Best Practice Research Program
Policy Research Paper

Preventing Disputes:
Best Practice in Workers Compensation Dispute Resolution

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1. Introduction

The Victorian WorkCover Authority is undertaking a review of "world best practice" while making fundamental improvements to the efficiency and effectiveness of workers compensation in Victoria.

For this review, the Authority engaged the services of The Boston Consulting Group (BCG) late in 1992, to examine aspects of the Commission's activities. The BCG reports underpinned the reforms encapsulated through the introduction of WorkCover. This project follows on the work undertaken by BCG.

As part of this project, the elements of dispute resolution under the Victorian WorkCare scheme were examined and compared to experiences in NSW, the United States and Canada. Alternatives to formal tribunal dispute resolution were analysed and features identified which, through their contribution to return to work outcomes and the management of costs, could be described as meeting the standard of **best practice** for a workers' compensation system.

2. Terms of Reference

The terms of reference for this project were to:

- Analyse caseflow processes under the WorkCare scheme
- Compare Victoria with best practice models in Australia and overseas
- Develop a model for dispute resolution in Victoria which:
  - is cost effective and efficient against best practice standards
  - is demonstrably fair
  - will quickly return workers to satisfactory employment
  - uses medical evidence effectively rather than wastefully
  - ensures equitable and efficient representation of the worker.

During the term of the project, the 1992 changes to the Accident Compensation Act were introduced and consequent alterations to the workers compensation system in Victoria occurred. Facets of the analysis of other jurisdictions undertaken in this project were able to inform the administrative review that has resulted in the new WorkCover scheme.

The new WorkCover Conciliation Service and WorkCover Medical Panels were introduced on 1 December 1992 and incorporate several key features that are reported on here, including alternative dispute resolution processes.

In line with the changes to the Act and the introduction of the new scheme, the second term of reference for this project was addressed through an analysis of overseas and Australian models and identification of best

practice procedures and performance standards.

3. Pre - 1993 Workers Compensation Dispute Resolution in Victoria

Work injury compensation before 1993 came under 'WorkCare'. This was a comprehensive work injury compensation system managed by the State. It was characterised by strong Government control, financial support for workers throughout the assessment and claims process and a separate but linked rehabilitation system, independent of employers.

Dispute resolution was typified by a move away from the court system to a tiered system of specialist tribunals that supplemented but did not fully replace the court proceedings.

The objectives of the WorkCare dispute resolution system were to provide a just, fair, economical and quick review mechanism. The system that was devised to implement these objectives had the features of an investigative rather than an adversarial process and was sensitive to the problems faced by workers. Additional objectives were set that the system build a sound and credible reputation.

Dispute resolution for workers compensation cases could involve three separate bodies.

The first body was the Accident Compensation Commission Operations Division (Commission Officers) which resolved levy disputes and appeals by employers against decisions made by `claims agents' or insurers charged with managing claims for the Accident Compensation Commission. The second body heard appeals against claims agents' decisions, but only those made by workers. This body, called the WorkCare Appeals Board (WAB), was staffed by full-time and part-time 'members' who conducted hearings and made determinations.

The third body was the Accident Compensation Tribunal (ACT). It was staffed by judges and registry staff and operated similarly to a court. The Tribunal formally heard cases on appeal from the WorkCare Appeals Board and made decisions on the facts and the law. Appeals against these decisions could be made to the Supreme Court of Victoria. Parallel common law actions alleging negligence against the employer and seeking lump sum compensation were also available in the County Court of Victoria. A more detailed description of the caseflow procedures is given in Attachment A.

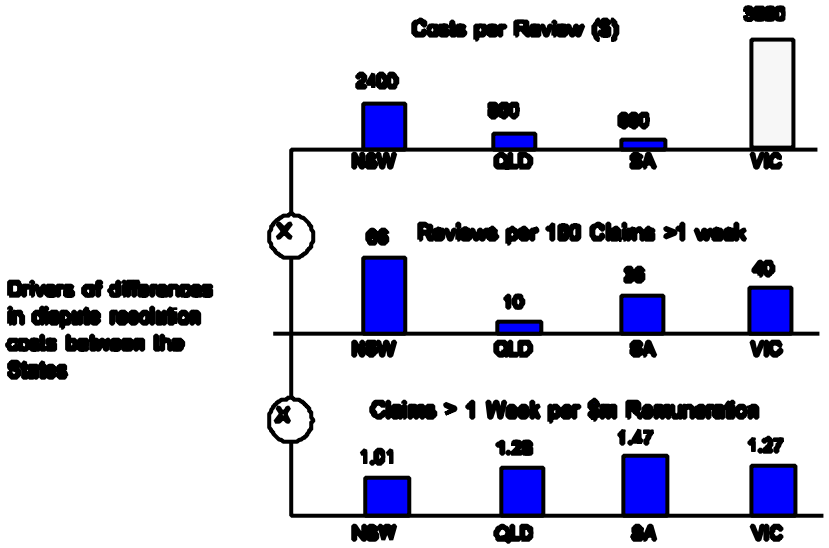
3.1 Review of Dispute Management under the WorkCare System

In a comprehensive examination of the efficiency of dispute resolution systems in both Victoria and NSW, Boston Consulting Group found that despite similar case outcomes there were significant cost disparities between the Victoria and New South Wales systems:

- legal costs[1] in Victoria were more than twice as high as those in New South Wales.
- the costs in appeals against Victorian claim decisions were almost 60% higher in New South Wales and several times higher than in Queensland or South Australia.
- workers remained on benefits in Victoria on average approximately four times longer than their counterparts in New South Wales
- disposals per member of the Compensation Court in New South Wales averaged 580 per annum while the Accident Compensation Tribunal in Victoria averaged only 370 per member per annum.

Figure1

Victoria's high unit cost per dispute placed WorkCare out of step with other States



Source: Boston Consulting Group,1992

The BCG study concluded that;

> `Victoria's legal costs are clearly out of line with other states and changes to the way that legal costs are effectively underwritten throughout the dispute resolution process and the efficacy of claimants remaining on benefits pending appeal outcomes should be considered.'

(See also figure 2)

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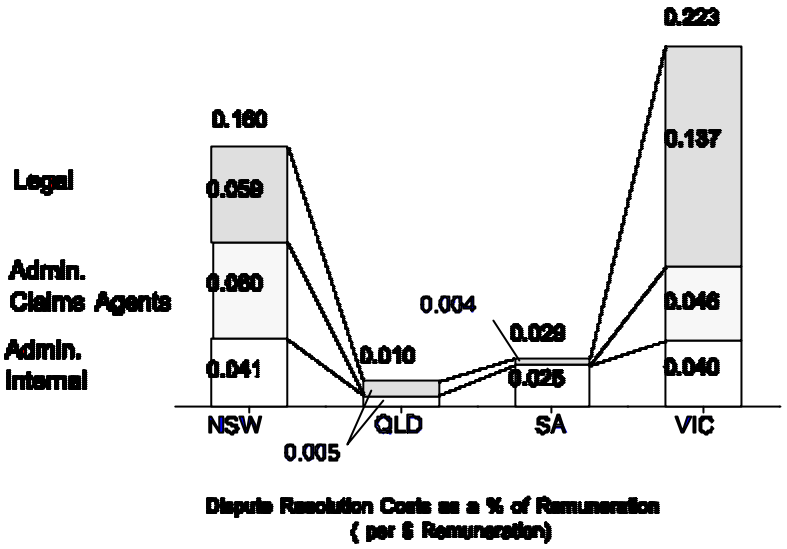
1 This figure does not include legal costs paid by the ACC in common law actions.

Figure 2

Legal and Medical costs in Victoria accounted for a much higher proportion of the WorkCare dollar than in other States



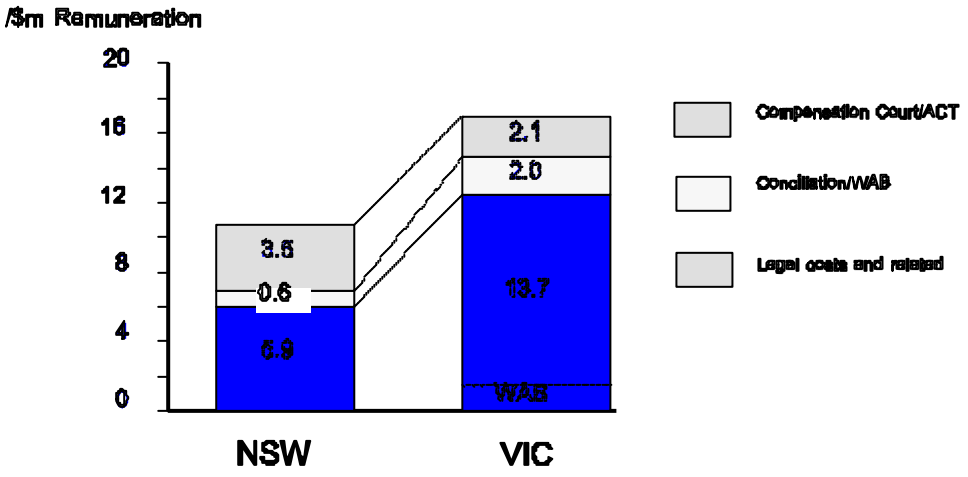
Source: Boston Consulting Group, 1992

BCG further recommended that a close investigation of the dispute resolution process should be conducted and that the New South Wales system be considered for adoption in Victoria.

Figure 3

While BCG directed attention to the cost of the dispute resolution system,

All the higher cost of Dispute Resolution in Victoria was due to Legal Costs



Source: Boston Consulting Group (from ACC WorkCover data), 1992

it was also clear that there were a number of issues relating to its

effectiveness. These needed to be examined and lessons learned both from the environment in Victoria, from overseas and other Australian schemes.

The most concerning of the BCG findings was the length of time workers stayed away from work after injury in comparison with New South Wales. This presaged a number of undesirable consequences including gradual de-skilling of the injured workforce, breakdown of the employer-employee relationship, and strains on the rehabilitation dollar. It was evident that the delay in return to work in Victoria was due in part to its different dispute resolution system. Specifically in Victoria, there was concern that the system could do little to prevent disputes and had little effective control over their management. Control of the system seemed to rest wholly with agents.

Prior to identifying best practice techniques a detailed analysis was undertaken of the management of disputes under the pre-1993, WorkCare system against its stated objectives. The operations of the system are described in Attachment B with a detailed analysis of some problems that were evident. The principal conclusions from this analysis are reported here.

3.2 Principal conclusions

The pre-1993 dispute resolution process failed to achieve its objectives because:

- Parties were not brought together at an early stage in the dispute. The first forum where all parties were required to attend was the Accident Compensation Tribunal. The Tribunal may not have heard a dispute until after a delay of some nine to ten months from the original claim decision.

- Adversarial positions were established from the outset by requiring parties to obtain expensive evidence to prove their case and by giving them time to take entrenched positions. The worker had no opportunity to go back to the Claims Agent to review the decision with further information but was immediately forced into a formal appeals process.

- All parties did not have a fair opportunity to appear and to present information at all stages of the review process. The WorkCare Appeals Board hearings restricted employers and claims agents from putting their cases to the same extent as workers.

