



National Alternative Dispute Resolution  
Advisory Council Conference

## ADR: A Better Way to do Business

4 - 5 September 2003, Sydney, Australia

Summary of proceedings

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# Introduction

On 4-5 September 2003, the National Alternative Dispute Resolution Advisory Council (NADRAC) convened a conference entitled *ADR: a Better Way to do Business*. It was held in Sydney and 180 business people, ADR practitioners and other professionals attended. The conference on business use of ADR provided an excellent opportunity to:

- demonstrate the benefits of ADR
- show how ADR can be successfully implemented in business practices, and
- enable participants to develop strategies to take back to their own businesses.

The following is a summary of the conference proceedings. It has been prepared with the assistance of La Trobe University students, Argyle, Smith and Chand, and, where feasible, checked with relevant speakers or session coordinators. The summary is based on the papers and other materials provided. Complete papers and Powerpoint presentations may be obtained from NADRAC's web-site at [www.nadrac.gov.au](http://www.nadrac.gov.au).

# 1. Plenary sessions

## The Hon. Daryl Williams AM QC MP

The Honourable Daryl Williams AM QC MP, Australian Attorney-General, opened the conference, stating that all businesses need to maintain positive relationships with their clients, staff, business associates and other stakeholders. Disputes are something that everyone can do without. Not only do they cost money, but they consume valuable time and resources. Complex and serious disputes have been known to destroy important business relationships and, if left unresolved, some disputes can ultimately destroy the business.

Disputes within a business can arise in any area of operations and may involve a number of parties, including suppliers, contractors, customers, staff, government, boards, business partners and competitors. The disputes within a business may jeopardise the future of the organisation or may be minor disputes that affect certain sections (eg. reputation and productivity).

Few people like to be involved in disputes, however they are a facet of everyday life and cannot always be avoided. A 1999 survey of Australian small businesses showed that nearly half of the respondents had experienced a serious dispute over the preceding two years. Two-thirds of these disputes reduced profits or affected business viability. In four per cent of cases the dispute put the operator 'out of business'.

The concept of dispute prevention is particularly important. It makes sense to try to prevent a problem from escalating into a dispute by being pre-emptive. ADR is already receiving much attention within the business sector in Australia and overseas. This increased use of ADR can only support claims that it has the capacity to successfully resolve disputes with minimum fuss, reduced costs and time savings. This will also provide a framework for better internal and external business relationships.

This conference aims to give participants insight into how ADR works in theory and in practice. It seeks to illustrate some of the strategies which can be used in business to manage disputes and avoid the financial and damaging costs usually associated.

Amongst other things it aims to demonstrate how organisations have designed and implemented systems for internal and external disputes and how disputes in major projects can be avoided.

## Resolving Conflicts in Construction Contracting

### Wal King AM

Wal King AM, President of the Australian Constructors Association and CEO for Leighton Holdings Limited, showed how conflict could be resolved in construction contracting. Leightons is Australia's largest project development and contracting group which employs more than 15,200 staff throughout Australia, Asia and the Pacific. Its annual revenue is over \$5.6 billion,

and has works at hand to the value of \$9.7 billion. The Australian Constructors Association was formed in 1994 to represent the major contractors. Its member companies, which account for 30% of total construction activity in Australia, employ over 50,000 people and have a total turnover of \$15 billion. The association aims to make the construction industry more efficient and competitive and through this contribute to the development of the nation as a whole.

King outlined the issues associated with contract conditions. More time was often spent on bullet proof contracts than on developing job specifications. There is no such thing as a standard contract, and there may be inaccuracies in tender documents. Risk may be inappropriately allocated and there may be poor selection of project delivery methods.

Relationship or alliance contracting is a method for resolving these issues and preventing conflicts from occurring. Its key components are alignment of goals, risk allocation, clearly defined project scope, an integrated project team and 'gainshare/painshare'.

Dispute resolution boards (DRBs) offer a better way for dealing with disputes that do occur. A DRB is a panel of three independent technical experts which is established at project commencement and meets regularly during the project. When an issue is not resolved directly between the client and contractor, it may be referred to the DRB which makes non-binding recommendations that are discoverable in legal proceedings.

King concluded by pointing out that contracts are becoming more complex. Inappropriate risk allocation, damage clauses and delivery methods make disputes more likely. Alliancing and DRBs offer alternative and effective means for preventing and resolving disputes.

## From Dispute Resolution to Conflict Management

Carole Houk

Carole Houk noted that ADR appears to be at a 'Tipping Point' or moment of critical mass. The ADR movement has evolved to include efforts at conflict prevention and management rather than just dispute resolution.

Prevention and management of conflict is slowly becoming as important as the resolution of live disputes. Large organizations recognize that it is worth the effort to train contracts personnel in effective negotiation skills and many federal agencies who had put in place mediation programs for workplace disputes have now introduced communication skills training for supervisors and managers.

An Integrated Conflict Management System requires that all leaders and employees in the organization must champion the effort to create a model workplace, support the design and rollout of the integrated conflict management system, and model the behaviours of interest-based communication and cooperative problem solving.

In conjunction with a speech pathologist, Houk redesigned a health complaints program by offering the services of an internal ombudsman and mediator to resolve patient – provider concerns when they first occurred. This led to improved patient safety, creative options for resolutions, enhanced staff and patient satisfaction and an informal feedback loop that identified and fostered systemic improvements within the hospital. Over 200 cases had been satisfactorily resolved at a 100% success rate, with no legal claims filed and no monetary payments made.

Malpractice claims that are mediated after entering the litigation stream tend to be framed by the attorneys who represent the parties as a legal action that can only be resolved by the payment of dollars. Cases of medical error and unexpected adverse outcomes that are resolved by the HealthCare Ombuds are framed quite differently, such as concern at what happened, how will care be affected, will the organization and the individual providers acknowledge suffering and apologize if it's warranted, and how the error won't be repeated again.

In another example, Houk noted that in a recent major contract, the parties agreed to a robust partnering arrangement that 'builds an environment that encourages open communication and fosters the achievement of mutual goals; addresses how the parties plan to identify and solve problems, how the parties plan to anticipate and avoid claims and disputes; and agrees to attempt to resolve disputes through the least litigious manner, including ADR.'

This demonstrates how far ADR has come.

## Opportunities for ADR in business

### Laurence Boulle

A panel session facilitated by Professor Laurence Boulle, (Chair of NADRAC), looked at ADR opportunities from a range of perspectives. The speakers for this session included:

- Louise Sylvan (Chief Executive, Australian Consumers Association)
- Deena Shiff, (Managing Director, Telstra Wholesale)
- Assoc. Prof. Pat Cavanagh, (the Jakarta Initiative), and
- Sarina Jan, (Managing Director, Indigenous Business Institute Ltd).

### Louise Sylvan

Louise Sylvan spoke of solving consumer complaints through business to consumer ADR.

Australian ADR is characterised by high quality schemes, extensive coverage and tripartite processes. Industry schemes are based on the benchmarks of accessibility, independence, fairness, accountability, efficiency and effectiveness. Industry schemes should be optional for consumers (i.e. the terms of ADR should not be dictated to consumers in clauses), decisions must be binding on the business, adjudication (not arbitration) should be involved, possibly with mediation elements, the decisions should be enforceable, and industry coverage should be virtually total. A scheme must be underpinned by a comprehensive and efficient complaints

handling mechanism. Systemic analysis is required which seeks to eliminate systemic recurrence of issues and to achieve resolution with finality.

ADR can provide advantages in business/consumer relationships. It broadens access to justice as many smaller matters, which would not be taken to court by consumers, are able to be resolved through processes of ADR. It is more time efficient and less costly. Often it preserves a functioning relationship between the business and client. There are also new advantages in the context of e-commerce as usually jurisdictions are not well-defined. There is a need for 'global enforcement' between jurisdictions to achieve a comprehensive safety net for consumers. Global Business Dialogue and Consumers International have taken steps to achieve this by creating a global ADR scheme.

Additional principles to be addressed for good business to consumer ADR include licensed or mandated standards, the addressing of systemic issues to preventing recurrence, and public reporting (or name and shame). There is a need to improve social learning and services to consumers. Consumers are still concerned that business dictate the terms on which ADR can be utilised.

## Deena Shiff

Deena Shiff spoke of dispute resolution in the telecommunications industry. By 2000-1, the industry was characterised by conflict and disputes largely over access pricing. ACCC disputes increased in number and duration. One dispute gave rise to a tribunal appeal. Although arbitration was used, the approach adopted by the ACCC steered away from preliminary hearings or evidence presented by way of hearing. Therefore no forum existed for resolution, in which parties could meet personally and engage in productive negotiations.

