HEADS OF WORKERS COMPENSATION AUTHORITIES

Resolving Disputes

Best Practice Dispute Resolution Systems

A report prepared for

Workplace and Safety Board of Tasmania

by

Transformation Management Services
November 1995

Foreword

This report arises from a project commissioned by the Workplace and Safety Board of Tasmania as one of a series of national consistency projects, on behalf of the Heads of Workers Compensation Authorities.

The Terms of Reference were:

1. *Explore the range of alternative dispute resolution techniques operative in workers' compensation and allied jurisdictions in Australia and elsewhere;*

2. *Evaluate the effectiveness of these techniques in relation to attaining best practice outcomes in terms of quality decision making and expeditious resolution of disputed workers' compensation claims;*

3. *Recommend options which, in light of these investigations, could be adopted by Australian jurisdictions.*

Refer to:

A. *the existing situation in Australian in workers' compensation and allied jurisdictions which may include motor vehicle accident compensation schemes; small claims courts; industrial relations conciliation and arbitration systems etc;*
and

B. *the recommendations of the Industry Commission Report No. 36, Workers Compensation in Australia.*

Consult with:

C. *each Australian workers' compensation jurisdiction.*

A separate report entitled *Medical Panels - Securing Definitive Medical Advice in workers Compensation* was prepared for WorkCover, New South Wales in the course of this project. That report complements the information in this report and describes best practice in the operation and design of Medical Panels in Australia and overseas.

Scope of Consultation

Consultation for this report included structured interviews and numerous telephone and less formal contacts with well over one hundred people in the course of 1995. The organisations consulted are included at Attachment E.

Various stakeholders involved with the operation of dispute resolution systems both nationally and on a state level were interviewed. These included nationally based employers, employer representative groups, insurer representative groups and unions and a legal representative organisations.

Research for this project has been comprehensive and far-reaching, including international reviews of similar schemes and information extracted from the Internet. Statistical information has been drawn from internal information held or known by the various organisations, including estimates on legal and associated costs from the various national self-insurers.

We are grateful for the assistance of many people in the preparation of this report. We would like to thank the Heads of Workers Compensation Authorities, Board Secretaries, Senior Policy Officers and Librarians of each of the workers compensation agencies visited. Our thanks also go to the many judges, review officers, conciliators, mediators and support staff resolving workers compensation disputes daily around Australia, for their time. In particular we would like to thank, David Bryson, Elizabeth Hatton of the Victorian WorkCover Conciliation Service, Alan Clayton of Bracton Consulting for his well considered views and Anne Hall for her continued support.

Our special thanks to Rod Lethborg for his sustained enthusiasm.

About Transformation Management Services

Transformation Management Services specialises in providing advice on dispute system design and effective case management to the commercial and government sectors as well as providing mediation services to a range of organisations.

The principals' experience is drawn from an extensive background in Australian courts, private sector complaint systems, law reform, case management technology, quality management and more recently workers compensation.

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Findings

Best Practice Strategies

Good practice in dispute resolution can be considered to be relative, to the extent that features which work exceptionally well in some places cannot be picked up and dropped into every scheme. Existing legislation, the political climate and industrial history are just some impediments to the portability of the best techniques.

While acknowledging this constraint, there clearly are schemes that are superior, providing lower unit costs, higher throughput of cases and better outcomes for workers. These "Best Practice" schemes exhibit many common elements and the way they have dealt with problems is instructive for Australian schemes facing similar challenges.

At a strategic level, the best schemes:

Pursue needs before rights
Align functions and levels without overlap
Firmly control information.

The best practice schemes pursue these three strategies, within local constraints. Where they succeed, they produce outcomes desired by all dispute resolution systems - low numbers of disputes as a proportion of the number of disputable events, ie. low disputation rates.

Fewer disputes mean less obstruction to getting workers back to work and/or achieving proper compensation for injury. This is an outcome in accord with the generally understood aims of workers compensation schemes:

- high return to work rates
- effective treatment regimes
- fair allocation of compensation
- integration of partially injured workers to useful work
- low costs[1]

1 I.e. Industry Commission, Workers Compensation in Australia, Report No 36, Canberra 1994 (pp xxix)

Pursue needs before rights

The pursuit of needs before rights is perhaps the most contentious of the three strategies of Best Practice systems. In many jurisdictions, legal rights of injured workers are the basis of an advocacy industry that over time has highlighted inadequate post-injury support and poor industrial safety. Best Practice schemes do not ignore rights. They seek to shift the balance of scheme effort away from disputes over rights, to meeting the immediate and long term needs of the injured worker; so that arguments about rights do not routinely arise.

The better schemes in all jurisdictions deliver this by offering Alternative Dispute Resolution (ADR)[2] processes. These processes are more suited to meeting needs than traditional courts, which focus on narrow questions of proof and monetary outcomes. ADR enables a broader range of more tailored outcomes for individual cases. If ADR is offered early, schemes avoid disputes that arise from a failure to meet immediate needs and the objectives of better return to work rates and lower disputation costs are more likely to be met.

Align functions and levels without overlap

Best practice dispute resolution systems (DRS) manage disputes in four distinct ways. Although these ways or "levels" are most often described hierarchically, the best systems ensure that few disputes pass beyond the second level. In practice, at each level the system has the potential to resolve or pass on disputes to the next level and to escalate or diminish the complexity of a dispute. Each level has successively higher unit costs. These four levels are:

1. An initial decision prompting the grievance (the primary decision)
2. Facilitated (ADR) dispute resolution (first outside attempt at resolution)
3. Determinative review (formal hearing of the dispute on merits)
4. Review on the law (assessment of interpretation and application of law in the determinative stage)

At each level, case progress is tightly managed and where required, the DRS can use a variety of mechanisms to direct the more complex matters to the appropriate level. In workers compensation, the Best Practice core functions can be described as follows.

At level 1, insurers properly make decisions based on sound information.

At level 2, ADR bodies facilitate but do not impose resolution.

At level 3, determinative bodies make review decisions and do so in a manner that enables them to be accountable to courts.

At level 4, courts properly interpret the law, establish precedent and do not rehear the facts already heard.

Successful schemes align each level with their core functions and ensure that there is no overlap. In those schemes where overlaps in function occur, costs and disputation levels are higher.

In some schemes, disputes are not managed by a DRS. Either administrative action to signal a dispute is left to the worker (or a third party), or legislation allows the

2 ADR includes mediation, conciliation, arbitration and any other facilitative processes sponsored by the workers compensation agency. Examples of the latter are Dispute Resolution Officers in WA and the former Information Officers in Victoria.

parties to the dispute to control the progress of the dispute and the forum in which in it will be heard.

The first time the DRS is made aware of a dispute can often be quite late after a dispute has arisen. By this time, the parties attitudes may be well defined and non-determinative meditation options may already be untenable.

These unmanaged systems are often characterised by overlaps in administration and decision responsibility. In these systems predictable problems occur.

Primary decision-making may be abnegated by the insurer. Depending on scheme design this role may then be taken up by insurer lawyers or the DRS. In either case, the result is usually greater delays, more and longer disputes by appropriately aggrieved workers.

In the absence of an informed primary decision, ADR officers are forced to supervise claims management. This is resented by insurers. Under this and other pressures, ADR officers tend to take on a determinative role and then find it very difficult to facilitate a solution between the parties. Where ADR starts to include determinative functions, they invariably become criticised for legalistic behaviour. Parties confused by the nature of the process and feeling ambushed by an inability to bring a legally qualified negotiator, clamour in protest. When this happens, confidence in the purely facilitative ADR process wanes, forcing more matters to the court level and increasing costs and delays.

Courts, also dissatisfied with lower level processes, rehear the factual issues and inject costly duplication into the system. If most cases are reviewed on the facts by the courts, the ADR process becomes superfluous and costs again escalate.

Facilitative processes which should have been conducted in the ADR level move to the control of private third parties, generally lawyers. These spill into the court process as "settlements". Weak court controls, which do not ensure that only disputes requiring adjudication reach the court door, result in high court door settlement rates and more costs.

Where the overlaps between the levels are large, costs and delays predominate, small problems escalate, administrative delays become political issues, the disputation rate is high and the culture becomes more and more litigious.

Firmly control information

Better schemes have identified four tools that help them keep functions aligned with levels. These tools all involve either the collection, distribution, evaluation or control of information. They are usually built in to the scheme at design stage and are the hallmarks of the Best Practice. The tools are listed here and described in the following paragraphs. They are:

- Early education, worksite interaction, thorough information about the scheme and "navigation" assistance when participating
- Reconsideration of primary decisions by experienced insurance claims managers (with authority to reverse primary decisions) as part of a quality review mechanism or continuous improvement mechanism.
- Mandatory information exchange between the parties before lodging the dispute with the DRS
- Fully informed streaming and screening by the DRS to exclude "artificial-disputes" and to fast-track particular disputes to appropriate forums (Tribunal, ADR, Medical Panel or Court)

Better schemes keep disputation rates right down by managing the expectations and actions of the parties from the earliest times. They promote work-site activity and early contact with the claimant. Often these are combined with rehabilitation

programs. Extensive information to help workers navigate around the often complex and confusing parts of the system can help ally fears and eliminate the "friendly advice" role often taken up by advocates, as the means of introducing their services to an injured worker.

High quality primary decision making is the key to limiting disputes. Schemes that do not require primary decision-makers to collect all information before making a decision or to be accountable for their decision-making, have a large proportion of unnecessary disputes. Better schemes make use of quality management practices in claims management to continuously improve their handling of cases. They may even use early intervention ADR techniques themselves.

Dispute resolution depends on arranging for all the elements needed for a resolution to come together at one time [3]. Information is the most important of these elements. Better schemes tightly control how much information is collected, when it is collected and the timing of its presentation. In these schemes, legislation supports the early exchange of information, imposing sanctions where it is deliberately withheld but allowing new information where it was impossible to obtain at an earlier time. If information is withheld, consideration of its significance to the decision or dispute is made at a later time, inevitably in the next level. The best schemes do not countenance withholding information to obtain advantage or increase advocacy costs.

Best practice schemes screen cases for compliance with information exchange requirements, and to ascertain the appropriate forum to resolve the dispute (streaming). The decision to refer the case to ADR, tribunal or even back to the primary decision-maker is a key "gatekeeping" role performed by the DRS. Schemes that allow participants or their advocates to determine when a case will proceed, inevitably incur delays. Delays result in a need to refresh information such as medical reviews as they become outdated. This can place further cost imposts on the system.

As each level resolves disputes unable to be resolved at earlier levels, their experiences provide valuable information to improve the functioning of the earlier levels. Courts have traditionally used a superior court review on the law, to achieve this feedback. In best practice workers compensation schemes, this method is used to establish precedents to guide the actions of the earlier tribunal level and to establish the parameters for mediated settlements at the ADR level. The DRS facilitates feedback through newsletters, case decisions and training sessions to all levels. Based on the principles of continuous improvement[4], the feedback is also useful in delivering consistency and predictability to the users of the system.

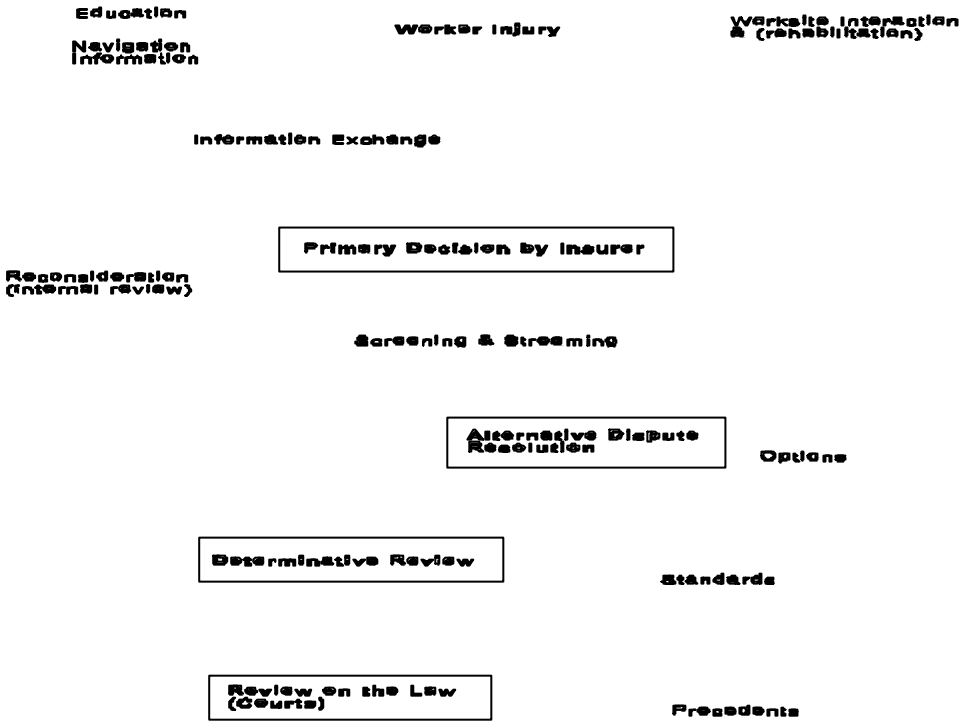
3 Wallace N and Hall M, *Preventing Disputes*, Transformation Management Services, 1992

4 Imai M, *Kaisen: The Key to Japan's Competitive Success*, Random House, NY, 1986

Best Practice Model

The Best Practice concepts summarised above are examined in detail in Chapter 4. The model of system operation represented by Best Practice is shown in the figure below.

Fig 1 Components of Best Practice Dispute Schemes



In summary, the findings are as follows:

- Overall, Australia boasts a higher level of adoption of ADR approaches than either the US or Canada in workers compensation.
- There is an emerging trend overseas to privatise dispute resolution replacing traditional court and tribunal systems, with industry-based and commercial cooperative systems. This trend is not yet evident in Australian workers compensation but may in the future put jurisdictionally based systems in competition with privatised counterparts.
- Case flow management techniques are a powerful means of reducing delays and disputation rates. To be effective they must apply from the start of the dispute and must be integrated with the court level. Courts that apply caseflow management techniques handle fewer unnecessary disputes and are quicker and more effective. A lack of caseflow management will sabotage both the best designed ADR and court schemes.
- Courts that do not apply caseflow management techniques are characterised by multiple pre-hearing conferences, high court door settlement rates, high adjournment rates and long waiting times.
- Court-annexed mediation schemes that are voluntary are largely unsuccessful as are out-sourcing schemes. Better schemes build very

strong links between administratively run ADR programs and courts. Courts should have the option of referring cases back to ADR and of applying cost sanctions to avoid abuse of the system.

Expeditious resolution of cases also requires careful management of expert medical advice. Exploration of issues and findings relating to the management of medical advice was undertaken in parallel with research for this report. The findings are given under a separate cover: "Medical Panels: Securing Definitive medical advice in Workers Compensation". The terms of reference for this report are given in an attachment.

Selected findings relating to Medical advice are:

- Better schemes limit the development of an adversary expert culture and resolve medical issues close to the incident. They place high importance on the role and status of the treating doctor. The most successful processes provide incentives to parties to elect medical umpires themselves and give a discretion to the dispute resolution body to use medical panel resources only as a last resort.
- The best use of expensive medical panel resources is as expert advisors not as tribunals. This is achieved by limiting the cases placed before panels. Cases are carefully screened and all factual issues are established first. Medical Panel findings are made binding on medical issues alone and set medical precedent for the system.
- Medical panels lose credibility over time if their findings are considered as only one of several "opinions" by the courts. In these circumstances they become irrelevant.

Australian Practice and moves towards national consistency

Australian workers compensation schemes employ some dispute resolution procedures that rank with the better schemes in the world. While our schemes are not universally the best, in some instances best practice in Australia is world best practice.

Some of our schemes show a high use of low cost ADR options for the bulk of disputes. In many instances high cost court processes have been excluded and replaced by more efficient administrative schemes. Despite these innovations, low cast ADR is not the main method of dispute resolution and schemes vary widely between jurisdictions:

- The bulk of workers compensation disputes in Australia are resolved either through correction of poor claims decision-making or lawyer negotiated settlements. A smaller group are resolved by formal adjudication hearings, and ADR processes.
- Workers compensation dispute resolution costs in Australia vary by a factor of 10 between jurisdictions. Studies reported here, show that a higher cost does not correlate with a better financial outcome for the worker. There is also no evidence to suggest the objectives of workers compensation schemes are enhanced by higher expenditures.
- Stakeholders at a national level are unhappy with the divergence of Australian schemes. They are generally satisfied with the introduction of

ADR into Australian schemes but are concerned that systems be fair, predictable, unbiased and cheap.

Already, in the course of this project, three jurisdictions have made substantial changes to their dispute resolution systems along the lines of best practice described in this report. Experience from other schemes show that different techniques have proven successful in managing the transition from older to newer more progressive systems. The last chapter of this report looks at managing caseload legacies and introducing new technology to avoid inevitable early backlogs. It also proposes in line with the recommendations of the Industry Commission, national monitoring and an agreed set of national standards, together with proposals to carry the momentum of change towards national consistency in dispute resolution that this project has begun.

Summary of Best Practice Features

Best Practice Schemes:

- *Intervene early*
- *Most importantly, look after needs before rights*
- *Offer a range of dispute resolution methods*
- *Allocate resources flexibly according to the nature of the dispute*

Agencies should be proactive by:

- ***Making navigation assistance readily available through the claim and dispute resolution process***
- ***Ensuring early personal contact of very high quality***
- ***Giving information about entitlements***

To deter disputes, on-site interaction should:

- *Keep the worker involved with the worksite in some way*
- *Include the authority to take necessary action*
- *Use standardised investigation tools*
- *Ensure communication between insurers, doctors, rehabilitation providers, worker & employer.*

Best Practice Primary Decisions:

- require personal contact

- rely on access to all the relevant information
- are made in an environment that feeds back bad and good outcomes to decision makers

Agencies should:

- Require internal review of claims decisions within time-lines
  - Either after a dispute is lodged; or following a rejection
- Require that staff who perform internal reviews be separate to the decision-maker, and have the requisite experience and seniority
- Encourage rotation of the internal review function.

DRSs should:

- Require information exchange by the parties
- Give out hearing dates or appointments only after information exchange is satisfactorily shown

Agencies should:

- Appoint gatekeepers to screen disputes
- Steam disputes into categories with flexibility by senior gatekeepers to make overriding decisions where necessary

Facilitators should:

- Control the process not the outcome
- Adopt quality measures that include peer review and rigorous adherence to predefined processes

Best Practice Schemes:

- Allow facilitators power to offer solutions that can be agreed by the parties and later confirmed at a determinative level.
- Separate the facilitative role and the determinative role
- Encourage early settlement by reversing cost incentives
- Introduce court rules that mandate early information exchange
- Limit the number of medical reports in court processes
- Promote the use of offers of compromise

In moving towards Best Practice schemes should:

- Examine any new court cost rules and monitor impacts carefully
- Bring evidence of abuse to the attention of court rules committees
- Examine the operation of future IRC cost rules with a view to establishing evidence of best practice
- Adopt evidence caps
- Limit appeal to on-the-record review
- Ensure the determinative level is appropriately constituted to withstand judicial scrutiny and to avoid the possibility of de-novo appeals
- Use medical panels to limit medical evidence
- Establish preceding self-help and screening mechanisms
- Appoint the best specialists to give binding advice

To improve support from external environment Schemes should:

- Inform Judges through training and structured contact with other parts of the DRS
- Choose to litigate specific cases to clarify the law
- Support the development of national model legislation

Recommendations

Despite different legislatures, systems of workers compensation dispute resolution are similar across Australian jurisdictions. Similar industrial climates and a single economic environment suggest that Australian schemes will have least trouble

adapting successful techniques trialed elsewhere in Australia. In this respect information on failure can be just as important as information about success.

Unfortunately, Australian jurisdictions publish far less in the way of critical analyses of their experiments than US or Canadian schemes. This report has been one of the first attempts to compare systems and identify better dispute management options.

We experienced great difficulty in obtaining quantitative measures on which to base judgements of best practice, as different schemes use different measures of performance and success. Our first recommendation is therefore to suggest the means of enabling easier identification of successful Australian techniques in the future. This would be through the adoption of a common set of performance measures by all jurisdictions. The performance measures we propose are detailed in Attachment A. We recommend:

1. Australian Heads of Workers Compensation agencies agree a set of common performance measures for dispute management, similar to those detailed in Attachment A [5]

Consistency between Australian Workers compensation jurisdictions will benefit companies with workforces spread across different Australian States and Territories. With increasing globalisation of business, consistency will also reduce the negative aspects of setting up business in Australia and is supportive of other microeconomic reforms.

Implementing a best practice model will inevitably require legislation in each jurisdiction. Consistency between Australian jurisdictions will be improved if local legislation is based on a common model. To continue the momentum of moving towards best practice we therefore recommend:

2. Australian Heads of Workers Compensation agencies sponsor a project to develop model legislation for implementing Best Practice dispute management in Australia.

In moving between Australian jurisdictions on this project, our consultants have found great interest in discussing the detailed operations of schemes in other states. Knowledge of scheme operations in other states is generally superficial and lack of details about how they integrate into compensation policies and benefits is a major reason why successful techniques are not picked up by other schemes.

The existing HOWCA forum and formal papers and reports seem insufficient to continue the interchange of detailed information needed for the common pursuit of best practice.

A range of measures would be available: from more officer level contacts between schemes at conferences, to the formal interchange of personnel, and a regular news forums specifically directed to this end. We believe this interchange of ideas to be important enough to warrant specific action by HOWCA. We therefore recommend:

3. HOWCA promote exchange of information between Australian schemes, initially by establishing a working party to: examine practical implications of the Best Practice model and divide responsibilities for developing implementation approaches based on the existing expertise of each jurisdiction.

The credentials of dispute resolution officers are often the source of criticism and attack on otherwise well functioning schemes. Credibility is becoming even more of an issue in the more populous states as a mediation option is being promoted for all

5 This recommendation is similar to a recommendation of the Industry Commission Report No 36, given at pp 206.

manner of disputes including: building, childhood abuse, civil law, residential tenancies etc. More professional "mediators" and "conciliators" are advertising their professional qualifications in the law, accounting or engineering, to establish their credibility.

Facilitators and determinative officers may have some qualifications but most likely these would not be related to mediation. Mediation training courses are now available from many tertiary institutions but these need to be nationally recognised to overcome local concerns about qualifications and experience.
We have discussed the possibility of a national accreditation program with Bond University similar to that conducted by the Insurance Council Of Australia. Bond is recognised in Australia for its expertise in ADR training. A draft proposal has been distributed to all jurisdictions.

4. We recommend HOWCA invite expressions of interest from institutions interested in providing specific training for personnel in dispute resolution for Workers Compensation and then endorse a scheme of nationally recognised accreditation for dispute resolution personnel.

In some jurisdictions, schemes are experiencing unusual delays in progressing disputes though the Court system. This report details a range of court delay reduction strategies in chapter 6.

While not all schemes are affected, the opportunity for some schemes to eliminate major problems through special delay reduction initiatives is sufficiently important for the recommendation to be encompassed within the terms of reference for this report. We recommend.

5. Schemes with specific delay problems associated with Court settlement of disputes institute court delay reduction programs initiating caseflow management techniques.

2

Scope of the report and defining a common framework for comparison

Scope of this Report

Describing Best Practice

Workers compensation systems are an interplay between statutory bodies, private insurers, employers, unions, and workers. The task of identifying best practice is complex. There is limited common use of terms and little collection of equivalent statistical information on scheme performance.

The elements of dispute resolution systems are also different in overseas schemes. The first task of this project was therefore to define a framework for comparing dispute resolution schemes operating under different conditions. This model is presented in the second half of this chapter.

Understanding that disputes are dynamic not static

Traditional and Dynamic View of Disputes

The traditional view of dispute management is that of a formal process, dealing with static entities. A compensation dispute is signalled by a formal event and is treated as representing a fixed position or attitude.

The accepted method of dealing with disputes has been to seek to define the positions of the parties and then to negotiate to reach a compromise between them. This understanding of disputes has supported the typical organisation approach to managing disputes: first register, then assess, then determine. Efficiencies in management have been pursued by providing dispute services as add-ons, with the main quality issues being the manner of service and how quickly it could operate.

In a contrasting view, disputes are seen as dynamic entities, where the behaviours of the participants can and do change with time and under the influence of different aspects of the dispute resolution system.

The evidence that in unmanaged disputes, behaviours and expectations do change is presented in chapters 3 and 4. First, the escalation and inflation caused by unmanaged systems is described. In brief, if the quality of communication between parties is poor, when new information is introduced, it may be incorrect. Mis-communication, mistakes and misunderstandings abound. Frustrations increase with delays, making any simple solution less acceptable. Objectives change. More people become involved. The parties lose control of the dispute and there is a need for a third party to step in to finalise the issues.

In contrast, the best practice chapter describes systems that are lean and highly interventionist result in a smaller dispute population.

Best Practice solutions, both here and overseas, involve understanding and controlling the causes and subtle influences on disputes, from before the time a worker is injured. These systems not only have fewer disputes but have less complex disputes, cause less inconvenience, take less time and consume fewer resources.

Understanding that disputes are not static is essential to accepting that they can be managed, that interventions made at various times can markedly change the course and the likely cost of a dispute.

The Elements of Dynamic Resolution

The four elements needed to bring a dispute to resolution are described in chapter 4[6] They indicate how a population of disputes can be resolved.

The largest proportion will resolve based on clarification of information. These disputes are simple to sort out and the best approach is to send them back to the source of incorrect information so that a correction can be made. This needs to be done quickly.

As time goes on there will be an increase in the matters that are driven by frustration. These need a "voice" opportunity. That is, parties need to express their concerns to a person perceived to be in "authority". They require a venue where this can occur. The opportunity to do this is important. If left unattended, disputes can become more and more complex. Parties that try again and again to "get someone to listen" may forget about the material elements that caused the dispute in the first place. The dispute will have evolved into a dispute of a different type.

Formal documents and processes registering a dispute do not articulate the different goals of the parties. In most instances these will be very different to the goals they are allowed to express in the initial dispute documents. Also, they can and do change over time. Underlying a claim of compensation, for example, may be a poor working relationship between an employer and employee. In another example, a worker may continue to dispute an already existing claim to express concern over the subsequent behaviour of an employer. These goals need to be identified, expressed and placed in context.

Resolution requires the forum or opportunity for all of these elements to be untangled and resolved. At some point parties will be unable to devise their own solutions and will need assistance. Along the way there will probably be an opportunity for modest intervention to assist the parties to a solution. In the worst cases, a solution will need to be imposed.

A dispute resolution system needs to put all of the layers together as quickly as possible to diffuse disputes.

6 See also Wallace N and Hall M, Preventing Disputes, 1993

ADR and Case Management

The terms of reference for this project included specific requirements to report on related ADR systems and expeditious resolution of disputed claims. An examination of ADR trends shows that Australia has ventured further than overseas workers compensation counterparts in adopting ADR. The various applications in allied jurisdictions also show a clear move to privatised ADR. either through industry-based schemes or union-facilitated schemes. Conversely, progress in court delay reduction is less apparent. While widely accepted best practices exist, there are considerable difficulties in achieving implementation. The more successful approaches which allow legitimate input from regular court users and direct extra resources effectively are detailed.

Maintaining Gains

Striving to achieve best practice is pointless if gains are not sustained. Australian Workers Compensation history shows examples of expedient reforms that have delivered predictable if not desirable results on disputation levels. Chapter 7 of this report looks at the vulnerability of ADR schemes and offers suggestions for defending them against unwarranted tampering that would eventually result in their replacement.

This report summarises what appears to be a **cycle** of change that many Australia schemes have experienced. This cycle shows **pressures for change**, typical scheme responses and the outcomes to be expected from succumbing to these pressure. It pinpoints aspects of scheme designs that over time, have allowed pressures to build that precipitate more change. The fall out from these changes have in turn prompted further changes.

Chapter 8 explores a range of threshold issues that will arise when implementing Best Practice. These include issues such as: compulsory versus voluntary ADR, composition and qualification of the determinative level, legal representation, independence etc.

Chapter 9 examines transitional issues in implementing both new schemes and national consistency.

Defining a common framework

A systems analysis approach to understanding disputes

Establishing a common set of terms is not only essential to discussing best practice but also for comparing performance under different systems. So, identifying and naming the components of dispute resolution systems was a necessary first task for this project.

In common with other recent research, we have identified the components of best practice in dispute resolution by examining the sequence of events that constitute a dispute and attempts to resolve it. We have then drawn out the common practices as a framework for understanding disputes.

The supporting evidence for this framework is derived from research presented in later chapters (5, 6, 7). The framework is presented here to ensure discussion of the best practice model which follows is underpinned by a common understanding of terms.

The framework identifies chronological stages in the life of similar disputes. Disputes are tracked from the first potential conflict to the final place of legal appeal. These disputes may arise at the workplace when interactions between the parties begin to fail. Studies in **best practice** court administration and in dispute management all

apply this chronological method.[7,8,9] Each stage is identified and given a component title.

Certain components either appeared in all schemes or were proposed for inclusion in schemes where they were lacking. What became clear from discussions with stakeholders and our research, was that certain components were essential.

Labelling the components was made more complex because the jurisdictions examined did not label consistently. **Review**, **adjudication & appeal** are all used in various jurisdictions to describe differing functions. There were additional complicating factors. In some jurisdictions, the same function is performed but by different system participants. In others, a single term describes different methods to perform the same function. The component labels that were adopted for this report were drawn from those used consistently by all jurisdictions. Where they were not consistent a generic term has been used.

Components of Disputes

The dispute components identified were:

- On-site interaction (including rehabilitation)
- Primary decision-making
- Reconsideration (Internal Review)
- Information exchange
- Screening & streaming
- Facilitation or conciliation / mediation
- Determination
- Guidance on the law

Four of these components may be described as **levels** of dispute management and four as **tools of alignment**. The following sections describe each component in detail.

On-site interaction

Dispute resolution in workers compensation has traditionally focussed on a discussion of what occurs *after* a decision to reject or change workers compensation benefits. An **appeal** from this **primary** decision has been considered the starting point of the dispute. Work on this project showed that the real starting point is the interaction between the two putative disputants, either at the time of the injury or before (see chapter 7).

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7 See generally, Baar C & Deschenes J. *Masters in their own house* - A Study on the Independent Judicial Administration of the Courts - Canadian Judicial Council, Toronto 1981

8 Solomon M. *Caseflow Management in Trial Courts Now and for the Future,* American Bar Association, Chicago, 1987

9 Friesen E C, Solomon M & Mahony E. *Caseflow Management - Principles and Practice,* Denver Institute for Court Management, National Centre for State Courts 1991

The bulk of what become labelled as **disputes** arise from failed communication between two parties. In workers compensation the two originating parties are the employer and the worker. The insurer often takes over the role of employer or the workers compensation agency depending on the nature of the scheme. In either case, if the insurer or the agency manage the immediate interaction after an injury or even leading up to the likely occurrence of injury, they can reduce the incidence of disputes. (also Chapter 7). If this interaction is ignored then more disputes may occur. The need for a third party to intervene to resolve the dispute may then be necessary.[10]

In disputes about changing benefits, the same applies. Action taken before the decision is made is far more important in influencing disputation rates than that taken after.

Primary decision-making (level)

The decision to accept or reject a compensation claim is the central function of the second component of a dispute resolution system. It includes all the work involved in collecting the information to justify the decision, the extent and nature of contact between the parties and the internal management systems that ensure the quality of the decision. Primary decision-making is often constrained by legislative machinery that dictates primary decision making within certain time lines or specifies criteria for initiating or recognising a dispute.

The critical information is usually medical information. It is necessary to support the rationale behind the primary decision or the basis of disagreement with the primary decision. A preliminary function is to collate this information, identifying the information that is relevant and presenting it so a decision maker can determine entitlement.

Reconsideration or Internal Review

Reconsideration or internal review is an examination of a primary decision by a senior supervisor or officer within the decision making organisation. Most often this is a senior claims manager or supervisor within an insurance company.

Canadian systems describe this as an internal review process. In the Commonwealth scheme, it is called reconsideration. It should be distinguished from the case review processes involved in quality management practices. It is usually initiated following a complaint about a decision by an affected party.

Information exchange

This component is where each party is provided with copies of the information from the opposing party. This may occur anywhere along the chronological path.

Screening & streaming

There are two functions within this component.

Screening

Screening is a function performed by a dispute resolution body to ensure that all the steps necessary to make effective use of the forum are taken. These steps might include ensuring that all the relevant information is available, referring the dispute -

- back to the primary decision maker for reconsideration if this has not occurred already
- to a rehabilitation agency for further action
- to a medical referee for an opinion on conflicting medical evidence,
- to facilitation (ADR processes)
- directly to a court or empowered decision maker,

10 Wallace Nerida, Hall Michael, *Preventing Disputes,* Transformation Management Services P/L for Victorian WorkCover Authority, May 1993 - See Page 9 for a flow chart showing the likely points and nature of intervention of a third party in a workers compensation dispute.

This component also includes court delay and management processes. An example is setting a time table for the preparation and finalisation of the case if it is a complex matter. The screening function is also useful for identifying more clearly the issues that have become confused.

Streaming

Streaming is the function of deciding in which forum the dispute should be resolved and then referring the case to that forum. This might be a court, particularly if the dispute outcome might set precedents for the rest of the system. This function has the ability to by-pass ordinary processes.

Facilitation (level)

There are two functions within this component. Both can **facilitate** the resolution of a dispute.

Alternative Dispute Resolution (ADR) processes

Facilitation is the provision of services by a third party to resolve the dispute once the parties are in a position where they are unable to resolve the matter themselves. Facilitation can range from a pure mediation model to more interventionist models such as conciliation.[11]

In the former, interventions are minimal and the third party does nothing more than assist the parties to reach their own solution. In conciliation, the third party makes suggestions about how the dispute might be resolved. A more extreme model, the **med-arb** (mediation combined with arbitration) operates in some states. This gives arbitration powers to the facilitator and enables the facilitator to decide the outcome of the dispute, after first trying to mediate a result. In a pure definition, arbitration means that parties must first consent to abide by whatever the arbitrator decides

Settlement

Facilitation also includes the settlement process where two representatives of the parties, usually lawyers negotiate a settlement to the dispute.

Determination (level)

Determination includes the function most thought of when dispute resolution systems are considered. This is where a third party reviews arguments and imposes a decision on the parties. Unlike facilitation, the parties have no control over the type of outcome or whether such an outcome should occur. In most jurisdictions it devolves to an adjudication process where the parties are not asked if they consent to a decision being made by a third party.

In determination, the claim is considered afresh. All matters are put to the adjudicator and the adjudicator makes a decision that is determinative.

11 Wallace and Hall, 1993, ibid

Guidance on the Law (level)

This component includes review of the processes followed by the adjudicator. This may be conducted by a senior member of the judiciary in a formal court. The function is mainly there to ensure that earlier processes abide by the law and the principles of natural justice.

A further function is providing final interpretation of legislation. Questions of law may be referred to this level. The judge may then provide an interpretation that applies to the particular factual situation. These decisions are used as precedent. They can direct the culture of the system as they are followed all the way through the system from primary decision to adjudication level.

Technically, guidance on the law can include review on a question of law or on a question of fact.

Consistency of Component functions in Australia

Despite labels, each of these functions is performed in some manner in each state or in each jurisdiction in Australia. The chart below shows in detail where they are performed. While identification of functions is simple and can easily show consistency, the conditions under which each of these functions operate pose a different set of problems again.

The key task in any best practice exercise is to identify under which conditions these functions can best operate. Each of these conditions of course will be reliant in some respect upon local environmental matters outside the control of the relevant workers compensation agency. These issues might include the current legal culture, the political climate, and the predominate work place environment.

Components of Dispute Management in Australian Jurisdictions

	Primary decision-making	Reconsid-eration (Internal Review)	Information exchange	Screening & Streaming	Facilitation or conciliation / settlement		Determ-ination	Guidance on the law
Qld	*	*	*	*		*	*	*
Vic	*	*			*	*	* * *	*
NSW	*	*			*	*	*	*
WA	*	*	*	*	*	*	*	*
SA	*	*	*	*	*	*	*	*
NT	*				*	*	*	*
Tas	*					*	*	*
ComCare	*	*						*
Seacare	*						*	*

Chapter 3 details the problems specific to each component and commonly experienced across a range of jurisdictions. This chapters also examines the impact on disputation rates of differences in workers compensation scheme design.

3

Pervasive Issues in Dispute Management

Sources of Issues

Dispute resolution systems (DRS) experience common problems and similar criticisms from users in any industry in which they are established. Stakeholders frequently complain of high costs, delay and bias.[12,13] The common nature of DRS problems suggests that their causes may be more attributable to system design than to cultural or environmental differences or even the different nature of the disputes.

This report gathered evidence on dispute resolution system problems from a wide selection of participants and industry groups. The capacity to comment on more than one system in Australia was a major criteria for selecting stakeholders interviewed for this project.[14] In depth interviews were conducted with representatives of major employer groups, legal practitioners, medical practitioners, workers compensation board members and legal specialists. Worker concerns were drawn from surveys conducted in Western Australia and in Victoria and from interviews with representatives from peak union bodies.

This chapter reports all the issues raised in Australian stakeholder interviews about dispute resolution systems. Their importance as issues has been confirmed by reference to similar issues raised in the literature and reported in reviews of other schemes.

The chapter is in three parts. The first part examines how the number and duration of disputes are affected by the design of workers compensation schemes.

The second part reports issues specific to the operation of the DRS. These have been grouped according to their place in the sequence of events in dealing with a dispute, outlined in the framework in the previous chapter.

12 Victorian Parliamentary Enquiry - Residential Tenancies Tribunal, May 1995.

13 Administrative Review Council, Review of Commonwealth Merits Review Tribunals, Discussion Paper September 1994

14 The Attachments include a list of the stakeholders interviewed for this project

The third part raises the specific issues of concern to employers with national operations. These mainly focus on the impact of differences between schemes in terms of efficiency and costs.

Scheme Design Issues and their Impact on Disputes

The highly political nature of workers compensation in Australia has often produced legislation that is at best highly regulatory, and at worst inconsistent, lacking cohesive design and clumsily attempting to meet the needs of diverse interest groups. Designing a successful DRS in this environment is difficult. It is not surprising that the costs associated with workers compensation DRSs are generally high and that overall disputation rates are disproportionate in comparison to efficient schemes in other environments.

Schemes that are not managed well are unable to have any impact on the precursors of conflict. The many different participants in workers compensation schemes make the task even more difficult. There is often more than a note of despair in the comments of those charged with responsibility for scheme outcomes:

> *Administering workers compensation is like holding a beach ball under the surf - you never know where it is going to pop up*[15]

Badly drafted legislation is the starting point of many scheme problems and the starting point for understanding how schemes can approach Best Practice. The scheme features common in Australia and overseas which result in unnecessary disputation are described below.

Control over legal costs

Court processes and the accompanying legal costs are probably the most controversial areas of DRS design and one of those most difficult to control. Court related activity also represents a largely uncontrollable cost centre for workers compensation schemes overseas. An American commentator in part attributed increasing workers compensation losses across the United States, to court related costs.

> *"Workers compensation is saddled with cost shifting, minimal control over the choice of physician, and duelling expert testimony in an adversarial arena."*[16]

Where there is no special workers compensation dispute management body and disputes are mainly dealt with in the courts, costs will be high. The reason court actions are expensive lies in the cost structures often buried in legislation and in court practices that are outside the control of workers compensation administrators. Recently in New South Wales court related costs were put as high as 75% of the current workers compensation liability of $613m.[17]

Legal cost drivers

It is one thing to measure the extent of additional cost to the system arising from legal involvement. It is another to determine whether legal involvement in the system actually increases costs over time.

Studies of this type of **cost driver** are not available in Australia, however, the American Workers Compensation Research Institute (WCRI) has completed several

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15 Hon. Roger Hallam, Minister in charge of WorkCover Victoria, addressing a meeting of the Law Institute of Victoria, 27 July 1995

16 Sheridan, Peter J., "Soaring Costs, Beset Comp System", Occupational Hazards V54 (9) Sept 1992

17 Hon. J W Shaw, Attorney General and Minister for Industrial Relations, New South Wales Press Release 7 June 1995.

studies in this area. In the last of a series of studies of cost drivers in various schemes in the US, WCRI found that in Missouri, the major cost driver was "attorney" or lawyer involvement. Between 1989 and 1993, fund costs increased by 6.6% every year due to lawyer involvement after all other economic factors had been accounted for, including the recession. According to WCRI the system characteristics which resulted in high legal involvement were:

- regular reliance on lump sum settlements
- relatively high attorney fees (25%) of award
- constitutional (legislative) requirements that employers or insurers be represented by attorneys
- a policy of initiating reviews for possible permanent partial disability awards
- the absence of objective guidelines for assessing permanent disability.[18]

Similar studies would have to be repeated in Australia to determine to what extent legal costs are increasing and the relative contributions of the factors identified by WCRI. However, some of these factors can be detected in operation now.

Lump sums

Lump sum settlements and proactive pursuit of permanent partial disability claims are translatable to Australia. Both of these characteristics were blamed by stakeholders for high legal costs. The combination of low benefits and the availability of lump sums was raised by one self-insurer as a major cause of disputation and legal cost in New South Wales. Their view was that the courts were "swamped" to obtain lump sums to make up the short fall in weekly benefits.[19]

A series of studies by the WCRI also pointed to this combination as a cause of high legal involvement.[20] Between 1989 and 1992, WCRI studied causes of non-recession related controllable cost growth in 6 states. Increases in costs from 3.4 % (New Jersey) to 13.6% (Florida) were found. The most recent study of New Jersey listed the factors causing the growth as:

- increases in the frequency and size of permanent partial disability claims and lump sum settlements.
- a small number of attorney firms gaining a greater share of the market
- more medical service utilisation

Opportunities to obtain legal costs were more prevalent in some states than others. In the latest study (New Jersey) in particular, poor initial screening and poor information collection were identified as the cause of courts instituting multiple pre-trial conferences - to aid the collection of relevant information.

