

22 November 2007



Accident Compensation
Conciliation Service

Level 9, 460 Lonsdale Street, Melbourne 3000
GPO Box 251, Melbourne 3001
phone (03) 9940 1111
fax (03) 9940 1000
freecall 1800 635 960
email info@conciliation.vic.gov.au

The Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
Spring Street
East Melbourne Vic 3002

Dear Sir or Madam,

Parliament of Victoria Law Reform Committee: Alternative Dispute Resolution Inquiry

The Accident Compensation Conciliation Service (ACCS) welcomes the opportunity to submit comments to the Alternative Dispute Resolution (ADR) Inquiry.

Introduction

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 versus 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.¹

We therefore believe we have significant experience in effectively providing ADR services and hope that the comments below are helpful in the deliberations of the Committee. Given the extent and nature of our work we concentrate our responses to the Discussion Paper on those issues that have proved most successful, reiterating critically important elements that underpin an effective ADR service –

- Structural framework that aligns the goals of ADR, legislative objectives, scheme regulation, and partnership with key stakeholders
- Flexible and diverse ADR mechanisms that meet individual needs and produce outcomes that protect rights
- Proactive preparation of consumers, especially those most marginalised, for ADR, including the provision of navigators through the system
- Management of consistency issues in line with national best practice using measures, feedback, peer support and development, recognising the obligation of providing higher consumer service standards within a mandatory ADR scheme

¹ ACCS Annual Report 2006/2007 (copy attached)

Responses to Discussion Paper

ADR provision in civil disputes (Question 1)

The Chapter 3.1 classification is helpful in describing ADR services in Victoria. We note with some surprise that the ACCS is absent from Figure 1 “Major ADR suppliers in Victoria”. We concur with the comment that confusions may arise for consumers, accentuated by language and cultural backgrounds, where the diverse range of ADR services in the community and the different terminology used to describe the services are on offer. This is not so much a definitional issue – the NADRAC definitions are universally accepted by ADR providers – but the deployment of terms within a particular context.

In our experience the solution to potential consumer confusion over the use of the term “conciliation”, or any other ADR term, is that service providers and the practitioners must ensure adequate and accurate information is provided prior to and during the process. This is consistent with the NADRAC recommendation that all ADR service providers adopt and comply with an appropriate code of practice that covers the ADR process, informed participation, access and fairness, service quality and complaints and compliance.²

The ACCS use of the term “conciliation” is a case in point. Contrary to conciliation practised in other statutory ADR schemes, conciliation pursuant to the Accident Compensation Act 1985 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
- Formally request information to be supplied and if it is not supplied prevent it from being used in subsequent legal proceedings
- Refer medical questions in dispute to a Medical Panel for a binding opinion
- Conclude 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 made all reasonable steps to settle the dispute, and, if not, prevent the party from proceeding to court until such steps are undertaken
- 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

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.

² NADRAC (2001) A Framework for ADR Standards, pp.97-99

Conciliators can have multiple roles and 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 by conciliation, the Conciliator is asked to make a decision whether the employer or insurer have an arguable case for the adverse decision they have made in relation to the worker (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.

If the Conciliator is satisfied that there is no genuine dispute with respect to such liability, then the Conciliator may direct an employer or insurer to pay compensation for a limited period. 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. We argue for some of the benefits of this approach in our context below. However the difference has been a motivation to ensure that our explanation of our particular ADR model is clearly understood by all consumers.

Access to ADR services (Questions 7-10, 36-39)

Our experience is that the issues of access are best met by information and proactive intervention in the course of the consumer's involvement in the dispute resolution process.

The clients of the ACCS are culturally and linguistically diverse, with about 16% of workers requesting interpreters for the conciliation conference. The 2006-2007 Annual Report (attached, p.12) provides details of how we attend to the needs of such clients in a range of ways, including -

- Publications
- Free interpreter service – phone and in person
- Video/DVD available in 8 languages, with accompanying booklet in 12 languages
- Translation of our ADR agreements (Outcome Certificates)
- Regional services to Victoria

In addition, the independent research company engaged to carry out the Annual Client Survey employ multi-lingual survey staff to ensure that people from diverse language backgrounds can participate effectively in the survey. We are also currently assessing what is required in order to ensure that effective interpreting services are provided to consumers from new and emerging language groups.

