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Maintaining service standards in ADR

ADR for the long haul — a progressive model of conciliation in action

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A well-known mediator and educator said of us in 1993 that, 'ADR programs generally last about three years before being subject to review and change'. It is certainly true that dispute resolution in workers' compensation schemes has traditionally been caught in a cycle of rights-based versus interest-based approaches, as policy makers veer from one to the other under the influence of one lobby group or another.

However, the Accident Compensation Conciliation Service of Victoria is still here 15 years later and largely intact. Why is this so? And how is it that this service has been essential to the transformation from an adversarial workers' compensation culture of dispute resolution to one in which all parties contribute positively to its wellbeing?

This article explores the key reasons for the success of a service that is positioned centre-stage in the industrial landscape. These include factors such as how the 'blended' or 'hybrid' conciliation/decision-making model of ADR works, the relationship to the justice system and the importance of government and regulatory support for the role of conciliation, relationships and partnerships with stakeholders, a proactive and unfettered ability to deal directly with all parties and address balance of power issues, and a culture of peer support and policy development in the service. Future challenges to the organisation will also be discussed in a potentially changing industrial and legislative landscape.

What is the Accident Compensation Conciliation Service?

The Accident Compensation Conciliation Service (ACCS) is an independent statutory authority within the Victorian workers' compensation scheme, a 'no-fault' scheme. The worker does not have to prove injury due to an employer's negligence. The scheme was first introduced in Victoria in 1914. It has been through a number of iterations with the current scheme administered by WorkSafe Victoria through its agents. Claims are handled by agents or the employer itself if it is a self-insurer.

Since 1992 the ACCS has become the largest provider of mandatory conciliation services to the Victorian community, handling over 215,000 cases in that time. We operate in a complex legal, industrial, medical and regulatory environment and deal daily with the emotive and personal responses to physical and psychological injuries. While the historical pattern of workers' compensation schemes in Australia has seen the pendulum swing to and fro between determinative and consensual mechanisms of dispute resolution, the conciliation model of ADR in Victoria has been widely accepted and trusted by all stakeholders and remains successful and cost efficient (approximately $839 per conciliation meeting or conference).

The ACCS was established by the *Accident Compensation Act 1985* (Vic) (the Act) and Ministerial Guidelines regulate such things as the business of the ACCS, how conferences are conducted and the conduct of parties at a conference. Its role is to resolve issues between WorkCover agents or self-insurers, employers and workers when disputes arise regarding workers' compensation benefits, such as weekly payments or medical expenses. It is the first level of dispute resolution in the scheme.

Dispute resolution structure in the scheme

As I have indicated, the conciliation service is the first level of dispute resolution in workers' compensation matters in Victoria. The scheme makes conciliation compulsory prior to issuing in the courts.[1] The Act prevents lawyers from attending conciliation conferences unless all parties and the Conciliation Officer agree.[2] Like all ADR processes, it is informal and non-adversarial. In the last financial year 13,899 new requests for conciliation were filed which is slightly higher than in 2006-07 (13,733). The resolution rate in 2007–08 was 71.8% compared with 70.1% in the previous year.

The objectives of the service are to some extent outlined in the governing legislation. Section 56(2) of the Act provides that:

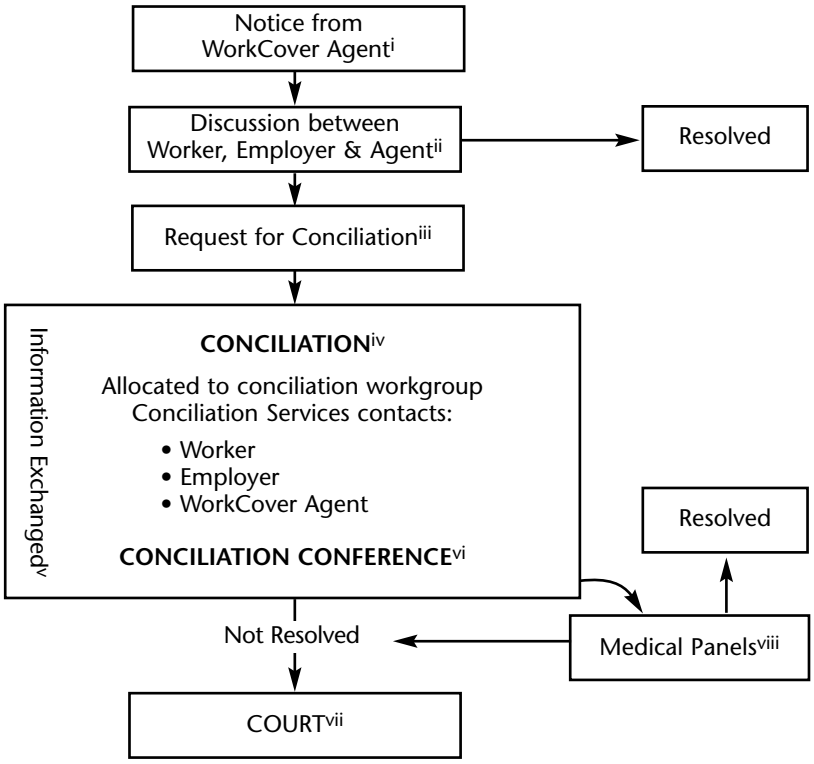
> A Conciliation Officer must make all reasonable efforts to bring the parties to agreement, having regard to the need to be fair, economical, informal and quick.