- Workers took the opportunity to maximise benefits under the scheme and appealed routinely, regardless of likely outcome. This behaviour was reinforced due to a lack of clear precedents that may have deterred inappropriate appeals, but rather encouraged them. Both WAB and the Accident Compensation Tribunal were perceived to base decisions on minor and unexpected technical issues rather than on substantive principles. Coupled with annual results showing a substantial majority of reversals of claims

agents decisions, this led to an employer perception of bias in favour of the worker.

- X System users were not held accountable for their costs and ultimately the total costs of disputes were born by employers through the WorkCare levy.

- X Use of medical services was not controlled, allowing some claimants to 'shop' for supportive medical opinions. Workers' legal and medical expenses were met by the Commission according to scale costs but the frequency of services was not restrained.

- X Early inclusion of expensive legal processes encouraged overcharging. Lawyers were paid fees to prepare appeal applications and legal cost scales were used although non-qualified law firm clerks acted in a representative capacity at WAB hearings.

- X Medical Panels operated as effective umpires in differences of medical opinion. However, referrals to Medical Panels could only be made by WorkCare Appeals Board referees and by Accident Compensation Tribunal Members. Effectively referrals were only made after a hearing and after multiple doctors were already involved. There was no opportunity to use the opinion early in the dispute and as a preventive mechanism to avoid unnecessary doctor opinion.

Overall the system did not afford an opportunity for an early exchange of information or the application of early expert opinion. These factors would have removed the causes of many disputes. Parties were forced into an adversarial process in which information was used selectively and at different times in the process to protect tactical positions. What is more important, there was little scope for raising the standard of initial decisions made by claims agents and accordingly preventing disputes. The cost incentives to appeal masked poor decision-making and ensured that the standard of claims management across the industry received inadequate attention.

4. Analysis of Dispute Resolution Systems

In searching for solutions to the problems faced by the pre-1993 Victorian scheme, workers' compensation systems in other jurisdictions were examined in detail. Many overseas and local schemes have adopted informal dispute resolution processes. However, there was concern that any new approach adopted in Victoria should both meet a need to reduce costs and be equitable yet deliver a service that sufficiently addressed the task of returning injured workers to work.

Traditional court processes do not cater to these needs particularly well. They deal with disputes in two ways:

- The bulk of cases are settled before the court hearing through the actions of expensive agents and by negotiation, or
- Cases heard formally are dealt with by judges and referees who impose decisions.

The court managed process is characterised by lack of involvement by the key parties, the employer and the employee. There is little scope to consider the existing relationship and the parties commonly complain that they have not been properly heard. In all cases the resolution imposed is within the confines of the law, leaving little latitude to evolve novel solutions that would better meet the real needs of the parties.

While cost is high on the list of reasons for changing systems, the international experience is that court processes are not the most appropriate mechanism for addressing the problems of workers compensation. Workers' compensation schemes worldwide are now turning to **Alternative Dispute Resolution (ADR)** mechanisms for reducing litigation and its associated costs. (Also called Informal Dispute Resolution (IDR) in USA workers' compensation literature.)

4.1 Alternative Dispute Resolution Systems

ADR is a *process* for helping people resolve disputes. People can use ADR techniques to help when they are unable to solve problems by themselves, yet unlike a court, they retain control of the process and the eventual outcome of the dispute.

In ADR, a neutral third person brings the parties to a solution, using a variety of techniques and strategies. These techniques always include exchange of information and may include conferences with all parties. The third person, often called a conciliator or mediator, has several tasks:

- Ensuring that all parties have a common set of information.
- Calling for more information if this is needed and identifying the information that is relevant to resolving the dispute.
- Ensuring that frustrations or emotions surrounding the dispute are aired and seen as legitimate. (Many people in dispute want their side heard and want the other party to truly understand the problems the dispute has caused.)

- Uncovering what each party wants. (These wants may be quite different from what is initially expressed.)
- Suggesting solutions to resolve the dispute. (These are usually identified from experience gathered in solving similar disputes.)

Courts established the formal hearing procedures they now use before much of the technology available today was developed. ADR processes in contrast, tend to less formality than a court and much of the work in exchanging information is carried out by phone or facsimile. Face to face meetings are only used when necessary. The common techniques include:

- Telephone negotiations and telephone conferences
- File reviews,
- Discussions and interviews with the various parties
- Letters suggesting solutions.
- Work-site visits
- Conciliation conferences

ADR processes apply best where the parties are not strangers or where they have an ongoing relationship. This is because each person knows the other's communication habits, and will generally have an interest in continuing the relationship. Their vested interests will mean that they will be more likely to adhere to an agreed outcome. Where parties are strangers there is no such incentive and often the outcomes have to be enforced.

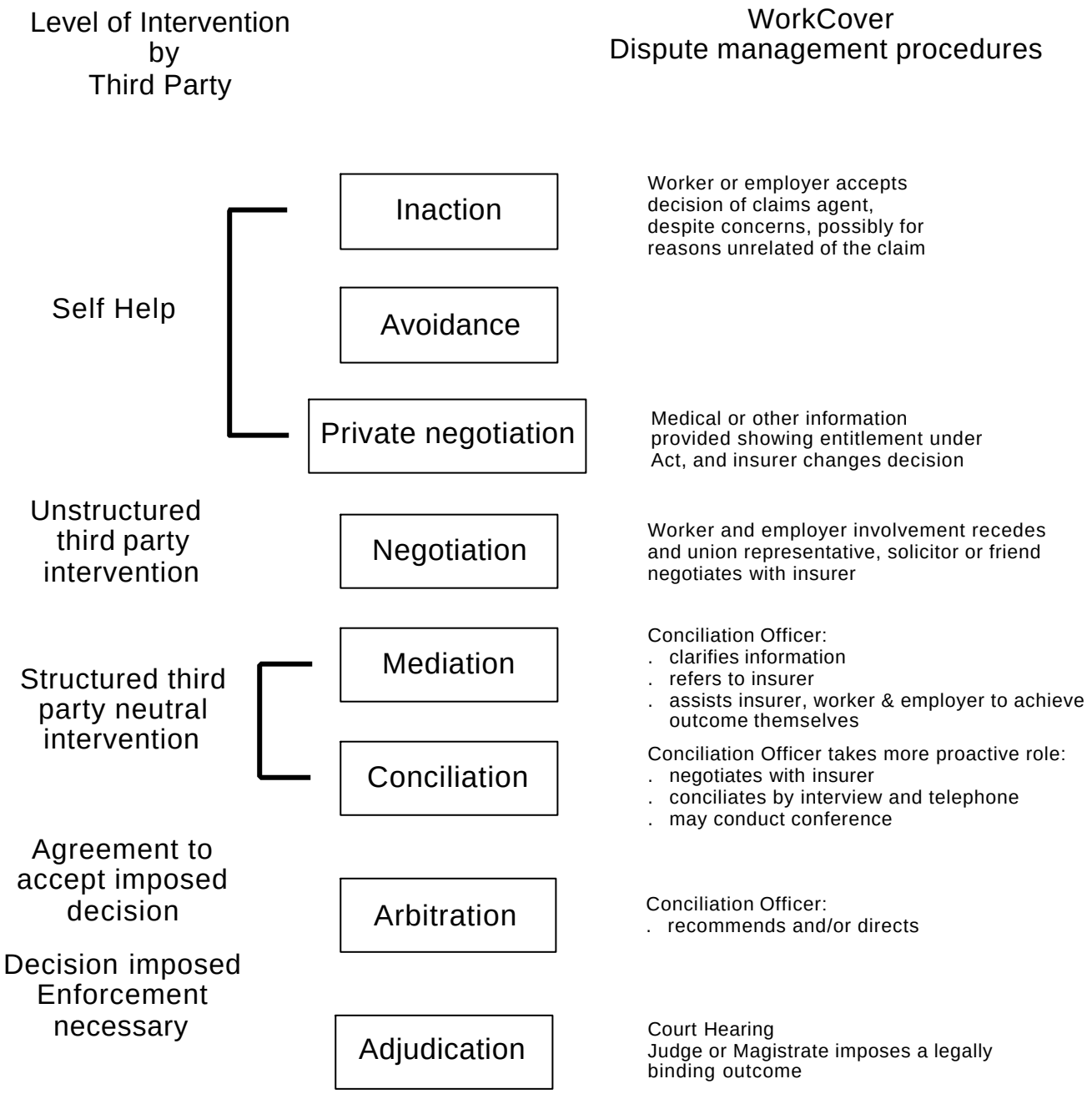
ADR experience shows that the earlier a dispute is addressed within its history, the less likely it is to need complex application of the various techniques. Accordingly, older disputes as well as disputes where parties are strangers, can be better dealt with by a court or tribunal system that imposes and enforces outcomes.

There is sometimes confusion over the meaning of the terms used when discussing ADR. Mediation and conciliation are often used interchangeably, but they are not equivalent. The confusion is compounded because the different forms of ADR are used at different times in the management of the resolution process. A detailed description of the terms used in ADR is given at Attachment C.

The Victorian WorkCover Conciliation Service has access to the entire range of ADR mechanisms. As Conciliation Officers can impose an outcome in circumstances of unreasonable behaviour by one party, the Conciliation Service model may be described as a 'med-arb' type. The fact that outcomes are almost never imposed demonstrates the power of the conciliation aspects of ADR to resolve even the most difficult of disputes. (see figure 9.)

Figure 4

Dispute managment terms used in ADR, Court and Tribunal processes



No matter which system is used to resolve disputes, the major need is to return workers to work quickly. Administrative review, conciliation, and mediation processes provide much greater flexibility in achieving this outcome. They give employers, doctors, insurers and workers a much more accessible forum to manage the impact of injury and to find satisfactory alternative work if this is necessary.

4.2 Overseas Workers Compensation Schemes

4.2.1 Findings from the United States

As early as 1981, over 27 states in the USA had introduced ADR schemes and most states now have some form of ADR. In contrast to the pre-1993 Victorian system, few schemes meet workers' legal costs automatically or continue benefits during the appeal process.

Table A reports the rate of use of alternatives to judicial dispute resolution, in each of a number of jurisdictions within the United States. The resolution rate of cases outside court or tribunal processes is a useful measure to compare the overall costs of essentially different workers' compensation dispute resolution systems. Judicial or quasi-judicial processes are the most expensive method of resolving disputes, mainly because of the cost of judges and lawyer advocates. Administrative review of the case or intervention by court officials to promote settlement reduces overall costs substantially.[2] Of course not all disputes can be kept away from the courts. In any system, some disputes will always require an imposed decision. However, most disputes can be diverted from the courts through careful and appropriate intervention, especially early in the life of the dispute.

It is clear from overseas experience, that schemes which use administrative review and ADR processes at the early stages are the most effective at reducing costs and delay. Mediation schemes are also effective in settling disputes that are already in court. The particularly successful schemes are those where treating doctors play a much greater role and where relevant information is exchanged between the parties as a first step. Those that are not as successful are characterised by a proliferation of expert witnesses debating around uncertain medical standards.

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[2] The most recent survey of costs in Victorian courts was conducted for cases completed in 1990. This showed that in personal injury hearings, the average *private* cost per side was $11,500. Cases negotiated and settled prior to hearing averaged $3,000 per side. See Williams P L, Williams R Goldsmith A, and Browne P, *The Cost of Civil Litigation Before Intermediate Courts in Australia*, The Australian Institute of Judicial Administration Inc, 1992 p33.