Changes emerged late in 2001. Factors underlying the change were recognition that the adjudicative process was inefficient and failed to deliver realistic commercial outcomes in a timely fashion. The commercial environment no longer sustained these uncertain outcomes. A period of strong growth and technological advancement had given way to single digit growth after the dot coms crash. Businesses became very focused on commercial outcomes.

SPAN (the telecommunications industry service providers association) brought about a 'Velvet Revolution'. The telecommunications industry wanted change but was wary of the alternatives. Industry roundtables were convened to discuss the high level of disputes, and it was agreed that reform was needed. A steering committee, comprised of representatives of the major telecom companies, consulted with the ACCC and ACA to promote a 'learning by doing' approach.

Through this eleven disputes were successfully resolved in 18 months. Trust was engendered between competitors through the use of mediators. There was improved confidentiality in agreements and an agreed mediator list. A new industry dispute management centre was created (resolution@SPAN).

ADR enables parties to move past unconstructive, toxic relationships through case management, mediation and broader commercial engagement. It helps to retain a commercial focus by

removing legal hurdles, providing expert opinions, identifying the scope of difference and enabling open and frank communications. It helps in building sustainable and successful commercial relationships. It results in team training and trust building. It changes industry 'atmospherics'.

Ms Shiff observed that ADR seems most effective for recurrent and standardised disputes. Senior management must be included and active on both sides of the dispute to build a broader commercial relationship. Industry discussion is critical to achieving uniformity and consensus. An organisation such as SPAN confers legitimacy and helps effect social and attitudinal change. There is a need for an eclectic range of dispute resolution techniques.

### Pat Cavanagh

Pat Cavanagh spoke of his experience of commercial mediation in Indonesia, where he typically deals with syndicated bank loans in excess of USD10 million.

In commercial negotiations one should first determine what the contested issues are, and then attempt to resolve them. One must have a clear understanding of conflict and there is usually an environment of mistrust, suspicion, and betrayal. Common issues to deal with in this context are which currency to negotiate in, length of negotiations, and the multi-party, multi-issue nature of disputes. Further, it is common for internal disputes (within a party comprised of distinct entities) to occur, causing obstacles to resolution. Very rarely is the original lender involved in negotiations. Participants often do not have decision-making authority. Low levels of professionalism and proficiency in negotiating skills mean that the mediator must take a proactive role in assisting resolution. Participants can be encouraged to cooperate with mediation under the threat of correspondence with government agencies, and the prospect of rewards. Lack of trust in, and access to, the court system is an issue in these negotiations.

### Sarina Jan

Ms Jan gave a quick insight into how culture influences a dispute and how some disputes can affect a whole community or region. She talked about how Indigenous disputes have in some instances gone on for years, with the end results sometimes becoming generational (i.e. inbred and forever perpetuated) within a family and/or region. She also gave an understanding about her role as a cultural mediator within an Indigenous dispute, where mediation for Ms Jan is more an extension of her role as an Indigenous leader and role model, rather than as a profession, and more as a responsibility she has learnt from within the Indigenous community, rather than through any formal studies.

Ms Jan then talked about the 'cultural framework' in which an Indigenous dispute should be mediated and resolved within. She highlighted the difference in the aim of mediating. Usually one's aim is to resolve disputes and provide win-win solutions for the disputing parties, however as a cultural mediator it is much more. Firstly, it is the protection of the 'Indigenous credibility' of the situation (i.e. the standing, the integrity, the authority and beliefs held by the disputing parties) and secondly, it is the resolution of the dispute in a culturally appropriate framework. She

emphasised that Indigenous disputes are better resolved through ADR and in a culturally sensitive manner because Indigenous disputes often involve extended families, communities and regions, and often cannot be confined to the individual. The process of resolution must also be conducted with consideration to cultural issues concerning status and community standing.

Ms Jan also highlighted three major steps of preparation that a mediator should do before they engage in mediation between disputing Indigenous parties, they include:

1. Socially map the parties involved in dispute
2. Gain an understanding of the holistic ambience: the environment of the dispute and how it originated.
3. Identify social limitations upon the dispute and assess the conduciveness of the mediation environment

She emphasised the need to mediate in a cultural framework, where the location (rural, regional, metropolitan); the entities involved (individuals, small business, companies) and the status one holds in a community/region (youth, elder, native title claimant, role model, spokesperson, etc) must be taken into account.

Ms Jan highlighted that in Indigenous dispute resolution, one must always give consideration to the whole picture, especially to the racial dimension that may exist in a dispute where both indigenous and non-indigenous parties may be involved. She also highlighted the fact that 'culture' defines the ethos, ethics and behaviour of a country and in the real world, business too is often underpinned by these same characteristics.

Ms Jan then made a statement that Australians are often wary about incorporating these same characteristics into their daily dealings with Indigenous people because they are afraid of the unknown repercussions, rather than being delighted that they could end the biggest dispute in Australia's history - that of recognising Indigenous people as First Australians. Ms Jan said that as a young Indigenous Australian, she was sad that today, this dispute in Australia still remains unresolved and will continue to be perpetuated across future generations unless we as a community start to make a difference.

In ending, Ms Jan asked everyone to afford Indigenous Australians and their culture the same respect and recognition that they afford other countries because here in Australia, culture defines Indigenous Australians 'as being the oldest living Indigenous culture in the world'.

## Cross-cultural conflict resolution

Chaired by Associate Professor Pat Cavanagh of the Jakarta Initiative, a plenary session showed how effective communication underpins the successful prevention, resolution and management of conflict. The conference noted that in today's diverse workplaces and global marketplaces, businesses need to be able to communicate effectively with employees, customers and business associates from many different nationalities, languages and cultures.

## Professor Paul Pedersen

Professor Paul Pedersen, Professor Emeritus Syracuse University, Hawaii USA, is a lecturer and consultant with over 30 years of experience in dispute resolution techniques and approaches. His primary area of interest is the effect of group difference on interpersonal and intra-personal interaction between cultural and nationality identities in the educational setting, multicultural corporation, public or private sector and the community. Pederson noted that the words 'conflict', 'dispute' and 'resolution' are defined differently in each business and cultural context. By defining culture broadly to include ethnographic, demographic, status and industry affiliations and by re-framing conflict into cultural categories it becomes possible for two groups or individuals to disagree without either one being necessarily wrong.

His presentation explored alternatives for solving disagreements at the macro and micro levels and the importance of a culture-centred perspective to understand different perspectives. He outlined strategies for managing conflict in a cultural context by separating behaviours from expectations in a Cultural Grid.

## Jenny Wallis

Jenny Wallis, Director of the Hong Kong Economic Trade Office, observed that Confucius had said 'human beings draw close to one another by their common nature, but habits and customs keep them apart'. In many ways, Hong Kong is a case study in how to address the conundrum. Hong Kong is one of the most internationally-focused places on the planet. Born in dubious historical circumstances of the China trade, it emerged in the last half of the last century as one of the most important global trading crossroads with an externally-oriented economy that might have been a role model for the whole idea of globalization. An outstanding arbitration centre has evolved where customs have intertwined to make cross-cultural arbitration and mediation a success. Westerners weaned on a fair and impartial judicial system can also feel comfortable with a mediation process that better suits the Chinese and Asian tradition that tries to avoid losing face. She addressed some of the cultural landmines that need to be avoided and defused.

## Developing an Integrated Dispute Resolution System

### Anne Thomas

Anne Thomas (Executive Secretary, Appeals Committee) from the World Bank Group discussed integrated dispute resolution systems (IDR) and their advantages. IDR was said to offer informal, non-adversarial, preventative and problem solving processes as well as traditional formal grievance processes. IDR helps staff to consider many options rather than a simple grievance procedure, in order to control problems and complaints. IDR helps to resolve complaints at a low level and sees the development of a positive and conflict competent organisation.

Using an Ombudsman, mediation, ethics office, ACO and tribunals are all alternative options when dealing with disputes. The Ombudsman can offer neutral and confidential advice and help to identify and evaluate options to handle complaints. Mediation can also be informal but sees a

structured framework managed by a professional mediator. The process facilitates open and constructive discussion around disputed issues. Ethics and business conduct supports management and staff in fostering a work place with a high level of ethics in relation to operational decisions. The ACO is a formal peer review arbitration process which allows staff to challenge administrative decisions that affect their terms of employment. A tribunal is also an option, where an international panel of judges provides an impartial review of management decisions. However, in such processes the judgments are final and binding.