Lawyer initiated claims - permanent partial disability

18 Gardner J A, Victor R A, Telles C A, Moss G A Cost Drivers in Missouri, Workers Compensation Research Institute, December 1994

19 Interview National Australia Bank

20 Gardner J A, Victor R A, Telles C A, Moss G A, Cost Drivers in New Jersey, Workers Compensation Research Institute September 1994

The New Jersey study also found that the increase in attorney involvement from 37.6% to 46.5% over the three year period was in part attributable to attorney advertising and outreach programs. These programs were directed to alerting potential claimants to entitlements. The extent of these programs was measured by determining when attorneys became involved. A significant proportion became involved within one week of injury or before the filing of an objection to termination of payments.[21]

In Australia, the perception that some law firms are aggressively moving to extract costs from workers compensation systems was evident from both employer and union interviews. There was concern that early referral of workers to lawyers, immediately after injury, did not necessarily achieve the best outcome in terms of recovery from injury, return to work or, relations between the employer and the worker.[22]

Changes in union subscription structures have seen union officials take a closer look at legal costs. The NWU and Telstra separately reported that they had achieved lower fees and less litigious practices through the engagement of solicitors from a **panel** selected after meeting standards.[23] There was also a greater reliance on in-house union lawyers and union advocates.

These industry interviews also raised concerns that past injuries or newly emerging injuries from past accidents were becoming a fresh source of lawyer initiated disputation.

> *Almost every claim the company has had in the past is now resurfacing as a s98 matter*.[24]

Interviews with DRS staff in Victoria and NSW, confirmed that the practice of lawyer initiated disputation is increasing. Although no Australian equivalent to the WCRI research studies have been completed, it was reported in interview that one law firm had taken up a shop-front in a major industrial city. Signs in the window offered $500 rewards to workers of a certain age and work history if they would provide the names of 5 former work colleagues to the law firm. After obtaining lump sum settlements for that particular population, a process which took little under a year, the firm closed shop and left.[25]

The practice of lawyer initiated claims seems likely to increase in Australia, in line with moves to allow advertising by lawyers in most states, where previously ?touting" was expressly prevented. The Federal Justice Minister?s Access to Justice Advisory Committee found that advertising led to lower legal fees and has recommended uniform lifting of restrictions on advertising.[26]

Although control of the legal profession is a state issue, it seems likely that the environment of reform of legal services will result in more advertising in the future.[27] This would seem likely to result in an increased number of lawyer initiated claims.

Court set legal costs are an incentive to litigation

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21 Ibid pp 67

22 Interviews: NUW, Ford, BCA, Telstra

23 Ibid

24 Interview, Ford

25 Interview, NSW Medical Panel

26 See pp 135

27 The federal government has confirmed its intention to remove restrictions on advertising. See Attorney-General s Department - Justice Statement, Canberra May 1995 pp45

Legal costs systems in Australia ensure that injured workers can dispute a compensation decision with a very low financial risk. This arises from a combination of causes.

Workers Compensation Schemes pay most legal costs. This is due to two factors:

? according to many of the stakeholders interviewed, the largest proportion of cases are won by workers and lost by insurers. [28] [29] Unsubstantiated estimates in three Australian jurisdictions put this rate at somewhere between 75% to 99% at any one time.

? in Australia, most jurisdictions, apply the **cost indemnity** rule.[30] This means that where insurers "lose" a case, the legal costs, including the costs of medical opinion are met by the scheme. Cost scales are set by the court or the tribunal in which the claim is lodged.

There is also a further area of cost precipitated by the involvement of lawyers and medico legal experts which is often hidden. These costs are the private charges between solicitors and clients. Workers are usually able to avoid these costs by including them in settlements as a surcharge.

There were concerns some legal firms were promoting contingency fees schemes. Workers were attracted to advertisements that promised a "no win / no fee" outcome.[31] From a legal assistance perspective this did give the workers an avenue of redress that cost barriers may have previously prohibited but also more directly continued a low financial risk opportunity for workers to dispute compensation decisions.

Timing of settlement

The time or stage at which settlement occurs has a major impact on costs. Court processes allowing last minute court door settlements between lawyers have been strongly criticised.[32] Cost rewards for lawyers are higher at this stage than if the matter is settled at an earlier time. Many stakeholders were concerned that matters were not settled earlier. They reported that they thought this was a direct result of the opportunity for lawyers to receive higher costs. This problem is not limited to workers compensation cases.

A 1992 examination of personal injury cases in the County Court in Victoria found that costs increased at each stage quite markedly.[33]

"In all cases, stage of disposition is clearly a major determinant of costs."

Legal Costs of Personal injury Cases - after Williams 1992

Stage at which Settled	% of Cases	Avg. Cost (ea)
At Pre-trial conference	45	$3000

28 Gardner J, The Victorian WorkCare Appeals Board - An Investigatory Model, Torts Law Journal V1 No 1 pp154 See pp161 for a discussion of the "beneficial" rule, often sourced for the proportion of cases in this category.

29 Interview Insurance Council of Australia

30 Australian Law Reform Commission, *Who Should pay? - A Review of the Litigation Costs Rules* - Issues Paper 13, October 1994. Sydney, See generally for a more detailed description of the costs indemnity rule.

31 Some jurisdictions legislate against these private contracts. See S122 of the Workers Compensation Act 1987

32 Worthington D, Compensation in an Atmosphere of Reduced Legalism, Civil Justice Research Centre, Law Foundation of New South Wales, December 1994

33 Williams P L, Williams R A, Goldsmith A J, Browne P A, The Cost of Civil Litigation before Intermediate Courts in Australia, 1992 A.I.J.A. Melbourne, pp33 -35

Stage at which Settled	% of Cases	Avg. Cost (ea)
At Pre-trial conference	45	$3000
After Pre-trial Conference	11	$4700
Door of Court	30	$5100
During trial	6	$5100
Verdict	8	$11500

In personal injury cases the costs divided into five groups. Those that went to the "court door" attracted the highest costs and also comprised one of the largest proportions of litigated cases. If resolved at a pre-trial conference or before the case reached the door of the court, costs were less than half of the costs of cases that went to verdict.

The study also examined and commented on the files held by the corresponding legal firms:

> "For personal injury cases not settled at the pre-trial conference the value of firm inputs was nearly 15% lower than for cases which were settled and total costs were 20% lower.
>
> This is suggestive of insufficient effort being put into the case leading up to the pre-trial conference."[34] Williams et al. also found some "limited evidence that the use of senior staff aids settlement".

A similar study of the Workers Compensation Court of New South Wales was conducted more recently by the Civil Justice Research Centre. Its findings support those by Williams et al.

> "It was found that there was no attempt to negotiate settlement before the day of hearing in 64% of litigated disputes."[35]

Settlement at the door of the Court reached 57% of litigated matters. Costs again increased depending on the stage of the process at which settlement occurred. [36]

Settlement costs Workers Compensation Court of NSW - Worthington 1994

Stage at which Settled	Avg. Costs
ior to litigation	$ 1173
Listed but then struck out	$ 4381
Before the day of hearing	$ 4882
On the day or during hearing	$ 13779
Determined	$ 12732

34 Ibid pp34

35 Worthington D, 1994 pp33 and ppx

36 Ibid pp33

The high costs allowed for settlements on the day of hearing for workers compensation cases indicates that the court was sanctioning costs on the basis of accrued time spent. Allowing costs to be determined on this basis does not encourage parties or advocates to strive for early settlement.

A study of NSW motor car litigation files sought to find the factors that prompted settlement by both insurers and claimant solicitors. Previous studies had established that barristers were typically the negotiators of settlements in the system. The time that the barrister came in contact with the case was important in managing delays. The study found that:

> "While the solicitor routinely briefs counsel during case preparation the insurer does not usually brief counsel until just before the hearing."[37]

This study also found that insurers were less likely to initiate settlement , relied on court events to stimulate activity on the file, did less work on the file and were inactive for longer periods on the file. Both sides contributed to delay.[38]
These studies point to cost incentives which place a higher value on the timing of work rather than on its substantive or qualitative value.

Access to redress

The other side of the legal cost issue is the worker?s need for some type of representation, particularly where legal issues are involved and where the worker?s livelihood may depend upon the outcome. Lawyers interviewed stated very strongly that the worker should be entitled to a number of "rights". These include the right to redress as well as a right to competent representation.[39] Some commentators considered that a right to go to a court of law for redress was equally important as the right to redress.[40] Others were more concerned with the cost of any type of representation and the impact on worker income while appeal processes were underway.[41]

Information Management

Information Supporting the Primary Decision

All stakeholders talked about the availability of information as a key issue. Information is usually in the form of medical reports or assessor reports and is used either to support the primary decision of the insurer, subsequently justify an insurer position or support the worker?s claim.

In all jurisdictions, rules relating to information collection are set out in legislation or in guidelines issued to the primary decision-makers. Payment or non-payment of compensation follows decisions that rely on the scrutiny of this information. Where primary decisions over entitlement to compensation are routinely made without the necessary information, the collection of that information becomes a task for the dispute resolution system along with the need to review the decision.

Some schemes have actively passed the responsibility to the DRS to speed up the information collection. This was evident in South Australia, New South Wales and Tasmania.[42]

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37 Matruglio T, The Other View of Activities: An Examination of Third Party Claimant Solicitor Files, Civil Issues, No. 2 July 1992, Civil Justice Research Centre See pp3

38 Ibid pp4

39 Workers Compensation Committee, Law institute of Victoria (Representatives from 16 plaintiff and defendant law firms). Interview CMFEU

40 Committee member, Ministerial Working Party, WorkCover Review and Appeal process, South Australia

41 ACTU Response to Industry Commission - Recommendations on Workers Compensation, Submission to Government, July 1994

42 In Tasmania under Section 81, insurers may refer matters to the Commissioner for decision.

- In Tasmania, s 81 allows employers to refer matters to create an initial dispute over liability but only within 14 days after receiving a claim and usually before they have had enough time to collect information.
- In South Australia, workers lodge s102 applications if they believe there has been an undue delay in determining a claim.
- In New South Wales, under s102 an insurer must commence payment within 21 days of lodgment of a claim or refer the matter for conciliation.[43]

In each of these schemes, the DRS was not considered to be successful in reducing the time taken by the insurer to make a considered decision. In New South Wales, delays of up to 10 weeks were often reported before an order by a conciliation officer allowed payments to the worker to commence.

> *Why don't the insurers get it right in the first place. Why does the worker have to miss out on payments?*[44]

Disputes that arise because information is not exchanged or disputes that arise because decisions to deny benefits are made on the basis of inadequate information are **artificial disputes**.

An examination of the caseloads of these states showed that there were a large proportion of artificial disputes of this type. The insurer withdrew or accepted liability after newly collected information had been examined. In effect the DRS did not "resolve" these disputes. Described as a "parking lot" by one DRS officer, these cases had administrative costs of registration and files preparation that need not have occurred.

The problem was not restricted to insurers. Worker information was also elusive in these jurisdictions. The table below shows the availability of both sets of information at the time of entering the DRS. The Victorian statistics have been included to show the impact where insurer information is available.

Fig 3.1 Availability of information supporting claim at time of start of DRS processes in Australian jurisdictions with primary decision supervision functions*

State	Worker Information	Insurer Information	Proportion of legislative ?artificial disputes, in total dispute population	Proportion later taken out on insurers initiative - without input by DRS
Vic 94/95	(partial)**	Yes	Not specified	6.7%
NSW (1994)	No	No	93.6% (s 102)	54.4%
SA (93/94)	No	No	30.4% (s 102)	N/A ****
Tas (93/94)	No	No	65% (s 81) approx	33% approx

43 Extracted from materials provided to Dispute Resolution Conference, Melbourne November 1994

44 Interview, CFMEU

** Insurers are required to contact workers and obtain their information before making a decision and in some cases are successful in doing so.
*** Mediation process only.
**** This figure was suggested to be 30.4% or close to all of the matters lodged under Section 102 - Interview Review Panel.
Note: Medical Panel matters not included in the Victorian data.

Worker information

In schemes where court action was available a common concern was that information was not made available to the DRS. This meant there was considerable difficulty in resolving the issue.

> *Workers should be required to have their documentation available at the time a request for conciliation is lodged. This is also a problem in New South Wales as well as Victoria.*[45]

> *In 40 to 50% of cases where medical information is critical, workers are not providing it.*[46]

The view was that in these schemes, information was withheld for later court proceedings where costs were more lucrative.

> *Workers are encouraged by their legal advisors not to cooperate and large numbers of matters are proceeding to court where they are settled at the door. Some members think it would be best to abandon compulsory conciliation (Victoria) and proceed straight to court and not waste the time and resources.*[47]

In court systems, the problem is the same. However, lawyers saw the problem as one of court rules or inconsistent enforcement by the court.

> *?The Civil Court Procedure Rules require that parties exchange medical reports. Plaintiff's have to file those they 'intend to rely upon' and defendants have to file all medical reports. The problem is that at the door of the court the plaintiff revises what was a subjective judgment and produces other medical evidence. This promotes court door settlements.*

> *In the magistrates court, the magistrates can make one of two orders at mention. The first is for exchange of documents 14 days after mention and the second is for exchange 7 days prior to trial. The magistrates are not consistently firm in enforcing these orders and there is still a tendency for reports to be held back to the door of the court.*[48]

Scheme design elements that do not manage the provision of information in a timely manner increase the number of disputes and reduce the possibility that the insurer will make a sound decision. They also add cost to the system through the requirement for expensive registries to keep unnecessary files.

There was no evidence that the type of legislative provisions that require DRSs to manage and monitor information collection achieve the intention of the draftsman to speed the system. Evidence was found that insurer decision-making standards deteriorate when information is not available.

Decision making standards

45 Interview National Australia Bank

46 Interview Ford

47 Interview Business Council of Victoria

48 Interview, Victorian plaintiff legal firm

In 1989, in Tasmania, 74% of Commissioner decisions under s81 favoured the employer.[49] Statistics from 1994 show that this figure had reduced to nil. Several explanations are possible for this outcome. The first that there is bias on the part of the Commissioner was not supported. Reports of even-handedness were the norm and Supreme Court appeal outcomes for the period are evenly balanced. Another explanation is that the evidence produced to support liability contests on behalf of the employer by the insurer was not sufficient. This suggests that primary decision-making standards have deteriorated and that the hearing function of the Commissioner had become one of decision supervision.[50]

A further problem emerged in discussions with stakeholders. Some legislation was structured so that worker benefits were not paid while the information collection process was underway. Workers became frustrated with inactivity and their inability to speed up a decision on their claim.

> *?Our workers sit at home watching television, unpaid, when they should be getting better and trying to get back to work while the insurers do nothing.*

The "bottom line" for the worker in these processes is that an unsubstantiated decision has been made to refuse them payments and delays are routinely experienced while the relevant information is collected. During this time the worker is unpaid and will seek other sources of income. In most states union representatives described these alternatives as either;

- sick leave or other leave entitlements
- social security benefits

No information was available as to the number of these claims subsequently dropped by the workers once alternative sources of income had been established.

Stop-gap provisions

Both overseas and local schemes give stop-gap powers to the DRS to overcome the problem of workers remaining unpaid while information is collected. DRS officers are required to make a quick decision on the validity of the grounds for disagreement and are given powers to make short term interim payment orders, if they consider that the grounds are sufficient. In the longer term a more qualified tribunal makes a decision as to the merits of the entitlement claim.

In some jurisdictions the stop-gap process has become a mini-trial. Insurers and workers alike are concerned that an order may set a precedent for future actions. The greater the impact of the order the greater their concern. In Victoria and New South Wales, the power to order payments is limited to 10 weeks retrospective and 12 weeks prospectively.

Where the power to order payments is unlimited as in Tasmania, the problem is more acute. Both sides see a need to put more effort into defending their positions and lawyers are employed. In this situation, the original purpose of the "stop-gap" power is defeated.

Evaluation of Permanent Partial Disability

49 Conference Paper, Office of the Commissioner, Dispute Resolution in Workers Compensation Conference Melbourne November 1994

50 Interview, Commissioner s Office Tasmania

Scheme design can also promote disputation in other, less obvious ways. A study by WRCI in Oregon found that aspects of the equivalent guidelines to the AMA guidelines promoted disputation. Small differences in expert opinion translated into large differences in payments. WCRI commented:

> "Given that disability evaluation is as much art as science, guidelines that contain thresholds, multiplicative formulas, or other features that produce large payments changes for small differences in opinion breed litigation because they disproportionately raise the stakes in controversy."[51]

A study of 11,000 disputes by the Texas Workers Compensation Centre[52] in 1993 found that 87% of all disputes were over impairment ratings. Medical issues were more likely to be found at the earliest stage of the process and dwindled from 7.7% to 1 % at the judicial review level. Disputes over issues of fact were more prevalent in judicial proceedings.

In Australia, the AMA methodology is credited with similar problems[53], in that doctors interpret guides differently and achieve quite different outcomes. Where a scheme sets a threshold for payment, numbers of disputes grow around cases that approach that threshold level.

Turnover in schemes

All stakeholders commented on the changeable nature of workers compensation dispute resolution. A review of legislative change in the past five years shows that in Australia there had been no less than thirteen complete changes of Dispute Resolution System in Australian schemes. In addition there have been eleven substantial changes. Since the beginning of this project a further complete change (South Australia) and two substantive changes (Tasmania, New South Wales) are underway. Stakeholders were concerned about the costs involved in retraining staff, the perceived complexity of the system changes and the increased reliance on lawyers that this engendered.

Selection of DRS officers

The most vehement comments from stakeholders were about DRS officers. In terms of DRS design the concern was over the inappropriate nature of the appointments. In all jurisdictions this was raised as an issue either in respect of currently appointed officers or those that had been appointed in the past. Officers appointed for reasons other than merit were often the catalysts for change after poor performance highlighted the scheme?s deficiencies. This has also been raised as an issue in the United States.

> `*Michigan has launched an effort to select adjudicators more systematically, even though they are appointed through a political process. It is hoped that this will end the perception of bias among workers compensation adjudicators. Practitioners universally agree that political appointment of magistrates is a mistake.*'[54]

Structural tensions

Together with concerns over the political patronage enjoyed by some appointees to DRSs, there was also concern over tensions between the workers compensation administrative agency and the DRS.

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51 WCRI Research Brief, reducing Litigation in Oregon, Sept 1991, vol 7, no 9

52 Texas Workers Compensation Research Centre, *Dispute resolution process Analysed by Key Issues*, reported in BNA=s Workers Compensation Report 23 January 195 Volume pp 33

53 Australian Institute of Surgeons - Healesville (Vic) conference discussion, October 1995. This is also the subject of a separate Best Practice project by HOWCA

54 WCRI Research Brief, Workers' Compensation in Michigan March 1990 Vol 6, No.3 pp5

The allocation of functions to different entities within the overall workers compensation structure raises a set of often contentious issues. Some issues recurred in a large proportion of the interviews, whether workers compensation related or otherwise. Best described as common tensions, they ranged from demarcation issues over controlling the quality of the primary decision and disseminating community information, to concerns over the nature and level of "independence".

These tensions are common in most jurisdictions, notably where the DRS investigates disputes involving the associated administrative agency. When tensions become extreme, and external calls for change are high, inappropriate organisational or staffing changes may be precipitated.

Recognition that these tensions exist becomes important when designing new systems and in finding models that endure. Tensions of these types have caused pressures resulting in system failure. They are discussed in chapter 8.

Issues at each Level of DRS Operation

On-site interaction

Most of those interviewed indicated that early attention to the worker on the site reduced the extent of disputation after an injury.[55] If workers were not contacted soon after injury, they were inclined to accept offers of assistance with their compensation claim from third parties such as union advocates, legal advisers.

55 Interview: Tasmania Union representatives, Interview Ford

In addition, concerns were raised that some rehabilitation providers "over-serviced" injured workers. In doing this they kept them away from potential early return to work. This encouraged them to focus on compensation rather than rehabilitation and promoted the opportunity for disputation.[56] There were many suggestions for promoting a culture that brought workers back to the work environment as soon as possible. These are discussed in detail in chapter 4.

Education about rights

Confusion about compensation, about what was compensable and what was not was raised as an issue by several stakeholders.

> *Many workers have the attitude that all health problems they suffer are compensable* [57]

Unions and employers alike believed that workers did not know enough about their entitlements and their obligations. Having expectations that were out of step with the scheme compensation options, put them at a disadvantage. They were either likely to accept settlements that under-compensated or unrealistically reject fair compensation offers. The result in both cases would be disadvantageous to the worker. In the second case likely result would be protraction and escalation of the dispute.[58]

Representation

In interviews, unions all stated that workers should have a right to representation in conciliation processes. In some cases (i.e. Tasmania), unions saw their expertise as being appropriate and adequate to support workers claims. In New South Wales, their view was that the system was more adversarial and that representation needed to be legal. Employers were equally concerned that their views should be heard and that they should have a chance to put all of the legal aspects of their position.

Primary decision-making

Poor decision-making

Most stakeholders interviewed raised the poor the standard of decision-making by insurers as an issue. Poor decisions resulted in disputes that should not have occurred if decisions had been properly made (artificial disputes). Better decisions were supported by adequate information, attention to legal requirements, taking medical evidence in context and by ascertaining the facts from the worker and from the employer at the worksite.

Some stakeholders blamed legislative time-lines for the low standard of insurer decision making.[59] Other causes identified included:

- the junior status and low pay of claims officers
- a desire to avoid criticisms from the employers
- it was easier to reject a claim where entitlement was uncertain
- high volumes of claims prevented careful error checking
- a general lack of preparedness to make decisions, exacerbated by legislative mechanisms that made avoidance easier, eg s104 Victoria[60]

Decision-making standards appear to vary between insurers. A New South Wales study of 1385 randomly chosen conciliation files from the years 1987-1989 found large

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56 Interview WA, WorkCover,
Interview Insurers, Tasmania
Aust Inst. Surgeons, Healesville Conference October 1995

57 Interview Ford

58 Interview ComCare, Interview Insurers, Tasmania

59 Interview, MTIA. Interview ICA (Tasmania), Interview CIC.

60 Interview, National Union of Workers

differences between insurer withdrawal rates.[61] The s102 referrals of some insurers were more likely to be withdrawn than others, once the insurer had the relevant information to properly decide the case. One insurer resolved 89% of initial disputes by withdrawal, while another only withdrew 34.5%. The difference in withdrawal rates would seem to indicate that some insurers are better (more diligent) at collecting information and making initial decisions than others.

The study also found that insurers made 96.1% of referrals under s102. The researchers thought the high level of referrals resulted from strong financial incentives. A referral is sufficient to enable the insurer to suspend payments. In cases where the insurer agreed to pay, the time taken to resolve the dispute was a median of 97 days. Conciliation officers have retrospective powers to restore benefits of up to only 70 days. For the typical case therefore, insurer delay resulted in a loss of 27 days of benefits to the worker.

Artificial disputes are not unique to Australia. The WCRI found that in Virginia, 40% of all disputes filed were resolved, rejected or withdrawn before they were referred for adjudication. WCRI stated that:

> 'Rather than respond to quasi disputes, states more and more are trying to prevent disputes by setting standards, monitoring performance, and penalizing sub-standard performance.' [62]

Reconsideration (Internal Review)

Another important issue raised was that there was little effective internal review by insurers in most systems.

The exception to this was the federal system where reconsideration processes are institutionalised. While providing an excellent tool in some circumstances, (see chapter 4), several "Recons" problems were reported that related to "licenced authorities". First the system of reconsideration tended to result in further unnecessary delays and reconsideration increased the chances of legalisation.[63]

Information exchange

Late exchange of or withholding of information

A primary decision that is not support by adequate information will be flawed. Information issues for primary decision making parallel those identified earlier as issues associated with late or inadequate provision of information to the DRS.

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61 Beed,T Fitzgerald,R.W Worthington, D, The Role of Conciliation, November 1990, Civil Justice Research Centre

62 Telles CA & Ballantyne DS, *Workers Compensation in Virginia - Administrative Inventory*, April 1994, WCRI Research Institute

63 Interview, Telstra. Recons are also used as a determinative level by ComCare. Some of the problems common to the Determination level apply.

In addition to these, these are particular issues related to the management of information exchange in the subsequent determinative levels. These issues are best seen as they relate to a specific example. The example chosen was the Victorian magistrates court, but similar rule structures govern determinative levels in other jurisdictions.

Court rules govern the provision of information to the courts. The operation of civil rules to enforce early exchange of documents is not effective in Victoria. Order 3.08 of the Civil Court Procedure Rules require that parties exchange medical reports 14 days after the Notice of Trial is filed. Plaintiff's have to file those they 'intend to rely upon' and defendants have to file all medical reports. The problem is that at the door of the court the plaintiff revises what was a subjective judgment and produces other medical evidence. This promotes court door settlements.

In the Victorian Magistrates court, magistrates can make one of two orders at mention. The first under Section 98s is for exchange of documents 14 days after mention and the second is for exchange 7 days prior to trial. The magistrates are not consistently firm in enforcing these orders and there is still a tendency for reports to be held back to the door of the court.

Too many medical reports

The information exchanged in workers compensation disputes is generally medico-legal reports. In a study done in Victoria in 1992, medical reports featured in almost all disputes.[64]

The number of medical reports will be as many as the system allows. The highest number of reports gathered for one case and reported in interviews for this project was 59! Other states reported extreme numbers in the high twenties.

The timing and quality of the medical information are two other factors that are crucial. The earlier the information is collected the simpler will be the dispute. Other issues aside, time itself serves to escalate the dispute. This is both from a human behavioural point of view and from a medical position. Where time elapsed and inactivity became the norm, the mentality of the worker was said to move from a "rehabilitation" mentality to that of a compensation mentality.[65] Resolving the claim then became much more difficult.

Medical opinion diversity

Both in Australian and overseas jurisdictions a small number of doctors were described as constantly presenting opinions in favour of either insurer or worker. These opinions were likely to give percentage differences well outside the range provided by other doctors in the case. Apart from unnecessary cost, these extreme opinions escalated disputes and made them more difficult to resolve, as further authoritative opinion or medical panel intervention was necessary to offset their advice.

One large employer had discontinued use of doctors providing near zero percentage ratings because they had found that such opinions were unhelpful and exacerbated disputes.[66] Workers are also unnecessarily inconvenienced having to make additional appointments to undergo additional examinations.

Opinion was divided on whether these regularly extreme opinions consistently favouring one side were written from a more radical medical viewpoint or for more commercial motivations. The suggestion was also made that once doctors opinions in certain fields

64 Wallace N and Hall M, Preventing Disputes, 1992

65 Reported by the Chairman of Medical panels in Western Australia who estimates 80% of the matters dealt with in his first year of operation fell into the latter category.

66 Problems associated with extreme medical opinion are discussed in detail in *Securing Definitive Medical Opinion in Workers Compensation*

became known, then they would be repeatedly selected by the insurer or the workers representative to reflect that position in relevant cases.[67]

Treating doctors

There were concerns that under some schemes it was too easy to get treating doctors reports to substantiate workers injury claims. This in turn caused unnecessary disputes.[68] The chief concern was that the opinion of treating doctors were given greater importance by DRS officers than the opinions of specialists who may only have seen the patient briefly.

The main problems with treating doctors opinions is that these doctors tend not to be properly qualified in workers compensation law, and do not understand the ramifications of their advice. These doctors were also likely to be unfamiliar with the conditions at the workplace and more likely to take on an advocacy role on the workers behalf, rather than give objective advice based only on their medical condition.[69]

Screening & Streaming

Inappropriate use of DRS resources

Many DRS officers complained about cases that "should not have got this far". These were matters involving small amounts of money, lack of prior communication, and primary decision-making that was not up to general standards.

Other cases were routinely processed through an initial DRS but due to a lack of information, the process was not completed successfully. In these schemes the DRS process had been made compulsory to provide an opportunity to forestall court processes. Criticisms that the DRS was nothing more than a "hurdle process" to the main forum were evident.[70]

> *"If the workers position is not supported by the evidence, why waste time and resources going to the conciliation hearing. It would be better for such matters to proceed straight to Court. Some BCA members are of the view that compulsory conciliation should be abandoned, although not all share that view."*

Facilitation or Conciliation

Issues of Process and Quality of Outcome

At the same time the new WorkCover Conciliation Service was being established in New South Wales, an article appeared in a journal for legal advocates explaining the new scheme.[71] It advised readers that there were a series of arguments that lawyers could use to avoid conciliation processes. These were:

- X qualifications or lack thereof of conciliators,
- X employment by Authority of conciliators therefore lack of independence,
- X power imbalance against workers due to repeated contact with the same personnel from insurance companies, and
- X conciliators not making known their 'lack of independence'

These concerns are all commonly raised about conciliation and mediation processes wherever they are found. There were specific concerns over the impartiality of ADR systems. One company cited the practice of granting easy adjournments to worker representatives to obtain more information but not

67 Conference Australian Institute of Surgeons

68 Interview National Australia Bank (Secretary Victorian Self-Insurer group)

69 Medical issues are described in more detail in *Securing Definitive Medical Advice in Workers Compensation*

70 Interview, Business Council of Australia

71 Stiffe M, Conciliation or the Courts - Advising on WorkCover Disputes LIJ 1993 pp1054

granting the same latitude to the insurer.[72] In another jurisdiction the conciliation process was equally criticised for lack of impartiality by both worker representatives and employer representatives![73]

All DRS officers were concerned about their independence. The need for recognition of their role and the legitimacy of their position was a strong underlying theme in all of the discussions. It was also an issue in other jurisdictions.[74] All jurisdictions spoke of the need to balance a proper observance of independence with reasonable requirements for competency. These issues are discussed in more detail in Chapter 8.

Lack of consistency between DRS officers was cited as a another recurring problem. This related both to the methods used by DRS officers and to differences in the outcomes in similar cases. There were perceived differences between approach, level of formality and in the interpretation of the legislation.

> *We got a silk's opinion which showed quite clearly that the officer was wrong but nothing was done. We had to wear the outcome.*[75]

The problem of accountability became another concern for most stakeholders, particularly where opportunities to have the matter reheard by a court were limited. Limitations on merit review also meant that a greater effort had to be expended at the conciliation level to ensure that the interests of both workers, employers and insurers were adequately represented. Insurers pointed to this as an issue for resourcing:

> *I have to send along one of my senior claims managers. It is not his job. His job is to manage claims, but I have to make sure that our position is clear to the conciliator.*[76]

Caseload of Conciliators

Around Australia, conciliators and mediators are conducting up to four fully prepared conferences every day, including preparation time. In schemes where this number exceeded two per day, there were concerns over quality and the capacity of the conciliators and mediators to sustain the quality of the outputs.[77]

Training

Underlying criticisms from stakeholders that DRS officers were not consistent were concerns that training was not adequate or uniform. Fisher, co-author of *Getting to Yes* and one of the most respected writers in the ADR field describes the impact that lack of training and heavy caseloads can have on the quality of facilitated dispute resolution.[78]

> *'Being untrained and feeling pressure to 'get something done', mediators and negotiators tend to focus too soon on extracting some commitment from the parties, even if only an agreement in principle. Later efforts are then devoted to debating what was agreed upon rather than jointly exploring what ought to be agreed upon for the future."*

Many stakeholders commented that some mediators behaved more like arbitrators or judges than facilitators.

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72 Interview National Australia Bank

73 Interview, Manager Policy & Conciliation WorkCover New South Wales

74 Interview, Residential Tenancies Tribunal

75 Interview, Coles Myer

76 Interview Insurance Council of Australia

77 Interviews, Conciliation Service - WorkCover Vic., WorkHealth Auth. NT, Conciliation and review Directorate - WorkCover WA

78 Fisher R *Beyond Machiavelli - Tools for Coping with Conflict*, Harvard University Press 1994 pp133

Power of conciliators

The formal power to make awards affecting entitlement was a vexed issue. Conciliators with this power, albeit limited, in Victoria, were accused of abuse, while in states where there was no power, or the power was severely limited, there were calls for the power to be increased.

> *"It is just a waste of time to go through a conciliation conference and everyone agree to an outcome, for the conciliator not to have any power to confirm the agreement. We just have to go through the whole process again."*[79]

There also seems to be a need for the conciliator to be more proactive. Legislation was introduced "mandating" mediation in Colorado in 1991. After a year, experience showed that the parties wanted a more interventionist model than just mediation.[80] They wanted:

> *?a mediator who actively tested the validity and credibility of the information presented and who checks the reality of the parties positions and offers."*

The issue of a broader role with more formal power to support it was also raised by conciliators in all states where they operate. The reasons varied, from the practical need articulated above, to a need to attract greater respect for the process from the participants. Some commentators thought this latter need reflected on the quality of the training and the skill of the conciliators rather than on any legislative rule. In contrast, in the Northern Territory the success of the "mediation"?program was ascribed to the fact that the mediators had no power.[81]

Imbalance of power

One of the standard criticisms of ADR process is the concern that parties without adequate representation will agree to outcomes that they would not have agreed to otherwise. They will do this for a range of reasons outside the awareness of the third party neutral and the ADR process These reasons will spring from the fact that these parties are in a "weaker"?position than the other "stronger" party. In workers compensation this translates to a large insurer and an employer with greater access to resources. Workers may agree to "compromise" to ensure future employment or deter employment related disadvantages.

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79 Interview Union representative Tasmania

80 Lawonn Michel M, *Legislatively Mandated ADR in Colorado Workers Compensation*, The Colorado Lawyer April 1992 pp 680

81 The mediators are also regulatory officers so "formal" power may be less important than the "informal" power that this dual role gives them.

A further imbalance arises from the fact that the insurer is a regular attendee at any conference process and the worker only appears once or twice. Galanter described those in the insurer's position as "repeat players" and those in the position of the worker as "one-shotters".[82] He theorised that even with legal representation, claimants moving against large organisations with repeat player representation had little chance of consistent success.

The concerns are greater if it is obvious that the third party has another relationship with the insurer, that shows through familiarity at the conference, or knowledge that the third party has working experience in that field.

Where it is obvious that one party has less capacity to undertake the process, the third party neutral often has to tread a fine line between advocacy and facilitation. This can bring criticisms from the "stronger party"?that the other party is being "favoured". One employer observed that some conciliators put a lot of time and energy into speaking with worker representative solicitors but rarely spoke to employer or insurer solicitors.[83] In a different state, union representatives levelled the same criticism at conciliators with a bias towards insurers. It seems that in these situation perception is of greater importance than the reality. Conciliators reported strategies to ensure that both sides received "equal treatment".

Precedent

Concerns over precedent are a major part of ADR processes, particularly where large organisations are involved. There is always a concern that agreement to a solution proposed by a third party will "open the floodgate" and set precedent for all manner of other matters. There is also the related concern that agreement to any part of a workers compensation claim will be judged as an admission of liability at a later time.[84]

Tendency to legalisation

Legalisation occurs where an informal process moves to become a formal process that includes legal professional involvement. It begins with a concern to ensure "fair play"; to make both parties aware of all the information surrounding the dispute. Once legal support is introduced, requests for opportunities to question the information are made. Further information is required and where the DRS officer does not pursue that information under an inquisitorial scheme, assistance is called on to prepare it. Legal assistance is brought in for this preparation and finally the request is made for this information to be presented in the "best light" by a legal representative, in a face to face forum.

82 Galanter, M, Why the 'Have's' come out ahead: Speculations on the Limits of Legal Change, 9 Law & Society Review, 95

83 Interview Coles Myer

84 Interview Insurance Council of Australia

Gradual legalisation can be such as problem that reactions to it can result in system changes that actually reduce equity. The Chairman of the Superannuation Tribunal referred to legalisation as a reason for avoiding conciliation in resolving disputes over superannuation policies. Instead, matters are reviewed "on the papers??with no conference or face to face contact with the parties.[85]

Tendency to become a hurdle process

Reactions against conciliation processes can take surprising forms. In Victoria, a recent amendment to the Magistrates Courts rules excludes reference to the workers compensation conciliation process from any consideration by the court.
Amendment of Rule 4.02(g) requires that documents provided to the court to support issue of proceedings will include the date but not the details, of any conciliation recommendation or direction.

This rule ensures that no work done by the conciliator or the parties prior to the court proceeding can be used in that next step. It shows the court's determination to hear all facts afresh and make their own decisions. In this jurisdiction, this rule effectively turns conciliation from a preliminary process into nothing more than a hurdle, that delays the final decision.[86]

Recording agreements

Conciliated or mediated agreements are put into writing in some jurisdictions. Enforcement of these agreements vary. In some states there are problems when either the insurer or the worker renege on undertakings given in conciliation conferences. The most serious comment was from one stakeholder who now takes a witness to conciliation conferences to call upon when agreement details are subsequently called into question.[87]

Determination

The determinative level of the DRS is the level that is most vulnerable. It is subject to greater scrutiny than other levels and is the point at which concerns are most likely to result in changes to the system. This is largely due to the fact that determinations involve decisions about whether and under what circumstances money from the workers compensation fund should be paid, in cases where entitlement is unclear.

The composition of this level, including the mode of operation and the qualifications and selection of staff drew the most intense comment. These issues are discussed extensively in Chapters 7 and 8. Suffice to say here that schemes that are not particularly successful are likely to have a large amount of adverse comment over the composition of their determinative levels in contrast to the more successful schemes.

The management or mismanagement of cases is an area of special contention that is outlined here.

Multiple Hearings

High cost workers compensation schemes exhibit repeated attendances by the parties at a determination level. Costs are high because with multiple hearings the work of resolving the case is not being completed but simply postponed. The work involved in arranging postponement, however, places an additional cost on the scheme as well as stimulating hidden costs for the participants. Some examples are given below.

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85 Wilkinson, Neil, The Tribunal -its powers, its purpose and its priorities, Address to the Law Council of Australia February 1995 in Superannuation 1995 Leo Cussen Institute Melbourne

86 Proposed Magistrates Court Civil Procedure (WorkCover) Rules 1995 (Victoria)

87 Interviews, Ford and National Australia bank.

The WCRI have carried out an extensive series of studies over time, and across a number of US workers compensation jurisdictions that is unmatched by work in the Australian context. The similarity between US and Australian problems suggests that issues facing schemes are more likely to be related to the type of scheme and less likely to be related to environmental factors. A WCRI study of cost drivers in **New Jersey** found that:

> *'Delay is the product of frequent adjournments precipitated by a lack of preparation by both sides and problems with scheduling medical examinations, particularly among the small corps of medical expert evaluators. Multiple pre-trial conferences and serial-style formal hearings also can lead to delay, as the parties use the hearing process for discovery.'* [88]

The **Missouri**, system shows increasing costs and low benefits to workers. The system was reported to be characterised by multiple pre-hearing conferences, adjournments to obtain information and very high court door settlement rates.[89] In **New York** the number of hearings was very high. Informal conferences and formal hearing sessions were used by attorneys to meet with their clients and the conferences were routinely used by the agency to prompt submission of reports. An average of 2.8 meetings were held per case.[90]

In the **Northern Territory** Magistrates Court, between 5 and 10 pre-hearings are conducted per case. This is for all cases, not just workers compensation cases. The effect is that resources are diverted from hearing full cases and most cases are delayed. Lack of resources was given as one of the reasons a new court-annexed conciliation process had not been implemented eighteen months after its initial proposal. This was also despite a relatively small waiting list compared with other states of just over 90 cases.[91]

In **South Australia,** a "short hearing" was introduced to bring all the parties to the Review Panel prior to a full hearing. While timing targets were met for these preliminary hearings, the real delay for cases that went to the second or full hearing became much longer. This delay was raised as a major criticism of the Panels.[92]

Poor listing practices

Multiple pre-hearing conferences may be caused by poor listing practices. Listing involves making appointments for cases to be heard and estimating the amount of time required before the next appointment. Some courts and tribunals use fixed periods of time, that create a regime of postponements if matters typically take longer or, leaving judges idle if matters are settled at the last minute.

A high adjournment rate was evident in **Washington,** that resulted in considerable delays. Judge 'mediators' conducted their mediations by telephone conference calls. They allocated 15 to 30 minutes per case and started with a full list for each day. As these were telephone appointments, they were obliged to move on to the next case even if the first was not complete. Second phone conferences were scheduled, but the next appointment available was generally months away. Washington also has a low mediation

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88 Gardner J A, Victor R A, Telles C A, Moss G A, Cost Drivers in New Jersey, Workers Compensation Research Institute September 1994

89 See Calise, Angela K. National Underwriter(Property / Casualty / Employee Benefits) vol 97 no. 32 Aug 9 1993, and Gardner J A, Victor R A, Telles C A, Moss G A Cost Drivers in Missouri, Workers Compensation Research Institute, December 1994

90 WCRI Research Brief, Workers' Compensation in New York Oct 1992 Vol 8,No 9

91 Interview, Judicial Registrar Darwin Magistrates Court

92 Interview, Ministerial advisor, South Australian Minister for Industrial Affairs

resolution rate in comparison to other ADR programs.[93] (See Chapter 6 - Pre-Trial Conferences - are they effective?)

Reasons for Decisions

In line with general concerns over the accountability of determinative level officers, discussed more fully in Chapter 8, stakeholders were concerned about reasons for decisions. The concerns were that they were either:

- not provided
- provided far too late, or were
- lengthy and difficult to understand.

The content of decisions is another source of disputation. In jurisdictions where specialists judges, magistrates or review officers were not available there was concern over the mediator?s lack of understanding of workers compensation. Apart from a failure to understand the law there were also problems with a lack of understanding of workers compensation generally. This resulted on occasion in "absurd decisions" with impractical consequences. Agencies, unions and employers were forced to appeal an attempt to clarify the law.[94]

Guidance on the law

Contradictory legislative drafting

Many stakeholders were concerned about the scope for confusion and further litigation caused by poor legislative drafting. Many cases were before courts unnecessarily in attempts to interpret new phrases developed by draftsmen in the latest version of the Act.[95]

In Australia, legislation in the different jurisdictions is very different in structure and in the use of terminology. A payment of money in lieu of future rights is labelled “redemption” and “commutation” in different acts from different jurisdictions.