Table A: Percentage of disputed cases resolved outside the traditional court system by state and a description of the dispute resolution mechanism used.

Location	Cases resolved without court intervention	Dispute resolution mechanism used
Washington	**96%** (1989/9)	Appeals are granted through review process conducted by the Board of Industrial Insurance Appeals. In all, 96% of cases are settled or resolved before court. The remaining 4% are assigned to judge-mediators. The settlement rate in mediation is 57% (1990) Workers are required to first protest decisions back to the equivalent of the claims agent. Here decisions are reviewed internally and either reaffirmed or reversed. The worker may then appeal within 60 days to the Board. There is also a process by which the claims agent can `reassume' a claim and reconsider it again. This occurs in 25% of cases and 66% of these are resolved often by `agreed examination' where the worker is re-examined by a physician mutually acceptable to both parties. Parties usually feel honour bound to accept decisions, even if they are not binding. Appeals are to mediation. The mediation sessions are usually conducted by telephone and last 20 to 30 minutes. Often more than one session is needed. Recesses are called while parties gather further information. The settlement rate is high but the average time to settlement is 22 weeks.
Oregon	**88%** (1989- possibly higher following 1990 reforms)	Treating practitioner assessments are used as the basis for Determination Orders, issued by independent evaluators employed by the state agency, to set individual worker entitlements. Parties are advised of what should be paid and when. Insurers are expected to comply and are monitored. Appeals are to a referee for a de-novo review. Reforms in 1990 allowed no new medical evidence on appeal and medical guidelines were further clarified to obtain parity between evaluators and referees. Payments previously made up to appeal were stayed pending appeal.
Colorado	**small %**	A mediation unit provides *voluntary* mediation and mandatory mediation according to the case type. The settlement rate is 76% in voluntary mediation and 62.5% in mandatory mediation. There is an overall settlement rate of 26.5 % before mediation. (Jan 1991- Jan 1992)
Florida	**small %**	A general Mediation Master is attached to the Workers Compensation Court and conducts a *voluntary* process. 1991
Massachusetts	**80%** (1992)	Most cases go to conciliation or are settled soon after. Weekly payment disputes achieve 60% settlements rate if conciliated and 30% otherwise. Accepted liability cases with disputes about medical fees and other ancillary matters achieve 90% settlement rate if conciliated and 30% otherwise.

Location	Cases resolved without court intervention	Dispute resolution mechanism used
Connecticut	**`vast majority'**	Administrative process (1989)
Texas [3]	**86%** (1986)	The Industrial Accident Board administratively review files. Review settles 31% of cases. Awards are made and if not by mutual consent, short pre-hearings are scheduled. A further 9% are settled before the hearing date. The pre-hearing conference hears 60% and settles 49% of cases. If not resolved, cases go to the full board. The board votes to uphold or amend the pre-hearing recommendation. Only 3% of recommendations are amended. If the parties still do not consent then the appeal goes to a civil court before a jury. While 8% file, only 1% actually go to trial. Treating doctors reports are used in 70% of all claims and single expert medical reports are used in only 28% of claims. Note; Lawyer advocates are involved in the pre-hearing process and as these hearings only last some 20 minutes and 17 pre-hearing examiners handle some 40,000 cases per year, it is unlikely that proper mediation is attempted. Lawyer advocates negotiate most claims and are paid on a contingency fee basis. These are some of the highest rates in the country. A 1989 Workers' Compensation Research Institute (WCRI) study found medical costs escalating and rapid settlement times despite the high legal involvement.
Wisconsin	**82%**	The Division of Workers Compensation administratively monitors all claims and conducts Pre-hearing Conferences in designated circumstances. Eight to ten months later an administrative law judge conducts a formal hearing with lawyer advocates. Appeal `on the papers' is available to the Wisconsin Labour & Industry Review Commission. Lawyer advocates receive 20% of the award if the case goes to court and the worker wins. They receive nothing if the amount is not more than offered by the insurer. Update - November 1992. Data on percentage of payroll spent on workers' compensation insurance show that Wisconsin is 22% lower than that of the median state (47 states) and 31% below the national average. This is despite the fact that its benefits are equivalent to other states.
New Jersey	**0%**	Applications for adjudication are filed with the courts in all claims. Some 8% are settled 8 months later at pre-trial hearing with the remainder filing settlements for approval or entering a full hearing at the court door some nine months later. Duelling experts are used in 90% of cases with multiple pairs being involved in 30% of cases.

[3] The Workers Compensation Research Institute of the USA has developed benchmarks for three very different states, Texas, Wisconsin and New Jersey. Victoria, pre-1993, was most similar to New Jersey.

4.2.2 Reducing traditional lawyer involvement

While most cases are kept out of the courts, many US workers' compensation systems have not successfully kept traditional adversarial legal representation out of the ADR processes. They are however recognised by the WCRI as the second major source of cost.

In examining the US schemes that are more successful in reducing the use of lawyers acting as adversarial advocates, two schemes in particular merit attention. Table B examines schemes in Wisconsin and Oregon and details the reforms needed to lower the costs of adversarial dispute resolution.

Table B: Percentage of cases resolved without the involvement of lawyers as advocates and reforms identified by WCRI as necessary to achieve reductions

Location	Cases resolved without Lawyer advocacy	Reforms needed to achieve reduction in the use of lawyers as adversarial advocates
Wisconsin	**68%** - higher than in most states	Reforms introduced in 1988 combine to reduce the use of lawyer advocates. X Mandatory minimum ratings for particular injuries X Active oversight by the state agency X heavy reliance on the treating physician X dispute resolution by `final offer adjudication'
Oregon	**50%**	Reforms have been designed to create reasonable certainty about what is owed, stimulate prompt payment by employers and insurers, and discourage the use of partisan experts in favour of treating physicians. These new features are described as X Written guidelines (the standards) that create greater certainty for workers, employers, and insurers about payments due. X An active agency that requires evaluations by treating physicians, monitors them according to the standards, and tells the parties what should be paid and when. X Incentives to use treating, not partisan, experts. (Referees rely heavily on treating physicians' evaluations and almost never compromise among disparate impairment reports.) X The use of state-employed independent evaluators to translate medical reports into disability ratings. A Workers Compensation Ombudsman (WCO) and a Small Business Ombudsman operate vigorous educational and outreach programs. The WCO in particular operates a `mobile tour' stopping at various locations and meeting and counselling workers. Interestingly the major cause of problems reported by workers was not a lack of information about the operation of the system, but frustration and a need to know in plain English what had happened in respect of their claim.

4.2.3 Preventing disputes

While removing the source of cost in dispute resolution is a significant reform, finding ways of preventing disputes can be even more effective. Success is reflected in few claimants lodging appeals for review.

Minnesota has allowed disclosure of medical information without written authorisation. The effect of this has been that decisions are made swiftly and are often soundly based decisions. In only 13% of denials (rejections) do workers lodge appeals or petitions for hearing. The Minnesota Department of Labour & Industry is also very active in informing workers of their rights to compensation, monitoring compliance and sanctioning adverse performance.

All discontinuances or terminations have to have a formal conference before the decision is made. Specialists run the conferences and they are completed routinely within 12 to 15 days with a decision within one week.

`Final offer adjudication' involves choosing one or the other of two medical positions. A study of the Maryland system in 1986 found that adjudicator outcomes represented a process of `splitting the difference' between the two parties' positions. This use of the medical assessments meant that opinions were sought to counterbalance each other and the more extreme the better. Lawyer advocates were then needed to provide advice on which doctors would present the more advantageous and extreme position. Negotiated settlements became more difficult because the parties were so far apart. The study showed that the wider the disparity the more likely the case was to go to court.[4]

The US Workers Compensation Research Institute (WCRI) has also identified many factors that encourage litigation and are instructive in identifying the causes of disputes. These are[5]:

- No minimum ratings or other evaluation guidelines.
- Passive oversight by the state agency.
- Heavy reliance on the ratings of adversary experts hired by both sides of the dispute.
- Dispute resolution by splitting the difference between the adversary ratings.
- Guidelines including factors requiring subjective measures such as range of motion, strength & chronic limitations of repetitive motion.
- Large differences in outcome depending on small differences in expert opinion or medical rating.

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[4] WCRI Research Brief, *Use of Medical Evidence, Low-back Permanent Partial Disability Claims In Maryland*, Vol 2, No. 9, September 1986

[5] Boden L I, 1988 Reducing Litigation, *Evidence From Wisconsin*, Workers Compensation Research Institute, Cambridge, MA 1988

WCRI Research Brief, *Reducing Litigation in Oregon, Using Permanent Partial Disability Guidelines and State Evaluators*, Vol 7, No. 9, September 1991

Further reforms introduced in Wisconsin and Oregon to prevent disputes have clarified medical guidelines and more importantly *limited the medical reports allowed in appeal to those submitted before the reconsideration or internal review by the Claims Agent*. This change creates an incentive to present all expert evidence before appeal and ensures that referees (conciliators and magistrates) and evaluators (review officers) use the same evidence.

4.2.4 Measuring success in the United States

The Workers Compensation Research Institute has undertaken a comprehensive study of several workers compensation schemes in the United States and has developed a series of `selected performance indicators' for comparison. The study is progressively examining new states against these indicators. Those relevant to the dispute resolution include:

Adversariness
- X Percentage of cases in which the worker is represented by an attorney(lawyer)
- X Percentage of claims with no issue in dispute

Friction Costs
- X Average of all friction costs (in claims where the worker is represented by an attorney (lawyer) -
  - Claimant incurred costs
  - Paid by claimant

Administration (State agency & claims agent activity)
- X Percentage of claims applying for adjudication
- X Percentage of claims involving adversary experts
- X Percentage of claims resorting to public intervention (private insurer schemes)
- X Percentage of claims lump-summing future payments
- X Average time from accident to resolution
- X Average time from application to resolution

The Institute does not make judgements on which systems are better than others. However a number of conclusions can be drawn from their work and the international experience detailed above in respect of the policies that should be followed in designing a `best practice' dispute resolution system. The principles identified by the WCRI are:

> ***Friction should be deterred (lawyer advocacy and disputation).***
>
> ***Information should be exchanged as a first step.***
>
> ***Duelling experts should be eliminated.***
>
> ***The evidence of the treating practitioner should be given `best evidence' status.***
>
> ***The quality of primary decision making should be improved.***
>
> ***Extreme medical positions and the range of probabilities in***

medical decision-making should be reduced.

Workers should be encouraged to return to work (lump sum payments have been found to militate against early return to work).

Shorter resolution times allow more flexibility in tailoring return to work outcomes and increase the chances of amicable resolution.

Ambit claims should be discouraged.

4.3 Canada

Workers Compensation Schemes in Canada operate on a different model to those in Australia. Canada uses a single fund model where control of the fund rests with the central authority. This enables in-house measures to improve the standard of primary decision-making and thus reduce disputes. However, the need to avoid litigation and the use of lawyer advocates is still paramount. The Canadian provinces have taken the approach of reducing the workers need to seek advice from lawyers by taking over the role of lawyer advocates in safeguarding rights. The state body takes responsibility for explaining the rights of both workers and employers under the legislation. Two examples are given outlining these two approaches.

4.3.1 Ontario - Office of the Workers Advocate & Office of the Employer Advocate

Ontario has established two divisions within its workers' compensation agency with the specific task of helping workers and employers meet their workers' compensation obligations.