While these resources have become standard in most statutory services in Australia, they are particularly effective when they are complemented by a flexible, unencumbered and proactive approach to consumer contacts. Examples of processes that we have found successful in navigating parties through ADR are –

- Dispute resolution practitioners making early contact directly with unassisted parties to navigate them through the system
- Driving case management so that timeframes, costs and means of information collection and exchange are agreed, supported by Ministerial and regulatory requirements and memorandums of understanding with key stakeholders
- Development of free paralegal services to assist workers to prepare for and participate in conciliation conferences
- Disputes screened and streamed upfront to ensure the most appropriate treatment, rather than frustrating consumers with a one-size-fits-all approach

The effectiveness of this a dual approach to access for consumers – information and navigation - can be measured to some extent. One measure is reflected in the ability to resolve matters early and without formal meetings, something that is of benefit to many clients whose ability to manage more formal proceedings is limited. For example at the ACCS 34% of disputes are resolved without a conference with the parties. This is achieved by a “front door” screening and streaming of cases for appropriate action, and the freedom for the conciliator to take action without relying on a formal meeting or the strategic manipulation of the parties. A complementary measure of meeting access needs is the average number of formal ADR conferences or meetings are required prior to conclusion. The ACCS average over the past two financial years has been 1.05.

A second measure is the timeframes for concluding ADR matters demonstrating successful navigation of parties through the process. The ACCS concluded over 70% of matters within 80 days of lodgement of a conciliation request.

A third measure is the durability of agreements, perhaps measured by the return of cases on the grounds of a party allegedly not complying with the original agreement. The readiness of the ADR practitioner to remain involved post-conference is an important part of providing an environment where the consumer is not put off accessing ADR when things do not go according to plan.

However, standardisation and comparison of such measures between ADR services is not straight forward. For example, ACCS Conciliators operate in a regulated environment where decision makers, ie, WorkCover Agents, are rewarded financially for performance targets, including those for conciliation. Conciliators also refer matters to a Medical Panel. In 2006-2007, 1363 matters were referred to the Medical Panel (1291 in 2005-2006). Matters referred to the Medical Panel generally have a longer time to disposal due to the time required for the Medical Panel to arrange assessments and provide their opinion (on average 55 days from referral). Such a referral may have no equivalence in another ADR service.

An area of concern for the ACCS is the lack of data about those matters that do not resolve at conciliation. As referred to above, one of the options available to a Conciliation Officer at the conclusion is to decide that there is an arguable case and that the claimant has taken all reasonable steps to resolve the matter. The Conciliation Officer will then issue an Outcome Certificate that allows the parties to proceed to court. There is no data that indicates how many of these matters actually

proceed to court and no research that addresses the question of what do the parties do if the matter does not resolve.

The tracking of cases beyond conciliation, may inform what practitioners do in an ADR process. How much it will inform what ADR practitioners do may be limited but a lack of research means that this issue remains unaddressed.

Mandatory ADR, relationship to the courts and power imbalances (Questions 13-17, 30, 33)

Conciliation has become one of the principal ADR methods favoured by Australian governments to reduce legal costs and divert cases from the court lists. If conciliation is mandatory, as it is in the Victorian workers compensation jurisdiction, dispute management institutionalised in this way is often practised within considerable time and resource constraints to achieve multiple goals, industrial, HR management and fiscal. The particular dispute context supports mandatory ADR because -

- Disputes arise from legal and administrative decisions in relation to a worker's claim by other parties (the insurer and insured)
- Regulatory oversight is critical in managing a complex system of interacting factors
- Rights and obligations of all players are defined, including the employers (the insured)
- An unrestrained litigious approach increases costs for the whole system and the broader economy and negatively affects fundamentals of the scheme; eg early return to work
- Continuous learning and improvement of the whole scheme by identifying systemic issues arising from disputes

