DESIGNING DISPUTE RESOLUTION SYSTEMS - LESSONS FROM WORKERS COMPENSATION AND MAGISTRATES COURTS (AUSTRALIA & NEW ZEALAND)

ABSTRACT

This paper looks at nearly two decades of work undertaken by the author in mediation system design across Australia and more recent innovations in Victoria's Magistrates Court. Comparisons will be made between the different types of disputes, which while different in subject matter have been found to require common design elements. Traps for system designers will be highlighted and the results of research conducted by the author presented.

Nerida Wallace is a Victorian solicitor and legal consultant with over 30 years in courts, government policy, law reform, & private dispute resolution schemes. Nerida is the principal of Transformation Management Services and provides strategic advice, issues management and systems analysis & evaluation to various private and public sector clients. She is co author of *Banker Customer – Resolving Banking Disputes*, (1992 Longman) and an author the 2000 Guide to Resolving Native Tittles Disputes used in Cape York and across Australia. She has also authored a range of privately commissioned research reports with her partner Michael Hall and some of these are available on her website www.transformation.com.au She has been a private and institutional mediator at various times during her career and has conducted mediation training course for the Law Institute of Victoria. She was nominated for a President's Award for General Excellence last year by that Institute. She is a current member of the Dispute Resolution Committee of the Magistrates Court of Victoria in her own capacity as an advisor to the Court.

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INTRODUCTION – SPOKEN VERSION

1. Dispute System Design is not about tinkering with various parts of a system and hoping to get remarkable results. It is about taking a view of the entire system; including the end-to-end life of a dispute; the stakeholders – regular and 'once-offa's interests and aspirations; and that hazy notion of justice; and then building a set of processes protocols and practices that working together and inevitably in tension are the constituents of a dispute system.

2. Is this a radical view? Perhaps not, for those in the business of systems thinking. When my firm Transformation Management Services began in the early 1990s dispute system design seemed to be limited to matching different types of disputes to dispute resolution forums – some of you might be familiar with Fisher's work on certain types of disputes requiring different forums and of course, there is some truth to that. There was also Nader's work, which set out how different types of disputes are resolved – some by self-help and then adjudication for the more serious. Importantly it looked at the idea of disputes moving through stages – a new concept in a field where conflict was to be avoided and to be treated as an immutable object that had to be 'finalised'.

3. My partner has a psychology background and for him immutability was ridiculous. Disputes like any other human behaviour are open to manipulation. Interventions could indeed be made that would elicit different and better behaviours. For me, with years of working in courts, ombudsman schemes, conciliation services and even ministerial offices, the type of the dispute irrelevant. The key was the status of the relationship between the parties or indeed if there was a relationship at all. This is familiar ground to all mediators.

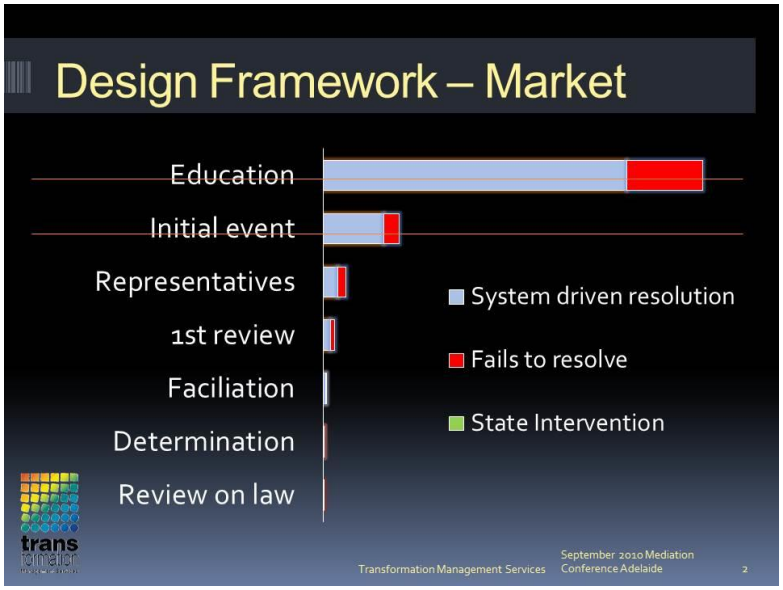
4. But there was more to it and the mediation movement made the discovery late in the 1990s. People could self-transform and they could be transformed in the course of a dispute process. Nevertheless, how would that happen? (I am pleased to say that before the term 'transformation' became the fad in mediation our company had been well established).