The Office of the Workers Advocate employs some 60 staff and since its establishment from a central office in Toronto, now has offices in all regions of Ontario. The Office has three functions. It provides information to workers about the scheme. It helps workers in the preparation of an appeal to Workers Compensation Appeals Tribunal (WCAT), the appeals mechanism in Ontario. It concentrates on educational programs for workers. The officers are not lawyers but have some legal training.

A separate office exists to ensure that employers, particularly small businesses receive similar assistance. This office has less staff, but undertakes a similar range of functions. No quantitative or qualitative evidence exists on the success of the Canadian models in reducing the use of lawyer advocates or litigation. However, the Ontario system is very close to the model used in Oregon, USA and similar success rates would be expected.

4.3.2 British Columbia - Defining performance in terms of outcomes

In British Columbia, the focus has been on the quality of the primary decision-making. A review of the adjudication function in 1992 by Deloitte & Touche and the Workers Compensation Board of British Columbia outlined a comprehensive performance management system. There are appeals bodies in British Columbia but the solution to excess appeals was seen to be in improving the standard of primary decision making through the development of a client centred operating model. This means that service is measured from a client's perspective. Improvement directed to client satisfaction should translate to clients less inclined to appeal. The performance indicators highlighted:

- Quality, measured through the percentage of decisions changed, the number of days workers were off work and the percentage of workers returned to work.
- Timeliness, measured by time taken in making and implementing decisions.
- Cost-effectiveness, measured by costs per claim, and
- Client satisfaction, measured by surveys of employers and workers rating: clarity of communication, courtesy, demonstration of understanding of the case, frequency of progress reports, promptness of response, number of complaints and commendations.

The model proposed a team approach to decision making with teams including senior and junior claims staff together with medical advisers and vocational advisers. Mandatory case management planning was also proposed including on-site meetings between employer and worker.

Imaging technology that allows `images' of original documents to be simultaneously available on screens in the different organisations was declared mandatory. This removed opportunities for misinformation caused by inaccurate or insufficiently clear computer coding and, improved the speed of processing simply by avoiding the inevitable file paper chase.

The additional principles of good dispute resolution from Canada are:

> ***Total quality management approaches focussing on the client improve primary decision-making.***
>
> ***Clarity and speed of communication are essential. Both can be improved through the use of state-of-art technology.***
>
> ***The use of Lawyer advocates can be reduced if responsibility for explaining workers and employers rights and entitlements is vigorously adopted by another party, usually the state agency.***

4.4 Comparable dispute resolution schemes in private industry and government

One key change that WorkCover will introduce in 1993 is opening the market to a broader range of insurers and allowing employers to choose for themselves the insurer best equipped to handle their claims. This change will not only enable competition to affect prices in the market, the insurers' need to differentiate their products will also encourage competition based on improved standards of service across the industry.

An integral part of an open industry is a dispute resolution mechanism that actively provides swift responses to customer reaction to poor products. The insurance industry has led the way by establishing private alternative dispute resolution schemes to avoid legal costs and to provide a better service for customers.[6] In Europe schemes exist in eight countries and there are also schemes in Singapore, Hong Kong and South Africa. Dispute resolution has become the standard rather than a novelty.[7]

Similar business and financial market industries have introduced privatised dispute resolution mechanisms, primarily designed to keep consumer complaints in-house and to avoid government regulation of industry activity. These private mechanisms sit in a client-centred management culture that promotes self-regulation and improvement of customer standards of service as the way to greater market share. The incentive to improve performance is provided by the publication of company performance reports.

In the Australian banking industry, the Australian Banking Ombudsman handles complaints about banks and charges banks for this service. Banks fund the ombudsman scheme on the premise that they probably can handle most disputes themselves or prevent them by improving their practices. The ombudsman should be a place of last resort for legitimate disputes.

The combination of published information and the high cost of running disputes has driven many banks to introduce internal dispute resolution mechanisms, an initiative also adopted in the insurance industry. In Victoria the GIO has a Consumer Appeals Centre. All of these schemes are characterised by initial referral of complaints back to the company concerned for reconsideration. If the matter still remains unsettled, it is dealt with by the scheme.

Private industry adds the following principles to good dispute resolution:

Internal review processes should be adopted by each insurer

Charges for disputes should be borne by the insurer (or by

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6 The General Insurance Claims Review Panel and the Life Insurance Complaints Service, were established in 1991 by the Insurance Council of Australia and the Life Insurance Federation of Australia Incorporated.

7 See Drake R *Insurance Dispute Resolution and Prevention - Lessons from Europe and the USA*, Australian Consumers Association, May 1991.

the employer)

All appeals should be referred back to the insurer for reconsideration. A resumption option should be provided to allow insurers to avoid the cost of disputation.

4.5 Comparing the New South Wales and Victorian models

4.5.1 Elements of the schemes

The New South Wales WorkCover scheme was introduced in July of 1987. Many of its features are similar to the new Victorian scheme. In dispute resolution the Workers Compensation Court was retained and a Conciliation Service was established.

The NSW Conciliation Service has 8 Claims Review Officers and only 2 Conciliators. Controllers provide administrative support. Review Officers make the initial assessment and draft recommendations. Conciliation Officers supervise the two teams and make final decisions. As at late 1992, some 30 directions had been made by Conciliation Officers and 28 of these had been overturned by the Compensation Court.

Most of the work is done by telephone with the Insurers. Workers contribute little and there have been criticisms that the worker is not involved. Recent reforms suggested have been to allow legal representation in the conciliation process on the basis that equity requires worker representation and to allow access to the NSW Medical Panels on a more informal basis.

The major distinguishing feature of the New South Wales Conciliation Service from the new Victorian Conciliation Service is that its use is optional. Although not a compulsory process in Victoria, in practice, most disputes will be dealt with in the Conciliation Service. This is because courts have a discretion to refer cases back to conciliation if a 'reasonable attempt' to conciliate has not been made. The Conciliation Service provides a certificate advising conciliation outcomes that may later be produced in court. In New South Wales most worker appeals go direct to the Compensation Court. The Conciliation Service deals mainly with decisions to reject or terminate weekly benefits referred by the insurers.

4.5.2 Voluntary or compulsory schemes

There has been considerable debate over the conditions necessary for successful conciliation and mediation. One argument is that these processes can only work if parties volunteer to enter the process. The other view is that these processes can resolve most disputes and at least clarify the issues for future settlement if resolution is not reached. On this view, the preliminary positions of the parties are not relevant to the eventual outcome. Much depends on the skill and scope of opportunity of the neutral third party. The parties' position has to be changed from one of antagonism to one of a working relationship where solutions can be worked out.

In a voluntary system, common preliminary antagonistic stances would ensure that not many cases would enter conciliation or mediation. High rates of resolution would be expected due to the predisposition of the parties to settle. If the argument is true that compulsory mediation or conciliation fails, then the resolution rates between voluntary schemes and compulsory schemes should be expected to be markedly different, with much higher rates reported by voluntary schemes. In Australia, there is some evidence to the contrary. A recent study in the Family Court has shown that resolution rates are the same.[8]

One explanation often offered for this result is that parties forced to mediation actually agree to solutions against their best interests. Suggestions are made that employees will agree to a solution to keep their job safe or because they do not feel they can cope with a lengthy fight. If this were so, then perceptions of the process much later when tensions had cooled, would show the weaker party to be unhappy with the outcome. Again this is not borne out by the figures. Qualitative evidence in a similar compulsory jurisdiction reports satisfaction rates are very high even when measured some time after the completion of the process.[9]

In reducing the costs of litigation the question of whether to introduce compulsory processes is crucial. In New South Wales the effect of a mixed voluntary and compulsory process has had a major influence on reducing the number of cases kept out of the system. Only 24% of disputes are dealt with by the Conciliation Service. Of the cases reaching the Workers Compensation Court, 38% go to court hearing and the remainder settle before a court date is set. Staff at the NSW Conciliation Service consider that many of these cases could be settled by them at a reduced cost if their jurisdiction was increased.

In New South Wales the total cost per claim is $2400 compared with Victoria's pre-1993 cost of $3800. [10] In comparison, Ombudsman statistics show that administrative review processes are much cheaper and that claims can be resolved at around $1,000 per case.[11]

A comparison between the pre-1993 system in Victoria and NSW on the number of cases involving legal representation shows the following (see figure 5).

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8 Family Court Mediation Program-Dandenong Registry (unpublished conference paper)

9 Legal Aid Commission of Queensland: See Table 3 below.

10 Boston Consulting Group

11 Commonwealth Ombudsman, New South Wales Ombudsman and Australian Banking Industry Ombudsman statistics.

Comparison of pre-1993 Victoria and NSW Dispute Resolution disposal rates for 1990/91.

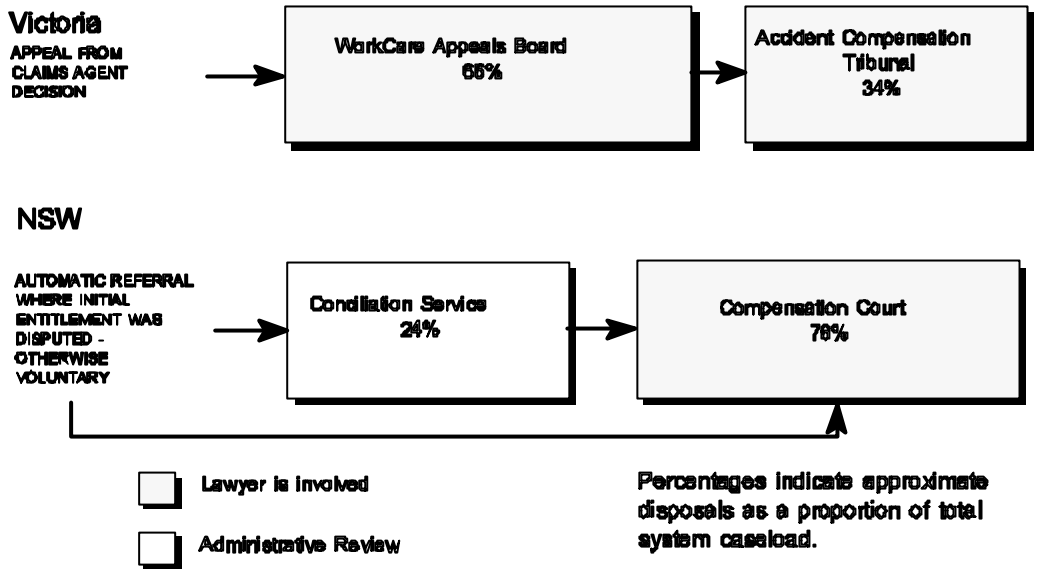

Figure 5

In summary, examination of the NSW and other dispute resolution mechanisms adds these principles:

Workers should be given an opportunity to be involved in the process.

Internal medical advice should be available to Conciliation officers.

Conciliation should be mandatory rather than voluntary.

All cases should be dealt with administratively

5 Elements of a Best Practice Model

International and interstate comparisons allow identification of the systems that successfully reduce disputation. However, in none of the systems reviewed were conditions identical to those found in Victoria and no single system could be copied. A better solution is to identify the elements from each system which drive `best practice'. The best practice model must therefore incorporate the best features of these systems. This `best possible practice model' as it relates to the different participants is described below.

