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Colin McKenzie

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New developments in ADR

Designing a dispute system across an entire industry

Colin McKenzie
Director, CMNZ Ltd

In mid-2002 managers from a NZ primary industry (the industry has not been identified due to the existing stage of the process) talked to me about the impact of disputes in the industry. They talked about high costs, time delays, declining credibility, poor relationships, lack of durable outcomes and the reduced ability of the industry to achieve its goals.

My initial thought was, 'I know something about applying dispute systems design (DSD) theory to organisations. But what about its application across an entire industry? How do we start? Who do we talk to? What approach should I take?'

This article discusses our (the Conflict Management New Zealand (CMNZ) design team's) response and the process we have been through over the last eight months. We cannot provide any actual results in this article as the Conflict Assessment report is about to be presented to industry leaders and we do not want to compromise this process.

Concept of dispute systems design

The subject of dispute systems design (DSD) was popularised in the book

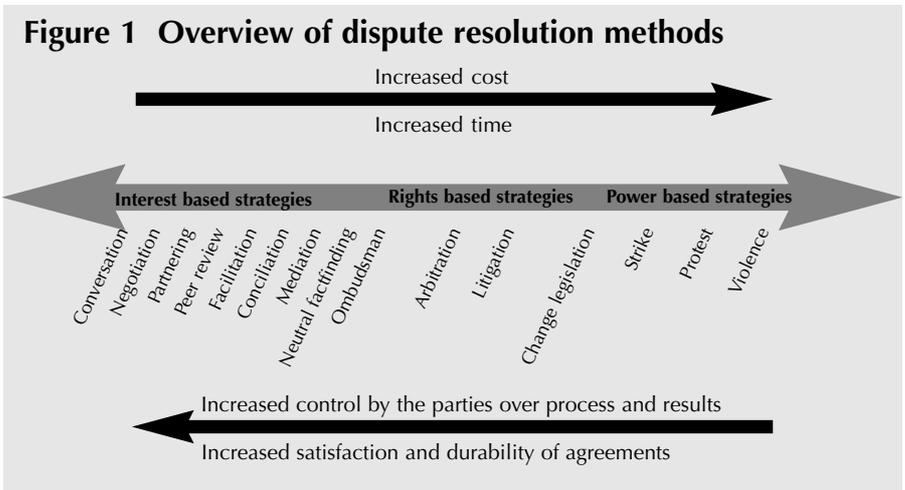
Getting Disputes Resolved by Ury, Brett and Goldberg.¹ The authors describe three primary strategies for resolving disputes:

- (1) determining who is more *powerful* — for example employees going on strike, using coercive or threatening tactics, civil disobedience or other adversarial processes;
- (2) determining who is *right* — for example, going to court, tribunals, case law, precedent or arbitration; and
- (3) reconciling differing *interests* or stakeholder needs — for example, negotiation, mediation or conciliation.

To engage industry stakeholders in a discussion around these ideas, we developed a dispute resolution continuum, as shown in figure 1, which we sent to stakeholders as part of our initial mailout.

To minimise the dispute costs in the industry, more attention was needed on reconciling *interests* as a precursor to using a *rights* or *power* approach.

This does not mean that focusing on interests is always better than rights or power; it simply means such a focus is likely to reduce transaction costs,



achieve greater satisfaction with outcomes, put less strain on stakeholder relationships and result in fewer disputes.

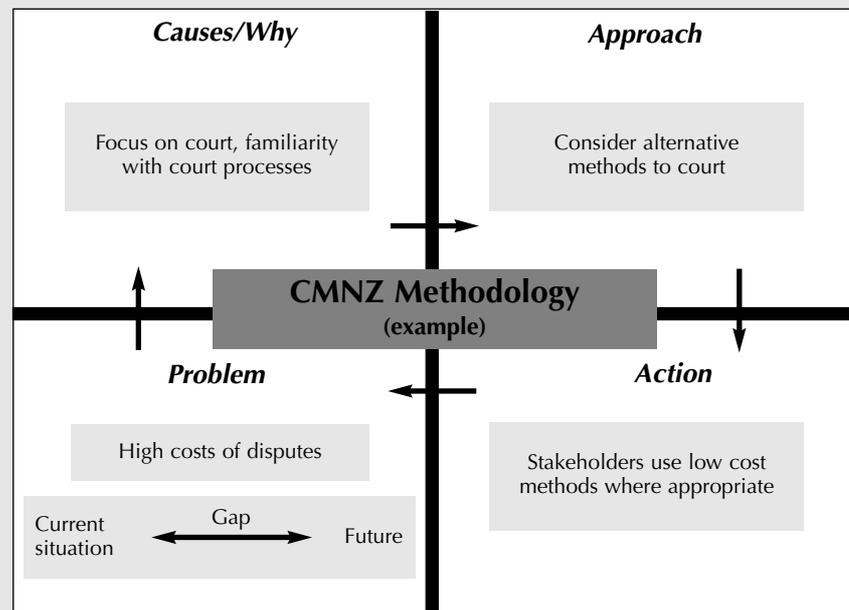
In developing our thinking about DSD in the industry we realised the industry needed to develop its own decision processes that would enable stakeholders to make good choices about how to resolve disputes. Stakeholders needed to know what method best suited each dispute, when to use it, how to apply it and what resources were available to support them.