Issues of National Consistency

93 Interview D Winset, a Victorian Conciliator who visited Washington in late 1993, 5 May 1995

94 Interviews, ComCare , LIV

95 Interview WorkCover South Australia

For larger national employers, the lack of national consistency between the schemes in the larger states was a significant issue of concern. Large companies as self insurers needed to duplicate many administrative aspects of their workers compensation systems to cope with vastly different state schemes. For example, in Queensland there are no self insurers. Large companies that are self insurers in other states are obliged to insure with the Queensland Government for all workers compensation costs. They do not have the opportunity to explore efficiencies in administration and claims management that they do in other states and they find it difficult to plan when uncontrolled costs are involved. They report that for them, Queensland has the highest unit costs. [96]

Concerns were raised that industries such as building construction, with mobile workforces and extensive subcontracting on large projects, could not ensure that compensation obligations had been met by smaller contractors. This tended to lead to higher initial disputation, confusion about rights and obligations and under-insurance.[97]

Queensland raised the problem of migration of older workers from southern states to Queensland, which retains common law dispute options for injured workers.[98] It is difficult to see this as a problem, if a nexus between the injury and new location cannot be established. It does however seem likely that this type of "forum shopping" could be an issue in the specific industry of interstate transport. In this regard, recent legislation has been introduced in an attempt to establish the appropriate jurisdiction for the workers compensation dispute to be heard.

In terms of efficiency, comparisons were particularly drawn between New South Wales and Victoria, being the states of highest volume. National employer groups and national union representatives agreed that local conditions did not demand different schemes with different procedural requirements. One interviewee likened the problems that arose from lack of consistency to the impediment to national growth and efficiency caused by the states' decisions to establish different gauged railways in the 1800s.[99]

Over all, the key requirements for national consistency which were not being met by separate state schemes were:

- the need for predictability
- the opportunity to minimise costs through efficiency
- avoiding unnecessary, additional transaction costs

Summary of primary issues raised by stakeholders

Issues that were specific to dispute resolution procedures included concerns over delays and concerns over the costs generated by the disparity between procedures in different states.

Major concerns emerged over the performance of those deciding appeals. Performance had to be:

- consistent

96 Interview Coles Myer, Interview National Australia Bank.

97 Interview CFMEU

98 Interview Workers Compensation Board, Queensland

99 Interview, MTIA

X impartial
X informed

This latter group of concerns also predominated in the various reports made available to the project. These included investigations conducted by different workers compensation agencies and parliamentary inquiries.

Stakeholders were uniform in the view that the major cost in the system was court involvement and legal involvement. They saw a distinct relationship between the design of the workers compensation scheme and the level of disputation in the jurisdiction. Poor scheme design translated to higher legal costs and greater court involvement.

> *"Courts should be right out of all employer / employee disputes. They cost too much and usually get it wrong when they finally hear the case. Everything should go through conciliation."*[100]

There was general support for national schemes or nationally consistent systems.

> *We have great difficulty with the states operating different systems. Our members operate and think nationally, why can?t they!* [101]

> *We do not support lawyers rorting the workers compensation system, but we think there is a need for workers to be helped through the process.*[102]

> *In-house union advocates do the job cheaper and a lot better in most cases*[103]

Employer and insurer groups were concerned that whatever forum was available, that forum decided quickly and gave guidance for primary decision making.

National employers wanted dispute resolution systems to be consistent and therefore predictable.

Preliminary conclusions about scheme design

The sections above show that several features reappear consistently in schemes that do not perform well:

100 Interview Australian Chamber of Commerce and Industry

101 Interview Business Council of Australia

102 Interview ACTU

103 Interview Australian Workers Union

- High costs,
- long delays,
- the availability of cost-harvesting opportunities,
- uncontrollable court rules,
- a pattern of late settlement behaviour,
- workers lacking effective assistance with unrealistic expectations and changed by the system from effective workers to dependent status,
- unmanaged information,
- artificially created disputes,
- a large market of highly resented third party professionals,
- besieged and criticised ADR practitioners performing increasingly irrelevant functions, and
- increasingly low quality primary decision-making.

The repetitious nature of all of these features across a variety of schemes in diverse geographical locations show that they are symptoms of system design flaws. If certain elements are present the results are entirely predictable. This is regardless of place, local environment or, with regard to insurers and lawyers, as one member of a workers compensation agency put it:

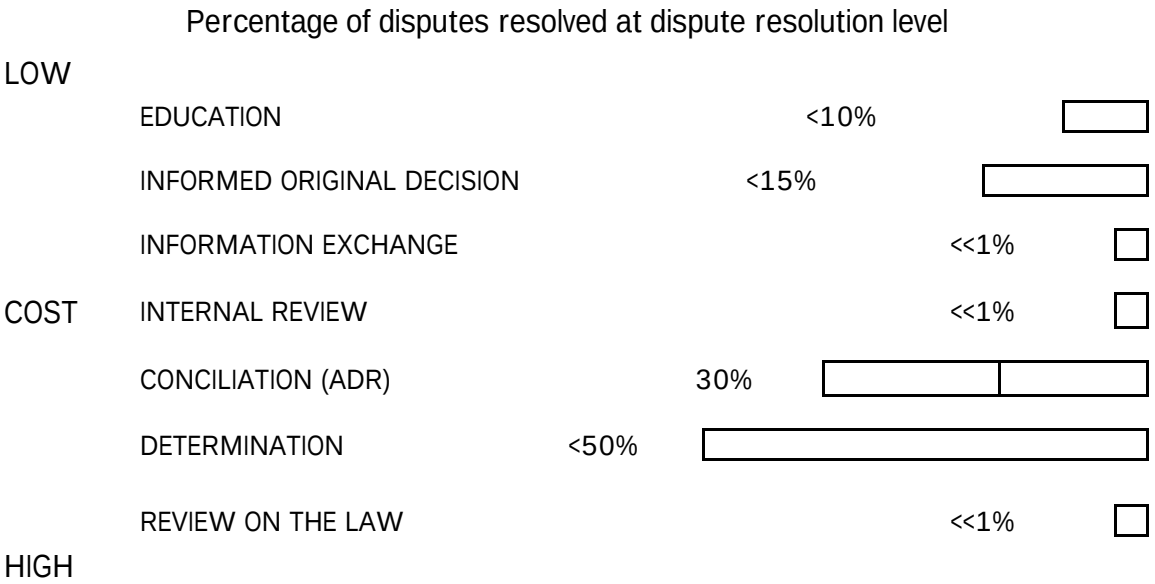
"...what is going on inside their heads."

Even so, the above sections show that some of these features are not clearly evident as single causes of particular problems. Rather, there is an interplay of elements and a series of distinct patterns. For example, high legal costs will always be produced by a system that allows: information collection to "leak" into the court system, combined with a lack of quality control or compliance monitoring on primary decision-making. The injection of hybrid ADR systems either administratively or in the court system will have little if any impact on reducing these costs. Different combinations of elements will have different effects.

The figure below shows how this interplay occurs. It does not represent a particular scheme but reflects the disputation outcomes from a "typical" scheme experiencing the problems outlined above. This figure should be contrasted with expectations of a Best Practice model given in chapter 4.

Figure 2 A Model of Poor Practice - Contrast with Figure 3

Poor Practice



In terms of the disputation market, that is the total number of disputes and how those disputes are resolved, in the Poor Practice model there are predictable proportions resolved in particular ways.

As workers are poorly informed and insurers and workers communicate poorly, a large proportion of disputes will be resolved through intervention of outside representatives, such as lawyers or union advocates. Where this is more likely to occur at the door of a court, costs will be high and the number of cases actually adjudicated by judges will be low.

In the poorly functioning scheme, there are few filters to screen out poor decision-making, so dispute resolution by workers compensation agencies and / or insurers will be low. Matters actually resolved by ADR processes will also be low.

If the poor scheme introduces procedures to reduce costs, the proportions shown in this figure would change. Some features will be more successful for different objectives than others. ADR can lower costs and bring high customer satisfaction levels, but lower costs can also be achieved in schemes that do not have ADR.

The next chapter examines the features of better performing schemes and develops the Best Practice Model.

4

Best Practice

This chapter identifies the objectives and elements of best practice dispute resolution schemes.

Best Practice objectives are built from a discussion of modern dispute system design approaches and examples of best practice from around the world. They should also be affected by new trends in the particular area of expertise under revision. After identifying the objectives from the perspectives of the participants and stakeholders, the first part of this chapter concentrates the strands of fresh thought in the management of dispute resolution to give a new way of looking at the task. New objectives are thereby clarified.

The middle section discusses the practical techniques that various schemes have used to overcome many of the issues and problems detailed in chapter 3. Where statistical evidence supports a claim that their approach represents best practice, the techniques they have used are described under the heading of the relevant component. Similarly to the discussion of problems, the comparative format shows a series of commonalities. This information is compiled in a final section of this chapter to give the key elements of a best practice system.

Best Practice Objectives

Across the world, recent reforms of dispute resolution systems have been driven by imperatives that advance "generic" or scheme objectives. To a large extent reform has been driven be cost concerns and has not paid much attention to impacts on individuals. This has been a world wide trend, not one that has been restricted to workers compensation.

Efficiencies can almost certainly be made in most dispute management systems, but changes that are unsympathetic to individual goals or ignore the continuing relationships between participants, will undoubtedly fail to deliver the outcomes that are intended.

In a major report on defensive medicine and medical malpractice, the US congress - OTA[88] pointed out that reforms were ignoring very real impacts on individuals in the single-minded pursuit of financial goals.

88 The OTA (Office of Technology Assessment) is the research body of the American Congress.

> *"It should be noted that concern for patients -- eg., increasing access to the courts for the many meritorious claims that are never filed and reducing the incidence of malpractice has been conspicuously absent from the rationale supporting many of the existing reforms. Rather, most reforms have been driven by the perception of a "malpractice crisis", which high litigation rates and questionable financial incentives are viewed as the culprits.?*[89]

In workers compensation, most of the literature reviewing achievements in workers compensation focuses on the reduction of costs and the removal of vested interests as the primary objectives of system reform.[90]

The move to establish replacements for the traditional court system has also been largely driven by these imperatives. ADR processes have been heralded as low cost substitutes for litigation. They have been introduced to provide a "cheaper, and quicker" forum for resolving disputes.

Flaws in the indiscriminate adoption of ADR have been found.[91] In reviewing ADR programs in 1990 the IAIAB [92] cautioned that if not done properly ADR programs could just add "an extra layer of bureaucracy". In 1989, the WCRI had already raised the issue in terms of system objectives:

> *Evidence is emerging that policy makers cannot expect to satisfy two objectives - stimulating earlier settlement of cases that would otherwise settle and replacing formal adjudication for cases that would otherwise go to adjudication - with a single design.* [93]

More recently, a leading Australian expert on ADR was more arresting,

> *"Discussion and reform is often muddled by unthinking and anecdotal lawyer-bashing; by the triumphal rhetoric of new process zealots; and by the embarrassing defensive rhetoric from senior lawyers."*[94]
> Reform objectives are jeopardised if they are developed without an understanding of individual expectations and goals.

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89 US Congress, Office of Technology Assessment, Impact of Legal Reforms on Medical Malpractice Costs, Washington, DC October 1993 OTA pp23

90 In *Preventing Disputes* there were two major objectives identified from the overseas and local research. These were to: limit lawyer involvement and limit court involvement

91 International Association of Industrial Accident Boards and Commissions (IAIAB), a Jackson Mississippi based organisation that represents US workers compensation administrators.

92 Cook, T *Opinions Vary on ADR in Work Comp Claims*, Business Insurance, October 8 1990 pp 96

93 WCRI Research Brief, *Informal Dispute Resolution Works*, May 1989 Vol 5, No.5.

94 Wade J, In Search of New Conflict Management Processes - The Lawyer as Macro and Micro Diagnostic Problem Solver Submission to ARC - Australian Lawyers Conference Bali July 1994.

Although often unstated, dispute resolution serves different purposes for different participants. An understanding of these purposes assists in designing a more relevant and durable system. The behavioural model of dispute management outlined in chapter 2, described the framework for understanding that disputes and expectations change with time, and under the influence of different aspects of the dispute resolution system. Objectives for reform must also impound this perspective.

Broader objectives, of which low cost will be one, can be drawn from the requirements of each of the participants in the system:

? ***Workers*** returning to work take the outcomes with them into the work place and must manage a continuing relationship with employers. They must also try to return to health and to work.

? ***Employers*** must accept the outcomes as fair and must be careful to avoid imposing direct or indirect penalties on injured workers. They must be able to have confidence in the outcome, to be able to plan and set workforce and financial goals.

? ***Insurers and claims managers*** use the dispute resolution system to make decisions on their behalf that may be unpopular within their organisations. They also use dispute resolution systems to make decisions to set precedents for future claims and to test legislative provisions.

? ***Workers compensation agencies*** use dispute outcomes from a series of cases as a source of information to improve the standards of insurers primary decision making. They also seek accountability from the DRS in terms of administrative costs and in consistency of outcomes, particularly if outcomes have financial consequences for the fund.

? ***Dispute resolution systems*** feed information back to the insurers to prevent repetition of disputes types. They send messages back to primary decision makers as to the circumstances under which payments should be made in the future. They are particularly concerned to maintain independence from the compensation agency on individual cases while addressing the different purposes of the schemes.

From these requirements we can extract the following objectives. Best Practice schemes are those that:

X don?t harm the future relations between worker and employer.
X ensure that all parties have a common understanding of the problem
X contain problems so that they can be specifically resolved
X deliver equitable outcomes that are respected by the parties
X promote return to work rather than establishing or reinforcing a culture of compensation
X achieve lowest overall disputation rates
X are the low cost means of providing this service

The best objective for all the participants is to have fewer disputes. Disputes get in the way of achieving many of the objectives outlined above. Yet good outcomes can have a positive influence on the workers compensation scheme.
The key is to design a dispute resolution system that first cuts the numbers of disputes and second, integrates dispute outcomes back into the system.

Modern Approaches to Dispute System Design

A new way of looking at dispute resolution

Government and large organisations, establish dispute systems to quarantine conflict, minimise disruption or just to manage more efficiently. Whatever the reasons, dispute resolution systems tend to focus on the common elements of conflict. They categorise disputes according to their match with certain criteria They set up systems to process disputes in each category in much the same way that industry has learnt to mass produce products. Workers compensation dispute resolution around the world is no exception to this approach.

Several contemporary themes that are analysed in this chapter suggest that disputes should be looked at in another way. These themes include:

- finding the precursors or causes of a dispute and determining the mode of best resolution from the elements
- being selective about the allocation of dispute resolution resources
- structuring early intervention to prevent disputes starting and escalating

These themes combine as a new approach to dispute resolution. In this new approach, variously described as "proactive" or "catalytic"[95], the basic premise is that the cause of the problems must be searched out and managed. It is not sufficient to provide a service for anything that fits certain criteria.

Workers compensations agencies that use this approach are active in managing the market response to their services.

> *'Rather than respond to quasi disputes, states more and more are trying to prevent disputes by setting standards, monitoring performance, and penalizing sub-standard performance.'* [96]

Over time, the better management of worksite and rehabilitation reduces disputation and a better skilled claims management workforce reduces the need for reliance on hired professionals.

In contrast to other services that achieve best practice status, success in establishing proactive dispute resolution is shown in a decreasing demand for the service. This is accompanied by an improvement in general well being, avoidance of community problems and a reduction in costs.

Selecting the appropriate dispute resolution forum

This section looks at the cause of workers compensation disputes and the impact that this has on the choice of resolution method.

The myriad interactions, circumstances and environmental factors that can combine to produce a dispute are rarely considered when determining an appropriate forum for resolution.

Traditionally, disputes have been referred to different courts or tribunals depending on value. "Higher" courts deal with large commercial disputes and "small claims" tribunals deal with disputes between traders and customers over small amounts. In designing schemes for workers compensation it is important to establish some of the elements so that appropriate schemes can be established.

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95 See generally, Osborne, D E Gaebler T *Reinventing Government : how the entrepreneurial spirit is transforming the public sector* 1992 United States

96 Telles C A & Ballantyne D S, Workers Compensation in Virginia - Administrative Inventory, April 1994, Workers Compensation Research Institute, p xix.

Wallace and Hall[97] identified the elements and causes of genuine workers compensation dispute as:

- lack of relevant medical information
- different interpretations of medical information
- misinformation about workplace practices
- different views on what is relevant
- pre-existing relationships and conflicts
- poor communication between worker and employer
- mistakes by claims agents

To list could be added the following additional potential causes of dispute:

- Fraud
- Financial / risk management
- Poor application or understanding of the law
- Desire to avoid backing down from a public position. (Using the dispute forum to "save face")

they argued that the different elements and causes of disputes required different approaches to resolution, a view shared by other commentators:

> *"Each method of dispute resolution has advantages and disadvantages for each type of dispute. Choice of a method of dispute resolution can and should be based upon these advantages and disadvantages, related to the relevant aspects of the parties and their dispute, rather than any preconception that one method is "law" and the others are 'first resorts' or 'last resorts'.* [98]

Effron pointed out that 'negotiator assisters' or 'facilitators' are best at relationship disputes, interpersonal problems, communication & strategy problems, and in cases where information has been withheld. Arbitrators are best at dealing with matters where information is unknown to one or both parties and where options need to be offered to meet problems. Matters that involve rule interpretation on the other hand are adjudication's ?home ground'.[99]

Other evidence suggests that pure mediation has its limitations. In a review of the relevant research in this area, Kressel found that in labour disputes where hostility was high and where there were many sources of impasse, mediation was unlikely to be effective:[100]

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97 Preventing Disputes pp25

98 Effron J, Alternatives to Litigation: Factors in Choosing, The Modern Law Review Vol. 52 July 1989 pp 480 at pp 497

99 Effron J, Ibid., pp 497

100 Kressel K, Pruitt D, *Themes in the Mediation of Social Conflict*, Journal of Social Issues. Vol 41. No 2. 1985 pp175 at pp186

"The Nobel Peace Prize will not be won by finding that mediators have a hard time under conditions of intense conflict and when parties lack motivation to settle...

...these findings may also be an antidote for mediators who are victimized by the belief that no dispute is too tough to mediate."

The messages from this literature are that dispute resolution systems have to provide a wide range of methods. Rigid adherence to artificial categories will result in ineffective outcomes.

The more fundamental conclusion is that there has to be flexibility at the door, in allocating cases to appropriate forums.

?In deciding upon a form of dispute resolution, one must decide fundamentally on the intrusiveness desired - whether the decision, the decision-making process or both will be taken out of the parties' hands." [101]

This decision is a decision that is rapidly becoming a familiar one to court administrators and members of the judiciary. Recent initiatives in all courts in Australia, most notably the Supreme Courts of South Australia, New South Wales and Victoria, see courts firmly taking control of which cases reach a judge. They are pushing the responsibility for resolution out to the offices of the legal profession and to the parties.[102] Wade describes this change in mood as follows.

"it is clear that as traditional judges become less resourced, more criticised, more overloaded with work, and more sophisticated in administrative and conflict analysis theory, they will become less accepting of disputants' self diagnosis of both problem and solution.

"You may want elective surgery, but we are not willing to provide such a service, particularly at the taxpayers' expense."

Accordingly, some judges and supporting court staff, are more readily (and mandatorily) diverting certain disputants towards arbitration, mediation, and expert evaluation under strict time limits supervised by the court." [103]

While courts search for ways of taking control of resource usage, changes in contemporary public administration point to new ways of managing the service industry in general. There are lessons here for workers compensation; the better schemes exhibit highly "proactive" characteristics when it comes to managing and preventing disputes.

Early intervention

A key element of proactive management is structured early intervention in disputes. Early intervention reduces the complexity of disputes and the resources required to resolve them.[104]

Coles Myer and Ford both attributed low disputation rates to highly active rehabilitation programs and early intervention programs designed to keep the worker on site. Ford?s achievements were most impressive, reducing its numbers of disputes by much more then an order of magnitude over 3 years.

Number of claims for workers compensation Ford, Broadmeadows Victoria* 1991 - 1995

101 Effron J, (above) PP 482

102 Differentiated Case Management has operated in South Australia since 1991 and in New South Wales since 1992. The "Portals" program was launched in July of this year in Victoria.

103 Wade J,(above) pp 2

104 See Felstiner, A, *Influence of Social Organisation in Dispute Processing* (1974) Law & Society Review pp 65

Year	Claims at Ford, Broadmeadows
94 / 95 (nine months to March)	55 (12 disputed)
93 / 94	509
92 / 93	1200
91 / 92	2000

* 3000 people currently on site

Ford attributes the results to taking a risk management approach using incident recording. Rather than a focus on post investigation after injury - there is now both reporting at incident level by worker and, an emphasis on ergonomics together with worker input into new design. A booklet explaining the workers compensation system has also been published for their employees. Apart from claims numbers, the injury index was "down", the lost time index was "down" and duration was "down drastically".

Wallace and Hall [105] described four necessary elements to effectively resolve a dispute. These elements needed to be brought together at one time, for resolution to be achieved. The earlier in the life of a dispute that this could be done, the lower the likely cost and the lower the overall disputation rates of the system. The four elements were:

? **Information:** 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.

? **Frustrations:** Ensuring that frustrations or emotions surrounding the dispute are aired and treated as legitimate. (Many people in dispute want their side heard and want the other party to truly understand the problems the dispute has caused.)

? **Identification of real goals:** Uncovering what each party wants. (These wants may be quite different from what is initially expressed.)

? **A forum to achieve innovative solution**: Suggesting solutions to resolve the dispute. (These are usually identified from experience gathered in solving similar disputes.)

The evidence from Ford suggests these principles are equally effective in dealing with potential disputes. Early "intervention" is a discussion of needs with the relevant parties, together with the information, matched with a desire to immediately deal with any concerns. This type of intervention avoids many disputes.

Meeting Needs before Rights

105 See *Preventing Disputes* pp 7 & 39

Refocusing on needs rather than on entitlements or "interests" rather than "rights" follows contemporary work by one of the foremost thinkers in the ADR field William Ury, co-author of the seminal work *Getting to Yes*[106]. Ury, Brett and Goldberg describe resolving a dispute as turning opposed positions, the claim and its rejection, into a single outcome.

> *'In a dispute, people have certain interests at stake. Moreover, certain relevant standards or rights exist as guideposts toward a fair outcome. In addition a certain balance of power exists between the parties. Interests, rights and power then are the three basic elements of any dispute.*
>
> *In resolving a dispute the parties may choose to focus their attention on one or more of these basic factors. They may seek to (1) reconcile their underlying interests, (2) determine who is right, and/or (3) determine who is more powerful.'*

Negotiation, court procedures and wars or strikes respectively are the usual methods for each of these three approaches. The authors argue that the first approach, an interests approach, is less costly and more rewarding than a rights approach. This in turn is less costly and more rewarding than a power approach. They identify the goal of dispute resolution systems design as devising a system:

> *'that provides interest-based procedures for disputants to use whenever possible and low-cost rights procedures (such as advisory arbitration) or low cost power procedures (such as voting) as backups.'* pxv

Their methodology calls for six basic principles of dispute systems design:[107]

106 See Fisher R, Ury W, *Getting to Yes: Reaching Agreement Without Giving In*, Boston, MA, 1981 p5

107 Ury W L, Brett J M, Goldberg S B, *Getting Disputes Resolved - Designing Systems to Cut the Costs of Conflict*, San Francisco 1988, pp 4 (A more recent edition of this book has been published)

Principle One
Putting the focus on interests or creating ways of reconciling the interests of the disputants.
This is done by:
X designing procedures that bring about negotiation as early as possible
X establishing a negotiation procedure (times, places, who)
X strengthening motivation by overcoming barriers to the use of interest based negotiation, ie accessible forums, stopping retaliation
X providing skills and resources
X providing a person to turn to for help
X establishing a mediation procedure
X familiarising prospective people with the alternative option
X referring parties formally (from a court)
X training & protecting mediators
Principle Two
Build in Loop-backs to negotiation or give parties already in court every opportunity to return to negotiation. This can be done by
X giving them information about likely court outcomes
X giving quotes
X mandating cooling off periods
X injecting third party neutrals
Principle Three
Provide low cost rights and power backups by replacing costly court systems and providing forums that give determinations. These can be:
X conventional arbitration
X med-arb
X final-offer arbitration
Motivate the use of these forums by making arbitration advisory not binding on the party that has nothing to lose by going to court, or
X commit in advance to binding arbitration or
X make it mandatory
Principle Four
Build in consultation before, and feedback after to prevent future disputes and unnecessary conflict.
This can be done by:
X notifying and consulting first to avoid misunderstanding.

In terms of workers compensation these principles can be seen operating in the better schemes. The measurable performance indicator in comparison to other schemes is the number of disputes arising from the scheme. The ?disputation rate?[108].

108 See Attachment A for an explanation of how this rate is calculated.

Schemes that take a proactive approach to preventing disputes have lower disputation rates. Potential disputes are diffused before they can develop by concerted moves to fulfil the immediate needs of workers and employers. With workers these needs will invariably include continued income and treatment; with employers back to work timetables, rehabilitation plans and accident prevention programs.

A "needs first" approach avoids the artificial dispute that is generated by systems where rights must be established first.

Where rights are made paramount, benefits do not flow until rights are settled. Practical problems that arise from day to day, such as the payment of bills may not dealt with. In order for them to be paid, the worker must start the machinery of disputation, obtaining certificates, filling out forms etc. The insurers preoccupation with liability prevents insurers and employers from meeting "needs" and creates an atmosphere around the injury that works against a return to work. As the focus on rights predominates, information is withheld for fear of unknown legal repercussions. The resulting dispute is not so much a real dispute as a dispute over a failure to meet needs.

As the previous chapter showed, schemes that place an emphasis on entitlement first are less successful. Schemes that leave the needs of the parties to be met only after entitlement is ascertained, often then requires the intercession of third parties, armed with the knowledge and information to make these decisions. The delays inherent in this process escalate the dispute. An artificial dispute becomes a real dispute. Schemes with this approach are high cost, have higher legal involvement and lower return to work rates.

Proactive Intervention

Meeting needs is not the only solution. Proactive schemes also take an energetic approach to ensuring that all participants know the system and then have agencies enforce it. This is a view shared by other commentators about the elements of a best practice DRS.

At a recent conference in Melbourne, Munroe Berkowitz a leading American commentator in workers compensation pointed to the proactive role of the agency as a key element in reducing costs.

> *'If the parties know what to do (evaluation), if they believe what they do is a matter of concern (monitoring), and if the agency has knowledge of what they do (record keeping), adjudication of disputes should be minimized.*[109]

In summary, it seems that concerns that access to justice means free access to resources by parties is being overtaken by a new mood. While advocates may argue that it disregards "rights". the new approach offers better solutions for the peculiar nature of workers compensation matters.

Schemes should:

109 Berkowitz M, The Administrative Role of the Workers Compensation Agency in Return to Work Programs, Paper for the 'A View from America Conference', Victoria WorkCover Authority July 1995 Melbourne pp2

X ***Most importantly, look after needs before rights***
X ***Offer a range of dispute resolution methods***
X ***Allocate resources flexibly according to the nature of the dispute***
X Intervene early

The next section give examples of best practice at each of the levels of dispute resolution. These examples taken together clearly show that the proactive approach outlined above yields the successful schemes that meet all the objectives of workers compensation dispute resolution.

Best Practice Examples

Characteristics that Reduce Disputation Levels

Are pension-based schemes and schemes that limit legal fees best practice?

In Australia, schemes that have lump sums provisions attract legal involvement. ComCare reported increasing legal costs as did Victoria. Logic suggests that an incremental method of making payments limits the opportunity for legal representatives to take a portion as fee. However, pension-based schemes may not be a better solution. Research from North America indicates support for the view that they are not a better solution.

The OTA reviewed similar schemes for their success in controlling the costs of medical malpractice litigation.[110] (Parallels may be drawn between workers compensation and medical malpractice in terms of delivering compensation to injured plaintiffs and the means by which that compensation is assessed). OTA examined the results of 6 multi-state studies that used statistical techniques to estimate the impact of specific malpractice reforms, on four indicators of direct malpractice costs. These were;

- X frequency of suit (legal action),
- X payment paid per claim,
- X probability of payment,
- X insurance premiums.

The six studies were selected because they used the most methodologically rigorous approaches to isolating the impact of malpractice reform on malpractice costs. OTA also identified several studies that either examined trends in malpractice activity in states with malpractice reforms or, compared trends in such a state with those in other states without the same reforms.[111]

The results of OTA's review were that limits on attorney fees and periodic payments did not result in any statistically significant reduction in one or more malpractice cost indicators.

While this result is persuasive, other factors were examined for this project on the basis that they may combine with these reforms to achieve lower costs.

In **South Australia**, limits on legal scale fees are used, and costs are comparable with better performing schemes. Other states reported capping private fee contracts between lawyer and client. Both **Western Australia** and **New South Wales** reported that such provisions were successful in limiting legal costs accrued in settlement

110 US Congress, Office of Technology Assessment, *Defensive Medicine and Medical Malpractice*, Washington, July 1994

111 See above pp76

discussions.[112] It should be noted that New South Wales still experiences high costs and high disputation rates in comparison to other states, indicating that the likely market behaviour is that more cases are run, albeit at the lower rate.

The Western Australian experience should be considered in the context of a major overhaul of the state? dispute resolution system. This now excludes merits hearings by the courts and has resulted in effectively eliminating the bulk of the state? legal profession from involvement in workers compensation. (See Attachment B for comparative cost information between Australian jurisdictions).

In the light of this conflicting information, no hard conclusion can be drawn about the success of pension-based schemes or of schemes which limit legal fees on reducing legal costs. Other factors or a combination of other factors may be more important.

Limiting Disputes over Liability

Better performing schemes take two approaches to reducing the need for repetitive litigation or disputation. First, they automatically accept liability in pre-defined groups of similar cases. Second, they standardise awards of compensation litigation for like injuries.

Some research has been completed in the USA to identify similar claims that could be handled in a less expensive manner than litigation. In the medical area particularly adverse injuries called "Accelerated Compensation Events" or ACEs are automatically compensated without causality being debated. Following an empirical study into actual claims data, a list of events was developed, drawn from high-litigation areas. Adoption of this approach has proven successful in reducing litigation, although there are concerns that this approach can create a disproportionate number of serious claims.[113]

In workers compensation, the use of the AMA Guides is cited as a reason for reduced litigation levels both in **Oregon** and in **Virginia**. In Oregon, the AMA Guidelines were shown to clarify ambiguities in standards and reduce the incidence of widely differing opinions, a common source of litigation.[114] In Virginia, together with other scheme characteristics they reduced the litigation over permanent partial disability claims. The other factors included:

- employers and insurers directing the choice of treating doctor
- adjudicators placing more weight on treating practitioners than on adversarial experts
- PPD weekly payments voluntarily being initiated by insurers and employers.[115]

In the absence of good quantitative evidence, the most that can be said from US experience is that measures listed above reduce disputation rates, but to what extent is uncertain.

In **Australia** there is considerable experience with "tables of maims" as a tool for streamlining awards. Another project commissioned by HOWCA is examining Best Practice in this area. A more detailed discussion of the Australian experience is therefore outside the scope of this report.

Proactive Agencies

While scheme design is important, the evidence suggests that reducing disputation is most successfully achieved through the activities of the workers compensation agency.

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112 S122 New South Wales

113 US Congress, (above) pp 89

114 WCRI Research Brief, Reducing Litigation in Oregon, September 1991 Vol. 7 No. 9

115 Telles C A & Ballantyne D S,(above)

Reports of successful schemes consistently show large reductions in disputation rates as the agency becomes more active in some type of ***early personal contact*** with the parties, particularly the worker.

Various North American schemes have undergone reforms with significant impact on scheme costs and litigation rates. Each scheme behave "proactively". most notably Wisconsin, Virginia, Minnesota, Texas and Oregon.

Wisconsin cited by WCRI as having ? the lowest rate of requests for litigation of any state we have studied', has a workers compensation Division which:

- X ?tracks claims through the system, provides information and help at key points, and investigates when next steps are not taken - activities that keep misunderstandings from becoming disputes.
- X actively works with the parties to set standards and regulatory practices on the assumption that timely payment of benefits prevents litigation on entitlement
- X is committed to educating participants in the system?[116]

A comparatively low rejection rate of 5% of claims was attributed to the Division informing workers what to expect, monitoring compliance and penalising sub-standard performance. Technology supports enable tracking of claims to completion including dispute resolution intervals and hearing patterns. All this is achieved at low cost. WCRI reports:[117]

"The budget of the Wisconsin agency, despite the divisions active posture, is quite low compared with that of many other states. This suggests that extra expenditures up front on dispute prevention more than pay for themselves by saving resources that later would have to be spent on dispute resolution.

...employers and insurers that understand their responsibilities are more likely to take action within required time-frames, preventing the uncertainty that often drives workers to hire attorneys. Similarly workers who know what is supposed to happen, and when, are less likely to look for an attorneys help in resolving problems."

116 According to WCRI Wisconsin is relatively low cost state which pays average benefits.

117 WCRI Research Brief, Workers' Compensation in Wisconsin, November 1992 Vol. 8 No. 10

Oregon has employer and worker ombudsmen. The worker ombudsman travels from shopping centre to shopping centre in a caravan equipped with on-line access to computerised information about the status of the claim. A large part of the role is in answering enquiries. There is a heavy emphasis on education about rights. Oregon also has a highly proactive workers compensation agency.[118]

Virginia has a scheme which seeks to replace Attorneys by actively helping workers to "navigate" the system. This is assisted by providing a reason for workers to first contact the agency. Uncertainty as to when payments are supposed to start prompts many workers to go the agency to intervene. There is no denial to fight against, just uncertainty, so lawyers are not engaged. [119]

In **Minnesota**, a rehabilitation consultation is required by statute after sixty days of lost time, (thirty days for back injury) unless it is waived by the agency. A qualified rehabilitation consultant conducts the evaluation and supervises the rehabilitation and back to work plan. Minnesota's disputation rate is just under 1%.[120]

Taking Berkowitz' approach[121], these agency activities may be put into the category of what would be described in Australia as regulatory. They go further than just educating or helping a worker or employer through the system. They enforce system rules that make sure that these contacts occur.

In **Australia**, there was no clear example of best practice in alerting workers to the conditions under which claims may be made. No scheme indicated that its efforts in this area were particularly successful.[122] Past information campaigns had, on the contrary, brought on spates of increases in numbers of illegitimate claims.

> A preferred approach was to make help available at the time a claim was made. Insurers reported that this was a successful strategy in reducing disputes. One insurer reported that programs on site with employers and workers were designed to send a message of:
>
> *"Put people first"* [123]
>
> An international insurer reported that a program in **California** calling workers into the insurance company for interview immediately following an injury had shown excellent results. Similar programs in Australia had become legalised as lawyers insisted on attending to protect worker interests.[124]
>
> Recently distributed guidelines under consideration by the **Insurance Council of Australia** [125] include provisions to encourage claimants, trade unions and employers to contact insurers with questions about claims and procedures. The Guidelines state that staff should be made available to handle this task.

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118 Reporting in October of 1994, the Governor of Oregon, Barbara Roberts commended a safety record that had maintained a 60% decrease in serious time-loss injuries over 7 years from 1640 in 1988 to 648 in 1993/94. The huge savings meant that premiums from 1990 and 1991 would pay all the states losses for 1992 to 1997 Internet, *Oregon, A State of Safety,* contact C. David White, transmitted Friday October 28 1994.

119 Telles C A & Ballantyne D S.(above)

120 WCRI Research Brief, Workers' Compensation in Minnesota, June 1991 Vol. 7 No.6

121 Berkowitz M, July 1995, Melbourne, (above)

122 Note Ford s experience above - information booklets are provided to all staff.

123 Interview, Insurance Council of Australia, Tasmania

124 Interview, Insurance Council of Australia. See s162 of the Victorian legislation.

125 See *Best Practice Guidelines for Licensed Insurers - Workers Compensation Claims,* (Developed in Western Australia and adopted by Tasmania)

In an effort to encourage similar approaches, the **Victorian** WorkCover Authority now identifies legal costs of claims when it allocates fund resource to insurers, in the partially privatised scheme. Insurers now have an incentive to avoid litigation. At the time of writing, results were not available to confirm the success of this approach.

That people want this type of contact and help is clear. A WCRI survey of 2540 claimants in **Washington** in 1989, found that more than one quarter would have liked better information about "navigating" the system.[126]

Personal contact under the umbrella of rehabilitation, seems to be successful, as shown by Minnesota above. The **Queensland** Workers Compensation Board places a very high priority on "early intervention rehabilitation" and enjoys a comparatively low number of disputes.[127]

Berkowitz argues that despite conventional wisdom supporting early intervention for the best rehabilitation outcome, there are still considerable problems in timing these interventions and selecting clients to avoid unnecessary costs. The same may be said about dispute prevention with the following exception. What is important about early intervention in dispute resolution is that it happens, and that it happens in a certain manner. In rehabilitation in contrast, the nature of the continuing program is crucial. Its success is measurable in return to work rates.[128]

While contact is important, the nature of contact, especially the very first contact is crucial. Research by the American Bar Foundation into the effectiveness of different styles of dispute management shows that first impressions of early interventions are vitally important.[129] These impressions heavily influence participants' assessments of the fairness and effectiveness of the entire dispute resolution system.

The perception formed of the relationship to the legal authority is most important. Three aspects are crucial:

trust: That the authority is benevolently disposed towards the person and is trustworthy.
Shown as the perception that one's needs and views are considered

standing That the person is viewed by the authority as a fully fledged member of society and won't be relegated to secondary status.
Shown as politeness, dignity and respect

neutrality A belief that one will be accorded even-handed non discriminatory treatment.
Shown as perceptions that decisions are being made in an open, fact based fashion, rather than in discriminatory or biased fashion.

According to Lind:

> *"most people are much better at perceiving whether they are being treated impolitely than they are at interpreting whether the fine they received or the judgment handed down in their lawsuit is fair.*

This approach emphasising the nature of the intervention is supported by a study of 8 US district court annexed arbitration programs. Acceptance of the arbitration awards as resolving the case was much more strongly linked to the participants impression of

126 WCRI Research Brief *Claimant Satisfaction with Workers' Compensation* May 1987 Vol 3, No 5

127 This observation is qualified - See Attachment B

128 Berkowitz M. (Above)

129 Lind E A, Procedural Justice, Disputing , and Reactions to Legal Authorities, American Bar Foundation Chicago 1994

fairness than to the actual outcome. If perceived as unfair, there was low acceptance.

Agencies should be proactive by:

- X ***Making navigation assistance readily available through the claim and dispute resolution process***
- X ***Ensuring early personal contact of very high quality***
- X ***Giving information about entitlements***

If perceived as fair, there was very high acceptance.

Once matters are within the dispute resolution system, the issue is how best to deal with them. The next sections address this question.

Is ADR Best Practice?

An examination of best practice benchmarks found that the schemes which have reduced costs were those which:

- X limit or abolish public court involvement
- X limit or abolish legal involvement [130]

These features are clearly "best practice" overseas, and there is evidence that they deliver reduced costs in Australia.[131] The Western Australian WorkCover scheme most closely meets both of these requirements. It also enjoys comparatively low disputation rates and pays much less per case for the resolution of disputes than other schemes in Australia.[132]

In the Western Australian scheme, the conciliation and review directorate is under the administrative control of the state WorkCover authority. This trend is also evident from overseas (discussed more fully in Chapter 5) When taken together with removing opportunities for rehearing evidence in the court system, this move combines to produce a wholly administrative dispute resolution system. The issue for these systems then becomes how their "informal" processes should best deliver dispute resolution, whether through ADR, tribunal panel models, papers review or even, investigatory decision-makers?

While ADR appears to be the current favourite, the evidence indicates that arbitrary introduction of ADR by itself is not a complete solution. It will not unilaterally bring about reduced costs and less adjudication. In some schemes the opposite occurs over time, if ADR is allowed to become a hurdle process. It seems that a combination of elements is necessary to bring about an optimal ADR program.

In 1987, the International Association of Industrial Accident Boards and Commissions, identified four requirements for the optimal informal dispute resolution (IDR) system. These were:

- X The IDR conference should be mandatory.
- X The hearing officer conducting the conference should be specifically selected for ability and special talent for informally resolving cases and bringing them to settlement.

130 See Wallace N & Hall M, Preventing Disputes Transformation Management Services Pty Ltd Victorian WorkCover Authority, May 1993

131 See Chapter 5

132 See Attachments

- The conference should be unrecorded to allow the parties to speak freely.
- Sanctions should be promulgated, whether by statute or by rule, for failure of the parties to make a good-faith effort to adjudicate their differences at this level.[133]

The same organisation reviewing ADR programs in 1990 still regarded voluntary schemes as unsuccessful. [134] [135]

In Australia, compulsory ADR schemes have been introduced in several states with varying success. In **Victoria**, for example, despite compulsory conciliation, half the disputes end up in a court and legal involvement is correspondingly high. In **Western Australia**, three quarters are resolved by conciliation and very few go to a court.[136]

There are a series of issues surrounding the advantages and disadvantages of compulsory and voluntary schemes. For example, will the prospect of resolution be tainted by the fact that a person was coerced to attend. These issues are discussed in Chapter 7.

ADR does however provide the best opportunity for taking a "needs" based approach to dispute resolution, when compared with adjudicatory models. One indicator of whether needs are met is the level of customer satisfaction. Logically, this level will be lower when outcomes are imposed. In **Queensland,** which operates medical boards on a formal adjudication model, letters of complaint are received in just over 15% of all matters, a level not experienced any where else in Australia.[137] These complaints indicate high levels of customer dissatisfaction.

In contrast, surveys show high levels of customer satisfaction with ADR systems both in **Western Australia** and **Victoria**.[138] For Australians, ADR would seem to be a preferred model for meeting needs.

ADR can also be effective in reducing costs and delays. In **Canada,** the introduction of mediation to the **Quebec** *Commission de la sante et de la securite du travail,* is

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133 Fletcher, M Informal dispute resolution popular among comp officials, Business Insurance, January 16, 1989 pp 13 at pp 14

134 Cook, T Opinions vary on ADR in work comp claims, Business Insurance, October 8 1990 pp 96

135 In another related field, compulsory conciliation has recently been introduced by the Australian Industrial Relations Commission, albeit under a "voluntary" label. Evidence of its success is yet to emerge. (A description of the new industrial relations system is given in Chapter 5).

136 Interviews and statistical information provided from both states.

137 Interviews, Workers Compensation Agencies in South Australia, Northern Territory and Queensland.

138 Interviews Victorian Conciliation Service and Western Australia WorkCover. (Western Australia have since published the results and Victoria has published results of earlier surveys.)

reported as bringing vast improvements.[139] Despite being voluntary, since its inception, conciliation in the Quebec board's appeal system has reduced the need for formal hearings in approximately 65% of cases. Delays in early 1994 had reduced from 3 or 4 years to only 3 or 4 months.