5. For us it was about assisting in the transformation and even driving that transformation. If disputes were human processes then surely the behavioural norms that existed in other disciplines such as economics could apply to dispute system design. The question was what could those drivers be?

6. For those concerned with the costs of legal systems and with justice, - subsequently our clients - the possibility of drivers was tantalising. Courts for them were simply uncontrollable cost centres. They compared their legal spends with other jurisdictions around the world and saw vast differences. How could their state be one of the lucky ones?

7. So what did we find out? We were in a unique position with the resources and capacity to explore. We had a variety of tools - consultation; systems and data analysis; sophisticated computer programming capacity and statistical expertise. We had offered to us great experimental laboratories – compensation funds that delivered a complete end to end costing model from complaint handling processes to high court cases and which could show the impact of different interventions in case costs, delays and legal outcomes. We had time. I want to share a synthesis of those decades of work for you today.

FRAMEWORK



8. I want to put up our first slide. This follows Nader's staged flow of cases and I found it useful in helping clients to think about dispute systems in a different way – rather than on a case-by-case basis or taking the immutable view. We needed people to understand that impacts at different times created changed outcomes. This chart did that. It represents to the total pool of disputes and the proportions that are resolved in different ways after moving through different stages. I won't talk today about reducing disputation rates that is another subject – but let's say that the bulk of disputes are resolved using education – I can give you examples of jurisdictions where community 'common' knowledge and the culture that arose with it was key to cutting disputation after years of government advertising and education programs. Others without this had many more disputes.

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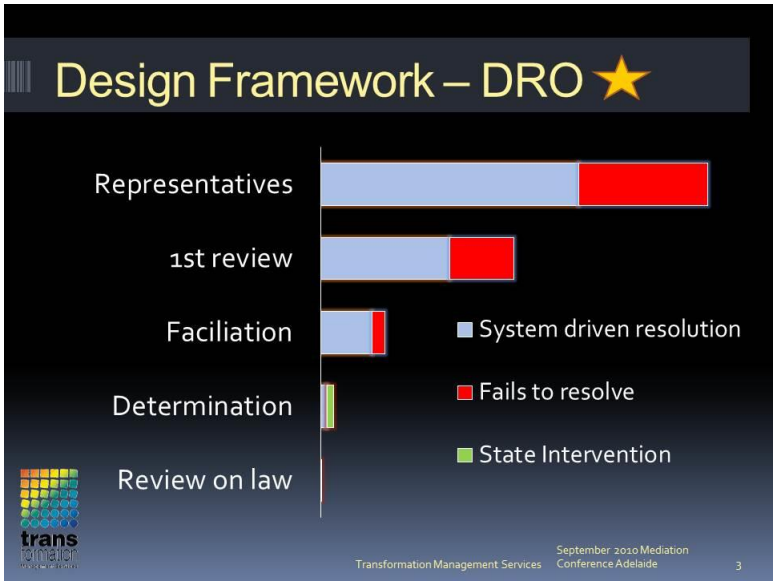
9. The 'initial event' is the cause of the dispute – the argument; the insurance claim decision or the breach of contract. We know that at that point and our research showed that personal contact by the other party would curtail later costly disputation. When I say system driven resolution, I means that the dispute system design has put in place processes that must be performed and that 'drive' resolution. At this point for instance, and which I will talk about in a minute, managed information exchange is crucial.

