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THIRD PARTY INTERVENTION RECONSIDERED: NEW ROLES FOR AUSTRALIAN INDUSTRIAL TRIBUNALS

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The Workplace and Corporate Law Research Group (WCLRG) is a research concentration within the Department of Business Law & Taxation, Faculty of Business & Economics, at Monash University. It has been in operation since March 2008, having previously operated as the Corporate Law and Accountability Research Group (CLARG) since November 2005.

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THIRD PARTY INTERVENTION RECONSIDERED: NEW ROLES FOR AUSTRALIAN INDUSTRIAL TRIBUNALS[∞]

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1. Introduction

In an important article in 2004, from which the title of this paper borrows, Professor William Brown observed that – since the mid-late 1990s – there has been a significant shift internationally away from traditional forms of third party intervention by public dispute resolution bodies.[1] Over this period, dispute resolution agencies in Canada, the USA, Ireland and the UK have increasingly taken on mediation, facilitative, advisory and training functions, among others. These new roles are aimed at preventing workplace disputes from arising, by encouraging employers, employees and unions to adopt 'model' or 'best practice' employment arrangements. Voluntary engagement with these approaches by industrial relations parties (rather than judicially-imposed processes and outcomes) is another feature of the new approach identified by Brown.[2] The transformation of public agencies in these four countries, from their past focus on dispute *resolution* to a greater focus on dispute *prevention*, reflects a broader departure (particularly in Ireland and the UK) from conflict-oriented industrial relations processes in favour of cooperation and partnership.[3]

Part 2 of this paper examines and evaluates the dispute prevention roles of the following agencies:

- Federal Mediation and Conciliation Service (Canada);
- Federal Mediation and Conciliation Service (USA);
- Labour Relations Commission (Ireland); and
- Advisory, Conciliation and Arbitration Service (UK).

[∞] This paper draws upon some sections of the following report: Anthony Forsyth and John Howe, *Current Initiatives to Encourage Fair and Cooperative Workplace Practices: An International Survey*, Report for the Victorian Office of the Workplace Rights Advocate/Department of Innovation, Industry and Regional Development, June 2008. Thanks to the Office of the Workplace Rights Advocate for funding that research, and for granting permission for its use in this paper. The research in this paper was also partly-funded by a research grant from the Faculty of Business and Economics, Monash University.

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[1] William Brown, 'Third Party Intervention Reconsidered: An International Perspective' (2004) 46 *Journal of Industrial Relations* 448, especially at 452-455.

[2] Brown, above n 1, at 452-453.

[3] See Brown, above n 1, at 453-454. On social partnership in Ireland, see for example William Roche, 'Social Partnership in Ireland and New Social Pacts' (2007) 46 *Industrial Relations* 395; and Tim Hastings, Brian Sheehan and Padraig Yeates, *Saving the Future: How Social Partnership Shaped Ireland's Economic Success*, Blackhall Publishing, Dublin, 2007. On the UK experience of partnership, see for example John Kelly, 'Social partnership agreements in Britain', in Mark Stuart and Miguel Martínez Lucio (eds), *Partnership and Modernisation in Employment Relations*, Routledge, Abingdon, Oxon, 2005, p 188.

The paper then assesses the implications of these overseas developments for industrial tribunals in Australia (Part 3). Commencing with the shift to enterprise bargaining in the early 1990s, the traditional dispute resolution functions of the Australian Industrial Relations Commission and State tribunals have been curtailed.[4] Under Work Choices,[5] the AIRC was transformed into a 'voluntary' dispute settlement body, and forced to compete with private alternative dispute resolution providers.[6] At the same time, the State tribunals lost much of their former jurisdiction due to the Federal 'takeover' of State industrial laws.[7] The paper examines these developments, in order to address the question: how 'ready' are Australian industrial tribunals to effect a shift towards a greater role in dispute prevention, along the lines of comparable overseas agencies? This discussion will focus, in particular, on the decline of dispute resolution in the Australian Industrial Relations Commission in recent years, and the potential dispute prevention role of the Federal Government's proposed new workplace agency, Fair Work Australia.

Finally, some concluding observations are made in Part 4 of the paper.

2. New Roles for Industrial Tribunals: Recent Experience in Four Industrialised Countries

The dispute *prevention* functions of industrial tribunals in Canada, the USA, Ireland and the UK (operating alongside, rather than replacing, their traditional dispute *resolution* services) will now be examined in some detail.

2.1 Canada

Federal Mediation and Conciliation Service ('FMCS Canada')

(http://www.hrsdc.gc.ca/en/lp/fmcs/11Federal_Mediation_and_Conciliation_Service.shtml)

2.1.1 Dispute Prevention Services Offered by FMCS Canada

In addition to its role in providing dispute settlement services, FMCS Canada places a significant emphasis on the prevention of labour disputes. As explained on its website, FMCS Canada 'offers an extensive range of preventive mediation and grievance mediation services', as well as 'manag[ing] the Labour-Management Partnerships Program, which provides seed funding for innovative projects designed to improve labour-management relationships'.[8]

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[4] See Braham Dabscheck, 'The Slow and Agonising Death of the Australian Experiment with Conciliation and Arbitration' (2001) 43 *Journal of Industrial Relations* 277; H Forbes-Mewett, G Griffin, J Griffin and D McKenzie, 'The Australian Industrial Relations Commission: Adapting or Dying?' (2003) 11 *International Journal of Employment Studies* 1.

[5] That is, the new national workplace relations system introduced by the former Coalition Government with effect from 27 March 2006, through the amendments to the *Workplace Relations Act 1996* (Cth) made by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

[6] See Anthony Forsyth, 'Arbitration Extinguished: The Impact of the Work Choices Legislation on the Australian Industrial Relations Commission' (2006) 32:1 *Australian Bulletin of Labour* 27; Anthony Forsyth, 'Dispute Resolution under Work Choices: The First Year' (2007) 18:1 *Labour and Industry* 21.

[7] See Andrew Stewart, *Stewart's Guide to Employment Law*, The Federation Press, 2008, pp 39-41.

[8] Human Resources and Social Development Canada ('HRSDC'), *About the Federal Mediation and Conciliation Service (FMCS)*, 2006, <http://www.hrsdc.gc.ca/en/lp/fmcs/02About.shtml> at 26 January 2008.

FMCS Canada also has a Legislation, Research and Policy section which, in addition to its research responsibilities, develops through its officers 'an extensive consultative and advisory network with representatives of labour and business, and with the legal and academic communities focusing the area of labour relations'.[9]

Preventive Mediation and Grievance Mediation[10]

Through its Preventive Mediation Program, FMCS Canada provides services which are 'designed to help parties build and maintain constructive working relationships'. These services predominantly focus on the provision of training to employers and unions, but may also include 'facilitation' and mediation services. Each service is 'customized' for individual workplaces.

The training workshops provided through the Preventive Mediation Program cover the following topics: negotiation skills, committee effectiveness, joint problem-solving and grievance resolution. Workshops can include a variety of different activities for training employers and unions, including 'presentations, exercises, … simulations and group discussion'.

FMCS Canada also provides mediators to act as 'neutral facilitator[s]' for joint initiatives at workplaces, and provides an intensive 'relationship by objectives program' which 'enables employers and unions to redesign a relationship which may have become ineffective or dysfunctional'. Finally, a 'grievance mediation' service is provided as 'an informal and low-cost alternative to arbitration'.

Labour-Management Partnerships Program[11]

The Labour-Management Partnerships Program ('LMPP') provides funding to 'pilot or demonstration projects' which are designed jointly by employers and unions, and which 'explore new ways of working, and of working together'. The projects must 'promote dialogue between labour and management' and 'have the potential to provide practical final results, such as information or tools (for example, a report, video or course module) that will be useful for other workplaces'.[12]

2.1.2 FMCS Canada – Effectiveness of Services

It is estimated that FMCS Canada provides 'mediation and conciliation assistance in approximately 300 collective bargaining disputes per year'.[13] In 1999, FMCS Canada was able to resolve 90% of cases referred to it without a work stoppage occurring.[14] By 2006-07, it was settling 96% of cases without work stoppages.[15]

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[9] HRSDC, *Legislation, Research and Policy section (LRP) of the Federal Mediation and Conciliation Service (FMCS),* 2006, <http://www.hrsdc.gc.ca/en/lp/fmcs/08Legislation_and_Research.shtml> at 16 January 2008.
[10] The following discussion is based on HRSDC, *Preventive Mediation and Grievance Mediation,* 2006, <http://www.hrsdc.gc.ca/en/lp/fmcs/06Preventive_Mediation.shtml> at 26 January 2008.
[11] The following discussion is based on HRSDC, *Labour-Management Partnerships Program (LMPP),* 2006, <http://www.hrsdc.gc.ca/en/lp/fmcs/07LMPP.shtml> at 26 January 2008.
[12] See further 2.1.2 below.
[13] Department of Human Resources and Social Development, Canada, *Report on Plans and Priorities 2007-2008*.
[14] Claudette Bradshaw (Federal Minister of Labour), 'Federal Labour Program Initiatives' (1999) 11(4) *The Worklife Report* 10.
[15] Department of Human Resources and Social Development, Canada, *Departmental Report 2006 – 2007*.

A report issued by HRSDC revealed that '[i]n the spring of 2002, an independent client satisfaction survey concerning FMCS services found that 88 percent of its clients were very satisfied with the quality of service provided'.[16]

In relation to the Preventive Mediation Program run by FMCS Canada, which is aimed at improving employer-union relationships during the closed period of a collective agreement, (see 2.1.1 above), survey results demonstrate 'very high [client] satisfaction with the quality of preventive mediation services provided' (although no statistics are given in support of this).[17] According to the same source:

> While it is difficult to assess the number of collective bargaining disputes which have been averted due to preventive mediation efforts, it is commonly believed among industrial relations experts that constructive union-management relationships result in fewer work stoppages and increased productivity.[18]

In relation to the LMPP, some examples of work undertaken pursuant to this program were provided by the Canadian Minister of Labour in 2002:

> Positive relations between trade unions and employers were … fostered through the [LMPP]. The program helped the Western Transportation Advisory Council host two conferences last year on the critical shortage of skilled workers in Canada's transportation sectors. Another project funded the study of sick leave at the St. Lawrence Seaway Management Corporation, and was instrumental, according to the Canadian Autoworkers union, in averting a strike during bargaining talks in October of 2001. These are just two examples of the many joint management projects we have been working on.[19]

A brief article on the LMPP in 2004 stated that the program has 'witnessed many … instances where management and labour have proven the value of co-operation'.[20] In one example, parties obtained an LMPP grant 'to create a pilot grievance resolution process that could be used by other small- and medium-sized companies and unions'; the grievance resolution process which was subsequently created 'achieved basically the same results' when tested in a similar case against the traditional arbitration method, 'but whereas the case going through the traditional process cost the employer $3,500, the cost of the new process was only about $875.' [21] Another project involved 'funding … to identify and solve ergonomic problems' at the factories of two different companies; in this case, it was found that 'working co-operatively has paid off for all the parties involved and [set] the stage for future co-operation.' [22]

An evaluation of the LMPP was conducted in 1998 by Human Resources and Development Canada.[23] The evaluation report discusses perspectives on the LMPP from a small selection of Human Resources and Development Canada staff members, independent industrial relations

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[16] HRSDC/Service Canada, *Government On-line 2005 Public Report*, 2005, available at http://www.hrsdc.gc.ca/en/cs/comm/gol/2005.shtml.
[17] Author unknown, *Preventive Mediation Program,* available at www.sedi.oas.org/ddse/documentos/TRABAJO/new_portfolio/Canada-SC-Preventive%20Mediation%20Program-ING.pdf.
[18] Ibid.
[19] Evidence to Standing Committee on Human Resources Development and the Status of Persons with Disabilities, Parliament of Canada, 7 May 2002, (Claudette Bradshaw).
[20] Katy Burnett, 'Management and Labour Can Work Together' (2004) 17 *Canadian HR Reporter* 15.
[21] Burnett, above n 20, at 15-16.
[22] Burnett, above n 20, at 16.
[23] The following discussion is based on, and the quotations obtained from, Human Resources and Development Canada, *Evaluation of the Labour-Management Partnerships Program (LMPP) - Final Report*, March 1998 (5.0 Success Factors and Barriers, Strengths and Weaknesses, and Suggestions for the Future), available at: http://www.hrsdc.gc.ca/en/cs/sp/hrsdc/edd/reports/1998-000389/page09.shtml.

experts, and labour/management representatives. Interviewees identified the following strengths of the program, in addition to its flexibility:

> [T]he program's third-party neutrality, which can help defuse adversarial relationships and encourage parties to persevere; cost sharing between sponsors and government, which gives parties a stake in the process and similarly encourages them to "stick it out"; the fact that the program is client-oriented; and the synergy between LMPP and Mediation Services, which facilitates identification of potentially good candidates for LMPP funding.

