an industrial agreement, and they were dealt with by the Equity and Diversity Group (E&D) rather than by Employee Relations.

The ER manager said the DSP in the enterprise agreements was for *'industrial matters'* while the grievance procedure was more concerned with *'interpersonal matters'*, such as harassment, discrimination or victimisation.

The DSP could be used for any dispute over an issue that directly affected the interests of either the employer or the relevant union. The procedure provided for local grievances to be settled, if possible, at the workplace between the employee and the employee's immediate manager. Where practical, a genuine attempt to resolve the dispute had to be made within 24 hours of the dispute being raised. The union was almost always actively involved in disputes from the first step. If the grievance could not be resolved with the immediate manager, a formal dispute notice was to be prepared by the local union delegate or the employee and given to local management. In practice, according to the ER Manager, the nature of the dispute was often poorly articulated. The ER Manager said that the union would often try and bypass local management completely and deal directly with the Manager, Employee Relations. If discussions at the local level were unsuccessful in resolving the matter, it was to be referred to the Manager, Employee Relations, who was to attempt to resolve the matter in conjunction with the employee involved, or a union delegate or union official. Quite a high proportion of issues did get elevated because local management was wary of making decisions that could set a precedent for the whole organisation.

The next step was to refer the matter to the Manager, Human Resources and an official nominated by the union. If the dispute continued to be unresolved, it had to be referred to the union peak body, following which a 72-hour cooling-off period was to apply. If the union peak body was unable to resolve the matter, either party could refer it to the (state)

Commission for conciliation and if necessary arbitration. The DSP included a general commitment to resolve disputes as quickly as possible, with each step generally taking no more than five working days to complete. At each step, attempts had to be made to hold discussions within two working days from the start of the step. The parties could agree to skip any of the steps if necessary in order to accelerate resolution or for some other reason. Work practices which existed prior to the dispute continued to apply while the dispute was being dealt with under the procedure.

No centralised record was kept of disputes lodged under the DSP, though the ER Manager estimated that there were several hundred formal disputes lodged by union delegates each year. Of these, around 50 (or about 10 per cent) would be referred to Employee Relations. Around 10 of these would be referred to the Manager, Human Resources. The largest proportion of disputes would be about rostering, changes to shifts and access to penalty rates. Other issues included workplace conduct, discipline and employee monitoring.

The ER Manager put the large number of disputes down to the need for local union delegates to make themselves relevant: '*... and how do you make yourself relevant? By causing problems, by giving the appearance that we are in dispute and that I am here to save you and all that. So you've got a situation where often they'll put a dispute notice in before they've even spoken to the manager to find out whether they're in dispute. It's crazy but that's the way the world works.*'

The ER Manager suggested that the step in the DSP involving the peak union council was of little value, and there was an increasing tendency to go straight to Commission.

According to the Employee Relations Manager, about half a dozen disputes were referred to the NSW Commission in an average year – *'maybe a dozen in a bad year'*. Sometimes there would be a hidden agenda with these disputes; while they might present as being about safety issues, for example, the real agenda might be wages. Few ended up being arbitrated – *'in a bad year, maybe two, in a good year, none'.*

The State Government Agency had used private arbitration for disputes with the union in very limited circumstances (i.e., three or four in the previous 12 years). Arbitration through the Commission (*'an external body with credibility'*) was a *'good safety valve'*, according to the Employee Manager.

The union official, on the other hand, was very critical of the way the DSP operated in practice. He said that the employer simply ignored the timeframes in the DSP. The union was reluctant to take matters to arbitration in the Commission because the process was too long and too cumbersome. Even the conciliation process '*takes forever and a day.*' In his view, repeated conciliation conferences did not serve much of a purpose. The union's preference was to fix matters in the workplace rather than in the tribunal.

The Grievance Resolution Procedure could be used by all employees of the State Government Agency, including employees who had left. The first step in the procedure was to try and sort out the problem directly with the person or people involved. However, it was recognised that some people would not want to do this and could go straight to the next step, which required the complainant to report their complaint to their local manager or the corporate general manager. Alternatively, they could report their complaint to the Regional General Manager or

the Manager Equity and Diversity Unit. In practice, it appears that all complaints at this step were referred to the Equity and Diversity Unit where a handler would be appointed to manage the complaint. The grievance handler had to get all relevant information from the complainant as soon as possible, normally within two days of being notified of the grievance. Complaints did not need to be put in writing, though the grievance handler would produce a written report. The grievance handler then had to attempt to resolve the complaint as fast as possible.

Grievance handlers were managers professionally trained to deal with harassment, discrimination and workplace bullying issues. In practice it appeared that these were usually staff from the Equity and Diversity Unit.

Grievance handlers would, wherever practical, within one week of an interview with the complainant, put the complaint to the person/people complained about and ask that person/those people to put their side of the story. Wherever practical, within one week of interviewing the person/people complained about, and no later than four weeks from the receipt of the original complaint, the grievance handler then had to assess whether was is enough information to determine if the matter alleged in the grievance did or did not happen. They may have needed to speak to witnesses, having due regard for confidentiality throughout.

The grievance handler then had to decide how the complaint should be resolved and inform everyone involved of the decision. When the grievance involved an allegation of a non-disciplinary or minor nature, and the main facts were not in dispute, the grievance handler would attempt mediation to bring about a resolution that was acceptable to all parties. When the problem or complaint involved an allegation of a non-disciplinary or minor nature, and the main facts were in dispute, they would:

- tell all parties involved what might happen if the grievance was proved one way or the other
- warn all parties involved about the disciplinary consequences of any future victimisation and/or breaches of confidentiality
- tell all parties about the right to an internal review of the process
- consider the need for staff training in particular policies or standards, and
- monitor and manage developments.

When the problem or complaint involved an allegation of a more serious nature against a staff member, the grievance handler would:

- work out whether, on the balance of probabilities, harassment, discrimination or workplace bullying had or had not occurred
- make recommendations about how the problem or complaint should be resolved. This would usually involve recommending a disciplinary measure against one or more employees responsible for harassment or discrimination. The disciplinary penalty would depend on the level of the breach and/or type of problem and might involve anything from a verbal apology through to dismissal.

The grievance handler would then:

- consider if there was a need to use a professional, internal or external mediator to assist the parties to readjust and work effectively together
- reimburse any party involved in the complaint for particular costs such as medical/counselling costs or reimbursement of sick leave, and
- relocate an employee to another section or change reporting lines during or following investigation.

Most grievances were dealt with within three weeks.

For at least three months following the resolution of the complaint, the grievance handler would monitor the outcome to ensure that the remedy was effective. In the event there were problems, the grievance handler was responsible for responding to those problems or for referring the matter to his or her manager for resolution.

External mediators, normally sourced from the Australian Commercial Disputes Centre (ACDC), had been used successfully at the agency to deal with a number of issues. Mediation had generally been used only where the parties had agreed to it. Often mediation was used where the issue had come down to one person's word against the other and there were no witnesses to confirm what took place. There may have been conflict for a long time, no disciplinary process could be invoked and both parties realised that the only way to achieve some resolution was through mediation.

If the complainant was unhappy with the way the grievance had been handled, he or she could ask the Regional General Manager or General Manager Human Resources for a review of the process. Such a review should take no more than two weeks.

If, following an internal review, the complainant was still dissatisfied with the outcome, they could seek advice from any relevant external agency and ask for assistance in resolving the complaint. These agencies could include the Human Rights Commission or the Industrial Relations Commission (though it should be noted that the grievance resolution procedure does not of itself give those bodies any additional jurisdiction).

The union did not formally represent its members in relation to the grievance resolution procedure (though in around 30 per cent of grievances the complainant would be accompanied by a union delegate). The union official was very critical of the process. Based on complaints he received from his members, he said that in the majority of cases the procedure failed to produce effective outcomes. What happened was that both parties were given a copy of the policy and told to follow it in future. While mediation was a good idea in principle, it did not seem to be very effective in practice.

Unlike with disputes, records were kept of grievances; 65 grievances were received by the Equity and Diversity Unit in the year the interviews were conducted. No analysis however was conducted of trends (beyond numbers and the cost of investigations) and there were no feedback loops in place. Most complaints concerned peers rather than managers.

The Manager of the Equity and Diversity Unit considered that the next step for the organisation should be to increase training, coaching and mentoring of line managers to enable grievances be dealt with more effectively at the workplace level rather than by the staff in the ED unit. Some training had already occurred and this had led to some reduction in the number of grievances received. However, this training had been more focused on basic awareness than on how to conduct conflict resolution in a fair and effective manner.

In addition, there had been a contact officer program, involving volunteer staff from different areas of the organisation, but this had been abolished as it was found that employees lacked the skills to perform the role effectively.

Clearly the State Government Agency lacked a comprehensive conflict management system. The general approach was reactive rather than proactive; employee engagement was not measured and there appeared to be no general HR strategy. The emphasis was on service delivery, with no acknowledgement that better people management might contribute to better service. Line managers did not receive training in conflict resolution and there was no system in place for holding them accountable for preventing or resolving conflict. Finally, there was no systematic monitoring of disputes and grievances and there were no feedback loops.

