Dispute Resolution in Workers Compensation

WorkCongress5

Work Injuries Prevention, Rehabilitation & Compensation

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Legal and other escalating costs in workers compensation dispute resolution systems have been a key focus of scheme administrators and politicians here and overseas. I thought I would start my dissertation on this subject by telling you a story that puts the concerns of these people in a suitable Australian context.

The recently departed WorkCover Minister in Western Australia was faced with just this problem some time ago. He told this story the length and breadth of Western Australia, not a small distance, to bring about the change that was needed.

The story was this.

A gold-miner won a case in the Court and was awarded what was then a considerable sum of money. In jubilation he returned to the pub in his hometown in the dry centre of Australia - somewhere around Kalgoorlie. That very evening - quite a hot evening - he 'shouted the bar'. For a packed hotel fast filling with thirsty miners, this was no cheap exercise. In the morning the hotel owner woke him with some difficulty and said,

"Here's the bill, but before you look at it your lawyers on the phone."

"We' ve just worked out our costs", said the lawyer

"and I'll be taking about half the money."

Bleary-eyed the bushy surveyed the wrinkled bill. Even though he had had a hard night, he could still add up - there would be nothing left.

The Minister got his reforms and not surprisingly, - the lawyers were blamed - not the publican. The specialist court and the lawyers were excluded from

the workers compensation scheme leaving in their place a new administratively based service.

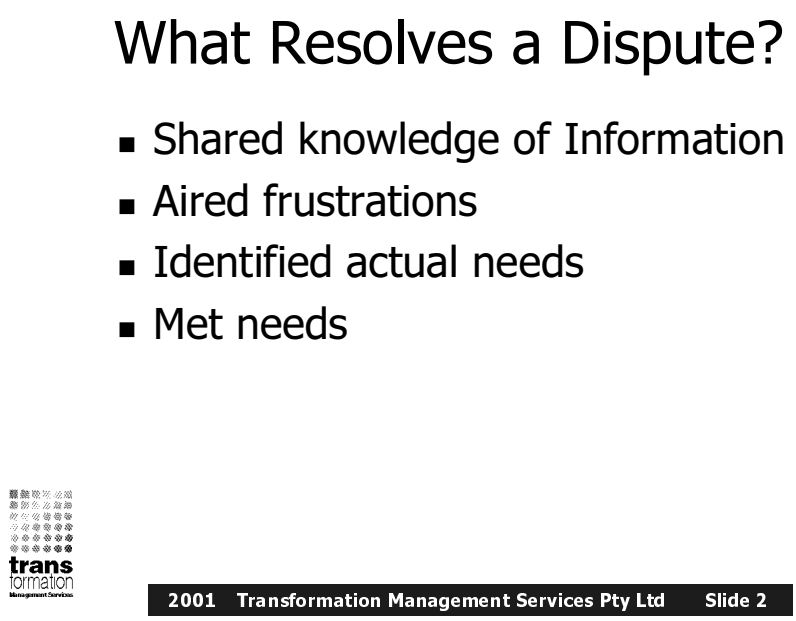
While this pleased many people at the time, it still cost a lot to change the system and there has definitely been a 'rebound' of sorts, which has and will cost more again. Today I thought I would tell you about more of the Australian experience that we have been involved with, and that we believe provides a more scientific way forward than just removing all the lawyers.

We began work in this field in the early 1990s. During 1995 we undertook an examination of world best practice in dispute resolution for the Heads of Australian Workers Compensation Authorities. Since then we have worked in most parts of Australia and New Zealand.

I thought I would try and distil in 10 minutes some of what we have found in 10 years of thinking about and working with these issues.

You should all have a copy of the blue single page document, which describes the best practice model we have developed. It is a framework and way of thinking about the whole area of disputes too often obscured by debates over unscrupulous lawyers and independence. You can download the full report called ***Resolving Disputes*** from our website.