On the other hand, the following problems with LMPP were identified:

> The main weaknesses identified in the program relate to communications and marketing. Here there are two inter-related problems: (1) the program's low profile, and (2) insufficient dissemination and communication of project results. Key informants noted that, as the program is not widely known or understood, those who need it most may not be aware of it. One respondent noted that the program is not well known or understood even within [Human Resources and Development Canada]. The other problem relates to insufficient communication and dissemination of project results, which obviously minimises the program's effectiveness.

The Human Resources and Development Canada report made a series of recommendations for improvements to LMPP, including in relation to better measurement of project outcomes and dissemination of results.

Finally, a case study submitted to an APEC Symposium in 2001 details how FMCS Canada assisted OC Transpo (the Ottowa public transport authority) and the Amalgamated Transit Union to turn 'an acrimonious and unproductive labour-management relationship into one characterized by open communication and a cooperative approach to problem-solving', by 'undertaking a number of joint initiatives over several years, many of which were funded and/or facilitated by FMCS'.[24]

2.2 United States of America

Federal Mediation and Conciliation Service ('FMCS USA')

(www.fmcs.gov)

2.2.1 Dispute Prevention Services Offered by FMCS USA

While dispute resolution is a major focus of FMCS USA's work, 'prevention of conflict at the outset remains an equally important goal.'[25] FMCS USA seeks to achieve this objective through the provision of 'relationship-development and training programs (RDT) designed to improve the labor-management relationship'[26] (see further below). In addition to these programs, the FMCS Institute for Conflict Resolution provides more general 'skills training and

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[24] Author unknown, *The Amalgamated Transit Union, OC Transpo and the Federal Mediation and Conciliation Service of Canada,* Paper presented at APEC Symposium: Responding to Change in the Workplace: Innovations in Labour-Management-Government Cooperation, Mexico City, 25-26 June 2001, p 2. Further details of this case study are provided in Anthony Forsyth and John Howe, *Current Initiatives to Encourage Fair and Cooperative Workplace Practices: An International Survey*, Report for the Victorian Office of the Workplace Rights Advocate/Department of Innovation, Industry and Regional Development, June 2008, pp 43-44.

[25] FMCS USA, *Five-Year Strategic Plan 2004-2009*, 2005, p 5.

[26] FMCS USA, above n 25, p 5.

education in conflict resolution and management'[27] through courses on conflict management theories and practice.[28]

Another initiative of FMCS USA is the establishment of a Grants Program to 'support the establishment and operation of joint labor-management committees'[29] by employees and employers. This program enables the FMCS to 'encourage labor-management committees to develop innovative, joint approaches to workplace problems.'[30]

FMCS USA also performs what it calls 'outreach', ie 'a process by which mediators make every effort to gain trust from the parties so that they are viewed favorably by both sides even before a dispute begins'.[31] Outreach activities include 'lecturing at universities, seminars and conferences, and meet[ing] with local leaders in the collective bargaining community.'[32]

A more recent initiative of FMCS USA is the Dynamic Adaptive Dispute Systems Program (see further below).

Relationship-Development Training ('RDT') Programs

The RDT programs offered by FMCS USA aim to 'instruct labor and management partners in the art of positive communication', with a view to developing 'meaningful cooperation'.[33] The range of workshops and education programs offered by FMCS USA is extensive, covering the following topics:[34]

- alternative bargaining;
- contract administration;
- group facilitation;
- interpersonal communication;
- labor-management partnership building;
- labor-management roles and responsibilities;
- organizational development; and
- repairing broken relationships.

A number of the services offered are highly interactive, including facilitation of joint meetings,[35] mentoring, systems design and evaluation services.[36] FMCS USA also delivers customised training as 'an on-site program or an off-site workshop' to individual organisations.[37]

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[27] FMCS USA, *About the Institute: Unique Training,* <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=145&itemID=16140> at 26 January 2008.
[28] FMCS USA, *The FMCS Institute,* <http://www.fmcs.gov/assets/files/Public%20Affairs/FMCS%20Brochures/insert_Institute.pdf> at 26 January 2008.
[29] FMCS USA, *Labor-Management Grants,* <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=194&itemID=16621> at 26 January 2008.
[30] FMCS USA, above n 25, p 6.
[31] Peter Hurtgen, *Labor and Management Relations: The American Experience*, Speech delivered at International Seminar on Labor Dispute Settlement, Peking University, Beijing, China, 19 November 2004, p 6.
[32] FMCS USA, *2006 Annual Report*, 2006, p 4.
[33] Hurtgen, above n 31, pp 5-6.
[34] FMCS USA, *What we do: relationship development and training* <http://www.fmcs.gov/internet/categoryList.asp?categoryID=17> at 26 January 2008.
[35] FMCS USA, *Interest-Based bargaining*, <http://www.fmcs.gov/internet/printerPage.asp?categoryID=131&itemID=15804> at 26 January 2008.
[36] FMCS USA, *Alternative Dispute Resolution*, <http://www.fmcs.gov/internet/printerPage.asp?categoryID=132&itemID=15821> at 26 January 2008.

Dynamic Adaptive Dispute Systems ('DyADS') Program[38]

The DyADS program was designed as a response to the 'numerous workplace complaints, ranging from statutory claims of discrimination to personality conflicts, not typically resolved in the collective bargaining arena.' The FMCS has identified an 'increased trend toward [workplace] complaints' and has asserted that they 'pose a growing threat to the nation's economy by bleeding valuable time and resources from businesses'. Hurtgen describes the program as follows:

> [A] DyADS project includes representatives of management and labor, collaborating to design and maintain a system for resolution of conflicts arising in their workplace. These conflicts can range from complex equal employment opportunity claims to morale and workplace relationship problems that are damaging to the working environment. … A DyADS process begins with discussions between front-line managers and union representatives whose member employees would be directly affected by any new system. The parties themselves build the program from its inception, designing different processes to efficiently handle, and hopefully resolve, workplace disputes.[39]

The project may be administered by a neutral individual or committee that can help disputants to arrive at solutions to workplace problems. In 2005, Mayer et al envisaged that '[m]ost of FMCS's role in DyADS would utilize existing agency capabilities in convening, training, and facilitating.'[40] They also described the program as being at the 'pilot' stage:

> FMCS is seeking to pilot DyADS in a number of diverse workplaces. Because of the lack of experience with having labor and management jointly develop complex adaptive conflict management systems, such pilot projects in a real-world setting are important to understanding the complexities, problems, and possibilities that these programs will encounter. The pilot experiences will be evaluated with an eye toward refining the DyADS program. After a period of piloting and refining the DyADS experience, FMCS will determine whether and how to expand its availability to customers.[41]

In 2007, FMCS USA engaged the services of the Werner Institute at Creighton University to further refine the DyADS program.[42]

2.2.2 FMCS USA – Effectiveness of Services

The dispute prevention activities of FMCS USA constitute an increasing part of its workload. In 2003, Thaler observed that:

> Whereas 25 years ago an FMCS mediator's workload consisted 90% of dispute cases and only 10% of preventive cases, nowadays the average mediator's caseload consists of only 65% dispute cases and 35% preventive cases.[43]

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[37] FMCS USA, *Custom Training and Workshops,* <http://www.fmcs.gov/internet/printerPage.asp?categoryID=60&itemID=15876> at 26 January 2008.
[38] Unless otherwise stated, the following discussion is based on information obtained from the FMCS USA website at: http://www.fmcs.gov/internet/itemDetail.asp?categoryID=42&itemID=18115.
[39] Peter Hurtgen, *DyADS – Dynamic Adaptive Dispute Systems in the Workplace*, 2004, available at: http://www.fmcs.gov/internet/itemDetail.asp?categoryID=42&itemID=18115.
[40] Bernard Mayer, Arthur Pearlstein and Peter Robinson, "DyADS: Encouraging "Dynamic Adaptive Dispute Systems" in the Organized Workplace" (2005) 10 *Harvard Negotiation Law Review* 339, at 349.
[41] Mayer et al, above n 40, at 381-382.
[42] FMCS USA, 'FMCS Partners with Creighton University's Werner Institute To Bring Workplace Dispute Resolution Initiative to "Next Level"', *News Release*, 21 May 2007.

FMCS USA's 2006 Annual Report provides the following statistics on its dispute resolution and dispute prevention activities:[44]

- collective bargaining mediations: 5,484 negotiations
- grievance mediation: 1,625 cases
- arbitrators' involvement in cases: 2,473 cases heard
- employment mediation: 1,022 cases
- relationship-development training: 2,445 classes provided
- outreach: 3,859 'efforts'.

FMCS USA has had a significant impact on the US economy through its prevention and resolution of work stoppages. As its Director states in FMCS USA's 2006 Annual Report:

> In FY 2006 alone, through early intervention in collective bargaining disputes, FMCS is estimated to have prevented 251 work stoppages and reduced work stoppage duration in 196 cases, preventing the loss of at least $1.7 billion in employees' wages and company profits for U.S. businesses.[45]

In 2005, the Employment Policy Foundation estimated that FMCS USA 'saved American workers and businesses more than $9.0 billion' between 1999 and 2004.[46] The Foundation also concluded that the stage at which the FMCS becomes involved in negotiations had a significant impact on the duration of the work stoppage:

> [T]he expected duration of a work stoppage was 32 days when FMCS mediation occurred prior to contract expiration. When FMCS was not involved in or was first involved in negotiations after the contract expiration date, the expected work stoppage duration was 59 days – 84.4 percent higher.[47]

The benefits of FMCS USA's dispute settlement role have also been stated as follows by Brommer et al:

> All FMCS mediation services are aimed at promoting and improving the conflict resolution and collective bargaining processes in the United States. This, in turn, helps American business remain competitive in the global marketplace, and thus helps increase the American worker's quality of life.[48]

Information regarding the specific benefits and effectiveness of FMCS USA's dispute prevention activities was difficult to locate. A number of observers have outlined the expected benefits of the DyADS program. For example, Hurtgen claims that in addition to improving workplace productivity, DyADS 'can reduce workplace disputes, improve morale, and enhance the quality of workplace life.'[49] Similarly, according to Mayer et al, DyADS may lead to 'reduced transaction costs; higher performance and productivity; greater satisfaction with outcomes; better morale from improved workplace communications and relationships; and

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[43] David Thaler, 'The role of industrial relations in the structural change of organisations', *EIROnline*, 2003, available at: http://www.eurofound.europa.eu/eiro/.
[44] FMCS USA, above n 32, pp 4, 6.
[45] FMCS USA, above n 32, p 1.
[46] Employment Policy Foundation, *Impact Measures of Federal Mediation and Conciliation Service Activities, 1999 – 2004,* 2005, p 1.
[47] Employment Policy Foundation, above n 46, p 2.
[48] Brommer, Buckingham and Loeffler, *Cooperative Bargaining Styles at FMCS: A Movement Toward Choices*, 2003, p 37.
[49] Hurtgen, above n 39.

more durable resolutions of conflict', as well as enhancing 'the ability of individuals and the organization as a whole to actually learn from disputes that do occur.'[50]