Chapter Seven: Approaches to workplace conflict management

A dual system of workplace dispute resolution

It is first necessary to observe that there were certain findings that were common to all the organisations studied. The first – and most fundamental – finding was that all the organisations had formal mechanisms in place to deal with workplace grievances and disputes. Most of the organisations had enterprise agreements in place covering at least a large proportion of the work force, and – in compliance with industrial relations legislation – those agreements contained DSPs. Nevertheless, the extent to which use was made of those DSPs varied greatly. In relation to the four private sector and not-for-profit organisations, there was no DSP at the Manufacturer, and the DSPs at the Retailer, the Bank and the Charity were barely used. By contrast, the DSPs at the three public sector organisations were regularly used, particularly at the State Government Agency, which lodged hundreds of disputes under the procedure every year.

However, an equally significant finding was that all of the organisations, whether they had DSPs or not, had their own internal grievance procedures, with the status of human resources policies. These were used extensively in all the organisations studied and were of far more significance than the DSPs in the private sector and not-for-profit organisations. In the public sector organisations, they were predominantly used by individual employees (though sometimes assisted by the union) and were more likely to be used in relation to 'interpersonal' issues such as discrimination, bullying or harassment. The DSPs were generally used by the unions and were more likely to be used to deal with disputes arising out of the enterprise agreement, even though in practice there was considerable overlap between the types of issues dealt with under the two different mechanisms.

Elsewhere, the author has labelled the existence of DSPs alongside grievance procedures as a 'dual system of workplace dispute resolution'. (Hamberger, 2012)

It is important to note that none of the DSPs or internal grievance procedures dealt with disputes about termination of employment. This suggests that the provisions in the Fair Work Act concerning termination of employment (including unfair dismissals) has largely displaced alternative enterprise-level procedures for resolving such disputes (though this does not mean that parties may not try and settle unfair dismissal claims before they reach the tribunal.).

There was almost no evidence of the use of any third party other than the Commission (or its state equivalent) being used to make final determinations of workplace disputes or grievances. The only exception was the occasional use by the state government agency of private arbitrators. None of the internal grievance procedures allowed for any external body or person to make final binding decisions; in every case the final decision lay with senior management. There was some use of external mediators by most of the organisations, particularly when dealing with certain types of interpersonal disputes. However, in each case this was very much the exception.

In some cases, the grievance procedure acknowledged that complainants who did not obtain a satisfactory outcome from the procedure c could take their matter to an external body such as the Human Rights Commission. These external bodies did not, however, play any role under the grievance procedure. In particular, whether the grievance procedure was used or not did not affect the authority of the external body to deal with the matter.

All the DSPs provided for matters unresolved at the workplace level to be referred to the Fair Work Commission (or its state equivalent). While a number of matters did get referred from the University, the Commonwealth Government Agency and the State Government Agency, these appeared to represent only a very small fraction of the number of disputes filed under their DSPs. Moreover, the great majority of the disputes that did get referred were resolved by conciliation, with arbitration being very much the exception.

Unions played a major role in relation to DSPs. With a few exceptions, disputes under DSPs were almost invariably lodged by unions or employees with union representation. The only employer who lodged any disputes with the Commission was the State Government Agency.

The only internal grievance procedure that did not allow an employee to be represented was at the Bank. Complainants at the Manufacturer were generally represented by a union delegate. Unions tend to play a more limited role in relation to grievance procedures at other organisations. At the Retailer, the union was involved in fewer than 20 per cent of grievance cases a year. Complainants also used a lawyer only very rarely. The Charity's grievance policy allowed any party to a grievance the opportunity to have a support person of their choice present during any interviews. However, the support person's role was to observe the proceedings, not to participate in the interview. Unions were involved in only around 10 to 15 per cent of all grievances, and there had been an increase in representation by lawyers. The procedure at the University explicitly allowed individuals to obtain advice or support from a representative (such as the union or a legal advisor). Parties making formal complaints were usually represented either by the union or a lawyer (both were equally common). Complainants at the Commonwealth Government Agency usually had a support person, who could be a union delegate, and the union would give advice to its members about the grievance process. The union official at the State Government Agency was very sceptical about the internal grievance procedure, though a significant minority of complainants using the procedure were supported by union delegates. In most of the other organisations, a significant minority of complainants using the grievance procedure was represented by the union.

Commitment to resolving disputes at the workplace level

Another striking finding was the broad commitment to resolving disputes and grievances at the workplace level, a commitment shared by both management and unions. Management generally saw resolving matters locally as cheaper (both in financial and human resources), less disruptive and less likely to have adverse reputational effects. Management at the Bank went further in that it saw the ability to resolve matters internally as part of its promise of fair treatment to employees and an important element of creating a high-trust working environment and promoting employee engagement. Management at the Manufacturer

likewise described the ability to resolve disputes and grievances at the local level as an expression of the commitment of the organisation to treating its employees fairly.

The HR manager at the Retailer said dispute resolution processes '*are really important as almost a form of healing.'* So, for example, people could acknowledge their own conduct, moderate it and learn to work together. The grievance process sometimes acted also as a pressure valve in interpersonal conflicts.

The IR Manager at the Commonwealth Government agency placed a bit less emphasis on resolving matters internally, rather than taking them to the Commission. Indeed, the union official, while acknowledging that many line managers took a cooperative approach to resolving workplace disputes, saw HR as much more aggressive, with a tendency to just say '*no*' and rely on the Commission to back the department up.

The former industrial relations manager implied that it would sometimes be better not to have to go through all the steps in the DSP and just go straight to the Commission, because it had a lot of expertise in mediating disputes and was seen by the employees as genuinely independent.

All the union officials interviewed preferred to resolve matters at the workplace level, which they saw as much less resource intensive and more effective. The official at the Commonwealth Government Agency noted that its members were often intimidated by the thought of attending an industrial tribunal hearing. He described the Commission as having become less user friendly, with more matters requiring written submissions.

The different approaches to workplace conflict resolution adopted by large organisations in Australia

Comparing the case studies for similarities and differences suggests three 'ideal types' when it comes to different approaches by large Australian organisations to workplace dispute resolution. I call these three types 'strategic', 'transitional' and 'passive'. I will briefly outline each type and where each organisation fits within this typology and then consider in more detail the factors that make up each type that might lead an organisation to adopt its particular approach, and the consequences of that approach.

The key elements of the strategic approach are:

- an emphasis on employee engagement, as part of a broad HR and business strategy and an acknowledgement that this requires the fair treatment of employees
- a recognition that fair treatment requires an effective and comprehensive internal grievance resolution procedure
- limited reliance on third parties in relation to grievance resolution
- the use of the grievance procedure to provide a feedback loop for continuous improvement and
- ensuring that line managers are trained in and held accountable for people management, including dispute resolution.

In the passive approach, these factors are all absent, but the following elements are present:

- a concern to maintain ‘managerial prerogative’
- a distinction between ‘industrial’ disputes and ‘inter-personal’ grievances with DSPs in enterprise agreements used to deal with the former and internal grievance procedures restricted to the latter
- significant use of third parties to resolve disputes
- poor monitoring of grievance and dispute resolution and lack of an effective feedback loop
- limited training of line managers in people management and limited accountability.

The ‘transitional approach’ lacks the ‘strategic’ emphasis on employee engagement, the use of a grievance procedure to provide a ‘feedback loop’ or provision of training in, and accountability for, people management by line managers. However, unlike the ‘passive’ approach, there is a comprehensive internal grievance procedure, which, rather than the DSP, is the main mechanism for resolving workplace conflicts; there is only a limited role for third parties.

The key features of each approach to workplace conflict resolution are summarised in the following table.

	Strategic	**Transitional**	**Passive**
Employee engagement	YES	NO	NO
Comprehensive grievance procedure	YES	YES	NO
Significant use of third parties	NO	NO	YES
Use of grievance procedure as feedback loop	YES	NO	NO
Line managers trained in and held accountable for dealing with disputes	YES	NO	NO
Emphasis on ‘managerial prerogative’	NO	NO	YES
Significant use of DSPs	NO	NO	YES

The Bank and the Manufacturer can most clearly be identified as having a strategic approach to conflict management.

Management at the Bank had a clear HRM strategy based on direct engagement with the workforce. A central business objective of the Bank was to improve customer service and it was recognised that this could not be achieved without a high level of employee engagement. Employee engagement was measured regularly and closely monitored. Having an effective system for dealing effectively with workplace conflict was seen as critical to promoting a high level of employee engagement.

The Bank's internal grievance process could be used to deal with a wide range of grievances. There was very little role for third parties, the grievances were closely monitored and the results were used to adjust workplace policies and practices. There was a strong emphasis on the training of line managers in people management issues and on holding line managers to account. The DSP was rarely used.

Management at the Manufacturer likewise had an express preference for a 'direct relationship' with its employees. It also measured engagement. The need for a high level of engagement was seen as being related to the need to meet high quality standards, reflecting the highly regulated nature of the product markets within which the Manufacturer operated. Being able to respond quickly and effectively to workplace grievances was seen as an important part of maintaining a high level of employee engagement. There was no DSP, but the grievance procedure was widely used and had a comprehensive scope. There was a very strong emphasis on training line managers in people management issues and holding them to account for their performance in this area.

Like the Manufacturer and the Bank, the Retailer and the Charity had comprehensive grievance procedures, which were used to resolve disputes in preference to the DSP. Similarly, there was a very limited role for third parties in dispute resolution. However, neither the Retailer nor the Charity measured or tracked employee engagement on a regular basis. There was limited training of line managers and no well-developed feedback loops. Both the Retailer and the Charity could best be regarded as having a transitional approach to workplace conflict resolution.

None of the three public sector organisations were able to identify the way in which their approach to grievance and dispute resolution fitted within their broader HR strategy. Indeed, these organisations appeared to lack any clear HR strategy and in particular could not explain how to approach the dispute and grievance resolution within a broader strategic framework.