This best practice model is underpinned by a two-part behavioural thesis that describes how we understand dispute resolution processes and the interactions between the parties to a dispute. In simple terms, if you want to resolve a dispute you must have four elements present in the one place at one time. These elements are:



1. Each party sharing and understanding the information that is relevant that dispute,

2. Parties having an opportunity to talk about frustrations relating to that dispute,

3. The identification of the real needs and priorities of each of the parties, and;

4. A facilitator or forum where these needs can be addressed.

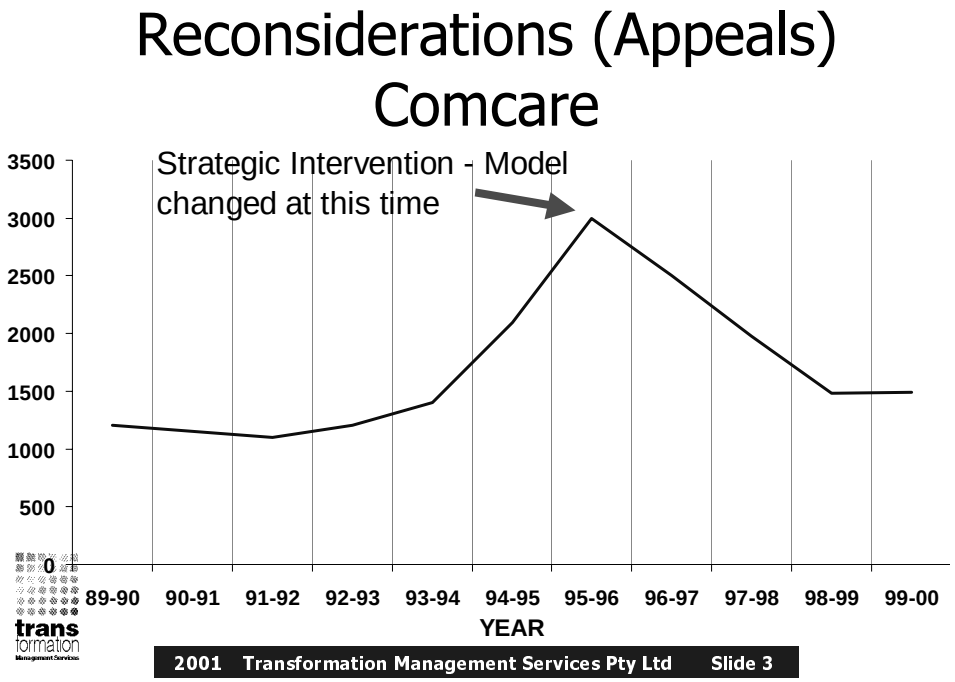
Designing disputes systems is about overlaying structures and processes on those four elements.

The second part of our behavioural thesis is that disputes are not static or fixed. They are not like boxes on a conveyor belt. We know that if you intervene at different times and work with the four elements that you can

drastically reduce the time and costs of a dispute. In effect you can turn hard fought disputes into agreements and importantly change behaviour to stop dispute occurring in the first place. Taken across all disputes, if you have a system that supports appropriate interventions, you can reduce the cost of the dispute resolution process.