Insurers

- In certain types of injury (back surgery), provide an automatic, no-fault, standard payment, up front and top-up payment later according to entitlement circumstances.
- Require a meeting between the claims officer, worker, employer and rehabilitation team before a decision is made by the claims agent to alter weekly benefits.
- Improve primary decision making based on client-centred management and internal review processes, with appropriate incentives and disincentives rewarding a 'getting it right first time' approach, ie disputation penalties.

State Agency

- Monitor and enforce the entitlement to benefits of all those with an entitlement.
- Take responsibility for informing workers and employers of entitlements.
- Sponsor worker and employer advisers who provide a primary information and screening role.
- Maintain and ensure that state-of-the-art technology is used by all participants in the system to quickly share information, and to monitor and facilitate claims processing.

Conciliation officers, mediators, referral officers or evaluators

- Exchange all relevant information at the earliest opportunity & limit review to evidence collected and made available to the primary decision maker.
- Provide a readily available forum for all parties to discuss return to work and claim content.
- Refer claims back to the insurer with an option to the insurer to `re-assume' the claim and thus avoid dispute penalties.
- Introduce mandatory administrative review and/or conciliation, with mediation available at any stage of the dispute and at the work-site by experienced practitioners appointed on merit.
- Ensure confidentiality of conciliation and mediation processes.
- Maintain complete flexibility in resolution techniques with a power to vary primary decisions if necessary.
- Introduce final offer arbitration in disputes involving medical subjective assessment.
- Disallow lump sum payments.
- Ensure speedy resolution times.

Doctors

- Rely on treating practitioner opinion in determining entitlement.
- Develop guidelines accepted by practitioners for both process of examination and framework for reporting.
- Develop clear standardised evaluation guidelines accepted by practitioners for determining incapacity.
- Introduce respected medical arbitrators for complex medical disputes, who are easily and quickly accessible by all participants in the system and whose opinions are accepted without question in court.

Lawyers

- Limit lawyer advocate involvement to cases dealt with by courts or tribunals.
- Keep most cases out of court.

Courts

- Ensure appeals from conciliation are at the cost of the appellant unless the appeal is upheld.

Two important participant groups, the workers and the employers, are not represented as elements of the model. These groups are the clients of workers compensation processes.

Clearly, both workers and employers have important roles in minimising and preventing disputes related to work injury and compensation. Establishing ongoing relationships with local treating practitioners is one step that might be taken. Their performance in achieving this is best addressed in workplace reform and occupational health and safety. These matters are beyond the scope of this report.

6. Applying best practice in Victoria

6.1 The Victorian Environment

Achieving best practice in a 'green fields' site would be relatively easy. The application of some elements of the best practice model in Victoria will need careful tailoring.

The Boston Consulting Group (BCG) observed that the existing workers' compensation culture in Victoria promoted longer term claims under the Comcare scheme than other states. This occurred despite the fact that employers in several of these states and Victoria were members of the same scheme. BCG noted that It would take some time for this culture to be eroded.

This culture had also extended to the pre-1993 dispute resolution process, which had lost credibility. In particular, participants were concerned about the experience and skills of people appointed, their independence and the quality of decision-making. The new system would have to be seen to address the perceived problems in each of these areas. In particular, there was and is a need to:

- improve the standards of claims agent primary decision-making,
- improve the channels and quality of communication between worker and claims agent and between all participants in the system,
- elevate the perception of workers' compensation examinations by doctors and to improve the status of the treating doctor,
- build certainty into the system by establishing mechanisms that deliver more objective medical opinions and managing the expectations of the parties about what they are required to do,
- set clear standards, guidelines and precedents to enable the different system operatives to consistently resolve disputes,
- remove cost incentives to appeal but maintain equitable representation particularly for workers who believe they may be in a weaker bargaining position then their employers, and
- re-establish the credibility of dispute resolution processes in the system.

Conversely, effective aspects of the system needed to be retained and as with the medical panels, made more accessible. It is also necessary to learn whether the nature of workers compensation disputes in Victoria is such as to be amenable to successful overseas mechanisms. Victoria has been an environment where workers' rights have traditionally been dealt with in judicial forums and informed by a strong local union movement. This required a closer examination of the elements of these types of disputes.

6.2 The nature of a workers' compensation dispute in Victoria

Different dispute resolution interventions are more effective than others in resolving different types of disputes. Of importance are the underlying causes of dispute, the pre-existing relationship between the parties, and the state of parity of power and authority. Most of workers compensation disputes in Victoria arise from:

- lack of relevant medical information
- different interpretations of medical information
- misinformation about workplace practices, and
- different views on what is relevant

Many disputes are ancillary to pre-existing relationship conflicts that arise from the work environment or are the result of poor communication between worker and employer. A preliminary cause of dispute can be a simple mistake by the claims agent. These should be addressed as quickly as possible to prevent exacerbation of the dispute. In all of these disputes the early exchange of relevant information will often resolve matters. The more complex disputes where parties have entrenched positions and where disputes are based on conflicts over values or interests may be resolved in meetings with experienced conflict resolution practitioners. The worker-employer relationship provides a platform for consensus, particularly in trying to return the worker to work and to provide working conditions appropriate to the recuperation. [12]

Of greater concern are disputes where one party believes their position is so weak that they could not achieve an equitable solution. This is particularly so in a recessionary environment where workers need to remain employed and employers need to reduce all their costs. In this environment there must be an even greater emphasis on ensuring that the proper entitlements are strictly adhered to . Under the old system, claims agents and the state had left this important task to lawyers.

6.3 Addressing equity

Until the introduction of WorkCover, lawyers played a central role in the system. This included:

- Representing workers in obtaining their rights under workers' compensation legislation.
- Helping workers to navigate the complex administrative and adjudicatory procedures.
- Giving workers bargaining power in their dealings with insurers and employers.

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[12] The Workcare Appeals Board indicated that some **27%** of cases were withdrawn and that **50%** of these were resolved by staff using administrative process such as telephone conferencing, requests for further information and moderating telephone negotiations. `Hard' cases were selected for this process and the success of the process was only limited by the number of staff.

- Explaining the implications of insurer decisions[13]

The standard of service in each of these areas varied although costs were paid at the same rate and unfailingly. There was little control of quality of service and delays were common. However, workers were represented and removal of the underwriting of legal costs did not mean that the needs of workers for information and assistance through the process receded. Workers are accustomed to having representation and to relying on their representative as a source of authoritative advice about their entitlements. The large number of workers with non-English speaking backgrounds means that the need for representation in Victoria remains strong.

Some lawyers will continue to offer these services at rates their clients can afford. Other workers will rely on their own resources. There is scope to provide additional services. The Canadian and Oregon models provide good examples of how workers and employers can be assisted in a more structured and accessible manner.

6.4 Disclosure

There are a range of arguments against workers providing information to insurers. These include:

- Doctor/client confidentiality - In Victoria most doctors will not release information relating to the client without the written permission of the patient.

- Possible misuse of the information particularly in revealing personal and sensitive details to employers.

- Access to information not relevant to the claim.

In terms of possible later legal action, particularly in common law claims for damages, several concerns have been raised by the legal profession. They are not happy to provide information that may not be favourable to their client that may be called upon later in court. Recent changes to the WorkCover legislation now make it mandatory for workers to provide written permission or medical authorities at the time of lodging a claim for workers compensation. However, there are a large number of common law actions already issued which will progress through the conciliation process. These cases may be more appropriately dealt with directly by the courts.

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[13] Lawyers also argue that they add value to the awards workers receive in common law actions. In an interesting study in New York nearly 26000 cases were surveyed. These showed that workers employing attorneys could expect to receive on average $6,000 less than those not employing attorneys. These figures should be treated with caution as New York operates a contingency fee system. However, the study also showed that those cases going to court were better off with lawyers whilst the greater proportion that settled inevitably settled for less. This was thought to be because the Attorney did not consider the additional percentage of the extra jury award worth the work involved. See *How Do Attorneys Affect Case Outcomes?* Workers Compensation Research Institute, Vol 7 No 8 August 1991.

The Victorian environment and existing conditions add to the principles for best practice derived from others states and overseas. In summary, these additional principles are:

There is a need for worker and employer representatives charged with replacing the traditional information role of lawyers.

Streaming procedures are needed to identify cases that should be more properly dealt with by the courts.

Medical Panels should be accessible and used at an early stage to resolve medical disagreement.

7. Performance Indicators and International Benchmarks

7.1 Performance Improvement and Performance Indicators

The new WorkCover legislation successfully incorporates a number of the elements of the best practice model. To be successful, the model will need constant reappraisal and modification. This is achievable through the application of performance improvement techniques.

Throughout the western world the techniques that are proving successful in private sector performance improvement are being adapted by government business enterprises and the public sector. The use of efficiency and effectiveness measures in progressive US public sector enterprises has been reported by Osborne and Gaebler (1992) in 'Reinventing Government'. The lessons they relate on performance indicators are[14]:

- Both efficiency and effectiveness and quantitative and qualitative aspects of performance must be measured.
- Measures should neither be too few nor too many.
- An obsession with efficiency measures while ignoring quality and effectiveness can drive perverse outcomes.
- Identifying, reporting against, analysing and reviewing performance measures are important participation activities for service providers that enable continuous improvement to take place.

Osborne and Gaebler's often anecdotal studies of US public enterprises show that the performance of different service industries should be compared on dimensions such as timeliness and quality as well as the usual unit cost or total cost basis. The best organisations set the benchmarks against which performance of the others can be gauged. Comparison reveals where the worst performers can change systems, procedures and the behaviours of staff to meet benchmark targets of best practice in the industry.

The lessons from Australia's leading benchmark companies in manufacturing and commercial services[15] show that knowing how the benchmark or best practice standard relates to the particular company is only a small part of achieving best practice performance.