10. Representatives resolve large numbers of disputes – Nader identified them as friends lawyers and relatives. First review may be an early neutral evaluation, an appeal to an informed third party or even the finding of new information that resolves the matter. Parties at this stage still have a choice to accept or not accept these attempts at resolution.

11. Facilitation is the conciliation and mediation stage with which many of you will be familiar. Determination is an imposed outcome also called adjudication where the parties have no choice. Review on the law may seem to be irrelevant however, it must be considered. If for example, many cases are going to review. It means that there are issues with the decision-makers or other drivers such as new badly drawn legislation – remedied with better legislative drafting and policy-making; or activities by stakes seeking to change the law by precedent over a period to favour them. All of this must be examined.

12. In this chart, there is a line running down the side – time goes on and costs increase.

13. Therefore, if we look at our next slide – this is a well performing Dispute Resolution Organisation – so it has a star.



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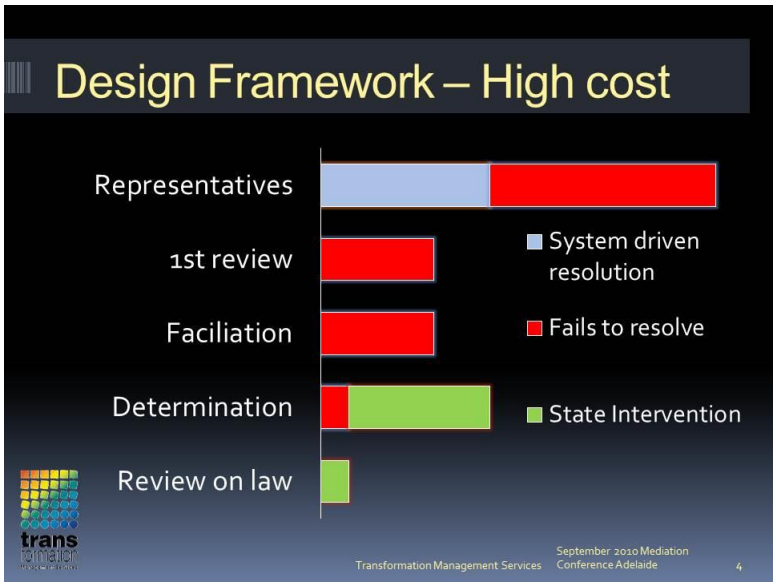
14. Why? Well here is a badly performing system.



15. You can see here that disputes do not resolve and in fact go through a number of stages attracting costs and delay. The state is required to apply resources to these disputes both in high levels of determinations and in more activity in the superior courts.

16. How does this spell out – in our extreme examples – a unit cost per dispute of $25,000 compared with $1500 – half of every dollar paid in compensation going in legal and medico-legal costs compared with 12 cents and as many as 52 expert opinions in a case compared with 2 or at most 3. I will not talk about delays except to say years rather than months and for the parties – coercion, disengagement and dissatisfaction from surveys compared with that simple statement of justice excellence – it was a fair thing.

17. So, how do we get a star?

DRIVERS

18. Our major finding is that certain drivers are present in better schemes – those that deliver less costly, timelier and just outcomes; and are not present where delay and costs predominate. Importantly, we find that all of these elements are necessary – the 'pick and choose' option is not an option.