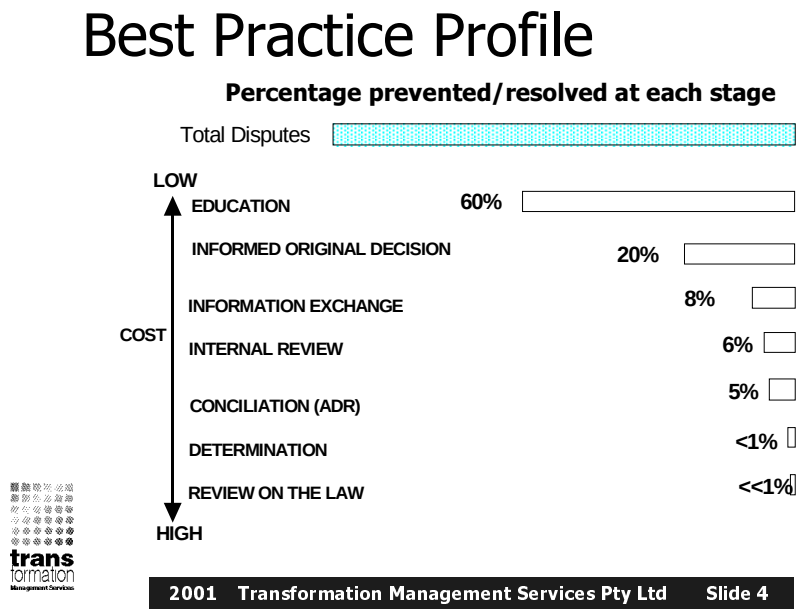
The clearest example I have that shows this is from the Commonwealth Comcare scheme, where we found that if a claims officer picked up the telephone and contacted a worker he or she would reduce the chances of that claim being disputed by 20%. In contrast, if a claim were referred to an expert doctor, without first contacting the worker, the chance of dispute would increase by 33%.

With this knowledge and some other changes, Comcare has been able to make a difference.



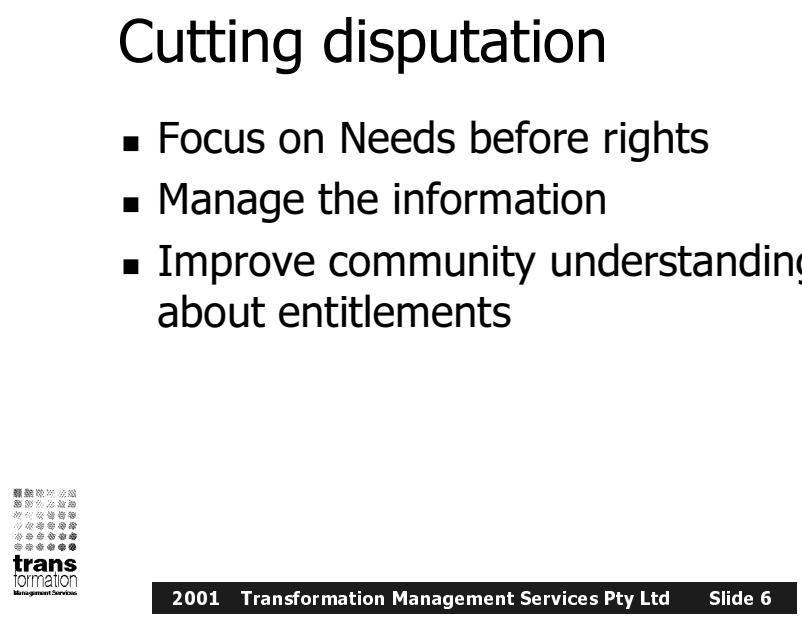
We can see a steady decrease in the numbers of disputes since 1996.

But - back to the best practice model. By looking at the better schemes around the world, we have been able to synthesise a model of dispute resolution, a profile if you like, of the proportion of disputes that should be resolved by different, often hierarchical methods of intervention and therefore at different costs. This model says that if you get the design right then you should be resolving a certain proportion of disputes before they escalate and therefore go to the next level. Obviously the earlier stages will be cheaper and the better schemes will have fewer disputes, resolved more quickly and therefore more cheaply.



From our observations of best practice schemes that appeared to persuade more people to resolve disputes without resource to high cost legalistic forums, we found hat there were three common mechanisms that scheme administrators built into their processes.