Despite the easy-to-find ADR success stories, this closer examination of the evidence shows that introducing ADR, whether voluntary or compulsory, is not the key determinate of a successful system.

It may well be that no one element will achieve lower disputation rates and that a combination of elements is necessary. The importance of information management examined in the previous chapter and alluded to by the IAIAB, together with DRS control of access, are just two elements that could have an impact. ADR is one effective element but others are required to create successful systems.

The next section discusses best practice in each of the eight components of a DRS, outlined in chapter 2, seeking to draw out these elements.

On site interaction

Staying on site

139 Williams, B, Dispute Resolution - Looking at Alternatives, OH&S Canada, V10(3) May / June 1994 pp 63

In *Preventing* Disputes, Wallace and Hall argued that the four elements needed to resolve a dispute[140] needed to be put together as quickly as possible, preferably at the worksite to avoid future disputes. Stakeholders supported this view but indicated that while this was important, it should form part of a larger objective. This is, to keep the worker at work after the injury, even during recovery and part-time, if necessary. Early return to work was suggested as more effective dispute management as it prevented workers from slipping into a "compensation mentality". It also maintained the work-place social links which were important in continuing a focus on rehabilitation.[141]

Examples of successful on-site strategies were cited by **Ford** and by **Coles-Myer**. The intervention of a rehabilitation officer with authority preferably from the most senior levels was considered a key element in making sure that those workplace changes that needed to happen did happen.[142]

Coles-Myer identified assessor reports as a possible source of disputation. Some reports had tended to represent the views of the employer almost exclusively. This was a problem when there was antipathy between employer and employee. Now, a standard set of assessor questions is used, backed by continuous training of employers on their obligations under the legislation. Coles-Myer considered this cut out many disputes caused by dislike between employees and supervisors or managers.

140 Chapter 4 (above)

141 Interviews, Unions Tasmania, VECCI

142 Interview Coles-Myer The "Rehabilitation Coordinator" has the words: Early intervention, Injury Management and Return to work after their title and they are used in all in-house material

In **South Australia,** an on-site stress consultancy program is credited with keeping stress claims low in comparison to other schemes with similar legislative provisions.[143] A team of eighteen stress consultants are on-call when a stress claim is lodged. A consultant immediately visits the site and is able to significantly reduce the scope of stress related disputes. Other agencies, **ComCare** and **Queensland** cite similar successes with rehabilitation and stress centres.[144]

Queensland's "Personal Injury Management Program" is also based on an early intervention approach.[145] It provides "a mechanism for the integration of claims, medical and rehabilitation management" through "ensuring optimum communication between the three areas".

Counsellor contact is arranged and the program ?provides a forum to discuss the concerns of Counsellors, Medical Officers or responsible Claims officers and to arbitrate unresolved matters from these Personal Injury Management Meetings.

Disputes are deterred by practices that include an awareness that unattended disputes can escalate and that the best practice means of dealing with this is early intervention on site.[146]

To deter disputes, on-site interaction should:

- X ***Keep the worker involved with the worksite in some way***
- X ***Include the authority to take necessary action***
- X ***Use standardised investigation tools***
- X ***Ensure communication between insurers, doctors, rehabilitation providers, worker & employer.***

Treating doctor

The **Texas** workers compensation scheme relies heavily on treating doctor reports - in 70% of all disputes[147] . **Oregon** takes a similar approach providing incentives to use treating and not partisan experts. This is backed by magistrates relying heavily on treating doctors evaluations and almost never compromising among disparate reports.[148] Building the role of the treating doctor to assume this level of reliability becomes important, if this Best Practice is to be achieved.

Methods to do this are discussed in detail in *Medical Panels - Securing Definitive Medical Advice in Workers Compensation*.[149]

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143 Interview WorkCover Corporation South Australia

144 Interviews, ComCare & Workers Compensation Board Queensland

145 Queensland Workers Compensation Board *Personal Injury Management Manual* Clause 1.4 1993

146 See also Scarlett D, Reviewing National trends in Claims judgements, Implications for Employers, Paper given to Best Practice in Workers Compensation AIC Conference, Sydney 12 April, 1995 pp5

147 Prior to 1991 reforms Texas had "one of the highest attorney rates in the US -90%, 25% of the sum recovered paid in legal fees, the highest escalating medical costs in the US and high court door settlement rates" (WCRI). The Texas reforms are discussed in detail in *Medical Panels - Securing Definitive Medical Advice in Workers Compensation*

148 WCRI Research Brief, Reducing Litigation in Oregon, September 1991 Vol. 7 No. 9

149 Wallace N, Kotzman D, and Hall M, *Medical Panels - Securing Definitive Medical Advice in Workers Compensation,* 1995. See also Medical Disputes (below).

Primary Decision-making

Making the Primary Decision

Chapter 3 established that poor primary decision making resulted in "artificial disputes" and in more genuine disputes. There are few studies that report examinations of good primary decision making and its effect on disputation.

The **Wisconsin** scheme reports reduced injuries and greatly reduced disputation rates. Employers & insurers cite effective initial claims handling as a main reason. Effective claims handling was constituted by:

- telephone contact with the treating physician to confirm causation before making a decision,
- issuing provisional one-week payments rather than risking penalties for late payment and unreasonable denial.[150]

The second action is similar to the "Deferral" process in the **Northern Territory**. Insurers may defer decisions to reject payments for a period of four weeks, allowing enough time to obtain and scrutinise any relevant information before making a decision.[151] Insurers agreed that this was an important option particularly in the "gray" cases.[152] To avoid disputation, they wanted options in addition to just outright rejection.

One option suggested was a structured opportunity to verify information with the worker. Legislative support for a preliminary discussion was reported to have been successful in the past. A "get-in-here (or GIH) for a chat" provision had been compulsory in **Victoria** to call workers in for discussions over redemptions.[153] It came with the qualification that if the worker refused to appear payments would be automatically suspended.

In **Queensland**, a centralized scheme makes all decisions on payment of claims. A sophisticated quality management system operates to ensure the quality of decisions. The benefits of this system are difficult to measure accurately, but the lower disputation rate in Queensland in comparison to other states may be partly attributable to this, together with various other scheme and local factors. (See Attachment B)

Continuous Improvement

Better schemes have decision-makers who make decisions only after talking with employer, treating doctor and worker, and after collecting all the relevant information. Quality management or continuous improvement processes can be used to improve the quality of initial decisions. Together, these factors should result in a high proportion of properly made initial decisions that do not have to be revisited. Disputes that arise after this will be bona fide disputes over fact or interpretation of rights and benefits.

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150 WCRI Research Brief, Workers' Compensation in Wisconsin, November 1992 Vol. 8 No. 10

151 See Attachment B

152 Interview Insurance Council of Australia

153 Interview Insurance Council of Australia

Continuous improvement is a means of providing feedback on the quality (outcome) of a decision to all the decision makers. This ensures that appropriate action can be taken to avoid mistakes in the future but more importantly, more successful techniques can be used again, and used by others.

In **Canada**, workers compensation claims are handled through central agencies usually called 'Boards'. **British Columbia** introduced a client centred operating model to their claims management or 'adjudication' function in 1993. Quality, timeliness, cost effectiveness and client satisfaction were identified as performance measures. Quality was measured as the proportion of ?changes' to primary decisions. Changes could be made either by the appeal mechanism or through internal review and audit processes. The target was a 'nil' change rate. If successful a reduction in disputation would be expected.

This program was planned to be completed by March of this year. To date statistics are not available to gauge the impact on the dispute resolution system.[154] The success of this scheme should be evaluated when figures are available.

The key common factors with all of these schemes are personal contact and access to all the relevant information, in an environment that feeds back bad and good outcomes to decision makers, reinforcing quality management principles.

Reconsideration (Internal Review)

Best Practice Primary Decisions:

X	***require personal contact***
X	***rely on access to all the relevant information***
X	***are made in an environment that feeds back bad and good outcomes to decision makers***

Better schemes allow decision-makers to review disputes before they move into the DRS. This assists the immediate feedback process and also allows internal rectification without the expense, delay and embarrassment of external review.

ComCare and its associated licensed authorities use an internal review process that is partway between a continuous improvement feed back and reconsideration by a more senior claims manager. Review in some authorities occurs at the same level as the decision maker. Reconsiderations (Recons) are internal reviews of decisions where a dispute has arisen. They are held on the volition of the claims organisation not because of referral from an outside agency. The **ACT ComCare office**, reported considerable success in improving quality using this approach. Claims managers from different claims teams rotated the "recon" function injecting an "objective" review element. The benefits were twofold. Internal practices were questioned by a objective person and the lessons learnt by the reviewing officers were taken back to their own teams.

154 Deloitte & Touche, Review of the Adjudication Function - Workers Compensation Board of British Columbia, June 1992, pp31

In another process, a backlog of "recons" was reduced by offering claims officers overtime to review the decisions of other claims officers. Similar benefits were experienced.[155]

Schemes that refer disputes through a formal internal review process are also successful in reducing the numbers of disputes eventually dealt with. Over time if the internal review process provides effective feedback to primary decision-makers, standards of decision-making will increase and disputes will further reduce. This model is favoured by private industry complaint handling schemes.[156]

In Australia, the Insurance Enquiries and Complaints (IEC)scheme operated by the **Insurance Council of Australia** to deal with general insurance complaints is a good example. Lionel Bowen the Chairperson of the Insurance Industry Complaints Council, reported a **28%** fall in the number of complaints referred to the Claims Review Panels for determination. He put this down to a

> *'greater reliance on internal measures to avoid the need for the consumer to seek redress with the scheme'* [157].

These internal measures constitute an internal review process. Each insurer must appoint "contact persons" with the authority, experience and seniority to resolve the complaint. Arrangements must be made for substitution in the event of their absence and their existence and responsibilities must be widely publicised by the 'relevant state or head office' throughout the company and to staff.[158]

Once a complaint is received, it is referred back to the insurer. They have 15 days (recently *reduced* from 30) to come back with a 'final decision' or resolve the matter themselves. The Claims Review Panel, a panel of three finally deals with difficult disputes.

In **Washington** a similar process operates. The workers compensation agency, which also make claims decisions, 'reassumes' one quarter of appeals. A 'claims consultant' from the same section as the claims manager who made the original decision reviews the appeal.[159]
All of these examples show some common elements which can be translated to best practice points.

Agencies should:

- X Require internal review of claims decisions within time-lines
  - ➢ Either after a dispute is lodged; or following a rejection
- X Require that staff who perform internal reviews be separate to the decision-maker, and have the requisite experience and seniority
- X Encourage rotation of the internal review function.

155 Interview ComCare November 1995

156 Wallace N and Hall M, Preventing Disputes, 1993

157 General Insurance Claims Review Panel Annual Report 1994, Insurance Enquiries and Complaints Limited (Insurance Council of Australia) pp 2

158 Guidelines for General Insurance Claims Review Panel and Insurance Industry Complaints Council, Insurance Council of Australia

159 WCRI Research Brief, Jan. 1990 Vol 6, No.l Workers' Compensation in Washington

Information Exchange

If parties are required to share information on their own time prior to entering the DRS, the evidence shows that disputation rates are significantly reduced. In **Montana**, in July 1987, a package of reforms including mandatory non-binding mediation went into effect. Described as the "key to the programs success", is a requirement that both sides disclose all information supporting their positions prior to the mediation session.[160] Failure to comply means the case is stalled and no new date is set until all the information is disclosed. The results were a substantial decline in backlogs.

In **Minnesota**, the agency mandates the exchange of information, "more frequently" than in other states.[161] WCRI suggest this could explain 60% of termination cases and 73% of other matters being withdrawn by workers before conference. Most conferences scheduled by the agency do not need to occur. The fact that a date has been set with a deadline for exchange of information ensures that the parties have access to all the information they need to settle the case well in advance of DRS intervention. The exchange process also provides a focus for communication between the parties which might have been lacking. This extensive exchange of information may also explain the high 90% resolution rate for mediations of cases that are not settled directly by the parties.

In **Victoria**, the benefits of mandatory early exchange of information have been realised in the court system. The key finding of the 1992 examination of the personal injury list of the County Court discussed in Chapter 3, was that early exchange of information assisted early settlement.[162]

In **Wisconsin**, rules require the exchange of information before the agency will deem the matter ready for hearing. Medical reports must be attached to hearing applications or submitted within sixty days, and the parties must indicate they are ready for a hearing before one is scheduled. These procedures are one of a series of factors cited as preventing unnecessary litigation. [163] [164]

The example of these better systems, together with the evidence in Chapter 3 of the costs and delays occasioned to systems where information is unmanaged, show that early exchange of information is an essential element of better systems.

DRSs should:

X ***Require information exchange by the parties***

X ***Give out hearing dates or appointments only after information exchange is satisfactorily shown***

160 Fletcher, M Informal dispute resolution popular among comp officials, Business Insurance, January 16, 1989 pp13

161 WCRI Research Brief, Workers' Compensation in Minnesota, June 1991 Vol. 7 No.6

162 Williams P L, Williams R A, Goldsmith A J, Brownes P A, *The Cost of Civil Litigation before Intermediate Courts in Australia*, 1992 A.I.J.A. Melbourne

163 Ballantyne D S, Telles C A, *Workers Compensation in Wisconsin* - Administrative Inventory, Workers Compensation Research Institute, Massachusetts 1992, pp xxii, pp68

164 Wisconsin Department of Industry, Labor and Human Relations of Wisconsin, Workers Compensation Act of Wisconsin with Amendments to January 1, 1992

Screening & Streaming

Recent trends in court management have included "differentiated case management" as a major tool for managing information flows, participants in disputes and, in reducing delays. The guiding principal is that the most expensive resources should be used properly; that an initial review by a senior officer often an experienced judge should direct the "track" into which the case should proceed. Differentiated case management is discussed in detail in Chapter 6.

The principals are equally applicable to administrative processes in workers compensation. The research indicates that they can be considered an essential best practice feature of any administrative scheme. The components of differentiated case management are variously labelled as screening and streaming. Essentially cases are culled by a "gatekeeper" who acts to direct cases to the appropriate forum.

In **Georgia**, a Screening & Administration Section is used to review all requests for hearing by the Board.[165] It refers them to one of two units: Peer Review or Legal Orders. The peer review makes recommendations that are not binding if the case later goes to hearing. The other Legal Orders unit tries to settle by telephone, conference or interlocutory order & final order.

In **Washington**, once an appeal is granted the file is reviewed by Chief Mediation Judge for likelihood of settlement. Only 80% are assigned to mediation judges with a conference being scheduled. The other 20% are resolved without cluttering up the schedule.[166]

In **Texas**, Dispute Resolution Officers screen all cases and resolve well over 50 % by telephone and by collecting further information before the matters proceed to the next level. This result is similar in **Western Australia** which has officers similarly titled, who review every dispute before it proceeds to conciliation.

In **Virginia**, screening takes out 11.6% of potential disputes.[167] Once in the administrative dispute resolution department, cases are streamed to one of three processes:

- on-the-record determination where material facts are not in issue and the case falls into one of 18 categories.
- 14 day further information collection period
- formal hearing (Applications must be made by the parties and the department grants these in most instances), A further streaming process refers 12.5% to administrative review on the record and 47% to formal hearing. In the administrative review process, 7.6% are on the record determinations and the remaining 4.8% are withdrawn, or resolved in the screening process.

> *'The Commission's objective is to resolve disputes at the lowest possible level within its administrative and adjudicatory structure. Once a claims for benefits is filed, it is reviewed by an assistant claims examiner to determine whether the claim is filed properly, whether additional information is needed, and whether resolution without hearing is likely. The primary job of the examiner is to resolve aspects of the claim that are not disputed and, where possible to facilitate a commission award. If information is missing, the examiner sends a form letter to the worker , requesting the information. No action is taken on the claim until the information is received. If a case is*

165 Georgia Workers Compensation Annual Report 1989 / 90

166 Irvine M, *Mediation Before the Board of Industrial Insurance Appeals*, Washington State Bar News April 1991, pp 22

167 See note 54, pp 62

clearly outside the statute or not compensable the examiner Informs the applicant. This decision can be appealed to the Deputy Commissioner on the papers.

In cases that are not clear, the examiner sends an order in the form of a checklist to the employer or insurer. A response is required within 20 days. The order focuses on the status of the claim, the progress of the investigation, the parts of the claim that are accepted, whether the claim is denied, (if so the reason must be given), and other related information. After receiving the response, the examiner may contact the insurer to find out whether it is willing to accept the uncontested part of the claim or pay the claim voluntarily pending an investigation. Commission officials say that a significant number of applications are resolved at this level.

They fast track cases to hearing particularly if all the information is on the file, otherwise it is a 2 month process.

In **Minnesota**, disputes are split by type between non-attorney specialists and judges, the former handling termination, medical and rehabilitation; and the latter handling table of maims, entitlement and complex legal issues.

Despite the low disputation a note of caution has been signalled. Multiple agencies(3) involving multiple tracks for informal dispute resolution have increased the staffing requirements and costs of the system and the need for attorney involvement. [168] [169]

Michigan processes 100,000 claims annually. Until ADR was introduced in 1985, one third of the 20,000 disputed claims were litigated. Now only 20% are litigated. Cases are streamed to a mediation track based on certain criteria. These criteria are:

- the claim concerns a finite period of time and worker is back at work,
- medical benefits only
- unrepresented worker
- discretion of bureaus that dispute could be settled.

Possibly due to the limited nature of the issues under discussion, mediation sessions average less than 30 minutes and the resolution rate is 70%.[170]

In **Oregon,** within the agency the dispute resolution section includes:

- a medical review unit,
- an appellant review unit,
- a rehabilitation review unit, and
- an administrative support unit.

Disputes are streamed on the following basis. The appellant review unit conducts mandatory reconsideration of claim closure orders (terminations). It has sole discretion to refer cases to medical arbiters. (See Medical Disputes below). The rehabilitation unit mediates vocational assistance disputes, issues directions orders in unresolved vocational assistance matters and provides consultations on vocational assistance issues. The medical review unit resolves disputes and issues directions orders relating to medical treatment, medical fees and palliative care.

Before the reforms in 1990 that established these units, delays averaged five months. The new system resolves most matters within nineteen days and the remainder within sixty eight days.[171]

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168 WCRI Research Brief, Workers Compensation in Minnesota, June 1991 Vol. 7 No. 6

169 See Chapter 6 Differentiated Case Management

170 Williams, B, Dispute Resolution - Looking at Alternatives, OH&S Canada, V10(3) May / June 1994

These examples show that screening is an essential best practice feature. Streaming, on the other hand takes various forms some of which are more successful than others. It may involve a senior officer making decisions as to what forum a matter can be referred to, or cases may be automatically sorted into "tracks" by category. Alternatively, a combination of methods may operate, with the senior officer making overriding decisions where necessary.

The examples in Chapter 7, particularly of the Supreme Court of South Australia, show that the latter more flexible approach is most successful. The key elements are ensuring that cases go to the appropriate forum and that the system is flexible enough

Agencies should:
X ***appoint gatekeepers to screen disputes***
X ***stream disputes into categories with flexibility by senior gatekeepers to make overriding decisions where necessary***

to allow specific interventions to be directed to occur when necessary.

Facilitation

Conciliation and Mediation

171 Material on the operation of each of these sections was provided by L. Owens, WorkCover Corporation South Australia, from a visit to Oregon in 1993.

Some measure of the quality of conciliation and mediation processes is usually found in customer satisfaction surveys. Kressel suggests that the existing research puts this figure at 75%.[172] That is, 75% of all those involved in conciliation and mediation processes were satisfied with the process. Other quality measures include the resolution rate and the durability index. (See attachment C). Approximately 70 to 75% of matters should be resolved and close to 100% of the resolved outcomes should still be in place 6 months later.[173] The measure of a successful conciliation is that parties agree, are committed to delivering on the outcome and are able to sort out any further problems themselves because the avenues of communication have been successfully cleared by the conciliator or mediator. A simple way of finding the latter is to look at re-opened files or new files that have been re-lodged for a further conciliation involving the same parties. An unsuccessful conciliation will be measured by low satisfaction rates, short-lived agreements and recourse by the parties to other forums.

In **Victoria,** two surveys of the WorkCover Conciliation Service have returned high satisfaction rates, and relatively high resolution rates (65-75%). These results have been matched recently by the **Western Australian** WorkCover Conciliation and Review Directorate.[174] The Victorian scheme, operating since 1992, has sought to provide a consistent service by following a regime involving:

- X appointing highly paid and highly experienced Conciliation Officers
- X continuous training (See Attachments)
- X the development of a Code of Practice and Protocols governing every aspect of the conduct of conciliations
- X using a full time Quality Manager and Training Manager to support a total quality management program.
- X using a team structure to reinforce consistency and minimise anomalous decisions on the part of individual conciliation officers.

The most recent innovation, a video of a typical conciliation is sent to both worker and employer on the receipt of a request for conciliation. This has had the unexpected result of acting as an objective control on quality - workers and employers complain if the process deviates from the video.

Another mediation model instructive in achieving quality is the community mediation model. This has been operating in **Neighbourhood Dispute or Community Justice Centres** in Australia for well over ten years.[175] Based on disputes in "ongoing relationships", they typically deal with neighbourhood, partnership, workplace and public interest disputes. Mediators are paid at much lower rates -$10 to$20 per hour but do much more in terms of ongoing training, regular debriefing (after almost every mediation) and intensive group work.. They also develop the procedures to handle different types of disputes.
The most effective means of obtaining consistency in these centres, however, is credited to "co-mediation", where two mediators handle one dispute. This process enables peer review and immediate feedback on technique. Co-mediation has been endorsed by the Administrative Review Council (see below), and more recently was approved at a national conference of Residential Tenancies Tribunals.[176]

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172 Kressel

173 See above

174 Compare with Washington that has a resolution rate of only 45% but "judges mediate" 10 to 14 cases per day, those with legal representation on the telephone, and leave many part-heard for up to 6 months when conferences go over time or when parties indicate information has not been collected. Winset D Interview

175 Interview, Dispute Settlement Centre of Victoria

176 Wright R *Consistency, The Challenge of the Century*, Melbourne, October 1995

In community-based family law mediations, a quality standard has been identified and is enforced. In a variation of peer review, any other mediator must be able to enter a mediation in progress and identify the exact stage of the process - they measure in terms of over 20 different separate stages. This ensures that the most effective processes are constantly repeated and avoids the deviations that inevitably bring criticism.[177] It also reinforces the role of a facilitator which is to control the process not the outcome.

Although quality is often referred to in the literature, the field of quality control is a new area in ADR. Workers compensation systems, due to their relatively high volume, are probably at the leading edge in Australia in testing different approaches to achieving quality. However, several conclusions can be drawn from the information that is available. Quality management must include peer review and a concentrated attempt to define the steps in the process and to see that they are adhered to.

Achieving resolution

As already discussed above, information and the extent to which it is shared is very important in preventing unnecessary disputes. In ADR, these aspects of information management are also particularly important in achieving resolution:

?ADR is an exercise in futility unless the parties come prepared. This is a basic proposition. Nevertheless, based on the Mediation Unit?s experience, issues are frequently in dispute because a party is not familiar with the case file. The probability of achieving case settlement is directly proportional to the parties' knowledge and preparation of its case.[178]

> *Mediators have more distance and perspective on parties' discussion, therefore they can impartially hear, and impartially report to the parties any crucial parts of their own dalogue that they themselves may not have grasped fully or even heard, because of their closeness to the situation.?*[179]

For information sharing to support resolution of disputes, two criteria must be met.

- X Parties to the mediation must come prepared
- X Mediators must ensure that both parties fully understand the information.

Facilitators should:

- X ***control the process not the outcome***
- X ***adopt quality measures that include peer review and rigorous adherence to predefined processes***

Med-arb models

The need for facilitators to have some limited power to influence benefits or the timing of payments has been met in some schemes with the adoption of model that includes authority to compel an outcome.

In conciliation as distinct from mediation, the parties have an expectation that the conciliator will suggest solutions, based on solutions from similar cases. Where this role expands to imposing solutions on the parties, it is described as a

177 Wade J, Address *Towards Consistency* Conference, Victorian WorkCover Nov. 1993

178 Lawonn Michel M, Legislatively Mandated ADR in Colorado Workers Compensation, The Colorado Lawyer April 1992 p 679

179 Witlin, R K,(above) pp 47

mediation / arbitration or "med-arb" model. This model operates in **New South Wales** and in **Victoria**, where conciliation officers have limited stop-gap powers. In **Northern Territory**, in contrast, a "pure" mediation model is used.

To avoid the criticisms that a med-arb model seems to attract, (ie that the facilitator is unqualified, biased and unjustifiably legalistic), some schemes have split the function.[180] There are three devices to do this:

- ratification of agreements,
- rotating the function and
- making recommendations.

Ratification of agreements

Some schemes have adopted process that ratifies outcomes. Here the facilitator proposes a solution that is later ratified by a higher level in the DRS. In **Florida** for example judges must approve agreements. They are given 10 days to accept or reject the agreement. The time limit ensures action. If no rejection is made by a judge within 10 days then the agreement becomes a binding order by default.[181]

In **Washington**, 1 judge does 10 to 14 conferences per day, 3 days per week, after first reviewing the file. The Judge then creates and drafts the order for Board's signature. This is known as an "Order on the Agreement of the Parties". The Board will not sign the order unless it conforms to the law and the facts.[182] A similar approach is included in the new Australian Industrial Relations legislation.[183]

In **Virginia**, a low cost state, 80% of claims have decisions to suspend benefits upheld pending hearing. Insurers and employers have unilateral power to suspend in some situations. A DRS officer has to find there is 'probable cause' for the suspension to be maintained. These orders are upheld in later proceedings in the vast majority of cases.[184] [185]

In **Quebec** if the parties are able to reach an agreement, the conciliator assists them in drafting the terms. The agreement then goes to the review board to ensure that the proposed solution does not violate any laws or policy. After the agreement is ratified by the review board it is final and cannot be contested. If the parties cannot reach an agreement, or if the agreement concluded is not ratified by the review board, the board makes a decision based on the agency?s file. A ratified agreement does not represent a precedent and will not form part of the appeal board's ?jurisprudence?.[186] If an agreement is not reached, a tribunal hearing is held.[187]

Better schemes also have high ratification rates between levels. Confirmed outcomes instills confidence in the lower level and reduces the amount of work that passes through to the higher level. **Western Australia** reported that the close proximity in location and time between the two levels resulted in this effect. 86% of cases were resolved at conciliation, and 24% at review.[188]

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180 See Chapter 8, Binding or Not Binding for other criticisms and a discussion of the med-arb role

181 Witlin R K, Mediation: So Misunderstood The Florida Bar Journal December 1991 pp 46 at pp 48

182 WCRI Research Brief, Jan. 1990 Vol 6, No.l Workers' Compensation in Washington

183 See Chapter 5 - Consent Arbitration

184 Telles C A & Ballantyne D S. (Above)

185 See also chapter 3 - Stop Gap Power. Ratification is also necessary at this level for Best Practice.

186 Compare to S61 of the Victorian legislation.

187 Williams, B,(above) pp 63

188 Interview, Conciliation and Review Directorate, Statistics from first 12 months

Rotating the function

Another approach to avoiding the criticisms of the med-arb model is to rotate the function. In **Washington**, judges have a dual role of mediating and reviewing and they rotate 4 months in each.[189] This approach was also endorsed as being used successfully and enhancing the status of officers in the Australian **Industrial Relations Commission**.[190]

Recommendation powers

Recommendation powers are used in many schemes.[191] They give a preliminary option to the facilitator to suggest a solution and make a recommendation that the parties may choose to accept. They are used to give indications of likely determinations. These indicators often prompt settlement. One reason given for this is that one party often needs to "save face" and needs the opinion of an impartial third party to rely upon in agreeing to settle.

While none of the above devices was shown through hard evidence to be "best practice", there was a great deal of opinion supporting the splitting of the functions. There was also concern that information revealed for the purposes of a facilitative process should not be available for consideration at determinative level without the consent of the parties. In situations where there was no consent, it was proposed that a fresh determinative process be undertaken.

Schemes Should:

- X ***Allow facilitators power to offer solutions that can be agreed by the parties and later confirmed at a determinative level.***
- X ***Separate the facilitative role and the determinative role***

Early settlement incentives

Information made available to this project indicates that in 1993/94, approximately 40% of all the workers compensation disputes in Australia were settled by solicitors at the door of a court. [192]

Earlier settlement can be encouraged through a range of measures including information exchange. The OTA cited a study that showed that early exchange was effective in culling weak cases and getting early settlement for deserving cases. With good early exchange of information, 67% of cases were settled before discovery was completed.[193]

A study of **NSW** motor car litigation files sought to find the factors that prompted settlement by both insurers and claimant solicitors.[194] Previous studies had established that barristers were typically the negotiators of settlements in the system. As such, the time that they came in contact with the case was important in managing delays. The study found that:

189 WCRI Research Brief, Jan. 1990 Vol 6, No.l Workers' Compensation in Washington

190 Interview, Ministerial Advisory Committee - Leader of the Opposition SA

191 Victorian Conciliation Service, New South Wales Conciliation Service, Banking Ombudsman, General Insurance Complaints Review Panels

192 This estimate is approximate. It is based on Interviews and available statistics from all jurisdictions.

193 US Congress (above) pp 10

194 Matruglio T, The Other View of Activities: An Examination of Third Party Claimant Solicitor Files, Civil Issues, No. 2 July 1992, Civil Justice Research Centre

- While the plaintiff?s solicitor routinely briefs counsel during case preparation, the insurer does not usually brief counsel until just before the hearing.
- Insurers were less likely to initiate settlement , relied on court events to stimulate activity on the file, did less work on the file and were inactive for longer periods on the file.
- Both sides contributed to delay.

From the plaintiffs and defendants point of view, reasons for settlement rely on other matters besides pressures of work. These issues were raised in a report by the Civil Justice Research Centre, *Who Settles and Why*?[195]. This report made the following findings.

- Men were more likely than women to settle on the day. Women tended to settled earlier.
- Organisations were more likely to settle on the day than private individuals.
- Smaller firms settle earlier and very large firms go to verdict.
- Shorter cases settled earlier and longer cases went to the court door.
- Small sums settled earlier, medium on the day or during and large or nil sums at verdict.
- The skill of the registrar conducting any pre-trial conference impacts on settlement rates.
- The number of medical reports was directly related to the difficulty in settlement and the likelihood that settlement would occur at the court.
- Predictions at the court door that matters would actually go before a judge did not correlate to subsequent settlement rates.[196]

These findings help provide a framework for determining incentives that may encourage earlier settlement. Importantly for workers compensation they show that limiting medical reports will promote earlier settlement. In Australia, a range of proposals have been made to limit medical evidence in court processes.[197] These include:

- hanging rules to limit incentives to go doctor shopping; ie forcing disclosure of all medical reports obtained,
- compelling disclosure of all medical reports within one month of examination
- restricting the range of medical practitioners available to report
- using court appointed experts or expert assessors assisting the judge, and evidence submitted to them and to create by presumption a rule that costs of such evidence not claimable from the other party. "The court does not dictate what the evidence is to be but rather places limits on the amount and sources of evidence it is prepared to listen to in reaching its decision"
- changing rules taxing bills
- getting judges to limit number of medical reports per injury
- introducing a rule that party-party costs only apply if medical reports are exchanged at or before disposition
- ensuring the standardisation of reports through standard criteria or report forms included in court rules

Costs seem to be a powerful incentive in some schemes. In a review of the research on cost incentives, WCRI found that

> *"Conventional wisdom has it that fewer suits are brought or go to trial if the loser pays more of the legal costs. But the theoretical studies*

195 Baker, J Who Settles and Why? - A Study of the Factors Associated with the Stage of Case Disposition Civil Justice Research Centre, November 1994

196 Baker J. (Above)

197 Williams P L, Williams R A, Goldsmith A J. & Brownes P A. (Above)

demonstrate that the effect of changing rules for distributing legal costs is ambiguous." [198]

Settlement rates were higher if the option of the defendant paying the plaintiff's costs was available. WCRI also found that settlement rates were affected by are policies that increased litigation costs, lowered settlement costs, and made disputants pessimistic about outcomes.

Offer of Compromise

Offers of compromise are a commonly used cost disincentive to late settlement.[199] In this type of offer, one party registers an offer of compromise with the court. If it is rejected by the other side and that party does not later achieve a better court result, that party is required to bear all the costs of the other side.

This approach was used successfully to reduce court door settlement costs in **Victoria** for old common law claims. Variations between the offer and the final outcome of only 20 per cent were allowed, before costs shifted to the worker. [200] [201]

The approach also deters advocates from using preliminary, pre-trial and administrative ADR processes as a discovery process for a later court action, when they have no intention to actually settle. It can also be a useful "ratification" device. Workers unhappy with facilitated agreements may go to the determinative level, but take a risk of paying costs if the outcome is similar.

Schemes should:

- X ***encourage early settlement by reversing cost incentives***
- X ***introduce rules that mandate early information exchange***
- X ***limit the number of medical reports in court processes***
- X ***promote the use of offers of compromise***

Containing legal costs

The US workers compensation agencies have used a number of devices to control agency expenditure on legal costs. These include:

- X Reporting all litigation expenses and lawyer fees to the head of agency
- X The Board hearing the matter fixing legal fees
- X Penalising parties undertaking unreasonable litigation by getting them to pay the costs of both parties
- X Court cost scales that are subject to agency head or judge approval
- X Making costs payable out of the compensation award unless there is bad faith by the employer or lack of diligence; and then limiting them.
- X Placing ceilings on contingency fees
- X Applying a rule that each party bears their own costs but the fees charged must be subject to Board approval
- X Regulating the contribution of a portion of award to legal fees
- X Paying costs according to the stage of proceedings.

198 WCRI Research Brief, Lessons on Litigation, May 1990 Vol 6, No.5

199 Victorian Magistrates Court Civil Procedure Rules 1989 0rder 15, and County Court Rules of Procedure in Civil Proceedings 1989 Order 26

200 See Victorian *Accident Compensation Act 1985* s135B(6)(b)

201 See also *Proposals for NSW WorkCover Scheme* (2.2) 8 November 1995

- X Making costs not awardable by the court to the worker unless the insurers actions are "unreasonable"
- X Using an appointed "state industrial attorney" to represent parties at and above appeal level (legal Aid)
- X Paying fees based on effort expended but with a ceiling
- X Paying all legal fees from the fund if lawyers are requested by the employee, however the Board fixes the percentage of award payable to the lawyer
- X Enforcing a rule that costs follow the event [202]

In Australia, these and other devices are used to limit costs. Agencies have little input into court cost scales but they can exert control by establishing a panel of legal firms to represent employers. The instructions provided to the legal profession in common law cases by the Workers Compensation Board of **Queensland** are an example. These were favourably reviewed in comparison to arrangements to restrict late settlement costs in other states. Williams described them as follows.[203]

> *A "management plan" was required giving an estimate of damages, - a pricing plan with fees based on hourly rates was to be unacceptable. Use of barristers was to be restricted and approved on the basis of genuine necessity. Barristers were to notify solicitors of fees involved in briefs prior to commencement of work. If fees were exorbitant, the brief was to be directed elsewhere. Alternatively, solicitors had to nominate the fee applicable for the class of work. Negotiation or mediation was to take place with a view to earliest possible resolution of the action. ?Steps of the court settlements were not be entertained or tolerated.*

Williams proposed three additional initiatives

1. Change the cost scales from rewarding settlement closer to trial to rewarding settlement early in the case. (See above)

2. Pay barristers 60% of the brief fee if they procure settlement prior to delivery of brief on trial, or

3. Reverse the barristers fee structure to get higher fees early in the case.

Each of these points is in line with a cost reversal approach.

ALRC Report

The most recent review of costs in the courts and tribunals of Australia has been conducted by the Australian Law Reform Commission. Their report, entitled *Costs shifting - who pays for litigation?*, was tabled in the Federal Parliament on 25 October 1995. The report will influence moves to change cost rules in the state courts and will be followed in the federal courts.

The ALRC proposals move the task of setting the price of legal services from judges to lawyers. The cost indemnity rule is retained and cost scales are replaced by the concept of "reasonable" costs.

Cost scales have been both conservative and traditionally difficult to change. This has resulted in the gap between party-party costs and solicitor / client costs described above. The ALRC proposals are supposed to bring the official costs (party / party) more in line with the actual cost or solicitor client cost. The ALRC defines "reasonable costs" as the costs "reasonably required to prepare and conduct litigation".

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202 US Chamber of Commerce, 1994 Analysis of Workers' Compensation Laws, Washington 1994 pp 38-43, pp 52-54

203 Williams P L, Williams R A, Goldsmith A J. & Brownes P A,(above) pp77

Unfortunately the report makes no significant recommendations to address major issues of excessive litigation costs. Allowing the lawyers to "set their own prices" will make the task of containing costs more difficult.

In New South Wales a similar system has been in operation in the state? courts for three months. The "reasonable" costs are established by agreement between legal firms and their clients. These are then reviewed by cost assessors (mainly legal firms). Early indications of the effect of this system are not clear, however, it is difficult to comprehend that costs would actually reduce. As suggested in an earlier review:

It is arguable that practising lawyers, may be less inclined than, say, full-time court officers or cost accountants to reduce bills submitted for assessment.[204]

A further consequence of this approach is possible. It may well be that new rates set under this process will provide a higher base-line to use in the calculation of private fees, with the inevitable price creep.

In other recommendations the ALRC proposes that courts "cap" costs by setting a budget for cases at the beginning of the case, although the basis on which they should do this is unclear.[205] Courts can also waive the cost indemnity rule early in proceedings if an application is made that an adverse costs outcome will have a material effect" on the person's ability to run the case. The court can change the costs outcome so that each party bears their own costs or that the loser only pays the winners costs to a "cap". It is hard not to draw the conclusion that in workers compensation cases, plaintiffs will be assuming a smaller risk of financial loss than they do now.

Surprisingly, no changes are suggested for the more modern DRSs, the Family Court, the Industrial Relations Court and the Administrative Appeals Tribunals. In these jurisdictions parties bear their own costs. The ALRC offered no recommendations for these tribunals on the basis that they operate more informal proceedings, and that their jurisdictions are too diverse.

The more promising ALRC recommendations related to the Industrial Relations Commission. Best Practice was not identified in the ALRC research. Its proposals were based on interviews rather than bench marking. However, even with its current restricted control over case management, the ALRC reported that the IRC was "accessible", "informal" with "limited involvement of lawyers", and quick.[206] Perhaps because of these findings, the ALRC proposed that the IRC should exercise much more control over party and case costs than it had proposed for any other court or tribunal.

Under the current Industrial Relations Act there is a limited costs indemnity rule. Costs can only be obtained by the winner if any part of the loser?s case management was unnecessary or if the claim was vexatious. The IRC uses these provisions to apply strict case management rules. (Information presentation, exchange and time lines).

The ALRC made recommendations that have the effect of making success or loss by the claimant, irrelevant. They recommended that each party must pay their own costs. The power to vary from that would rest with the Commission, based on the conduct and merit of the case, or where one party is possibly disadvantaged - for example where, "a legally represented employer or employee is determined to have the matter go to a hearing".

The ALRC recommended that control over the extent of work attracting payment would not lie with lawyers (as it recommended for the courts), but with the IRC.

If this approach is adopted, the risk of running a case would be with the party taking the case. The risks associated with running a case inefficiently, or with abusing the IRC

204 Access to Justice Advisory Committee *Access to Justice,* Canberra 1994

205 Australian Law Reform Commission, *Costs shifting - who pays for litigation?* pp129

206 Id pp103

process would be very high, because both personal costs and the costs of the other side are at stake.

The ALRC recommendations for the IRC may offer the closest example to best practice in costs management, as it is in line with the principles of dispute system design, that ensure administrative control of cases rests with the dispute management body (the DRS, Tribunal or Court). [207]

It is likely that these reforms will be accepted, at least in federal courts. In terms of reducing unnecessary litigation costs in workers compensation, it seems that there are a number of implications.

Schemes should:

- X ***examine any new court cost rules and monitor impacts carefully***
- X ***bring evidence of abuse to the attention of court rules committees***
- X examine the operation of future IRC cost rules with a view to establishing evidence of best practice

Determination

Best practice for the determinative level hinges on two dimensions. First, the quality of the people selected and second, the relation between the determinative level and the rest of the DRS, specifically the capacity to submit information and the scope of appeal rights available.

Hearing matters once

Concerns over the quality of the determinative level may lead some jurisdictions to allow a fresh appeal on the facts.

If this type of appeal is allowed, then in most instances, an evidence cap will operate that ensures, the appeal level only considers evidence heard by the previous level. Some schemes restrict appeals further by not allowing the appeal level to hear any evidence at all. It must rely solely on the record of evidence from the previous level. Both of these devices are designed to ensure that cases attract the cost of an evidentiary hearing process only once. The evidence cap also ensures that unnecessary evidence is not collected.

Evidence Cap

An evidence cap, or "freezing the record" is a device used in various forms by many courts and tribunals both locally and internationally. Its main purpose is to control the amount of information lodged and the timing of its presentation. Specifically, it is designed to:

- X stop a proliferation of unnecessary evidence including evidence updating original evidence
- X stop late gathering of relevant evidence for use in the last determinative level in the dispute resolution process (usually the most expensive level)
- X force parties to present the evidence they intend to rely on at an early stage

In **South Australia**, an evidence cap has been operating for some time.[208] Its rationale was stated succinctly by Mr. Justice Cox of the Supreme Court.

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207 Also see Industry Commission *Workers Compensation in Australia* Report No 36, Canberra 1994 7.2.7 D3 where the Industry Commission proposed that DRSs have discretion to award costs where cases had been brought "without proper justification".