The benefits of FMCS USA's dispute prevention activities have been illustrated through a number of case studies. For example, Weismann examined FMCS USA's work over a 15 year period with Minnesota Hospitals, which involved assisting with 'negotiations between the Minnesota Nurses Association (MNA) and a multi-employer hospital bargaining group'.[51] Whereas the history of the parties' relationship had been marred by significant strike activity in 1984, in 1999 the parties were able to enter into 'Transition Agreements' which were 'the products of a joint Labor-Management Committee representing one union, two employee bargaining units, three hospital systems, and five hospitals.'[52] Weismann summarises the evolution of the parties' relationship, and FMCS USA's role in improving it, as follows:

> How did MNA nurses and the hospitals bridge the divide to form a joint partnership? What we call best practices describe the actions and processes that constitute the "joint labor-management partnership" between the hospitals and the MNA. These best practices evolved as confidence in both the process and the relationship increased and additional collaborative efforts were successful. A third party from ... [FMCS USA] played a crucial role in the success of the relationship at every stage of its development.[53]

In another case study, Thaler examined the preventive work undertaken by the FMCS with Miller Dwan Medical Center, in which unions and management were successfully trained in interest-based problem solving: 'the parties, with much hard work and great effort toward attitudinal change, overcame years of acrimonious relations and set the course for the future using interest-based negotiations (IBN).' He notes that this example is 'but one of thousands of organisations that have worked with the FMCS to incorporate [IBN] into their labour relations work.'[54]

While this suggests that FMCS USA's partnership-building activities are making an important contribution to developing more positive employment relationships, other evidence indicates that the broader industrial relations context in the United States is becoming increasingly adversarial. For example, analysing 'a series of three stratified, national, random sample surveys of matched pairs of union and management negotiators',[55] Cutcher-Gershenfeld et al note that:

> The 2003 data point toward more adversarial relationships, greater divergence in the views of labor and management, a decline in workplace innovation, and a decline in preference for [IBN]. This suggests that the stresses on [FMCS USA] have increased. ... On the union side, the trend is clear: fewer union negotiators reported very cooperative relationships and more reported very adversarial relationships.[56]

Kochan supports the view that adversarialism has not given way to partnership on a widespread basis in the USA, stating that 'partnerships have proved fragile over the years in large part because they are not supported by our national policies or championed sufficiently by

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[50] Mayer et al, above n 40, at 350.
[51] Gretchen Weismann, *Minnesota Hospitals Case Study*, undated, available at: http://www.fmcs.gov/internet/itemDetail.asp?categoryID=177&itemID=16791, p 1. Further details of this case study are provided in Forsyth and Howe, above n 24, pp 49-50.
[52] Weismann, above n 51, p 1.
[53] Weismann, above n 51, p 2.
[54] Thaler, above n 43.
[55] Joel Cutcher-Gershenfeld, Thomas Kochan, John-Paul Ferguson and Betty Barrett, 'Collective Bargaining in the Twenty-First Century: A Negotiations Institution at Risk' (2007) 23 *Negotiation Journal* 249, at 252.
[56] Cutcher-Gershenfeld et al, above n 55, at 253-254.

labor unions or employers'.[57] He criticises FMCS USA, along with the US Department of Labor and the National Mediation Board, for taking 'largely caretaker and subordinate approaches to their roles', and claims that '[m]ore active professional leadership is needed.'[58] In advocating reform of American labour relations, Kochan asserts that the 'labor policy agencies need to be catalysts for innovation and change in business strategies, employment systems, and enforcement/monitoring of employment standards'.[59]

2.3 Ireland

Labour Relations Commission ('LRC')

(www.lrc.ie)

2.3.1 Dispute Prevention Services Offered by LRC

LRC was established in 1991,[60] with a general mandate to promote 'the improvement of industrial relations' in Ireland.[61] It is charged with a number of specific duties to achieve this objective, including requirements to: provide conciliation and advisory services; prepare codes of practice; conduct research into industrial relations issues and review developments in industrial relations; and 'assist joint labour committees and joint industrial councils in the exercise of their functions'.[62] The founding legislation provides that most disputes are initially to 'be referred to the Commission or to its appropriate services' rather than to the Irish Labour Court, which is now seen as a 'court of final resort'.[63]

LRC therefore provides a 'range of industrial relations advisory and mediation services'.[64] To fulfil its statutory obligation to improve industrial relations, LRC identified key 'strategic objectives' for 2005-2007, which included the provision of 'dispute resolution services … that place a premium on the early identification and the speedy resolution of problems', and the development of '[s]tronger, innovative and flexible conflict prevention activities to assist sectors and enterprises'.[65] The focus on preventive measures reflects an emphasis on 'pushing the focus of dispute resolution back to the parties themselves and moving away from the culture of third party dependency'.[66]

LRC is structured into four service areas/divisions, as follows:[67]

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[57] Thomas Kochan, 'Updating American Labor Law: Taking Advantage of a Window of Opportunity' (2007) 28 *Comparative Labor Law and Policy Journal* 101, at 113-114.
[58] Kochan, above n 57, at 116.
[59] Kochan, above n 57, at 116; see further 116-123.
[60] Under *Industrial Relations Act 1990* (Ireland), section 24(1).
[61] *Industrial Relations Act 1990* (Ireland), section 25(1).
[62] *Industrial Relations Act 1990* (Ireland), section 25(1)(a)-(c), (g)-(i).
[63] *Industrial Relations Act 1990* (Ireland), section 25(3).
[64] LRC, *Introduction: LRC Services* <http://www.lrc.ie/ViewDoc.asp?fn=/documents/work/index.htm&CatID=13&m=w> at 26 January 2008.
[65] Kieran Mulvey, *Commission Strategy and Current Challenges*, Paper presented at Labour Relations Commission Symposium on New Perspectives on Workplace Change, Croke Park Conference Centre, Ireland, 9 November 2006, available at: http://www.lrc.ie/viewdoc.asp?m=u&fn=/documents/symposium05/symp05.htm, p 7; see also LRC, *Statement of Strategy 2005 – 2007: "A Quality Shift in Employment Relations",* 2005.
[66] LRC, *History of the Labour Relations Commission*, <http://www.lrc.ie/viewdoc.asp?m=a&fn=/documents/aboutus/history2.htm > at 26 January 2008.
[67] See LRC, above n 64.

1. Conciliation Service: ie conciliation of collective disputes arising between employers and unions, such as in collective bargaining negotiations.

2. Rights Commissioner Service: investigates and makes recommendations/findings on disputes and grievances referred by individuals or small groups of workers under relevant employment rights legislation, eg relating to leave entitlements, minimum wage breaches, and unfair dismissals.

3. Workplace Mediation Service: a specialist service offered to provide quick and effective resolution of internal workplace conflicts involving individuals or small groups of employees, eg interpersonal disputes, breakdown in working relationships, or other issues that have not yet developed into a Rights Commissioner claim (the aim is to prevent that from happening).

4. Advisory Service Division: provides a range of free services to assist employers, employees and unions to build and maintain positive working relationships, and to develop effective industrial relations practices and structures that meet their needs. Some of the services provided by the Advisory Service Division of LRC include:[68]

- 'IR Audits': where there are identified workplace problems, LRC examines existing practices/procedures and conducts surveys of employee and management attitudes; it then provides a report outlining a change agenda and recommended improvements, assistance with implementation, and post-report monitoring;[69]
- Preventative Mediation/Facilitation: LRC assists parties who anticipate future workplace difficulties, including advising on and developing dispute and grievance procedures, and providing guidance about implementing new work practices or other measures to enhance competitiveness;
- 'Frequent Users Initiative': LRC explores with parties the reasons for their frequent use of its dispute settlement services (eg for bullying or harassment issues), and how their relationships can be improved to avoid this (the service is confidential and has no impact on the rights of parties to use LRC's dispute resolution services);
- 'Joint Working Parties': LRC chairs joint meetings of managers and employee representatives aimed at agreeing upon and implementing solutions to workplace problems;
- Codes of Practice: LRC outlines recommended practice in relation to issues such as grievance and disciplinary processes, addressing workplace bullying, and voluntary dispute resolution.

The Advisory Service Division is the primary avenue for implementing LRC's focus on dispute prevention. The Division's Mission Statement is to 'work closely with employers, trade unions and employees to promote, develop and implement best industrial relations policies, practices and procedures, in order to enhance the economic well-being of the enterprise and assist in employment creation and retention'.[70] The Division has three organisational units:[71] the Advisory Unit (which develops Codes of Practice, undertakes 'IR Audits' and preventative mediation, etc); the Research and Information/ICT Unit (which engages in joint research projects with academic and other institutions); and the Strategy and Standards Unit (which

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[68] See LRC, *Advisory Service Division*, <http://www.lrc.ie/ViewDoc.asp?fn=/documents/work/advisory_service.htm&CatID=15&m=w> at 26 January 2008.
[69] See further the discussion of 'company review' projects at 2.3.2 below.
[70] LRC, *Annual Report 2006,* 2006, p 18.
[71] See LRC, above n 70, pp 24-29; Mulvey, above n 65, p 6.

monitors legislative developments, holds seminars and training sessions, issues publications, etc).

2.3.2 LRC – Effectiveness of Services

Recent trends indicate a considerable shift away from use of LRC's traditional services for resolving collective labour disputes (ie the Conciliation Service), with a significant increase in notifications of individual employment rights disputes (ie to the Rights Commissioner Service).[72] In comparative terms, however, there has been only limited take-up of the services offered by the Workplace Mediation Service and the Advisory Service Division.

LRC's 2006 Annual Report provides the following statistics on its dispute resolution and dispute prevention activities:[73]

- Conciliation Service: 2,095 meetings conducted
- Rights Commissioner Service: 7,179 referrals
- Workplace Mediation Service: 24 cases undertaken
- Advisory Service Division: 210 projects managed, including:
    - IR Audits 13 cases
    - Joint Working Parties 11 cases
    - Preventative Mediation/Facilitation 30 cases
    - Frequent User Initiative 24 employers contacted
    - Voluntary Dispute Resolution 82 cases
    - Advice on Good Practice 10 cases
    - Training Services 21 programs
    - Small-Medium Enterprise Workshops 2 regional workshops
- Visits to LRC website: 280,139

A 2004 report examined the experience, over a 12 year period, of the 'company review' projects formerly run by the Advisory Service Division of LRC. [74] The report included discussion of a survey undertaken by 'a representative selection of the companies and unions involved' to indicate 'the levels of satisfaction with the company review process'. [75] This survey incorporated questions as to the positive impact of the review process on employment practices, and thus provides a small, yet concrete, example of how LRC has assisted industrial relations parties in Ireland to prevent disputes.[76]

A 'User Satisfaction Survey' carried out in 2005 suggested a high level of awareness of and satisfaction with LRC's activities.[77] The general statistics on awareness of LRC services demonstrated the following trends:

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[72] See Paul Teague, 'New Employment Times and the Changing Dynamics of Conflict Resolution at Work: The Case of Ireland' (2006) 28 *Comparative Labor Law and Policy Journal* 57, at 65-67.
[73] See LRC, above n 70, pp 18, 23-26, 28-30, 32.
[74] See Maedhbh Cronin, *Industrial Relations and Human Resource Management Practice in Ireland: Analysis of 12 Years of Labour Relations Commission Advisory Services Division Company Reviews*, November 2004. The 'company reviews' examined in this report seem to approximate the 'IR Audits' service now provided by the LRC's Advisory Service Division; see 2.3.1 above.
[75] Cronin, above n 74, p 14.
[76] See further Cronin, above n 74; this report is examined more closely in Forsyth and Howe, above n 24, pp 56-57.
[77] See Assumpta McGill, 'The Labour Relations Commission's User Satisfaction Survey' (2005) 5 *LRC Review: The Journal of the Labour Relations Commission* 7.