These are:



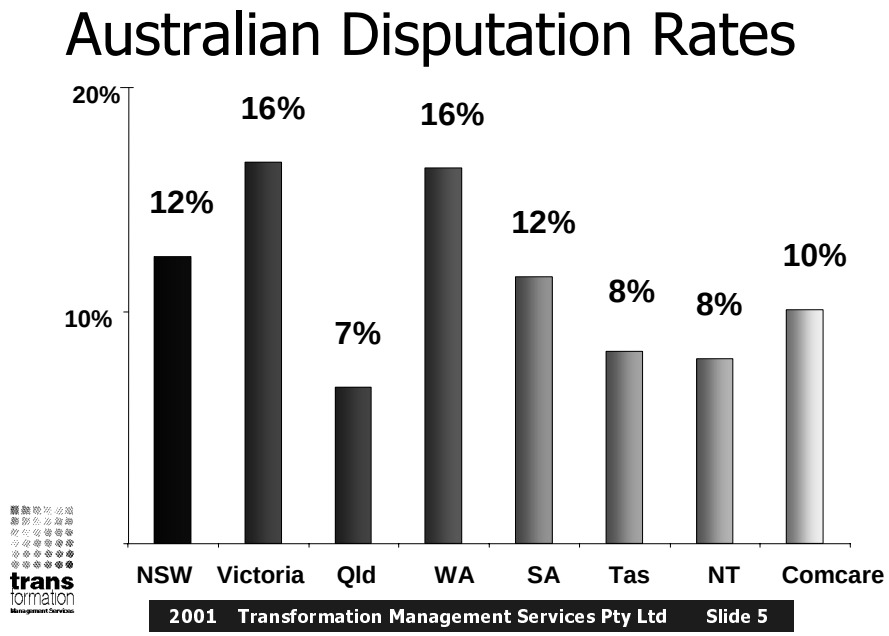
1. Ensure that workers needs are met foremost and if this fails only then move to a focus on workers legal rights. (Not surprisingly the research shows that the timing of rehabilitation intervention after injury directly impacts on the time that workers take to get back to life and work.

2. Tightly managing the information flow - here that means the preparation and timely lodgement of information such as medical reports.

3. Ensure that the understanding of entitlement to benefits is exceptionally high.

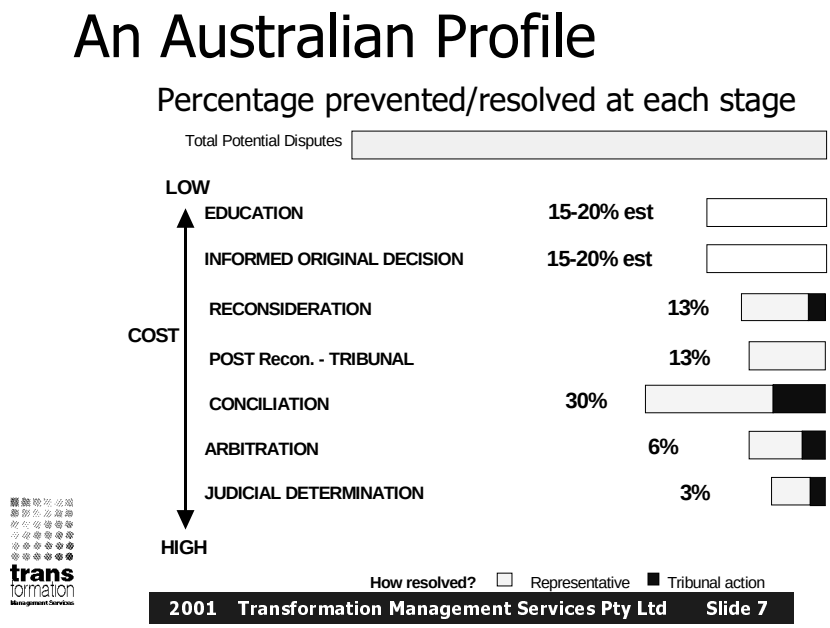
Australian schemes provide interesting comparisons. We know that some schemes have fewer disputes. For instance Queensland with an equivalent population to that of Victoria and New South Wales has fewer disputes.

