Alternative Dispute Resolution In the workplace[1] –September 2014

I express my gratitude for the Valuable assistance and input of my colleague, barrister and ADR practitioner Joshua Grew of Edmund Barton Chambers.

1 Introduction

The 21st century workplace has become a complex one with matrix reporting, a multicultural and diverse workforce and influences from a global economy. Our awareness as a society has also evolved. Workplace safety, safeguards for diversity, legislation to prevent discrimination and bullying safeguards have all become accepted parts of the modern Australian work force and the legislation that governs it.

Dealing with diversity in all its complexity can result in conflict. Work places must have in place both processes to ensure adherence to legislative requirements and also practical ways of building skills within the workforce to deal with issues and conflicts when they arise in a strategic and effective way.

Lawyers working in this area need not feel afraid, or indeed threatened; this is a challenging and exciting canvas. It provides the opportunity to add value in a way that stretches the bounds of the traditional "legal adviser".

This paper explores the skills necessary to assist clients to manage conflict early, and to intervene to minimise costs and stress and maximise workplace efficiency. It also provides some tools and tips for using alternative dispute resolution (ADR) in the Court system.

The term ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them[2].

2 Conflict in the workplace

"The better able team members are to engage, speak, listen, hear, interpret, and respond constructively, the more likely their teams are to leverage conflict rather than be leveled by it" - Runde and Flanagan

To manage conflict, it is important to understand the fundamentals of disputes and their resolution. That is, one must have a clear view on the "role" of conflict. Without this understanding, any intervention in conflict risks being devoid of a strategic goal.

Disputes are arguably an essential and inevitable part of daily life, yet they are neutral – it is how they are handled that makes them positive or negative events.

As a lawyer involved in disputes, one's natural inclination is to concentrate on the content, both when preparing for and conducting the dispute resolution process, whether it be determinative, by way of

[1] Prepared for Legalwise seminars –Procedural skills for Industrial Courts ad Commissions 2 September 2014

[2] *National Alternative Dispute Resolution Advisory Council* (NADRAC) glossary of terms 2003. (Disbanded 2013).

litigation, or facilitative, by way of mediation. Yet every dispute management or dispute resolution process comprises three core components that any party to a dispute must address in relation to their own and their opponent's interests:

(a) Their own relationship within the dispute resolution process;

(b) The dispute resolution process itself; and

(c) The content in dispute[3]

Effective dispute management provides the most suitable process to assist in resolving each dispute, individualising the process to suit the dispute itself and indeed the parties to the dispute.[4] Viewed on a horizontal continuum, the approaches for resolving a dispute may be categorised as moving from the most passive approach (avoidance), to the most active approach (co-operation).

Disputes, and thus conflict may be thought of as a useful window into issues that need to be managed in a workplace. Conflict is like a pizza oven, heating the ingredients to fuse and form anew.

> *Example:*
> *Jane is the Financial Controller of a company. She is a senior finance person who has taken a part time role to balance with her family responsibilities. It is the first time that the company has had a senior person in this position rather than a bookkeeper. Tom is the Sales Manager of the company. He is used to having complete autonomy in his role. Recently, Jane questioned an expense incurred by Tom and finds herself in a heated dialogue with him. He slams the door telling Jane "this is my turf get off it". Jane lodges a complaint*

How this conversation is framed and characterised will have great impact on how it is discussed. This will in turn decide how it is resolved. On a basic level in an organisation this may be treated as "personality clashes" or investigated as a bullying complaint.

In considering the conflict as a window, one would look more broadly. Consider how the parties' growth has been managed, and explore the definition of each of their roles in the company.

2.1 Practical tips

There are a number of practical lessons for human resource practitioners and lawyers that flow from this example:

- Understanding that conflict provides a window into issues and can assist good management makes it easier to justify the expenditure on systems to recognise conflict early and have a system for intervention.

[3] Boyle, A, The Institute of Arbitrators and Mediators Australia, *The Practitioner's Certificate in Mediation Course Handbook* (2007) 4.
[4] Ibid, 5.