Our starting assumptions

We thought it was important to articulate and test our assumptions with the industry. We developed the following draft assumptions and principles.

- We can only act as facilitators; industry stakeholders need to drive the design process and control the outcome.
- It is essential to be inclusive rather than exclusive. All those people responsible for the final decisions or affected by the decisions should be included as early as possible.
- Participation, openness and feedback would guide the design process.
- The design team should be separate from anyone called in to mediate or manage any conflict in the industry.
- Changing an 'industry culture' is a long term project, looking at beliefs and values as well as strategies and behaviours.
- Managing the negative effects of conflict, rather than eliminating conflict, would help the industry meet its priorities and goals.
- The program should enable industry stakeholders to make good choices about which dispute resolution method is needed, rather than replace one method with another.
- There needs to be emphasis on conflict prevention, as well as management.
- The process design is a developmental and iterative program in which stakeholders can develop skills and experience managing conflict.
- Questions over fundamental values will inevitably arise; we need to plan for these rather than avoid them.

Figure 2 CMNZ approach to interviews



Conflict assessment

We started with the old saying, 'let the diagnosis determine the method', and hence our first step was to initiate a conflict assessment. The conflict assessment was an information gathering exercise that attempted to mirror the concerns of the various parties in the industry in terms of:

- what issues were important and why;
- whether it was appropriate to proceed to the next stage in designing a new dispute resolution system; and
- under what conditions would stakeholders agree to participate.

The assessment was not a comprehensive analysis of conflict in the industry, but a snapshot on how conflict is currently affecting the industry. We saw it as a starting point in a much longer process of change and ongoing industry dialogue.

Our methods

In early November 2002 we sent a questionnaire to approximately 100 people throughout the industry and 38 responded after a follow up letter and phone call. To gain a more in-depth understanding of the issues and concerns, we interviewed 20 people representing all the primary stakeholder groups. Our interviews were structured around four questions.

1. What are the problems you see

within the industry which are giving rise to conflict?

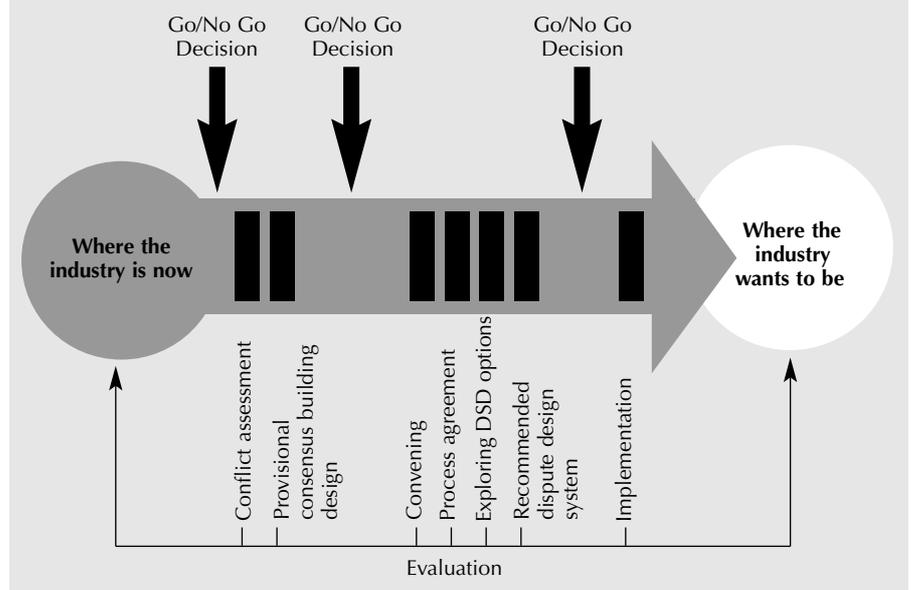
2. What are the causes behind these problems?
3. What general strategies would you recommend to deal with these problems?
4. What action could we (the facilitators) take to help the industry move forward?