It was found that 89% of staff have an awareness of conflict resolution systems available to them resulting in an increase in system use and a positive impact in changing corporate culture.

## Conflict Management Systems for Business

Shirli Kirschner, Phil Singleton, Nicole Cullen, Simon Rice, Michael Kay

A panel session facilitated by Shirli Kirshner examined, through a hypothetical case study, how an organisation's approach to complaints is central to business success. Members of the panel were Nicole Cullen, Deputy Chairperson of the Superannuation Complaints Tribunal, Simon Rice, a consultant to the not-for profit sector, Phil Singleton, previous Chair of SPAN (the telecommunications industry service providers association) and Michael Kay, Chief Operating Officer of AAMI.

The session hypothesised that complaint-handling was a business process and it should be treated as such. Complaint measurement and communication are vitally important in the management of an enterprise. When we treat complaint handling as a task in its own right, we ignore the more important task of communicating the extent and nature of complaints, as well as the effectiveness of complaint handling, to the operatives in an organisation. The hypothetical highlighted that organisations tend to operate in silos, missing valuable lessons. Lessons learnt, for example, in the litigation department should filter back to the front line and the statistics gathered by the customer relations department should be reviewed by management. This information is critical to business decisions, brand and reputation. In order for this to be achieved stakeholders need to be more aware of the value of the insights that complaints can provide a company strategically.

Organisations need to embrace complaints as welcome feedback on the health of their organization and as opportunities to move towards prevention of the issues that give rise to complaints. This means engendering a culture, recruiting the right people, providing training and giving people authority to make decisions. It is important for companies to think through the mechanisms for dealing with complaints. Options include customer complaints being part of a job, not a separate department. Staff need specific training to handle complaints and there needs to be consideration of operational aspects such as funding for staff training and for back up administrative systems.

Stakeholders need to be educated about complaint handling. They in turn become educators and champions of the process. Training in interest-based negotiation and consensual approaches to dispute resolution provides skills that are useful in life generally, as well as in business.

Top level managerial support is needed for organisational change initiatives as well as initiatives that assist to empower the staff to take ownership of complaints handling. The prospect of complaints and customer satisfaction measurements being included in employee performance evaluation and remuneration incentives also needs consideration. The objective after all is not to streamline complaint handling so much as removing the cause of complaints in the first place.

The aim should be to reduce the customer's stress (or 'unresolved crisis'). This means a quick response. People also want to be responded to in the same modality as they complain. It is important to welcome complaints from all modalities (eg writing, comment cards, email, phone)

and to respond in the same way. Customer research indicates that people want the problem fixed. A standard acknowledgement that ignores the substance of the complaint is worse than not replying at all as it raises customer expectations and then disappoints. When challenged by limited resources it is important to assess the real long term value to the organisation of committing resources to monitoring and responding to feedback. It costs more to deal with complaints that are responded to at too late a stage.

There is, however, a temptation to provide a quick and decisive solution that ignores the underlying causes. Customers can turn their needs into legal rights based language. Skilled staff are needed who can fix things constructively without engaging in rights based rhetoric. When disputes move from being about the original issue or problem to a matter of principle, people dig in and become hard to move from positions.

Mediation can be an effective way to resolve problems that escalate past the initial complaint stage. There may, however, be barriers to getting people into mediation. Companies can be concerned that agreeing to participate in mediation could be a sign of weakness. They may believe that they have 'not done the wrong thing' and therefore 'there is no room for negotiation'. They may feel that 'mediation involves compromise' and, as they are not prepared to make any financial offer, there is 'no point' attending mediation. There may also be a culture of asserting rights in which a problem solving mode doesn't feel familiar.

A skilled case management approach might be able to bring parties together to some form of reconciliation and agreement. There is little to gain and much to lose by pursuing litigation, regardless of what the final decision would be. There has to be a circuit breaker and some form of ADR, such as mediation, is the obvious path.

# Workshop sessions

## A Preventing and managing contractual disputes

### Incorporating ADR into Contracts

A summary of the presentations by Ian Nosworthy, President of the Institute of Arbitrators and Mediators Australia (IAMA) and Mary Walker, Barrister and Mediator, highlights the following points.

There is no value in incorporating ADR clauses into contracts if they are struck down or found to be ineffective. This has occurred in a number of recent instances in Australia. e.g. Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194. The Commercial Arbitration Act provides a helpful framework for parties.

In incorporating ADR clauses into documents it is risky to 'cut and paste' from other documents and contracting parties are better advised to adopt one of the many available standard dispute clauses. IAMA has provided specific such clauses for each scenario whether recommending arbitration, expedited arbitration, international arbitration, mediation-arbitration, industry-consumer contracts and expert determination.

Regardless of the scenario, parties need to take time to familiarise themselves with clauses included in their documents after deciding on preferred ADR process(es). Consideration needs to be given as to whether facilitative, advisory and/or determinative interventions are most suited. A 1997 Justice Research Centre study of plaintiffs' satisfaction with dispute resolution processes revealed high levels of satisfaction and perceptions of fairness with ADR processes.

Common themes and outcomes were again evident within this session of the NADRAC conference; the importance of being careful in drafting suitable dispute resolution clauses, finding the preferred and/or most suited ADR processes. In addition there was large pressure placed on the importance of the parties understanding commercial arbitration.

### Processes for Resolving Technically Complex Disputes

This session, chaired by Sir Laurence Street, was conducted by David Singleton and Rolfe Hartley, titled 'Processes for Resolving Technical, Complex Disputes'.

David Singleton, CEO of Arup Australasia and Chair of National Engineering Registration Board, spoke at length about the role of large disputes within complex projects involving engineering (i.e. energy, oil and gas, infrastructure, mining and minerals and manufacturing). Singleton suggests that as this industry is complex and intricate due to the time frames, the contracts and money involved, the inherent tension can only be resolved by ensuring that dispute resolution specialists bring with them an appropriate level of technical expertise.

Suggesting that the engineering construction sector is 'by its very nature... a very fertile area for risks, liabilities, and conflicts to develop, due to the interface with legal, contractual, ethical, and financial obligations of the participants' (Engineers Australia), Singleton proposes that there need be the adoption of a more efficient and less destructive resolution process, and that this will not only reduce the costs of conflict, but also bring about changes in the way conflict is managed.

Disputes in the construction industry today are considered to be more complex and involve more parties, thus accepted and traditional methods of dispute resolution have become extremely costly and cumbersome- suggesting that the industry can no longer afford to proceed with this traditional pathway, proclaiming that the industry will have to change this aspect of its culture.

Similarly Rolfe Hartley, National Vice President Engineering Practice of Engineers Australia, followed through with a discussion on Engineers Australia's role in facilitating and assisting parties to resolve disputes within the engineering industry. Hartley described a two-tiered structure on one hand dealing with the accreditation of engineering arbitrators, and on the other hand dealing with the development of policies, strategies, training and practice notes which help to educate members on dispute avoidance and dispute resolution. In addition they also help with the documentation and administration of engineering contracts.

Hartley indicated that whilst there are benefits to the growth of dispute resolution, there are also consequences. He challenged the notion that a good mediator and arbitrator are 'good' regardless of the nature of the dispute. Instead he suggested, similar to Singleton, that a mediator or arbitrator within their industry needs to be trained and well-educated with technical competence and literacy skills.

Both Singleton and Hartley discussed the perceived importance of having a mediator and/or arbitrator who possesses the technical skills and knowledge for that industry. The value of this expertise is akin to the arguments used by the courts for having expert witnesses.

## Dispute Resolution Boards

Robert Hunt, Immediate Past-President of IAMA; Jim Barrett, Secretary of Australian Constructors Association (ACA) and David Opperman, Partner, Freehills, discussed the potential of Dispute Resolution Boards.

Dispute Resolution Boards (DRBs) are set up to avoid or minimize the likelihood of disputes by early intervention and largely informal processes that occur while work is in progress. A DRB is a contractual institution. The clause in a contract providing for the DRB needs to specify its constitution, operation and administration. Set up prior to the commencement of a project, it has two primary functions, namely to become familiar with the project during the implementation phase and to resolve any disputes efficiently and effectively.