In each of the University and the State and Commonwealth Government agencies, the internal grievance procedure was more narrowly focussed on 'interpersonal' issues, such as bullying, harassment and discrimination, as opposed to 'industrial issues', which were dealt with under the DSP. Unions played a relatively important role in dispute resolution, though relations tended to be quite adversarial and there was an emphasis on maintaining 'managerial prerogative'. There was little emphasis on training line managers; dispute resolution was relatively tightly controlled by the centralised HR function and effective feedback mechanisms were non-existent.

In summary, the University and the State and Commonwealth government agencies had a passive approach to workplace dispute resolution.

The different approaches to conflict management in terms of equity, voice and efficiency

There is room for argument about how each approach lines up against Budd's three goals. All three approaches provide employees with a basic mechanism for challenging managerial decisions that are regarded as unfair. Thus all three reflect some commitment to equity and voice. The strategic approach more clearly places an emphasis on efficiency.

The strategic approach downplays the role of third parties in dispute resolution. The emphasis is very much on the internal grievance procedure as the primary mechanism for resolving workplace disputes that cannot be resolved informally. Arguably, the lack of access to an independent and impartial decision-maker external to the organisation could be seen as a limitation on the equity of the grievance procedure. In the case of the Bank, there was not even a right to representation (as opposed to the presence of a 'support person'.)

In practice, however, the strategic approach is based on training line managers, *inter alia*, to deal fairly with their employees, and on holding them to account if they fail. The Manufacturer in particular emphasised the importance of speed when dealing with grievances, reflecting the priority attributed to grievance resolution by the company.

Dealing with grievances quickly and giving them a high priority has important implications for equity. While there appears to have been little research on the topic, it is reasonable to assume that employees would regard a process that resolves their grievances expeditiously as fairer than one that takes a long while. A process that is quick and informal is likely to impose much less stress on all those concerned and be much more acceptable to employees.

While the FTR process at the Bank left the ultimate decision-making authority with management, employees had the right to access the DSP in the enterprise agreement if they were unhappy with the FTR. Few do so. The evidence, based on the results of the employee survey, was that the FTR process was effective. Employees overwhelmingly were aware of the process and were willing to use it if necessary. Few did so because they considered they were generally treated fairly and could resolve matters directly with their immediate managers. When grievances were lodged, employees had a reasonably high success rate in having their grievances upheld.

As for voice, there is little evidence that employees had much if any say in the design of the FTR system or the Manufacturer's internal grievance process. Employees at the Bank who lodged a grievance were however given an opportunity to complete an evaluation of the process once it was completed. Moreover, grievances in the strategic approach were monitored centrally and used to improve the policies and performance of the organisation.

Without being conclusive, the evidence does suggest that both the FTR process and the Manufacturer's internal grievance procedure themselves were quite efficient and that they contributed to the overall efficiency of the organisation. By increasing a sense of fairness on the part of employees, they helped lift employee engagement (and therefore factors such as

customer service and quality) while at the same time providing a feedback mechanism which helped identify management deficiencies.

On paper, the passive approach demonstrates a commitment at least as strong – if not stronger – to equity than the strategic approach. Employees had a clear right of redress against management decisions, including to an independent third party (the Commission). Employees, through their unions, also had a direct say in the design of the DSP in the enterprise agreement. The downside was that more formal processes could be ‘unfriendly’ and could take longer. Moreover, in the absence of the features of the strategic approach, such as the training of line managers and effective feedback loops, it is doubtful whether employees were in practice actually treated more fairly.

The factors that lead different organisations to adopt different approaches to workplace conflict resolution

Given the limited number of case studies, it is clearly not possible to draw conclusions about the factors that lead some organisations to adopt one approach to workplace conflict management rather than another, or indeed about the outcomes. However, it is possible at least to develop some possible linkages. One can also bolster the data from the case studies with the results of the surveys referred to in Chapter Five. In particular, those organisations that had a relatively large number of disputes referred to the Commission were likely to have an approach to workplace dispute resolution closer to the 'passive' ideal type than the 'strategic' or indeed 'transitional' types.

Jurisdiction

All the case study organisations conducted their workplace relations under broadly the same the same legislative environment, the most important piece of legislation being the *Fair Work Act 2009*. The only exception was the State Government Agency, which was governed by the *Industrial Relations Act 1996 (NSW).* However, the relevant differences between these two sets of legislation were fairly minor. There was very little evidence that operating under federal as opposed to state legislation affected the likelihood of adopting one approach to workplace dispute resolution instead of another.

Sector

While the sample size was small, it is notable that the three case study organisations that took a 'passive' approach to workplace dispute resolution were the three public sector organisations. Two of the three private sector organisations, by contrast, took a strategic approach. The one not-for-profit organisation was in the 'transitional' category, as was the remaining private sector organisation. It is tempting therefore to suggest that being in the public or private sector is closely linked to the approach an organisation takes to workplace dispute resolution.

It is also notable that the survey of the 30 organisations that had the largest number of disputes referred to the Commission found that 13 were from the public sector. Given that outside Victoria most state government employers do not come within the federal jurisdiction, this supports the proposition that a reliance on third party dispute resolution (and therefore possibly a more 'passive' approach) is at least partly related to being in the public sector. There was, however, little evidence from the case studies as to why this should be so. Governments do impose some human resource management policies on their agencies that would not necessarily apply to private sector organisations. It could be because public sector organisations typically are less subject to market disciplines than private sector organisations and therefore have less incentive to reap the potential benefits involved in a more strategic approach. There may also be a greater emphasis on compliance with formal procedural norms, which is perhaps easier to demonstrate with the 'passive' approach.

It is worth noting that some of the innovators in conflict management in the United States have been in the public sector. Bingham in particular has done much to highlight the successful use of mediation in the US Postal Service (Bingham, 2003). She found that that agency's REDRESS Program had a significant positive impact on conflict management, substantially reducing the number of formal filings by resolving conflict at an earlier stage than the traditional EEO complaint process.

Indeed in the mid-1990s, a task force appointed by the secretary of the U. S. Department of Labor examined employment relations in state and local government and concluded that in some respects, the public sector led the private sector in the adoption of ADR systems: 'Overall, it appear[s] that the public workplace might be more receptive to [ADR] systems, particularly to setting them up in a manner that protect[s] the fact and appearance of neutrality and independence, and providing employees' access to the court if they felt that their case was meritorious or did not choose to use the ADR system.' (U.S. Department of Labor, 1996)

To the extent that there is a difference between the willingness of public sector agencies in Australia and the U.S. to take a more 'strategic' approach to workplace conflict resolution it may be explained by the absence in Australia of the types of statutes and regulations that have been adopted in the U.S. designed to promote the use of ADR. There is, for example, no equivalent in Australia to the federal Administrative Dispute Resolution Act (ADRA), which was passed by Congress in 1990 to spur agencies to consider using ADR. (Lipsky, Seeber, & Fincher, 2003, pp. 305-6)

Industry

It is possible that – quite separately from the issue of sector – the type of industry is also another important variable. As noted in Chapter 5, the 'heavy users' of the Commission's dispute resolution services were concentrated in a relatively small number of industries. Private sector organisations that made the greatest use of the Commission were transport, manufacturing and construction. The question is whether there are features of these industries that lend themselves to a more 'passive' approach to workplace dispute resolution. All three are exposed to a high level of domestic competition. However, transport and construction have typically been regarded as 'cost-plus' industries; neither faces any direct overseas competition and both appear able to pass on costs to their clients. It is beyond the scope of this research to examine this question further, but it is possible that these types of industries are less likely to make the kinds of long-term investments in 'strategic' approaches to workplace dispute resolution than other industries. Manufacturing is more of a puzzle. However, it is possible that manufacturers that operate in more 'sheltered' competitive environments tend to adopt more passive approaches to workplace dispute resolution, in contrast to manufacturers such as the case study, which operated in highly competitive globalised markets. Thus it may not be the industry *per se* that is important, but the nature of the product market.

Level of unionisation

While all the case study organisations had a significant union presence, the actual level of membership varied considerably. Categorising less than 20 per cent membership as 'low', 20 – 50 per cent as 'moderate' and more than 50 per cent as 'high', it can be seen that the Manufacturer and the Charity had a relatively low level of union membership, the Bank, the Retailer and the University a moderate level of membership, and the Commonwealth and State Government Agencies a high level of membership.

Two out of three of those organisations with a 'passive' approach had a high level of union membership; the third had a moderate level of membership. One of the two organisations with a low level of union membership had a 'strategic' approach; the other had a 'transitional' approach. Those with a 'moderate' level of membership were shared equally between each of the three approaches. This certainly suggests some – but by no means a perfect – correlation between the adoption of a particular approach to conflict management and the level of union membership.

However, to the extent that there is a correlation between the level of union membership and the adoption of a particular approach to conflict management, the direction of causation is obviously not one-way. Thus, the manager at the Bank suggested that the Bank's HR strategy, including its fair treatment policy, was directly responsible for a decline in the level of union membership. More broadly, it would be reasonable to infer that the adoption of a 'strategic' approach to workplace conflict management by both the Bank and the Manufacturer was at least partly motivated by a desire to promote a 'direct relationship' between management and employees; this could also be described as a marginalisation of union influence.