19. These drivers can be characterised as falling into several groupings.

- Economic drivers - Judge Richard Posner described these as early as 1973 – that system participants will gravitate to finalisation points of optimum return if allowed –
- Behavioural drivers –what precipitates settlement – written up in our attached paper – commonly understood information, being heard, progressed aims, and tailored outcomes?
- Accountability drivers - Control (LW) Mgt capacity & control of resources (TMS Prof Scott) Screening & streaming (TMS Baar)

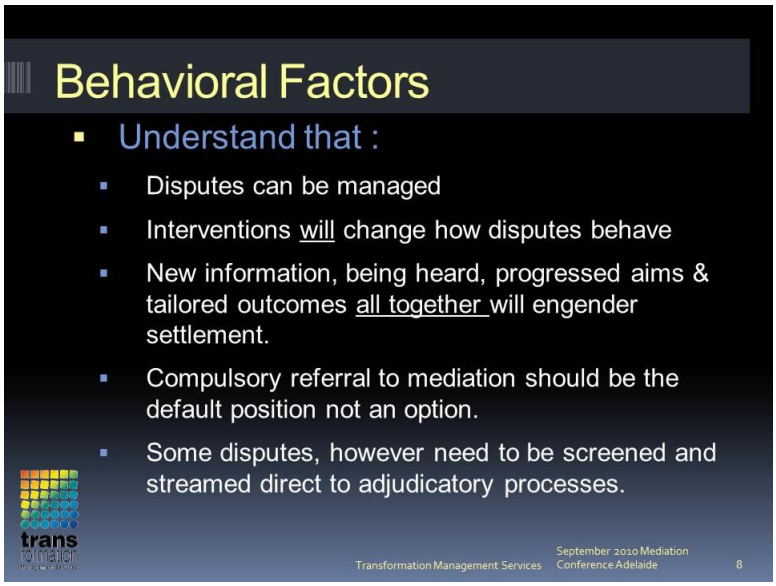
20. These elements are applicable to all jurisdictions. The role of the dispute system designer is to undertake the detailed case analysis and data analysis to pinpoint the localised and dominant 'drivers'.

WHAT WAS LEARNT

21. Our research findings from some of these studies for example taught us the following.

- Enforced information exchange is crucial.
- Facilitation – mediation, ENE - cuts court time and case complexity.
- The time to be heard by a person perceived to be in authority must be built in – representatives can play this role.
- Representatives if involved early, cut costs.
- Representatives if involved late, increase costs.
- Time expectations should be specific and will cut delay.

22. However, in terms of the three types of drivers, we learnt and got across to our clients a series of understandings that would help them shape their own dispute systems long after we left the stage.



23. I will never forget going to a conference and being besieged by a group of enthusiastic New Zealanders saying 'it worked, it worked, it worked'. Or meeting a muted policy advisor outside a board meeting and seeing his face light up – Oh you wrote that report – we are still using it and quoting back my own words in how it had changed the scheme and the experience for the people in it.

BEHAVIOURAL FACTORS

24. I will speak briefly about compulsory mediation. In some circles, this is still a revolutionary idea. Our research on various schemes showed that mediation conducted before the court process, whether compulsory or voluntary both clarified the issues and reduced the incidence of court activity (and total associated costs) An early example showed that legal costs were halved for those cases that went on to a court hearing.

25. Put simply compulsory mediation nets many more cases and more results like this than voluntary schemes. In voluntary schemes, take-up is universally low. Impacts on costs and delays are therefore minimal and these programs tend to flag and fail once evaluations show they are not dealing with the core issues.

26. My argument for compulsory conciliation as against those that say if not voluntary then predictably will fail is that this is simply not true. Once people get into mediation, it is not about how they got there, or their attitude towards the dispute. It is what happens once they are there. Moreover, for this audience I do not have to explain that. Suffice to say mediation works by changing people's view of the dispute through exposing them to new information and in the hands of skilled mediators opening the way for settlement.

27. As importantly, mediation offers parties the option to be 'heard'– and this more than anything else will enable parties to move forward. This works regardless of jurisdiction. Picking up the behavioural drivers here – systems must be designed so that these necessary things to get a resolution all come together at the earliest and cheapest time.

28. Our research also showed us that while the bulk of cases resolved in mediation others did not. These cases would be best served with fast tracking to hearing or to an expert panel.