- trade union respondents to the survey were, overall, more aware of LRC services than employer respondents;
- public sector employers were, overall, more aware of LRC services than private sector employers.[78]

According to the 2005 survey, general satisfaction rates with LRC services were as follows:[79]

Customer	Satisfied	Dissatisfied
Employers	90%	10%
Trade Unions	72%	28%
Public sector employers	98%	2%
Private sector employers	87%	13%
Total	86%	14%

In relation to satisfaction with the services provided by the Advisory Service Division of LRC in particular, the 2005 survey found that 81% of respondents were very satisfied; 12% were neutral; and 7% were dissatisfied (or very dissatisfied).[80] The survey also found that:

> The three most frequently used Advisory Services ... [were]: advice, the Code of Practice on Voluntary Dispute Resolution and industrial relations audits. Joint working parties and preventative mediation and facilitation services [had] slightly less but very similar levels of usage amongst respondents.[81]

More recent data obtained from a Client Survey conducted by the LRC in 2007[82] indicates that clients perceive the Advisory Service to be 'independent and objective', and that it 'provided useful help to parties dealing with breakdowns in relationships', whether the issue was individual or collective. Clients believed access to be 'quicker to the Advisory Service than it is to the Conciliation Service', but also perceived that the Advisory Service 'give[s] more time to issues and achieves a deeper understanding of the change agenda', allowing 'more time for discussion and analysis … than might be available in the Conciliation process'. Respondents to the survey also considered that the Advisory service was '[p]articularly good at handling complex issues through the establishment and chairing of joint working parties'.

However, the 2007 survey found that: 'some employers 'shy away' from the Advisory Service seeing it as part of the civil service and as intrusive.' A number of survey respondents expressed unhappiness with the outcomes achieved through its activities, for example:

> [s]ome considered that some of the Advisory Service's reports were 'middle of the road' in their conclusions and lacking a critical edge and others considered that the Service couldn't call things exactly as they were for reasons of diplomacy and in order to generate progress.

There was a low level of awareness of Advisory Service functions among smaller businesses, in particular. Among the other findings from the 2007 survey were the following:[83]

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[78] McGill, above n 77, at 7.
[79] McGill, above n 77, at 8.
[80] McGill, above n 77, at 10.
[81] McGill, above n 77, at 10.
[82] The following discussion is based on LRC, and quotations obtained from, *LRC Client Survey 2007,* 2007, available at: <http://www.lrc.ie>.
[83] See LRC, 'LRC clients get their say' (2007) 8 *LRC Review: The Journal of the Labour Relations Commission* 3-5.

- there were mixed views as to whether LRC should stick to resolving disputes in the 'here and now', or attend to the longer term needs of parties by helping to build better relationships and promoting 'best practice' in industrial relations (although clear needs were identified in terms of greater provision by LRC of training, information/advice, and dissemination of best practice);
- there needs to be wider dissemination of knowledge of LRC services and relevant personnel;
- Advisory Service interventions were often 'seen as facilitating an organisational climate that fostered openness to change on the part of employees as well as greater levels of understanding between managers, employees and union representatives at workplace level';
- the Advisory Service provided useful assistance in matters such as union recognition cases, grievance-handling in non-union companies, bullying and harassment, pensions, and workplace restructuring issues;
- while unions were more positively disposed towards the Advisory Service than managers, companies that had used it in cases of poor industrial relations or dispute situations reported positive outcomes.

More generally, Ireland's LRC has contributed to the country's transition from an adversarial industrial relations system to one that is based on social partnership, and efforts to implement firm-level partnership arrangements.[84] This can be seen in the dramatic reduction in levels of industrial disputation over the last 20 years, from 315,500 working days lost annually in 1986 to just 7,400 in 2006.[85] Announcing an even lower figure for 2007 (6,038 working days lost), the Minister for Labour Affairs attributed this success to the social partnership framework and, partly, to LRC.[86] However, as several observers have noted, there is still a level of conflict evident in Irish employment relations; the reduction in levels of collective conflict has been offset, to a considerable extent, by the increase in individual employment rights disputes.[87]

Teague concludes that while Ireland's public dispute resolution agencies (including LRC) have made attempts at 'pro-active' dispute prevention activities:

> ... more needs to be done. Greater coordination has to occur among the dispute resolution agencies ... New closer methods of working with firms are required so that they can establish clear ground rules on what constitutes acceptable and unacceptable practice in relation to particular employment rules. Working closer with firms will allow them to identify and get a better insight into high performance dispute resolution policies. These revisions are not beyond the capabilities of the dispute resolution bodies.[88]

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[84] See Roche, above n 3; Hastings et al, above n 3.

[85] Kieran Mulvey, *A New World of Work*, Speech delivered at the Chartered Institute of Personnel and Development in Ireland, 2007, p 1; see further Teague, above n 7272, at 60-62, 65-67.

[86] Department for Enterprise, Trade and Employment, 'Minister for Labour Affairs Welcomes Lowest Ever Annual Industrial Dispute Statistics', *Press Release*, 2008.

[87] See Brian Sheehan, 'Labour Relations Commission Reports Fewer Strikes but More Disputes', *EIROnline*, 2007, available at: http://www.eurofound.europa.eu/eiro/2007/06/articles/ie0706019i.htm; Tony Dobbins, 'New direction required for governing disputes?', *EIROnline*, 2004, available at: http://www.eurofound.europa.eu/eiro/2004/06/feature/ie0406203f.htm; Teague, above n 72, at 65-67, 72-75, 87-88.

[88] Teague, above n 72, at 88.

2.4 United Kingdom

Advisory, Conciliation and Arbitration Service ('ACAS')

(www.acas.org.uk)

2.4.1 Dispute Prevention Services Offered by ACAS

Some form of government conciliation and arbitration service has existed in the UK since 1896; and in its current form, ACAS, since 1974.[89] ACAS is an independent, statutory body, although it is fully funded by the UK Government.[90] Its functions and powers are set out in the *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), starting with a 'general duty … to promote the improvement of industrial relations' in the UK.[91] ACAS's interpretation of this statutory remit is as follows:

> Our mission statement is to improve organizations and working life through better employment relations. To achieve our mission we provide practical support and advice to employers and employees. We help all involved in the employment relationship to make sense of sometimes complex employment legislation and promote good practice in the workplace. We are here to help prevent disputes and, when they do occur, to help resolve them.[92]

Traditional dispute settlement (through the exercise of conciliation and arbitration powers)[93] still forms a large part of ACAS's workload. This work falls into two main categories. First, ACAS offers conciliation services for collective labour disputes, on a voluntary basis (ie disputes between unions and employers, over matter such as pay and conditions, union recognition, redundancies, and the like).[94] ACAS is usually involved in the resolution of most high-profile industrial disputes in the UK.

Secondly, ACAS must offer conciliation in individual employment rights disputes, such as unfair dismissal/disciplinary matters, discrimination/sexual harassment cases, breach of contract claims, and so on. These and other claims that are (or may be) lodged with an Employment Tribunal ('ET') under UK law must first be subject to conciliation by ACAS, which settles around 75% of such cases.[95] The huge increase in the numbers of these disputes in recent years[96] has led to several attempts at reform, including the introduction of formal '3-step' dispute resolution procedures in 2004,[97] which will soon be repealed when the *Employment Bill 2007-*

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[89] ACAS, *Acas History* <http://www.acas.org.uk/index.aspx?articleid=413> at 26 January 2008.
[90] ACAS, above n 89; see also ACAS, *Acas structure*, available at: http://www.acas.org.uk/index.aspx?articleid=418 at 19 April 2008.
[91] *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), section 209.
[92] ACAS, *Annual Report and Accounts 2006/07*, The Stationery Office, London, 2007, p 7.
[93] Under *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), sections 210-212.
[94] Keith Sisson and John Taylor, 'The Advisory, Conciliation and Arbitration Service', in Linda Dickens and Alan Neal (eds), *The Changing Institutional Face of British Employment Relations*, Kluwer Law International, 2006, p 24 at 28. Union recognition disputes are also subject to the statutory recognition procedure operating under Schedule A1 of the *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), which may lead to the determination of such disputes by another agency, the Central Arbitration Committee; see for example Gregor Gall, 'The First Five Years of Britain's Third Statutory Union Recognition Procedure' (2005) 34 *Industrial Law Journal* 345.
[95] See http://www.acas.org.uk/index.aspx?articleid=2010 and http://www.acas.org.uk/index.aspx?articleid=1400 at 11 June 2008.
[96] See 2.4.2 below.
[97] See Gillian Morris, 'Britain's New Statutory Procedures: Routes to Resolution or Barriers to Justice?' (2004) 25 *Comparative Labor Law and Policy Journal* 477.

08 passes into law. This legislation, arising from the Gibbons review of Britain's employment dispute resolution system in 2007,[98] will provide a greater role for ACAS conciliation at a much earlier stage of individual rights disputes.[99] From April 2009, ACAS will offer an expanded range of 'pre-claim conciliation' services to identify and prevent ET claims from arising.[100] This enhanced role has resulted in the provision of additional funding to ACAS, after a number of years of cuts to its budget.[101]

Dispute prevention has become an increasingly important area for ACAS, reflecting 'the changing context of employment relations' as employers seek more assistance 'in managing their human resources more effectively'.[102] Under its founding legislation, ACAS has powers to:

- 'give employers, employers' associations, workers and trade unions such advice as it thinks appropriate on matters concerned with industrial relations or employment policies';[103]
- make inquiries in relation to 'industrial relations generally' or 'in any particular industry or … undertaking', and publish the findings of any such inquiry;[104]
- 'issue Codes of Practice containing such practical guidance as it thinks fit for the purpose of promoting the improvement of industrial relations'.[105]

ACAS interprets these aspects of its role as follows:

> Our message is 'prevention is better than cure' and is becoming an increasingly important part of our work. We give advice and guidance to 800,000 callers a year via our telephone helplines, promote good practice at the training sessions we run each year, last year we provided training to 35,000 delegates. We also work in individual companies with employer/ employee/ trade union groups in partnership to find lasting solutions in their workplace. [106]

However, the organisation acknowledges that 'there is a hard-to-shift perception that [ACAS] is all about dispute resolution'.[107]

The dispute prevention activities of ACAS fall into the following main categories.

Advice

ACAS provides a range of advisory services. On a general level, it operates a national telephone helpline for workplace-related enquiries from employers, employees and their

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[98] See Department of Trade and Industry, *Success at Work: Resolving disputes in the workplace – A Consultation*, March 2007.
[99] See further Department for Business Enterprise and Regulatory Reform, *Employment Bill: Impact Assessments*, February 2008.
[100] See ACAS, *acasnews*, The National Newsletter of ACAS, Spring/Summer 2008, pp 1-2.
[101] See Author unknown, 'Are things looking up for Acas?', *Labour Research*, November 2007, at 10-12; Sisson and Taylor, above n 94, p 35.
[102] Sisson and Taylor, above n 94, p 27; see also John Purcell, 'After collective bargaining? ACAS in the age of human resource management', in Brian Towers and William Brown (eds), *Employment Relations in Britain: 25 Years of the Advisory, Conciliation and Arbitration Service*, Blackwell Publishers, Oxford, 2000, p 163.
[103] *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), section 213(1); the advice can be given on request, or (section 213(3)) ACAS can publish general advice.
[104] *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), section 214.
[105] *Trade Union and Labour Relations (Consolidation) Act 1992* (UK), section 199(1); see further sections 199-202.
[106] ACAS, above n 89.
[107] ACAS, above n 92, p 22.

representatives,[108] and the 'Equality Direct' helpline. ACAS also provides 'interactive training packages' on its website,[109] along with an array of publications (including guidelines and factsheets) on various employment issues.[110] The advisory services provided by ACAS also extend to health and safety issues (such as advice on stress reduction). [111] More intensive and workplace-specific advisory services are provided through the ACAS 'Workplace Projects' initiative.

Workplace Projects

Workplace Projects involve the provision by ACAS of advisers who 'work with employers and employees to get to the root causes of problems in the workplace'.[112] The types of issues or strategies that might be focused on in Workplace Projects include: 'improving working relationships', 'developing partnerships', 'putting in place structures, such as employee councils', and assisting organisations to 'set up and train employee representative groups'.[113] ACAS Workplace Projects are examined in detail in the Appendix to this paper.