Typically a DRB includes three persons, one nominated by each party and a third chairperson appointed by the former. The nominees are acceptable to both parties and participate as independent, impartial members not as advocates or representatives. DRB guidelines will specify

the duration and timetable for visits, procedures, information to be accessible, dispute handling mechanisms as well as administrative matters.

Either party can refer a dispute or potential dispute to the DRB. The DRB process seeks to avoid or minimize disputes rather than resolve them. Ongoing trust between the parties is developed which greatly assists to ensure that efficient and effective project delivery occurs and that expectations are met.

The DRB determines objectives, meeting arrangements and ensures that ordinary principles of natural justice are observed in dealing with the parties. Parties are not dealt with in isolation and periodic visits to the project occur irrespective of progress, thereby providing for a dispute avoidance mechanism. The written decisions of the Board, usually termed recommendations, are non-binding but admissible as evidence later in any formal dispute resolution processes.

DRBs facilitate trust, open communication, reasonable behaviours, certainty of results and minimise aggregation of claims. They increase the likelihood that relationships are enhanced and provide an effective, constructive means to minimise the negative effects of disputes on projects in a cost effective manner. The fees and expenses of Board members are shared equally by the parties.

The clear and intentional set up of processes, the composition and parameters for dispute resolution businesses, and ongoing monitoring were some of the more evident common themes and outcomes. Further common outcomes and themes were identified as the focus on the possible cost savings, the importance of trust within contractual relationships and the obvious high levels of commitment needed by the parties.

## Dispute prevention in contract and related negotiations

Many damaging disputes can be avoided, or the loss associated with them minimised, by adopting a 'dispute prevention strategy' early in negotiations. Ways to do this were explored in a workshop facilitated by Peter Condliffe (CEO, AIMA) that featured barrister Ian Bailey and lawyer/mediator Ruth Charlton.

Construction disputes are often complex and time-consuming. Most of the Institute's business since it was founded in 1975 has been concerned with construction disputes which can be complex and time-consuming. Moving from a resolution-centric, usually arbitration-based response to such disputes in the 1970's there have been perceptible attempts to move towards management and prevention-focused approaches. These attempts have included partnering, alliancing and expert determination. Many of these were derived from overseas experiences.

Partnering is an attempt to bring together the contract administrators to enable them to better communicate and understand each other and compromise (often around issues of rights and liabilities) where necessary. Many partnering provisions run into difficulties because the operational procedures were not incorporated into the contract and therefore are open to challenge. This type of procedure requires both commitment and skills on behalf of the parties that are not always necessarily going to be there.

Another more recent development has been alliance contracting. In this process the parties come together to share the burden of risk under a contract. The challenge in these sorts of arrangements is to ensure the parties co-ordinate their respective activities. There is obviously a cost in doing this. As with partnering the principle is to recognise that conflict will occur and that early prevention and management is preferable.

Expert determination has also been introduced although it is probably not so suited to complex or larger type disputes. The Institute has introduced rules to facilitate its use although it is fair to say that it is probably not now being used in contracts as much as it was ten years ago. It operates in much the same way as a simplified arbitration procedure operating under a very strict set of rules. The expert determination process is particularly suitable for single issues, or disputes of a limited size or scope.

In the NSW Supreme Court, a reference out system has developed and appears to be operating effectively. Despite the fact that Rules of Court in other States permit this process it has hardly been employed. In Victoria the Supreme Court has given more emphasis to mediation as the preferred process.

The introduction of statutory adjudication under the Security of Payments legislation in New South Wales and Victoria also points the way to more speedy administratively driven processes. This type of process with limited jurisdiction and strict timelines within which to make final determinations may be extended. If such processes can be used in relation to payments why not extend the process to such matters as extensions and variations?

A more substantial managed dispute resolution process is the Dispute Review Board ('DRB'). It is a procedure, again developed in America, which has proved successful on major projects. Recently the Dispute Review Board Foundation established a branch in Australia. The process involves a panel of three, appointed at the commencement of the project. The three comprise in effect a nominee of each party and an appointed or neutral chairman. The DRBF would meet regularly during the course of the contract and deal with disputes as and when they arise in accordance with a prescribed procedure.

The need for thorough preparation and selection of the appropriate management technique was emphasised throughout this session.

## B: Improving customer relationships

### Setting the scene - Industry-based customer dispute resolution schemes

This was the first of the four sessions presented by the Industry-based ADR/Ombudsman Scheme Network. It was delivered jointly by Colin Neave, Banking and Financial Services Ombudsman and John Pinnock, Telecommunications Industry Ombudsman.

The session covered the history and evolution of industry-based customer dispute resolution schemes in Australia; their role in regulatory compliance; their value-added to Australian commerce and industry; their ADR practices and methodologies; and the critical link between the schemes and their members' internal complaint handling processes. Some emerging issues affecting the various schemes were also raised.

When Australian customers can't resolve disputes directly with their industry and commerce service providers, they most commonly turn to an industry-based ADR scheme. While industry-based schemes are described as an alternative to the court system, in reality, for many people for whom financial considerations put court action out of reach, they are the only option.

The Australian Government has actively supported the establishment of industry-based ADR schemes, with the view that they result in improved business practices. It is believed this leads to the creation of better quality goods and services for customers and that ADR schemes enable industry to ascertain the problems faced by their customers and take steps to rectify these, thus negating the need for government intervention; and that they play a vital role as an alternative to expensive legal action for both customers and industry.

Australia's first industry-based, independent, ADR scheme was the Australian Banking Industry Ombudsman (ABIO), launched in 1989 and recently renamed the Banking and Financial Services Ombudsman (BFSO). It was followed by Insurance Enquiries & Complaints (IEC), the Financial Industry Complaints Service (FICS) and the Telecommunications Industry Ombudsman (TIO). The first energy and water scheme was the Energy and Water Ombudsman Victoria (EWOV) launched in 1995, followed by similar schemes in New South Wales, Tasmania and South Australia.

Handling over 250,000 individual contacts annually, these schemes deal with issues directly affecting the quality of the lives of ordinary people - complaints about electricity, gas, water and telephone services; about access to savings; home or business purchases; investing; and personal disability, home and business insurance safety nets. They manage combined budgets exceeding \$25 million, operate in both the public and private sectors, and are highly regarded in Australia and internationally.

In 1997, the Federal Government published its 'Benchmarks for Industry-based Customer Dispute Resolution Schemes' (the National Benchmarks). This document sets standards that ensure industry-based ADR schemes are independent, accountable and effective. It sets out key

practices, within underlying principles of accessibility, independence, fairness, accountability, efficiency and effectiveness. All of the above schemes have regard to these Benchmarks.

While funding formulae vary from scheme to scheme, industry-based ADR schemes derive their funding from their industry members. There is no charge to the consumers or affected parties who use their services, or to the broader community.

Scheme independence is assured by way of governance structures, either a single Board or a combination of a Board and a Council. Both models feature a balance of consumer and industry representation.

The primary purpose of industry-based ADR schemes is to resolve complaints within particular industry sectors, following receipt of individual cases. In doing this, they deal first and foremost in what is 'fair and reasonable' in all the circumstances, taking account of relevant industry codes, good industry practice and the law. They also play a pivotal role in identifying systemic issues and in reporting cases of serious misconduct to appropriate regulators, and in public reporting on complaints trends for their particular industries.

For individual service providers, the benefits of membership of an industry-based ADR scheme can extend well beyond the handling of individual complaints. For example, having an ADR scheme improves an industry's image among stakeholders generally. ADR schemes are also a valuable source of independent research into customer experiences.

While each scheme operates slightly differently, common procedures include:

- ease of access for customers – most initial contact is by phone
- members are given the opportunity to address and resolve the complaint first
- legal representation is not required and not encouraged
- schemes are neither industry nor customer advocates
- investigation of complaints is on a case by case basis
- customers are not bound to accept any decision or determination
- once the customer does accept it, the member must carry it through

The session closed with a look at emerging issues for industry-based ADR schemes. One such issue is the dissolution of traditional market boundaries, with the rise of multi-utilities and multi-service financial organisations. Where it was once clear to customers what they were buying and from whom, today the purchase and payment landscapes are becoming more complex. Electricity companies are now selling gas, and vice versa; some are also selling water; others have been selling ISP services; banks are selling financial products; phone companies are taking on third party billing responsibilities. Schemes agree that where their jurisdiction starts and finishes is an issue they will increasingly face.

The full paper and presentation for this session is available on the NADRAC website.