All interviews were confidential.

We found this simple format, as outlined in figure 2, quite powerful. In an industry where 'time is money' and delays mean lost opportunities, it is inevitable that people often go straight from identifying a problem to taking action to fix it. In many situations this jump from the problem to the so called 'solution' is appropriate and will result in the desired outcomes. However, in a complex primary industry, if we jump too quickly from the problem to the action, we may just deal with the symptoms and not the real cause.

To provide a sounding board for us as facilitators we set up a small task group comprising of an industry representative, a lawyer, a natural resource consultant and conflict management specialists. This became incredibly valuable in brainstorming our process and testing understandings.

To provide a mentoring role, a specialist in designing large dispute systems, Cathy Costantino, co-author

Figure 3 Stages in designing a dispute resolution system

of *Designing Conflict Management Systems*,² was appointed from the US. Our weekly conference call was essential to test theory and new ideas.

We initiated an international literature review of large scale dispute system design programs to establish best practice principles.

Finally, we tried, where possible, to use existing industry mechanisms to provide feedback to stakeholders and engage them in the process.

Where we are today

We have now submitted an interim report to the industry outlining what stakeholders have told us and what we recommend for going forward. The proposal recommends a multi-stakeholder consensus building program over the next 12 to 14 months. The purpose is to build ownership among industry stakeholders, empower industry representatives to develop their own solutions to managing disputes better, and provide the time and place for stakeholders to tell their stories and consider the options before making any commitments.

Stages of the design program

We are convinced by the value of a conflict assessment. For people in the industry there may be no surprises in the results. However, a common understanding of the existing problems, the likely reasons they exist, along with commonalities and differences can provide an important baseline for

proceeding. Figure 3 is an overview of the stages we are suggesting.

The characteristics we believe are important from Figure 3 are:

- a *conflict assessment* that sets the stage for an ongoing program;
- a *gap analysis* of where the industry is today and where stakeholders want it to be;
- *multiple go/no go decision points* that allow the program to be flexible and still have a relevant mandate from the decision authority;
- a separate stage that focuses on the *process agreement* (with so many parties it is critical to get agreement on elements such as goals, functions, decision making, roles, dispute resolution and milestones); and
- an *evaluation* of the process of consensus building as well as the outcomes.

Some things we struggled with

Starting the program

Programs like this start when you talk to the first person, not when you would like them to start. Ensuring your entry is appropriate, well staged and sensitive to industry norms and cultural protocols is a critical feature of building trust and credibility.

Assumptions

It is easy to assume that a dispute resolution design program is critical to

the future of the industry. Many stakeholders were not so convinced. Time delays are a very real concern for them and, in their eyes, we were just another delay. We all have assumptions; that is not the problem. The problem is whether we are prepared and open to test the assumptions we have.

Questionnaire design

It is easy to come up with a few questions and think you have a questionnaire. Fortunately, we sent the questionnaire out to a professional consultant, which helped immensely. However, we did not pilot the questionnaire and so several questions were either incorrectly interpreted or the results were difficult to use due to poor layout and/or design. We also received criticism from several people that it was too time consuming — although we only had 12 questions and most were of the ‘tick the box’ format. In the future, we need to spend more time on design and layout that will reduce analysis time.

Interviews

It was difficult to justify two interviewers at meetings that were spread around the country. However, it is almost impossible to ask good questions, engage in constructive dialogue and get all the essential points recorded at the same time. In an industry where disputes are both frequent and contentious, many interviewees were uncomfortable with a tape recorder. We support the idea of having two people to ensure the information is correct and to act as a check on comprehension.

Representation

This was a difficult issue in the early stages of the conflict assessment. The danger is that the design team can miss people out who should be involved, involve the wrong people or identify the wrong issues. We found that asking everyone at the end of a meeting who else we should talk to and why was a valuable mechanism to check our list of stakeholders and make sure we were making the best decisions, given constraints on time and resources.

Relationships

It could be easy to carry out a conflict assessment without any face to face interviews. We think, in retrospect, that the early interviews were an important part of developing credibility, respect, trust and rapport with key stakeholders and that a simple questionnaire would not have sufficed. These interviews should also take place at the location determined by the stakeholder. This provides a rich understanding of their environment and a recognition of how important they are to the success of any assessment.