208 Workers Rehabilitation Compensation Act s97 ss

?to call all the evidence at the proper time, and not simply to sit back and see what the Review Officer decides and then take the matter seriously for the first time when it gets to the Tribunal"[209]

This evidence cap was reported to be effective in keeping cases out of the more expensive tribunal level. Review Officers (until recently) performed the determinative function and,(with some exceptions, a Workers Compensation Tribunal reviewed cases on the law. The Tribunal had discretion to hear evidence but only at its own motion not on the application of the parties. The discretion was only exercised if :

- insufficient notes of evidence were available from the review process
- an oral representation by a doctor was not given to a Review Officer

In a best practice result, in 1993/94 the Tribunal heard only 0.2% of the cases that were dealt with by Review Officers.[210]

Despite these "best practice" results, in another field, the Administrative Review Council (see above) expressed doubts about the desirability of an evidence cap.[211] Claimants might be "unfairly prevented" from lodging newly acquired evidence and accordingly, the ARC recommended that this evidence should be heard. It considered that a mix of other measures would prevent abuse of this concession. These measures are:

- a more structured approach to primary decision-making
- greater reliance on internal review
- increased sanctions for deliberate abuse of the process
- a better mechanism for resolving questions of medical causation

It should be noted that the ARC proposals focus mainly on regulating the practices of government departments and the overriding single tribunal, the Administrative Appeals Tribunal, is committed to exercising sanctions. In highly legalised systems where information is routinely withheld and the courts intermittently and inconsistently enforce abuse sanctions, these measures are unlikely to be enough. An evidence cap will be necessary.

Appeals de-novo

Most schemes in Northern America restrict appeals by courts to "on the record" reviews.[212] Appeals allowing the same evidence to be heard before a higher level are not considered desirable. Some examples are described below. These examples indicate that de-novo hearings are best avoided. However, great care should be taken in cladding the first level determinative function in trappings that will satisfy superior court scrutiny.

Under the pre 1985 **Michigan** system, an Appeal Board provided a de-novo review of hearing decisions on both law and fact. 'The availability of this second bite at the apple encouraged appeals and undermined the decisions of the administrative law judges. Approximately 80% of hearing decisions were appealed. An Appeal Commission was created which reviewed decisions principally on matters of law. The Commission considers findings of fact by the lower level to be conclusive if supported by competent, material and substantial evidence on the whole record.[213]

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209 *Simpson Limited v Arcipreste*, Supreme Court of South Australia, 7 Nov 1989 No. 2139 of 1989 p6

210 Interview Review Panel South Australia

211 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 Canberra September 1995 pp 168-180. pp39-42

212 US Chamber of Commerce, 1994 Analysis of Workers Compensation Laws, Washington 1994 pp52

213 WCRI Research Brief, March 1990 Vol 6, No.3 Workers' Compensation in Michigan

Virginia has a relatively high disputation rate of 38.6% and an even higher appeal rate from administrative review decisions.[214] The latter is partly attributed to the availability of a second de-novo hearing at administrative level. This means that half of all heard disputes are heard twice and the first level is considered a hurdle process. The other reasons cited by WCRI for the high rate are that: an appeal stays a previous decision, costs are minimal and an appeal is necessary to get through to the court, (although only 2.2% do).

In **Australia**, the right to a de-novo appeal is viewed by the courts as dependant on certain features of the first hearing. The Supreme Court of **South Australia** in examining the role of Review Officers, found that there should be certain features of a lower level decision to attract a de-novo appeal. These were:

- the determinative officer was an employee of the corporation (agency) although by legislation not subject to direction by corporation
- the determinative officer had no legal qualification, although required to deal with 'difficult questions of fact and law'
- there was no requirement to keep transcript of evidence although notes of evidence contemplated by Act.

The composition of the appeal tribunal was also relevant. If lay members were included then it was clear that the legislature intended evidence to be heard as "lay members were competent to assess witnesses but could not assess the law".

From these factors an evidence cap and an abolition of de-novo appeal is desirable but only where the determinative level is independent, properly equipped to understand the law, provides a transcript for later review of the evidence and ensures that all the relevant evidence is heard.

While these features are desirable they can also have considerable resource implications. In **Washington,** despite an evidence cap, about half of matters are referred to an appeal process after a Workers Compensation Board administrative hearing.[215] Board hearings are held before administrative judges. They last 3 to 4 days with live testimony from medical experts and a record is kept. The Board can review following a petition to review, but decisions can be appealed to the courts. Jury processes encourage appeals to courts in half of Board decisions where an evidence cap operates. The record is read to the judge or jury.

The Boards processes are seen as resource intensive, given that the transcripts and evidence are only used in half of he cases. WCRI saw them as:

- increasing the cost of litigation and expert evaluations by relying on live testimony rather than simple medical reports, and
- leading to further delay

It may be that the availability of jury assessment leads to the high appeal rate. In any event, the lesson here is that better systems should keep as many cases away from the determinative level as possible, but may have to commit resources at this level to avoid the higher costs of duplicative hearings.

Schemes should:

- **adopt evidence caps for information prior to determinative level**
- **limit appeal to on the record review**
- ensure the determinative level is appropriately constituted to withstand judicial scrutiny and to avoid the possibility of de-novo appeals

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215 WCRI Research Brief, Jan. 1990 Vol 6, No.1 Workers' Compensation in Washington

Some schemes reduce evidence-taking costs at the determinative level by changing the process of gathering and evaluating evidence from the typical adversarial mode to an inquisitorial process.

In practice, this means removing from two or more advocates the opportunity of presenting extremes of position and replacing them with one or more expert officers inquiring into the facts. This is thought to reduce the amount of evidence necessary and to confine it to that which is relevant.

Inquisitorial systems

A recent Australian inquiry defined the features of an inquisitorial system.[216]
They are:

- X individual assignment to a single judge (determinative officer) responsible from filing to disposition (start to finish of the resolution process)
- X all supporting documents (Information) filed with claim and notice of defence
- X preliminary hearing or written pre-trial ordered at judges discretion
- X judge orders clarification of evidence and orders documents produced
- X judge tells parties what is wrong with their case and tells them what additional information they need
- X judge encourages settlement
- X single hearing for each case, with no adjournments
- X witnesses examined by judge, after judge gives narrative of what has happened
- X legal counsel allowed to add questions after initial ground has been covered by the judge

A previous inquiry making proposals for change to a workers compensation DRS suggested that these features were desirable because they ought to substantially reduce ?legal costs, appeal tribunal costs and medical expenses.?[217] They would also give the DRS some control over the presentation of evidence where before there was no control; a cause of delay and expense.

Apart from a reduction in excess evidence, the report?s conclusion was that the real problem was in deciding what the 'correct or preferable' decision should have been, based on the merits of the case. Finding the truth through a maze of evidence was not the task. Making the correct primary decision was.

Despite the introduction of inquisitorial evidence taking to a number of workers compensation DRS systems in Australia, there are still problems with this approach. Criticisms are common and mainly revolve around the unfairness of the process. Inquisitorial officers miss evidence, behave legalistically and do not understand enough about the positions of the parties, to appreciate the need for additional evidence. They also do not understand or properly apply the law particularly if they are not legally qualified.[218]

While the process itself seems to achieve a removal of unnecessary evidence, its delivery is less than satisfactory.

Some inquisitorial federal tribunals, however, attract little criticism and can lay claim to a "best practice" label. These tribunals operate as panels with more than one determinative officer. In these tribunals the common view is that this is the better

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216 Senate Standing Committee on legal and Constitutional Affairs, Cost of Legal Services and Litigation - Discussion paper No 6, *The Courts and the Conduct of Litigation*, Canberra March 1992 pp26-31

217 Parliament of Victoria *WorkCare Committee Final Report*, August 1988 pp 344

218 In various interviews, these criticisms were made of the now defunct Victorian WorkCare Appeals Board, the now defunct South Australian Review Panels; and of the currently operating Western Australian Conciliation and Review Directorate.

model.[219] (An exhaustive discussion of the advantages and disadvantages of the different compositions of the determinate level is included in Chapter 8.)

It would seem that adoption of an inquisitorial approach at the determinative level should be made with caution. If a model that uses panels is employed, it may be more likely to deliver the advantages of the inquisitorial model and be less likely to attract criticisms.

Administrative Review Council

In the course of the project, the Administrative Review Council, the body charged with examining all federal tribunals, completed a major review.[220] The final report published on 16 October 1995 made a series of recommendations that are relevant to the operation of case management bodies such as DRSs and determinative bodies with similar roles to those of the federal tribunals. The tribunals reviewed included the:

- **Administrative Appeals Tribunal**
- **Australian Industrial Relations Commission**
- **Administrative Review Tribunal**
- **Human Right and Equal Rights Commission**
- **Immigration Review Tribunal**
- **Refugee Review Tribunal**
- **Student Assistance Review Tribunal**
- **Social Security Appeals Tribunal**
- **Veterans Review Board**

The Councils report examined the merits review function of these tribunals.
A merits review, is a fresh examination of the original decision of the federal departments over which the various tribunals have jurisdiction. The result of the review may be a fresh decision.

Parallels may be drawn between tribunal decision making and workers compensation where DRS are required to examine primary decisions by insurers. Insurers are typically large organisations similar to government departments and the issues surrounding the activities of the tribunals are very similar to those in workers compensation.

The council reported on tribunal processes, including ADR options, membership and qualifications, selection procedures, the need for improved agency decision making, the relationship with other review bodies and administrative departments.

Most of the recommendations support the findings made in this report. Specific recommendations are set out below.

Recommendations made by the Administrative Review Council on determinative level issues.

Issue	Recommendation
Composition of level	For all review tribunals, there should be a statutory preference for multi-member panels in appropriate cases. Recommendation 8 Review tribunals should develop guidelines for determining how panels should be constituted in different cases. These guidelines should be developed in consultation with user groups and should be published. Recommendation 9
Information exchange	Subject to confidentiality and secrecy provisions, agencies whose decisions are under review should be required to provide review tribunals with:

219 Interview, Chairman Social Security Appeals Tribunal. Also see above recommendations of the ARC.

220 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No. 39 Canberra September 1995 pp 168-180.

Issue	Recommendation
	A statement setting out the finding on material questions of fact, referring to the evidence or other material on which those findings were based, and giving the reasons for the decision; and Information relevant to the review that is in the agency?s possession or control, including information that was relied on in reaching the decision. Recommendation 10 A copy of that statement and other information provided to the review tribunal should be made available to the applicant, without the need for a request by the applicant, at the same time. Recommendation 11
Accountability	Subject to confidentiality and secrecy provisions, review tribunals should disclose to the applicant all the information whether favourable, neutral or adverse, that it proposes to take into account in making its decision, and should give the applicant an opportunity to make submissions regarding that information. Recommendation 14
Screening & Streaming	A review tribunal should not convene an oral hearing of a matter if it considers that the issues may be determined adequately without an oral hearing, and provided that the applicant gives informed consent to the tribunal adopting that course. Recommendation 19
Legal Involvement	The extend to which applicant?s representative or assistant can participate in review tribunal proceedings should be left to the discretion of the tribunal. There should be no statutory limitations on the roll that such representatives or assistants are allowed to play. Recommendation 23 There should be no prohibition against lawyers - or any particular group- from advising or representing parties in review tribunal proceedings to the extent that advice and representation is permitted in the relevant tribunal. Recommendation 25
Selection	Assessment of applicants for review tribunal membership against selection criteria should be undertaken by a broad-based panel established by the minister responsible for the proposed appointments. Recommendation 35 Appointments of members of review tribunals should be made only from within a pool of people who have been assessed by the assessment panel as suitable for appointment. Recommendation 36 Assessment panels should consider the use of a range of techniques for testing the suitability of applicants for review tribunal membership. Recommendation 37 The assessments made by assessment panels of the suitability of applicants for review tribunal membership against the selection criteria should be documented: applicants should be given access to their own assessment on request. Recommendation 38
Quality	Review tribunals should continue to develop performance appraisal schemes for their members, covering all aspects of the work of members other than outcomes in particular cases. Recommendation 46 All review tribunal members should ensure that all new members have acquired a minimum level of knowledge and skills before they commence reviewing decisions. Recommendation 47 The skills and experience of review tribunal members should be developed through their participation on multi-member panels where appropriate and through training and development programs. Recommendation 49

Other recommendations promoted:

- the adoption of a code of practice applicable to all decision makers,
- the use of circuit panels,
- video conferences,
- assistance for non-government agencies making applications for review, including explanatory material,
- payment of travel expenses,
- published summaries of decisions, and

- consistent statistics.

The review made recommendations for a new umbrella Administrative Review Tribunal with a series of divisions. Workers compensation matters arising out of **ComCare** decisions, will be dealt with by a General Division of the new tribunal.[221]

The recommendations reflect the combined experience of administrative tribunals in Australia. Most align with the findings in this report, with the exception of those relating to an evidence cap.

Standard setting for primary decision makers

Continuous improvement requires reliable feedback. With a well integrated system, determinative level staff can set standards for primary decision-making that will influence the operation of the entire system. An example of this in operation is the office of the Banking Ombudsman.

Banking Ombudsman officers tour regional banks taking with them a list of case studies. They ask bank staff how they would handle the cases and then explain how the Ombudsman would handle them.[222] Following this example, a banking region reduced its disputation rate to nil through the device of circulating the written descriptions of how complaints were handled in the head office. Bank staff, uncertain about handling what were generally repeated types of complaints were able to resolve matters themselves.

Applied to workers compensation, feedback has to be provided from the determinative level and in some instances from the primary decision-makers back to the determinative level.

The Administrative Review Council made recommendations to encourage this feedback between Tribunals and primary decision makers in administrative departments. Establishing the feedback linkages required several initiatives by departmental administrators. [223]

- The active promotion of the potential beneficial effect of review tribunal decisions on the quality of agencies decision making
- Better training
- An onus to take up incorrect decisions within the court system
- A commitment to raise concerns over tribunal decision-making with the agency or ombudsman and to provide internal review by officers independent of agency decision making and finally,
- Personal contact between internal review officers and applicants.

Continuous improvement at this level is reliant upon a vibrant and operating feedback loop between primary decision-makers and determinative levels. This loop is comprised of identification of appropriate standards, effective communication strategies, improved skills for all participants and the use of accountability mechanisms exactly where appropriate.

Accountability

The legitimacy and credibility of officers exercising determinative power is reinforced just as much by appropriate accountability mechanisms as it is by requirements for qualifications and selection processes. Accountability mechanisms reassure parties that power cannot be exercised capriciously.

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221 Concerns by ComCare over the skills and experience of tribunal members in dealing with workers compensation matters may not be addressed by these proposals, unless specific workers compensation training programs are initiated.

222 Brooks, S , Speech to Corrs Chambers Westgarth, Melbourne 22 June, 1995

223 See Administrative Review Council report above

Review by a court is one accountability mechanism. Allowing parties to make submissions on the material that the determinative level intends to rely upon is another.[224]

Other measures include:

- carefully controlling the qualification and selection of officers
- ensuring independence in the exercise of discretion
- allowing legal representation when needed
- re-balancing an imbalance of power between the insurer / employer and the worker

These measures are discussed in more detail in Chapters 7 and 8.

Medical Disputes

As part of this project, a report entitled *Medical Panels - Securing definitive Medical Advice in Workers Compensation* was completed for the New South Wales WorkCover Authority. The major findings of this report are outlined below. Aspects outside the scope of the inquiry requested by New South Wales are also discussed.

Extract from
Medical Panels -
Securing definitive Medical Advice in Workers Compensation

Features of a Best Practice Medical Panel advisory structure
1. Cases are screened so that issues considered by panels are narrowly defined and clearly limited to purely medical issues
2. Medical panels are staffed by doctors currently practising in the field in which expertise is required, who are recognised professionally as the best in that field and who provide assessment services intermittently at a price commensurate with their standing in the field
3. Authoritative medical assessment advice is available if required, at all stages of a dispute, from the worksite, insurers office, conciliation service, legal negotiation to full court hearing.
4. Medical panels are used as a last resort and are preceded by processes ranging from informal self help mechanisms to more formal intervention designed to resolve all but the most difficult medical conflicts.
5. Medical panel convenors organise and refer impartial specialists to arbitrate these disputes to obviate the need for a full medical panel.
6. Medical panel convenors provide guidance to the medical profession on the role of Doctors in assessing work related injuries and scrutinise training and certification of Doctors for workers compensation.
7. Medical panel convenors have complete flexibility in how medical panels operate to ensure that 2. is complied with, but also consider the needs of the workers in making sure that procedures are explained and consistently applied, and that unnecessary inconveniences and delays are avoided.

A key concern in this inquiry was whether Medical Panels should make determinative decisions affecting entitlement, or whether they should only provide medical advice on the worker's condition and its relationship to work. In a compensation system, the role

224 See ARC Recommendation 14 above and also see Chapter 7 "Legalisation" for a discussion of the potential for legalisation of this option

of an expert medical panel is to provide expert advice to a determinative officer not to make determinations themselves. These panels are experts, appointed for their specific, detailed knowledge and experience.

> *Under the inquisitorial system, experts are judicially appointed, the choice of expert having first been discussed with the parties. Experts are not so much regarded as witnesses but as collaborators with the judge.*[225]

In the Best Practice model the choice of experts is left with an appointed Convenor. A person who is aware of the medical issues and is independently appointed and resourced. Medical Panels are limited to providing advice. The Medical Panels report also recommended a range of self-help mechanisms prior to intervention by a Convenor. Some examples of these in operation are given below.

One company reported establishing its own group of independent doctors to refer employees to in the course of a workers compensation claim.[226] This group was put together after doctors were interviewed and assessed against their ability to be objective. It is also used in the event of a dispute. A third doctor is elected and both parties agree to accept the verdict. This has been found to cut out a considerable amount of delay when compared with the formal DRS.

In another example, **Oregon** conducts a "medical arbiter process". Similar to the **Texas** designated doctor program, the process involves "impartial examination" by a physician selected by the department. Workers may request a panel of three members to perform the examination and this is paid for by the insurer. The process is characterised by an evidence cap or as it is called "freezing the record". No subsequent medical information is allowed into the record.

> "Any subsequent decision maker is bound to utilise the information contained in the record at the time of the reconsideration or clarification of same. A theoretical effect is reduced litigation."

The medical arbiter or the panel reviews the medical record and has discretion to perform an examination.

The issue has been raised in Oregon that control of closure of the file and the point at which the record is frozen is with the insurer. In cases of "premature claim closure" the appellate review unit can rescind the closure order. The option exists to obtain additional information. However, this period is limited to sixty days.

The appellate review unit then closes the record and where appropriate refers the matter to a medical arbiter. Questions are prepared for the arbiter and a brief is drawn up, outlining the facts, issues, examination methods and test results required for rating the claimants impairment. A list of all doctors is also included and the times at which the worker was seen. The medical arbiter is independently appointed and is not any one doctors who may have seen the worker previously.

The unit has eighteen working days to reconsider matters but if the matter is referred to a medical arbiter an additional sixty days is given.

Once received the medical arbiters report becomes part of the record and is the final piece of information allowed into any subsequent court hearing. Sixty one percent of the work load in Oregon consists of medical disputes and the bulk are resolved in this manner.

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225 Senate Standing Committee on legal and Constitutional Affairs, Cost of Legal Services and Litigation - Discussion paper No 6, *The Courts and the Conduct of Litigation*, Canberra March 1992 pp 31

226 Interview Coles Myer

Schemes should:

- X ***use medical panels to limit medical evidence***
- X ***establish preceding self-help and screening mechanisms***
- X ***appoint the best specialists to give binding advice to the determinative level***

Guidance on the Law

Many of the stakeholders interviewed called for ?specialist decision-makers particularly where inconsistent judgements had caused problems for subsequent claims management.

In some states, court administrators ensure that only judges with experience in workers compensation deal with these cases. In others, no such specialisation is applied. In the past "workers compensation courts" have been established and judges with appropriate workers compensation experience have been appointed. Even these were thought to give inconsistent decisions. Some were perceived to be part of the legal workers compensation "club" as they had previously been defendant or plaintiff lawyers. Experience alone is not enough.

The key issue is knowledge of the organisational aspects of the workers compensation system as well as the intricacies of the law. Employers, insurers and Union representatives all commented that often judges did not understand the ramifications of their decisions.

Two states reported some success in broadening the perspective of judges and magistrates.

- X **South Australia** ran seminars where judges from the Accident Compensation Tribunal attended with Review Officers.
- X **Western Australia** installed the Magistrates Court under the same roof as the Conciliation and Review Directorate

Another solution is to provide compulsory training. In **Missouri**, reforms introduced in 1993 mean that all judges now have to get training in workers compensation law.[227] This approach was also lauded in the "back to school" recommendations of the Access to Justice Report[228] and training programs are now being conducted by the Australian Institute of Judicial Administration.

The conclusions that may be drawn from this evidence are:

- X Judges and magistrates giving guidance on the law should be specialist magistrates, not necessarily with experience as workers compensation lawyers
- X Training courses should be established and required as a prerequisite to judges moving into positions dealing with workers compensation cases.
- X Judges and magistrates should be invited to attend regular seminars together with DRS officers to encourage understanding of the role of each level in the system and the interactions with stakeholders.

In **Wisconsin** the approach to inform judges is rather novel. Judges "man" the telephones on rotating shifts and undertake other administrative tasks, with two or three on call each day. These Judges provide the determination function in the system, but when on call, they explain the law and applicable court rulings. The Wisconsin approach is similar to a judges "quote" system and reduces the number of disputes due

227 Calise, Angela K. National Underwriter(Property / Casualty / Employee Benefits) vol 97 no. 32 Aug 9 1993

228 Federal Attorney General s Department - Access to Justice Report, Canberra May 1994

to misunderstandings of the law.[229] The only concern is that advocates ring to "shop" for opinions, but judges are careful to avoid this trap.

Clear legislation

Where there is confusion over interpretation, some schemes have mechanisms where specific issues can be referred direct to the court for guidance. The ICA has a provision for a **test case:**

> *8.10 An insurer may request that the Panel not consider a matter referred to it on the grounds that the complaint should be referred to the courts as a "test case" and upon the insurer undertaking to pay the insured's legal costs on a party/party basis with respect to the test case, including costs of any appeal*.[230]

The advantage of this approach is that issues which cause repeated legal activity are precluded though proactive legal action on the part of the agency.

These devices are costly and should not be resorted to as a substitute for clearly drafted legislation. The *Access to Justice* Inquiry identified that simpler legislation was an issue and in summarising previous inquiries into the problem proposed two solutions:

- X wider consultation in the preparation of legislation
- X a plain English drafting style including the use ?wherever possible of plainer language, flow charts, "road map" clauses, reader's guides and rate calculators?. [231]

The national consistency process represents an opportunity to build draft model legislation applying these solutions. This would follow similar national legislative consistency programs in crime, credit law and corporations law. Such a process may provide a focus for at minimum, consistent workers compensation terminology across Australia. A reduction in unnecessary legal activity would be immediate.

Schemes should:

- X ***Inform Judges through training and structured contact with other parts of the DRS***
- X ***Choose to litigate specific cases to clarify the law***
- X ***Support the development of national model legislation***

Elements of Best Practice

Most discussion about dispute resolution and possible reforms focuses on the levels at which power is exercised.

In traditional workers compensation schemes, this point has been where an appealed decision is either upheld or overturned. Qualifications and selection, procedures and the level of formality, the need for further review - all of these issues are scrutinised in detail, commented on and often criticised by participants in the process. This activity tends to focus the attention of the workers compensation agency on these facets of dispute resolution.

While important, they miss the point that the bulk of the work of dispute resolution is achieved by other means.

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229 Ballantyne D S. & Telles C A, Workers Compensation in Wisconsin - Administrative Inventory, November 1992, pp 62

230 Guidelines for General Insurance Claims Review Panel and Insurance Industry Complaints Council, Insurance Council of Australia

231 Access to Justice 2117-21.24 (See above)

In traditional court systems this is through settlement processes. Between 90 and 95% of cases fall into this category. In informal systems, this occurs through screening processes, often done on the telephone or through information exchange, that ends in withdrawal once one party becomes aware of information not previously known. Face to face processes generally form a larger proportion of these caseloads than courts. Reform of these areas is equally if not more important.

To address both, a better approach is to look at the dispute population as a whole and to ask a series of questions to establish whether it can be managed in other ways. These questions include:

- Where is the work being done?
- Who has control if that work occurs?
- What is the nature of most of the disputes?
- Can they be resolved in other ways?
- What are the potential parts of the system requiring reform and where could new methods of resolution be introduced?
- Are the current components of the system being used appropriately?

From the performance of schemes overseas that show elements of Best Practice, and those components of schemes in Australia that deliver best practice performance, we can estimate the benchmarks that an ideal system might achieve.

Measurement of performance of this system starts with the proportion of compensation cases that are disputed.[232] This is the baseline from which resolutions are made.

The first and major point at which the Best Practice system can reduce disputation is through education, at the worksite and immediately after the injury. This is before a decision to grant or alter benefits has been made.

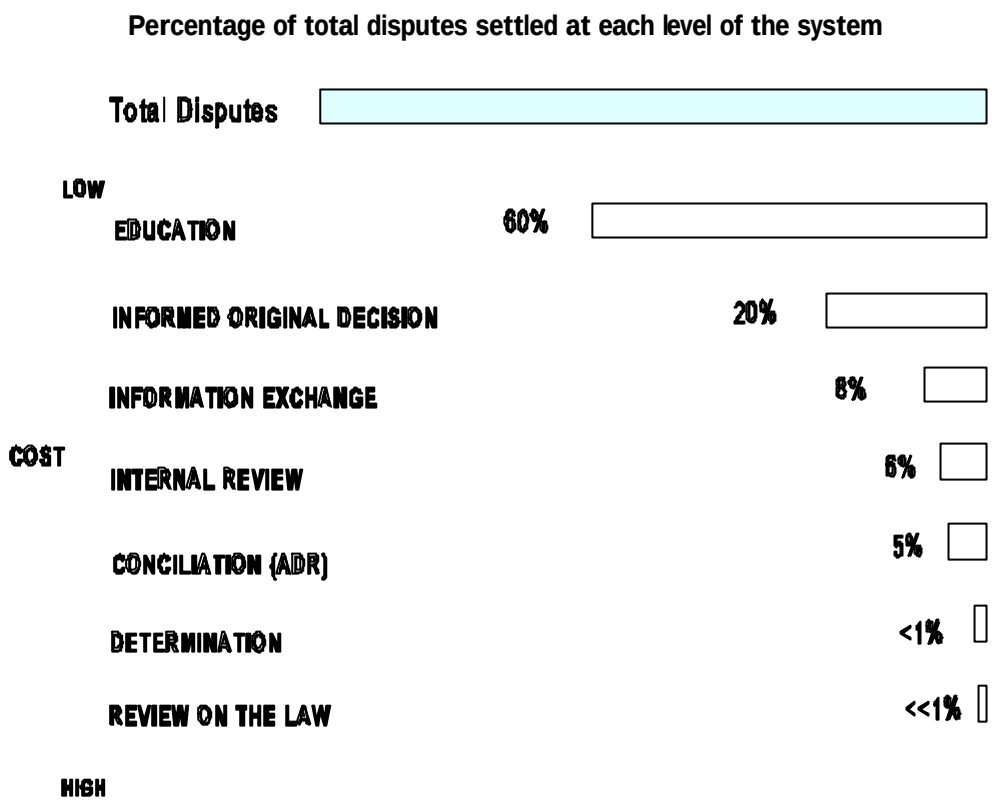
Where this is done, over 60% (up to 67%) of what would have been disputes can be avoided.
Quality primary decision-making that is "continuously improved" will resolve another 20% or so of cases leaving around 20% that are authentic disputes over fact, law, entitlement or benefit.

Managed information exchange and internal review will result in most of these cases being resolved before outside intervention is needed. The 6% or so of cases that remain will be mainly resolved by conciliation (about 5%) with a few being directed to Determination for a merit review of the original decision (<1%) and even fewer being reviewed subsequently on the law (<<1%).

232 Disputation rate - see Attachment A

Figure 5 shows this model Best Practice system and the percentage of disputes expected to be finalised by each of the levels. This should be contrasted with the model of poor practice shown in chapter 2.

Figure 5 Model of Dispute Management under an Ideal Best Practice System



6

ADR - Variations and Trends

Together with other elements, ADR is a part of Best Practice dispute resolution schemes.[187] As a specific requirement of the terms of reference for this project, this chapter examines the extent of the use of ADR in workers compensation schemes in Australia and overseas.

The first part of this chapter examines the use of ADR and variations in overseas and Australian dispute resolution systems in similar jurisdictions, dealing with similar types of disputes. Excellent examples of best practice are found in the general insurance industry and new initiatives in the industrial relations field are described. In contrast, disputes over the assessment of disability in superannuation are not managed well, a source of concern to government and to industry.

The second part of the chapter shows that the move to privatised dispute resolution is increasing, particularly in employer / employee disputes and in disputes arising from insurance claims. Cooperative commercial schemes offer practical options for companies frustrated with legal costs and poorly operating, alternative government systems.

A final section describes some of the forms these alternatives might take and discusses the pressures which precipitated the promotion of privatised schemes.

Why is ADR used

A basic issue in dispute resolution is whether the issues in dispute should be dealt with just once or allowed to be disputed more than one time in several different forums. The ideal system would have the matters being properly decided by the primary decision-maker (insurer) and reconsidered by a competent appeal forum if disputed. This would ensure all disputes were heard once . In the literature this is known as a single tier system.[188]

The legal system has developed a range of devices to allow a further appeal. To avoid repetition of evidence, later tiers are generally limited to scrutiny of the application of the law, or the principles of natural justice, not to rehearing the facts. Interpretation of the law is also included in appeals. Very rarely will this second tier re-hear the evidence in what is known as a "de-novo" hearing.

187 See Chapter 4 (above)

188 Administrative Review Council, *Review of Commonwealth Merits Review Tribunals, Discussion Paper* September 1994, pp 44

ADR is used by both the courts and by administrative review panels. It offers a process where people can have a say without necessarily incurring the legal costs of a court process. The other attraction of ADR is that it is essentially a consensual process, so it is perceived that the weight of a panel decision is not as necessary to make outcomes "enforceable". It is usually held out to be quicker and less formal, as well.

Courts "annex" ADR programs but usually for the purpose of reducing backlogs, identifying the issues the court has to eventually decide or reducing delay. ADR variations are operating in a number of jurisdictions.

ADR in workers compensation

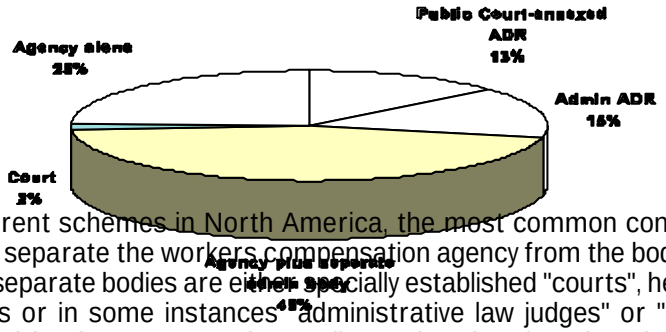
There is a very clear trend in Australia to include ADR of some type in most dispute processes. Surprisingly, with the exception of the courts in the USA, ADR schemes do not predominate in either Canada or in the USA. Australia has more widely embraced ADR in workers compensation, employer and insurer associated dispute resolution systems. This is not to say that the development of ADR in other areas in the USA has not produced some innovative forms of ADR which will be discussed later in the chapter.

The incidence of ADR in USA and Canadian schemes is shown below. (Australia is shown for comparative purposes).

North America

The figure below represents the incidence of the use of ADR in its various forms in different schemes in North America as of 1 January 1994.[189]

Fig 3 Frequency of ADR, Court and Agency based Dispute Resolution in USA (57 schemes)



Of the 57 different schemes in North America, the most common configuration (24 schemes) is to separate the workers compensation agency from the body that handles disputes. The separate bodies are either specially established "courts", hearing officers, appeals boards or in some instances "administrative law judges" or "adjudicators". They are funded by the agency and usually conduct hearings but do not run ADR procedures.

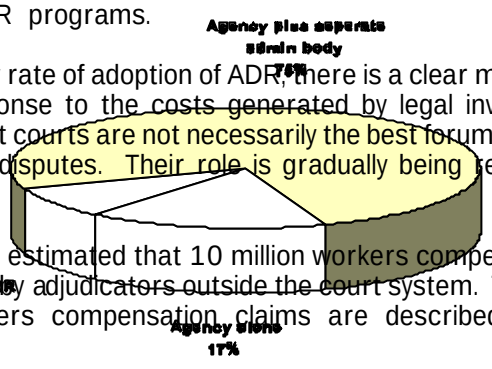
A further 13 schemes take responsibility for all matters relating to workers compensation including resolving all disputes. These schemes are either Commissions, Boards or Bureaus.

The third group includes an ADR process, either arbitration, or mediation. In this group, with the exception of two schemes, appeal to the courts does not involve a "de-novo" hearing or trial with a full hearing on the merits of the case. Most appeals are

189 US Chamber of Commerce, *1994 Analysis of Workers' Compensation Laws*, Washington 1994 pp52

"on the record", based on law; or on law and fact. In the two schemes that allow merits hearings, one excludes occupational disease and the other limits the trial to evidence already presented at the lower level.

The remaining 5 schemes allow direct recourse to the public court system, most of which have ADR programs.



Despite the low rate of adoption of ADR, there is a clear move to take cases away from courts in response to the costs generated by legal involvement. There is also a recognition that courts are not necessarily the best forum for the resolution of workers compensation disputes. Their role is gradually being replaced by non judicial third parties.

In 1985, it was estimated that 10 million workers compensation cases were handled across the world by adjudicators outside the court system. These people who adjudicate disputed workers compensation claims are described as the "heroes that are unsung".[190]

Canada

A recent comment fairly sums up the situation in Canada, although some schemes have adopted ADR - (See description of Quebec scheme above).

> *"WCBs in Canada have generally resisted the notion of employing ADR techniques, favouring a structured administrative tribunal appeal system."*[191]

The same commentator described Nova Scotia as typical of the problems besetting these traditional board models.

> *"As of January 1994, the Nova Scotia Workers compensation Board had a 1,756 case backlog, with some of those cases dating back to 1990. The board heard 633 appeals in 1993 a little more than half of the 1,126 appeals filed that year."*[192] *p62*

The predominance of the Board model is shown below.[193]

Fig 4 Frequency of ADR, Court and Agency based Dispute Resolution in Canada (12 schemes)

190 Cain C, Comp Administrators Importance Stressed, Business Insurance, Sept 1985 pp 14

191 Williams, B, Dispute Resolution - Looking at Alternatives, OH&S Canada, V10(3) May / June 1994 pp62

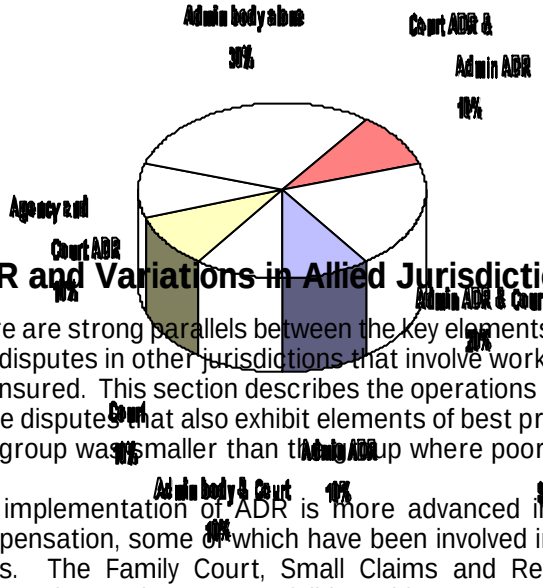
192 See above Williams, pp62

193 US Chamber of Commerce, 1994 Analysis of Workers' Compensation Laws, Washington 1994 pp53

Australia

Australian workers compensation schemes show most of the different types of ADR and traditional dispute resolution variations. Overall, there is a greater use of alternative dispute resolution here than in either North America or in Canada.

Fig 5 Frequency of ADR, Court and Agency based Dispute Resolution in Australia (10 schemes)



ADR and Variations in Allied Jurisdictions

There are strong parallels between the key elements of workers compensation disputes and disputes in other jurisdictions that involve workers and employers or insurers and the insured. This section describes the operations of some of the bodies that deal with these disputes that also exhibit elements of best practice. It is probably fair to say that this group was smaller than the group where poor practice was evident.

The implementation of ADR is more advanced in jurisdictions other than workers compensation, some of which have been involved in ADR for more than ten or fifteen years. The Family Court, Small Claims and Residential Tenancies Tribunals and Community Justice Centres fall into this category. Disputes between employers and employees have been traditionally dealt with using ADR techniques in the Industrial Relations Commissions. More recently these disputes are variously heard in the Superannuation Tribunal and in the various Equal Opportunity Commissions.[194]

In another field related to workers compensation, disputes over decisions relating to insurance policies are heard in the General Claims Review Panel, in the Superannuation Tribunal and in the courts. Each of these areas was examined to find instances of best practice.

Industrial Relations

Conciliation

194 Some of the stakeholders were of the view that the newer tribunals are just siphoning off this traditional area of work and that the main cause of all of these disputes was poor management. The only issue was who paid the bill!

In the federal industrial relations area, legislation was introduced this year to make conciliation a compulsory preliminary to formal adjudication. This was foreshadowed by President Dièdre O?Connor of the Industrial Relations Commission in the course of this project.[195] [196] [197] Apart from the compulsory nature of conciliation under industrial relations, the facilitation and determination functions continue to be split and ratification processes have been introduced.

The legislation, introduced on 29 June 1995, addresses complaints for wrongful dismissals. Instead of matters commencing in the Industrial Relations Court of Australia, all applications now commence in the Australian Industrial Relations Commission.

195 Interview, Industrial Relations Commission

196 It followed recommendation made by President O'Connor following her extensive experience in the Commission, the Federal Administrative Appeals Tribunal and the Broadcasting Review Tribunal.

197 Interview, Australian Chamber of Commerce and Industry - The changes were also endorsed by the President of the Australian Chamber of Commerce and Industry, Brian Noakes.

The press release accompanying the Bill describes the new process as allowing 'voluntary binding arbitration to encourage non-legalistic resolution'.[198] This in fact is a misnomer. Close examination of the Bill reveals that a compulsory conciliation process has been introduced. Parties can only go direct to the court and avoid the 'voluntary' process if the Commission issues a certificate stating that:

> *'the Commission has been unable to settle the matter by conciliation within a reasonable period and that the parties have not so elected (to go to consent arbitration)'*[199]

Consent arbitration

The parties may at any time during a conciliation elect in writing to have the matter moved to consent arbitration. The consent arbitrator must be a different conciliator to the conciliator that handled the conciliation unless the parties agree.[200] In electing to a consent arbitration the parties must also agree to:

- X comply with any requirement of the Commission for the purpose of the arbitration,
- X to comply with any AWARD
- X if the award is taken on appeal to the full bench of the Commission to comply with any appeal outcome.

Regulations prescribe the grounds of appeal. The Commission 'must inquire into the matter' to which the application relates and try to help the parties to the conciliation to agree on terms for settling the matter.[201]

General Complaints Review Panel

The impressive performance of the general insurance industry in resolving customer disputes has already been outlined in Chapter 4. More detail about the system is included in this section.

The system?s operation is relevant because it deals with most of the same insurance companies that operate in the workers compensation field in Australia. Many of the concepts that work in general insurance and are representative of best practice in dispute resolution, are readily translatable to the workers compensation field, particularly for insurers primary decision-making standards.

A General Claims Review Panel deals with disputes over general insurance claims "on the papers" or through a small number of conciliation and interview processes. The panels consist of a legally qualified chairman and an insurer and consumer representative. Awards of up to $400,000 may be made against the insurer. Claimants may take the matter to court if unhappy with the outcome.

All claims must first be reconsidered by the insurers or dealt with by enquiries staff. The enquiries staff are mostly retired insurance managers and until recently were employed by the Insurance Council of Australia.

Concerns over independence led to the establishment of a separate body. This body, the Insurance Enquiries and Complaints (IEC) will now also be responsible for the administration, monitoring and enforcement of the industry?s "General Insurance Code of Practice". The IEC and Panel also deliver timely resolutions and publicise their processes by sending out details with policy renewals.

Superannuation Tribunal

198 Press Release, *Unfair Dismissal Laws* Hon L Brereton, Minister for Industrial Relations Canberra 21 June 1995

199 *Industrial Relations and Other Legislation Amendment Bill* 1995 See Clause 170ED(1)

200 Above Clause 170EC(2)

201 Above Clause 170EB(1)

The Superannuation Tribunal is a relatively new federal tribunal. It is required to deal with medical disputes over disability levels under the injury provisions of superannuation schemes.

In the first twelve months of operation, the Tribunal has not has not established a notable record for resolving matters in its general jurisdiction. Of the 800 or so complaints received in its first year, less than 20 have been completed. Over half have been rejected as outside jurisdiction. Some of the reasons for this are to be found in the restrictions of the legislation. However, it is clear that the same problems of information collection in other dispute resolution bodies hound its attempts to bring matters to a final conclusion. What follows is an analysis of its operations and the public perceptions that give some indications of scheme features to avoid.

A Commonwealth Senate Select Committee on Superannuation is currently enquiring into the Tribunal?s first year of operation. In this context the tribunal was recently publicly criticised by consumer groups for failing to conduct any conciliations and for being little used by consumers.[202] The most trenchant criticisms arise from the fact that the process is mainly a review on the papers. In this consumers have no voice.[203] There is also concern that consumers are given no assistance in using the Tribunal. Calls for a consumer based legal service are actively being considered by the Committee.

The Tribunal requires complainants to lodge complaints with fund trustees in the first instance. Trustees have 90 days to respond. If still dissatisfied complainants can go to the Tribunal. Tribunal staff then make "post lodgment checks and inquiries". If matters are outside jurisdiction they are rejected. For those not rejected, supporting documentation is called for from both sides. The majority of complaints are currently awaiting documentation. No statistics are kept on the time that this process takes. A "settlement attempt" is made but this does not involve conciliation.

The legislation requires that review takes place "on the papers". So far only 12 matters have reached this stage. Review involves three members examining the papers. Before review, all parties get copies of each other's submissions and are given an opportunity to prepare their own response.

In a speech given earlier this year, the Chairman was of the view that the main impact of the Tribunal would not be in terms of its decisions, but in terms of its influence on administration and complaint handling back in the funds.

> *"The adoption of best practice there will be a mark of our success."* [204]

This is despite the fact that records of original complaints are not kept at the Tribunal. Its capacity to monitor or provide information for compliance purposes or give feedback to the funds on emerging poor decision-making practices will necessarily be limited.