However, it would be wrong to suggest that the 'passive' approach necessarily reflected a more supportive approach to union membership on the part of management. After all, an emphasis on 'managerial prerogative' is one of the distinguishing features of the 'passive' approach. It may therefore be that a relatively high level of union membership leaves little room for management to adopt a 'strategic' approach. At the same time, there is no reason in principle why many, if not all, of the key features of the strategic approach could not be adopted in an organisation with a high level of union membership.

Size

All the case study organisations were large employers by Australian standards. However, they did vary, from the Manufacturer, with just over 1200 employees, to the Bank with around 38,000. AWIRS data certainly suggests a relationship between size and approach to workplace dispute resolution. However, it is not clear whether there is a difference once an organisation gets beyond a certain size. As noted the Manufacturer and the Bank were respectively the largest and the smallest case study organisations - yet they had both adopted a strategic approach to conflict resolution.

Workforce

A strategic approach to conflict resolution involves a significant investment of time and resources. One would imagine therefore that a workforce that includes a lot of highly skilled

employees who are expensive to replace would more likely be associated with a 'strategic' approach. On the face of it, however, the case studies did not support this hypothesis. The two case study organisations with the largest proportion of relatively unskilled, blue-collar workers, – the Manufacturer and the Bank – were at opposite ends of the spectrum when it came to their approach to workplace conflict resolution.

Perhaps the approach to conflict management is more likely to be correlated with a broader approach to HR that may involve an attitude to the 'expendability' of the workforce, rather than a relationship with skill level or occupational make up. The Manufacturer, while it did employ a large proportion of relatively low skilled blue-collar workers, had a low level of staff turnover. While there was no evidence that staff turnover was higher in the case study organisations that had a 'passive' approach, one could imagine some professional services employers, or some types of financial services organisations that have a high rate of staff turnover, would not be willing to invest in a strategic approach to workplace dispute resolution.

Grievance rates and industrial relations climate

Lewin and Peterson (Lewin, 1988) found that the more adversarial the labour relationship, as judged by the parties themselves, the higher were the grievance and arbitration rates, the higher was the level of grievance settlement, the slower was the speed of settlement, and the lower were management's and union officials' perceptions of the equity of grievance settlement.

The pattern for grievance rates amongst the case study organisations did not completely match this picture. Based on the material gathered, the best estimate of the grievance rate (expressed as the number of formal complaints lodged under DSPs and grievances lodged under grievance procedures per 100 employees in a 12-month period, rounded to the nearest decimal point) for the case study organisations was as follows:

- The Manufacturer: grievances 3.4
- The Bank: disputes 0, grievances 0.1 (total 0.1)
- The Retailer: disputes 0, grievances 0.6 (total, 0.6)
- The Charity: grievances 0.5 (total 0.5)
- The University, disputes 1.0, grievances 1.0 (total 2.0)
- The Commonwealth Government Agency : disputes: 1.5, grievances 0.2 (total 1.7)
- The State Government Agency: disputes 10.6, grievances 1.4 (total 12)

There is no very clear pattern in these figures. They are, with two exceptions, very low when compared to equivalent US grievance rates. The two exceptions are at opposite ends of the spectrum when it comes to the approach to workplace conflict resolution. The State Government Agency had by far the highest rate of use both of its disputes and grievance procedures, which appears to have been linked to the generally adversarial industrial relations

climate. The relatively high usage rate at the Manufacturer by contrast is explained by the HR Manager as resulting from an increase in the degree to which employees trusted the management.

The low number of formal grievances lodged at the Bank does warrant a query about the efficacy of the FTR process; however the results of the employee survey did not support the notion that it was underutilised because of low awareness, or unwillingness on the part of employees to use it.

If one focuses on disputes lodged under DSPs, the organisations with the 'passive' approach were those with the highest rate of disputes.

Lewin and Peterson (Lewin, 1988) found that in all four of the organisations they studied certain contentious grievance issues were later interjected into the collective bargaining process. In other words, the grievance procedures were used to influence collective bargaining. The only case study organisation where there was evidence that the grievance process influenced collective bargaining was the State Government agency, where the employee relations manager suggested that the level of grievance activity rose leading up to the renegotiation of the enterprise agreement. He suggested that this was a way of putting indirect pressure on the employer in the bargaining process.

Generally, the organisations that had adopted a strategic approach to conflict management appeared to have relatively harmonious industrial relations compared to those that had taken a 'passive' approach. One could hypothesise that the adoption of the strategic approach was at least partly responsible for the good industrial relations climate, though one cannot draw hard and fast conclusions from such a small number of case studies.

An alternative possibility is that relatively poor industrial relations would make the adoption of a strategic approach difficult. The author finds this proposition rather unconvincing. For example, while it might be somewhat dispiriting to measure employee engagement in an organisation that has poor industrial relations, there is no reason why one could not do so.

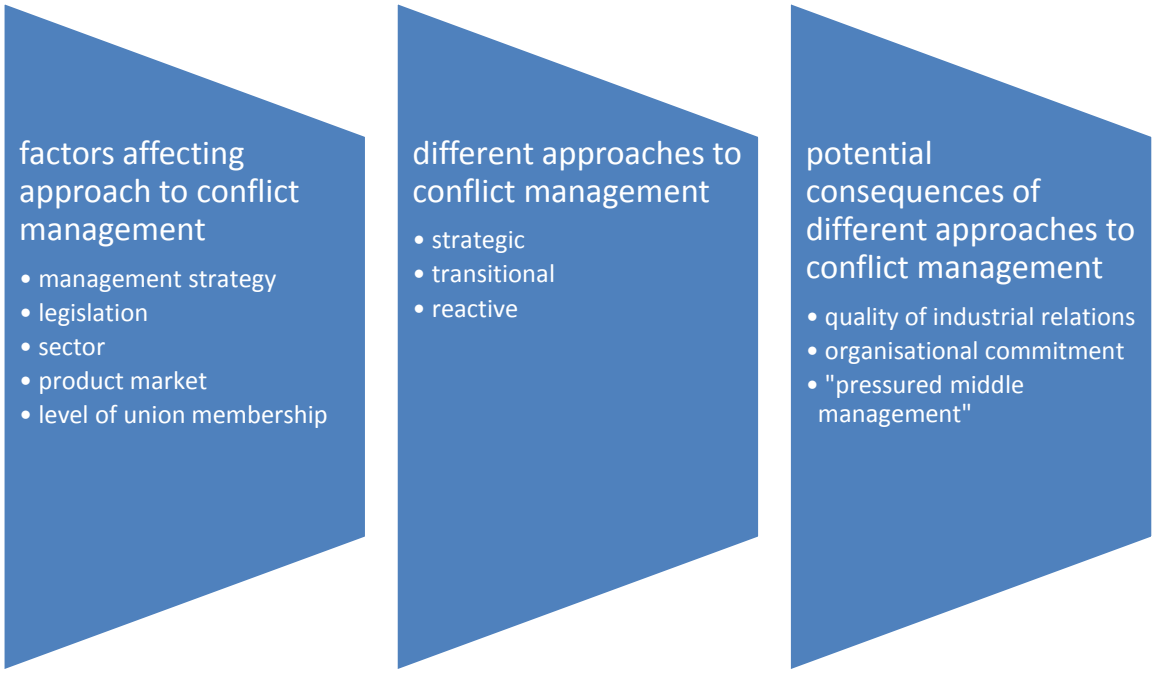
Nor is there any obvious reason why one could not adopt a comprehensive internal grievance procedure (that is, one that covers more than 'bullying, discrimination and harassment'). Of course, in a low-trust environment, employees may prefer to have their concerns processed as 'disputes' by their union representatives, with the option of going to the Commission if the matter cannot be resolved at the workplace level. It is also likely that unions might be highly suspicious of any attempt by management to encourage employees to pursue matters through an internal grievance procedure rather than through the DSP. However, that does not mean that management could not do so.

Clearly, a reduced reliance on third parties, such as unions and the Commission, is potentially more difficult where there is a low level of trust between employees and management. However, there is no reason why line managers could not be trained in and held accountable for dealing with workplace disputes. Nor would there be anything to stop better monitoring of grievances, with the data being used to improve management practices and procedures. Rather, it is perhaps an issue of the managers' mind set of. In an adversarial workplace, managers have a natural tendency of to close ranks and rely on their 'prerogatives', rather than identify their own failings and take responsibility for fixing them.

The model

While, as already noted, one cannot draw strong conclusions from a series of case studies, it is reasonable to use them to suggest a reasonable set of hypotheses about the relationship between different variables.

The following model is designed to suggest the various factors that lead large Australian organisations to adopt different approaches to workplace dispute resolution.



This model suggests that the primary determinant is management strategy itself. While other factors might influence what strategy is adopted, ultimately this is an area where management is able to make its own choices. Legislation does impose some constraint on the range of choices available, but it does not prevent organisations from choosing which approach to adopt within that range. Whether the organisation is in the public, not-for-profit or private sector appears to have a significant influence on what approach is adopted, though it is unclear whether it is a determinative factor. The same can be said for the nature of the product market and the level of union membership.

There is at least some evidence to suggest that adopting different approaches to conflict resolution may have consequences for the quality of industrial relations and the level of organisational commitment by employees. It is also likely that whatever approach is adopted will have consequences for the pressures placed on middle managers, especially given the increased responsibility for conflict resolution placed on such managers by the ‘strategic’ approach.

How does the strategic approach correspond to Lipsky's Integrated Conflict Management System?

There are clearly similarities between the strategic approach identified by the case studies and Lipsky's integrated conflict management system. In particular those organisations that have adopted the strategic approach largely share the following characteristics identified by Lipsky: a 'proactive approach', 'shared responsibility', 'delegation of authority' 'accountability', 'ongoing training' and 'feedback loop' (see discussion on page 42 above).