29. For example, in **survey research** conducted in Victoria, we found that there were two groups within commercial litigation – those described as corporate counsel who disavowed meetings – many had already occurred - and wanted speedy determination of the dispute. Active business people in contrast wanted an opportunity to meet early so that they could negotiate an outcome face to face, preferably without the cost of a lawyer.

30. What was needed was a method of identifying these different cases at the door of the registry and streaming them to the best forum. It was not enough to fast track – it was important to continue to manage how the case evolved. That management had to be done by the court of the dispute resolution organization and it had to have the resources to do it. Similarly, if the process was compulsory, there had to be a means of enforcing the information exchange between the parties to ensure that the parties could fully participate in any compulsory process. It should not become a hurdle to the court door and an opportunity to 'cost harvest'.

31. Why are Intake Officers so important? Our own research shows that the collection and exchange of all relevant information is essential to achieving settlement. Parties can be brought together but only when exchange of all relevant information has occurred. Settlement then follows with competent mediation. At the base level, someone impartial has to make sure this happens.

32. For this, you need specialist resources in the court and this takes us to accountability.

    - Resources must be with those that are measured and that are accountable
    - Front end resources are more effective than expensive end-game resources
    - Intake officers; coordination offices; screening and streaming groups; information exchange technology.

ACCOUNTABILITY FACTORS

33. We did an analysis of a civil caseload from a magistrate's court that showed a direct correlation between delay and available resources. Less delay was delivered if more resources per magistrate were made available.

34. In another state where traditional court registry processes and a specialist court were replaced with an independent Commission led by a judge and with budgetary control - the savings were impressive and remain so. That Commission has a strong gatekeeper managing information flows and screening and streaming cases variously to conciliation, arbitration, medical review and adjudication. Delays were reduced and annual satisfaction surveys show workers and other stakeholders accept the model. Therefore, you can see the accountability drivers are aligned in this model.

35. Our research also shows that costs scales that reward what has been called 'front loading' and mediation cooperation do deliver higher settlement rates simply because the mediation is conducted with all the relevant information, which some of parties may be seeing for the first time.

36. More behavioural factors

    - Published timelines are necessary to manage the expectations and workload priorities
    - Imminent hearing dates or 'critical events' are important to encourage settlements both on and immediately after the day of the mediation.

37. A further element has to do with explaining the processes and consequences of non-settlement - another role undertaken by the Intake Officer. Parties must be very clear on this. It is important to underpin this advice with swiftly arranged court hearings and in doing so to understand that an imminent court hearing deadline does assist in the breaking deadlocks. As we found with Broadmeadows the mediation process will continue even after it has officially finished on the day. A distant hearing date, however will allow time for new incidents, more legal fees, backlogs and complexity.

ECONOMIC FACTORS

38. Our last theme relates to the economic incentives and disincentives that populate court rules. We consider that a systematic approach has to be taken to designing rules with Posner's warning in mind.

    - Markets created for legal costs will attract more legal activity so…
    - Cost incentives are necessary to bring forward parties' preparation work and engagement in informed preliminary discussions.
    - Cost consequences are necessary to obtain the best level of cooperation for mediation and to fulfill 'proportionality' requirements, i.e. appropriate court resources aligned with the value of the dispute to the community.

39. Cost disincentives to failing to cooperate in mediation are useful. These may include:

    - advice to the court from the mediator on the 'level of cooperation' of the parties in mediation which may have costs consequences; and, or
    - Offer of Compromise provisions that enable parties to lodge offers based on the mediator's suggested solution.

40. Our most recent example where some of these approaches were used is the Victorian Magistrates Court compulsory mediation project for civil disputes under $10,000 – the 2007 Broadmeadows pilot. A key element was changing the available costs scales between the court hearing track in the court - pre-hearing conferences and those available for mediations.

BROADMEADOWS PILOT

41. The Broad meadows pilot led and championed by Deputy Chief Magistrate Peter Lauritsen is now a departmental programme. At the time of the pilot, disputes of amounts up $10,000 represented 60% of all cases issued in Victoria. The pilot therefore had the potential to affect court time significantly. In addition, the amount claimed was low enough to justify a proportional response.