- It is imperative to ensure that human resource managers, internal legal advisers and other people involved with workplace complaints regard conflict as an opportunity, not a threat. (As a legal adviser who may be in charge of the overall process it is important to check yourself to see if you have made this transition in perspective).
- Having a system for mapping the conflict (that is, working out the root cause and not just the symptom), is a powerful management tool and is discussed more below.
- Taking action quickly once a complaint is lodged is important. Not to do so is likely to lead to conflict escalating or spreading to other areas. Managing conflict early means having people who are skilled and trained in dispute resolution within the organisation. Good skills in "having difficult conversations", "negotiation" and "conflict coaching" are fundamental in assisting people to have the conversation that can identify and deal with the complaints.
- Not everything can be resolved in-house. Having a pre-prepared list of dispute resolution consultants – lawyers, investigators and mediators - who are known and understand the nature of conflict avoids time-wasting in having to source them when they are needed because the conflict has escalated.
- Legal advisers can offer a value added service of being the co-ordinator of these resources. This also allows a corporation to avail itself of legal professional privilege if a matter does need to be investigated.

3 The role of ADR

"The only difference between stumbling blocks and stepping stones is the way in which we use them." – Adriana Doyle

Despite the best intentions of the employer, the parties or the lawyers, many matters do in fact end up in a Court, Tribunal or other specialist bodies. The specialist bodies use ADR more and more. For historical reasons many of the processes are called "mediation." This label has been applied in a way that describes the full spectrum of facilitative ADR: that is ADR where the role of the mediator is as a neutral third party to assist the parties in dispute.

It is important for lawyers to have a more nuanced understanding of ADR processes. This allows them to advise clients not only on the substantive legal matters in dispute, but also in relation to the practical and tactical use of processes to meet their aims.

I have previously reviewed the different types of dispute resolution processes and their uses, noting the importance of matching the process to the problem[5]. Here I consider the types of facilitative process that are available to assist in moving a forward a workplace issue.

Even within the range of facilitative process, there is a plethora of choice. One of the most underused mechanisms is a process for assessing the matter and referring it to the correct place. This has been called triage (coming from a medical model), root cause analysis (from consultancy land), or more formally by NADRAC, case appraisal.

[5] **2012 Choosing the Optimal ADR Process for Resolution of Conflict -**
Shirli Kirschner and Dr David Moore Chapter 10 The future of Dispute Resolution 1st Edition 2012 Spi-Legg

"Case appraisal is a process in which a third party (the case appraiser) investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved[6]*." (NADRAC's Definitions Paper).*

Example:

Tim and Georgina come before the Court. They have taken a marketing job for a start-up company, which has required them to move to Adelaide. After some months, it became evident that while the project was fairly successful the work was coming out of Sydney and for them to continue they are required to relocate to Sydney. They did not relocate, choosing instead to terminate the relationship and commence legal proceedings for unpaid notice, breach of contract and statutory entitlements which were due and owing as a result of their engagement. The company argued that the relationship was a sub-contracting/consultancy relationship and therefore no employment benefits or rights accrued. It came before the Registrar. The Registrar began with a case appraisal.

It became evident that the parties were all members of an extended family, and that the business was to be a family business. The Registrar referred the matter to private mediation. The parties resolved at private mediation, not only the employment relationship but also the more extensive family dynamic, which had become strained as a result of the incidents.

In practice, in matters that do not arise within a formal system, court, industry scheme or the like, case appraisal is the domain of the lawyers who are undertaking such a task without having the benefit of the full picture.

There are a number of common processes available, including but not limited to, Registrar Assisted Settlement Process (RASP) (available in the Federal Circuit Court), evaluative mediation (sometimes labelled conciliation within a legislative context), and mediation. Each of these processes, excepting RASP, is also able to be conducted via court-annex or privately.