These similarities suggest that at least some Australian organisations are responding in a similar way to their American counterparts to similar social, economic and legal pressures.

There are however some important differences. In particular, it should be acknowledged that there appears to be much less innovation in dispute resolution mechanisms in Australia - including amongst those who have been identified as having a strategic approach - compared to some of their US counterparts. Most notably, much less use is made of 'neutrals', whether mediators, arbitrators, or ombudspersons. Nor is there any evidence of the use of mechanisms such as 'peer review'.

Only the manufacturer made any significant use of external mediators. Indeed one of the significant findings of the research is to confirm the limited use of external mediators even by large employers in Australia. Private arbitrators are even rarer. To some extent this can be attributed to the existence of a well established and publicly funded third party dispute resolution organisation - the Fair Work Commission. Management at the Commonwealth government agency was quite explicit that it saw no point in the union's proposal to create a private arbitration mechanism as it saw this as simply replicating the role of the Commission. Similar comments were made by managers at the State government agency. Moreover there are specific legal reasons (flowing from cases such as *Gilmer*) for firms in the US to adopt private arbitration of employment disputes.

However the differing legal and institutional frameworks cannot adequately explain the lack of interest in innovations such as ombudspersons and peer review. It is at least reasonable to hypothesise that Australian managers are simply less innovative than (some of) their American counterparts.

These observations underline that while market based pressures may encourage organisations to adopt a particular approach to conflict resolution, institutional and legal factors also play an important role. Moreover these factors should not be seen in a deterministic way. Management in individual organisations still retain a significant degree of discretion about how they approach the issue of workplace conflict management.

Finally I note that these conclusions provide support both to Lipsky's model as well as the model presented in this Chapter.

Chapter Eight: Conclusions

This chapter discusses the original research questions posed in Chapter One, in the light of the evidence disclosed in the subsequent chapters.

Are dispute settlement procedures (DSPs) being used effectively?

The Hancock and Niland reports supported DSPs as a way of encouraging the parties to accept greater responsibility for their own industrial relations. Their recommendations were made in the context of a compulsory conciliation and arbitration system where unions and employers were generally able to take industrial disagreements to an industrial tribunal without any prior attempt to resolve the matter directly between them. Since those reports, legislation at both state and federal level has promoted the inclusion of dispute settlement procedures in awards and agreements. Has this legislation been successful in encouraging the parties to take greater responsibility for their own industrial relations?

The evidence from Chapter Five indicates that relatively few disputes are referred to the Commission under award DSPs. It is possible that these procedures are used to resolve disputes at the workplace level without matters ever having to be referred to the Commission. However, the much more plausible inference is that DSPs in awards are not used much at all.

Procedures in enterprise agreements are, however, a different matter. Both the case studies and the analysis of Commission data indicate that some large organisations make considerable use of the DSPs in their enterprise agreements, particularly those with high levels of union membership. Moreover, the case studies suggest that the great majority of disputes dealt with under DSPs are resolved at the workplace level, with only a small minority being referred to the Commission for resolution. Even then, the Commission (or its state equivalent) resolves most matters by conciliation, with arbitrated outcomes being very much the exception.

The overwhelming majority of interviewees from the case studies – whether managers or union officials – evinced a clear preference for resolving disputes directly between the parties, if at all possible. There can be little doubt that the trend over the last 30 years has been for unions and employers at the workplace level to take greater responsibility for their own industrial relations. It is unlikely that DSPs (or indeed the development of grievance procedures) have in themselves brought about this change but they have certainly helped its facilitation.

Both Hancock and Niland saw DSPs as providing a mechanism for minimising industrial action, particularly (in the case of Niland) over rights disputes. They were clearly conscious that one of the traditional benefits of workplace dispute resolution procedures in the United States was that they were seen as an alternative to strikes and other forms of industrial action (Lewin & Peterson, 1988). There has undoubtedly been a dramatic decline in the level of industrial action in the last 30 years. While it would be hard to attribute this decline directly to the development of dispute settlement procedures, it is likely that the requirement for such procedures in enterprise agreements – including the access they provide to an industrial tribunal if the dispute cannot be resolved at the workplace level – has made unions and their

members more accepting of the effective legislative prohibition of any form of industrial action during the term of an enterprise agreement.

Hancock and Niland also envisaged that DSPs would provide a fair mechanism for dealing with disputes. The research revealed relatively little criticism of the fairness of DSPs. Under the terms of the *Fair Work Act*, DSPs in enterprise agreements must meet certain minimum standards if the agreement is to be approved by the Commission. For example, they must allow the Commission, or another independent person, to settle disputes that cannot be resolved by the parties themselves. This does not mean the procedure must give the Commission (or other independent person) the power to arbitrate or otherwise to finally determine the matter. However, as discussed earlier, constitutionally it may not be possible to require that DSPs provide for compulsory arbitration of rights disputes, as arguably that would be to give the Commission 'judicial' power. In practice however, the survey data reported in Chapter 5 shows that the overwhelming majority of DSPs in enterprise agreements do in fact give the Commission the power to resolve disputes by arbitration, even though this power is in practice used only sparingly.

The legislation also requires that DSPs allow for the representation of employees for the purposes of the procedure. The evidence is that employees usually are represented in disputes lodged under DSPs, at least once a dispute has got past the first step of the procedure. Where they are not represented, this is usually at their own volition.

A more common criticism of DSPs is that they are simply too formal, especially when compared to internal grievance procedures. One of the main differences between internal grievance procedures and DSPs is that the former generally either make no (or very limited) provision for the involvement of persons external to the organisation, such as mediators, let alone arbitrators. This is both a strength and a weakness. While access to an independent third party objectively increases the fairness of the process, it can also make employees less willing to use it. The union official at the Commonwealth government agency considered that a lot of his members would be frightened if he took a matter to the Commission. '*It's seen as you going to court. ... It's frightening and intimidating*'.

The survey of the Bank employees suggested a general perception that the employer's internal grievance procedure was fair. There was less awareness, and less interest, in using the Bank's DSP. Clearly, the lack of access to an independent third party in an internal grievance procedure creates a risk that the procedure will end up being biased towards management. Van Gramberg expressed concern that processes dominated by management, even if they have an aura of fairness, end up reflecting the imbalance of power in the workplace. One of the concerns expressed at the growth of non-union dispute resolution procedures in the United States is the lack of protection they provide to employees compared to more 'public' forms of justice, and the potential for employee interests to be subordinated to those of the employer (van Gramberg, 2006). Similarly, Bingham has commented on the new workplace conflict management systems in the US that employers design them unilaterally, without union participation. *'They are designed by employers in order to meet employer interests'* (Bingham, 2005).

One difference in Australia is that, particularly with employers who have enterprise agreements, the DSP is there as a back stop. As the former industrial relations manager at the

Bank noted, the traditional processes of the union and the Commission provided a 'control' for the internal process. If the employees were to lose confidence in the fairness of the system promoted by the employer, they could resort to those mechanisms. Thus the existence of the DSP kept the pressure on the employer to maintain the integrity of the internal grievance handling process.

This is very different from the situation with regard to non-union dispute resolution procedures in the US. In that country there is generally no scope to access the support of the union if the non-union grievance procedure is unsatisfactory. Moreover, in those US organisations where the procedure provides for employer-sponsored arbitration, there is a legal bar – since *Gilmer* – to accessing the court system.

In conclusion, DSPs do appear to be used effectively in a number of organisations. Moreover, even where relatively little use is made of DSPs, their presence provides a 'safety net', helping ensure the presence of other effective mechanisms for resolving workplace disputes.

To this extent, the policy developed since Hancock and Niland to insist on the inclusion of DSPs in awards and agreements can generally be regarded as a success.

Why have organisations developed their own internal grievance procedures?

Why did those organisations that had DSPs feel the additional need to have separate grievance procedures? Why could they not simply rely on the DSPs in their enterprise agreement? After all, as the guidelines developed by the NSW Anti Discrimination Board pointed out:

> *Clearly, it makes sense for an organisation to have just the one procedure capable of handling all types of workplace grievances, as it is much less confusing for all concerned.*

These guidelines noted that *'many organisations develop a separate procedure for handling discrimination/harassment/EEO grievances'* giving the reason *'usually because they do not want to wait until their award or enterprise agreement comes up for review before developing a procedure that will work for these types of grievances.'* However, the organisations studied here have all maintained separate grievance and disputes procedures over a number of rounds of enterprise agreements, and have shown no inclination to integrate the two when agreements have come up for renewal.

The rationale for the development of a separate grievance procedure does vary to some extent from one organisation to another.

While there is quite an overlap between the issues that can be dealt with through either procedure, in four of the organisations studied, namely, the Retailer, the University, the State Government Agency and the Commonwealth Government Agency, there was at least a notional distinction between what types of matters the different procedures covered. In particular, the DSP in each of these organisations was notionally concerned with 'industrial' issues covered in the enterprise agreement, while the grievance procedure dealt with 'inter-personal' issues, such as discrimination, harassment, bullying and victimisation. It is at least

arguable that the grievance procedures were better designed to deal with the latter types of issues, as they tended to provide scope for investigation and/or mediation. DSPs, on the other hand, generally involved meetings between the employee and his or her representative, and management. All the DSPs had, as their final step, access to an industrial tribunal. In most cases, this involved access to arbitration. In contrast, none of the grievance procedures provided for a right of access to an industrial tribunal. External mediators were used in some of the organisations, but generally only at the discretion of management, and on an infrequent basis.