Training

ACAS offers two main types of training: first, 'public events designed to help employers [and other parties] keep up to date with good employment practices and new employment legislation'; and secondly, 'bespoke training on request in the context of particular issues facing their organisations' (eg combating harassment and bullying, or improving information and consultation processes).[114] A broad range of topics is covered in ACAS's training offerings, including conflict management, discrimination, absence management, and work-life balance.[115] A number of 'e-learning packages' on various aspects of employment law are also available on the ACAS website.[116] While many ACAS services are provided free of charge, training is one of the main areas in which it has introduced 'charged-for services' in recent years.[117]

Mediation

The mediation services provided by ACAS are designed for conflicts between 'employers and individual employees or between individuals or groups of colleagues'.[118] In addition to providing mediators, ACAS assists 'internal workplace mediation' by 'help[ing] organizations to design, implement and evaluate workplace mediation arrangements'.[119] ACAS provides in-house courses which '[train] individuals to act as mediators in workplace disputes in their own organizations' and to assist 'public sector organizations implementing their own workplace mediation schemes'. [120]

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[108] ACAS, above n 92, p 25.
[109] ACAS, above n 92, p 25.
[110] See for example the information provided under the 'Rights at Work' link on ACAS's website (at: http://www.acas.org.uk/index.aspx?articleid=341), covering issues such as pay, time off, equality and discrimination, discipline and dismissals, trade unions and representation, etc.
[111] ACAS, above n 92, p 14.
[112] ACAS, above n 92, p 14.
[113] ACAS, above n 92, p 14.
[114] Sisson and Taylor, above n 94, p 29.
[115] See http://www.acas.org.uk/EMSOBS/acas_events_new.asp.
[116] ACAS, above n 92, pp 22, 24.
[117] Sisson and Taylor, above n 94, p 35.
[118] ACAS, above n 92, p 28.
[119] ACAS, above n 92, p 29.
[120] ACAS, above n 92, p 29.

ACAS Model Workplace

'The ACAS Model Workplace' initiative is a diagnostic tool that businesses can adapt to their own organisations, as a benchmark for developing good working relationships.[121] It is based on three key principles: (1) putting the right systems/procedures in place (eg in relation to discipline, grievance resolution, performance pay, health and safety); (2) developing good relationships between managers and employees (eg by establishing processes to encourage and reward employee initiative, flexible working hours, skills development); (3) creating a 'climate of trust' (eg through joint working or consultative groups).

Research

ACAS conducts employment relations research both 'independently … [and] in partnership with other organizations'. [122]

2.4.2 ACAS – Effectiveness of Services

ACAS's workload in recent years has seen a significant increase in conciliation of individual employment disputes, declining involvement in collective disputes, and a strong increase in demand for its information and advisory services.[123]

The ACAS Annual Report for 2006-2007 provides the following statistics on its dispute resolution and dispute prevention activities:[124]

- Conciliation in collective disputes: 912 requests
- Conciliation in individual disputes: 105,177 ET claims
  57,476 non-ET claims
- Advisory visits: 1,343
- Workplace Projects: 221 projects started
- Training sessions: 2,707 delivered
- Calls to ACAS national helpline: 839,335

ACAS has conducted (and commissioned) a significant amount of research on customer perceptions and satisfaction levels, and the effectiveness of its many services. This includes detailed research papers about the ACAS helpline,[125] training services,[126] and conciliation in ET cases.[127] A 2004 report by Dix and Oxenbridge provides support for ACAS's activities in both the dispute resolution and prevention spheres, as the report summary indicates:

> The paper focuses on the diverse roles played by Acas in relation to both dispute prevention, and dispute resolution. It draws particularly on data reporting the views and experiences of the users of Acas services. The data are located within the wider debates around the competing notions of 'conflict' at work and workplace effectiveness. It concludes that Acas' strength lies in bringing the parties to the

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[121] ACAS, *The ACAS Model Workplace,* <http://www.acas.org.uk/index.aspx?articleid=335> at 26 January 2008.
[122] ACAS, above n 92, p 42.
[123] Sisson and Taylor, above n 94, pp 28-29.
[124] See ACAS, above n 92, pp 12, 52-66.
[125] Hülya Hooker, Thomas Usher and Dilys Robinson, *Research Paper: Acas helpline survey 2007*, ACAS, 2007.
[126] Alex Dawe, *Research Paper: Acas training services, 2005-6 – National evaluation*, ACAS, 2006.
[127] Acas Research and Evaluation Section and Ipsos MORI, *Research Paper: Service user perceptions of Acas' conciliation in Employment Tribunal cases 2005*, ACAS, 2006.

table to both resolve disputes, but also to develop innovative strategies for improving workplace effectiveness. The paper also assesses future opportunities for seeking a more strategic approach to managing conflict at work.[128]

The following customer satisfaction survey results are provided in ACAS's 2006-07 Annual Report:

Service	Survey Conducted	Satisfaction rate	Notes
Collective conciliation	March 2007 survey of collective conciliation customers (preliminary findings only)	86%	86% of surveyed customers were 'likely to use or recommend us in the future. In addition, more than 50 per cent of respondents said that if we had not been involved, the dispute would have taken longer to resolve or would not have been resolved at all'.[129]
Conciliation in employment tribunal cases	Independent research	90%	'90 per cent of customers were either fairly satisfied or very satisfied with the service'.[130]
ACAS training	Unspecified customer surveys	96%	'In 2006/07, 96 per cent of customers who attended an Acas training session were either satisfied or very satisfied with the session'.[131]
ACAS national helpline	Helpline satisfaction survey	94%	94% of callers were satisfied with the help received; 97% would use the service again. 90% of callers 'found the information valuable'.[132]

There is evidence indicating that ACAS is highly regarded by both employer and union representatives,[133] although some reluctance on the part of small-medium businesses to use its services has been detected.[134] According to Sisson and Taylor, employers generally 'value

[128] Gill Dix and Sarah Oxenbridge, *Coming to the table: The role of Acas in collective disputes and improving workplace relationships*, ACAS, 2004, p 2; see further the discussion of ACAS Workplace Projects in the Appendix to this paper.
[129] ACAS, above n 92, p 17.
[130] ACAS, above n 92, p 8.
[131] ACAS, above n 92, p 9.
[132] ACAS, above n 92, p 26.
[133] See for example Paul Latreille, Julie Latreille and KG Knight, *Employment Tribunals and Acas: evidence from a survey of representatives* (2007) 38 *Industrial Relations Journal* 136.
[134] See Michael Sanderson and James Taggart, "Acas Advice – a lost cause?" (1999) 21 *Employee Relations* 128.

Acas as a source of information and advice because it does not have enforcement powers', so they know they will get a 'problem-solving' rather than a 'rights-based' response.[135] Sisson and Taylor also observe that:

> ... the complexity of the issues that people in the world of work are having to grapple with means Acas staff are involved in satisfying a substantial and rising demand for information and advice. People are coming to Acas for the very same reasons that they come for help when they are in dispute – they want to know that the advice [they] are being given is independent and impartial. Crucial here has been Acas' staff extensive practical knowledge and experience of employment relations that comes from direct local involvement in workplaces across the country. ... Acas looks like an organisation that you would have to create if it did not already exist.[136]

In 2007, the National Institute of Economic and Social Research published a report on the economic impact of ACAS's services on the UK economy.[137] The report showed that for every pound of taxpayers' money spent by ACAS, 'over £16 is returned, generating benefits worth almost £800 million a year across UK businesses, employees and the economy'.[138] ACAS's dispute resolution work produced £313 million of savings to the economy, 'while the advice and guidance provided to employers and employees contributed a further £475 million'; further, the report's author indicated that the benefits highlighted in the report 'represent[ed] a minimum, not least because it does not take into account the potential for long-term improvements in productivity and investment as a result of better relationships in the workplace'.[139]

Finally, as in Ireland,[140] there has been a considerable reduction of workplace conflict in the form of strike activity in the UK in recent years, but a surge in individual employment disputes. Therefore, according to Drinkwater and Ingram, lower levels of industrial action may be seen as 'an erroneous measure of harmony at the British workplace'; they note that 'individual disruption' has 'emerged as a substitute means of articulating discontent in the workplace, as collective forms of expressing discontent have proved both difficult and expensive to organize.'[141]

3. The Decline of Dispute Resolution in Australia, and Inventing a Dispute Prevention Role for Fair Work Australia

3.1 The Impact of Work Choices on Australian Industrial Tribunals

As indicated in Part 1 of this paper, the traditional dispute settlement roles of Federal and State industrial tribunals in Australia have been dramatically altered in the last 15 years or so.

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[135] Sisson and Taylor, above n 94, p 31.
[136] Sisson and Taylor, above n 94, p 36.
[137] Pamela Meadows, *A Review of the Economic Impact of Employment Relations Services Delivered by Acas*, National Institute of Economic and Social Research, November 2007. Aspects of this report are discussed further in the study of ACAS Workplace Projects in the Appendix to this paper.
[138] ACAS, *Independent study reveals Acas adds £800m to UK economy*, 13 November 2007, available at: http://www.acas.org.uk/index.aspx?articleid=1328&articleaction=print at 14 January 2008.
[139] Ibid.
[140] See 2.3.2 above.
[141] Stephen Drinkwater and Peter Ingram, 'Have Industrial Relations in the UK Really Improved?' (2005) 19 *Labour* 373, at 393; see also Sisson and Taylor, above n 94, pp 35-36.

3.1.1 Impact on the AIRC

In respect of the Federal tribunal, the Australian Industrial Relations Commission ('AIRC'),[142] this process began with the shift to a formalised legal system for enterprise bargaining in 1993.[143] It was hastened by the former Coalition Government's 1996 reform legislation,[144] which imposed significant limits on the AIRC's arbitral powers. Then, under the Coalition's 2005 Work Choices legislation,[145] the AIRC was stripped of many of its former functions (for example, minimum wage-setting, approval of workplace agreements). In fact, Work Choices saw the abolition of the AIRC's compulsory conciliation and arbitration (ie dispute settlement) powers. These powers had existed, in one form of another, for over 100 years.[146] What we have witnessed, therefore, is the total transformation of the AIRC: from a body with a central role in the determination of wages and conditions and the settlement of industrial disputes, to one with substantially reduced powers and a greatly diminished role.

Work Choices restricted the AIRC's dispute resolution functions to three areas: disputes under the Model Dispute Resolution Process ('Model DRP'), collective bargaining disputes, and disputes arising under workplace agreements.[147] Importantly, the AIRC's involvement in these types of disputes was made voluntary, in the sense that all relevant parties have to agree upon it. Further, the parties have been given the choice of taking their disputes to alternative dispute resolution providers such as accredited mediators and arbitrators. However, this 'private ADR' stream of workplace dispute resolution has been a total failure, with parties opting overwhelmingly to refer disputes to the AIRC.[148] This is no doubt attributable, in large part, to the fact that the institution itself has responded admirably to the challenges it has faced in recent years. The AIRC has been very proactive in positioning itself as the 'first choice' provider in the new 'market' for dispute resolution services (through innovations such as allowing the parties to choose which member of the AIRC they want to handle their dispute).[149]

Even so, Work Choices has led to a considerable reduction in the AIRC's overall workload, as the following table illustrates.

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[142] See http://www.airc.gov.au.

[143] Under the *Industrial Relations Reform Act 1993* (Cth). The following discussion of the impact of workplace reforms since this time on the AIRC receives more extensive treatment in Forsyth (2006), above n 6, at 28-30, 36-40; see also Dabscheck, above n 4, and Forbes-Mewett et al above n 4.

[144] *Workplace Relations and Other Legislation Amendment Act 1996* (Cth).

[145] See above n 5.

[146] See further The Hon. Justice Michael Kirby, 'Industrial Conciliation and Arbitration in Australia – A Centenary Reflection' (2004) 17 *Australian Journal of Labour Law* 229; Joe Isaac and Stuart Macintrye (eds), *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration*, Cambridge University Press, Cambridge, 2004.

[147] See Part 13 of the *Workplace Relations Act 1996* (Cth) ('WR Act'), discussed further in Forsyth (2006), above n 6, at 30-32, 36-38; and Forsyth (2007), above n 6, at 22-25.

[148] For example only $74,000 was spent on the Alternative Dispute Resolution Assistance Scheme ('ADRAS'), which offers a subsidy of up to $1,500 per dispute for parties wishing to use a private ADR provider, in its first year of operation: see Forsyth (2007), above n 6, at 26-27. It is understood that there were *no* applications under ADRAS in the 2006-07 financial year: Department of Employment and Workplace Relations, *Annual Report 2006-07*, p 115; see also Ashley Midalia and Rachel Nickless, 'Workers, Employers Shun Disputes Fund', *The Australian Financial Review*, 20 July 2007.