Mandatory conciliation is often practised as an interventionist form of ADR, with significant input into the dispute resolution process from the practitioner, who may have wider powers and roles given to them (see above). The ideal of pure facilitative ADR is questionable in this context because –

- The requirement that the ADR practice must balance the requirements of the legal and administrative framework while seeking an agreement between the parties which satisfies their interests and protects rights
- Lawyers are not permitted to attend conciliation conferences unless all parties agree, placing an onus on the conciliator to create balance
- If ADR is practised in the shadow of the court then the ADR component of the scheme requires legislative and regulatory reinforcement to remain the centre of the dispute resolution process, rather than legal advisers diverting the process into costly and at times inappropriate and inaccessible litigation
- Outcomes are prescribed to some extent by law or should be recognisable as fair and consistent with the interests and rights of the parties. It is an obligation on conciliators to sometimes make affirmative interventions based on their knowledge in order to achieve fair negotiations between the parties with unequal power, or to meet other systemic goals such as speediness, fairness and low cost

- Manage perceptions arising from structural elements in the compensation scheme – eg the “weight” of the legislative benefits for a particular participant (worker) or the strategic relationship between the decision makers (employer/insurer)
- Decisions under review have had a serious and tangible affect on people’s lives and a process for bringing speedy closure and certainty to the dispute is imperative for all parties

Although this kind of “blended ADR” may have its attractions, especially in a mandatory system, our experience is that such an approach requires rigorous mechanisms to ensure consistent quality. We now turn to that issue.

Maintaining ADR standards (Questions 50-54)

Consumer feedback

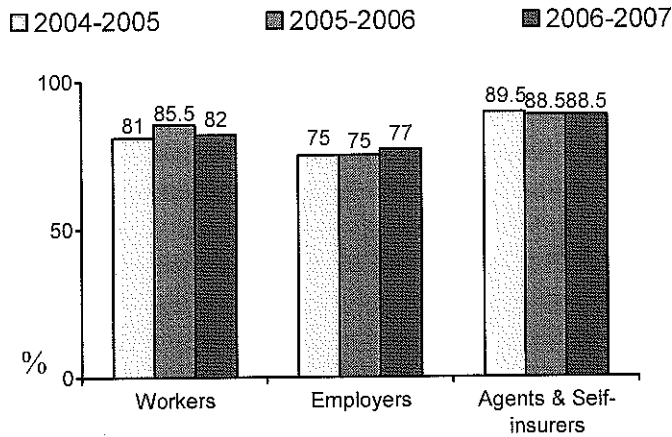
We believe that the starting point for standards is with consumers of the ADR service, and providing an opportunity for them to have a say in the service operations. For this reason the ACCS User Group was established at the request of the Minister for WorkCover. The User Group is a vital forum for regular and formal discussion about strategic and significant issues facing the ACCS and its users.

The User Group’s membership includes major stakeholders (employers, unions, Victorian Workcover Authority) and its primary roles are to provide a forum to:

- Raise ongoing and operational issues of concern to stakeholders and the ACCS
- Build a shared understanding of the current issues facing the ACCS and stakeholders and the environment in which they operate
- Investigate and advise on service performance standards and KPIs for the ACCS that do not undermine the independence of the Conciliation Service to facilitate continuous improvement in the organisation
- Provide the Minister with sufficient information in regard to its role