Private ADR options

In Australia and Overseas, a range of privatised alternative dispute resolution options are emerging. Similar to agencies in workers compensation, and industry associations, private companies are seeking ways of avoiding the costs, delays and damage to relationships caused by litigation. They take an innovative approach to sharing dispute resolution resources and drawing on privately available expertise.

EDR (Employment Dispute Resolution)

202 The Age 12 August 1995 *Super tribunal inadequate consumers say* p

203 Telephone conversation with Christa Gardner, secretary to the Senate Select Committee on Superannuation 14 August 1995.

204 Wilkinson, Neil, The Tribunal -its powers, its purpose and its priorities, Address to the Law Council of Australia February 1995 in Superannuation 1995 Leo Cussen Institute Melbourne pp20

"Plaintiff's attorneys are to the 1990s what unions were to the 1960s and they can be a lot more expensive to business" [205]

In response to large numbers of disputes over collective bargaining agreements, there has been a move in the US to use alternative dispute resolution in a more structured manner. Groups of companies form ADR networks and lend senior officers to arbitrate or mediate in disputes in one or other of the companies. When a dispute arises in their own company a person from another company is brought in.

Commercial arbitration companies manage these mediations. In an example from Atlanta, a three person team is organised by the commercial company. The team comprises a worker from the company, a manager from another company in the network and a retired judge or lawyer versed in the relevant law and trained by the commercial arbitration company in ADR.

The benefits to employers are that it facilitates changes to corporate culture that they need to pursue total quality management practices and it vastly reduces costs. For workers, it promotes a view that disputes are being settled by peers rather than unknown jurors. One company reported major claims were resolved in under four months and that legal costs were reduced by an order of magnitude.

"This (commercial arbitration) company operates as a third party entity that contracts with employees and employers separately to provide binding arbitration of all employment related disputes, including personal injury, age, race, sex, disability and religion...

The EDR program comes complete with a defence fund shared by participating employers and involves training for employees who become adjudicators of disputes. Volunteer employees are sent to adjudication training through a random selection process and, after the training has been completed, are made available to other companies... A list consisting of three trained non-exempt employees from other companies, three trained management employees from other firms, and three retired judges / attorneys is provided by the outside corporation. The parties alternately strike names until a three person panel, with one person from each of the different groups remains to hear the case." [206]

A similar scheme is operated by a union in Australia, the Construction and Building Unions Superannuation Complaints Procedure.

Union Facilitated Dispute Resolution

The Construction and Building Unions Superannuation Complaints Procedure deals with disputes over superannuation, before a dispute is taken to the Superannuation Tribunal. In a move echoing the frustration with traditional forums of overseas employers, the union has made submissions that its process should replace the Tribunal?s findings and be equally enforceable in a court of law.

Complaints are firstly reviewed by a senior internal review officer known as the national claims manager. Following referral back to the trustee / insurer for reconsideration which involves calling for additional information, the claim is referred to a Claims Review Committee. This is done with the agreement of the claimant. The Claims Review Committee consists of an insurer representative, a trust member representative and an independent chair person. The member representative always has a similar occupation to the claimant. The committee meets and reviews the file "on the papers".

Fairness and reasonableness are the criteria for the decision - legal precedent and argument are excluded. The insurer has a contractual commitment to abide by the decision of the committee. Claimants receiving adverse decisions still may apply to the superannuation complaints tribunal. (In the union?s submission this further option would be changed to the courts)

205 Ritzky, G M, *Reducing Employment-related Litigation*, Risk Management V41(8) August 1994 pp49

206 Id pp 65

US Medical Practitioners

The ?AMA / SSMLP? is the equivalent to the Australia Medical Association. Doctors seek agreement to voluntary binding arbitration under pre-treatment contracts with patients. Described as a "fault based administrative system" any claims for medical negligence are reviewed by a claims examiner. If the examiner considers the claim has merit, an attorney is provided to the claimant to take to a board.

The board consists of seven members, including two doctors and another health professional. The decision of claims examiner can be appealed to a member of the board.

If the claim is overturned at any point the claimant would have to obtain a Certificate of Merit and their own counsel to proceed further. The system relates claims back to professional licensing standards and licenses may be revoked.[207]

Privatised ADR

Private mediation firms offer mediation services to business and the general public. In Australia, these firms are not widely used for actual dispute resolution; most tend to focus on training and related consultancy work.

Successful mediators require some regular source of work. This can be through direct contact with organisations that refer disputes to them; or through direct advertising. Professional organisations such as the law societies or architectural institutes may refer work. Alternatively legislation may establish mediation as an option in a dispute and a government body will refer disputants to one of a panel of mediators, accredited according to the legislative requirements.

In, Australia despite a fairly long gestation period, private conflict resolution has not been particularly successful. Commercial meditations are expensive with mediators charging anything between $500 and $4000 per day. Neighbourhood mediation centres sponsored by government legislation are much cheaper with mediators receiving $10 or $20 per hour for resolving neighbour disputes. Mediators in the building industry charge according to rates set by legislation as do private mediators resolving custody and property disputes under the Family Law Act.

These mediators are expected to arrange the premises, review any written material, possibly interview the parties separately before-hand and then conduct the mediation. Generally, parties first sign mediation agreements which protect the confidentiality of the process (although whether they stand in subsequent court proceedings is open to question).

In North America, several thriving organisations practice dispute resolution, obtaining work through direct advertising and extensive marketing.

While privatised ADR may seem attractive, the use of private mediators attached to workers compensation schemes has not been particularly successful in the US. This is possibly due to the fact that workers compensation mediation requires a degree of expertise and industry knowledge. However, research shows that it may have more to do with the fact that outcomes are less predictable. A study in **Michigan** found that:

> *?...attorneys interviewed expressed a strong preference for the known bureaucracy rather than unknown arbitrators.*[208]

The same may be true in Australia. However, the EDR options offer a practical alternative, where some of these concerns may be overcome.

Potential Developments

207 U S Congress, Office of Technology Assessment, Defensive Medicine and Medical Malpractice, Washington, July 1994

208 WCRI Research Brief, March 1990 Vol 6, No.3 *Workers' Compensation in Michigan*

The recently mooted industry based national workers compensation schemes imply a future for workers compensation that includes privately funded schemes sharing a market with state managed funds and with self-insurers. Where dispute resolution services will sit in this scenario remains to be seen.
The traditional court systems, the past providers of dispute resolution services to the business community, are viewed as too costly to be used to resolve most disputes. The services of litigation lawyers as negotiators are also fast becoming too costly. The openly opportunistic behaviour of professional groups in workers compensation have made politicians and fund administrators wary of allowing disputes back into the courts or into any quasi-legal forum involving lawyers. Overseas trends indicate that the most successful schemes are those that provide ADR mechanisms within the fund bureaucracy.

EDR schemes offer another model for an environment that is embracing privatisation of service areas of government. Participating companies would employ their own dispute resolution organisations, perhaps including the lead-in processes in their enterprise bargaining agreements and employment contracts.

Opportunities may also exist for efficient privatised dispute resolution bodies to operate outside the court system. These could be operated by existing state schemes or newly established private funds and could provide services at a cost to other schemes. Competition would be evident in timeliness, and competency of facilitators. Similarly to other industry operated dispute resolution systems, options would still exist to take matters to the courts. Costs however, could be subject to more stringent cost arrangements than the current cost indemnity rules.

6

Case Management for Expeditious Resolution of Disputes

> *?..litigation was a game which litigants or their advisors were at liberty to play at their own pace and that the only duty of a judge was to decide a proportion of those few cases which survived to the last round.?*[207]

This chapter discusses Best Practice in managing the caseloads of Determinative bodies (usually courts) and ADR systems.

207 Lord Justice Templeman *Fourth River Property Case* (The Times, November 23, 1976)

Delayed cases are often the cause the major criticisms of both usually courts and ADR systems. ADR systems are just as likely as courts to be accused of delaying cases unnecessarily, of having back logs, of causing hardship in the community while cases are waiting completion. The essential task for both court and ADR systems is to manage an often large case load in such a way that serious matters are dealt with expeditiously and less serious matters do not "clog up" the system.

Typically Governments respond to criticisms of dispute management systems by imposing legislated time lines. However, regardless of imposed time lines, basic management practices have to be applied before any of the delays can be overcome.

There has been considerable progress in Australia and overseas in reducing court delays and most of the case management information comes from this area. Court case management expertise is so well developed that the basic principles have long identified and are used routinely in many courts. In fact, in the United States the American Bar Association as long ago as 1979 identified a set of "standards" that they claim would guarantee the removal of court delay. These standards have now been mandated in all the Federal Courts in the US.
Successful methods of reducing lengthy delays in courts have been trialed in Australia. Most notable were the programs run in New South Wales and in Victoria during 1988 and 1987 respectively. Originally developed in the US, they are known as "court delay reduction programs".

The strategies for reducing backlogs in courts seem to fall into two distinct categories:

? **providing additional resources** in the form of additional judges, or alternatives to judges to finalise cases. The alternatives might include the appointment of lesser judicial personnel such as masters or judicial registrars to deal with the less important matters and leave the more complex matters for the judges. Court-annexed mediation schemes and court-referred ADR schemes also fall into this category. Cases are diverted to court appointed "mediators" with the task of resolving these matters.

? **taking an active management role** over the activities of the participants in the court environment and how they prepare for their cases. Initially billed as "court control" initiatives, they seem to follow a chronological pattern. First pre-trial or pre-hearing conferences are introduced, then more sophisticated streaming measures or differentiated case management schemes are introduced.

The latter category is the more progressive and has been described as a function of a "recession justice" environment. To husband resources, judges and courts are forced to become more interventionist. The following sections discuss the initiatives in both of these categories in detail.

Court initiated ADR Processes

Court-Annexed ADR

Court-annexed ADR is seen by many as a means of improving the accessibility of the court system. In the US its use has been legislated. The US Civil Justice Reform Act instituted in 1993 required all US Federal courts to introduce ADR.

In **Victoria**, faced with 16 month waiting times, the Supreme Court conducted the `Spring Offensive' in late 1992. This included early screening of all backlog cases by five judges charged with the task of identifying which cases were suitable for mediation. A 'call-over' of all cases was then held and all parties were required to attend to explain the status of their case to the judges.

Cases were assigned to mediation, settled or directed to trial. At mediation, volunteer mediators (specially trained senior barristers and solicitors) met with the parties,

mediated in some cases and catalysed negotiations between parties able to resolve disputes themselves. Waiting times were reduced to 6 months. [208]

The process is equally successful in reducing delays in workers compensation annexed to agency DRSs. Since its inception, conciliation in the **Quebec** board's appeal system has reduced the need for formal hearings in approximately 65% of cases and introduced a 3-4 month process as against 3-4 years in the hearings system." [209]

Various approaches to court-annexed mediation have been tried. As described in Chapter 3, if voluntary, these programs are ineffective in reducing delay in court environments. In the US, the debate over whether the process should be compulsory or not has been largely completed and voluntary schemes are not used to any great extent. Rather quasi-compulsory schemes operate either by streaming cases after diagnosing them for ADR suitability; or allowing cases to opt-out under certain conditions. Variations in the first group include:[210]

- X Referral of all litigants to an ADR process for case assessment and to ensure early information exchanges between the parties
- X Asking the parties, as to which ADR process is most appropriate prior to a judge hosted conference, then
  - the court can overturn the choice
  - the court can assist the choice
- X Asking the parties; but the exact choice is selected by the parties from a “menu” of options.
- X Court officers (gatekeeper) selecting cases by pre-determined case category based on pleadings, and setting an immediate date for the ADR process
  - Cases outside categories go to Judges
- X Judges conducting an ADR Assessment Conference where discovery orders are made. Judges are assisted by law clerks and ADR consultants.
- X Courts classifying cases around specified criteria using a weighting table and numerical formula. Cases are then sent off to an ADR or Court forum determined by their "total" assessment.

ADR can also be made fully compulsory with of one of a range of "opt-out" provisions which might include:

- X the ADR process is not likely to yield sufficient benefits to justify the resources committed to it
- X there is a special need to have all aspects of the case development remain the responsibility of a judicial officer
- X a precedent needed
- X government policy
- X the case is likely to get an inconsistent result compared to other similar cases where policy is important, if left to ADR
- X changed circumstances require the court to retain control
- X parties are not able to negotiate effectively for themselves with or without assistance from a lawyer
- X when repetitive violations of statutes need to be dealt with collectively and uniformly
- X when there is a need for public sanctioning of conduct

There may also be more general discretions given to the court to allow exclusion.

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208 Law Institute of Victoria - Report on the Supreme Court Spring Offensive, 1992

209 Williams, B, Dispute Resolution - Looking at Alternatives, OH&S Canada, V10(3) May / June 1994 pp63

210 Plapinger E, Shaw M, Managing and ADR Program, The Court Management & Administration Report Volume 4 No 5 May 1993 pp6

These quasi-compulsory programs adopt what may be described as variations on the streaming approach, but in them streaming criteria are made public and discretion is given the an experienced court officer or judge to allocate appropriately depending on the interventions that are thought necessary to resolve that particular matter. In these programs, the court also retains firm control.

Court Referred ADR

In line with attempts to reduce backlogs by spreading the workload, court-referred ADR relies on outside resources. These programs make use of independent commercial mediators who have cases referred to them by the Court.

The court or the government takes responsibility for certification of the dispute resolution centre or program, the types of cases which may be referred, and the guidelines and criteria for intake and referral, either by statute or court rule. Guidelines also cover confidentiality, fee structures and give an avenue to appeal to the court in proscribed circumstances.[211]

In Australia, there are several of these types of programs. Most Law societies have panels of mediators that are available to be used by the courts. There are also some commercial operations and in some schemes the courts are bypassed. In Victoria, the Institute of Commercial Arbitrators until recent times mediated certain commercial disputes. Legislation requires that a ?mediation clause be inserted in certain commercial contracts and that in the event of a dispute, the Institute provides an arbitrator. Arbitrators are required to meet certain accreditation standards.

Effectiveness of court-annexed and court-referred ADR

Questions have been raised about the longer term effectiveness of both court-annexed and court-referred ADR.[212] There are concerns that after achieving high resolution rates to clear court backlogs, clearance rates stabilise at a comparatively low level. Mediations then become nothing more than another routine step along the path to the court door.

There are also concerns that conferences become supervised meetings between parties, particularly as both parties are represented by experienced lawyers and the role of the ?mediator is overtaken by direct negotiations.[213]

WCRI examined ADR options in 1989 and found that court related options could waste resources if applied indiscriminately.[214] In 1989 these were called IPSOs or Informal Procedure Settlement Orientated. Of states that used IPSOs, 32% offered mediation conferences, 47% provided for advisory arbitration or offered an advisory opinion and a large but indeterminate percentage held settlement conferences. ('Advisory arbitrations' or "advisory opinions" are procedures where non-binding recommendations or opinions are issued by a third party.)

WCRI's review of then available American research found that:

- IPSOs do not reduce adjudication rates; they *substitute* for settlements that would otherwise occur.
- Advisory arbitration reduces the time to disposition if scheduled early enough in the process. When scheduled later, parties have a tendency to wait for the IPSO - delaying settlements that would otherwise occur.
- IPSOs require more resources. (Court or agency supervised settlement discussions are arguably a waste of resources particularly where specialists are involved)
- Advisory arbitration produces no significant savings in the parties litigation costs because the parties tend to engage in the same preparatory activity in order to settle with or without an IPSO.

WCRI also suggested that identifying criteria for IPSOs will provide:

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211 American Bar Association *Standards relating to Court Organisation* 1990 Edition. See Standard 1.12.5

212 Law Institute of Victoria, Review of the Supreme Court Spring Offensive, 1992

213 Interview, Law Institute of Victoria

214 WCRI Research Brief, Informal Dispute Resolution Works, May 1989 Vol 5, No.5.

'an opportunity for strategic gamesmanship by the parties and a possible source of litigation. An alternative approach is to make IPSO's available at the request of the parties. This eliminates the need for applying criteria but places the agency in a passive posture that can limit its involvement in reducing litigation.'[215]

In **Minnesota**, for example, reforms have initiated a 700% increase in requests for informal conferences a figure put down to attorney involvement.[216]

These findings indicate that court attached programs are not cost effective in the longer term. Unless, as can be seen from previous chapters, conferences occur with all the information, and the court directs the parties to attend. The conference must also be held very quickly after parties indicate readiness (that all information is to hand and has been exchanged) and very close to the court hearing date.[217]

Early Neutral Evaluation

A variation on advisory arbitration is early neutral evaluation. A neutral third party, usually a technical expert, provides a "quote" on the likely outcome of the case and parties use this information to stimulate settlement negotiations. The advantages are that the indication of what a court is likely to do is available earlier in the dispute process. It also removes cases away from the court system.

Early neutral evaluation, although endorsed by the Civil Justice Reform Act has only been used in a handful of courts. Its goals vary from forcing the parties to 'confront and assess their situations early and realistically' to being a 'settlement vehicle'. [218] No evidence was found to support its use as a "best practice" in Australia. At best, it should be included as part of an array of options open to a court for referral purposes, where it may resolve a few disputes.

Caseflow Management

Caseflow management has now reached such sophisticated levels that a series of "standards" have been agreed in North America and are in the process of being agreed in Australia.[219] The American Bar Association publishes "Standards of Judicial Administration" that describe all facets of court organisation, judicial resourcing and qualification, together with process and procedures in processing cases and in administering ADR programs. These "standards" are distinct from court rules and reflect the changing trend in court administration for courts to take control of resources and become self-governing.

Delay Reduction Initiatives in the Courts

The American Bar Association, an organisation recognised for its work in this field, has developed a set of standards which have been adopted by President Clinton and applied to all Federal Courts. These standards, have been found to effectively reduce delays and to guarantee that matters are heard within predictable time frames. [220]

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215 WCRI Research Brief, Informal Dispute Resolution Works, May 1989 Vol 5, No.5 pp3

216 WCRI Research Brief, Workers' Compensation in Minnesota, June 1991 Vol. 7 No

217 Western Australia applies the same principal in providing review dates within 2 weeks of conciliation hearings. This was cited as a reason for high settlement rates at the conciliation conferences. Parties could not see the point of returning with nothing new to present to the Review Officer.

218 Plapinger E, Shaw M, Managing and ADR Program, The Court Management & Administration Report Volume 4 No 5 May 1993 pp6

219 See Federal Attorney-General s Department *Access to Justice - An Action Plan* Canberra 1994 Ss 17.14-17.33

220 American Bar Association, Court Delay Reduction Standards, ABA, Chicago , 1992

ABA Case Management Standards *Essential elements which the trial court should use to manage its cases are:*
X *Court supervision and control of the movement of all cases from the time of filing of the first document invoking court jurisdiction through final disposition.*
X *Promulgation and monitoring of time goals from the overall disposition of cases.*
X *By rules, conferences or other techniques, establishment of times for conclusion of the critical steps in the litigation process, including the discovery phase.*
X *Procedures for early identification of cases that may be protracted, and for giving them special administrative attention where appropriate.*
X *Adoption of a trial setting policy which schedules a sufficient number of cases to ensure efficient use of judge time while minimising resets caused by over-scheduling.*
X *Commencement of trials on the original date with adequate advance notice.*
X *A firm, consistent policy for minimizing continuances (adjournments).*

Apart from describing the characteristics of better systems there has also been considerable work done on implementing them. A series of rules or steps have been identified and refined by a number of authors in this field. [221] [222]

These may be summarised as follows, under the general description of ***managing the interaction*** between the court and the users:

1. The Court should accept collective **responsibility for control and active management** of the flow of the cases from filing to disposition.

1. The Court should institute a process of **continuing consultation** among the users of the system concerning the development and the operation of the caseflow management system.

2. The consultation group must establish **standard procedures** governing the flow and processing of cases. The rules and procedures should govern the 90% of cases. Special arrangements should be made for the more complex or different cases.

3. The Court must adopt and apply a **restrictive deferral policy**. Once actions and deadlines are agreed there should be no allowance for parties who are not ready at the expense of the rest of the system.

4. There should be a **central point** at the court (registrar or coordinator) with responsibility for making sure deadlines are met, and armed with the ability to apply penalties and rewards (the stick and the carrot of the literature).

221 Baar C & Deschenes J, 1981; Scott, 1984; Solomon M, 1987; Friesen E C, Solomon M & Mahony E, 1991

222 See also *Access to Justice - An Action Plan,* (above) 17.14 to 17.33

5. The caseflow management system must incorporate case processing, time standards and system performance **standards**.[223] [224] These must be made **public**. (See Attachment C for a detailed description of best practice standards)
6. The system, deadlines and goals should be **constantly refined** in consultation.
7. The status of cases must be **monitored** from filing to completion.
8. The Court should **co-ordinate** the caseflow management process.

These principals can be seen in the highly successful operation of South Australia's Supreme Court differentiated case management system.

Differentiated Case Management

More recent trends in judicial administration have introduced a streaming approach attracting the new label "differentiated case management".

> ?**Differentiated Case Management** (DCM) is a management approach involving a commitment by court officials to sort out disposable cases as early as possible and to manage the remaining cases to disposition within set time frames along whatever specialised paths seem appropriate.' [225]

The paths or tracks are developed by the court. They may be based on length of time, witnesses & similar case histories. Alternatively there may be tracks for ADR, for standard cases and complex cases; or for fast cases.

In **South Australia** DCM is credited with achieving major reductions in administrative costs in the Supreme Court. Comparison with other states shows that despite a similar caseload of full hearings, the courts operating costs are 60 per cent less than other states.[226]

Three `tracks' for progressing cases have been established: the expedited track, the normal track, and the long / complex track. As the architect, Mr Justice Olssen describes the new procedures;

> "It can be seen that the new system focuses on early court intervention. As will be seen this is aimed at:
> ? attempting to catalyse negotiations for settlement as soon as the real issues are identified, or with a view to identifying and narrowing issues;
> ? confirming or determining the most appropriate track assignment;
> ? identifying the likely need for special treatment or resources having regard to the urgency, length and / or complexity;
> ? identifying what particular interlocutory issues need to be specifically addressed and giving any necessary directions in relation to them.?[227]

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223 Also see Lane P M, Court Management Information - A Discussion Paper, The Australian Institute of Judicial Administration, Melbourne 1993 pp35-40

224 Western Australia uses standards that represent best practice in Australia

225 Henderson Thomas A. & Munsterman Janice T. *Differentiated Case Management: A Report from the Field*, State Court Journal Spring 1991 pp25 - 29

226 Interview Supreme Court of South Australia. See also *Caseflow Management - Changes to the Civil Jurisdiction*, Supreme Court of South Australia, July 1993

227 Olsson L. T. *Civil Caseflow Management in the Supreme Court of South Australia - Some Winds of Change*, Journal of Judicial Administration, p 14, Melbourne Australia (1993) 3

Compliance with specific time lines and limitations are enforced by a policy of no adjournment or late amendment; and late lodgment of further information.

The system is also credited with identifying cases that would otherwise languish. Automatic default notices are issued for non-compliance with procedures. No application or trial is ever postponed indefinitely. [228]

Other experience around Australia is not so impressive, although this could be because of incomplete implementation. A recent study by the Civil Justice Research Centre entitled examined the **New South Wales** Supreme Court DCM program.[229] It shows that information management requirements have not been complied with in both the quality and timing of information lodged by solicitors. Control of entry to the DCM program seems to be with solicitors rather than with the court and adjournments are still readily available. It appears that while the differentiation element has been implemented, the case management element has been neglected.

The South Australian Supreme Court reported that successful implementation required:

- strong judicial leadership
- rigid enforcement of deadlines
- rewards in terms of favourably timed court appearances for compliance[230]

Most importantly lawyers "know what to do and when to do it".

Promoting Standards in Caseflow Management

Adoption of clear principles and standards has been used as a means of capturing the attention of participants in a dispute, managing their expectations and interaction. Also important is the role standards play in re-focusing the efforts of staff to manage time critical functions to deliver an overall improvement in output.

The standards rely on principles of early control and supervision of court caseloads by the court, rather than a system which allows court users to introduce delays in the interests of their clients.

Hall and Wallace two additional principals for these standards to achieve the expeditious resolution of disputes.[231]

Managing expectations

The first principle on which the standards rely is that the court must take on the role of managing the expectations of all parties involved in the dispute from the very beginning. This means setting clear deadlines and enforcing appropriate rewards for cooperation and penalties for lack of cooperation.

Moving the onus of collecting and sharing information

The second principle is that the court should move the onus of collecting the information needed to resolve the case back to the parties. This principle has been put in more innovative terms drawing parallels with the quality management principles used by the most efficient Japanese car makers. Their success relies upon the 'degree to

228 Goerdt J A, *Civil Justice Reform Model State Amendments: How will they affect State Courts?* State Court Journal, Winter 1993, pp6 at pp 9

229 Matruglio T & Baker J, *An Implementation Evaluation of Differential Case Management*, Civil Justice Research Centre September 1995. See generally

230 Interview, Supreme Court of South Australia

231 Hall M, Wallace, N *Managing Disputes*, Transformation Management Services March 1994

which they tracked the quality of the parts they received and their demand for zero defects from suppliers'.[232] In a similar way when the parties to a dispute have provided all relevant information to each other and to the court or the DRS, all resources can be directed to resolving the dispute.

Parties not only need to collect all the appropriate information at an early stage, they also need to meet to discuss possible settlement. (The USA `Pre-complaint Notice Requirement Act' requires parties to lodge a notice of intent to file a lawsuit 30 days before filing a complaint[233].) The intervening time allows settlement discussions to proceed and reduces the number of eventual complaints.

Implementing Caseflow Management

While setting standards has been proven to be effective in many jurisdictions, their adoption by various court systems has not been pursued with vigour. Lawyers and judges have been loathe to sanction measures which may interfere with the independent status of the courts. In addition there has been a view that claimants have a right to take any matter to the courts.[234] Courts taking control of case preparation flies in the face of the passive service role that this view entails. Perhaps more of a problem, few judges are trained as managers, which makes change unlikely.

The failure by courts to adopt the available "best practice" methods creates major problems for workers compensation agencies, particularly if they are paying the bulk of the legal costs bill. Despite being accountable for the cost, they are in the unenviable position of having very little capacity to influence change. The options for agencies are:

- to respond to the inevitable requests for further resources,
- to offer resource assistance to the court in change programs, specifically in quantifying the scope of the problems, and
- to negotiate new court rules.

Within these options, agencies want to know where resources can best be directed to have the greatest impact on both delay and cost. Where requests for additional judicial resources are made, there are indicators that will show that these resources will not be effective in resolving the problems. These are described below. Better use of these resources may be in proven backlog management programs and court delay reduction programs. Both of these are successful implementation strategies that could be promoted by agencies.

Indicators of poorly administered Courts, Tribunals and DRSs

Courts, tribunals and DRSs that do not manage their caseloads cultivate the poor business practices that lie at the root of delay problems. As well as delays, these systems are easily recognisable by two common indicators:

- on any on day, they show high adjournment rates, in comparison with the number of cases listed, and
- high court door settlement rates.

Caseflow management principles insist that information is collected and that parties indicate that they are prepared before a hearing date before the resources of the court are allocated. Systems that give away appointments without ensuring that the parties have done the necessary preparation will encounter a series of self-perpetuating problems:

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232 See Goerdt 1993, p6

233 See Goerdt, 1993 p 14

234 Interview, Ministerial Advisory Committee on Workers Compensation Dispute Resolution, South Australia

- The "idle" judge problem envisages a day when no cases are ready to proceed. All are adjourned, leaving the judge idle and cases delayed an extra day.
- Conversely, all cases might be ready and some may have to be adjourned because there is no time remaining to hear them. Parties who have prepared are frustrated and advocates do not take as much trouble preparing next time. They join the ranks of parties routinely applying for adjournments.
- Courts then fall into the habit of "over listing" or arranging for more cases than are necessary to fill the appointment "list". This is done because too many cases are being adjourned.

The problems are exacerbated if there is pressure on the DRS to deliver outcomes within certain time-frames. When appointments are measured as outcomes, with little regard to repeated appointments, delay problems can be masked.

Setting appointments can also be used as a step in trying to force parties to prepare for a case. In **Victoria**, in a case analysis of files of the WorkCover Conciliation service, this practice showed evidence of an increasing number of adjournments of conferences that had been set down without a complete file of information.[235] The step is fruitless if parties obtain easy postponements.

In summary, poorly administered DRSs show high adjournment rates, high court door settlement rates, and multiple listings.

Court Delay Reduction Programs

Delay brings its own costs. In an effort to reduce delays and increase access, Government administrations have tried various approaches to ensure the implementation of caseflow management measures.

- Mandating time lines and standards in legislation (USA & UK)[236]
- Establishing "partnership" arrangements with courts to overcome perceptions that there may be interference in court procedures
- Introducing court governance and requiring resource accountability through ordinary government mechanisms
- Supporting "Court Delay Reduction Programs"

The first three approaches assume the resources and expertise in change management are within the court. Often this is not the case and specialist resources have to be applied. Court Delay Reduction Programs meet this requirement.

Novak identifies active court management as the fundamental precept of a court delay reduction program.[237] The core elements are very similar to those identified above, and are:

- strong judicial leadership
- a design team to undertake empirical research and make proposals based on best practice
- an established process of wide ranging and ongoing consultation with court users
- clear agreed goals and objectives for the program
- a detailed analysis of caseflow and the provision of statistics on different stages in the court process collected with the aim of pinpointing causes of delay

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235 Hall M and Wallace N, *Managing Disputes*, Transformation Management Services for the Victorian WorkCover Conciliation Service, March 1994, pp13

236 Time standards are ineffective if complementary case management rules are not in place. Victoria has introduced mandatory time-lines of 28 days after which parties can issue in the magistrates court. In 1994-95 a significant proportion of these cases did issue. In effect, they have been delayed a further 28 days adding to delays already in the court waiting lists.

237 Novak R M & Somerlot D K, Delay on Appeal - A Process for Identifying Causes and Cures 1990 American Bar Association, Chicago, Illinois

- X reforms in procedure developed in consultation with users
- X an agenda for implementation
- X task forces and specialised committees formed to deal with the various issues
- X sufficient resources to bring about implementation

The set of procedures evolved through the program should include:

- X court supervision or capacity for the court to take remedial action if the procedures are not followed
- X time standards for each stage of the process
- X monitoring and information systems

Novak points out the benefits to the courts (and to workers compensation schemes) of a court delay reduction program. Cases are promptly disposed of and public confidence increases. Most importantly for the parties, the failure to achieve full entitlement which often occurs when cases are delayed is overcome. The legal status is resolved quickly and in criminal matters sanctions are imposed close to the time of wrong. Also, the substantive quality of the litigation process is improved as preparation is done while memories are still fresh.[238]

Quarantining Backlogs

There are several examples in Australia where workers compensation dispute backlogs have been dealt with effectively. These were:

In **Western Australia**, where a special team was devoted solely to dealing with cases brought over from the previous scheme. The team resolved 62% of a pool of cases equal to half a years dispute workload within 3 months, most by conciliation.

In 1993, the **Victorian** WorkCover Authority Conciliation Service quarantined their backlog and applied a special project team to deal exclusively with these cases. A group of "information officers" were recruited to contact each of the parties and to find out firstly if the issues were still in contention. A large number of matters were resolved in this way when it was found that one or the other party wished to withdraw as circumstances had changed in the interim. A second group of cases required further information collection and the officers arranged for that to occur. Conciliation officers resolved a large number of matters through telephone contact by suggesting solutions and identifying key issues. A further group were resolved through conference.

These examples employ many of the elements of case flow management. There needs to be a screening process of sorts, methods need to be applied to force the parties to collect information and those matters that do not require court resources need to be culled out.

What is a Reasonable Delay?

In Australian workers compensation dispute resolution few systems with the clear exception of **Western Australia** have adopted these principles to their full extent. Most systems have begun with legacy caseloads and have since had small success in reaching reasonable times. When asked, stakeholders considered a "reasonable" time as little more than four weeks from lodgement to final resolution, a goal reached by few schemes for the bulk of their disputes.

238 One of the best examples in Australia of this type of program is the 1990 Phoenix program in the Victorian County Court Criminal jurisdiction which substantially cut delays and resulted in specific legislation forcing early review of the case by prosecutors and defence lawyers. Early notification of pleas of guilty attracted lighter sentences.

7

Dealing with external pressures for change

?... a continual movement in legal history back and forth between justice without law, as it were, and justice according to law'

Roscoe Pound 1922[221]

"When nation-state law predominates extra judicial processes and social control mechanisms are replaced. At the same time most actual and potential disputes are those between strangers. The true plaintiff becomes only secondarily important and the courts decline in personnel relative to population growth and need. Court functions shift away from dispute settlement; access to courts decrease; the functions of the law as a power equalizer diminishes and the law decreased in its role relative to issues that effect the quality of everyday life.

Then we return full circle - extra judicial processes begin to develop in direct response to these trends and with them the struggle between the legal system and the litigant for control or influence over the extrajudicial processes that are evolving as a result of failure of the law. "

Laura Nader 1978[222]

The Pace of Change

The phenomena described by Pound and Nader can be seen over a period of centuries in most dispute resolution systems, including traditional court systems. The type of change these systems experience, and the type referred to above is generally attributed to "legalisation" of the dispute.

The pace of change in workers compensation seems to be considerably higher than the traditional court system. Complete changes may be measured in intervals of years rather than decades. This chapter explores the reasons for this and examines how useful this change has been in moving towards Best Practice. It concludes with proposals to achieve more sustainable systems, capable of reaching standards of quality not possible with systems often subjected to disruptive change.

Changes in Australia over the past 10 years

Worker?s compensation in Australia during the past ten years has undergone tremendous change. Perhaps change has been the only constant. Each year has seen a substantial change in dispute resolution systems, with the abolition of old systems and the introduction of new systems slightly less regularly. In the words of one working party:

> *?It could well be claimed that there has not been a time when the Corporation's dispute resolution processes have not been the subject of*

221 Pound, R *An Introduction to the philosophy of law* (1922) pp 54

222 Nader, L *No Access to Law: Alternatives to the American Judicial System* (1978) pp5

either an internal or external review or investigation of some form or another.?[223]

These changes have not been confined to one jurisdiction. The table below shows the number of schemes abolished or substantially changed in each year during the past ten years. It includes changes made in the course of the project.

Numbers of dispute resolution systems replaced with new systems or substantially changed in Australian Workers Compensation Jurisdictions from 1985 to 1995.

	1984-86	1987-89	1990-92	1993-94	This year
Qld		*	*		
Vic	** *	**	**	*	
NSW	** *	* *			* **
WA			** **	**	
SA			** * *	*	**
NT				* **	
Tas		**			*
ComCare		**			
SeaCare			*		

*** Substantial change**
**** New system**

The number of changes reflects in part the general change in workers compensation largely driven by economic and political factors. Despite this, the rate of change is still high compared with other jurisdictions such as industrial relations and equal opportunity.

A great deal of change has been directed to reducing legalism and providing alternative means of resolving disputes. But change in and of itself can have adverse consequences. A system undergoing major structural change diverts the attention of staff from primary service provision. The scheme loses credibility with every fall in service.
Cynicism appears after the same staff used in the previous scheme reappear to supplement a lack of experience by new appointees. More legal expertise is required to explain the new procedures which undermines the reasons for change.

One or the other of the worker or employee representatives take the view that the new scheme has been established to favour their constituency, a view sometimes shared by various appointees but more often causing considerable confusion when these expectations are inevitably not met. Attempts to establish the credibility of the new system and enforce outcomes may be met with resistance and sometimes contempt.[224]

223 WorkCover Corporation South Australia, 7 June 1991, Report of the Review Working Party pp

224 Interviews, DRS officers in several states with experience in progressive systems

Rising over these consequences and building the basis for respect needed to conduct a credible and sustainable DRS is very difficult. It is even more difficult in a window of opportunity that may last for as little as six months. Achieving quality of function is even harder.

Three types of impetus for change appear to be operating:

- the use of the DRS as a "token" to indicate changes from old to new workers compensation schemes
- the priority given to reactive change dealing with immediate criticisms or pressures rather than longer term change designed to sustain credible DRSs
- legalisation of the DRS

The following sections examine these types of impetus in more detail.

Token change

New labels, new locations, new processes, new representation rules, new legal aid arrangements, new interim income arrangements all signal yet another DRS in workers compensation. The most important signal is that this system is different to the old system. It is almost as if the DRS, the easiest part of the workers compensation system for most people to understand is the part of the system to attract the most notoriety when change is afoot. A new DRS seems to be used as a notice of change to the rest of the scheme.

Two more practical reasons for these changes exist. First, a new DRS is the repository of considerable opportunity to exercise political influence to achieve quick results. Second, when a scheme has begun to fail, the DRS is the point at which the deficiencies of the scheme are first seen publicly and so draws a higher level of criticism forcing change.

Reactive short term change

In the course of this project reports on the DRS? from the past five years were requested from each of the workers compensation agencies. The reports were both internally prepared, privately commissioned or produced by parliamentary committees. They document a series of consecutive reactive reforms. From these reports it can be seen that most systems have been changed as a reaction to the previous system?s deficiencies.[225] Together with the literature on overseas schemes, they provide a useful list of reforms.

Recurring reforms to achieve specific objectives are grouped below.

Reforms instituted in Australian and overseas jurisdictions to meet commonly experienced problems with the operation of dispute resolution systems
Aimed at reducing legal involvement
? Reduce fee scales ? Introduce para-legals ? Legislate against attendance in the DRS ? Do not keep out, but forbid the payment of costs, if involved ? Make involvement dependant on agreement of ? the other party ? the other party and the decision-maker ? the decision-maker alone
Aimed at reducing delays in court systems and quasi-formal systems

225 In 1988, the Victorian Rowe Committee proposed an >investigatory system, to replace the administrative adversarial system on the basis that correct determinative decision-making was the solution to all disputes. That committee criticised its 1984 predecessor the Cooney Committee, for perceiving the dispute resolution system as adversarial and in need of judicial style determinations.

Reforms instituted in Australian and overseas jurisdictions to meet commonly experienced problems with the operation of dispute resolution systems
? New technology ? Call overs ? Pre-hearing conferences ? Multiple pre-hearing conferences ? Legislatively mandated time lines
Aimed at ensuring a worker is not disadvantaged due to a power imbalance
? Deeming provisions ? Par-legal involvement ? Pay all costs of appeals
Aimed at reducing the number of disputes
? Establishing claim payment criteria & automatically paying ? Pay first-argue later payment regimes ? Removal or widening of thresholds to payment
Aimed at reducing the number of unnecessary medical reports
? Adversarial mode of operation to investigative mode of operation
Aimed at ensuring the worker is not disadvantaged while awaiting information to substantiate the claim
? Continue or start benefits pending appeals ? Stopgap or "genuine dispute" provisions ? Cost shifting
Aimed at reducing number of appeals
? Removal of court de-novo appeal rights and replacement with an appeal on the law only. ? Clarified legislation
Aimed at increasing credibility of administrative dispute resolution
? Move to court premises ? Ministerially sanctioned independence ? Legislatively sanctioned independence ? Appointment of more highly qualified and paid DRS officers(with judicial or quasi-judicial experience) ? Move from arbitration mode to inquisitorial mode of operation ? Move from inquisitorial mode to conciliation mode of operation

While resolving the problems in the short term, many of these reforms do not resolve the problems complained of, or preclude further change from new problems the reforms create. Moves to court premises, for example, do little to improve the standing of DRSs and in some cases expose them to a hierarchical tyranny that neutralises their effectiveness.[226]

Legalisation

The third impetus for change overlays both of the previously discussed areas and is evident as a longer term cycle affecting jurisdictions inside and outside workers compensation.

Concerns over legal costs, lengthy delays and financially unpredictable judgments generates moves to informal systems.

226 Medical Panels in New South Wales are an example of where a move to a court jurisdiction did not bring an improvement in standing with stakeholders.

Informality is supposed to deliver cheap, speedy and fair outcomes. It fails to deliver on the first two, concerns are generated about the third, particularly as outcomes mirror the inconsistency and unpredictability of the previous system. From this, the process of legalisation begins.

Judicial scrutiny provokes more formal processes as procedures are regulated and intense outside pressure provokes staff to modify their behaviour to accommodate these "judicial" requirements.

Participants in the process perceive the legalisation as forcing them to protect their claims with better legal support. At the same time, the increasing judicial behaviour of is not seen to provide better outcomes as the "qualifications" of staff are questioned. The scheme or government may attempt to control the quality of decisions through guidelines and codes. This provokes potential questioning of independence.