How does a matter get to conciliation?

The flow chart over the page shows how conciliation sits central to the scheme's dispute resolution processes:

This legislative and regulatory structure for resolving disputes has been beneficial to the stability of the conciliation process for a number of reasons:

- It facilitates an early exchange of information.
- Agents are scrutinised on their conciliation performance by the regulator.
- It streams complex medical issues to a determination process (using the Medical Panels).
- It provides free access to relatively speedy determinative process (the Medical Panels).
- It reinforces the conciliation function by driving a case management process rather than dominance by contesting parties.
- There is access to the courts only if all reasonable steps have been taken.



Footnotes

i. The WorkCover Agent makes a decision which is negative for the injured worker.
ii. There may be discussion at that point which resolves the dispute.
iii. If not, the worker files a Request for Conciliation.
iv. Once the Request has been filed, the matter is allocated to a Conciliation Officer and a date for a conciliation conference is set.
v. At this stage, the conciliation officer facilitates an exchange of all information and assesses the matter. Approximately 36% of matters resolved at this stage in 2007–08.
vi. If it doesn't settle beforehand, the matter proceeds to conference.
vii. If the matter does not resolve, then it can proceed to court.
viii. If it is a medical dispute then it can be referred to a Medical Panel for a binding opinion.

Effective hybrid model of ADR (conciliation)

Contrary to conciliation practised in other statutory ADR schemes, conciliation pursuant to the Act is a 'blended ADR' or 'hybrid ADR' where conciliators can:

- critically analyse authorised agent and self-insurer decisions against established principles of sound and proper 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 admissions of liability;[3]
- formally request information to be supplied and if it is not supplied prevent it from being used in subsequent legal proceedings;[4]
- refer medical questions in dispute to a Medical Panel for a binding opinion;
- conclude a conciliation that does not reach agreement by deciding 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 taken all reasonable steps to settle the dispute, and, if not, prevent the party from proceeding to court until such steps are undertaken;
- if the insurer does not have an arguable case, issue a Direction that weekly payments or medical and like expenses 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.[5] Directions are issued in only 1% of matters.

Conciliators in this context have the objectives of the law and the system to consider, and the responsibility to consider the repercussions of unresolved conflict. Conciliators can have multiple roles, possess distinctive content knowledge and are able to move from facilitation to a decision-making role. If a conciliator is unable to bring the parties to agreement, he or she is asked to make a decision whether the employer or insurer has an arguable case for the adverse decision — that is, is there a 'genuine dispute'? If the conciliator is satisfied that there is a genuine dispute with respect to such liability then the conciliator must notify the claimant that an application may be made to the courts to determine the matter.[6]

If the conciliator is satisfied that there is no genuine dispute with respect to such liability, then he or she may direct an employer or insurer to pay compensation for a limited period.[7] This direction period is often a time where the employer or insurer can re-align with legislative or administrative norms their initial decision that led to the dispute about a claim. Although an employer or insurer's acceptance of a recommendation, or payment under a direction, are on a non-admissions basis, this conciliation decision-making role is distinctly different from mainstream ADR as traditionally understood. Standing somewhere between facilitation and decision-making, it stops short of arbitration in the traditional sense.