The existence of the 'dual system' clearly owes something to the existence of separate industrial relations and anti-discrimination legislation. For various reasons, Australia has developed separate laws governing industrial relations and discrimination. Indeed, separate institutions have traditionally dealt with the two classes of matters. Industrial relations has been and remains the preserve of industrial tribunals, while discrimination is dealt with at the federal level by the Human Rights Commission and at the state level by anti-discrimination boards (though the general protections provisions of the Fair Work Act somewhat blur this distinction). These bodies operate quite differently and have a somewhat different ethos.

This separation partly reflects the differing political origins of anti-discrimination and industrial relations laws. The main interest groups influencing the development of Australia's industrial relations system have been the trade unions and employer organisations, which traditionally have been very male-oriented. Anti-discrimination laws have historically been promoted less by members of the 'industrial relations club' than by women's organisations, and by lobby groups supporting the interests of ethnic communities, people with a disability and so on.

At the federal level, industrial relations laws have historically largely been supported by the conciliation and arbitration power in the constitution, whereas anti-discrimination law has generally been supported by the external affairs power.

These factors are less relevant today. For example, women now play a much more important role in the union movement (reflecting its changing membership) and unions are much more interested in anti-discrimination and human rights issues. At a constitutional level, industrial relations laws are now primarily supported by the corporations power, which could also be used to support federal anti-discrimination law. Nevertheless, the historical legacy of the distinction between the two areas remains. This bifurcation is reflected within some of the organisations studied here. This is most notable at the State Government Agency, where disputes are dealt with through the DSP and are managed by the industrial relations staff, and grievances are dealt with through the grievance policy and are managed by the equity team.

At the level of federal legislation, disputes procedures were, until 2007, restricted to the settlement of disputes over the application of the agreement. Some issues, such as bullying and harassment, have not typically been dealt with in enterprise agreements and could not therefore have been dealt with under the DSP in an agreement. However, since the commencement of Work Choices, the parties have been free to give their DSPs much wider scope. It is also true that the types of matters dealt with through grievance procedures, such as discrimination, harassment and bullying, have not traditionally been the focus of unions or industrial tribunals, and have been seen as matters affecting only individual employees. This

distinction is becoming harder to make, particularly in the wake of developments such as the new 'anti-bullying' jurisdiction of the Fair Work Commission.

This does not appear as yet to have led to a move away from the dual approach of having both DSPs and internal grievance procedures.

Another related factor explaining the 'dual system' is that DSPs are largely, in a practical sense, the preserve of unions and 'collective' disputes (over issues such as pay and conditions). The real distinction in practice is that DSPs have come to be regarded as being the procedure of choice for unions while grievance procedures are mainly used by individual employees. This is despite there being nothing legally to prevent individual employees accessing DSPs in enterprise agreements (and indeed some limited evidence suggesting that an increasing proportion of disputes under DSPs are being lodged with the Fair Work Commission by individual employees).

What perhaps was not envisaged at the time of the Hancock Report was that the nature of workplace conflict would change so dramatically. Together with a general decline in the level of unionisation, there has been a shift away from 'traditional' industrial disputes towards more interpersonal conflicts. To some extent the issues in dispute may actually be the same, but the way they are characterised in a union environment as opposed to a non-union environment may differ. For example, a union might see an issue such as a disagreement over rostering as an 'industrial dispute' (and therefore something to be dealt with through the DSP), while an individual employee might be more likely to characterise it in individualistic terms of discrimination or victimisation (and therefore something that should be dealt with through the grievance procedure).

Clearly, therefore, the role of the grievance procedure reflects the changing nature of workplace relations. Moreover, this should not necessarily be seen as simply a 'passive' reflection of a broader trend. In at least two of the case study organisations – the Bank and the Manufacturer – the development of the grievance procedure was clearly associated with a desire on the part of management to have a 'direct relationship' between the employer and the employees. The Bank's management left no doubt about its wish to have disputes dealt with internally and without the involvement of any third party. The grievance procedure provides just such a mechanism, in contrast with the DSP and the role it gives unions and tribunals. Even in more highly unionised organisations, such as the state and federal government agencies, it was easy to detect a preference on the part of some of the managers interviewed for issues to be dealt with under the internal procedure, given management's greater control over the process. At the same time, the union official interviewed in relation to the State Government Agency seemed quite happy for inter-personal disputes to be dealt with through the grievance procedure, precisely because it meant the union did not need to get involved with disputes that often pitched one union member against another.

What are the lessons for management from the research?

The case studies indicate that there is scope for a variety of approaches to be taken to workplace conflict resolution by large organisations in Australia. This is reinforced by the analysis of the FWC database, which indicates that many large organisations rarely, if ever,

have disputes resolved by the Commission, whereas other organisations of a similar size are frequent users of the Commission's services.

The evidence from the case studies cannot be used to form firm conclusions about the 'best' approach for management to take to workplace conflict resolution. Nevertheless, the 'strategic' approach – best exemplified in this research by the Bank and the Manufacturer – does present certain attractive features, at least from a management perspective. Both organisations appear to have been successful in achieving high levels of employee engagement while minimising the role of third parties. Central to both organisations' approach was a firm emphasis on the role of line managers. Their line managers were expected to deal with people management issues; they received comprehensive training in this area and were held accountable for their performance. The desirability of line managers being able to resolve issues quickly and informally wherever possible is consistent with the recent research coming out of the UK (Saundry & Wibbereley, 2014).

At the same time, both the Bank and the Manufacturer had high-profile, comprehensive internal grievance procedures. Where employees were unhappy with the way in which they were treated by their line managers, they had access to a procedure that engaged the resources of both the centralised HR function and senior managers from other areas of the organisation. There was an emphasis on ensuring that grievances lodged under the procedure were dealt with quickly and effectively. Additionally, grievances were monitored and the data used to address any identified management failings. Implementation of this approach involved a significant investment of resources, training and performance monitoring of line managers, in dealing with grievances quickly and comprehensively, and in monitoring and acting on identified managerial short comings. One potential downside of this approach is the level of pressure it places on line managers. It is notable that the least positive responses to the survey of the Bank's employees came not from the lowest classification levels but from middle management. The strategic approach involves other costs, such as increased training and monitoring of line managers. Senior managers are also called on to take an active role in investigating grievances in other parts of the organisation. The issue is whether these negatives are outweighed by the positives. A higher level of employee engagement can be expected to lead to higher levels of customer service and attention to quality, and lower levels of staff turnover. It is also likely to save on litigation costs, since relatively few matters end up before courts or tribunals. Where these are important considerations, the benefits may outweigh the costs.

Given the apparent benefits of the strategic approach, it is worth considering why it was not adopted by the other case study organisations. In the case of the two organisations that had taken the transitional approach, it is possible that neither felt any pressure to make the sort of investment required by the strategic approach. Both had only a low level of unionisation and did not appear to be under any threat that this might change. This was quite different from the other case study organisations. The Bank had previously had a high level of union membership, and the Manufacturer had faced a long-term campaign by the industry union to collectivise its work force. The University and the State Government Agency had experienced recent industrial action (or the threat of it) and the Commonwealth Government Agency was also highly unionised. The Retailer's workforce, including its line managers, was not highly paid, and it may not have seemed worthwhile making the sort of investment entailed in the

'strategic' approach. On the other hand, the traditional model of retailing is under threat, especially from the move to online shopping and the expansion of overseas specialty retailers. One response for businesses such as the Retailer would be to lift its level of customer service. Such a strategy might require more emphasis on employee engagement, including greater training of line managers and a more sophisticated approach to workplace dispute resolution.

The Charity likewise appeared somewhat complacent about its approach to workplace dispute resolution. While the quality of its services might improve if it adopted the strategic approach to dispute resolution, there appears to have been little pressure for it to do so. Not only did it have only limited pressure from unions, it did not face the commercial market pressures faced by the Bank and the Manufacturer. It would probably take either some strong leadership from the CEO, or an external shock (like its experience with the workplace health and safety inspector, but on a larger scale) for it to adopt a more strategic approach.

It is notable that the three organisations that had adopted a 'reactive' approach to workplace dispute resolution were all in the public sector. The sample size was too small to conclude definitively that this approach to workplace dispute resolution was dictated by being in the public sector; on the other hand it was unlikely to be mere coincidence. The industrial relations manager at the State Government agency certainly claimed that its approach to workplace dispute resolution – especially the key role given to unions – was largely determined by state government policy. However, this is a bit too simplistic; there was no obvious reason why each of the public sector organisations could not adopt the key elements of the 'strategic' approach. However, none of these three organisations appeared willing to require line managers to take responsibility for resolving workplace disputes; their HR departments had strong centralised control of disputes. They also all had relatively adversarial industrial relations. Yet, it is hard to conclude that one caused the other. The experience of the Bank suggests that investment by the public sector organisations in a strategic approach to dispute resolution could, over time, improve employee engagement and industrial relations, and reduce the need to rely on external bodies. However, one could speculate that there are insufficient incentives for the relevant decision-makers to make the leap to that sort of approach. There are upfront costs (e.g. training of line managers) which may not always be easy to justify in a public sector context, and the level of devolution of responsibility and accountability may pose difficulties for public sector organisations. That does not mean, however, that it cannot be done. Perhaps there is a role for the sort of regulatory incentives (e.g. ADRA) that have been adopted in the U.S. to spur public sector agencies to take a more strategic approach to workplace conflict resolution.