## Resolving Customer Disputes - case studies and current issues

The second session presented by the Industry-based ADR/Ombudsman Scheme Network was a panel session facilitated by Fiona McLeod, Energy and Water Ombudsman (Victoria). Panel members were: Alison Maynard, CEO, Financial Industry Complaints Service (FICS), John Pinnock, Ombudsman, Telecommunications Industry Ombudsman (TIO), Diane Carmody, General Manager, Banking and Financial Services Ombudsman (BFSO), Jo Benvenuti, General Manager Strategic Operations, Energy and Water Ombudsman (Victoria (EWOV) and Peter Hardham, Chair of the Claims Review Panel, Insurance Enquiries and Complaints Ltd (IEC).

The session focussed on some of the fundamentals of industry-based ADR schemes, with case studies used to illustrate these. The case studies are contained in the full paper for this session available on the NADRAC website.

- Detecting and dealing with systemic issues  
Identification of systemic issues is usually by way of a succession of complaints of the same type. However, in some instances, schemes have detected systemic issues from just one complaint, by realising that the effect of the issue causing the complaint may well extend beyond that complainant to others. In identifying systemic issues and trends in this way, schemes help ensure that matters with the capacity to affect groups of customers are quickly identified, and acted on by the agencies with the ultimate power to deal with them.
- Focusing on what is 'fair and reasonable'  
All industry-based ADR schemes deal first and foremost in what is 'fair and reasonable'. The principle of 'fairness' requires a scheme to produce decisions which are fair, and seen to be fair, by observing the principles of procedural fairness, by making decisions on the information before it and by having specific criteria upon which its decisions are based. It does this having regard to good industry practice, relevant industry codes and the law.
- Identifying and applying 'good industry practice'  
As decisions made by industry-based ADR schemes go beyond simply applying the law, to allow consideration of good industry practice and fairness, they have the opportunity to consider ethical outcomes and raise the standards of industry participants. Sometimes what constitutes 'good industry practice' is more obvious, as it is set out or discussed in formal documents, such as industry codes of practice or regulatory guidelines. Other times this information must be sourced, eg. by calling around to survey members, consulting regulatory agencies, seeking the professional advice of independent industry experts. Where a scheme finds there's a need for some consistency of approach that doesn't presently exist, this can be drawn to the attention of the industry regulator. In some cases, schemes also publish guidance notes and position statements.
- Driving customer service improvements  
Industry-based ADR schemes have much to offer members who genuinely wish to improve their customer service. Some of that learning comes directly from individual cases, the resolution of which makes the member aware that something needs to change. As well, each scheme has a unique body of knowledge about the customer experience. When aggregated, this knowledge can

be used by individual members, and by whole industries, to drive customer service improvements. It's disseminated in various ways, eg. at meetings with specific members, at industry and member conferences, through published position statements, case studies and digests of binding decisions, in public reports, and through the training materials.

Also included in the session were case studies illustrating current topics of customer concern in the various industries the schemes service.

## Internal Dispute Resolution and the relationship with ADR/Ombudsman schemes

Three speakers featured in this the third session presented by the Industry-based ADR/Ombudsman Scheme Network and chaired by Fiona McLeod, Energy and Water Ombudsman (Victoria). Each spoke of their industry's involvement with an industry-based ADR scheme, in particular the link between it and their company's internal dispute resolution mechanisms. The full presentations are available on the NADRAC website.

Charlie Trkulja, Head of Customer Relations for the Commonwealth Bank Group is responsible for complaint management and dispute resolution for the Bank's banking, insurance, investment and superannuation products and services. His address outlined Australia's financial industry regulatory environment, noting a range of applicable codes of practice and a number of ADR mechanisms, in particular the Banking and Financial Services Ombudsman (BFSO). Mr Trkulja went on to discuss how to set up an effective complaint handling department, including changing the organisational culture so that complaints handling is seen as important, having the right mix of people and technology, training staff well and giving them sufficient power to make decisions, achieving resolution at first point of contact wherever possible, good data management systems and realistic benchmarks. He also outlined the role of the BFSO and the Commonwealth Bank's working relationship with it.

Michael Fraser, Group General Manager Energy Sales & Marketing for AGL, manages that company's retail arm. AGL is Australia's largest privately owned gas and electricity company. Mr Fraser illustrated how some of the more common sources of complaint in the energy industry (billing and collection) were as relevant when his company was set up in the mid-1800s as they are today. Mr Fraser explained AGL's primary focus as one of trying to stop customer issues becoming complaints. He outlined a number of AGL initiatives, including input from its Customer Council and its recently introduced 'Staying Connected' program, developed to assist customers who genuinely wish to pay their bills but are having difficulty doing so. Mr Fraser noted the value to his company of its working relationship with energy ombudsman schemes across a number of states. He also outlined AGL's operational procedures for handling, escalating and tracking complaints and measuring customer satisfaction.

Mary Jane Salier is General Counsel for OzEmail Limited, a part of the MCI WorldCom Australia Group. In that role, she provides legal and regulatory support for both the MCI and Ozemail internet service provider (ISP) businesses. Ms Salier noted that the ISP industry's heavy reliance on technology, relative newness and comparatively complicated service delivery, meant that customers often have difficulty understanding aspects of it. As a result, dispute resolution is an important part of an ISP's customer service processes. This is also an industry relatively new

to ADR, coming within the Telecommunications Industry Ombudsman (TIO)'s jurisdiction in 1997. In the early days, this, coupled with the TIO's inexperience in dealing with internet-related matters, meant a learning curve for all involved. However, since then, membership of the TIO has proven to have advantages for both customers and the company.

## Perspectives on the future of industry-based customer dispute resolution schemes

The final session presented by the Industry-based ADR/Ombudsman Scheme Network was a panel discussion facilitated by Fiona Guthrie, an executive member of Queensland's Consumers' Association and the Consumers' Federation of Australia. Panel members were Chris Field, Executive Director of the Consumer Law Centre, Victoria and Chair of the Australian Consumers' Association; Clare Petre, Energy and Water Ombudsman NSW; Dr Bronwyn Naylor, Senior Lecturer in the Monash University Faculty of Law; and the Hon. Tony Staley, Chairman of the Council of the Telecommunications Industry Ombudsman and the Board of the Energy and Water Ombudsman (Victoria).

Session Chair, Fiona Guthrie identified a number of themes emerging from the discussion:

- There is likely to be a shift away from dual governance structures (Board and Council) to single tier structures (i.e. Board only).
- There is a continuing need for collaboration/sharing between ADR schemes, such as information sharing, computer/technology/systems.
- ADR schemes are 'owned' by the community in a collaborative sense — not industry and/or consumers alone.
- Customer satisfaction will always remain critical to scheme success. ADR schemes cannot afford to take this for granted — they must continuously monitor performance and seek to improve.
- There is likely to be a trend towards convergence of schemes, with some schemes merging. However, the relatively small size of industry-based ADR schemes has contributed to their success — this should not be forgotten, or the benefits lost, if there are to be mergers.
- While ADR schemes will continue to identify systemic issues, their main role is to resolve disputes — there is sometimes a tension between the two.
- Involvement of lawyers can be problematic — the best approach is one where lawyers acting for scheme members take a problem-solving, rather than adversarial, approach.
- There is a need for schemes to continue to improve how they assist low income and vulnerable customers.

## C Work place dispute resolution

### Options for Dispute Resolution in the Workplace

This workshop featured presentations by Carole Houk, President and CEO, Resolve Advisors; Peter Anderson, Director, Workplace Policy, Australian Chamber of commerce and Industry (ACCI) and Anna Booth, Director, CoSolve.

Conflict in the workplace may include disputes between manager and employee, between employees and other problems or issues that harm relationships and reduce productivity. Typically these feature wages, employment conditions, entitlements, contracting, security and management policy and may result in disagreements, claims, stop works, strikes and boycotts.

In an integrated conflict management system instead of handling disputes on a case by case basis an organization is aided to systematically focus on relationship management. Prevention and early resolution of conflict is achieved at the lowest possible level. The goal is to equip organisations to recognise and manage conflict responsibly by sustaining a culture of conflict competence.

In an integrated conflict management system, managers are skilled and resourced to focus on prevention and early resolution and new dispute resolution procedures are managed in a low to high cost sequence. It requires a focus on relationship management and fostering trust.

To have a system rather than just a model, it should have a broad scope to encompass all types of conflict, have multiple access points, provide choices of interest-based and rights-based options and incorporate safeguards to protect confidentiality and individual rights. It should include a corporate commitment, a trusted structure and enhance internal capacity building.