Why has this hybrid model of ADR enhanced our ability to adapt over time and survive political change? Some reasons include:

- The seniority and experience of practitioners ensures that the ACCS has earned respect in a volatile industrial context. Conciliators have wide experience in managing workplace and industrial disputes.
- The process of conciliation is deliberately focused on the consensual rather than adversarial resolution of disputes — for example, the legislation provides for an evidence cap if information is not supplied by a party after a conciliator request.
- Potential decision-making roles of conciliation officers encourages

problem-solving activity of parties to avoid conciliation officers exercising these powers.
- The model helps address directly obvious flaws in decisions by agents and self-insurers and therefore gains credibility for conciliation role and scheme.
- Additional conciliator powers have been added to or adjusted over time as trust was gained in their handling of multiple roles.
- The hybrid model is consistent with other mandatory dispute resolution processes in which the scheme has broader objectives that need to be met. A purely facilitative function or a voluntary process would be in danger of inadvertently reinforcing poor industry practices and decision making.

Partnering relationships with stakeholders

The stakeholders and clients of the ACCS can be broadly identified as the following groups:
- workers;
- employers;
- WorkSafe Victoria;
- government;
- agents and self-insurers;
- assistants to the parties;
- lawyers;
- service-providers (doctors, physiotherapists, etc).

The ACCS operates in a unique environment in that some stakeholders have a financial interest in the outcome of conciliation cases. Agents' KPIs are linked to outcomes from conciliation — and not always in a positive way from the point of view of the ACCS. An agent views it as a positive if a matter does not resolve and the injured worker then has to take a matter to court because most workers will not do that. (In 2006–07 approximately 3,700 Genuine Dispute Certificates were issued and only 1,100 matters were filed in the Magistrates Court.)

In this environment what have we done to build a partnership?
- We consult with stakeholders about the policy and procedural functions of conciliation, especially in the early days: 'this is how we are interpreting our role or deciding to act over these kinds of disputes — what do you think?'
- An advisory group, which is not a board, holds regular liaison meetings.
- Information is provided to all stakeholders about the ACCS and conciliation — through various communication methods.
- Regular training and presentations to stakeholders.
- Regular meetings with all stakeholder groups.
- An ability for the ACCS to report on systemic or corporate strategies that are not aligned with the goals of the legislation.

'Repeat players' and balancing unequal bargaining positions

The ACCS is also unique in that a number of stakeholders are 'repeat players' in the conciliation process. All of the insurers have dispute resolution teams whose members attend conciliation on a daily basis, often several times a day. This of course means that there is, on one side of the table, a person who is a very experienced negotiator and knows the workers' compensation system very well.

Self-insurers have dedicated workers' compensation staff to manage claims and attend conciliation conferences. While they don't attend conciliation as regularly as insurers, they are also experienced in the conciliation process.

In contrast, with some limited exceptions, the injured worker will only ever attend one or two conciliation conferences. He or she will also have no knowledge of the workers' compensation system.

Employers will attend conciliation in only 30% of matters. Although their insurer should protect their rights, this will not always be the case.

We therefore have a system in which one or two parties to a conference are in an unequal bargaining position. To help ameliorate the effects of this, and so protect the perceptions of the conciliation service as fair, assistants can attend conferences with injured workers and employers.

The Ministerial Guidelines recognise that conciliation is a place for the parties to be heard. Therefore, the Guidelines provide that a worker or employer may attend conciliation with an assistant, but the attendance of an assistant does not subsume the prime responsibility of the respective party to a dispute to be a principal participant in the conference. The Guidelines also provide that a Conciliation Officer shall not permit an assistant to be an advocate for a party. In practice, consultants regularly attend with employers.

WorkSafe has funded two organisations to attend conciliation conferences with injured workers. Those organisations are Union Assist and WorkCover Assist. Union Assist can attend to assist a member of a union and WorkCover Assist is funded to assist injured workers who are not union members. Like insurer representatives, they attend conciliation conferences on a daily basis and they work to achieve a level playing field.

Client survey and quality service

Since 1994 the ACCS has regularly surveyed workers, employers, WorkCover agents and self-insurers. Because they are repeat players, additional questions related to the conduct of conciliation are asked of insurers and self-insurers.

Information obtained from the survey is used to improve service delivery. For example, for in the past couple of surveys stakeholders from the Mornington Peninsula area have indicated that it is simply too far to travel to Melbourne and it is not an area to which we currently circuit. In response to this feedback we ran a pilot project in 2008 where we held conferences in an outer Melbourne suburb convenient to the Mornington Peninsula. The suburb was not ideal, but it was selected because the Victorian Government had recently opened a new justice centre there with excellent conferencing facilities. We also wanted to gauge the response of the broader stakeholder group to holding conferences in an outer Melbourne suburb before we settled on long-term locations. Anecdotally, the pilot has been well received, but it was to be formally evaluated later in 2008. The evaluation was followed with discussions with stakeholders about holding conferences in other locations.