42. As at 1 April 2010, 546 proceedings had been referred to mediation. The results so far are:

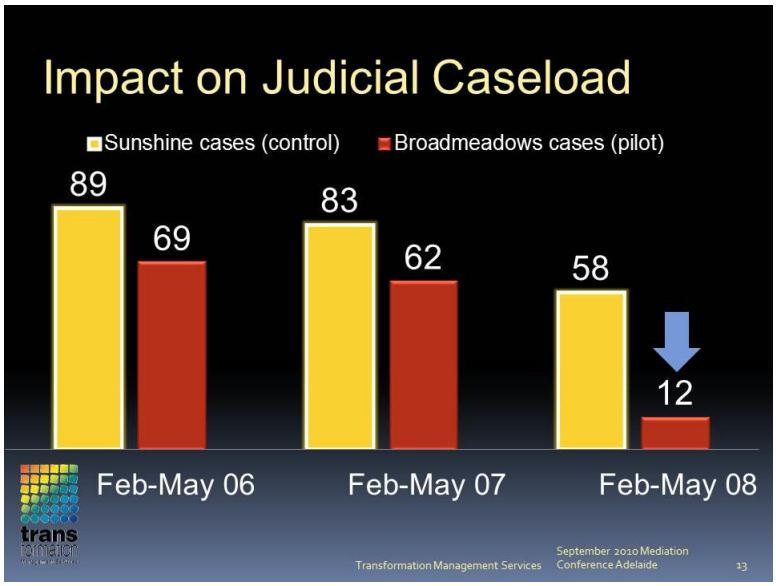
    - 377 settled at or prior to the mediation;
    - 85 were not settled and listed for hearing;
    - 50 were awaiting a mediation;

43. Of the completed matters, the settlement rate was 82%.

44. Broadmeadows court has several magistrates, one of the few judicial registrars in the state and about 4 or 5 courtrooms together with a history of innovation. The coordinating magistrate and the registrar were fully committed to the pilot and were involved in its development.

45. The program is slowly rolling out across Victoria and is now in Sunshine, Werribee and Latrobe Valley courts with plans for other suburban centres.

46. The 2008 evaluation of the program, showed a dramatic reduction in magistrate's time and that of judicial registrars. The current figures still reflect this. Most if not all matters are resolved within the strict timelines.



47. The first 100 cases from the pilot at Broadmeadows; those finalised between 1 November 2007 to end of May 2008 were the subject of formal evaluation. These mediations arose from the 1400 cases issued in that time that were for claims of up to 10,000. We found resolution rates of 86% - 32 % before mediation, 42% at mediation with a further 12% resolving in the period immediately thereafter.

48. Of the cases going on to hearing, the bulk settled at the court door and were run by one particular legal firm.

49. 86% of the resolved cases were resolved within 2 months of lodgement of Notice of Defence with most completed within three months.