[149] See further http://www.airc.gov.au/dispute/dispute.htm and Forsyth (2007), above n 6, at 27-28; see also, at 32-35, the discussion of the changed nature of dispute resolution in the AIRC including the requirement that Part 13 matters be dealt with in private.

Impact of Work Choices on AIRC's Workload
[Source: AIRC Annual Report 2007-08][150]

	2004-05	2005-06[151]	2006-07	2007-08
Disputes notified under certified/collective agreement dispute resolution clauses	851	956	1142	1081
Other dispute notifications (includes old 'section 99s', Model DRP disputes and collective bargaining disputes)	1675	1191	245	219
Initiation of bargaining periods	5139	6196	1686	2522
Suspension or termination of bargaining period	33	37	8	220
Applications for orders to stop industrial action	424	344	112	144
Termination of employment	6707	5758	5173	6067
Award variation	1701	1538	1230	1062
Agreement (extension, variation and termination)	6656	8836	189	89
Total lodgements	24,558	25,355	10,273	12,359

The table identifies key areas of the AIRC's activity, and shows that in some areas its workload has increased since Work Choices came into effect on 27 March 2006 (for example, dispute resolution under workplace agreements, suspension/ termination of bargaining periods, termination of employment matters). In other areas, however, the AIRC's workload has dropped dramatically (for example, other dispute notifications, initiation of bargaining periods, industrial action 'stop orders', award variations, agreement matters). Overall, the 'Work Choices effect' on the AIRC's workload is unmistakeable: total lodgements of matters/proceedings with the tribunal have been more than halved in the period from 30 June 2006 to 30 June 2008.

3.1.2 Impact on State Industrial Tribunals

As noted in Part 1, the State industrial tribunals[152] have also been significantly downgraded as a result of Work Choices. The Work Choices legislation had the effect that State industrial

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[150] AIRC, *Annual Report of the President of the Australian Industrial Relations Commission and Annual Report of the Australian Industrial Registry: 1 July 2007 to 30 June 2008*, pp 7, 49-51.
[151] Work Choices commenced operation three quarters of the way through this period, ie on 27 March 2006.
[152] These are the: Industrial Relations Commission of New South Wales ('IRCNSW') (http://www.lawlink.nsw.gov.au/lawlink/irc/ll_irc.nsf/pages/IRC_index/); Queensland Industrial Relations Commission ('QIRC') (http://www.qirc.qld.gov.au/); South Australian Industrial Relations Commission ('SAIRC') (http://www.industrialcourt.sa.gov.au/); Tasmanian Industrial Commission ('TIC') (http://www.tic.tas.gov.au/); and Western Australian Industrial Relations Commission ('WAIRC') (http://www.wairc.wa.gov.au/). Since its handover of industrial relations powers to the Commonwealth in 1996, Victoria has been alone among the states in having no separate industrial relations system and no functioning industrial tribunal: see *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

tribunals no longer have the power to deal with industrial disputes relating to employers and employees covered by the national workplace relations system (primarily, constitutional corporations and their employees). This followed from the general exclusion of State and Territory employment and industrial laws in section 16 of the WR Act. As a result, State industrial tribunals can only hear disputes involving unincorporated employers, State government departments and local government entities.[153] The New South Wales, South Australian, Queensland, Tasmanian and Western Australian governments responded with legislative amendments, which allow their industrial tribunals to deal with disputes voluntarily referred to them by parties covered by the Federal workplace relations system.[154]

There is some evidence that these efforts to retain an ongoing role for the State tribunals has met with some success, especially in New South Wales.[155] However, the overall impact of Work Choices on the State institutions has been dramatic, as the following statistics demonstrate:

- The TIC's workload (in terms of total numbers of applications) has been reduced by approximately 53%; the number of disputes it dealt with fell from 409 in 2004-05 to 217 in 2006-07.[156]
- The QIRC's workload (ie total matters filed) has dropped by around 60%, and as a result it has offered redundancy packages to its members; the number of disputes fell from 534 in 2004-05 to 121 in 2006-07.[157]
- The impact on the SAIRC has been described as follows: it 'is huge, it is adverse and it results in a substantial diminution of the longstanding role played by the Commission ... In particular, the jurisdiction of the Commission with respect to those in the private sector employed by corporations has been emasculated.'[158] The average number of disputes notified to the SAIRC in each of the five years to 30 June 2005 was 107; in 2006-07, only 38 disputes were notified.[159]

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[153] Except where local government authorities are considered to be trading or financial corporations, and therefore within the national workplace relations system: see for example *Bell v Shire of Dalwallinu* [2008] WAIRC 01269 (14 August 2008); cf, however, the Federal Court decision in *AWU (Qld) v Etheridge Shire Council* [2008] FCA 1268 (20 August 2008).

[154] These amendments enable the parties to enter into private 'referral agreements', or to nominate a State tribunal as the dispute resolution body for reference of disputes arising under Federal workplace agreements: see *Industrial Relations Act 1996* (NSW), sections 146A-146B; *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA), Schedule 1; *Industrial Relations Act 1999* (Qld), section 273A; *Industrial Relations Act 1984* (Tas), section 19A (see also section 61, introduced prior to Work Choices); *Employment Dispute Resolution Act 2008* (WA), Part 2, Divisions 2 and 4. See further Andrew Stewart and Joellen Riley, 'Working Around Work Choices: Collective Bargaining and the Common Law' (2007) 31 *Melbourne University Law Review* 903, at 931-934.

[155] There has been extensive use of the referral agreements mechanism provided by section 146A of the NSW legislation, with the result that major employers such as Bluescope Steel and many local government authorities have continued to have disputes dealt with in the NSWIRC: see The Honourable Justice Roger Boland, President of NSWIRC, *Address to the Industrial Relations Society 2008 Annual General Meeting*, 15 August 2008; and the Local Government and Shires Associations of NSW website: http://www.lgsa.org.au/www/html/2287-agreements-and-templates.asp.

[156] Department of Justice (Tasmania), *Annual Report 2006-2007*, pp 64, 66.

[157] Queensland Department of Employment and Industrial Relations, *Annual Report 2006-07*, p 66.

[158] President Judge P D Hannon, 'The Impact of Work Choices on the Commission's Role', *Speech to the Law Society of South Australia Continuing Education – Work Choices Conference*, 13 April 2007, p 1.

[159] Hannon, above n 158, p 4; Industrial Relations Court of South Australia and SAIRC, *First Annual Report of the Senior Judge Industrial Relations Court and the President Industrial Relations Commission 2006-2007*, p 16.

- The number of 'applications received' by the WAIRC fell from 2807 in 2004-05 to 906 in 2006-07;[160] the total number of 'matters dealt with' fell from 2877 to 1147 over the same period.[161]
- The number of disputes notified to the NSWIRC has dropped considerably, from over 1100 in 2004 to just under 600 in 2007.[162] The State Government is reportedly reconsidering the NSWIRC's current level of resourcing and personnel, in light of the significant reduction in its workload under Work Choices.[163]

In light of these developments, and the Federal Government's policy to extend the coverage of the national workplace relations system to the entire private sector across Australia,[164] there are significant questions over the future viability of the State industrial tribunals.[165] Key figures in the NSWIRC have argued strongly that it must have an ongoing role in the national workplace relations system envisaged by Federal Labor. These spirited defences of the NSWIRC have been based largely on the versatility of its dispute resolution services, including its ability to arbitrate in major disputes.[166] Developing a greater focus on dispute prevention, modelled on the experience of comparable overseas tribunals, may be a way of preserving the longevity of Australia's State industrial tribunals. However, to date, none of the State institutions has taken any steps in this direction.[167]

3.2 Federal Labor's 'Fair Work Australia' Proposal

3.2.1 Overview

At the Federal level, there has been a proliferation of agencies with regulatory responsibilities in the field of workplace relations. This arose from the former Coalition Government's strategy of 'sidelining' the AIRC,[168] with new bodies created to take on some of its former functions (for example, minimum wage-setting by the Australian Fair Pay Commission; agreement approval by the Workplace Authority) and others established to perform new functions (for example, enforcement by the Workplace Ombudsman; compliance in the building industry overseen by the Australian Building and Construction Commission).

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[160] Department of the Registrar, WAIRC, *Annual Report 2006/2007*, p 58.
[161] Chief Commissioner of the WAIRC, *Forty-Fourth Annual Report for the Period 1 July 2006-30 June 2007*, p 12.
[162] IRCNSW, *Annual Report Year Ended 31 December 2007*, p 14; the overall number of applications filed in 2007 was 2041 (see p 53), but no comparative figures are provided for previous years.
[163] See Workplace Express, below n 174.
[164] See further Forsyth et al, below n 173, pp 198-206. Implementation of this policy would require the other States to follow Victoria's lead (see above n 152) and refer their industrial relations powers to the Commonwealth; this is presently the subject of ongoing discussions through the Workplace Relations Ministers Council.
[165] See Forsyth et al, below n 173, pp 204-205, noting that the States may find it difficult to justify the expense of maintaining their own tribunals once these are left with jurisdiction only over State public sector employers and their employees.
[166] See for example Boland, above n 155; The Honourable Justice Roger Boland, President of NSWIRC, *Speech to the Industrial Relations Society of New South Wales Convention 2008*, 16 May 2008; IRCNSW, above n 162, pp 40-41 (concluding comments by outgoing President of the NSWIRC, The Honourable Justice F L Wright). See also The Honourable Justice Michael Walton, 'The New South Wales Industrial Relations System: 1998 to the *Workplace Relations Amendment (Work Choices) Act* 2005' (2006) 29 *UNSW Law Journal* 47.
[167] The WAIRC hosted a meeting of representatives from ACAS, the LRC and FMCS USA in October 2007, although this was focused mainly on the international experience with mediation in anticipation of the expanded mediation role of the WAIRC under the *Employment Dispute Resolution Act 2008* (WA): see Chief Commissioner Beech, 'The WA Industrial Relations System – A Bridge Over Troubled Water?', *Speech to the Industrial Relations Society of Western Australia Annual Convention*, 26-28 October 2007, p 8.
[168] See again Forsyth (2006), above n 6.

In April 2007, the then Labor Opposition announced that it would abolish these agencies – including the AIRC – and replace them with a new 'one stop shop' called Fair Work Australia ('FWA').[169] The efficiencies to be gained from rationalising the many existing agencies into one regulatory body formed one of the rationales for this new policy position, which took many by surprise given that the ALP had been critical of the Coalition Government's marginalisation of the AIRC since 1996 (especially under Work Choices). Instead, Labor now argued that the AIRC was 'an institution that reeks of the old industrial relations club'[170] and had become 'too remote from the needs of modern Australian workplaces'.[171] It followed that: 'it's time that [the AIRC] was gone and replaced with a new organisation'.[172] The many appointments to the AIRC from government and employer ranks since 1996 may have been another reason for Labor's policy shift,[173] although the Rudd Government has recently confirmed that all existing members of the AIRC will be offered positions on FWA.[174]

According to Labor's policy announcements,[175] FWA would be established from 1 January 2010 and would have a wide range of functions including the following:

- giving advice to employers, employees and unions about their workplace rights and responsibilities;
- dispute resolution (including assisting parties to resolve workplace grievances);
- minimum wage-setting;
- overseeing the awards system;
- conducting inquiries and making adjustments to Labor's 10 National Employment Standards;
- dealing with unfair dismissal claims;
- overseeing agreement-making and approval;
- overseeing collective 'good faith bargaining';
- overseeing protected industrial action (including secret ballot applications);
- registered organisations, including union right of entry and freedom of association issues;
- enforcement and prosecutions;
- a 'judicial arm' to hear cases and administer penalties;[176]

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[169] See Australian Labor Party ('ALP'), *Forward with Fairness: Labor's Plan for fairer and more productive Australian workplaces* ('Forward with Fairness'), April 2007, pp 17-18; ALP, 'Federal Labor's New Independent Industrial Umpire: Fair Work Australia', *Media Statement*, 26 April 2007; and ABC, 'ALP vows to replace IR Commission', *7.30 Report*, Transcript, 25 April 2007.