A corporate commitment will include 'buy in' by leaders and an organisation-wide policy of conflict management. It will provide the human and financial resources needed. This will usually include provision of a coordinator, establishing strategic communication, flexibility, system monitoring and an evaluation mechanism.

Anna Booth noted that, to date, the take up of ADR in the Australian workplace has been relatively low. Possible barriers include a perception by some unions that ADR is an attack on the Industrial Relations Commission and a desire by some employers to set terms and conditions unilaterally without the involvement of any outsiders. Lack of knowledge about private ADR and the lack of a credible and known cadre of private dispute resolvers or a peak organisation are additional problems. There needs also to be a working relationship between the tribunals and private ADR to bring about a more integrated system. The episodic and positional nature of collective bargaining can create a context where it can be difficult for ADR to take hold.

ACCI policy states that 'subject to a few exceptions, conciliation and arbitration within the formal system should be an essentially voluntary process'. Further 'greater use of ADR style

model should be considered. This should include an emphasis on less adversarial models of dispute settlement including through industrial tribunals...' (Modern Workplace: Modern Future 2002-2010 Blueprint)

ADR in the workplace turns on a contemporary, party driven consensus which is custom designed for the particular organisation. There are no jurisdictional constraints and parties will often look at problems more holistically and pre-emptively. ADR can facilitate whole of organisation relationships and interactions and can go into greater depth to identify and tackle deep-seated problems in-house.

Effective workplace ADR will have a number of characteristics. Firstly, it will be the product of stakeholder consultation and will support the organisational infrastructure. Secondly, it will focus on relationships and on underlying needs and interests rather than just making deals. Thirdly, it will include stakeholder training and be based on objective criteria rather than individual personalities.

Options for dispute resolution in the workplace inspired a plethora of common themes and outcomes: the integration of systems as a whole organisational approach, a focus on the prevention of dispute escalation and the need for fair and objective criteria.

## Choosing Internal or External Dispute Resolution

This session was conducted by Captain Helen Marks, CSM, Director of Alternative Dispute Resolution and Conflict Management for the Australian Defence Organisation and Scott Pettersson, the Chief Executive Officer of LEADR.

Scott Pettersson introduced the session by detailing the hallmarks of a system which completely referred to external sources and those that used external sources as a discretionary asset available to the dispute system. He examined and discussed with the participants some of the recent studies and highlighted the satisfaction measures reported in the US Postal Service study. In this study, settlement rates were noticeably higher when using external dispute resolvers. The session looked at some of the reasons for this disparity in settlement rates and participant satisfaction.

Captain Marks spoke at length about her experiences within the Australian Defence Organisation, detailing the familiar issue of 'when and how to deal with disputes internally and when to move to external resolution' and how to recognise which cases are suitable for external dispute resolution.

Within the realms of choosing an external or internal dispute resolution system, Marks and others identified certain common themes, when faced with this choice. Marks, using her knowledge about the Australian Defence Organisation, suggested that one would need to consider all aspects of the initial organisation (here the Defence Organisation) including the culture within and any pre-formed structures, including the power, the dynamics and the official hierarchy found within her organisation.

Whilst admittedly more obvious within Marks' organisation, the concerns for pre-existing cultures, beliefs, and power structures within any organisation (internal) impacting on the neutral third party (external) dispute resolution system, is a palpable one. These hierarchies, beliefs, cultures and power structures must be examined when implementing an internal or external dispute resolution system.

## D Self regulation, small business and the professions

### Industry self-regulation and small business

A presentation by ACCC Commissioner John Martin and Retail Grocery Industry Ombudsman Bob Gaussen provided an overview of how self-regulated codes of practice assist in the prevention and management and resolution of disputes involving small and medium enterprises. The Retail Grocery Industry provided an example of the development of such codes.

### Case Studies of Small Business Dispute Resolution Schemes: Cinema, Retail Tenancies and Farming

The session was organised and facilitated by Robyn Carroll (University of Western Australia) and featured Fran Rowe (Rural Assistance Authority), Ken Carlsund (Retail Tenancy Unit) and David Newton (The Accord Group).

Each speaker presented with regards to the session topic on the benefits and procedures of implementing a dispute resolution system in small business. Robyn Carroll provided a framework for identifying features of small business dispute resolution schemes, and listed thirteen important features of a small business dispute resolution scheme. A number of overarching themes found within this section resonated with themes throughout the conference generally.

Fran Rowe, Chair of the New South Wales Rural Assistance Authority, spoke in detail about Mediation and Farm Debt. This legislative dispute resolution system was designed to protect farmers impacted upon by the agricultural crisis of the late 1980's early 1990's. The system was introduced to account for and 'correct' the highly variable outcomes (and natures) of previous negotiations between farmers and financiers.

Ken Carlsund, Registrar at the Retail Tenancy Unit, addressed the conference on the dispute resolution system he is involved in, including the legislative definitions, and the characteristics of Retail Tenancy Unit mediation as contrasted to the tribunal or the courts. Carlsund strongly encouraged informal mediation but recognized the benefits of the tribunal within the Retail Tenancy Unit, which allows a failed mediation to proceed to a determinative process. The Retail Tenancy Unit has however allowed for a loop-back - permitting cases at the tribunal to be referred back to mediation.

Lastly in this section, David Newton from the Accord Group spoke about the Film Exhibition and Distribution Code of Conduct. This industry-based, external body of dispute resolution provides a system that responds to and resolves disputes quickly whilst aiming to ensure fair and equitable trade, thus providing a guideline for industry behaviour.

This session of the conference contained strong recommendations about what a dispute resolution system within a small business should look like, how mediation should be defined within such

schemes, appropriate application, intake and mediation procedures and recommendations as to appropriate mediators.

Rowe, Carlsund, and Newton all agree that there is a strong need to have both an internal and external dispute resolution scheme within any business, small or big. In addition, any dispute resolution system is not worth having unless it is well used, offers benefits to both parties and is sensitive to intercultural facets of the business.

The speakers also communicated that they believed that it was important to have proper 'regulation' for the dispute system, and for the scheme to have both government backing and funding in conjunction with user funding. In addition they also contended that it was important to accept and allow for 'failed' mediations, but also to provide a next step process, and possibly even a loop back from that process into mediation again.

### Dispute resolution and the professions

NADRAC member and Professor of Law and La Trobe University, Tania Sourdin, facilitated a workshop on dispute resolution with the professions. The workshop featured Carole Houk of Resolve Advisors, USA, who is an internationally recognised conflict management trainer, facilitator, and ADR systems designer, and ACCC Commissioner, Sitesh Bhojani, whose current responsibilities on the ACCC include enforcement (as Chair of the Enforcement Committee, the Professions and the Health Sector).

The workshop noted that often a complaint over the quality of a professional service rendered stems from poor communication or unclear expectations. This realisation has led to a widespread movement for physicians to focus on effectively communicating with their patients, and in particular, to discuss unexpected adverse outcomes when they occur. The speakers in the session drew parallels between general consumer research approaches about 'positive' and 'negative' consumer surprises and complaints and disputes handling in the health care and legal industry. A particular focus was upon why complaints became disputes and whether any trends could be relevant in this area.

The session also explored the organisational differences within the health care and legal services sector and the impact that sole practitioners have upon dispute management. Other organisational restraints on complaints handling (including perceptions of professional roles) and notions of professional self identity (and that professionals may feel personally attacked when complaints about services were made) were discussed in a lively session. Specific strategies in complaints and dispute management were discussed that included professionals focussing on communication and negotiation skills and how effective internal and external dispute resolution processes could be used.

## E Strategic initiatives

### Dispute resolution and corporate governance

Facilitated by Barbara Filipowski, NADRAC member and Legal Counsel and General Secretary of Sydney Ports Corporation, this workshop featured Geri Ettinger and Sarina Jan. Geri Ettinger directs policy and operations at St George Bank and has served as a Board member for 15 years. She has previous experience with the Administrative Appeals Tribunal, Fair Trading Tribunal, and NSW Medical Tribunal in her role as a mediator and in private practice. Sarina Jan is a Bardi descendent (Nyul Nyul clan) from the Kimberley region and is strong in her Aboriginality, identity and culture. She co-founded The Indigenous Business Institute Ltd to assist Aboriginal business people gain the appropriate professional acumen and to encourage strategic partnerships between Aboriginal and non-Aboriginal Industries.