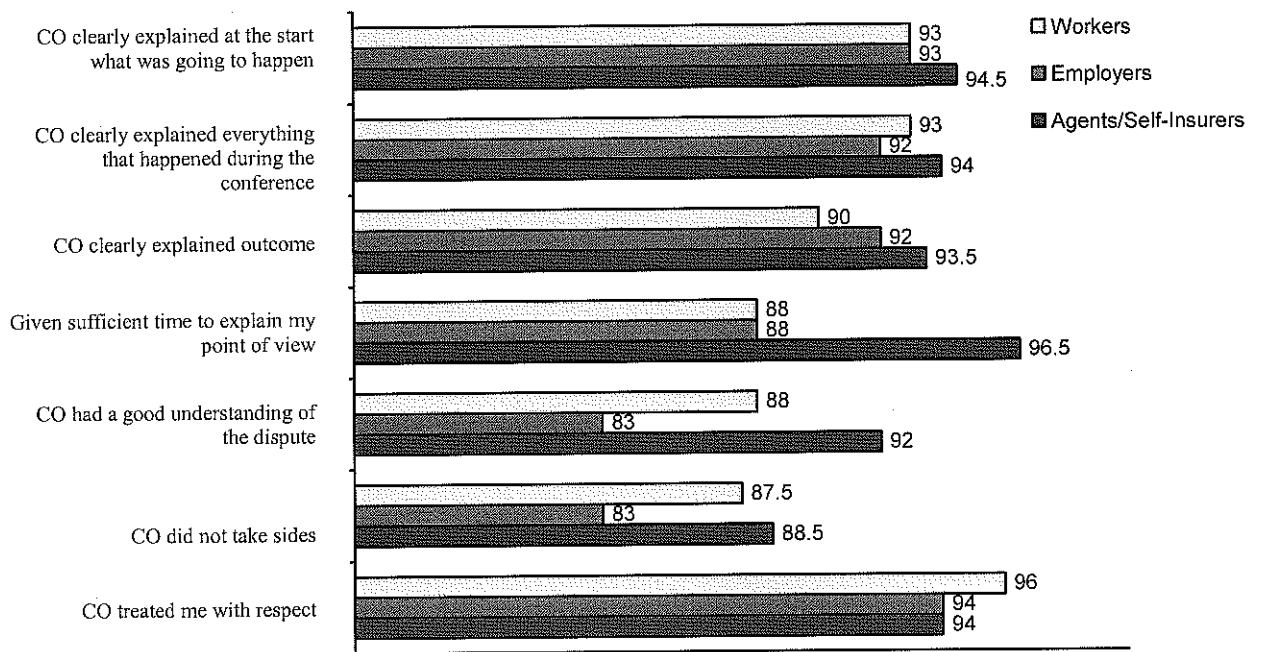
Given our reliance on the partnership with stakeholders and their perceptions of our effectiveness, since 1994 the ACCS has surveyed workers, employers, WorkCover agents (insurers) and self-insurers. The survey is conducted every 6 months by an independent agency and has proved a valuable tool to track trends and improve our performance. A copy of the survey is available on request, but the Committee may be interested in the following summary of the 2006/2007 results.

As part of the survey, the following question about overall perceptions of the service provided throughout the conciliation process is asked of all stakeholders: “Thinking about all of your dealings with the ACCS (involving this dispute), regardless of the outcome how would you rate the service you received?” The percentage of each group that rate the service “good” or “very good” is:



Each client group is also asked whether they agreed or disagreed that Conciliation was a valuable process. The percentage of each group that agreed was: 90% of workers, 89% of employers and 94% of WorkCover agents/self-insurers.

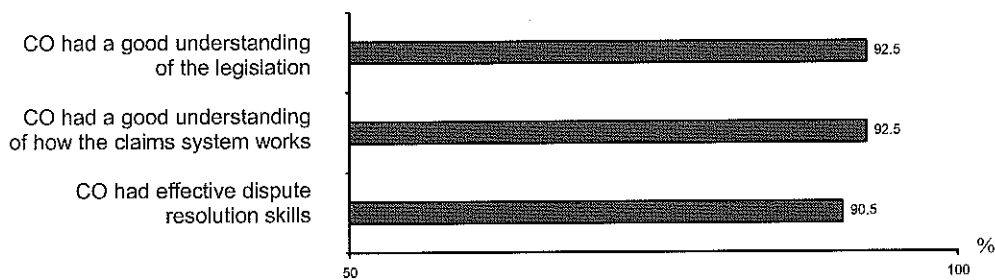
Another key section of the survey asks whether the respondent agrees or disagrees with a number of statements as to the conduct of the conference. Most statements were agreed to by over 90% of respondents, with the lowest percentage of agreement being 83%. The percentage of each client group that agreed with statements about the conduct of the conference was:



75

As well as the above statements, WorkCover agents and self-insurers were also asked if they agreed or disagreed with three additional statements regarding the conciliator's understanding of the legislation and how the claims management system works, as well as whether or not the conciliator had good dispute resolution skills. The

percentage of WorkCover Agents and self-insurers that agreed with these statements was:



Selecting for core competencies

As discussed above, it is important for an ADR service to be clear about what ADR model it operates in order to meet the needs of its users. Also without articulation of the competencies required in ADR practitioners it is difficult to create an acceptable standard of consistency among the practitioners engaged. Once competencies are identified then the ongoing discussion of performance can be meaningful and productive.