Terminology

Conflict management professionals have their own jargon that does not sit comfortably with stakeholders. Everything that goes out to the industry needs to be carefully worked over to ensure clarity and appropriateness. This is especially the case in developing a dispute resolution design where there is no obvious dispute and the goal can be hard to describe. People want to know what the program is about, what you are doing, what the outcome will be, why they should be involved and what they will get out of it. These are questions that need to be considered before starting interviews.

Roles

It was hard to convince stakeholders that we were just the facilitators when we were employed as ‘experts’ in conflict management. The common response was, ‘Well, you tell me’. We remain convinced that next to developing the relationships, the process itself is a critical aspect in getting started. This is being clear about your role and function. Another tension is whether the person/team doing the conflict assessment should be the same person/team that facilitates the design. To some this could be a conflict of interest. We concluded that although these roles may be best separated in theory, there are overwhelming benefits in doing both.

Key lessons to date

The will to change

It is easy to find evidence that supports the *need for change*. However, this often tells us very little about the

willingness to change. People use dispute resolution methods that are familiar to them, often regardless of the costs or the implications. People litigate because they have done it in the past, they know the process and can guess the outcomes. A design program needs to understand why these methods are used, not just the frequency or costs. We need to determine what motivates people, the culture of the industry and what changes they think are important. Just telling people they should use mediation more will change nothing.

Timing

It could be argued that when an organisation or industry is involved in several highly contentious disputes it may not be a good time to implement a dispute systems design.³ Our view is different. Does this mean we wait until there are no disputes? This time is unlikely to occur. Does this mean we wait until there is more case law to provide further guidance? The legal mechanisms continue to change and so case law continues to evolve.

Current disputes can make it harder to access certain information and engage certain parties and this may create some barriers to implementing a consensus building program. Existing disputes can also provide a very powerful example of a system in crisis and the impetus for change. We see no compelling reason why a design program cannot be run in parallel with the resolution of other disputes. Surely this is implied by Ury, Brett and Goldberg.⁴ All three strategies, as outlined above, can run in parallel as no method is the panacea for all disputes.

Stakeholder involvement

We are convinced that everyone with a stake in the decision or who could be affected by the outcome needs to be involved. But what if they don’t want to? Sometimes we may spend so much time trying to influence ‘important’ stakeholders that we forget about the interests of the majority.

The non-participants could be saying that their interests are better served by remaining outside the program. This could be an avenue to explore. What are the real alternatives and how much support is there for them?



Perhaps the non-participants are saying they don't want to be involved right now. This begs the question: is the design program totally open or representative? In a large design, being totally open may be difficult. Another avenue may be to explore the conditions in a process agreement by which early non-participants can engage at a later stage.

Other reasons for non-participation may involve power and/or status. This could be a risk to the program if the non-participants are the power brokers or the formal or informal decision makers. In this case, there seems to be a strong argument for discontinuing, as the program could be marginalised or any outcome will not be ratified.

Participation is not the product

We initially put so much emphasis on process and relationships that we forgot about the substance. What is the tangible product at the end? How will it help the industry? Initially we said we are working towards an industry wide agreement — but an agreement to do what? We think this can be a danger. For example, we began to see skill building, or better relationships, as a product. In the eyes of a mediator such things may be fundamental, but in the eyes of a stakeholder they may be seen as a waste of time that means more lost opportunities.

It can be hard to get people motivated by saying 'your relationships will improve'. This comes back to asking people what they want. The vision can provide the passion, and the passion ultimately drives the commitment. If disputes are causing inefficiencies, a loss of profit, the inability to achieve business or industry goals, then these

need to be translated into something stakeholders can realise.

In any industry where there are conflicting demands on a finite resource, we have to start thinking about how to 'create more value' out of what we have without diminishing other values. Many primary industries are well suited to explore negotiated approaches to maximise the value of the asset. In other words, those who gain have the opportunity to adequately compensate those who lose, and both parties can be better off. ●

Colin McKenzie is the director of Conflict Management New Zealand Ltd which is a partner to Conflict Management Group in Boston where he worked as a consultant. Colin has 20 years experience as a mediator and in teaching and training in conflict management. He can be contacted at <colin@cmnz.co.nz> or visit the website at <www.cmnz.co.nz>.

Endnotes

1. Ury W, Brett J and Goldberg S *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* Jossey-Bass San Francisco 1988.
2. Costantino C and Merchant C *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* Jossey-Bass San Francisco 1996.
3. Moore C and Woodrow P 'Collaborative problem solving within organisations' in Susskind L, McKernan S and Thomas-Larmer J *The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* Sage Publications Thousand Oaks CA 1999 p 628.
4. In above note 1.

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