### Case Studies of Dispute Resolution Schemes in Complex Industries: Electricity, Health, Insurance and Government

Chaired by NECA's Stephen Kelly, this workshop featured Carole Houk, Jon Kenfield, Brett Hausler and Commonwealth Ombudsman Professor John McMillan, who discussed aspects of including a dispute resolution system within a complex and intricate business.

Carole Houk, President and CEO of Resolve Advisors LLC, delivered a presentation on The HealthCare Ombuds: A Better Prescription for Medical Malpractice Complaints. This workshop focused on the process and system currently implemented within the Health Care Ombudsman, the background of the organization, how it works, and definitions of key concepts (Ombudsman, Mediator and Mediation). Continuing, Houk provides us with a 'scope of practice' detailing what the Health Care Ombudsman works on, 'primary focus is on achieving resolutions concerning patient- provider issues at the earliest possible opportunity and lowest possible level, well before they have elevated to legal claims'.

Not dissimilar to the work by Houk, Jon Kenfield, director of Dispute Solutions, introduced the medical alternative dispute resolution pilot project titled CALM- Conflict and Litigation Minimization; for medical practitioners. A system which was born out of the medical indemnity insurance crisis challenged the medical profession to pro-actively regain control of the situation, rather than wait for succour.

This system, currently in stage two, was developed as a three-year pilot project to introduce and test the effectiveness of modern dispute resolution systems and processes as a part of risk management in medical practice. Designed for three main issues; to help regain control over resolution of doctors, for patient issues, by maximizing medical/ relationship problem solving and to combat the increasing involvement of legal teams and insurers.

Brett Hausler, Company Secretary General Counsel. National Electricity and Marketing Management Company spoke of the experience in the National Electricity Market. Introducing

and defining the role of the National Electricity Market (NEM), Hausler spoke of a two-staged dispute system currently employed within the National Electricity Market. The two stages within the National Electricity Market allow for a more informal mediation session to begin with; failing that, it provides for a dispute resolution panel or other mechanism determined by the National Electricity Code Administrator (NECA).

All speakers within this section of the conference provided many overarching themes. It is very important for the dispute system within a complex industry to provide for early intervention before the dispute reaches the status of a legal claim. Furthermore, they all speak of the importance of offering mediation or alternate dispute resolution, as Houk explains 'if litigation is all you offer, litigation is all you get'. It is clear that a dispute resolution system inside a complex industry or business has to be user-friendly and appropriate for all parties, recognising cultural differences and that money is only one measure of compensation.

## On-line ADR

A special workshop session was conducted on on-line alternative dispute resolution. This workshop was given by US Federal Trade Commissioner, Mozelle Thompson and Elizabeth Wentworth, General Counsel of Banking and Financial Services Ombudsman (formerly Australian Banking and Industry Ombudsman). It recognised the speed and global nature of the internet, as well as its endless possibilities and challenges.

Wentworth suggested that the internet has generated a multitude of possibilities since its development- '...once thought of as a tool for scientific and academic exchange, now is a global communication medium with the potential to transform human communication and through communication, human society itself'.

Online Dispute Resolution, described as being 'the use of online resources to deliver dispute resolution services, whether or not the dispute is "land based"' is an increasingly growing area, one which Wentworth and others believe needs some specific criteria and strict regulation. Wentworth believes that mediation, arbitration, assisted negotiations, e-mail augmented by offline communication, could all be offered through online dispute resolution.

During the workshop, Wentworth also highlighted issues of concern for online dispute resolution providers, including authentication, security, accountability and flexibility, as well as issues of concern for consumers of online dispute resolution. The questions that need to be asked are: is online dispute resolution appropriate for your dispute; what are the costs; what are the standards; how long will it take; are there language issues; how are the outcomes enforced, and are there any alternatives. Wentworth also questioned whether online dispute resolution needed a different approach to land based dispute resolution, as well as whether diverse national standards could possibly translate into global best practice.

Wentworth's paper (2001) paper lists twenty-three aims and benchmarks which various organisations consulted identified as significant for any online dispute resolution system; ranging from being accessible, fair, visible, responsive, conducted by trained personnel, to being low cost or free.

A study assessing thirty online dispute resolution service providers against the criteria for alternative dispute resolution service providers of the European Commission and the Trans Atlantic Consumer Dialogue, detailed in Wentworth's 2001 paper, found, among other interesting results, that none of the thirty online dispute resolution service providers fully met the criteria.

## The role of a business in an external resolution activity

Nina Harding, Richard Willcock and Mozelle Thompson spoke about the role of a business in an external resolution scheme.

Harding (a professional dispute resolver and trainer) examined the franchising industry and how disputes are resolved within the field. Franchising is a major part of the Australian economy where there are close to 700 different franchise systems with 92% being Australian based. The nature of a franchising agreement lends itself to an imbalance of power. The franchisor retains much power whilst the franchisee has the bulk of responsibility and a minimal level of control. Therefore, it is inevitable that conflict will arise. The industry has been regulated by legislation, with the Franchising Code of Conduct, ACCC and the TPA providing for mandatory mediation. Because of this imbalance of power many franchise agreements are terminated because the investments 'sink' after a short time.

The very nature of franchising 'a set of mutual obligations embedded in an intimate interdependence between unequals' can make the relationship vulnerable to abuse and hence disputes. The resolution process typically begins with a toll free number and then a series of steps: a notice of dispute being sent out, 21 days waiting period and then a request to appoint a mediator. Results have shown that 57% of franchisees are in considerable disputes, in 40% of cases the system has provided assistance in solving disputes; 23% have gone to litigation, 18% have used mediation and lastly 39% of disputants were more likely to resolve their disputes using mediation.

Richard Willcock (General Counsel of WESTPAC) spoke on the Bank's view of dispute resolution systems and how this had undergone fundamental change over the past few years. Willcock explained that the bank now valued complaints and had created clear and easily accessible pathways for their customers to express their concerns. This has been adopted by the Bank under the 'Ask Once' scheme. He stated that such a significant change, from what some had seen as a fortress approach to complaints- to a highly interactive scheme aimed at timely and effective responses, required a whole of business approach. Significant discussion followed with Willcock further explaining the process, and the size of the financial and personnel investment in committing to rapid and effective resolution.

Mozelle Thompson (US Federal Trade Commissioner) was able to introduce an international perspective and spoke of some of the schemes instituted to ensure neutrality and effectiveness in dispute resolution systems. He also noted that the change in acceptance by business of schemes was pronounced in some countries and that businesses who were early adopters and maintained and enhanced these systems appeared to be gaining a business advantage.

## F Skills development

### Upskilling staff in ADR – Benefits, Costs and How

Nina Harding, Pat Cavanagh and Sue Thaler presented on training staff in ADR to better handle complaints.

Thaler (a Senior Executive with the Thomson Corporation and past CEO of LEADR) discussed how the skills she had acquired in dispute resolution had given her an advantage in the field of international commerce. She was able to point to an impressive array of savings achieved through utilising the principles of negotiation and practical skills she has acquired. Additionally she observed that in HR and Business administration these skills have allowed her to facilitate outcomes that benefited both the business and the participants to disputes.

Harding (a professional dispute resolver and trainer) identified a range of skills along with their costs and benefits. Staff are well equipped to help customers if they possess ADR skills. Active listening, diplomacy, option generation, impasse-breaking and problem solving can enable staff to understand complaints. It can also be useful to learn how to avoid disputes and strategies in dealing with conflict internally and externally. Negotiation skills are pertinent in conflicts and how to prepare for them, with a focus on the interests and needs of the other party.

A few options that can be arranged for staff include: conflict resolution and customer service, negotiation and conflict resolution skills, consultation with the community, facilitation and development of enhanced communication skills and mediation.

Costs are involved in upskilling staff. Firstly, there is a time factor in the form of management and staff meetings. There may be a loss in production time and lower productivity in the short term. However, the benefits of such training can be quite rewarding. Productivity will be on the rise, time savings can be achieved, legal costs can be reduced, staff empowered, and management and staff can alleviate frustration and distraction.

Pat Cavanagh (a mediator with the Jakarta Initiative Task Force) explained how as a practitioner he observed on an almost daily basis the woeful skills of many participants in the fundamentals of negotiation. Cavanagh was able to give many examples of the application of sound negotiation theory and observed that persons with training had managed the negotiation more effectively, with better results.

Scott Pettersson (CEO of LEADR) brought the presentations together and chaired the general discussion which highlighted many instances experienced by persons in the room where, (in either formal litigation or less formal processes) they had made fundamental errors where they delivered ultimatums, without any understanding of the consequences. The final activity was one of determining some principles of effecting a cost benefit analysis of training for use by participants at future times.