For example, the competencies we have identified for conciliators, whose characteristics lie somewhere between the lawyer and counsellor, include the following -

ADR Competency:	Description:
Analysis	Effectiveness in identifying the issues in dispute and seeking out relevant information pertinent to the case’s resolution.
Expert knowledge	Knowledge of the relevant law, case law and other relevant developments, including an understanding of the legal options, processes and practices beyond conciliation.
Interpersonal skills	Effectiveness of verbal expression, gesture and body language in communication and managing the interaction between parties.
Inventiveness and problem-solving	Pursuit of collaborative solutions and generation of ideas and proposals consistent with case facts.
Legislative framework	Appropriate use of administrative law principles in considering parties’ rights, options and responsibilities under the law.
Managing expectations	Effectiveness in managing the parties’ expectations of conciliation. This is important where the entry to conciliation is a compulsory phase prior to legal proceedings.
Multiple roles	Parties need to be clear about what role the conciliator has at any time. Conciliators must manage their various roles effectively. For example, signal changes in roles and in more determinative or conclusive interventions, conform with rules of natural justice.

Objective Empathy	Ability to refocus a party's self-absorption in their dispute to a problem-solving approach. Rapport, awareness and consideration of their needs and interests are demonstrated, but the objective is towards closure and resolution.
Personal flexibility	Effective in adapting preferred styles and roles to differing circumstances during conciliation.
Self-efficacy	Personal power and psychological strength to be effective in a meeting with changing emotional and power dynamics within the limitations of what a conciliator can actually achieve. This includes the capacity to manage the dumping, blaming and aggressiveness of parties.
Strategic direction	Effectiveness in moving parties toward areas of agreement or towards a productive streamlining of the dispute.

Practitioner professional oversight & development

Most ADR practitioners in Australia work alone. Except for some community and family mediation services, the fact is that dispute resolution agencies and judicial processes in Australia today largely function with solo practitioners. Economic restraints, outsourced services and practitioner preference are reasons for this widespread phenomenon.

At the ACCS we have been fortunate in having a relatively large and stable pool of conciliators that has allowed us to develop a collegiate approach to policy and practice issues and acquire knowledge of how to furnish, sustain and develop ADR professionals. For example, conciliators regularly debate policy issues together and form collective views and responses to issues arising. Conciliators observe each other's conferences on a regular basis in order to develop new dispute resolution skills and learn from colleagues who may have different styles and expertise. The Senior Conciliator observes and evaluates each conciliator in a conference situation twice a year and together they develop appropriate professional development options.

We have also found that debriefing opportunities are vital at critical times to support the emotional demands of this work. The availability of colleagues within a small workgroup setting, and a confidential independent counselling service, have both assisted us to deal with these demands. We have also experimented with small, voluntary, learning groups whose activities include conciliation conference observations and feedback, co-conciliation, case presentations and group discussions, with a deliberate focus on personal learning goals and experimentation with the model.

More quantitative feedback is also provided to conciliators: throughput measures and range of outcomes are discussed bi-annually with each conciliator together with an examination of a selection of files by the Senior Conciliation Officer.

We strongly support the recent national ADR mediator standards as a starting point for conciliation practice in Australia, so long as there is recognition of the important differences between conciliation and mediation practice, and mandatory and voluntary schemes.

We look forward to an opportunity to elaborate on points raised in this submission with the Committee during public hearings to be scheduled later this year.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Susan Cibau', with a long horizontal flourish extending to the right.

**Ms Susan Cibau
Senior Conciliation Officer
Accident Compensation Conciliation Service**