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# When wearing different hats: suggestions for ADR practice

David Bryson

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# The ADR Bulletin

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### General Editor



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## Multiple roles in ADR

# When wearing different hats: suggestions for ADR practice

*David Bryson*

### Introduction

To those of us schooled in the orthodoxy of mediation principles and practice, the findings of Kressell and Pruitt on the benefits of mediation/arbitration (medarb) have always been somewhat discomfoting:

Our results for medarb [same practitioner] suggest the value of mediator power in dispute resolution. [It] encouraged the disputants to be attentive to their wishes and anxious to reach agreement [during the mediation phase]. As a result, the disputants moderated their tactics and aspirations and tended to engage in problem solving, developing creative ideas for solving their controversy.<sup>1</sup>

In Australia there are forms of ADR practised on a large scale within the workers' compensation jurisdiction which combine such diametrically opposing roles as facilitator and decision-maker. Seven years and 100,000 cases later, WorkCover conciliators in Victoria have proven the mixed blessing of wearing many hats. What does their experience teach us about managing multiple roles?

### WorkCover conciliation

WorkCover conciliation is mandatory for all who wish to appeal a decision made by an employer and insurer arising from a work-related injury claim. Conciliators conduct multiparty conferences, lasting about one to two

hours, between workers and their assistants, employers and sometimes their consultants, and insurers. Although not possessing a strictly arbitration role, WorkCover conciliators have a range of roles to bring closure to disputes and prevent escalation of the dispute into the courts, including powers to:

- explore insurer decisions, on the basis of provided documentation, against established principles of proper and sound decision-making;
- facilitate or mediate disputes through discussion of the issues in order to reach agreement;
- make formal recommendations which in law protect those accepting such recommendations from admission of liability;
- suspend or adjourn matters, and request further information to be supplied;
- refer medical questions in dispute to a medical panel for a binding decision;
- prevent the use of material formally requested from a party, but not submitted by that party, in any subsequent legal proceedings;
- conclude conciliation by a decision that agreement is not achievable, and then decide whether or not the employer/insurer has an arguable case for the denial of liability;
- if there is an arguable case, decide whether the claimant has made all reasonable steps to settle the ➤



## Editorial Panel

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➤ dispute, and, if not, prevent the party from proceeding to court until such steps are undertaken; and

- if there is not an arguable case, issue a direction that weekly payments be made or continue to be made for up to 36 weeks, or that medical and like services up to \$2,000 be paid, without a party so directed being held liable for the claim.

The results of WorkCover conciliation are that about 65 per cent are settled either by mutual agreement or agreement with a recommendation. Another 15 per cent do not proceed to court, although the reasons for this are complex and cannot necessarily be claimed as conciliated resolutions. Fewer than two per cent of conciliation matters result in a direction.

### Seeing ourselves as others see us

Annual surveys of workers, employers and insurers in this jurisdiction show an overall satisfaction rate of 85 per cent, with ratings reaching into the 90s for conference skills. Questions related to the issue of whether parties feel pressured by conciliators in the process are generally answered in the negative, but there is evidence that the parties whose decision is under examination and negotiation (insurers and employers) feel more pressured than those who are affected by such decisions (the workers).

The contradictions of the conciliators' roles may generate possible risks in response from those who attend regularly. These responses may vary from the bizarre — 'If I don't accept the recommendation will you direct?' — to the pragmatic — 'I will wait until I have to before bargaining the matters in dispute'. In practice, the vast majority of responses are more straightforward and open, perhaps reflecting the research findings of Kressel and Pruitt.

The variety of roles also creates a risk that individual conciliator differences are accentuated in the eyes of the parties because the results of the balancing act may appear idiosyncratic. A further risk is that conciliators may rely more on diagnostic and interpretive activities than

problem-solving and facilitative ones, leaving the impression that the conciliator is running to a predetermined script.