## Designing a dispute resolution system to suit your industry

David Bryson spoke about the design of a dispute resolution system in accordance with a given industry.

Bryson (Circuit Breaker Facilitator) from the National Electricity Marketing Management Company outlined the steps in designing a dispute resolution system. A system needs to share information and knowledge, air frustrations, identify needs and address these needs. The system needs to focus on interests rather than rights, use a variety of options, involve communication and provide support for its procedures.

Principles are crucial to a complaint system design. The system should be easily accessible, simple to use, governed by time, objective and confidential. Together with underlying principles there should be a continuum of dispute resolution providers. Initially for example, line providers such as call centres may be appropriate. If the matter progresses, a manager can investigate the complaint and if this does not succeed an external administrator can resolve the dispute.

The design of a jurisdiction system should provide an informal process, which is fair, economical and quick. A jurisdiction system can involve repeat players, power imbalances and limited time. Legislation also needs to be kept in mind. For example, the Workers Compensation System involves a notice from a work cover agent which is then discussed between the worker, employer and agent. If the issues are not resolved a conciliation session is then ordered. It was found that 70% of disputes are resolved at the conciliation stage. The system has achieved bipartisan support, employer involvement, decision making and case management. Some challenges with the system include: systemic issues, differences in decision making, limited expert reports and early settlement.

The National Electricity Market system aims to keep the market and code objectives in mind whilst providing a simple, quick and inexpensive system of dispute resolution. There is also an emphasis on dispute avoidance, preserving relationships and encouraging resolution without formal representation. The process consists of two stages. In stage one a conference occurs between the involved parties where resolution might occur. A circuit breaker facilitator can help parties to identify issues and options or mediation and expert evaluation can be used. Parties can then move to stage two, where an advisor can assemble a panel to deal with the dispute.

The system has experienced acceptance of ADR principles and objectives and very few matters went to stage two. However, there were some challenges of confidentiality, how to deal with other affected parties and structure.

The presentation ended with some thoughts of implementing a system into a given field. The proposed system needs to be appropriate and in line with the culture of the industry, build prevention, support the users, be simple and controlled by the parties.

## Cross cultural communication

Led by Prof. Paul Pederson, the workshop was designed to develop a framework for understanding other cultures. It provides a safe place to take personal risks in discussing problems resulting from cultural conflict. Participants 'try on' a different cultural identity of their choice and interact with three contrasting synthetic culture groups. The primary objective is to find a common ground without sacrificing cultural integrity.

Participants select one 'synthetic culture' identity based on a 55-country database of Geert Hofstede. Each synthetic culture interacts with each of the other synthetic cultures in turn to discuss problems caused by 'outsiders'. The workshop enabled participants to:

1. identify shared common ground expectations across different behaviours
2. network with other participants from different cultural backgrounds
3. examine problems caused by 'outsiders' from other cultures
4. enhance consultation skills in working with other cultures
5. identify culturally different conflict management styles
6. develop a framework for understanding other cultures
7. increase each participant's multicultural self-awareness.

### 3. Common Themes

At the conclusion of each workshop session and the conference as a whole, delegates were invited to comment on key learnings and on the strategies that they could take back to their own organisations or practices.

The following common themes and outcomes emerged both from the presentations and from the comments of delegates.

#### Integrated Conflict Resolution Systems

The importance of system integration was a common theme at the conference, with attendees challenged to develop a whole of organisation approach to system design. Instead of handling disputes on a case by case basis, the organisation shifts to a systematic focus on relationship management through prevention, management and early resolution of conflict at the lowest possible level. Delegates noted that conflict is not necessarily a negative thing and that change cannot happen overnight.

The need to determine when disputes should be dealt with internally and when external resolution is more suited was highlighted as was the need to build strong linkages between internal and external dispute systems. A range of models of dispute resolution with wide-ranging benefits were shared at the conference together with the importance of setting up the most helpful model complete with procedures, intake and applications.

Delegates noted the usefulness of establishing an advisory panel and of consulting with similar services about their processes to avoid 're-inventing the wheel'.

#### Training and empowering staff

The importance of including training and empowering staff and other stakeholders was also emphasised. All staff have a role and need to be encouraged to deal with conflicts and issues in a timely, compassionate way. To this end delegates noted that it is important to investigate how to further empower front line staff, and that trust needs to be established on all sides. Staff need to have the confidence and expertise to make decisions at appropriate times. It is vital to ensure goals evolve from consultation and that information is communicated in intelligible form through two-way communication. For an organisation to take advantages of the benefits that ADR can deliver, one needs to plan, prepare, present and propose the 'upskilling' of staff in ADR principles and skills.

#### Cultural/cross-cultural and organisational cultures

Organisational cultures are unique as are the decision making processes and lines of communication. We need to consider all aspects of the initial organization including the culture within and any pre-formed structures, including the power, the dynamics and the official hierarchy found within the organization.

It is important to consider the impact of culture in the workplace and in cross cultural encounters. Effective dispute resolution systems need to incorporate intercultural understandings – this means understanding our differences and increasing levels of tolerance in reconciling them.

## Customer focus

Throughout the conference, customer focus and satisfaction was a common theme for many of the presentations, and customer satisfaction must always remain critical to business success. It was consistently pointed out that the customer needs to be the primary focus of any dispute resolution scheme. The needs of customers need to be considered along with their ease of access to schemes as well as providing customers with a range of options for dispute resolution.

The knowledge gained from day to day contact with customers can be used to drive customer service improvements. In any dispute resolution system the customer is the ultimate owner of the disputes and they need to be the key focus of the system. Delegates noted the importance of listening more, that all staff are essentially providing customer service, and that organisations need to change so that complaints are seen as gifts.

## Early intervention preferable

In an integrated conflict management system, managers are skilled and resourced to focus on prevention and early resolution and new dispute resolution procedures are managed in a low to high cost sequence. In many instances this equates to beginning with the informal processes before moving to more formal interventions.

ADR in the workplace turns on a contemporary, party driven consensus which is custom designed for the particular organisation. There are no jurisdictional constraints and parties will often look at problems more holistically and pre-emptively. ADR can facilitate whole of organisation relationships and interactions and can go into greater depth to identify and tackle deep seated problems in-house. For example Dispute Resolution Boards (DRB's) are set up to avoid or minimize the likelihood of disputes by early intervention and largely informal processes. Options for ADR within contracts could also be better understood.

## Availability of choices of ADR processes

Another common theme was that in order to have a system rather than just a model, it needs to have a broad scope to encompass all types of conflict, have multiple access points, provide choices of interest-based and rights-based options and incorporate safeguards to protect

confidentiality and individual rights. The full range of possible interventions needs to be explored, ranging from facilitative through advisory to determinative processes.

## Industry standards, regulations and national benchmarks

Many presenters at the conference spoke about having a certain set of principles that guide their practice. The Benchmarks for Industry Consumer Schemes were mentioned by several speakers.

Various criteria aimed at articulating a globally accepted best practice model for business to consumer dispute resolution were identified. Other standards or codes were also advocated, such as the code of banking practice and the electronic funds transfer code. Having a set of standards or benchmarks is critical to the success of a scheme. Defined safeguards were recognised as important.

Standards include ensuring that ADR systems are fair, objective, reasonable, neutral and independent. Fairness can include whether the member knows much about the customer, how such knowledge is used to help customers, consideration of special circumstances of the customer and how other schemes have dealt with such matters.

As well as external systems, internal dispute resolution standards were also mentioned. For staff, particularly their morale, internal systems need to be as good as, if not better than, 'public' systems.

## Cost savings/benefits

Speakers at the conference spoke repeatedly of the huge cost benefits that can be obtained for businesses and industry through the use of ADR processes. Costs and benefits need to be viewed broadly and these can include time wastage, management meetings, lost production time, lower productivity and recruiting costs to replace staff. There need to be efficient and constructive resolution processes that not only reduce the costs of conflict, but also bring about changes in the way conflict is managed.

## Relevance to Industry

A significant and important common theme was the importance of ensuring that any planned ADR intervention or dispute resolution system is relevant and 'in touch' with industry. Any dispute resolution scheme needs to be designed in consultation with, and relevance to, a given industry.

The design architecture of a system needs to be appropriate and 'to let the forum fit the fuss'. A system design cannot work if it does not fit into the culture of an industry or organisation. This needs to be the primary consideration of any design.