What are the lessons for unions from the research?

One possible lesson for unions from the research might be to view organisations adopting a 'strategic' approach to workplace dispute resolution as a threat. Union membership was generally much higher in the organisations with a 'reactive' approach than in those with either a 'strategic' or 'transitional' approach. However for unions simply to reject the strategic approach would be too simplistic. Unions and their members have an interest in organisations improving their performance – as long as the gains are shared. Unions can play a positive role

in representing employees in internal grievance procedures, and can ensure that organisations are kept to their promises of fair treatment.

The analysis conducted for Acas by Saundry and Wimberley of a number of organisational case studies in the UK suggested that employee representatives could play a useful role in helping managers identify emerging sources of conflict that could otherwise erupt into more serious disputes. High levels of trust between management and representatives facilitate the use of informal resolution (Saundry & Wibbereley, 2014).

Just as management can adopt a strategic approach to workplace conflict resolution, so can unions. Unions that want to keep their relevance in the contemporary workplace need to recruit and train high quality employee representatives and encourage them to work constructively with line management wherever possible to resolve disputes quickly and informally.

Where internal processes fail, unions are well equipped to help employees use external processes, such as the Fair Work Commission. Unions also need to have regard to the changing nature of workplace disputes highlighted by this research, in particular the shift from collective to individual grievances. Unions cannot in the long run afford – as the union at the State Government Agency appears to have done – to wash their hands of disputes over issues such as bullying and harassment. If the union movement is to retain its relevance it will need to treat issues such as this as its bread and butter.

What are the implications of the research for the Fair Work Commission?

Two broad sets of issues arise for the Fair Work Commission from the research: could it do a better job at dealing with those disputes that are referred to it, and should it play a more proactive role in promoting better workplace conflict management?

While some of the interviewees were complimentary about the way in which the Commission dealt with disputes, others expressed concern that the processes were too formal, legalistic and costly.

In practice, the research indicated that the overwhelming majority of disputes referred to the Commission under dispute settling procedures were resolved by conciliation. The interviews conducted with Commission members suggested that of the nine disputes analysed, the only one that seemed headed for arbitration concerned the interpretation of a particular clause in an enterprise agreement that had implications for a number of other workplaces. Commission members were also flexible about the style of conciliation adopted, varying their approach according to the nature of the parties and/or the issues in dispute.

The Commissioners on the whole adopted a more ‘interventionist’ approach than that normally promoted in the mediation literature. In a number of cases the Commissioner involved provided an evaluation of the case of each of the parties. This does not appear to have been resisted by the parties. Indeed previous research (for example that of Forbes-Mewett et al.) suggests that most parties want the Commission to play this role. The potential

downside is that this leads to the parties failing to take responsibility for resolving the dispute - 'we had to do this because that is what the Commission told us to do.' While that may mean that the immediate dispute is resolved it may do little to assist in improving the underlying relationships between the parties and may simply encourage parties with poor relationships to come back repeatedly and 'dump' their unresolved problems in the Commission's lap.

An alternative approach would be for the Commission to put a greater emphasis on assisting the parties resolve their own problems. Such an approach would require Commissioners to develop further their mediation skills. It would also probably require that more time is set aside to deal with each dispute. In the long run however a greater emphasis on helping the parties (or at least those of 'repeat users') improve their own relations should reduce the total number of disputes being referred to the Commission.

A key trend previously discussed is the move from collective to individual disputes. While most disputes referred to the Commission under DSPs were filed by unions or employers, there were signs that the Commission was receiving an increased number of applications by individual employees. The majority of applications in other areas of the Commission's workload, such as general protections, unfair dismissals and the new anti-bullying jurisdiction, come from individual – often unrepresented – employees and the issues are often interpersonal rather than legal in nature. Given the background of many members of the Commission, they may have had relatively little experience in dealing with these types of matters. This is potentially an area to focus on, both in terms of the selection of personnel and professional development.

The President of the Commission has acknowledged that the work of the tribunal has changed from dealing predominantly with collective disputes between represented parties to an increasing number of self-represented citizens pursuing individual rights-based disputes. The Commission has embarked on a range of initiatives in response to this change, including improved access to, and presentation of, information and advice and more effective use of technology (Fair Work Commission, 2014).

The research strongly suggests that the vast majority of workplace disputes are resolved without the assistance of the Fair Work Commission. It is generally desirable that workplace disputes are resolved quickly, informally and as close to their source as possible and the Commission generally gets involved only when matters cannot be resolved at the workplace level. The research also indicates that most of its dispute resolution work comes from a relatively small segment of the workforce.

In 2013, the Fair Work Act was amended to give the Commission the specific function of 'promoting cooperative and productive workplace relations and preventing disputes'.[9] Thus the Commission is expected to go further than just responding to disputes referred to it by parties and is required actively to prevent disputes.

How could it do this? One option would be for the Commission to promote actively the adoption by employers of a more strategic approach to workplace conflict, as described in this research. This could be done through providing information and advice, perhaps through the website, or through workshops tailored to the needs of particular sectors, industries or even

[9] Section 576(2) (aa), inserted by the Fair Work Amendment Act 2013

individual enterprises. The work of Acas in the UK provides a model that could be adapted for Australian circumstances.

Another option, as discussed above, would be to place greater emphasis in its own dispute resolution work on improving the longer term relationships between the parties coming before it, rather than simply focussing on resolving each individual dispute.

The Fair Work Commission has already announced that it will develop and implement a strategy to promote cooperative and productive workplace relations that facilitate change and foster innovation (Fair Work Commission, 2014, p. 5). Better mechanisms for managing and preventing workplace conflict should form part of this strategy.

What are the lessons for policy makers from the research?

There has never been a comprehensive review of workplace dispute resolution in Australia. The nearest thing were the Hancock and Niland reviews conducted in the 1980s and these were both focussed on 'industrial relations', a subject both wider and narrower in focus than workplace dispute resolution.

The primary focus of workplace relations policy since the 1980s has been on the development (or on some occasions, the curtailment) of workplace rights, with the issue of how to resolve disputes over those rights treated as a subsidiary issue. Unfortunately, even workplace rights have not been treated in a comprehensive or consistent fashion. Instead, there has emerged a plethora of workplace rights in a variety of overlapping jurisdictions with a confusing array of institutions designed to deal with disputes about those rights. Nevertheless there are certain clear trends, in particular, growing rights for individuals to be treated fairly at work and to have a safe workplace, with a concomitant responsibility for the parties to resolve, as far as possible, disputes about those rights at the workplace level. If those disputes cannot be resolved at that level, there are generally external bodies that may assist, generally by mediation or conciliation, and with formal determination only if necessary.

At least partly in response to this growing array of rights and jurisdictions, many organisations have developed their own internal procedures and policies to deal with workplace issues. One of the positive findings from this research is that even in the most adversarial of workplaces studied, the great majority of workplace disputes are resolved by agreement without resort to an external agency. This was an explicit policy objective of both the Hancock and Niland reports, and to the extent described here, one can conclude that it is an objective that has largely been achieved.

While there are some similarities between Australian and US developments, one major difference has emerged. In the US, following Supreme Court decisions such as *Gilmer*, many employees have had to trade off their right to an external review of their grievances for an effective internal review. In Australia, by contrast, even where employees have access to an effective internal grievance procedure, they generally retain the ability, if dissatisfied, to take their complaint to an external body (such as the Fair Work Commission).

The benefit of this model was acknowledged by the former HR manager from the Bank. Management at the Bank had a clear preference for employees to use the Bank's Fair

Treatment Review process. However, the existence of the DSP in the enterprise agreement gave employees a choice and acted as a control on the behaviour and the effectiveness of the internal company system. If employees felt the company was not running a fair and effective procedure, they had 'the external system' (including access to the DSP and the Fair Work Commission) as a fall-back.

The findings outlined in this research can be considered in the context of the three objectives of any industrial relations system discussed by Budd: equity, voice and efficiency.

One of the key findings of the research is the extent to which large organisations use internal grievance procedures as the main mechanism for resolving workplace disputes. Looked at from an equity viewpoint, there is a clear risk that any procedure that has as its final decision-maker someone either from management or paid for by management (such as the mediators used by the Manufacturer) will be biased – and/or perceived as biased – against the interests of the worker. While there was no uniform approach adopted by the case study organisations, internal grievance procedures did not necessarily guarantee a right of representation. The FTR process at the Bank, for example, implicitly excluded any role for union representation. The initiator may have had a support person such as a friend or family member but the support person could not perform a representative or advocacy role.

DSPs under the Fair Work Act, by contrast, must allow for representation, and must have as their final step scope to have the matter dealt with by a person or body independent of the employer. In most cases, in practice, this means arbitration by the Fair Work Commission.

However, this begs the question: if grievance procedures are less fair than DSPs, why do so many employees choose to use grievance procedures, even where they could have their matter dealt with under a DSP? There are a number of possible explanations:

1. Awareness. It is possible that organisations promote their grievance procedures to their employees rather than the DSP in the enterprise agreement. Employees may simply be unaware that they as individuals can use the DSP.

2. Accessibility. Employees may see the grievance procedure as less formal and therefore less intimidating than the DSP.

3. Fear of victimisation. Employees may perceive that their employer will be unhappy if they use the DSP rather than the grievance procedure and this will increase the risk of victimisation, especially in the absence of union representation.