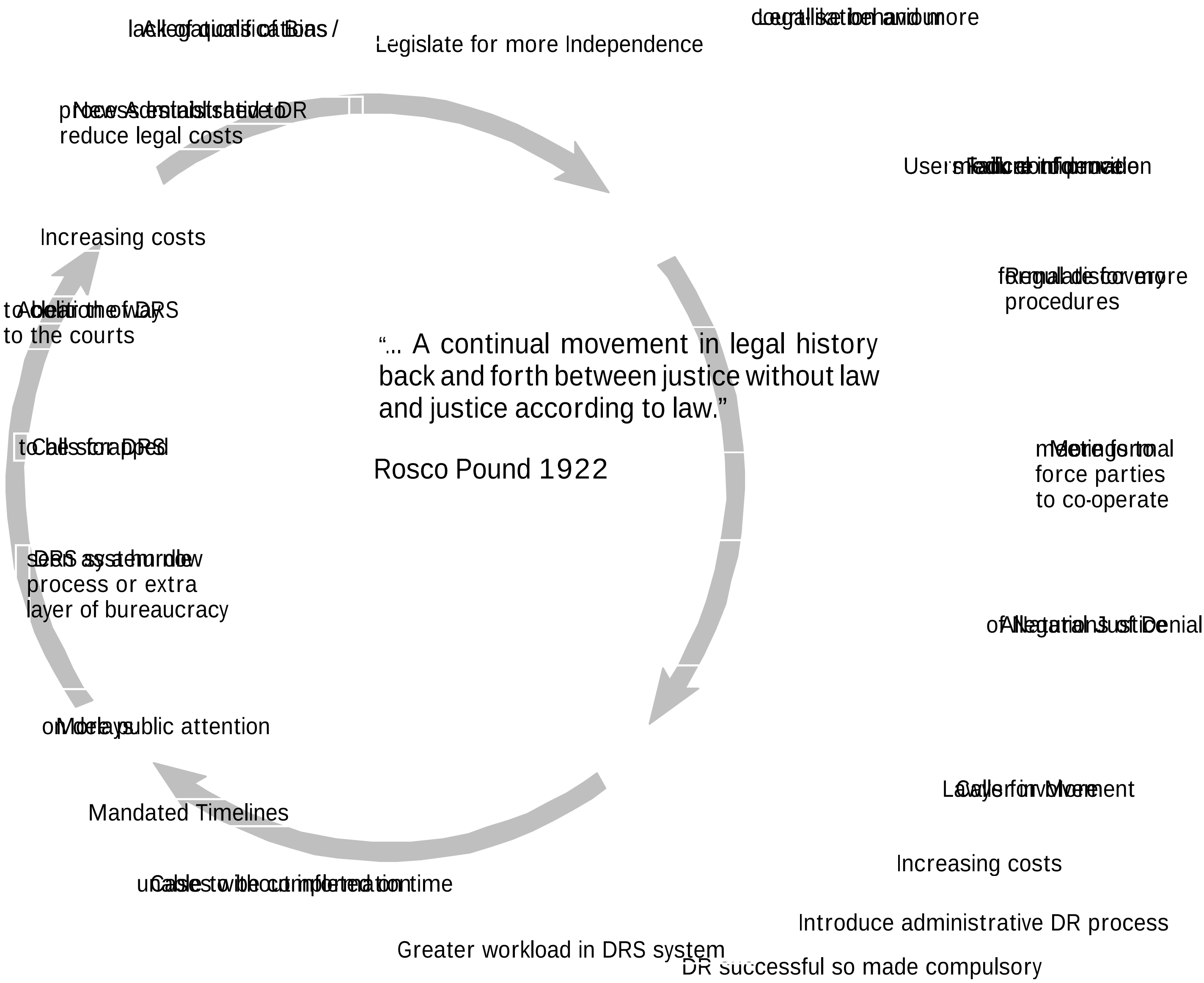
Resources dwindle as more individual effort is put into each case to "protect the outcomes" against judicial review. Delays and costs escalate and structural tensions develop. The pressure builds to establish another less formal system.

Change Represented as a Segment of a Cycle

While in reality, most jurisdictions will never experience anything like the disastrous succession of changes described above, the multiplicity of inter-connected cause and effect relationships in dispute management can be mapped. This map is useful in understanding the status of particular systems. The map lends itself to representation either as intersections in a latticework or stages in a cycle.

For clarity , figure 9 represents potential causes and responses to pressures for change as stages in a cycle. Any segment of the cycle presents common relationships between pressures for dysfunctional responses and the consequences that then provoke more pressures for change.

Figure 6 Actions and consequences in administering dispute resolution systems



This predictable process continues. As late as March of this year moves in Victoria were afoot to legalise the system. [227]

Proposals

There are options for dealing with pressures and bypassing these patterns of change.

? The most obvious is to diffuse pressures by meeting any concerns swiftly and effectively. An ongoing "better practice group" constantly consulting with stakeholders will ward off precipitate change if the group involves those with authority to immediately introduce new procedures in response to concerns.[228] This group could also have the capacity to undertake systematic research to inform proposed legislative changes.[229]

? A second, more subtle device is to pay detailed attention to issues of independence before they become contentious. Steps might include clarifying the difference between accountability and independence of function publicly, and most importantly between the agency and the DRS. This might also involve institutionalising the

227 The Proposed Magistrates Court Civil Procedure (WorkCover) Rules 1995 (Victoria)Amendment of Rule 4.02(g) stipulate that documents provided to the court to support issue of proceedings will include the date but not the details, of any recommendation or direction that the Court is required to determine under 39(1)(b). This shows the futility of any work by the conciliator to influence the next step proceedings. It also shows the court's determination to hear matters de-novo and make their own decisions. This effectively turns any preliminary processes into nothing more than hurdle delaying final decisions further.

228 This approach is taken in the courts. Rules committees constituted by judges have regulatory power to change court procedures. The changes in the South Australian Supreme Court, already described, were introduced in this manner.

229 A related example are the various offices of the workers and employers advocates in Canada which prepare policy submissions.

methods of "feeding" quality information back to the participants in the system between the DRS, the agency and the primary decision-maker.[230]

? The collection and publication of accurate statistics to protect good processes against unfair and unwarranted criticisms is another option used successfully by various DRSs. A preliminary consultative process with users defining the statistical categories is one way of avoiding subsequent misunderstandings over the functions of DRSs. It also avoids unfavourable comparisons with appeal levels or with other similar jurisdictions based on an incomplete understanding of the definitions behind the published categories.

230 The GIO Consumer Appeals Centre solicitor attends Board meetings every three months.

Internally, processes to ensure accuracy of statistical reporting are necessary to sustain outside confidence in the accuracy of published statistics.[231]

? The most vulnerable part of the DRS as already described is the level of qualification and competency of the officers at determinative level. Moves to require appropriate qualification and training; possibly matched with probationary periods to assess suitability must be emphasised. In **Victoria** the public appointment of retired magistrates to the new WorkCover Conciliation Service reassured stakeholders of competency and impartiality.

Peer review mechanisms to ensure quality will reinforce consistent practice. DRS Officers also need to be exposed to other sectors within the workers compensation environment both to avoid stagnation and the development of cliques. These cliques are one factor in driving the polarisation between legalistic behaviour and informal behaviour and which militates against consistency.

? Externally, the public profile of the DRS needs to be managed and alternative sources of sound information developed to those provided by the legal profession.

All of these options will form part of a basis for sustainable systems. Additional proposals are included in Chapter 9. In the interim, a series of debates will continue to revolve around this field. These too are instrumental in bringing about change. They are described in the next Chapter.

231 The Victorian Ombudsman personally signs off each file, ensuring accuracy and an added quality control over staff activity.

2

Contentious Issues

Several issues generated more debate than others in the course of the project and figured more frequently in the literature.

The most contentious issues related to how ADR was to be used and how DRS officers performed. Specifically whether conciliation and mediation should be:

- X compulsory or voluntary
- X binding or non-binding (ie not subject to appeal or appealable)
- X open to legal representation or only non-legal representation, or
- X avoided altogether because they only deliver compromised outcomes instead of pure entitlement.

Concerns directed to the officers performing the functions of facilitation and determination related to:

- X the composition of skills available and qualification of officer(s) at the determinative level, and
- X the degree of independence.

Some of these issues became less relevant as the project progressed. Better methods of meeting needs were identified making some activities unnecessary. An example was the need for legal representation in legal proceedings. In a Best Practice System, redirection of resources to improved education and decision-making will bring about a reduction in hearings on the merits. With appropriate pricing policies, unnecessary disputes and legal costs can be avoided. "Rights" are still exercisable under a best practice model for the few disputes that are streamed to determinative level. Legal representation does not have to be banned. Similarly, arguments about natural justice become redundant. (See chapter 4)

In schemes starting with a high legal involvement however, the debate over "denying rights" will continue, regardless. For this reason the arguments and counter arguments are included in this chapter. Schemes in transition will have to face one or all of these "threshold" issues at some time.

There are a range of other issues such as the confidentiality of ADR processes, the compellability of mediators to give evidence in legal proceedings and others which provoke much discussion in the literature.[226] These issues, however, were not conspicuous in investigations and interviews for this report. This may possibly be because ADR in workers compensation in Australia, through the sheer size of its case-load and its longer experience, has confronted and dealt with these issues already.

ADR Processes

226 See for example, Angyal, R S, *The Enforceability of Agreements to Mediate* (1994-95) 12 Aust Bar Rev pp1

Compulsory or Voluntary

Best Practice findings suggest that workers and employers(or insurers as their agents) should not be able to avoid the opportunity for mediation or conciliation of a dispute. If ADR options are not to be made compulsory, then they should be within the power of the court or dispute resolution body to direct the parties to these processes.

The standard arguments for and against voluntary processes are listed below.[227]

Arguments for and against compulsory mediation and conciliation processes

Arguments Against - Voluntary only	Arguments for - Compulsory acceptable
Mediation is only effective if parties understand the philosophy behind it which means they must embrace it themselves for it to be successful	This can be overcome with educative sessions before-hand
Needs to be voluntary to be successful	Parties need a compulsion to talk because neither side want to volunteer because it would indicate weakness
Compulsion would interfere in the negotiation process	At what cost?
Citizens have a right to have their disputes adjudicated according to law	Almost always one party is an unwilling participant and is forced to spend thousands of dollars in litigation while the other avoids a face to face discussion
	Public court resources are wasted
Other devices exist in court processes to ensure resources are not wasted	These are not effective and community resources are wasted more freely
As most cases settle before hearing through negotiation, diverting cases that would otherwise settle in private is more expensive in the long run	Private legal settlement is costly and lengthy and can exacerbate the dispute as information is withheld
	Cost-effective administrative systems can be established to reduce costs
There will be an increase in usage anyway as more parties learn about the process over time	Repeat players will avoid the process as they perceive any compromise process as more costly than a win-lose negotiation
The process will be nothing more than an unnecessary and costly hurdle for parties who will resolve their cases by trial or settlement in any event.	
Routinising ADR will reduce its flexibility and effectiveness and over time formalise it to nothing more than another court procedure with the same problems as traditional court procedures	
Repeat players will mould the process to suit themselves	This could also happen in a voluntary system
Courts will lose control over the way the law is operated with such a large number of mediators	The same could be said of a voluntary system.

227 Arguments taken from Sourdin T, *Compulsory & Voluntary Mediation*, National Best Practice Workshop on Court-connected mediation, Sydney 6 - 7 August 1994

Arguments Against - Voluntary only	Arguments for - Compulsory acceptable
in the system. They will not legitimise it and the system will fail	With a few exceptions courts do not legitimate mediation schemes in Australia - voluntary or not
Mediators will become the subject of natural justice claims if forced to certify that parties did not participate in mediation in a bona-fide manner; and penalties are applied subsequently by a court	Mediators should be subject to some sort of accountability.
Perceived lack of control at the outset will effect parties perception of the process and therefore their satisfaction levels with it	Measures in the course of the mediation based on dignity etc can offset this
Parties will not be able to choose the mediator themselves	Parties will not have the skill or knowledge to make such a choice
Repeat players will not own the process therefore will not "foster the continuing evolution of the mechanism".	Early consultation and involvement of repeat players in the design of the system will ensure that they own it; (Alternatively they will take the opportunity to sabotage it)

As can be seen from this table and from the previous chapters, most concerns about compulsory systems may be overcome with careful system design and management.[228]

A key factor in persuading critics is to emphasise that mediation or conciliation are ***processes***, that take parties from a state of conflict to a state of agreement. It is participation that is mandated, not an initial consent to agree to any later outcome. Mandatory mediation has been accepted by the legal profession. Mandatory mediation was endorsed by Victorian solicitors who were involved in the Spring Offensive and Autumn Offensives in the Supreme Court of Victoria, on the basis that:

228 See also *Preventing Disputes* for arguments for compulsory mediation. pp

?what is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come?. [229]

The problems for DRS is that the community is not familiar with the concepts of mediation and conciliation. The federal government has recommended that steps be taken to improve this understanding,[230] particularly as research and local experience show that people are unlikely to volunteer. [231]

A closer examination of the reasons highlighted by the research for avoiding mediation give a clearer idea of where educational resources should be directed. The research shows that the reasons are more complex than just unfamiliarity. Users are likely to favour processes on the basis of the amount of control they can have over the outcome. This occurs regardless of their post evaluative assessment of the alternative resolution processes.

> *"The main influence on their choice will be ?the degree to which they feel they can directly or indirectly control the outcome and the favourableness of that outcome".*[232]

Other factors also influence choice:

> *?Field studies of mediation have found a persistent discrepancy between choice and post-experience evaluation (MacCoun, Lind and Tyler, 1992; Tyler 1989a). Numerous studies have demonstrated that people who have experienced mediation evaluate it very positively, often more positively than a formal trial. On the other hand, if people are given the choice of having their dispute resolved through a court trial or via mediation they typically choose court trials. Neighbourhood-based community justice centres to which people can voluntarily bring disputes usually have very few voluntary cases, and the trial courts must mandate mediation to divert cases to such centres. Hence choices are not consistent with evaluations.?*[233]

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229 Law Institute of Victoria, *Mediation - A Guide for Victorian Solicitors*, 1995 Quoting Giles J at p 44., Melbourne 1995

230 See generally Attorney-General s Department *Justice Statement* Canberra May 1995

231 The Dispute Settlement Centre of Victoria reports that despite a voluntary mediation process being in place for over 18 months, only 11 motor vehicle insurance disputes of a potential market of tens of thousands were dealt with. Both insurers and the insured (and their lawyers) preferred the costs and delays of the Magistrates Courts.

232 Tyler T, Huo Y J, Lind E *A, Preferring Choosing and Evaluating Dispute Resolution Procedures: The Psychological Antecedents of Feelings and Choices*, American Bar Foundation, Chicago 1993 pp10

233 Ibid pp 9

Further reasons for this may be that mediation outcomes are so diverse and so unknown that they are not predictable. Court outcomes, in comparison are predictable. Lawyers attract customers by the accuracy of their predictions assisted by a court system rigidly controlled by precedent. Faced with certainty or uncertainty, claimants given the choice will inevitably choose the court system.[234]

Seen in this light, it is clear that using voluntary mediation will not result in a high usage rate.

The research also showed that the choice of parties was most influenced by the expected value of the claim. In other words, the likelihood of a better monetary result in the next forum, unfettered by restrictions on their ability to pursue costs, encouraged parties to pursue the claim further. This occurred despite an optimal experience in mediation. The studies also showed that despite negative experience of the procedure chosen, people would be likely to choose it again.[235]
There are implications for the design and marketing of future systems.

For disputes, mediation systems should be compulsory but its procedures should be transparent. They should familiarise potential clients with their basis of operation, that while participation is compelled, agreement to outcome is not. This should be accompanied by information on the likely financial outcomes in other forums.[236] (See Legal Representation below).

Binding or Not Binding

While making ADR compulsory is defensible there are strong contentions that having a compulsory process from which there is no appeal is not. Ralph Nader, an international consumerist, in a recent visit to Australia, commented adversely on US ADR systems. Systems that were both binding and compulsory institutionalised "a surrender your rights if you want to deal with us" approach. He warned that this form of ADR would be a target for change of the consumer movement, particularly if the process was buried in the fine print. An avenue to the courts must always exist.[237]

Following this visit nineteen Australian consumer organisations issued a Consumer Justice Charter in February of this year. They suggest that binding ADR processes are acceptable as long as there is an option to attend the court - in other words a voluntary process. Among other requirements they stated that "participation in dispute resolution processes as an alternative to adjudication in the courts should be conditional on free and informed consent". Wherever possible there was to be a choice.[238]

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234 See Chapter 3, where stakeholders stated their major need was predictability.

235 Tyler, pp14

236 Western Australia reported that the most important persuasive factor in introducing their compulsory conciliation and review system in 1994 was the story of a worker who found he had to pay the remainder of his lump sum award to his solicitor in fees after "shouting the pub" in celebration the night before.

237 Nader R, *Protecting the public interest in a competitive environment*, Consumer Action Dec / Jan 1995 pp16

238 Australian Federation of Consumer Organisations - Consumer Justice Charter February 1995.

This issue has also been the subject of considerable debate in the US in the context of the introduction of health reform. The reforms proposed by President Clinton introduced ADR processes as mandatory. The plan also limited rights of appeal, although appeal was still allowed in some circumstances, making ADR compulsory but non-binding. Under President Clinton's plan, a claimant could appeal their ADR outcome to a federal court but only after they received a certificate from a qualified medical specialist concerning the merit of their claim. Proposals by other senators to limit access to the courts have included:

- capping potential non-economic damage awards
- lowering lawyers contingency fees
- requiring awards above a certain amount to be paid as pensions
- making ADR outcomes binding if not challenged within 60 days
- cost indemnity rules [239]

Critics label the various plans as largely ineffective because they allow patients to sue afterwards and the two hearings make the entire process more expensive. In a bid to overcome this, one state **Maryland** allows in evidence of the first finding and it is presumed correct unless the plaintiff can refute it. Maryland?s jury trial rate was 2.2% compared to the national average of 4.7%[240] Similar concerns have been outlined above.

Legal Representation

The calls for legal representation rest on a series of assumptions. The first is that workers, generally the weaker party, will be advantaged or at least be able to compete on equal terms, if they are represented by an experienced advocate. A second assumption is that a lawyer will provide a higher standard of representation than other types of advocates.

If both of these assumptions are correct, it could be expected that workers will achieve better outcomes than if lawyers were not employed. One measure of this outcome in workers compensation will be financial.

A 1991 WCRI study of permanent partial disability claims in **New York** reported the factors that affect financial outcomes for workers.[241] This study found that lawyers:

- increase awards in cases that go to adjudication, but
- accept lower settlements for those that settle, and
- increase the likelihood of settlement.

On average given the smaller number of adjudicated cases, a worker would be disadvantaged financially by a factor of 10% by employing a lawyer.

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239 Granader, Robert , Will Health Care reform result in tort reform? Best's Review (Life / Health) Jul 1994

240 Overman, S. *Why grapple with the cloudy elephant?* HR Magazine Mar 1993

241 WCRI Research Brief, *How do Attorneys affect case outcomes?* Aug. 1991 Vol. 7 No.8

This finding supports more recent and local research into the role of lawyers in the **Victorian** Conciliation Service.[242] An analysis of file outcomes was completed between October and December in 1993 during the time that the Service dealt with most workers compensation disputes. The study found that lawyers:

- X improved the time to action a case if there were delays in initiating action
- X delayed the case once action had been initiated
- X did not increase the likelihood of a variation to the original insurer decision which would benefit the worker
- X were more likely to move a case through conciliation to the court process

Simply, lawyers were good at overcoming bureaucratic delay, but not good at improving outcomes.

However, it appears that some legal representation is better than other legal representation. A US study of closed medical malpractice claims[243] showed that there were considerable differences in settlement outcomes where different representation on both sides were involved. The study of 2896 claims from 1976 to 1988 was of the **Wisconsin** Health Care Liability Insurance Plan. The claims were dealt with by a mandatory mediation panel with most matters settled through negotiation. Only 5.6% went to court.

The study found:

- X patients without attorneys failed almost universally (5.6% success rate)
- X patients with "one-shotter" lawyers (inexperienced in workers compensation) were more successful but achieved lower payments (33.4% success rate)
- X patients who engaged (or were selected by) specialist repeat player attorneys won more often (50%) and received payments that were 10 times higher than one-shotter representation.

Health institutions and doctors defending the claims generally did better. They tended to use the same firms over time. Results were consistently better than patients even when pitted against the specialist patient lawyers. However, at least the specialist patient lawyer were able to counteract the advantages of the doctor lawyers (defence)

The conclusion to be drawn is that in general legal representation will not deliver better financial results unless it is provided by specialist firms.

Legal services

While legal representatives may not deliver improved financial outcomes in all cases, they do fulfil other important functions. They inject legal expertise into the selection of information in support of a claim. Under an adversarial system they also advise and

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242 Wallace, N & Hall M, Managing Disputes - A Report on Factors Governing the Disposal of Cases for the Victorian WorkCover Conciliation Service, Transformation Management Services March 1994 p16-18

243 Lowes, Robert L, *Can Malpractice Really be Kept Out of Court?* Medical Economics V71 No16 pp106, Aug 1994

manage the timing of the presentation of information, and they act as guides, a role acknowledged by the Industry Commission.

> *?In addition, lawyers provide a valuable information resource for injured workers.?*[244]

In **South Australia**, this role is performed by non-lawyers. The WorkCover Corporation employs "worker advocates" who advise some 17% of workers appearing in Review hearings. In Canada, long-standing worker and employer advocacy offices assist both in navigation and in advocacy before the various Boards.[245]

> *..the Canadian system, while recognising the need to consult or utilize the legal profession in the adjudication of a work injury claim, does not yet believe that a worker or employer needs to have a separate attorney in order to ensure equitable settlement of issues.*[246]

The various unions all cited examples of union employed advocates, some legally qualified and some not, but most with long experience in employee relations, as more than competent to perform any advocacy function.

The Industry Commission suggested the following.

> *The need for representation can be reduced if responsibility for explaining workers and employers' rights and entitlements is vigorously adopted by another party, possibly the scheme regulator or trade unions groups. If the quality of service provided to participants is sufficiently high, there should be little need for legal involvement. The early exchange of information, and the avoidance of confrontational processes would also decrease workers need for legal advice.*[247]

The traditional market for legal services in Australia has been dominated by the legal profession. This has meant standards of service and pricing that have mostly been unchallenged. In concert with the opening of the legal market in other areas of the law, the advent of new groups in workers compensation able to perform the navigational and lower level advocacy functions, may result in better outcomes; both in a reduction of costs and generally for workers.

Determinative level

Composition

244 Workers Compensation in Australia, Report No. 36, Industry Commission 4 February 1994, Australian Government Publishing Service, Canberra

245 Association of Workers' Compensation Boards of Canada Comparison of Canadian and United States Workers Compensation Systems 1993

246 Interviews, NWU, CFMEU, ACTU

247 Industry Commission *Workers Compensation in Australia Report* No 36, 209 Canberra

The determinative level of the dispute resolution system must be structured and staffed to convey to the participants that decisions are credible. This is possibly the most crucial part of the dispute resolution system.
Decisions send messages on how the act is to be interpreted, on what approaches are acceptable and what are not. This level also performs a major role in supervising claims management and setting standards. Decision content and decision-maker behaviour are major topics of discussion and excite activity to promote changes to the system possibly more than any other dispute resolution activity. This level is also subject to administrative law review by a court because its decisions can affect the livelihood of workers.[248]

The composition of this level is therefore very important. The following table describes options for the structure of this level, composition of panels, where used and the advantages and disadvantages of each variation.

248 The most recent review in Australia was of the Medical Panels by the Full Court of the Supreme Court of Victoria in October to this year 1995

Advantages and Disadvantages of Determinative Level Structures

Option	Advantages	Disadvantages
Single lay person	Non-threatening and informal; usually works under control of workers compensation agency so costs can be contained. Will have broader perspective and possibly better experience in work-employer field If close to facilitative level physically and in time, more likely to ratify facilitative level	Tends to legalistic behaviour over time. Target for lawyer initiated administrative review. Judges more likely to dictate procedural processes which in turn legalise process. Insurers may not respect office and may not comply with decisions, causing behaviour to become more extreme.
Rotating function with facilitative process (Industrial Relation Commission model)	Enhanced consistency of approach and of enforcement of claims standards. Better understanding of nature of dispute due to higher exposure	May still tend to legalistic behaviour, but in both modes jeopardising the effectiveness of facilitation.
1. Legally qualified person	Similar advantages in terms of speed. More acceptable to next level review. Able to prepare written decisions addressing legal issues.	May tend to legalistic behaviour (excessively long and delayed written decisions) and to allowing legalisation of process mimicking court procedures. Not sufficiently in touch with need for standards supervision.
2. Magistrate / Judge	More acceptable to culture and based in an independent court. Usually trained to provide consistency, uphold natural justice and to ensure rigid adherence to legal entitlement.	Distanced from workers compensation field and not sufficiently aware of issues outside particular case. May be over-legalistic. Will usually exercise cost discretion and discretion to refer, in favour of legal representation, oral evidence and adjudication processes over ADR or medical panel processes.
3. Panel or tribunal of three; two lay usually representing employer and worker and one legally qualified person / or panel of medical specialists with lay or legal membership[249]	Preferred model in private insurance industry schemes; and in Commonwealth administrative schemes.	Delays and cost in assembling panel. Can also become legalistic unless carefully managed and if there is a practice for the lawyer to write all decisions.
4. Combined function with facilitative function using senior experienced decision-makers and allowing appeal to head of level (Victoria)	Decision power and perceived associated status attracts high calibre people to role, giving option to appoint people with more relevant experience. Ability to resolve matters should be much better. Can use determinative power immediately if necessary and ensure quick turnaround times. Can "force" compliance by strong repeat players where necessary.	Confusion over role by stakeholders. May influence participation at facilitative level if parties feel that information disclosed may be used in decision-making process. Concern over legality of decisions and dissatisfaction with limited appeal options.

249 See *Medical Panels - Securing Definitive Advice in Workers Compensation Disputes* for a discussion of different medical panel models and roles

Several of those interviewed for this project are the heads of Australian tribunals. Many have experience of various tribunals, including workers compensation. In the absence of any benchmarks, their views were sought on the best practice model.

The general consensus of this group was that multi-member panels (Option 3) were preferable if the tribunal was to avoid the stakeholder criticisms that inevitably lead to the demise of DRSs. [250] This preference was restated by the Administrative Review Council. (See Chapter 4).

250 Queensland's Medical Board model seems to support this approach. The Boards are comparatively long lived, handle a comparatively small number of disputes and have relatively swift turn-around times. However, they are not preceded by facilitative processes but by highly effective screening and good claims management. They also have a high customer dissatisfaction rate relieved by the availability of common law. (See Attachment B)

Multi-member panels were better at delivering quality outcomes and in preventing legalistic behaviours. While costs and delays are hindrances to this particular model, they could be managed. Effective facilitation could reduce the need for an excessive number of costly panels, and delays could be limited through better caseflow management techniques. They also pointed out that it was preferable to require that decisions had to be written and sent out on the same day and that this task be rotated between the members.[251]

These views accord with overseas experience. The **Canadian** schemes have a long tradition of stable determinative panels. In contrast, the new **Texas** scheme has single determinative officers. To achieve consistency and legal accuracy Texas uses employed lawyers to subsequently vet their decisions and rewrite them if they do not accord with the law. This has been the cause of some tension. [252]

A better approach may be to train the determinative officers in decision writing and the relevant law and to use panels. Panels of constantly changing members are less easily criticised than non-legally qualified single operators.

Consistency Between Levels

While there are concerns over the structure and composition of the determinative level, there are also concerns over its relationship with other levels, particularly where there are separate facilitative and determinative levels. Problems here can also affect the credibility of the entire system. They are:

- X demarcation disputes between the two groups
- X a "them and us" mentality; or "status" problems
- X different diverging enforcement of primary decision-making standards which shown in low ratification rates of first level recommendations.

Where these problems exist, they are obvious to stakeholders and increase their concerns over the lack of consistency within the system. They also bolster frivolous claims on the off-chance that a "lone ranger" will give a favourable decision. They encourage contempt from the other party and lower the standing of the system when this happens. The problems are equally applicable to different determinative officers across a level.
These problems are often generated from by approaches to the meaning of independence between the levels.

Independence

Accountability vs Independence

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251 This accords with a view that South Australia s Review Panel failed because it quickly relapsed into legalism after legally qualified officers took over decision writing and were inevitably caught up in delays.

252 Barth P S & Eccleston S M, Revisiting Workers Compensation in Texas - Administrative Inventory, Workers Compensation Research Institute, Massachusetts, April 1995

While independence or freedom from influence is important, there is also a need for agency budget managers responsible for the DRS to be accountable for the use of resources, improve quality and performance. An insistence on this requirement was described as interference in some instances and as having the effect of encouraging resistance to any moves to improve practices on the part of those making determinations.[253]

A review of the historical information provided to this project shows a distinct pattern. In the past, and in environments lacking strong leadership, determinative officers have reacted against perceived pressures to improve performance by developing their own method of undertaking their function. The resulting isolation has caused further problems that have had implications for the system. Officers either became more legalistic and tended towards formal behaviour or they allowed the plight of the claimant to influence decisions more than was appropriate. Both types of responses became entrenched as outside criticisms escalated. Further attempts by managers to achieve consistency made matters worse.

These patterns are common to all DRS including courts. They seem to reflect a failure in understanding of the different roles. First, the role of the manager to account for resource use and performance outcomes and second, the role of the determinative officer to make decisions without fear of repercussion, resource related or otherwise.

In workers compensation, the consequences are more serious. This jurisdiction is more vulnerable to pressures for change than other areas, (See previous chapter). The culture in which the determinative function must operate will react and demand change if decisions are seen as legalistic or unreasonably welfare oriented.

The standard-setting role of determinative officers is also ignored if an isolationist case-by-case approach is taken.

This section has only outlined the independence issues very briefly. There are no simple answers. Adopting the quality measures outline in Chapter 4 may assist in improving consistency. Other approaches should be adopted to clarify the standard-setting role of the determinative level, preferably in legislation.

An approach used in the Banking Ombudsman Scheme?s "terms of reference" is to require the ombudsman to consider:

- the law
- banking practice, (representing commercial practices, the banker culture and industry standards of operation)
- what is fair and reasonable in all the circumstances[254]

253 Interviews, WorkCover Corporation South Australia, Victorian WorkCover Conciliation Service

254 Australian Banking Industry Ombudsman Scheme Annual report 1991, Melbourne. These terms of reference were based on an extensive parliamentary review done of the UK scheme.

These legislative provisions should be matched with publicly known performance targets in resource usage to satisfy the accountability requirements of budget managers.

The trappings of independence also need to be clearly shown to workers and employers to maintain confidence that decisions are indeed fair. This means separate premises, separate business stationary, and clear protocols to protect from allegations of bias. There should also be prior written commitments on the part of the agencies to provide resources appropriate to fluctuating case levels. This will avoid criticisms that the DRS is being starved of resources for punitive reasons.

In the **Commonwealth**, the independence of the reconsideration process has come under scrutiny. In efforts to offset criticisms from unions that the function is not independent, Telstra has this year centralised control of its reconsideration function away from the line control of managers in charge of primary decision-makers.[255] In addition, "delegates" are drawn from a different part of the organisation to that where the primary decision was made.

Telstra is also subject to the licensing reporting requirements of the Safety, Rehabilitation and Compensation Commission.[256] These performance indicators are:

- percentages of reconsiderations completed within certain time lines after applications made
- reconsideration affirmation rates of primary decision-making outcomes
- Administrative Appeals Tribunal affirmation rates of reconsideration outcomes

These statistics are used as the basis of comparison between Licensed Authorities and ComCare. On the assumption that the AAT is truly independent, high affirmation rates would indicate that the reconsideration process is relatively unbiased. High affirmation rates between reconsideration and primary decision-making would indicate fairly high standards of decision-making and signal other reasons for the large number of applications for reconsideration. Conversely disparities between the three levels would show possible biases.

While agency performance information is known, it is not published in the Annual Report. In line with the above principles an in-house process such as reconsideration may benefit from the publication of this type of information, particularly if it shows high affirmation rates. (A problem may emerge, however, if the independent body, in this case the Administrative Appeals Tribunal suffers from the specialisation problems outlined in Chapter 3.)

Compromise or Entitlement

The debate over independence gathers momentum if there is a perception that ADR processes are used to achieve outcomes that are less favourable to "weaker parties" than court processes. Put simply whether ADR is a vehicle to promote compromise over pure entitlement.

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255 Interview Telstra

256 Safety, Rehabilitation and Compensation Commission Annual report 1993-1994 pp 89

The reasons given for this position are that:

- ADR looks for a win / win solution. This usually translates to half, when for one party to receive their "entitlement", one party must lose,
- adversarial systems operate to achieve optimum results, vigorously testing evidence. This is not a feature of ADR systems.

The opposite view is suggested by Fisher. He considers that the adversarial process often ends in negotiation and that this negotiation is limited to the confines of a legal solution.

> *'This concession hunting process tends to foreclose the possibility of generating creative options - the possibility that the pie can be enlarged through joint problem solving.?*[257]

Facilitative officers interviewed for this project were all aware of this as an issue. Most expressed the view that entitlement was the base-line from which further options were developed. The practical outcome of taking a compromise approach was that it encouraged a view from the insurers that all cases were negotiable and did nothing to improve primary decision-making standards.

Organisation Relationships

The survival of DRSs depend on the structural relationships between the DRS, the workers compensation agency and the stakeholders. DRS's are in the position of dealing constantly with disputes that have arisen from poor claims management. Repeated problems will lead them to try to achieve changes which, unless the proper protocols are in place, will attract high levels of resentment.

Experience in other jurisdictions shows that where the DRS takes on a policing role over claims managed by its adjacent administrative body, tensions also run high. Where that body also has responsibility for providing advice to government on dispute system design, the DRS, or the tenure of its officers, is likely to be short-lived. Examples of this phenomenon are to be seen in equal opportunity, and in the banking sector and in police complaints.[258]

In workers compensation, structural relationships are driven by the fund management model. Australia offers a mix of state managed funds either performing the claims management function or leaving it to insurance companies.

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257 Fisher R Beyond Machiavelli - Tools for Coping with Conflict, Harvard University Press 1994, pp 256

258 The Victorian Equal Opportunity Commissioner was ostensibly not re-appointed by the Attorney-General following criticisms over equal opportunity cases run against the Attorney-General s department. The Police Complaints Authority was abolished following the publication of reform proposals to the Victoria police. The Australian Banking Ombudsman s jurisdiction was considerably reduced following decisions that cost several banks over 10 million dollars.

In recent years a move from a "WorkCare" model, where claims management is in-house to a "WorkCover" model, where claims are administered by insurers has been the most significant change in workers compensation. Workers compensation agencies under the latter model now play a much more regulatory role. This entails using a range of incentives and disincentives to ensure that standards expected under the legislation are met.

The role expected of the DRS in this scenario has also changed. From playing "policeman" to the workers compensation agency when it managed claims, they now take the less controversial role of providing information to the agency. The "new" policemen are now the workers compensation agencies.

These structural relationships also affect perceptions of independence. Where included as part of the workers compensation agency, the DRS will not be highly credible if the agency operates a WorkCare model. Workers and employers will be constrained by concerns that "decisions" over entitlement will be constrained by the very agency that made the decision being reviewed.

However, under a WorkCover model the perceptions will change. The DRS has a legitimate role in providing information that can be used by the new policeman. In these circumstances concerns that the DRS is not independent of the workers compensation agency should not be as extreme.

The best example in Australia is in the **Northern Territory**, which has developed such a high level of confidence in its in-house voluntary program, that it has captured over 65% of the dispute market. The same personnel also "police" claims management standards.[259]

Overcoming perceptions of bias

Allegations of bias are high on the list of complaints about determinative levels. There is a need to clearly address the perceptions of users and to introduce system features that reduce the possibility of bias. A major issue is the selection process for determinative officers.

In **Michigan** an effort has been made to select adjudicators more systematically, even though they are appointed through a political process. This is hoped to end the perception of bias.

> *There is universal agreement that political appointment of magistrates is a mistake.*[260]

The concern is that when political fortunes change, the standing of those selected in this way will fall and their function will be affected detrimentally. New legislation to remove them may become inevitable.

In **Victoria,** the Attorney General has appointed a committee of eminent lawyers, with the task of interviewing and selecting magistrates. Those selected are automatically appointed. While this may overcome perceptions that appointments

259 Other experience shows that these two roles should also be separated with the DRS limited to providing information to another body which should take policing action. Northern Territory seems to belie this and other evidence supporting an alternative "best practice" statement was not found.

260 WCRI Research Brief, Workers' Compensation in Michigan March 1990 Vol 6, No.3

are made for political reasons there are some concerns over the qualification of those selected.

The lawyers on the committee are assumed to possess the skills necessary to recognise aptitude for judicial duties.[261] An "arms length" process, however, may not be enough. The common criticisms that determinative officers are not specialised also need to be met. One method would be to require pre-requisite qualifications.

Selection processes that overcome allegations of bias require:

- X independent selection on merit
- X training that requires commitment in time and resources on the part of the applicant
- X a probationary evaluation period
- X a clear list of qualifications and capacities and a search process capable of finding the appropriate people

261 Interview P Cain Courts Administration Justice Department 9 May 1995

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Transition To Best Practice

In the course of this project three States: **Tasmania, South Australia and New South Wales** have initiated substantial changes to their dispute resolution systems. Tasmania is moving to introduce conciliation as a formalised process at the work site. South Australia is taking the legalism and formality out of its existing process and is moving to introduce more informal processes, although under the umbrella of a court system. New South Wales is making its conciliation services compulsory and is diverting more medical questions to its medical panels. Each of these changes will be in line with some of the best practice options outlined above.

Establishing new systems

Legacy Issues - Backlogs

Typically, new systems are beset by back logs left by the previous system, by cultural ignorance over the requirements of the new system and animosity emanating from a natural resistance to change. New systems are rarely provided with the resources to handle the increased number of cases. Resources such as technology, staff and the administrative systems to support them often do not exist. Experience in Australia and elsewhere points to techniques that are effective in addressing these transition problems.

Cases from the previous system need to be quarantined and special resources and administrative processes applied to completing those cases within a published time.

This approach has been used quite successfully in both **Victoria**, for the transition from Common Law and in **Western Australia** for the transition from the Workers' Compensation Court. In both those examples special staff were allocated, given special premises and titles and specific targets for completion.
This approach enables a new system to start afresh with new procedures, and to be given time to establish a new culture. The process also prevents the older cases from sabotaging the success of the new system [253].

A similar process was applied in Victoria in 1990 to manage the transition from WorkCare to WorkCover, with the establishment of a "Legacy" team which was set the objective of reducing the backlog. The team was provided with additional staff

253 Gardiner J, The Victorian WorkCare Appeals Board - An investigatory Model, *Torts Law Journal* v1 No1, pp154.

and given separate premises. This quarantining approach injected a sense of urgency and the targets were indeed met.

In general the quarantine method is typically used in court and tribunal case flow management exercises in moving from traditional court listing processes to new case flow management procedures [254].

Resources and Technology

The main danger to new systems is an escalation of cases awaiting resolution. This can be due to a number of factors including attempts by insurers, lawyers or employers to "rush" the system for any number of reasons.
Problems can be avoided by setting a commencement date some months into the future to ensure that resources, technology and administrative procedures are well in place. The knowledge, training and selection of staff is also crucial.
When systems are rushed there is a tendency to re-appoint people from previous systems which again can tarnish the image of the new system and undermine the establishment of new relations with stakeholder groups and a better public image.

Case Management

Case management and the management of paper in Workers Compensation dispute resolution is clerically intensive. Appropriate technology can provide the means of relegating paper management to an automatic process. These systems need to be built on good case flow management principles.

Two local technology supported system exist in Australia, one in **Victoria** and a recently completed system in **Western Australia** which could serve as minimum standards for new systems.

Sustaining and Improving Current Systems.

Several problems affect dispute resolution system performance and can hasten their downfall if not attended to on a regular basis. These include:

- the stress of those involved in dispute resolution
- poor communication with stakeholders
- poor feedback to claims managers regarding the quality of primary decisions
- lack of regular monitoring and corrective action throughout the system.

While it is not popular to discuss stress management in administrative or government related work, the behaviours that stressed staff display can be a major cause of system failure. These behaviours seem to start to occur at stress levels far below what would be recognised as medically definable stress.

Staff working in environments where emotions can run high or where the volume of work is not being managed adapt to these problems in different ways. In Workers Compensation, criticism from external sources falls on the dispute resolution staff, particularly those involved as ADR facilitators and those making streaming decisions. Poor reactions to pressure to move high volumes of work seem to fall into two types:

- Staff may become more legalistic in their approach to disputes. This tends to influence participants to call for more legal representation.
- Staff become more "social welfare" oriented. They expend more time assisting workers to cope with problems that are related to their injury but unrelated to reaching agreement on compensation or return to work. This tends to result in delays in finalising cases and more calls for ADR to be bypassed in favour of determinative forums with legal representation.

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254 This approach was also successfully applied in the Family Court in 1987 paralleled the introduction of new case management procedures which were eventually adopted nationally.

Good case management includes a recognition of the causes of inefficient coping behaviour and should include training in techniques to minimise them. Useful techniques take the form of:

- regular debriefings,
- regular case review meetings,
- regular access to professional consulting services,
- co-mediation sessions,
- training and structured communication and feedback sessions.

Each of these devices are present in the various systems in Australia. They have reached a fairly sophisticated level in the Department of Justice - Dispute Settlement Centres in Victoria [255] Case review meetings and debriefing sessions are compulsory.

In some other systems dispute resolution is only undertaken for three days of the working week. The other time is devoted to writing decisions, training, case reviews, other aspects of case management and keeping up to date in specialist technical areas.

Dispute resolution staff reported in conciliation and in mediation systems that they believed that they performed optimally when no more than two matters including information collection and preparation were to be completed in any one day [256].

Managing Stakeholder Concerns

Many dispute resolution organisations have advisory groups with representatives from all stake holders meeting several times per year. These forums offer an opportunity for emerging problems to be aired and subsequently dealt with.

Regular communication with stakeholder groups ensures that representatives can understand operating procedures and go back to their own organisations to defuse concerns over the activity of the dispute resolution staff. Advisory groups also provide an excellent forum for disseminating new procedures and for testing and gaining acceptance for new ideas.

Quality

Total quality management requires that continuous improvement processes be put in place. Some of these concepts were dealt with extensively in *Preventing Disputes* [257].

Essentially, techniques of communication need to be put in place to ensure that problems are dealt with swiftly, their causes identified, new approaches tested and solutions fed back to staff. Total quality management requires that accountability for the decision rests with those making the decision, that support for that decision making be provided by the rest of the organisation and the systems and procedures which under pin it.

The use of quality management and continuous improvement techniques should be developed for each scheme by the staff of that scheme. Several useful techniques have been trialed in Australia:

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255 Interview, Radish M.

256 Interviews, Conciliation Service staff: Western Australia, Victoria 1995

257 Wallace N & Hall M, 1993

? Case notes are useful to educate both in house and external participants about the process.

? Recently videos have been introduced in Victoria as another means of improving understanding and consistency from all participants.

The Federal Government is equally concerned with quality in ADR. It has announced its intention of establishing a specialist Advisory Council,

> *to ensure high standards in alternative dispute resolution and to develop informed policy advice for Government on unresolved issues about the use and regulation of alternative dispute resolution.*[258]

In view of the large caseloads in this field, particularly in comparison to other jurisdictions, the workers compensation industry will offer a large body of practical experience to any advisory group. In addition, as such a group may influence future legislation, the Heads of Workers Compensation Agencies should consider making representations to this group of an appropriate form.

National Cooperation and Consistency

It became clear in the course of this project that many of the Australian schemes were dealing with common concerns and issues or attempting to find solutions to problems that had been addressed by other jurisdictions.