Kodak, the winner of Australia's first national quality award has shown that world class performance cannot be achieved by increasing controls on people to control quality. An organisation that strictly controls processes (through codes of conduct/practice and the like) risks embedding reactive, inflexible behaviours and losing potential improvement. The best organisations stress that **continuous improvement processes** need to be developed in the organisation that bring together customer focus,

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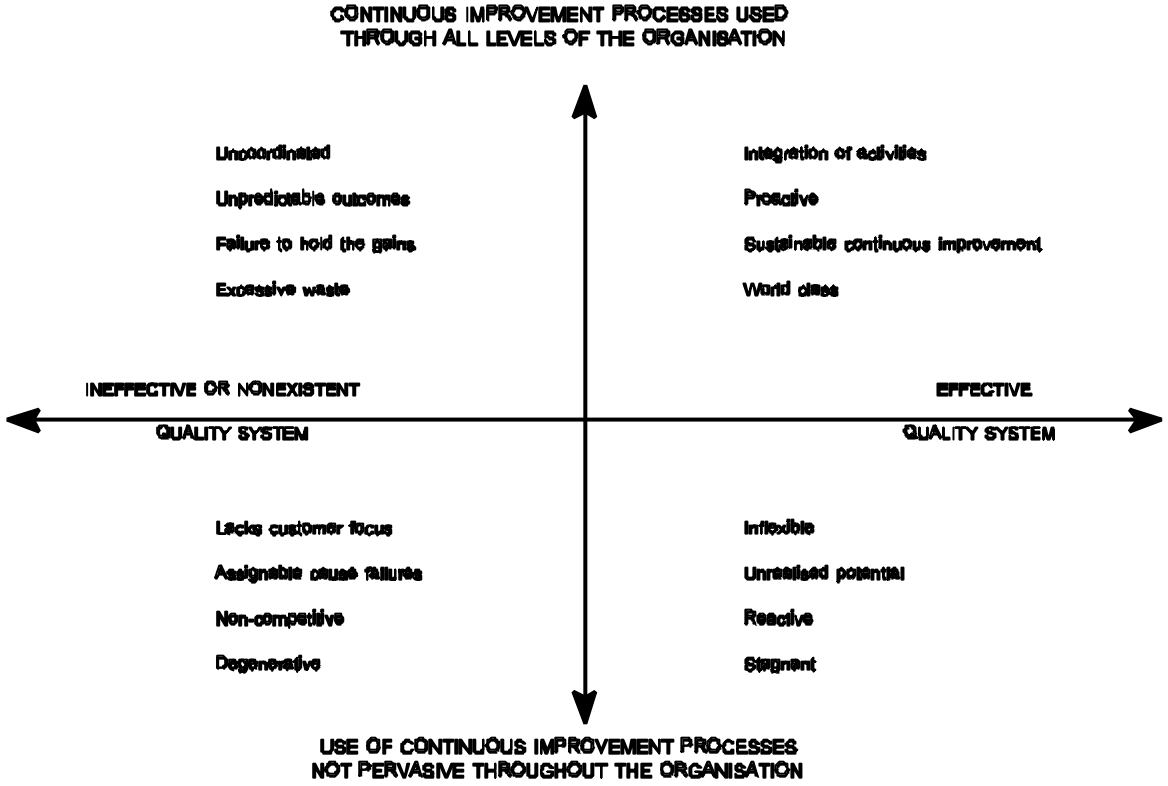
14 Osborne D and Gaebler T, *Reinventing Government - How the Entrepreneurial Spirit is Transforming the Public Sector*, Appendix B, The Art of Performance Measurement, Addison-Wesley, Reading, MA 1992.

15 Department of Industrial Relations and the Australian Manufacturing Council 1991, Proceedings of the Best Practice Program Conference, Melbourne July 1991.

quality standards, integration of activities and the empowerment of staff to identify and make improvements. This relationship is illustrated below.[16]

Figure 6



providers of services take a central role in suggesting and making the changes that result in performance improvement. For the cycle of continuous improvement to work, performance measures must be relevant to the behaviours of the production line workers and the service providers. Management information is not enough. To workers, refined statistics on unit costs or transaction volumes may simply not be relevant to what they do on a day to day basis.

The indicators chosen by WorkCover as measures of performance should not focus on monitoring the activity of processes, even though these are the most often reported and the easiest to measure. It is the people who make the contributions to continuous improvement. The performance measures must therefore relate directly to the behaviours of the people delivering conciliation services and to the professionals who provide advice services that directly support dispute resolution.

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16 After Stuart Williams, 1993, Quality Manager, Kodak Australasia, in *Proceedings of 1993 conference/Workshop on Quality Certification to AS3900/ISO9000*, IES Conferences, Chatswood, 1993

7.2 Performance managing behaviours

Examination of the dispute resolution systems in NSW, the US and Canada has shown that the best workers' compensation systems seek to avoid disputes. Steps are taken from the earliest point in a claim to reduce confrontation and eliminate the need or desire by the parties to take up opposing positions. When the systems work, there is an early resolution of disputes, lower costs to employers and a minimising of the costs of expert help that can reduce the compensation finally ending in the hands of the worker. The best results are achieved when all process and friction costs are minimised, system resources including medical resources are not wasted in conflict, the worker receives an appropriate entitlement under the legislation promptly and, the decision resolving the case endures.

In Wisconsin, extraordinary efforts are made to avoid conflict. Multiple system features discussed above, combine to reduce the level of litigation. The state agency works with the parties, employers and insurance agents to set standards for the service providers and then audits against those standards for individual and system performance.

In British Columbia, Canada, performance management in workers compensation is being addressed by the development of an integrated performance management system. This system is targeted at three levels: organisational performance, individual performance and quality assurance. The quality indicators include file reviews to detect error rates, internal audits, and reversals. Responsibility for performance against the quality indicators is directly assigned to unit managers. Clearly, while quality results from individual action, it is being managed as a work group or team responsibility and indicators need to be made relevant to the day to day work of these teams as they operate in the system.

7.3 Indicators of efficiency and effectiveness

Numbers of claims made or processed are often used as measures of activity. With financial information, they are needed to calculate the unit costs of different operations in the dispute resolution process. On their own or as unit cost information, this type of activity indicator cannot be used to benchmark. Unit costs are measures of process efficiency not outcomes. People working in the system have no direct control over unit costs on a day to day basis. They certainly do not control the expenditure component of unit costs. If they were to focus on the numbers of cases processed as the part of the indicator they can influence, they could try to process more claims per week or per month, regardless of the quality of decisions or later appeal outcomes.

Benchmarks for the three levels at which performance needs to be managed should be related and examined together. The three levels that allow best comparisons and are most useful to continuous improvement are: system wide (S), Team or work group (T) and individual standards (I). Table 3 sets out performance measures for each system component at each level and identifies benchmarks from the best of the systems examined overseas. These benchmarks are drawn from the available information. Data in this area are notoriously difficult to obtain. One reason is that agreement on common measures has not yet been achieved.

Table 3 Performance Indicators and Best Practice Benchmarks

System component	System indicators (S)	Team/ Group indicators (T)	Individual performance indicators (I)	Benchmark Standard	Benchmark Organisation
Insurers					
Quality of primary decision making	Rate of decisions sustained vs reversed at all review levels	Decision unchanged following conciliation - low penalty rate for numbers of disputes and high reassumption rate	Decision unchanged by internal review	(S) 58% 20% 50% 15% (T) 36% (I) Not known	Aust Bank Ombudsman SIO Consumer Appeals NSW WorkCover CS NSW Comp. Court Victoria WorkCover CS
	Historical comparison of number of claims lodged and rejected	Reducing numbers	Reducing numbers	No comparative information available	
Maintained worker/ employer relationships	High rate of return to work	Low rate of change to another insurer by employer	Low rate of rejection of employment offer by injured worker	(S) 65% closed cases with return to work (T) Not reported (I) 15% employment offers rejected	NSW WorkCover CS Boston Consulting Group Policy Research Paper No. 2 September 1992 Exhibits 12 & 14
Exchange of relevant information at the earliest opportunity	Appeal rate from initial rejection decision	Rate of conferences completed within (12) days of termination decision.	Performance assessable by survey.	(S) 13% of claim rejections are appealed. (T) 100% conferences completed (I) Not reported	Minnesota - technique reported to directly reduce disputation rate. WCRI June 1991, Vol 7 no 6.
Conciliation Service					

System component	System indicators (S)	Team/ Group indicators (T)	Individual performance indicators (I)	Benchmark Standard	Benchmark Organisation
Dispute resolution	Low rate of dissatisfaction & high rates of credibility	Survey information on whether all disputants satisfied that they have been heard and needs addressed	All cases reviewed for improvement	(S) High	ADR literature consistently reports very high levels of satisfaction with ADR and with conciliators
Durability of settlement agreement	Low rate of reversals Low rate of fresh requests involving same parties	Rate of agreement vs rate of determinations /recommendations	Low rate of re-hearing	(S) 90% decisions endure for more than six months	Custody Mediation Legal Aid Office Queensland
Speed of resolution	Percentage of cases dealt with according to pre-set timetables	Number of days from time of lodgement of request to first contact with all parties		(S) Between 80% and 100% depending on stages and excluding court process (T) 3 week target set by Conciliation Service	Texas Texas, *Performance Indicators for Permanent Disability Low Back Injuries in Texas* Pease, S WCRI
	Average time to resolve	Number of days from time of lodgement to resolution		(S) 5 months (T) 3 months	NSW WorkCover Conciliation Service Texas
Cost	Low	Cost per request resolved	Actual cost per unnecessary dispute	(S) $ 2,400 (S) $ 1,000	NSW BCG report Average of Australian Ombudsman schemes

System component	System indicators (S)	Team/ Group indicators (T)	Individual performance indicators (I)	Benchmark Standard	Benchmark Organisation
Workers	Satisfaction with outcomes Satisfaction with process Satisfaction with service provided by all participants			2/3 satisfied	Washington WCRI Claimant satisfaction with workers compensation May 1987 v3 no 5
Medical Panels	Rate of use of duelling adversary experts (ie more than two doctors) Incidence of medical reports of non-treating doctors			6% 14%	Wisconsin Reducing Litigation - Evidence from Wisconsin 1988 v4 no 12 Texas Performance Indicators for Permanent Disability Low Back Injuries in Texas Pease S WCRI p 20

7.4 Using Performance Indicators in Victoria for Continuous Improvement

The benchmark standards that measure the performance of the whole system help make senior administrators accountable for system costs but often have little management or individual relevance. To become a driving force for improvement, indicators need to be made relevant to the day to day work of the people who operate in the system. Identifying, reporting against, analysing and reviewing performance measures are important participation activities for service providers. These measures provide the feedback on performance that enables continuous improvement to take place.

In the local environment, pre-existing relationships, expectations of workers, insurers, and employers must all be taken into account when considering which indicators will provide the best improvement. The performance measures which Victoria should adopt from the international and interstate experiences are those that provide feedback on the performance of people as individuals and in teams and link these to the performance of the system as a whole.

Under continuous improvement, the outcome of improved dispute resolution will be more than an improvement in efficiency of the existing system. As each participant becomes more familiar with ADR processes they can use more of the techniques themselves to resolve or avoid disputes. Measures of performance against the indicators can be used by employers to select their insurers just as insurers can rate employers based on their history of workplace injuries. In this way performance information will form an important component of 'market information' to drive further improvements in performance. The best insurers will be those with low dispute rates providing services to employers with low rates of work injury.

Disputes will still arise but these can be resolved usually without the testimony of non-treating medical experts challenged by lawyer advocates for both parties. The overseas dispute resolution systems now look beyond the early goal of trying to objectively and precisely define the relative severity of each injury and its effect on future earning capacity. The objective of these systems is to reach an optimal solution for the injured worker given all the circumstances, not to reach medical certainty regarding the injury. An optimal solution takes account of the state of medical knowledge, the need to get the worker back to work quickly and to preserve the relationship between the worker and the employer.

The trend to reduce reliance on non-treating medical experts and legal advocates has shifted systems overseas to lower costs, produce more certainty in claims outcomes and show less delay. The US National Council on Compensation Insurance in a report published in 1991 summarised this approach in the following policy:

> 'The keys to reduced attorney involvement and judicial intervention are a law that is easy to apply and a strong administrative agency with the authority, resources and leadership to minimise the frequency of disputes and quickly resolve the disputes that do

> arise. The administrative agency should monitor the performance of all participants in the system and be the principal forum for dispute resolution. Appeals of initial administrative decisions should be to a body within the agency.'
>
> 'The workers' compensation agency should serve as an easily accessible information clearing house to which injured workers, employers and insurers can turn to for reliable information on how the system works and what to expect from it.'[17]

Overseas, ADR techniques have been found useful, not as an adjunct to a formal court process but as a replacement. Now with some years of testing and refinement, these dispute management options have become core elements of the best overseas workers' compensation systems. Victoria can develop and refine its own system by examining the world's best and adapting the most promising elements to our unique environment.