[170] ABC, above n 169.

[171] ALP (26 April 2007), above n 169.

[172] ABC, above n 169.

[173] See further the discussion of the FWA proposal in Anthony Forsyth, Breen Creighton, Val Gostencnik and Tim Sharard, *Transition to Forward with Fairness: Labor's Reform Agenda*, Thomson Lawbook Co., 2008, pp 228-235, covering appointments to FWA, service delivery by FWA, its proposed judicial arm, etc. See also The Hon Julia Gillard MP, Deputy Prime Minister, *Speech: Australian Financial Review Workplace Relations Conference*, Melbourne, 30 October 2008.

[174] See Workplace Express, 'AIRC members will be offered roles on Fair Work Australia: Gillard', 30 October 2008, referring to Gillard, above n 173.

[175] See n 169 above.

[176] This aspect of the FWA proposal attracted considerable attention, with questions being raised about the constitutional validity of having judicial functions housed within the same body that performs law-making/regulatory functions: see Forsyth et al, above n 173, pp 232-233. The Government has since indicated that rather than having a judicial arm within FWA, specialist 'Fair Work Divisions' will be established within the Federal Court and the Federal Magistrates Court: see Australian Government, *2. Fair Work Australia institutions – A one stop shop*, Fact Sheet, 17 September 2008.

- special unit to promote 'family-friendly' work practices;
- specialist industry divisions to focus on persistent unlawful behaviour, for example in the building/construction and hospitality industries.

More recently, the Government has stated that:

> [FWA] will oversee the new, fair, simple and modern workplace relations system. It is based around a user-friendly culture that moves away from the adversarial and often legalistic processes of the past in favour of less formal processes. The focus will be on providing fairness and efficiency, and excellent levels of service to users of the system.[177]

3.2.2 FWA's Dispute Resolution Role

Labor has said very little about the proposed dispute *resolution* role of FWA, apart from some comments by the then Opposition Leader, Mr Rudd (at the time the FWA proposal was announced), which suggested that the current voluntary dispute resolution framework will stay in place: '[FWA] will be there to settle major industrial disputes … It can also be there to assist parties with solving smaller disputes if they want that assistance and only if they want that assistance'.[178] This approach is consistent with Labor's proposed role for FWA in the bargaining sphere, where negotiating parties will generally only be able to seek assistance from FWA or ask it to determine outcomes for them where all parties want this to occur; and FWA will have arbitration powers only in very limited circumstances.[179] Overall, it is fairly clear that FWA will not have anything like the former compulsory conciliation and arbitration powers of the AIRC. However, it is not yet clear whether the current arrangements providing parties with the option of utilising private mediators or arbitrators (partly funded by ADRAS) will remain in place. Given the limited take-up of the private ADR option under Work Choices, a better option might be to equip FWA with the capacity to deliver a variety of dispute resolution approaches.[180]

3.2.3 FWA's Potential Dispute Prevention Role

As for dispute *prevention*, while an information and advisory role will be among the many functions to be performed by FWA, little has been said about what this aspect of FWA's activities might involve. Some members of the AIRC have expressed support for moving in a similar direction to the UK's ACAS,[181] although the impetus for such a shift would really need to provided by the Federal Government. The establishment of FWA presents an ideal opportunity to develop a much greater dispute prevention role than Australian industrial tribunals have traditionally performed.[182] The experience of comparable agencies overseas could usefully be examined in defining a dispute prevention function for FWA.

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[177] Australian Government, above n 176.

[178] Kevin Rudd MP, Federal Labor Leader, *Transcript of Joint Doorstop with Julia Gillard*, Commonwealth Parliamentary Offices, Sydney, 26 April 2007.

[179] See Forward with Fairness, above n 169, pp 13-16; and Forsyth et al, above n 173, pp 213-228.

[180] See WR Act, section 698 which specifies the following options for resolving Model DRP disputes: conferencing, mediation, assisted negotiation, neutral evaluation, case appraisal, conciliation, arbitration.

[181] See for example 'AIRC looks at international models', *Workforce,* Issue 1578, 16 March 2007 (quoting Vice President Watson of the AIRC). The AIRC hosted an international conference on industrial dispute resolution in Melbourne in October 2007, at which many of the representatives of overseas tribunals spoke of their recent moves into dispute prevention: see http://www.e-airc.gov.au/iidrconference/.

[182] Dispute prevention was a formal component of the Federal tribunal's role since its inception, although this was limited to the exercise of conciliation and arbitration powers for the prevention of industrial disputes (see for example sections 3(h) and 89(a) of the pre-Work Choices WR Act, and the head of power in section 51(xxxv) of

A number of the programs administered by public dispute resolution agencies in the countries examined in Part 2 of this paper stand out as particularly successful examples of regulatory support for dispute prevention and, in turn, workplace cooperation and partnership. ACAS has by far the best track record in this respect. Its dispute prevention programs are highly developed, and varied in nature (covering advice, training, mediation, benchmarking, and 'hands on'/practical assistance within firms). There is also a considerable amount of evidence showing that ACAS's programs are highly regarded by employers, employees and unions; that they are effective in improving employment relationships at the workplace; and that they have had a range of positive outcomes (including economic benefits at both the firm and national levels). The ACAS Workplace Projects initiative (examined in detail in the Appendix to this report) perhaps best illustrates the versatility of ACAS's approach to dispute prevention, and the beneficial impacts that can flow from public investment in developing workplace-level collaboration.

The Advisory Service of LRC in Ireland also provides a useful model for structuring an integrated 'menu' of dispute prevention initiatives. Its IR Audits, Preventative Mediation/ Facilitation, Frequent Users Initiative, and Joint Working Parties, seem particularly worthy of further exploration. However, the evidence to date does not indicate the same level of take-up or effectiveness of LRC's dispute prevention services as has been demonstrated in the case of ACAS in the UK (although it must be noted that LRC has not conducted as extensive measurement or analysis of the operation of these services as has ACAS).

The programs run by FMCS Canada (for example, Labour-Management Partnerships Program) and FMCS USA (for example, Relationship-Development Training Programs) are heavily focused on management-union relationships, and the transformation of traditionally adversarial collective bargaining practices through interest-based negotiations and other more cooperative approaches. These programs have an important role to play, and warrant closer examination. However, an expanded focus on dispute prevention through FWA should not be centred exclusively on unionised firms. With declining rates of union membership in Australia,[183] the non-union sector will increasingly be an important 'staging ground' for experimentation with more cooperative approaches to workplace regulation. Indeed, as Brown has pointed out, it has been the decline in trade union membership density, confrontational collective bargaining and strike activity that has triggered the move by dispute resolution agencies in many industrialised countries towards various dispute prevention initiatives.[184]

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the Australian Constitution on which the Federal system was primarily based between 1904 and 2006). In any event, the Federal tribunal's dispute prevention role was always under-utilised, not least due to the many legal/constitutional limitations that it was (or was considered to be) subject to: see further W B Creighton, W J Ford and R J Mitchell, *Labour Law: Text and Materials*, 2nd edition, Law Book Co Ltd, 1993, pp 603-616; Andrew Stewart and Breen Creighton, *Labour Law*, 4th edition, The Federation Press, 2005, pp 90-92; Andrew Stewart, 'Industrial Disputes and the Prevention Power: The World Square Case' (1991) 13 *Sydney Law Review* 199.

[183] In August 2007, only 18.9% of Australian employees were union members (41.1% in the public sector, and just 13.7% in the private sector): see ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, Cat. 6310.0, August 2007. See also (for example) Rae Cooper, 'Life in the Old Dog Yet? 'Deregulation' and Trade Unionism in Australia', in Joe Isaac and Russell Lansbury (eds), *Labour Market Deregulation: Rewriting the Rules*, The Federation Press, Sydney, 2005, p 93.

[184] See Brown, above n 1, at 449-451, 454.

4. Conclusion

This paper has examined the decisive shift away from traditional forms of third party intervention by public dispute resolution agencies in Canada, the USA, Ireland and the UK. It has also argued that, given the decline of dispute resolution in the Australian context and the imminent establishment of FWA, it is timely to consider providing our Federal workplace tribunal with a more expansive dispute prevention capability. In doing so, policy-makers in Australia would be wise to consider the recent experience of comparable overseas agencies. Moving in this direction would fit with the Government's often-stated objectives for the new system of workplace regulation: fairness for employees, national competitiveness, and the productivity needs of businesses.[185] The Workplace Relations Minister has also spoken about the need to move away from the conflict-ridden approach of the past, and to promote greater levels of cooperation and consultation in the workplace.[186]

ACAS in the UK, and Ireland's LRC, have been successfully driving this kind of agenda for several years now. Along with FMCS Canada and FMCS USA, they have been at the forefront of an international trend described by Brown as 'third party intervention reconsidered'. As he observes, this has occurred in response to fundamental changes in the nature of work and employment relations globally, and he asks:

> Where does this leave third party intervention? Certainly, traditional dispute resolution is unlikely to regain the significance it had through much of the twentieth century. But that does not mean that the agencies responsible for third party intervention are becoming redundant. What appears to be happening is that they are discovering new roles, to meet the new needs of a more internationalised economy.[187]

In Australia, the concept of 'third party intervention' in workplace relations was much-maligned during the former Coalition Government's period of office (1996-2007); discussion of it was often preceded by the term 'unwarranted', as part of the Coalition's efforts to undermine the AIRC. The Rudd Government has also been concerned to distance itself from the past era of 'compulsory arbitration'.

Therefore, to advance the debate about developing a dispute prevention role for FWA, it may be necessary to move away from Brown's third party intervention terminology. In the modern Australian setting, perhaps 'new forms of tribunal involvement in promoting positive employment relationships and workplace cooperation' would carry greater appeal. Whatever language is chosen, a dispute prevention function would help ensure that FWA becomes an effective regulatory body that meets the needs of all stakeholders in the Government's new workplace relations system[188] - and assist the Government in achieving its workplace reform objectives.

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[185] See for example The Hon Julia Gillard MP, Minister for Employment and Workplace Relations, *Speech to the Fair Work Australia Summit*, Sydney, 29 April 2008; *Speech to the Australian Workers' Union Industry 2020 Lunch*, Melbourne, 8 August 2008; and 'Introducing Australia's New Workplace Relations System', *Speech to the National Press Club*, Canberra, 17 September 2008.

[186] See for example The Hon Julia Gillard MP, *Speech to the RSL and Services Clubs National Conference*, Tweed Heads, 22 July 2008.

[187] Brown, above n 1, at 451-452.

[188] FWA will be established under the substantive reform legislation that the Government plans to introduce into Parliament in late 2008. The Government intends some elements of the new system (such as changes to unfair dismissal laws, and the new collective bargaining framework) to come into operation from 1 July 2009; the rest (including FWA) will commence operation on 1 January 2010.