### Managing multiple roles

When we as WorkCover conciliators discuss the challenges of how to manage our roles and powers we struggle with the contradictions that they generate. How do we achieve the right balance between our commitment to party control over their dispute and our assessment of a fair outcome for all parties within a legal framework?<sup>2</sup>

As we move in the conciliation process from consensus to direction, the professional issue becomes: *what are the limits of acceptable use of pressure and power?* Even if the actual exercise of the most extreme power of direction is rare, the presence of this reserve power can overshadow our thinking in subtle ways, as well as the management of the conference and the perceptions of the parties. This often creates inner tensions and dilemmas for the conciliator.

The way through these contradictions for us has been a developing awareness of the need to indicate to the parties up-front what roles we have, and to signal clearly any changes in role during the course of conciliation. In addition, conciliators require a clear understanding of the different procedural requirements of the roles as the interventions increase in power. The following guidelines summarise how conciliators in the WorkCover context manage these issues.

#### 1. *The importance of the opening conciliator statement*

The opening statement, complementing any written or visual material sent to parties prior to conference, should clearly explain the different roles of a conciliator and indicate a willingness to clarify roles during the process.

#### 2. *Signal transitions during process*

During a conciliation meeting, points of transition between roles should be clearly marked. 'My sense of the meeting so far is that we are not likely to reach agreement through discussion. As foreshadowed in my opening introduction, I now wish to move to a recommendation role ...' ➤



➤ 3. *Transition — when exercising a formal recommendation role*

If agreement cannot be reached through consensus, the conciliator signals the change of role to recommendation and gives conditions of acceptance or refusal of any recommendation proposed. A justification for the recommendation is provided: for example, if the dispute is a fundamental threshold issue of acceptance or rejection of a statutory entitlement, the recommendation is usually for the payment of compensation without admission of liability. If the issues in dispute do not concern a breach of entitlement, then the recommendation could take the form of a compromise on a practical or commercial basis.

4. *Transition — when exercising a decision-making role*

If agreement cannot be reached through consensus, and perhaps after attempts to get agreement by recommendation, the conciliator signals his or her intention to move toward deciding whether the dispute cannot be taken any further through conciliation. If the conciliator decides there is an arguable case concerning the liability of an employer or insurer to make payments ('genuine dispute') and decides that the claimant has taken all reasonable steps to settle the dispute, the conciliator can close the conciliation process. Comments are invited from all parties and discussed prior to a decision being made.

5. *Transition — when exercising a direction role*

If the conciliator decides there may be no arguable case ('no genuine dispute'), he or she signals that they now wish to move into the role of issuing a direction. A more formal procedure ensues: a summary of the arguments in relation to the no genuine dispute issue from both sides is given. The meaning and consequences of a direction are explained carefully and questions invited. Comments are called for from the parties on whether the conciliator should or should not direct, with an adjournment for a period an option at this stage.

The use of caucus or private meetings is cautioned against at this point, because

discussion between a party and a conciliator may alter the final decision to direct without an opportunity for the other party to challenge. The decision may be conveyed to the parties at the conciliation meeting, together with reasons, or follow in written form.

### Conclusions

ADR practitioners in the statutory environment can receive additional and more powerful roles from governments pleased with the success of their pioneering facilitative enterprises. US research findings indicate that decision-making roles following facilitation by ADR practitioners (medarb) may actually encourage parties to reach agreement in the first instance.

However, experience in one Australian context, the Victorian WorkCover scheme, illustrates that with increases in roles comes complexity and contradictions, exposure to criticisms of inconsistency and unacceptable use of pressure, and legal challenges on the exercise of the roles.

The management of multiple roles described in this article identifies practice disciplines for ADR practitioners that should help them survive scrutiny from all sides and more effectively achieve the aim of parties reaching consensual agreement without undue pressure. ●

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### Endnotes

1. Kressel K and Pruitt D G (1989) *Mediation Research: the process and effectiveness of third-party intervention*, Jossey-Bass, San Francisco, p 374.

2. Bryson D (1997) 'And the leopard shall lie down with the kid: A conciliation model for workplace disputes' *Australian Dispute Resolution Journal*, vol 8 no 4.