New disputes compared with new claims are around 7% while similarly sized states report between 12% and 16%? Queensland has a long-standing scheme where the compensation benefits and dispute resolution arrangements are well known and have been for decades. They have not experienced the five-yearly overhaul of other schemes.



Legal costs in New South Wales are three to four times greater than the nearest state Victoria.

If we take an anonymous Australian example and compare it with the profile and model - we can start to see why.



The yellow parts show disputes that were settled by lawyers and the dark blue parts show where the cases were actually resolved by conciliators or judges. A very large number of these disputes were resolved after they had got into a court but before anything formal had happened. The major reason is that the information that should have been collected when the primary decision was made was not around until after the matter got into court.

What else can we observe? A large number of matters moved from conciliation to arbitration - but why? Perhaps the cost scale rewarded information lodgement at a later time in the Court process. Perhaps the information management processes were generally not tight enough. Perhaps the parties had still not had the opportunity to state what they thought or wanted until they got in front of an expensive judge. Perhaps all of the parties were not in attendance? Perhaps the expectations of workers were for lump sums, lawyers and illness and not a well managed speedy return to work and life.

Two states have worked on getting this right - Western Australia, the forerunner of this model in Australia and Victoria my own state.

Western Australia & Victoria

	***Conciliation & Review Directorate* 97/98**	***Conciliation Service* 97/98**
Conciliation	**84%**	**65-70%**
Review	**16%**	**2%**
Magistrates Court	**0%**	**25-30%**
Court on the Law	**< 1%**	**< 1 %**

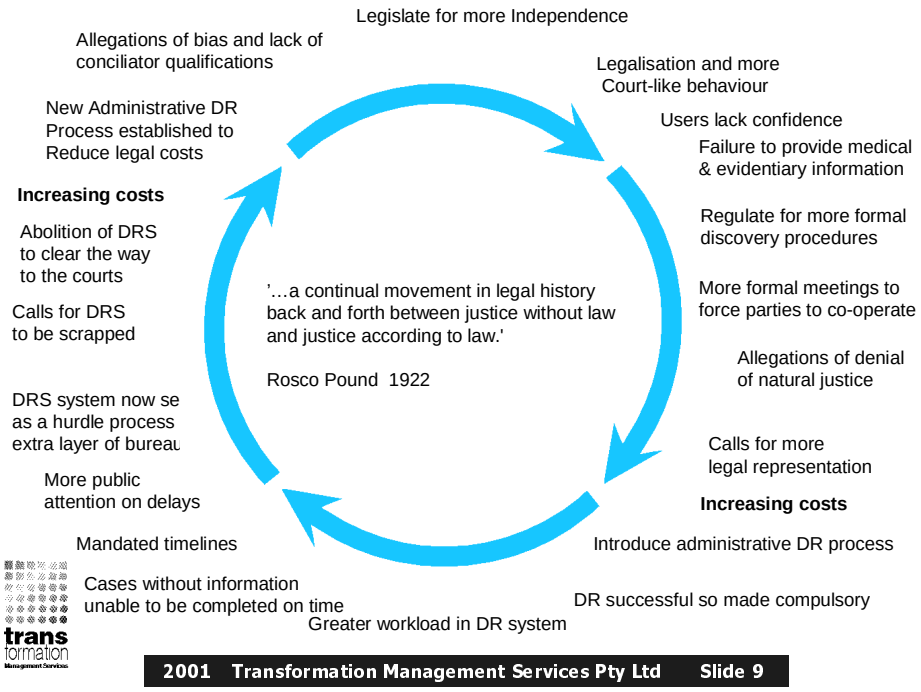
Victoria and Western Australia resolve a large proportion of disputes in the conciliation process, (which are compulsory in these schemes), without moving to the review or determinative level.

These states enjoy unit costs of between $300 and $1000 compared with other states where this figure is 10 times higher! By unit cost we mean the total cost to the workers compensation premium or levy dollar. These include legal costs as well as administrative costs.