We have also used the survey as a method of obtaining information from

ADR Bulletin of Bond University DRC

stakeholders about the service we deliver. For example, when we were upgrading our electronic systems, we needed to know how stakeholders wanted to be contacted so we asked the question when we were doing the survey. We were surprised to learn that generally, people wanted to be contacted in the traditional way — by post.

Each year we have two key questions that are pivotal to our service delivery:

Thinking about all of your dealings with the Conciliation Service, regardless of outcome, how would you rate the service you received?

The percentage of each group rating the service good or very good were:

- Workers: 80% (82% in 06–07, 85.5% in 05–06)
- Employers: 79% (77% in 06–07, 75% in 05–06)
- WorkCover agents and self-insurers: 90% (88.5% in 06–07, 88.5% in 05–06)

Regardless of the outcome, do you agree or disagree that conciliation is a valuable process?

The percentage of each group that agreed was:

- Workers: 88% (90% in 06–07, 86% in 05–06),
- Employers: 85% (89% in 06–07, 87.5% in 05–06) and
- WorkCover agents and self-insurers: 96% of (94% in 06–07, 92% in 05–06).

In addition to relying upon the client survey, the ACCS has a number of internal quality control mechanisms.

- Peer support is strong amongst Conciliation Officers.
- A collegiate approach is taken to policy decisions.
- Conciliation Officers are reviewed twice each year.
- There is a formal professional development program for Conciliation Officers, both at an individual and an organisational level.

As well as ensuring that we continue to deliver a service that is relevant to our stakeholders, these mechanisms operate to provide a support in what can otherwise be a highly emotional environment. These mechanisms are critical to the long-term good health of practitioners in that they prevent burnout and inflexibility of approach.

Challenges for the future

The key reasons that some of the ACCS's predecessors did not survive was that they were perceived as biased, too costly, and/or excluded parties to the process. Any ADR service in workers compensation faces the tension of balancing the powers it has and managing impartiality. We have worked to do that well enough over the years to survive periodic review.

The first review of the Accident Compensation Act took place in 2008, along with the whole compensation scheme in Victoria. The recommendations from the review are uncertain at the time of writing, but submissions range from suggesting no change to our process to giving us further powers.

If our model remains the same, there are still challenges that we must focus on into the future:

- We are affected by the performance of key stakeholders, especially original decision makers. That is, the emphasis is on preventing disputes rather than having a wonderful dispute resolution service, but if service standards in the scheme deteriorate we may be blamed for being ineffectual to alter systemic change.
- The delay between the conciliation process and a court hearing is a significant disincentive for workers. This is an issue of access to justice and we could be seen as providing sub-optimal justice in this context. This is particularly dangerous because the confidentiality of the process can lead to perceptions of 'hidden justice'.
- Victoria has enacted a Human Rights Charter which enshrines the right to legal representation. This is an interesting challenge when the current legislation only allows lawyers to attend conciliation with the consent of all parties. We will need to rethink old assumptions about the ACCS and its role.
- A national workers' compensation scheme is on the federal agenda which could lead to total change and the loss of regional achievements.
- Finally, every generation needs to claim this vision (if it's worth holding on to) and it can easily be lost and the wheel in policy-making will turn again. So the need is for constant vigilance on extolling the virtues of the process, providing credible information to government and regulator about the contribution of the service to the overall aims of the scheme, and always looking for ways to improve.

Conclusion

The title of this article is 'ADR for the long haul'. I have sought to analyse the factors that have led to the resilience of the ACCS. The factors that, as an organisation, we think have kept us around have been:

- a blended or hybrid conciliation and decision-making model which gives a Conciliation Officer some powers but stops short of an arbitration model;
- partnering relationships with stakeholders in a complex environment;
- managing power imbalances;
- regular circuits through regional Victoria recognising that stakeholder needs may change in this regard, leading to additional circuits or changes to circuits where necessary;
- conducting regular client surveys and taking these seriously in supporting internal mechanisms to ensure quality service at all levels of the organisation.

The ACCS also recognises that we operate in a changing political and industrial landscape and seek to respond to those changes as they are thrown at us. ●

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Endnotes

1. *Accident Compensation Act 1985*, s 49.
2. Section 56(3) and (4).
3. Section 61.
4. Section 56(9) and (9A).
5. Section 59(3) and (9), s 61.
6. Section 59(4).
7. Section 59(5).