3.1 RASP – strengths and weaknesses

RASP is available for certain claims in the Federal Circuit Court. By definition it is a process internal to a Court only. Its closest approximation as a private option would be evaluative mediation.

The process is afforded a timeframe of between three to four hours. It begins with the parties sharing their perspectives on the legal claim (and sometimes beyond). The Registrar will spend time with each side working out what they want to achieve and the range of solutions acceptable to them before assisting the parties to broker a deal. The process occurs firstly in joint session (with both parties before the Registrar) and then in private session (the Registrar speaking to each party separately).

[6] *National Alternative Dispute Resolution Advisory Council* (NADRAC) glossary of terms 2003

The Registrar is an officer of the Court, and the focus of these processes is on resolving matters, which would otherwise be before the Court. Not all of these are focused on commercial deals, some are focussed on ensuring litigants (particularly unrepresented ones) have thought through their rights and choices.

The advantages are:

- It provides flexibility.
- There is no cost.
- The authority of the Registrar can assist in moving the parties forward.
- The Registrar can provide input into the jurisdiction and non- binding views on the substantive issues in dispute.
- The parties are present, and therefore have the authority and emotional ability to engage in such a dialogue.

The disadvantages are:

- It cannot offer flexibility if more time is needed, (since it is inherently time-limited).
- It can be ill-equipped where the core of the issue lies outside the jurisdiction of the Court.

Example:

Jack came before the Court with a claim against a company and a director for unpaid notice, statutory entitlements and unpaid superannuation, in the small claims division under $20k. The parties have had no contact in the period since Jack lost his job. During the joint session the executive of the company shares that he is bankrupt and has lost everything and the company was to be delisted following a successful winding up order.

In private session the Registrar asked Jack what he thought was the reason for the lack of payment. Jack told the Registrar of the terrible downturn leading to the loss of the business and the bankruptcy of the directors. He is in court due to their silence- no-one has answered his emails. The Registrar asks Jack to assume that the Court finds in his favour and the company is relisted. They discuss the cost, time and energy associated with achieving this result. Based on Jack's own knowledge of the market and the company Jack decides that it is unlikely to be a sham and it is unlikely there is anything left.

3.2 Mediation

*'**Mediation** is a process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement that is suitable to each of them. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted*[7]*"*. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.

[7] *National Alternative Dispute Resolution Advisory Council* (NADRAC) glossary of terms 2003

*'**Evaluative mediation** a term used to describe processes where a mediator, as well as facilitating negotiations between the parties, also evaluates the merits of the dispute and provides suggestions as to its resolution by virtue of the mediator's own technical expertise in the context of the dispute. (See also combined processes).*
Evaluative mediation may be seen as a contradiction in terms since it is inconsistent with the definition of mediation provided in this glossary[8]'

3.2.1 The advantages of private mediation:

The main advantage in having a private mediation is the ability to choose the style of mediation and the style of mediator – facilitative or evaluative/advisory. Other advantages include:

- Flexibility around time, having a number of different sessions, extending time periods, having a morning and an evening (allowing time to think and do other work in between). These advantages are particularly crucial where the relationship is ongoing and might need some finessing, where people are coming from different jurisdictions so maximising the time is imperative.
- Where the range of issues in dispute falls way beyond the type of matters within the Court, an advisory mediator can often assist in brokering a deal (refinance in a partnership, re -structuring employment, coaching).

3.2.2 Clarity of skills in addition to mediation prowess:

In assessing the suitability of mediation to the particular dispute, it is important to consider which model of mediation is sought, together with whether it ought be court annexed or private.

In order to make this assessment, one must consider what the client needs to achieve from a strategic commercial perspective before choosing a mediator.

When selecting facilitative mediation, it must be remembered that the mediator offers no evaluation of options on a technical or legal basis – the parties are facilitated by the mediation in resolving their dispute for themselves (and with the assistance of their lawyers).