APPENDIX

Advisory, Conciliation and Arbitration Service (UK)
WORKPLACE PROJECTS

1. Summary

This Appendix examines in detail the nature and impact of workplace projects ('WPs') run by ACAS. WPs provide a tangible example of how ACAS attempts to *prevent* disputes in the workplace. As Stuart and Lucio demonstrate, WPs fit within the 'advisory and benchmarking'[189] system of employment relations regulation, which involves 'facilitating change through direct advice, the mobilisation of knowledge assets, and the propagation of new co-operative views of industrial relations.'[190]

2. Description of Workplace Projects

(a) Purpose

The purpose of WPs is 'to improve employment relations',[191] by providing 'customised help and support in the workplace'.[192] WPs are also intended 'to help to improve performance, business effectiveness and productivity'.[193] Dix and Oxenbridge describe the function of 'advisory projects' (as WPs were formerly known) as enabling 'workplaces to take a more proactive and strategic approach to preventing conflict.'[194]

(b) Format

WPs can involve the provision of 'advice, facilitation, training, or support on a particular work-related problem … to find an effective solution'.[195] They may involve 'the establishment of better communications, policies and procedures and new, more effective, bargaining and information and consultation arrangements.'[196] Dix and Oxenbridge state that of the different methods and techniques used in WPs, the 'two most commonly used methods are joint working groups and workshops'.[197]

As Meadows explains in her 2007 report on the economic impact of ACAS's services for the National Institute of Economic and Social Research, the 'focus of the projects is *consultancy work* aimed at helping organisations and their employees to set up systems and procedures

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[189] Mark Stuart and Miguel Martinez Lucio, *A Bridge over Troubled Water: The Role of the British Advisory, Conciliation and Arbitration Service (ACAS) in Facilitating Labour-Management Consultation in Public Sector Transformation*, Working Paper, ILR Collection, Cornell University, 2007, p 2.
[190] Stuart and Lucio, above n 189, p 25.
[191] ACAS, above n 92, p 8.
[192] ACAS, *Our Services: Business and Skills Solutions*, <http://www.acas.org.uk/index.aspx?articleid=2001> at 18 May 2008.
[193] ACAS, above n 92, p 14.
[194] Dix and Oxenbridge, above n 128, p 4.
[195] ACAS, above n 192.
[196] Meadows, above n 137, p 18.
[197] Dix and Oxenbridge, above n 128, p 17.

that improve relations in the workplace and reduce the potential for conflict.'[198] When providing WPs, ACAS advisers act as 'facilitator[s] to establish facts, clarify problems, and help to identify solutions in order to promote joint agreement. Advisers do not act as an arbiter, or decide on the merit of competing positions.'[199]

(c) Level of parties' involvement

Dix and Oxenbridge indicate that WPs necessitate the 'commitment and active, joint participation' of parties. They further describe the involvement of the parties as follows:[200]

> [T]op management and employee representatives … must jointly agree terms of reference for the project. Where a union is present, agreement is sought from the full time official; and where unions do not exist, the onus is on Acas advisers ensuring independent representation of employees through appropriate selection. Parties in the main tend to work together in the same room, unlike conciliation, and the process will often be carried out, not on neutral territory, but in the parties' own workplace.

3. Examples of Workplace Project activities

WPs can take a variety of forms depending upon the requirements of the parties. Dix and Oxenbridge's descriptions of the two main forms of WP activity – joint working groups, and workshops – are summarised below (the references to 'advisory projects' in this discussion are references to WPs).[201]

(a) Joint working groups

A feature of two-thirds of ACAS advisory projects, joint working groups involve meetings between 'Acas advisers and representatives of management and employees … at regular intervals over the problem resolution process.'[202] Through the joint working group, ACAS advisers may provide 'suggestions based on 'good practice', citing examples of initiatives introduced elsewhere, or clarifying concepts.'[203]

ACAS advisers 'play a crucial role in advising parties on the appropriate sequencing, dynamics and political sensitivities of the [joint working group] process.'[204] To this end, the advisers may conduct 'syndicate group exercises involving senior managers and employee representatives (who may have had minimal contact in the past) working together in mixed groups to solve problems.'[205] This has been identified as a popular activity which 'is especially valuable in identifying common areas of interest between the parties.'[206]

(b) Workshops

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[198] Meadows, above n 137, p 18 (emphasis added).
[199] Dix and Oxenbridge, above n 128, p 17.
[200] Dix and Oxenbridge, above n 128, p 5.
[201] Dix and Oxenbridge, above n 128, p 4 (footnote 5).
[202] Dix and Oxenbridge, above n 128, p 17.
[203] Dix and Oxenbridge, above n 128, p 18.
[204] Dix and Oxenbridge, above n 128, p 18.
[205] Dix and Oxenbridge, above n 128, p 18.
[206] Dix and Oxenbridge, above n 128, p 18; see also Stuart and Lucio, above n 189, p 18.

Workshops are of shorter duration than joint working groups, 'and may be one-off events, concluding with the development of action plans setting out ongoing objectives and changes.'[207]

4. Participants in WPs and issues covered

Organisations in both the private and public sectors have participated in WPs,[208] and it is estimated that '[t]he average workplace involved in workplace projects has 569 employees.'[209] ACAS's 2006/07 Annual Report provides a breakdown of the 219 WPs it carried out over that period, according to the subject of the WP and the region.[210] This shows that the two most popular subjects for WPs were 'improving relationships / problem-solving' and 'communications and consultation'; further details were as follows:

Subject	No of WPs
Discipline and Grievance	5
Turnover / absence management	7
Bullying and Harassment	0
Collective bargaining arrangements	12
Trade union recognition	22
Communications and consultation	53
Pay and reward systems	15
Grading arrangements	15
Management of change	14
Changes to pattern of work	5
Equal opportunities / work-life balance	4
Managing diversity	5
Improving relationships / problem-solving	62
Total	219

5. Effectiveness of Workplace Projects

(a) General customer satisfaction feedback

The 2006/07 ACAS Annual Report measured the success of WPs through 'independent customer feedback surveys to establish whether there [had] been an improvement' in one of the following areas: communications, day-to-day working, trust, employee morale, and fair treatment of employees. The surveys established that '70 per cent of our workplace projects reported improving employment relations'.[211]

Another form of measuring the success of the service is whether it attracts 'repeat customers'; Stuart and Lucio note in their study that 'the lead HR representatives [at two of the organisations involved] had a record of commissioning ACAS workplace advisory projects at previous organisations.'[212]

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[207] Dix and Oxenbridge, above n 128, p 17.
[208] ACAS, above n 92, p 14.
[209] Meadows, above n 137, p 50.
[210] ACAS, above n 92, pp 63-64.
[211] ACAS, above n 92, p 8.
[212] Stuart and Lucio, above n 189, p 16.

Dix and Oxenbridge note that 'case study data revealed how the parties, in most cases, linked improved organisational effectiveness to improvement in consultation and communication mechanisms.'[213] Further, customer surveys which assessed perceptions 'about the extent to which the organisation benefited from Acas assistance' were 'consistently positive'; and 86% of managers and 78% of employee representatives 'answer[ed] that the organisation had either benefited "a lot" or "a fair amount"'.[214]

(b) Impact of WPs for the parties

The tangible benefits which may be achieved for WP clients are listed on the ACAS website as follows:[215]

- improved profitability
- improved quality of goods and services
- lower levels of absenteeism
- fewer discipline cases
- fewer grievances
- avoiding redundancies.

According to Dix and Oxenbridge: '[t]he most common immediate achievements of advisory projects are the development and implementation of a new policy or procedure; or an agreement setting out joint proposals for change or an action plan'. Further: 'the Acas project may result in the development of an agreement which sets out the terms of a new workplace relationship,' and can also lead to 'a culture change within organisations, and build trust between management and employees and their representatives.'[216]

Dix and Oxenbridge illustrate that the training provided through WPs can teach employers and employees 'new methods of problem-solving and consensus decision-making which provide an alternative to traditional adversarial relations'.[217] The practical results of these changes include 'faster decision-making and negotiating processes, and more frequent, early consultation and problem resolution, leading to reduced numbers of formal disputes.'[218] Dix and Oxenbridge also cite customer surveys indicating that respondents' perceptions of workplace trust improved after ACAS intervention through WPs.[219]

(c) Perceptions of ACAS impartiality

Stuart and Lucio observe that the 'perceived objectivity' of ACAS 'was seen as one of the main reasons for, and benefits of, commissioning Acas as opposed to alternative third party organisations.'[220] They note that '[a]ll the trade union respondents [to an inquiry conducted by the authors] regarded ACAS as impartial, objective and independent.'[221] Dix and Oxenbridge note that 'managers and union representatives interviewed in advisory project case studies

[213] Dix and Oxenbridge, above n 128, p 21.
[214] Dix and Oxenbridge, above n 128, p 22.
[215] ACAS, above n 192.
[216] Dix and Oxenbridge, above n 128, p 19.
[217] Dix and Oxenbridge, above n 128, p 19.
[218] Dix and Oxenbridge, above n 128, p 20.
[219] Dix and Oxenbridge, above n 128, p 20.
[220] Stuart and Lucio, above n 189, p 17.
[221] Stuart and Lucio, above n 189, p 17.

often described – unprompted – how they valued advisers' ability to maintain a neutral and unbiased stance while at the same time showing an understanding of each party's concerns.'[222]

(d) WPs and partnership

Stuart and Lucio argue that ACAS, in addition to 'establishing (or reviving) effective forums for management-union consultation', also 'promote[s] a wider recognition of the legitimate different interests and role of unions and management'.[223] They suggest further that by 'facilitating engagement and co-operation (i.e. partnership) between management and trade union representatives', ACAS plays 'an important role in 'legitimating' attempts by management and unions to work together in partnership.'[224]

(e) Negative feedback

Dix and Oxenbridge note that the joint working group platform 'was viewed by the parties in some cases as time and resource intensive', although they observe further that 'this view was counterbalanced by the perceived benefits of the process of allowing parties to fully evaluate options, and generating commitment among all stakeholders'.[225] Stuart and Lucio indicate that resource limitations hampered the 'effectiveness of ACAS facilitation of new participation structures'; and where more than one workshop was held '[i]t was reported that the key issues were achieved during the first workshop, and there was less certainty over the value of subsequent sessions.'[226] Some parties in the Stuart and Lucio study also felt that the joint problem solving projects could have been 'disseminated to the wider staff … more systematically', and that this was an area where greater guidance was required from ACAS.[227]

(f) Case Studies

Many case studies, further demonstrating the effectiveness of WPs, are available on the ACAS website.[228]

6. Economic Impact

(a) Problems assessing economic impact of WPs

Dix and Oxenbridge suggest that the impact of initiatives like WPs is difficult to gauge statistically due to problems of causality and lack of sufficient data from employers, and because:

> ... the benefits flowing from changes to policies, practices, or relationships resulting from a project may only become evident once they have bedded in, and this may be some time after the project ends. Indeed, in some cases, certain performance indicators may actually worsen in the first instance, for

[222] Dix and Oxenbridge, above n 128, p 17.
[223] Stuart and Lucio, above n 189, p 24.
[224] Stuart and Lucio, above n 189, p 23.
[225] Dix and Oxenbridge, above n 128, p 18.
[226] Stuart and Lucio, above n 189, pp 20-21.
[227] Stuart and Lucio, above n 189, p 20.
[228] See for example: http://www.acas.org.uk/index.aspx?articleid=1580; four of these case studies are summarised in Forsyth and Howe, above n , pp 116-119.

> example where implementing change causes disruption to operations, or requires extensive workforce reskilling programmes.[229]

For this reason, they maintain that 'case studies offer a more appropriate method [of measuring WPs' impact], involving indepth discussions with parties'.[230]

Meadows' 2007 report for the National Institute of Economic and Social Research ('NIESR') assessed the monetary impact of various ACAS services (including WPs) on the UK economy.[231] However, the NIESR data is qualified by a caveat that 'evaluation of the impact of preventative work is generally difficult because of the challenge of establishing any link between the intervention and the outcome.'[232]

(b) Assessment of impact of WPs

Meadows' NIESR report evaluated the impact of ACAS WPs in 2005-06, encompassing both projects which were paid for by the parties, and others which were 'a continuation of collective conciliation cases after the resolution of the immediate dispute'.[233] The report attempted to determine the 'wider value over and above the value to the paying party (not least the value to the employees if the employer is paying)'.[234] The following table estimating the economic impact of the projects is extracted from page 49 of the report.[235]

[229] Dix and Oxenbridge, above n 128, p 19.
[230] Dix and Oxenbridge, above n 128, p 19.
[231] See Meadows, above n 137.
[232] Meadows, above n 137, p 49.
[233] Meadows, above n 137, p 49.
[234] Meadows, above n 137, p 49.
[235] See further Meadows, above n 137, pp 49-51 for discussion of the methodology by which these figures were calculated.

Table 6
Economic impact of Acas workplace projects

		Net economic impact
Impacts reported by those involved in projects		
	Improved productivity	£32,427,521
	Improved quality of goods or services	£36,398,237
	Fewer discipline cases	£ 784,059
	Fewer grievances	£ 241,589
	Lower absenteeism	£ 1,440,834
	Total	£71,292,240
	Cost to Acas of delivering service	£ 1,290,000
	Benefit/cost ratio	55.3