Knowledge of scheme operations in other states is generally superficial and lack of details about how they integrate into compensation policies and benefits is a major reason why successful techniques are not picked up by other schemes.

Our discussions with senior staff from each scheme has assisted some recent initiatives to proceed that incorporate lessons learnt in other places. We believe that continued future exchange of experiences could be of great benefit.

To this end we recommend that Heads of Workers Compensation Schemes establish a working group to examine implications and practical implementation issues from the Best Practice model and examples. We suggest a division of responsibility based on existing expertise closest to world best practice in each jurisdiction.

Our suggestions for this division of responsibility in line with Best practice features are given in Attachment B.

A range of other measures to increase contacts are available: from more officer level contacts between schemes at conferences, to the formal interchange of personnel, and regular news forums (Internet) specifically directed to this end.

Training and Selection of Dispute Resolution Staff

Most schemes in Australia and overseas have experienced difficulty in selecting appropriate staff. This is less a reflection of the quality of available staff but more a reflection of the lack of suitable training apart from "on-the-job" training.

The credentials of dispute resolution officers are often the source of criticism and attack on otherwise well functioning schemes. Credibility is becoming even more of an issue in the more populous states as a mediation option is being promoted for all manner of disputes including: building, childhood abuse, civil law, residential tenancies etc. More professional "mediators" and "conciliators" are advertising

258 Attorney-General s Department - Justice Statement, Canberra, May 1995 pp31

their professional qualifications in the law, accounting or engineering, to establish their credibility.

Facilitators and determinative officers may have some qualifications but most likely these would not be related to mediation. Mediation training courses are now available from many tertiary institutions but these need to be nationally recognised to overcome local concerns about qualifications and experience.
We propose that a national accreditation scheme be established. The scheme should be attached to a university of some academic standing in the field and the course should be similar to that run by the Insurance Council of Australia.[259] Credentials, Course structure, Qualifying requirements, affiliate, associate.[260]

We have raised the possibility of mounting a national accreditation program with Bond University along these lines. Bond is recognised in Australia for its expertise in ADR training. A draft proposal has been distributed to all jurisdictions.

Model Legislation

As identified above a major source of disputation is interpretation of the law relating to Workers Compensation. Opportunities for legalizing schemes arise from difficulties in interpreting the terms used in dispute resolution systems, and from the need, exploited in the legal market, to explain fresh versions of revised and abolished schemes.

We propose that to overcome these problems and to assist transition to the best practice options detailed above that a model Act be developed. The Model Act should include consistent terms and be drafted in plain English drafting style. The development of this legislation should be assisted by representatives of all bodies involved in dispute resolution in workers compensation, following the process suggested by the Access to Justice Inquiry.

Industry Commission recommendations

Recommendations relating to performance in dispute resolution

> *The proposed National WorkCover Authority should monitor all schemes dispute resolution processes, and publish performance standards to assist in identifying 'best practice' and in countering possible erosion of benefits.*
>
> *For all schemes the (proposed) National WorkCover Authority should: monitor scheme performance relating to:*

259 See General Insurance / Insurance Broking Course Guide 1995, Australian Insurance Institute

260 Also see Attorney General's Department Victoria, Mediator Selection Guidelines - Dispute Settlement Centre Program,

- *dispute resolution processes*[261]

Performance Standards

Performance standards were discussed in detail in *Preventing Disputes.* These standards were aimed at quantifying practices that avoided unnecessary disputation. Standard or performance indicators were identified at a system level, a team level and at an individual level for facilitative processes, medical panels, primary decision-making and workers. These are reproduced in attachment C.

In lieu of the establishment of a National WorkCover Authority, the Heads of Workers Compensation Agencies may consider adopting a set of consistent standards across all jurisdictions.

The industry Commission also drew attention to the imbalance of power between workers and employers / insurers.[262] Moves towards providing alternative sources of navigational assistance and advocacy , as well as the development of professional standards in the conciliation and mediation processes need to be supported and consolidated.

261 See Industry Commission *Workers Compensation in Australia* Report No 36, Canberra 1994 7.2.7 D3

262 See above

Attachment A - International Best Practice Standards

This attachment outlines the common themes in measuring success in dispute resolution schemes, particularly in workers compensation, in Australia and overseas.

This paper is intended to be used for the purposes of discussion, to assist in developing a basis for comparative bench-marking for Australian workers compensation jurisdictions. There are legitimate concerns that policy differences between the jurisdictions and differences in the way they define and count cases or events may invalidate direct comparisons based on currently collected statistics. Some of the issues that have already been identified as needing to be taken into account for comparative purposes are:

- Increased numbers of claims in jurisdictions that allow claims for lost wages for periods less than two weeks
- Increased number of disputes in jurisdictions that number disputes according to section of the act rather than according to the number of claimants.
- Lack of information about sections of the dispute population that if known would affect the overall figures, ie exempts use of legal representatives in South Australia.
- Variations in benefit structures that are reflected in workers being on benefits for longer periods or shorter periods and showing higher potential for disputation.
- Legislative requirements that provide interim benefits while further information is collected and their effects on acceleration of primary decision-making and dispute resolution procedures.
- Cost sharing arrangements between court administrative bodies and workers compensation agencies

Preliminary comments

Before discussion on best practice dispute resolution can occur, agreement is needed on the meaning of common terms. This is not as simple as it seems.

Even simple conclusions such as: "The resolution rate is high, they must know what they are doing.." can be flawed. In dispute resolution there are complicating factors.

First, there are always three parties involved, the two disputants and the third party neutral charged with "resolving" the dispute. Any one of the three of these or any combination of two could resolve the dispute. In different circumstances, the costs of the resolution may shift from the dispute resolution body onto the parties despite the measures showing that a "resolution" had occurred.

The second factor is that disputes are dynamic. They change according to time, to the amount of information shared between the parties and according to the amount of attention spent in checking original processes. Some just go away. Some become increasingly complex and require large amounts of energy and expense to resolve. A measure of two resolutions does not reflect this disparity.

The events that occur in the process of resolving a dispute have tended to be used to define the components of "claims" and "disputes". Often there are marked differences in the way these terms are used in different jurisdictions. In some places, simply lodging a piece of paper generates a "claim" or a "dispute". The terms used in most jurisdictions are descriptors of paper initiated events. A claim is made when a "claim" form of some type is lodged.

The real eligibility of that person for workers compensation or the existence of a work-related injury to support the claim cannot automatically be assumed. Accordingly, the number of claims cannot be used to reflect the state of work-place injury. Similarly, dispute numbers are defined by the number of "appeal" forms, "conciliation" forms or "review" forms received. Outcomes, even if only paper notifications of settlement, are often given the same weight as those where the dispute resolution body did a lot of work. In all these cases the existence of a piece of paper does not show the actuality of what is really happening.

Effective improvement does not occur by adding resources or refining processes that are not understood. And, if the performance base measurement is unreliable, improvement cannot be reliably measured.

In trying to get reliable measures, the first question that must always be asked is:

- has any "real work occurred"?, and secondly
- who has actually done it.?

The answers should reflect measurements of *real* events. They should measure units of effort that reflect roughly equivalent costs. Three areas have proved most fruitful in generating comparative measures. These are: cost, quality of outcome and delay.

Measures of Unit Cost

authentic disputes	"Dispute" is a term commonly used when either party has a grievance that may be nothing more than the result of a mistake, or a misunderstanding. **Real disputes** are those where the parties have shared all the information, but remain at odds and require the intervention of a third party.
processed or artificial disputes	These are paper initiated disputes that arise because the legislation has an automatic process that requires lodgment before any of the information is collected; or is used to force parties to collect information or make decisions in lieu of other regulatory methods.
Measures	- Claims numbers - Lodgements / 100 claims (Process Disputes) - Disputes / 100 claims (Real Disputes)
resolution	This is where a member of the dispute resolution body actively resolves a real dispute; **not** where one party withdraws or decides not to go on with the dispute and **not** where representative parties negotiate an outcome for rubber stamping by the body, without the participation of the body.
Measures	- Resolution rate by dispute resolution body - Disputes withdrawn (Process and Real) - Private resolution by consent (with Orders or Without)

Fewer disputes will generate less cost. In this context high disputation rates or a large number of issues in dispute per claim for compensation are not desirable. If too many artificial disputes are generated there will also be high flow-on costs to workers, employers and insurers. Removing artificial disputes is a preliminary objective to instituting better methods for resolving authentic disputes.

Cost drivers that will also have the effect of increasing the number of disputes as well as increasing their cost of resolution are:

- legal representation, and
- court involvement

The research outlined in the Report clearly shows that these two factors increase costs.

Quality of Outcome

Measures of quality relate to durability, equity and client satisfaction.

Where dispute resolution processes are correctly performed, the causes of conflict between parties will be removed. Often, the cause of conflict is poor communication. In the best outcome situations, the parties will be able to resolve any future issues themselves because the avenues of communication have been opened. This would mean a better relationship between the worker and the employer; or between the worker and the insurance claims officer. It should also mean that the opportunity for recurrence of the conflict will be minimised.

A durable outcome is a stable outcome. A high frequency of these types of outcomes will be shown by a low rate of "reopened" cases, or low frequency of attendance by the same parties.

Measure - Re-opened cases (Frequency per 100 Real disputes)

Equity does not relate to the views of either party but relates to the relative outcome for a case when compared to other similar cases. To an extent, measures of equity must be interpreted subjectively, but they can be based on clear statistical analyses of outcome information for cases of different types. If outcomes vary in comparison to other similar cases and trends highlight continuing high variances then equity may be an issue. Care must be taken to distinguish skews in outcome results which may be the result of poor claims management standards rather than any apparent bias on the part of the dispute resolution body.

Measure - Variance of outcomes

Client satisfaction is measured using regular surveys conducted after the process is complete. The research shows that typical criteria include conciliator / mediator's ability to be impartial, the mediator's level of sensitivity to client's feelings and distress, the mediator's ability to remain focussed on the issues, and the mediator's ability to provide enough information for informed decisions. The extent to which clients feel empowered during the process, and the effect of the process on relationships, are `additional identifiable dimensions that contribute to client's satisfaction?. [263]

(The Federal Bureau of Consumer Affairs is currently establishing a working party to consider uniform standards for all alternative dispute resolution systems in Australia. The Government has proposed future monitoring according to these standards.)

Delay

Customers of dispute resolution systems are most concerned about delays. Measures need to be taken based on their perspective. The most basic measure is the length of time for the entire process. The start is the injury or accident or crime that began the process. The completion is when full enforcement or compensation has actually been received. Most measures of delay reduction are based on this perspective.

A different focus but one which is just as important is the time that the actual dispute resolution body takes to complete the dispute from the time that the parties are ?read" to proceed. In courts, this time is typically marked as the time that a "certificate of readiness" is lodged or a "notice of listing" is requested. The distinction is drawn by courts and tribunals to differentiate the delay that they are responsible for and the delay for which the parties are responsible. Generally, the customers do not draw the distinction and the court or tribunal is accused of causing all the delay. Knowledge of where the delay is occurring can assist the court in introducing procedures to reduce party generated delay.

In workers compensation this type of delay translates to slow information (medical reports etc.) collection by either of the parties. If there is no control over the extent of information collected or the time it takes, there are usually high disputation costs.

Typical measures include:

- Time of event / injury to time of completion of the matter - Includes enforcement
- Time of start of process to time of completion. (If the process is two stage the time of start to completion for each, but the overall time should be included as well)
- Number of cases settled at different stages of the process. If more are settled later, the question has to be asked why they could not be settled before - this also has cost dimensions.

263 Kelly, J B, Gigy, L., *Client Assessment of Mediation Services (CAMS): A Scale Measuring Client Perceptions and Satisfaction*, Northern California Mediation Centre, 1994

Court statistics are the subject of considerable scrutiny in Australia at present. There is work being performed to establish benchmarks for the purposes of comparison of all courts.[264] Already case management statistics are collected by most courts. The common form of these statistics can usefully be applied to all dispute resolution programs and are already being applied in Western Australia by the Conciliation and Review Directorate. The basic measures are set out below.

Measures of Cases:

Percentage completed within 4 weeks
Percentage completed within 8 weeks
Percentage completed within 3 months
Percentage completed within 6 months

Taking a sample of cases:-

Percentage settled at identifiable stages in the court process
- *before readiness to proceed signalled to the court*
- *after readiness to proceed but before court date / pre-hearing conference date given*
- *after court date given*

Percentage settled at the door of the court
Percentage settled after partial hearing
Percentage heard and determined by the court
Percentage of cases adjourned
Average number of adjournments per case (including registrar meetings)

Scheme Comparison

In seeking to find "best practice" it is useful to have a series of performance indicators that act as signposts to scheme characteristics that produce better results. These must always be considered in view of local conditions as there may be other explanations for the results. However, reaching agreement on comparable measures allows some "best practices" to be readily identified particularly if they occur in more than one scheme.

WCRI (Workers Compensation Research Institute have the advantage of comparing 57 different schemes. The measures that they have agreed upon are included below. These measures are the rate of disputation, the cost per dispute, the extent of legal involvement and the time from the beginning of the process to resolution.[265] Higher results show poorer performance.[266] More detail on these and a translation of these indicators into Australian language is given below.

264 Access to Justice Advisory Committee. *Access to Justice* Commonwealth of Australia 1994. p404

265 See Workers Compensation Research Institute *Annual Report / Research Review 1993*, Massachusetts, USA

266 Most jurisdictions do not collect statistics of this nature. Most were obtained through interview or further analysis of available information. In some instances there were different assessments made by the users of the system and those that ran it. In these cases the latter, usually more conservative, position was taken.

Disputation rate

The disputation rate used in Attachment B is the number of disputes as a percentage of the number of new claims for compensation in any one year.[267] A low disputation rate generally shows a better practice system.[268]

Australian translation of WCRI measures

Disputation

Percentage of claims with no issue in dispute - or conversely the Percentage of claims with an issue in dispute ie disputation rate.

Legal representation

Percentage of cases where worker legally represented

Legal costs

Average of all disputation costs (including claims agent or insurer legal-medico costs) where worker legally represented

Worker-incurred legal-medico costs

Paid by claimant (Percentage)

Court / Tribunal level

Percentage of claims resorting to public or court intervention i.e. where process lodged

Percentage of disputes (paper) where process lodged

WCA level review

Percentage of claims applying for review or appeal from primary decision

Percentage of claims involving adversary experts (conflicting specialist medical opinions)

Percentage of claims lump-summing future payments

Average time from accident to resolution

Average time from application to resolution

Performance Indicators for Dispute Resolution

as used by the Workers Compensation Research Institute USA

267 Better evidence of the disputation rate would be a sample of processed claims and an assessment of those with "no issue in dispute", leaving those that were disputed. The method used here was applied in the absence of this type of empirical data.

268 Where possible 1993 / 4 statistics have been used. Rates may actually be higher in both New South Wales and Victoria as the rate of litigation appears to have increased

Performance Indicator	**New Jersey (1986)**	**Texas (1986)**	**Wisconsin (1985-1986)**
Adversariness			
Percentage of cases where worker legally represented	**100**	**89**	**44**
Percentage of claims with no issue in dispute	**0**	**26**	**59**
Friction costs			
Average of all friction costs where worker legally represented	**$3,934**	**$8,834**	**$11,380**
Claimant-incurred costs	**$1,559**	**$3,661**	**$3,220**
Paid by claimant (Percentage)	**51**	**100**	**100**
Administration			
Percentage of claims applying for adjudication	**100**	**69**	**39**
Percentage of claims involving adversary experts	**93**	**28**	**49**
Percentage of claims resorting to public intervention	**100**	**60**	**36**
Percentage of claims lump-summing future payments	**29**	**100**	**22**
Average time from accident to resolution (weeks)	**33**	**13**	**29**
Average time from application to resolution (weeks)	**25**	**4**	**15**

Source: Workers Compensation Research Institute Annual Report / Research Review 1993, Massachusetts

Attachment B - Dispute Resolution Systems in Australia

OVERVIEW OF WORKERS COMPENSATION SCHEMES DISPUTE RESOLUTION SYSTEMS IN AUSTRALIA SHOWING EXTENT OF ADMINISTRATIVE CONTROL, USE OF ADR AND COURT INVOLVEMENT

Scheme	Administrative DRS	Admin ADR	Public Drs	Public ADR
ACT ACT WorkCover **Primary decision-making** Approved Insurers	No (?Protocol?for the resolution of disputes over occupational rehabilitation)	* Inspectors informally resolve disputes at the workplace and at meetings held at ACT WorkCover	ACT Magistrates Court	No

Process

An application is made to the Magistrates Court by the employer or by the worker. The court determines whether the worker is entitled to compensation. The employer may also serve notice of termination on a worker and seek the court?s approval. The court can approve and order payments to cease 8 weeks after the notice. Inspectors are active in working with insurers to informally resolve disputes arising from poor decision-making or from conflict between worker and employer. This activity is independent of any court action. Court delays are considered a problem in this jurisdiction.

*** Best practice feature**

Scheme	Administrative DRS	Admin ADR	Public Drs	Public ADR
COMCARE **Primary decision-making** ComCare claims offices Licensed authorities Telstra Australia Post Self insurers SEACARE	?Reconsiderations?conducted by Delegates and Review Officers within the offices of ComCare, licensed authorities and self-insurers but by different staff to those making the primary decision. * In some offices, these are conducted by claims officers from other claims sections using a ?papers review?process similar to an internal review process and in others by specially nominated full-time officers. The latter process tends to be more formal and has become legalised in some agencies. The officer is required to reconsider the determination and affirm, revoke or vary it. *ComCare provides reconsideration services and the same process applies.	No	Commonwealth Administrative Appeals Tribunal Formal Tribunal. Legal representation allowed. Typical delay issues. Workers compensation matters are not heard in a specialist section of the tribunal.	Voluntary mediation, legal representation allowed. If no resolution can proceed to a hearing. Described as a ?case management tool?by the Registrar, mediation is little used and a large proportion of cases settle through negotiation rather than by the intervention of a mediator.

Process

Workers make requests for reconsideration in the event of an adverse primary decision (called a determination) In ComCare in 1994 / 95 2,200 requests were made from approximately 3000 rejections. Review Officers or Delegates reconsider decisions on the merits. These officers are not involved in the primary decision - in Telstra they come from different business units.
Appeal from the ?reviewable decisions?made by ?recon?officers is to the A.A.T. Voluntary mediation is available. According to Victorian statistics, a large proportion of cases are settled, both in mediation and in the A.A.T. formal process.

*** Best practice feature**

Scheme	Administrative DRS	Admin ADR	Public Drs	Public ADR
NEW SOUTH WALES **Primary decision-making** Insurers	*Internal review by insurers is now compulsory. *A Conciliation Service operates in independent premises to WorkCover. Review and Senior Review Officers (now to be called conciliation officers) have power to make orders for payment of weekly benefits of up to 12 weeks and 10 weeks retrospective if there is no genuine dispute. New legislation defines this as ?no sufficient or reasonable basis for dispute. Up until recently, the Service handled up to one third of all disputes. New policies and proposed new legislation will make referral to this Service compulsory and all disputes will go through it. *New provisions will also protect the tenure of conciliation Officers and bring them under the control of a Senior Conciliation Officer	*The Conciliation Service resolves the bulk of disputes by telephone with a few face-to-face conferences.	A Workers Compensation Court staffed by judges of District Court status and by Commissioners deal with the remaining two-thirds of all disputes. A large proportion are settled before or at the door of the court. A Medical Panel resolves disputes over hearing loss and gives authoritative advice to the Court when requested. The Court is not bound by this advice. Hearing loss cases form the bulk of the Panels? work. Findings are binding. Up to three doctors examine a worker in premises adjacent to the court and deliver immediate findings.	Judges can refer certain matters to Commissioners for arbitration.

Process

In new claims, insurers now refer all matters to Conciliation where payments have not commenced within 21 days. All terminated claims are likewise referred and all disputes are to be referred to Conciliation prior to the initiation of Court proceedings. At the time of writing proposals to change the role of medical panels and to expand the number of matters upon which their opinions are binding are under consideration. *Conciliation officers will have discretion to force exchange of documents and attendance at conferences. *Costs penalties will apply for unreasonable refusal of early offers of settlement. *Legal representation at conciliation will be by leave of the conciliation officer. In the Workers Compensation Court, the scope of Commissioners powers is to be expanded.

*** Best practice feature**

Scheme	Administrative DRS	Admin ADR	Public Drs	Court ADR
NORTHERN TERRITORY Work Health Authority **Primary decision-making** Insurers and lawyers employed by Insurers *Insurers have a 4 week deferral option No internal review	No	*Mediations are conducted by Work Health Authority senior staff in the premises of the Work Health Authority. Despite its voluntary nature, it deals with a significant proportion of all disputes and all within 14 days. The officers have no formal power. Insurers attending have to have decision making authority.	The Magistrates Court deals with the remainder, largely by settlement. Recent case decisions have meant that a large proportion now proceed to hearing. Pre-hearing conferences clog the system - up to 28 in one case.	Court-annexed conciliation (not yet implemented)

Process

Workers may take disputes to mediation or to the Magistrates Court. After a decision to reject, workers have 14 days to lodge an application for mediation. On receipt of the claim the WHA has 14 days to finalise the mediation process. Workers have 28 days to lodge in the magistrates Court. Mediation is confidential. Outcome notices are sent to the worker the following day.
Magistrates Court hearing proceed through a pre-hearing process. These have to be convened within 28 days of a court application being lodged.

*** Best practice feature**

Scheme	Administrative DRS	Admin ADR	Public DRS	Court ADR
QUEENSLAND	*Internal Review *Screening process prior to Medical Assessment Tribunals *Information exchange 14 days prior to tribunal (protocol) Medical Assessment Tribunals deal with the bulk of disputes. Tribunals are convened by speciality and operate in premises located in the Workers Compensation Board. Panels of up to three doctors examine the worker, listen to any submissions and hand down a binding decision. Legal representation is allowed. *Tribunals determine medical questions only. *The tribunal secretary scrutinises findings to ensure that the terms of reference have been complied with.	No	Industrial Magistrate Industrial Court Common law	Court-annexed mediation for common law

The General Manager of the Workers Compensation Board may refer any claim or question over a worker?s fitness for work to the Tribunals. Decisions can be deferred for three months. Tribunals can now determine permanent partial disability claims.

In rejected claims and in decisions terminating benefits, the worker may apply for a hearing to an industrial magistrate. Costs are according to the magistrates court scale and magistrates make decisions according to the balance of probabilities - the onus of proof is on the claimant. If the Board is unsuccessful it can appeal within 21 days to the Industrial Court.

*** Best practice feature**

Scheme	Administrative DRS	Admin ADR	Public Drs	Public ADR
SOUTH AUSTRALIA WorkCover Corporation **Primary decision** Compensating authority (Insurers) *Extension of time Source: Diagram provided by Minister of Industrial Affairs	New legislation was passed this year removing the old Review Panel and replacing it with a process in the Accident Compensation Tribunal. The new process has *Internal Review using approved officers (Expedited determination can by-pass this process)		Accident Compensation Tribunal If fails at arbitration then to a pre-trail conference prior to referral to a single judge. Full bench rehearing also available. Appeals to a full bench are on questions of law. Further appeal lies to the Supreme Court.	*Compulsory conciliation conference conducted by an assigned Judge or Conciliator If fails to settle can be referred direct to a judge or to arbitration.

Process

An applicant files a notice of dispute to a Registrar within one month. The registrar notifies all the other parties. An approved officer is nominated by the Compensating Authority at the same time to review the decision. The review is conducted and the Compensating Authority is advised and informs the registrar. If the matter remains unsettled the Registrar refers the dispute to an assigned Judge or Conciliator. A compulsory conference is called. If not settled at conference the matter can be referred to either arbitration or to judicial or full-bench rehearing following a pre-trial conference.

*** Best practice feature**

Scheme	Administrative DRS	Administrative ADR	Public DRS	Public ADR
TASMANIA **Primary decision** Licensed insurers	Office of the Commissioner Commissioner is at magistrates level. A registrar conducts registrar conferences.	New facilitation process Registrar?s conferences	Supreme Court	No

Process

All disputes are referred to the Commissioner?s office. The hearings are formal and legal representation is allowed. Preliminary registrars conferences are held in some matters.

*** Best practice feature**

Scheme	Administrative DRS	Admin ADR	Public Drs	Court ADR
VICTORIA WorkCover Model WorkCover Authority **Primary decision making** Insurers	WorkCover Conciliation Service operates a med-arb model with similar powers to New South Wales. Medical panels operate on a consensus model. The convenor is appointed by the Minister as are seventy panel members. Each member is a specialist of some standing. Matters that are referred to the medical panel convenor from insurers, conciliation officers, or magistrates or judges are referred to specialists according to the convenors discretion. Typically each specialist will interview the worker in their own rooms, prepare a report and then discuss the contents of that report with the other specialists appointed to that panel. A chairman?s report is prepared and this underpins a certificate signed by the chairman. That certificate is binding unless requested by a party in a court action. In that case it becomes a mere opinion to be considered with other medical expert opinions.	*The Conciliation Service has a staff of professional level conciliation officers, all appointed by the Minister. The Senior Conciliator reports in a statutory capacity to the Minister but is also a member of the WorkCover Authority Executive. *Conciliation officers resolve disputes in meetings attended by all the parties including legal representatives if all the parties agree.	Magistrates Courts State Administrative Appeals Tribunal County Court Supreme Court Jurisdiction is governed by monetary limits. Disputes over medical bills and services go to the A.A.T. Parties may issue in the Magistrates or County Courts after 28 days in Conciliation. In table of maims matters, parties must first go to the Medical Panels.	Since August 1995 Portals programs operate in all courts offering court-annexed mediation by outside mediators. This follows successful pilot ?offensives? to clear court backlogs. (County Court has required mandatory mediation.)

Process
All disputes must first be lodged with the Conciliation Service with the exception of disputes over the Table of Maims. The Service has 28 days to resolve matters after which the worker is entitled to issue in the Magistrates or County Courts. Insurers are required to lodge all information supporting the primary claims decision with the conciliation service within twenty-four hours of receiving a copy of the request for conciliation. Conciliation officers have flexibility in the manner in which they resolve disputes but in most cases a meeting is immediately arranged. Meetings are generally held at the conciliation service in Melbourne but regional sittings are also conducted in major regional centres. *Videos of conciliation are sent to all parties. *Conciliators are trained and organised on quality management principles.

Scheme	Administrative DRS	Administrative ADR	Public DRS	Public ADR
WESTERN AUSTRALIA **Primary decision**	Conciliation and Review Directorate *Dispute Resolution Officers screen all	Conciliation in the Directorate	Compensation Magistrates Court is only able to deal with questions of law referred from Review Officers	No

*** Best practice feature**

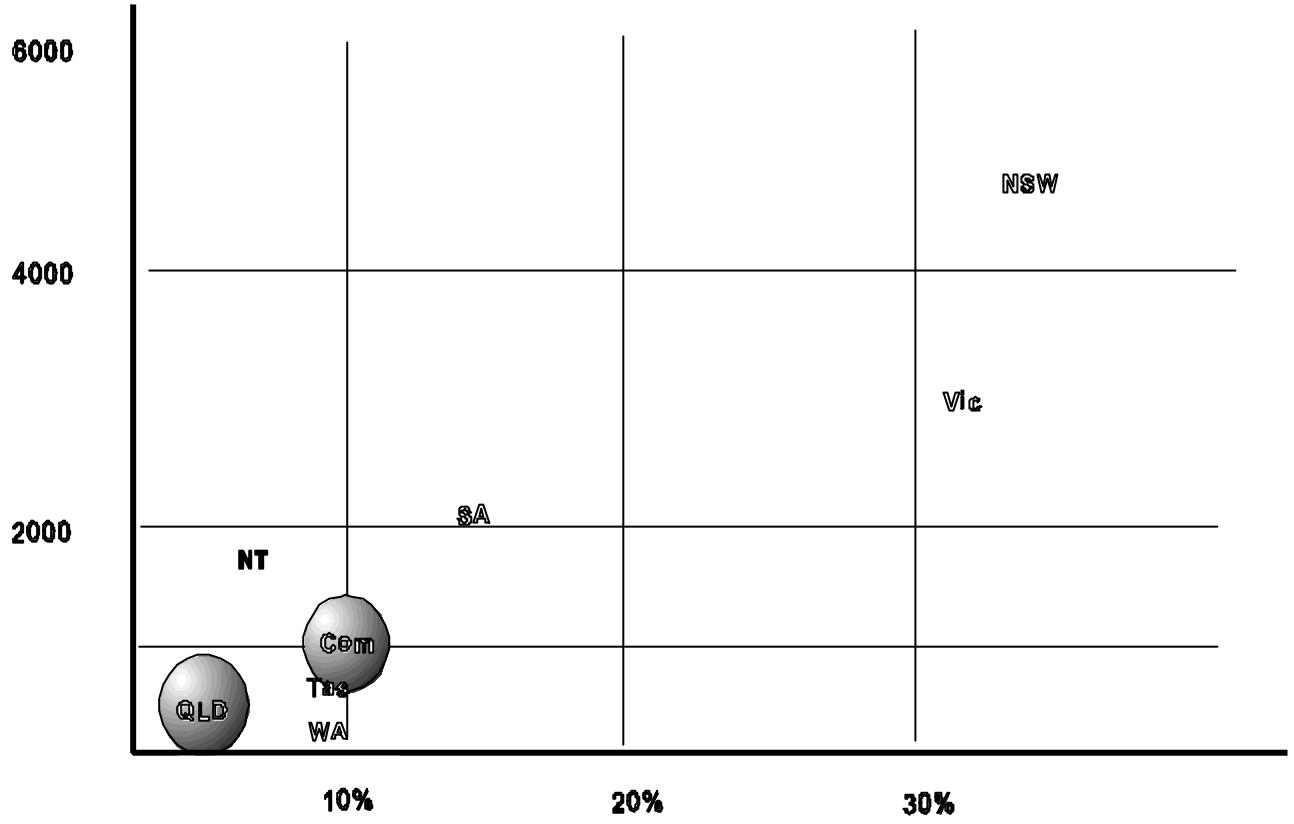
Scheme	Administrative DRS	Administrative ADR	Public DRS	Public ADR
Licensed insurers	matters before they go to conciliation resolving a large number by telephone. *Conciliation Officers hold conciliation conferences. They have no powers to determine issues and if conciliation fails matters are referred to Review. *Review happens within weeks. Single review officers conduct investigatory processes hearing and recording evidence. Determinations are appealable only on a question of law. Legal representation is allowed if all parties, including the Review or conciliation officer agree. *Fees are capped and private contracts are illegal. Medical Assessment Panels examine the worker together and make a finding.		or appeals on questions of law from decisions of Review Officers. *The Compensation Magistrates is a specialist magistrate. *The Directorate and the Magistrates Court are in the same building separate to the WorkCover Corporation	

Process

All disputes are referred to the Directorate. *Medical questions are referred to Medical Panels by Conciliation officers and by Review after screening by the Director and the Chairman of the Medical Assessment Panels. *Caseflow management rules require early lodgment of information and ensure delays are kept toa minimum. The bulk of matters are completed within 4 weeks of lodgment with the Directorate.
*Internal case management is controlled by the officers initiating follow-ups of cases.

*** Best practice feature**

Comparison of Australian Workers Compensation Jurisdictions Estimated Disputation Rates and Costs (1993/94)



Notes

1. Claim numbers taken from *Workers Compensation arrangements in Australian Jurisdictions*, Secretariat, HOWCA January 1995, so reflect 1993/94 statistics.
2. Queensland?s lower disputation rate may be explained by the fact that there are more claims recorded. Claim numbers are higher due to ?no excess? arrangements; claims can be made for any lost time. In the other states claims must be more than or equal to 5 days.
3. In Victoria, higher disputation rates may be explained by lower claim numbers. In addition the excess time was changed to 10 days on 1/7/93.
4. In New South Wales dispute numbers are made up of combined Conciliation Service, Workers Compensation Court and Medical Panel figures for the 1994 calendar year. (Overlap statistics were not available which may have reduced the disputation rate).
5. Costs information was provided to the project by national employers, individual jurisdictions and from published information.

Attachment C Extract from *Preventing Disputes*

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	
	High rate of return to work				
Maintained worker / employer relationships	Appeal rate from initial rejection decision	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		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.

System component	System indicators (S)	Team / Group indicators (T)	Individual performance indicators (I)	Benchmark Standard	Benchmark Organisation
Conciliation Service					
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
	Low rate of reversals				Custody Mediation Legal Aid
Durability of settlement agreement	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	Office Queensland
	Percentage of cases dealt with according to pre-set timetables				Texas
Speed of resolution		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	Texas, *Performance Indicators for Permanent Disability Low Back Injuries in Texas*
	Average time to resolve			(T) 3 week target set by Conciliation Service	Pease, S WCRI
	Low			(S) 5 months (T) 3 months	NSW WorkCover Conciliation Service Texas
		Number of days from time of lodgement to resolution			
	Comparative information on number of penalties levied against all Insurers			(S) $ 2,400	
Cost		Cost per request resolved	Actual cost per unnecessary dispute	(S) $ 1,000	NSW BCG report Average of Australian Ombudsman schemes
		Number of penalties levied		No comparative information available	
Claims management					

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

Attachment D - Best Practice Model - Case Study

This is not *the* definitive model. There are variations at each level which achieve similar objectives. However, this case study is designed to highlight the areas requiring attention in order that best practice may be achieved.

Case Study

Mrs X injured herself at work. On that day she was sent by her employer to her own treating doctor. He was familiar with her work site because he had visited it before and he had also attended training courses on workers compensation matters. From time to time he was called on to review the reports of other treating doctors where there was some dispute over the nature of the condition.

After visiting the doctor, Mrs X returned to the work site and met with the rehabilitation officer, her employer and a representative from the insurer. Her union representative was also there. A plan for Mrs X?s return to work was discussed. Her doctor was contacted on the phone. Mrs X went home to get better. The liability decision was deferred for 4 weeks by the insurer because it was agreed by the group that some specialist reports might be necessary. Mrs X was put on compensation immediately.

That evening her doctor completed the rather detailed form for the injury claim. He was not unduly perturbed by this because he was paid a surcharge for doing it.

He decided Mrs X needed a specialist opinion so he made an appointment for her to see another doctor. This was also paid for by the insurer. His training had equipped him with a few names but if in doubt he could call the state Medical Convenor?s office to find the name of a specialist for a particular injury. Mrs X attended that doctor within a few days. Her report was sent to the treating doctor who examined it and sent it on to the insurer with his recommendation.

The insurer claims manager was a little concerned over the contents of the report and she arranged a further report with another specialist after clearing it with her supervisor. She also talked with the in-house doctor. The appointment was made quickly because the insurer did not want to go over the four weeks deferral period. Mrs X was examined by the specialist and he also had copies of both doctors? reports. His report however disagreed.

The insurer rang the dispute resolution body and a ?designated doctor? was appointed to give a decision on the conflict in medical opinion. (To save time Mrs X could have already done this herself or both parties could have agreed on a doctor of their choice.) The panel doctor looked at the reports and gave an opinion on the papers. He could have called Mrs X in if he thought it necessary.

The insurer knew that if the opinion went against her she was bound by it; but Mrs X could and did ask for a further opinion when the opinion went against her. Only at that point, was a ?dispute? filed in the dispute resolution body.

All the papers relating to the dispute were filed with the application for resolution. Both parties knew that if these documents were not lodged that it would be very difficult to get a court to accept them later on. A screening process at the dispute resolution body made sure that all information was lodged. Screening officers rang all the parties and established that both parties had exchanged copies of everything. Exchange was a condition of obtaining action by the body on resolution. Failure to exchange all information

could result in dismissal of the application. Screening usually resolves some 50% of the disputes.

Mrs X had obtained the assistance of a Workers Advocate. She knew about them from the advertising on the television and the workplace information stand at her local shopping centre. She talked with a worker advocate in a booth at the stand who brought her claim up on a computer screen and told her what she should do. She had also been told about them by her union and on the workers compensation hotline. They were supposed to help sort out all the problems, what she would do when she went back to work, what medical treatment she should have, not just what she would be paid.

Her advocate had worked for the union before and had also attended training courses. Part of his salary came from the workers compensation fund. She could have employed a solicitor or para-legal but she might lose the case and have to pay. This might not be such a bad thing because the total fee was set independently and her lawyer was not allowed to charge her more by law.

She also had received a video from the dispute resolution body which she had watched and which explained the whole process to her. Her husband and neighbours had also watched it and had all talked about it.

Back at the dispute resolution office, a senior officer in charge of streaming has examined her file and sent it back to the insurer with instructions for a senior officer to review it. He knows that this process resolves a significant percentage of disputes although this figure had been reducing recently as the insurers got better at their jobs; due in part to intensive compliance monitoring. The review is done quickly. The insurer knows that compliance with these time lines will result in a benefit to the company.

In the meantime the insurer has decided to brief their own solicitors. They are still doing this because they have not yet put together an in-house team. This will also happen quickly because if they lose a case then they lose benefit to the company if their disputation rate and cost are too high in comparison with others.

The streaming officer can send the case directly to court, to mediation, send out a rehabilitation expert or a mediator to the workplace, or, in consultation with the convenor to a Medical Panel. None of these options is available within 28 days. He can make a short order extending Mrs X?s compensation in the meantime. In most matters he does this. He is required to do it automatically and if necessary repeatedly if the insurer has made a decision to terminate benefits without getting the appropriate information first. However, he must resolve the matter within 48 days total. If he cannot he must get permission from a more senior level to extend the time.

A timetable is sent to all the parties setting out what is going to happen and when. Conferences may be set down but not necessarily. They will be held closest to Mrs X?s residence or at the workplace itself.

At the conference, all the parties are made aware of all the information. Lawyers can attend but only if all parties and the mediator agree. The underlying tensions are brought out by the mediator and the objectives of both parties revealed. The mediator makes a suggestion based on her experience of other similar cases to resolve the matter. She is vigilant in ensuring that Mrs X legal entitlement is honoured because she knows that any agreement will be subject to later scrutiny. The conference may take up to 2 hours. The mediator had read all the material before she went in.

The parties agree but feel that they would like something more official than an oral or even signed written agreement. They all agree to allow the mediator to make a formal decision. They could also call in another randomly allocated mediator if they were not happy with the first one. If the matter remained unresolved they would go to the next level anyway. In that case the mediator would make a recommendation setting out what the order should be.

At this level there are several determinative officers hearing the matter. These officers are also mediators but not many of them are legally qualified. The hearing is held within 2 months of the mediation and no new material is allowed. (A court may give leave in extraordinary circumstances.) The process is investigatory, although lawyers and advocates have opportunities to bring out evidentiary problems. If these are severe the officers can immediately refer to the court; but such a decision might have been made earlier by the streaming office. All evidence is tape-recorded. The determinative officers rotate the function of writing the reasons for decision. This is done on the same day. In this way they all develop skills in writing reasons and the task has not fallen by default on the legally qualified mediators. Some of those have been fond of writing legal treatises in the past and have been roundly criticised for it by insurers and union advocates alike.

All have attended courses on plain English decision writing as part of their ?personal injury dispute resolution national accreditation course?. The decision writing is now much easier in any event since the legislation was put into plain English and a series of ?test cases? were sent to the court for interpretation guidance.
If their decision is the same as the recommendation, the party electing to go to this level will carry the costs of all parties.

The parties are still free to appeal but can only do so on a point of law.
The court still can hear matters that have been referred from the streaming officer and from the determinative process. [268]

Attachment E - Organisations Consulted

ACTU
Australian Chamber of Commerce & Industry
Australian Association of Surgeons
Bond University
Bracton Consulting Services
CFMEU
Coles Myer
ComCare
Department of Prime Minister and Cabinet
Department of Justice, Victoria
Dispute Settlement Centre of Victoria
Ford Australia
Health, Housing & Community Services Commonwealth
Industrial Relations Commission
Insurance Council of Australia Perth
Insurance Council of Australia Hobart
Insurance Council of Australia Melbourne
Law Institute of Victoria
Magistrates Court, Melbourne, Victoria
Magistrates Court, Darwin
Medical Assessment Board Western Australia
Medical Assessment Board Queensland
Medical Panels New South Wales
Medical Panels Victoria
Ministerial Advisory Committee, South Australia
MTIA
Motor Accidents Board, New South Wales
National Consumer Law Centre
National Union of Workers
National Australia Bank
Northern Territory Chamber of Commerce and Industry
Office of the Commissioner, Tasmania
Residential Tenancies and Small Claims Tribunals, Victoria
Rutgers State University of New Jersey
Senate Select Committee on Superannuation, Canberra
Social Security Appeals Tribunal
Telstra
Work Health Authority Northern Territory
WorkCover Review Panels South Australia
WorkCover Corporation, South Australia
WorkCover, Western Australia
WorkCover Conciliation and Review Directorate, Western Australia
WorkCover Authority New South Wales
WorkCover Conciliation Service Victoria
WorkCover ACT
WorkCover Authority Victoria
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Workers Compensation Board of Queensland

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Glossary of Unusual Terms and Acronyms

ADR	Alternative Dispute Resolution
Agency	The Relevant Workers Compensation Agency
ARC	Administrative Review Council
DRS	Dispute Resolution System (DRS administrative body, tribunal, courts)
EDR	Employment Dispute Resolution
Gate-keeping	The streaming and screening role of the DRS. This is a role similar to a listing master in a court. A case is not assessed for merit but is evaluated for compliance with the information requirements and an appropriate forum identified to resolve the dispute.
IAIAB	International Association of Industrial Accident Boards and Commissions, Jackson Mississippi.
IDR	Informal Dispute Resolution System
Level	Level within the DRS (Insurer decision, ADR, Tribunal or Court)
Navigation	Assistance provided to participants to help them understand the DRS, their options, timing of events, what they must do and the roles of others. Usually takes the form of literature, booklets, but can be videos, worksite information seminars or a nominated person etc.
OTA	Office of Technology Assessment - Congress of the United States
PPD	Permanent Partial Disability
Scheme	The Relevant Workers Compensation Scheme (Insurers, Agency, DRS and relevant legislation)
System	The Dispute Resolution System (DRS)
WCRI	Workers Compensation Research Institute. An independent US research organisation funded mainly by Insurance companies, Employers and Workers Compensation Boards.

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