The research provides limited evidence concerning the extent to which any of these explanations are valid. The employee survey at the Bank did suggest that employees were more aware of the grievance procedure than the DSP; however it also suggested that most employees felt confident about using the procedure if they had an issue. The interview with the union official at the Commonwealth Government agency suggested that employees would generally not feel confident about having a matter progressed through the DSP if it meant ending up in proceedings before the Commission.

It will be recalled that Lewin and Peterson (1988) found evidence of negative individual consequences resulting from grievance procedure usage and settlement. The data they

collected indicated that some organisational retribution was meted out to employee grievants – especially grievants who pursued their cases up the higher steps of the grievance procedure and grievants who won their cases. Compared to non-users of the grievance procedure, grievance users experienced higher post-settlement voluntary turnover rates, low performance ratings and promotion rates, and large amounts of work absenteeism and lateness. The authors concluded that employees ran considerable individual risks when they became directly involved in grievance activity and resolution.

It is quite plausible that there would be a greater likelihood of negative consequences for employees from using a DSP compared to an internal grievance procedure. The research conducted into grievances mediated by the New Zealand Department of Labour by Walker and Hamilton (2011) found that almost all the cases ended with the employment relationship being terminated. This suggests that by the time an individual employee grievance ends up with a third party an often intolerable strain has been imposed on the employment relationship.

This reinforces the desirability of implementing the sort of conflict management system described by Lipsky et al. where the emphasis is on preventing conflict in the first place, or at least on getting conflict resolved as close to its source as possible. Organisations may still need formal procedures to deal with conflicts that have not been able to be resolved locally, but they need to use these procedures to provide a feedback mechanism to take actions designed to minimise the need for the procedure to be used in the future. Managers must receive adequate training in conflict resolution and must be held accountable if they treat people unfairly. In a practical sense, if well implemented, such an approach can be equitable, especially where employees have the fall-back option of using a DSP, which guarantees the right to representation and access to an independent external body. Such a system can also provide a 'voice' mechanism enabling employees to indicate to management areas of concern. Finally such an approach can contribute to efficiency, if it enables the costs of workplace conflict to be minimised, and enables organisations to identify problem areas, issues or managers, as well as increasing organisational commitment.

This suggests that the 'dual system', with both internal grievance procedures, and DSPs as a 'back stop', can work well from a public policy perspective. It is a model that could be encouraged by public agencies, such as the Fair Work Commission and the Fair Work Ombudsman.

Looking at the Australian system of workplace dispute resolution more broadly, however, there are at least two ways in which the system could be improved. First, there needs to be some effort made to rationalise the array of overlapping rights and jurisdictions dealing with closely related issues, including occupational health and safety, workers compensation, discrimination, general protections, bullying, unfair dismissal and the types of matters that can currently be dealt with under dispute settlement procedures in awards and enterprise agreements. A 'one-stop shop' is probably unachievable. However, there should be scope for most employment disputes that cannot be resolved at the workplace level to be brought to the Fair Work Commission. If the matter cannot be resolved by the Commission and requires a judicial determination, it should then go to the Federal Circuit Court (or Federal Court). The processes for dealing with each type of matter should be consistent (with differences of

approach only where objectively justified). This would make the system fairer, more accessible and more efficient.

The focus of the system should continue to be on resolving disputes and grievances at the workplace level, if possible. Hancock and Niland understood the benefits of this approach. Indeed, this approach is probably even more important in an era of individual employment rights. The cost for an individual to take a dispute involving their employer to an external agency is far higher than for a body such as a union. The longer it takes for a dispute to be resolved the more relationships are likely to be irreparably harmed. The inevitable level of formality in accessing any external agency – even one using mediation or conciliation – is also likely to be difficult for most individual employees to handle.

It would therefore be appropriate for access to the Commission to be generally dependent on having first tried to resolve the matter at the workplace level (with some exception such as dismissals, or where the matter is genuinely urgent). However, the UK experience strongly suggests that it would be inappropriate to be overly prescriptive about what type of procedure should be used at the workplace level. Indeed, organisations should be encouraged to develop their own procedures reflecting their own circumstances. Instead of relying on regulation, the Fair Work Commission should use its expertise in dispute resolution to provide an educational and advisory service that would assist employers and employees resolve their differences at the workplace level.

What direction should future research take in the area of workplace dispute resolution in Australia?

The limitations of the study need to be acknowledged. The qualitative nature of the study means that some caution must be taken in generalising from some of the findings. Moreover the case study data relates only to large organisations.

There has been a paucity of research into workplace dispute resolution in Australia and this study leaves many issues to be more fully explored.

First, and most obviously, there is a need to examine dispute resolution in smaller organisations. While they are covered by the same statutory framework it is reasonable to hypothesise (based for example on AWIRS data) that smaller organisations adopt a different approach to workplace dispute resolution compared to larger organisations.

Secondly, a much larger number of case studies would help establish whether the typology developed here is more generally applicable.

Thirdly, even if the typology is broadly robust, more data is needed to establish both what leads particular organisations to adopt particular approaches, as well as to determine whether different approaches have different consequences (for example, to the level of unionisation, employee engagement etc.) Hypotheses could be developed from the case studies and then potentially tested using quantitative data.

Fourthly, it would be desirable to undertake more research into the experience of employees who use – or choose not to use – grievance procedures and/or DSPs.

Fifthly, there should be more research into the factors that enable workplace conflicts to be resolved informally. How important are the skills of managers and what skills are most important? What sort of support do line managers need from senior management? What role, if any, do employee representatives in helping (or hindering) the resolution of workplace disputes?

Finally, there is scope to conduct more research into the dispute resolution work undertaken by the Fair Work Commission (and other bodies performing a similar function, such as the Human Rights Commission). There is very little understanding of the way in which the Commission uses conciliation and/or mediation, despite the fact that this is how the great majority of disputes are resolved.

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Appendix A

Number of disputes involving BCA members referred to Fair Work Commission under s.739 of the Fair Work Act from 1 July 2012 – 30 June 2013.

AGL Energy Limited: 2

Alcoa Australia of Australia: 9

Amcor Limited: 7

ANZ: 3

Ashurst Australia: 2

Aurizon Holdings Limited: 15

Australia Post: 18

BHP Billiton: 17

BlueScope Steel Limited: 23

Boeing Australia and South Pacific: 1

Bupa: 3

Caltex Australia Limited: 1

Commonwealth Bank of Australia: 2

Downer EDI Limited: 5

Energy Australia: 8

GM Holden Ltd: 10

GWA Group Limited: 1

Hanson Australia: 2

Insurance Australia Group: 1

Leighton Holdings Limited: 3

Lend Lease: 2

Orica Limited: 2

Origin Energy Limited: 1

Programmed: 5

Qantas Airways Limited: 20

Rio Tinto Australia: 1

Santos Limited: 2

Shell Australia Limited: 5

Skilled Group Limited: 3

Telstra Corporation Limited: 3

Transfield Services: 16

UGL Limited: 5

Virgin Australia: 7

Westpac Group: 1

Woolworths Limited: 13

Appendix B

Demographic details of employee survey of employees at the Bank

1,000 work email addresses, selected at random, were provided by the Bank for employees from two business units that had a good spread of lower, mid level and senior employees.

150 employees provided usable responses.

6% of responses came from employees with less than 12 months' service, 31% with between one and five years' service, and 63% with more than five years' service.

45% of responses came from male employees and 55% came from female employees.

29% of responses came from lower level employees (earning around $38-$45,000); 16% came from mid level employees (earning more than $45,000 and less than $75,000) and 55% from (middle) managers earning more than $75,000 to $92,000.

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16 September 2009

Mr Jonathan Hamberger
23 Goodhope Street
Paddington
NSW 2021

Reference: HE25SEP2009-D00115

Dear Mr Hamberger,

FINAL APPROVAL

Title of project: Workplace grievances and dispute procedures in Australia: preliminary interviews

Thank you for your recent correspondence. Your response has addressed the issues raised by the Ethics Review Committee (Human Research) and you may now commence your research.

Please note the following standard requirements of approval:

1. The approval of this project is **conditional** upon your continuing compliance with the *National Statement on Ethical Conduct in Human Research (2007)*.

2. Approval will be for a period of five (5 years) subject to the provision of annual reports. **Your first progress report is due on 16 September 2010.**

   If you complete the work earlier than you had planned you must submit a Final Report as soon as the work is completed. If the project has been discontinued or not commenced for any reason, you are also required to submit a Final Report on the project.

   Progress Reports and Final Reports are available at the following website:
   http://www.research.mq.edu.au/researchers/ethics/human_ethics/forms

3. If the project has run for more than five (5) years you cannot renew approval for the project. You will need to complete and submit a Final Report and submit a new application for the project. (The five year limit on renewal of approvals allows the Committee to fully re-review research in an environment where legislation, guidelines and requirements are continually changing, for example, new child protection and privacy laws).

4. Please notify the Committee of any amendment to the project.

5. Please notify the Committee immediately in the event of any adverse effects on participants or of any unforeseen events that might affect continued ethical acceptability of the project.

6. At all times you are responsible for the ethical conduct of your research in accordance with the guidelines established by the University. This information is available at: http://www.research.mq.edu.au/policy

If you will be applying for or have applied for internal or external funding for the above project it is your responsibility to provide Macquarie University's Research Grants Officer with a copy of this letter as soon as possible. The Research Grants Officer will not inform external funding agencies that you have final approval for your project and funds will not be released until the Research Grants Officer has received a copy of this final approval letter.

Yours sincerely

Dr Karolyn White
Director of Research Ethics
Chair, Ethics Review Committee (Human Research)

Cc: Dr Paul Gollan, Department of Business