50. Data analysis showed that:

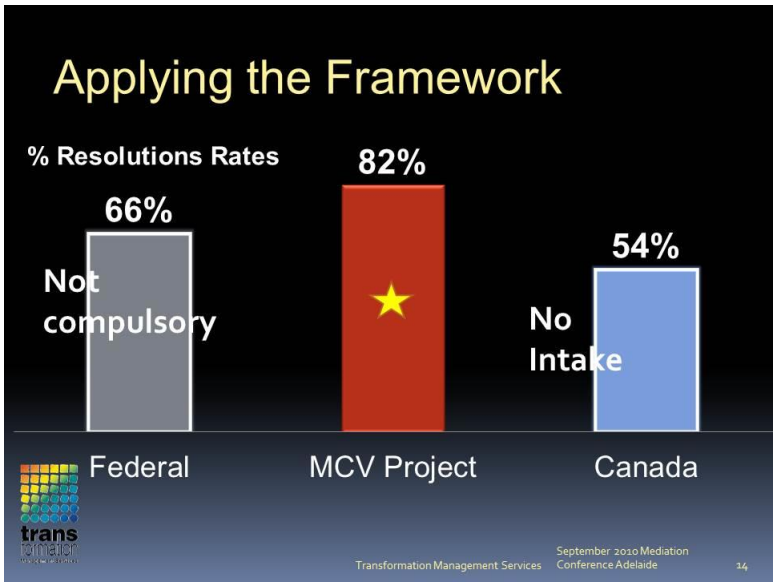
- The Pilot has reduced the workload for magistrates and the judicial registrar for both open hearings and arbitrations.
- At Broadmeadows Court, mediation saved the time of one half a day per week of a magistrate and one half a day a week of a judicial registrar.
- Sunshine with a similar caseload and no mediation pilot had no such reduction.
- Case settlement times from Notice of Defense filing to mediation fell well within DSCV expected timelines - that is within 2 months. Around half of matters were resolved one month or more in advance of the control court – at that time Sunshine Court.

51. Perceptions of justice were also evaluated. This was important because the parties did not have a choice about whether to go to mediation. In particular, the pilot had to meet expectations that mediators would be appropriately qualified and competent and that due process would be meticulously followed. Parties were routinely asked to complete survey forms after mediation. From a small sample of responses, we found that satisfaction levels were well in line with other DSCV mediation services at around 88%. That is that 88% of those responding found the mediation service helpful or very helpful.

52. We found that in the main, the Broadmeadows court-annexed mediation pilot was a suitable replacement for 'usual court practice' and was both effective and efficient.

53. In looking at why the programme was and is successful for today's presentation, we sought to apply our framework.

COMPARISON WITH LIKE PROGRAMMES



54. The outcomes of the Broadmeadows pilot program compare very favourably with other programs. In Canada, in British Columbia, the court concerns for disputes between $5000 and $25,000 were with delay, access to Justice and improving settlement rates above 50%. They wanted to ensure that court resources were not wasted and that the principle of proportionality applied. Their pilot studied 31 cases, finding that these objectives had been met but with mediations taking twice as long as 'settlement conferences', similar to our prehearing conferences. The more significant finding for them was that subsequent trial time was cut by half. The Canadian findings tally with our research in Australian workers compensation that shows that mediation reduces both the frequency of later court hearings and hearing time.

SLIDE

55. All of these systems have competent mediators; legal representatives; and mediations conducted in the 'shadow of the court', the latter presumably influencing a higher settlement rate due to the borrowed authoritative status of the mediators. The graph shows that Canadian settlement rates were 54% compared with our 80% plus ranges.

56. In Canada, mediations were preceded by the lodgement of certificates of readiness and then scheduling by a court registrar. This is a traditional court process. Parties' actions are managed by regulation not officials. The more flexible approach used at Broadmeadows added a relatively high-level official with discretion to intervene. Of course, this is more expensive in terms of registry resourcing.

57. Without being too definitive, because these systems are not directly comparable, one differentiating element for higher settlement seems to be the presence of an Intake Officer.

58. You can also see on the graph the outcomes from the latest report of the Federal Magistrates Court in Australia for their general federal law jurisdiction. That report outlines in more detail than in this graph the results over the past few years and reports an increase in settlements to the level shown. This may coincide with the reported appointment of regional dispute resolution coordinators. I am not sure. Either way, their report shows a focus of court resources on dispute resolution. I will leave those in the room with more knowledge of the federal system to speculate on why the settlement rate is relatively low. The point is that there will be an explanation for the difference and I hope today that I have provided you with an approach to finding out what that explanation might be.

59. I want to leave you with this wonderful poster created here in Adelaide and I have it framed in my office. It reminds us constantly whom we are working for and why this work is important and constantly challenging.

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