When selecting evaluative mediation, the type of skills to be favoured must be thought through with care. These type of technical kills include:

- Legal skills for the analysis of a legal problem
- Management consultancy skills where the mediator can assist to resurrect and fine tune the relationship and do any strategic planning going forward.
- Conflict coaching where the Mediator can assist parties to increase and enhance their skills in having the difficult conversation.

[8] *National Alternative Dispute Resolution Advisory Council* (NADRAC) glossary of terms 2003

4 The role of the lawyer in facilitative processes

Whether it be RASP or mediation, lawyers can and do affect the process. A skilled and effective lawyer can increase the chances of resolution. It is important for lawyers to consider:

- **Preparing the client emotionally**:
  Mediations can be long and draining and require input from the parties. Further, the parties need to know what to expect from the process - knowing can increase their tolerance.

- **Thinking about whether the client should talk:**
  Whether a client should do the talking depends on the objective of the mediation and the day. Where there is still a relationship between the parties, having those parties speak personally is often the key to resolving the issue. There are usually non-financial issues involved and many applicants in particular need to feel like they have had their "say".

  Understandably, this is often a risk for lawyers particularly if the person speaking is going to be a key witness in any court case that proceeds. It is important to assess the goals of the day broadly- what “success” looks like and how important the relationship between the parties is. An important relationship does not need to be a fixed relationship. It can also be an elegant termination.

  If the relationship is key and there is also a litigation risk, a way of dealing with this may with the client to a signal for a break where one can recalibrate or coach the client as needed. This type of strategy may provide the balance between effectively settling the dispute while still protecting the legal position.

- **Preparing broadly:**
  In preparing for mediation, RASP or other ADR processes, consider if there are matters, outside the scope of the traditional legal framework that can be included in any resolution. In small workplace claims this can include the payment of superannuation, which is normally outside the jurisdiction.

  Non-monetary solutions to a particular dispute, such as apologies, references, the ability to say goodbye to colleagues or keeping computers, are also ways of closing gaps in deals.

- **Thinking about your relationship with the Mediator or Registrar:**
  There will be occasions where the lawyer does not agree with the decision of the mediator or registrar (for example to break, to see clients only, to go back into joint session etc.) Sometimes the temptation in that moment will be to block the mediator's

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PO Box 15 Paddington NSW 2021 Australia | Tel 02 9380 6466 | Fax 02 9380 5687 | www.resolveadvisors.com.au

suggestion. This can both disenfranchise the mediator and/or make the process less effective.

In these cases it is important to note that the mediator may well be privy to information on a confidential basis that the lawyer doesn't have and this may be driving their decision-making.

In these circumstances, consider:

(a) trusting the judgment of the mediator; or

(b) requesting a break and raising their concerns with the mediator so that he/she can address them.

- **Taking responsibility for the process:**
  Sometimes things stall and the mediator thinks it is time to end trying. Legal advisers know their client's views and are therefore often very adept at deciding when things should push forward.

  If the matter looks like it has an impasse and the legal adviser has an idea how to resurrect it, it is a good idea to speak to the mediator privately and suggest it. The mediator can always say no. In my experience suggestions from lawyers in private have often provided a turning point that allows a matter to move toward resolution.

- **Preparing for the end:**
  Time is short, particularly in Court-annexed processes. It is useful to have available a draft Deed of Release with standard clauses on a laptop with you. This can allow for documentation and certainty where appropriate.

5 Conclusion

The advent of a broad range of alternative dispute processes within workplaces is a logical and helpful adjunct to the complexities that workplaces now present. It hopefully will provide an exciting way for traditional workplace lawyers to continue to expand their skills and involvement in an ever-changing global environment.

The addition of skills that allow for case appraisal, the use of soft skills to minimise disputes, and, combined with ADR training, are all expansions of the professional tool kit. They are skills that allow for a more effective strategy for de-escalation of disputes in a workplace. They are also valuable in a court context in resolving matters without the formality and expense of a hearing.

Shirli Kirschner
Resolve Advisors
Visiting Fellow UNSW Law School
Sessional Registrar Federal Circuits Court