The increased importance of information sharing and management of disputes from their earliest stages reinforces the changes which have already taken place in Victoria's management of Workers' compensation. The state agency, the Victorian WorkCover Authority, will need to go further if it is meet best practice standards outlined in this report. In future, its role as an information provider, monitor of performance and standards setter may become more important than its past role as the regulator and a direct provider of services.

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[17] Mueller, Werner A 'Workers compensation issues and reform efforts' in *American Agent and Broker*, Vol 64 No 7, July 1992

ATTACHMENT A

Analysis of dispute management under WorkCare

Caseflow management

Under the pre-1993 WorkCare system, a typical workers compensation claim followed a series of steps.

Claim decision level (Claims Agents)

Upon injury the worker lodged a claim for weekly payments with a claims agent by completing a claim for compensation and obtaining a medical certificate.[18] There were a number of insurers or `claims agents' which acted as agents to the Accident Compensation Commission. Their role was to determine within 28 days whether the worker was entitled to benefits. This time was varied in some instances according to the type of claim. If the claim was rejected, the worker was given a period of notice to lodge an appeal to the WorkCare Appeals Board. If the worker was already on benefits, these would continue until the appeal was heard. All workers appealing had access to free legal representation.

Claims Agents also had power to terminate existing benefits or to reduce benefits after 12 months on the evidence of a doctor. The evidence would have to show that impairment was less than 15%, or that the worker was not totally incapacitated. In the case of a termination, the worker had 21 days after notice of the decision to appeal in order to qualify for continuation of benefits. Payments to the worker in all other cases continued until the WorkCare Appeals Board hearing was conducted. This hearing may have been up to 4 months after the notice of appeal was lodged.

Appeal level

The Claims Agent had 14 days after notice of appeal was received to prepare a written submission to the Workcare Appeals Board. The worker's solicitor started the process of obtaining independent evidence, usually medical reports. Six weeks after appeal lodgement the Claims Agents reviewed their decision and generally had access to any information the worker's solicitor might have collected to that time. This process was called an Internal Review.

The Workcare Appeals Board issued a Notice of Meeting when it was advised that the solicitor's investigations were complete. At the hearing only the worker and his or her representative attended unless consent was given for the employer to attend also. Cases were allocated a hearing time of one hour.

Adjudication level

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[18] The Notice of Injury and the Medical Certificate are standard forms under the Workcare legislation. Copies are included in the Appendices.

If the worker was aggrieved by the decision of the WorkCare Appeals Board, he or she could appeal to the Accident Compensation Tribunal at any time. Benefits ceased at this point. The legal costs of the worker throughout the entire process including the collection of medical reports were met by the WorkCare scheme.

Attachment B

Problems with the WorkCare Process

The major problem with the WorkCare dispute resolution process in Victoria was that it did not provide a forum for settlement of claims early in the life of a claim or of an appeal.

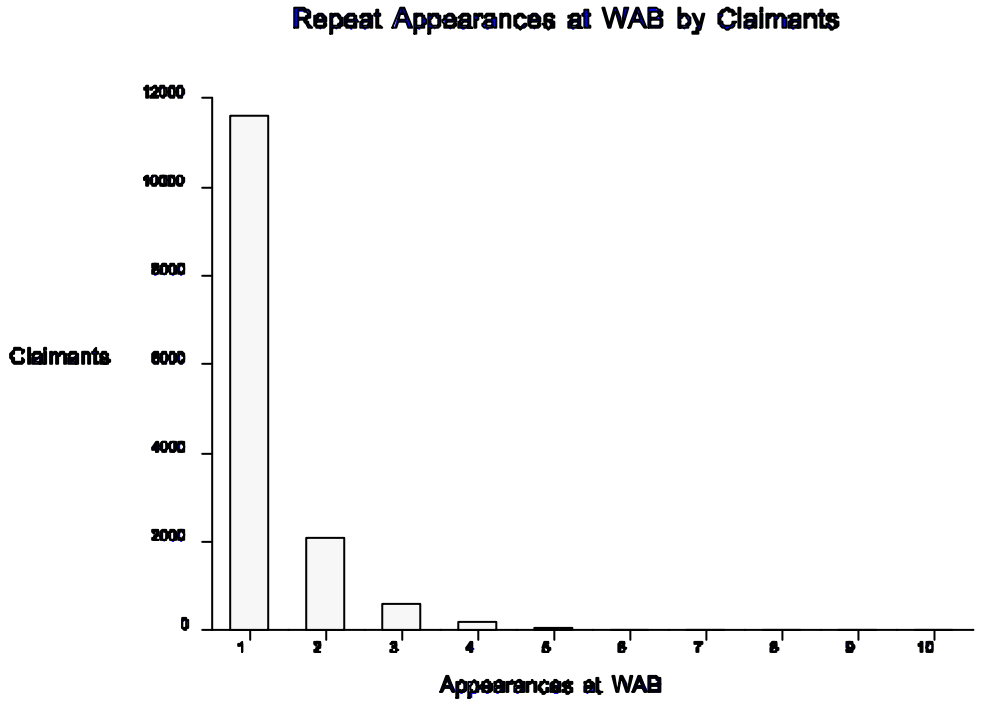
Potential disputes need to be addressed early or they can get out of control and become much more difficult and expensive to resolve. This is of much greater importance in a worker injury dispute because the social and economic tensions which can arise for an injured worker at home create an environment which can work against a return to health and productivity. Helping to get the worker healthy and back to work can become impossible if the people capable of managing injury, benefits, rehabilitation and re-employment are kept apart. Not only did the WorkCare process keep them apart through system requirements, it provided a series of incentives against settlement.

The system created unnecessary costs.

XThe process was characterised by repetition and rework.

Workers appearing before the WorkCare Appeals Board (WAB) had a **20%** chance of returning for a new hearing of their case. Of those who were re-heard, **20%** would have to return for another new hearing. Of this group, a further **23%** would return for their fourth hearing.

Some 71 claimants re-presented their case to the WAB **5 times** or more! The maximum number of appearances recorded was 10.



> Fresh evidence including medical reports were obtained for each new return. This was at an additional cost of **$5m per annum** since the WAB's inception in 1990. The problem was especially marked in termination decisions where it was simpler for the Claims Agent to wait for a short time after an unfavourable decision by WAB and then to re-terminate than to appeal to the Accident Compensation Tribunal.

Often decisions were remade with a different result. This would bring discredit on the decision maker (the WAB) and have the effect of reducing the effort which Claims Agents put into the primary decision to alter the worker's compensation benefit.

From the records of the ACC in 1990/91, 92% of decisions by Claims Agents to terminate worker's weekly payment compensation benefits were appealed. Of the appeals, the WAB supported the worker in 84% of cases. A small number of appeals from those decisions were then taken on to the Accident Compensation Tribunal. What was most damaging to the reputation of the system was the subsequent reversal of 70% by the Accident Compensation Tribunal.

Expensive resources were used where less expensive would have been appropriate.
Case management processes at the ACT allowed the use of solicitors and barristers, paid for by the ACC, to negotiate disputes. Of the cases dealt with by the Registrar of the ACT in pre-trial conference in 1991/92, **84%** failed to resolve with just solicitors in attendance but were later resolved by more expensive barristers at the court door.

This use of legal professionals as advocates in cases which do not require court settlement has the effect of increasing legal costs. Studies have shown that legal costs in similar types of cases increase by 50% if allowed to proceed to the court door past preliminary prehearing stages.[19]

High adjournment rates, settlement rates and consent award rates at the door of the Tribunal indicate that disputes were not being focussed on by the key decision-makers at an early stage.

The system was inefficient

XThe key elements of successful dispute resolution were delayed or missing.

Disputes can be managed efficiently if supervised correctly. Early meetings by the parties and exchange of all relevant information will prevent most disputes developing into costly fights. These elements only converged in the WorkCare system at the Accident Compensation Tribunal after a delay of some nine to ten months. Even at that stage

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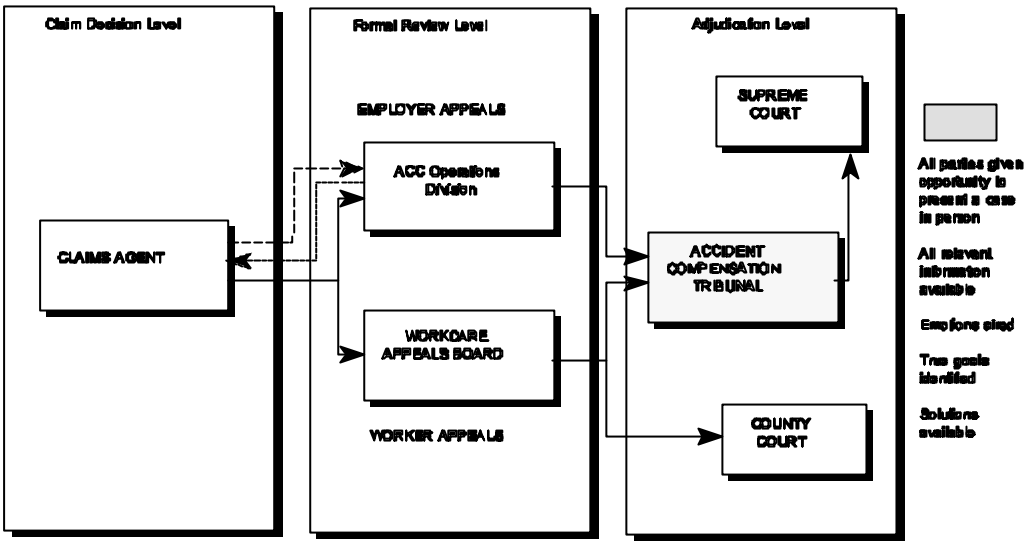
19 Williams PL et al *The Cost of Civil Litigation before Intermediate Courts in Australia*, p52.

there was no effective supervision of the party's preparation to ensure early settlement and to cull out issues the judge does not need to hear.

Point in process where elements for successful Dispute Resolution are first present



Supervisory mechanisms over the life of a dispute from beginning to end such as independent administrative units, performance indicators and management information systems were entirely missing. The three bodies had incompatible computer systems and different methods of measuring performance. There was no means of controlling the process or of ensuring that disputes are heard by appropriate decision-makers.

Both the Accident Compensation Tribunal and the Workcare Appeals Board heard `trivial' disputes. In addition it was not uncommon for partial hearings of different aspects of the same matter to be heard in the Tribunal, the County Court and in WAB. All aspects should be heard in the same jurisdiction.

XParties were forced apart by the process and by representatives.

Workers had no opportunity to go back to the Claims Agents with further medical information which might have affected the Agent's position, except prematurely through the internal review process. The Workcare Appeals Board prevented meetings. Representation by a third party was indiscriminately built in from the beginning regardless of whether there was a real dispute or not.

XThe information necessary to make sound decisions was not available early in the process to workers, claims agents or to Workcare Appeals Board members.

Treating doctors, often in the best position to advise on the worker's medical condition prepared scanty reports limited to the few lines on the Medical Certificate. Claims Agents had a capacity to obtain additional medical evidence but this was difficult under the time-limits set to make initial decisions and to prepare for appeals.