I should say that unfortunately these results are not static, which brings me to the final piece of information that I wish to impart today. We have observed that the frequent turnover of dispute systems is not necessarily a good thing. Some of our work has been about finding out the patterns of these changes and setting up structures and processes to achieve sustainability. I was not surprised to read about this phenomenon in the

history of the law. No less than the jurisprudential scholar Roscoe Pound described it in 1922 as: -

> ***A continual movement in legal history back and forth between justice without law and justice according to law.***



We see that schemes seem to cycle between highly legalistic systems and informal systems - take on love affairs with administratively based alternative dispute resolution, then retreat disappointed amidst allegations of bias, calls for more powers, and internal wrangles over the differences between independence and accountability. Then - turn yet again to the high costs and delays of traditional systems. In Australia, this seems to happen every 5 years.

We know that this cycle can be broken if the following things are put in place.

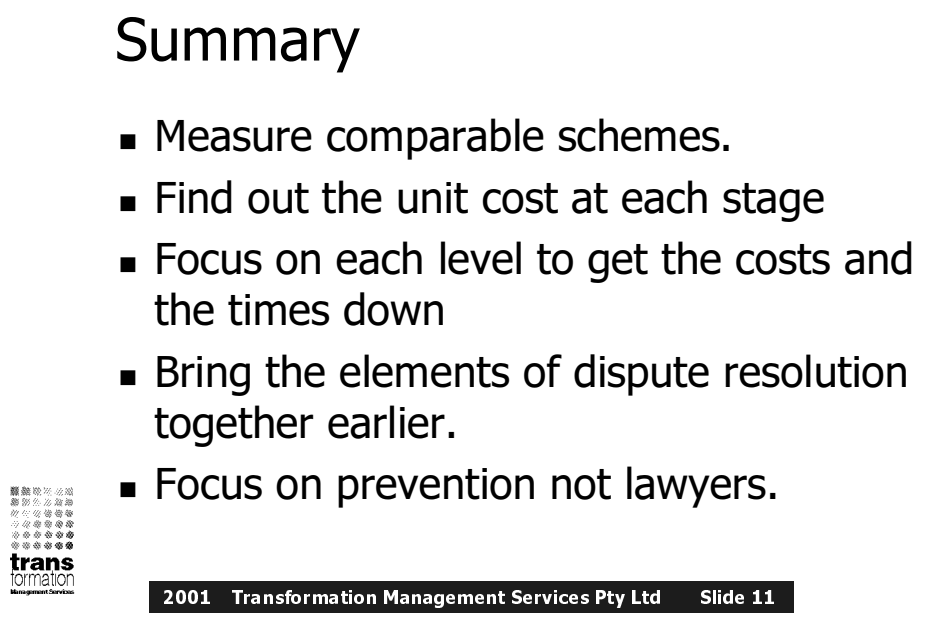
- Agreed output measures such as disputation rates and unit costs are monitored and published.

- Administrative independence is ensured and is transparent just as the delivery of justice must be. For some systems this means providing budget control to the judicial arm.

- Consultation is maintained between scheme administrators, the dispute resolution system, and all stakeholders, including political ones.

- Consistent procedures with strong quality incentives are put in place.

In summary, our message is this.



Measure how you compare with other schemes. Determine your unit cost at each comparable stage - then focus on each level to optimise the number of disputes resolved by less costly processes. This will get the costs and the times down. Look to where all the elements required for successful dispute resolution are first available in your scheme and look to bringing them together earlier. Focus on prevention. Dispute management is a market like any other. Create a market and the lawyers will come in. Restructure your schemes to focus on the elements that get a resolution and you will get a result. You must understand how individual disputes can be resolved, but also how disputes can take on unnecessary complexities and escalate if the scheme that manages them collectively is not configured to support the elements that are needed to achieve resolution.

We believe that Australia has a proud record although a way to go yet.

Thank you