Claims Agents were entitled to withhold information they believed was too sensitive from the Workcare Appeals Board.[20] Members therefore received only prepared summaries from Claims Agents and did not have access to the Claims Agent file. Claims Agents did not have access to material presented at the Board.

XAll the parties were not given the opportunity to have their say and a 'day in court'.

In some cases emotions relating to antecedent matters or to events surrounding he dispute can prevent settlement agreements, or acceptance of imposed decisions. The Workcare Appeals Board had estimated that the worker needed time to say their piece and had built this into the hearing procedure. The Claims Agents and the employers were not given a similar opportunity. Claims Agents reported that they could attempt to resolve their frustrations by initiating unnecessary appeals. Employers reacted against the Workcare Scheme by lobbying through their organisations.

XUncertainty about likely decisions caused unnecessary appeals

Every decision of the Workcare Appeals Board and the Accident Compensation Tribunal had the capacity to establish precedents and influence the subsequent behaviour and the initial claim decisions of the Claims Agents. However, the Workcare Appeals Board did not give out summaries of cases and decisions which could have given this guidance to Claims Agents.

A perception of reliance on technical loop-holes in decision-making at the WAB and at the Accident Compensation Tribunal created uncertainty amongst Claims Agents and other regular participants in the system.

XThose not accountable for the cost of the system controlled it.

Accountability for costs was not borne by the system users and was not within the control of the Accident Compensation Commission. Workers legal and medical expenses were met according to scale costs but the frequency of services was not controlled or restrained. There was no fixed case fee for lawyers and this promoted over-servicing. Control of a workers claim was left with the legal representatives and the doctors throughout most of the process.

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[20] ACC Claims Manual 1992

The system was unfair

XAccess to the WorkCare Appeals Board was not equally available to all and therefore `justice was not seen to be done'.

Only the worker had a right of appearance to address a claim to the WAB. Employers could attend and did in about **17%** of hearings but only for part of the time and only with the consent of the worker. The Claims Agents did not attend at all and presented a summary of their case in writing. In practice Claims agents had limited time - 14 days to prepare cases for WAB while the worker had unlimited time and resources to prepare. Control of the WAB process by WAB only began when a Notice of Meeting was issued. Before that time the worker's legal representative controlled the process. The claims agent was effectively circumvented.

The Claims Agents did not have access to the information made available to the WAB. The introduction of the Internal Review process, whereby Claims Agents had an opportunity to review their decisions six weeks after lodgement of claim with access to the workers medical reports did not improve the situation. There was some evidence to suggest that the information was not available even within the 6 week time-line. Of the **600** claims reviewed only **3%** had been reversed by the agents.

More WAB decisions favoured the worker than the Claims Agent. In the year from April 1, 1991 to the end of March 1992 and excluding settled, varied and withdrawn cases, where hearings may or may not have been conducted, **63%** of decisions favoured the worker.

This finding must be treated some with caution. Although a more even balance in outcomes generally occurs in other jurisdictions, a broad range of factors outside the control of the decision-maker may lead to skewing of the results. Two factors may have influenced the quality of the decision making - the lack of complete information and the privileged access of the worker.

The system did not focus on returning workers to work

XOpportunities for employers, claims agents, doctors and workers to negotiate practical return to work plans were not available.

Some work was being undertaken by VARC to develop pilot programs with the objective of assessing workers and developing management plans. However, the introduction of adversarial process and legal representatives at the earliest stage of the claim effectively mitigated against any such cooperation.

Some legal firms were charging for preparation of the initial claim for compensation. In addition, a perceived technical interpretation of the legislation by the Accident Compensation Tribunal, resulted in Claims Agents being discouraged from making job offers to workers undergoing rehabilitation.

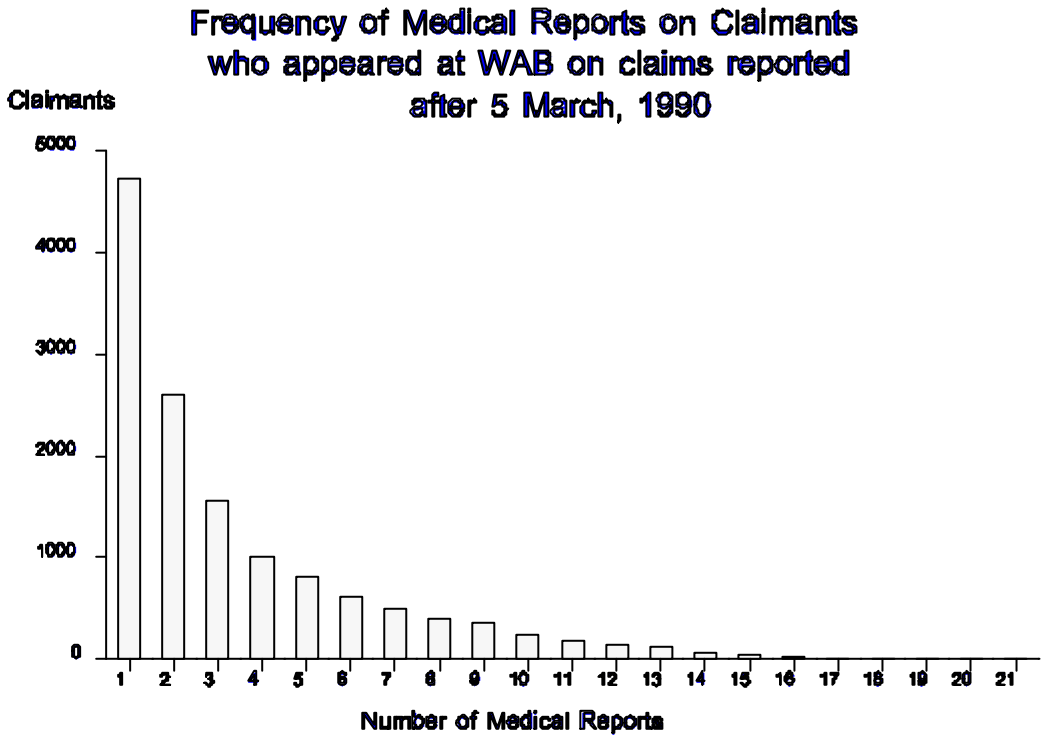
The system did not use medical evidence effectively

XThe worker visited the doctor too many times.

Delays in the process and returns to the Workcare Appeals Board required the refreshing of medical evidence. This meant a return visit to the doctor by the worker.
All workers lodging appeal to the Workcare Appeals Board were examined by the doctor for WorkCare purposes an average of **3.3 times.** Visits increased by **21%** from 1990/1991 to 1991/1992.

XThe system promoted over-servicing by doctors.

Multiple medical reports provided an opportunity to dispute the facts of an injury and to exacerbate disputes. 'Duelling experts' as they are called in the United States cost the Accident Compensation Commission **$3.97m** in 1990/1991 and **$4.83m** in 1991/1992. As many as **27** medical reports had been required for one claim.



The system rewarded confrontation

XIncentives and disincentives in the system were misplaced and operated to stop settlement.

Workers remained on benefits if they appealed a decision to end their payments. Due to delays in the system this resulted in benefits continuing for up to nine months for some workers. There was no provision for workers to return the money if the appeal was overturned.

No statistics were available to show how many of the appeals were intended to take advantage of the delay in appeals for purely mercenary purposes. However, lawyers argue that in these circumstances, together with the fact that all legal costs were met by the Accident Compensation Commission without discrimination, that it would be negligent of them to advise a worker against appealing. The escalating appeal rate gave some indication that an increasing number of claimants could have been taking advantage of delays.

Attachment C

Dispute management - a different process

An examination of international ADR and IDR Processes

Disputes are manageable. If managed properly through an appropriate system which strategically intervenes to direct parties away from confrontation (to, if not agreed then fair outcomes), costs can be reduced and better solutions for the worker found.

Alternative dispute resolution (ADR) or informal dispute resolution (IDR) as it is called in United States workers compensation systems is particularly well suited to these types of disputes. A growing number of overseas and Australian workers compensation authorities are introducing IDR mechanisms. IDR allows for ownership of the outcomes by the parties and scope for practical arrangements to meet the objectives of both worker and employer. Its major advantage in Victoria will be to get workers back to work at an earlier time, prevent disputes and allow redirection of previously assigned legal funds.

Each of the states surveyed had dispute resolution systems with different settlement mechanisms. The range of mechanisms available are described below.

Early Neutral Evaluation

Review of the case for expert opinion by a neutral third party and written opinion given based on discussions with parties and review of material. Conferences are generally not held and telephone discussions are the preferred approach.

- X Attached to internal review office within the workers compensation authority; expertise in similar case outcomes.
- X Used when expert opinion required - in this case, over conflicting medical opinions.

"Shuttle" Negotiations

The neutral third party uses a series of telephone calls to put each party's position to the other. Eventually an outcome is reached which is satisfactory to both.

- X Attached to internal review office within the workers compensation authority.
- X Attached to independent mediation/conciliation unit.

Investigation

Investigations are conducted through interviews, review of the papers at the investigators discretion. Equal representation is not assured. The process is most appropriate when fact-finding is the main objective and both parties will accept the investigators finding on the facts. (Used in Ombudsman processes and in the Workcare Appeals Board although meetings with workers and the quality of information provided by claims agents and employers was dictated by statute.)

Mediation

Facilitated process whereby parties determine the outcome of the dispute

X Voluntary and available at all stages of the dispute /or

X Compulsory, prior to lodgement of appeal and prior to allocation of judicial hearing time.

Conciliation

Facilitated process whereby conciliator proposes a range of solutions to the dispute and the parties, after considering the options, agree an outcome.

X Independent conciliation authority /or

X Attached to workers compensation authority

Arbitration

Less formal process than court process whereby parties agree to accept the decision of an arbitrator without knowing the content beforehand.

X Medical Panels and/or

X Attached to workers compensation court/or

X Voluntary and available at all stages of the process

X Clause in contract to go to an independent arbitrator in the event of a dispute. Both parties to pay own costs.

Adjudication

Formal court process where a decision is imposed on the parties by an independent third party, without the consent of one or both.

X Accident Compensation Tribunal or similar specialist court

X Cases heard by general courts

Caseflow Management

Techniques used by internal court staff to ensure that cases are fully prepared and that key decision-makers have met before judicial resources are allocated. It involves managing the expectations of all parties through setting timelines for all events in the process at the beginning of the process and ensuring their enforcement through penalty and reward systems.

X Listing Directorate contacting parties by telephone

X Sanctions for deadlines not met and failed preparation

X Pre-trial conferences and/or settlement conferences

X Judge responsible for overall function

X Identify potential settlements before judicial and legal resources have been allocated.

X Manage preparation of cases according to pre-set time-tables.

X Conduct pre-trial conferences.

X Conduct hearings in `minor' cases with appeal to judge available.

Representatives

Lawyers, lesser paid but skilled advocates, or authority staff

X Lawyers at all steps in the process

X Lawyer advocates completely banned from various stages of the process

X Para-legals or legal clerks with long experience in the field but paid at lawyer rates

X Worker advocates or worker advisors - similar to financial counsellors, operating locally and supported by a small group of authority funded specialist lawyers able to act in court matters