

# CORRECTED VERSION

## LAW REFORM COMMITTEE

### Inquiry into alternative dispute resolution

Melbourne — 11 February 2008

#### Members

Mr C. Brooks

Mr R. Clark

Mr L. Donnellan

Mr M. Foley

Mrs J. Kronberg

Mr E. O'Donohue

Mr J. Scheffer

Chair: Mr J. Scheffer

Deputy Chair: Mr R. Clark

#### Staff

Executive Officer: Ms K. Riseley

Research Officers: Ms K. Buchanan and Ms S. Brent

Committee Administration Officer: Ms H. Ross-Soden

#### Witnesses

Ms S. Cibau, senior conciliation officer,

Mr D. Bryson, conciliation officer, and

Ms A. Kaminski, conciliation officer, Accident Compensation Conciliation Service.

**The CHAIR** — First of all, Susan Cibau, Anita Kaminski and David Bryson, thank you very much for coming to talk to us this morning. You will be aware that this committee operates under the Parliamentary Committees Act, which means that whatever you say in this committee is subject to parliamentary privilege, so if you say things that may be a bit direct, no-one can take action against you. The same kind of remark said outside this meeting, of course, does not have the same kind of protection. Hansard will be taking down the discussion and you will be sent a copy of that afterwards for you to make any changes to clarify, but obviously not to make substantive changes. We have got just a bit over half an hour. Thank you, also, for the submission that you put in. I will hand it over to you to talk to us about your organisation, your amalgamation and your view on the terms of reference, and then we will jump in with any questions that we have.

**Ms CIBAU** — Thank you for that. I am guessing you have read our submission, and what I am about to say is basically a summary of our submission with some statistics added. I am not sure how aware you are of the Accident Compensation Conciliation Service. We are an independent statutory authority within the Victorian workers compensation scheme. Our role is to resolve disputes once WorkCover agents or self-insurers either terminate or reject a claim for compensation. We resolve disputes between WorkCover agents and self-insurers, the employers and the workers, and the scheme itself makes conciliation compulsory prior to issuing in the courts.

The service has handled over 215 000 matters since 1992; and, to put that into some context, in the last financial year we handled 13 733 matters. Our resolution rate for that year was 70.1 per cent, and the cost per conference for that year was \$827. We are currently tracking at just over — —

**The CHAIR** — Sorry, how much?

**Ms CIBAU** — Cost per case was \$827, and we are currently tracking at roughly 70 to about 73 per cent resolution rate.

We use a conciliation process which falls within the NADRAC definition of conciliation, and we have a blended form of ADR — and this is what makes us unique to other ADR services — where conciliators have responsibilities and powers in addition to dispute resolution. Their powers are outlined in the paper and I will not go through all of them, but I will highlight the ones that are specific to us and are unique.

Conciliators can make formal recommendations which in law protect those accepting such recommendations from admissions of liability. If an employer or insurer has an arguable case, the conciliators can decide whether the claimant has taken all reasonable steps to resolve the dispute and, if not, they can prevent the party from proceeding to court until they have taken all reasonable steps.

If there is not an arguable case then a conciliator can issue a direction that weekly payments be made or continue to be made for up to six weeks, or that medical and like services up to \$2000 are paid. The party that is so directed is not held liable for the claim, so again it is without liability attaching. The other difference is that we can make referrals to a medical panel that will then make a binding decision. That decision can then resolve the matter completely.

How do parties come to conciliation? How do they know about us? When an agent or a self-insurer makes a decision to terminate or reject a claim they have to notify the worker about us, so part of their decision letter is a notification that the next step for the worker to take is to attend conciliation. I am not quite sure what the percentage of workers is who actually take up the option to come to conciliation, but once they have made that decision they file a request for conciliation. We then send out an information booklet and a DVD which outlines our process to the worker, and we send the employer a copy of the request for conciliation, the information booklet and the DVD. There is no cost to any party attending conciliation; we do not have any filing fees, we do not have any fees for attendance or anything like that.

Access is a major issue for us because I think in the paper the figures are that something like 16 per cent of our workers are from a multicultural background, and I think that figure is rising. We cover all of our access issues in our paper, but the major one for us is our multilingual clients and also the parties who are in regional Victoria. We address those access issues by the provision of interpreters for our multilingual clients. Basically we provide that at any stage through the process. They are available by phone; they are available in person to attend a conference with a worker or an employer, whoever main need that service. We also produce our brochures and our DVD in a number of different languages.

We regularly circuit to regional Victoria — to some places more often than others. For example, we go to Geelong very regularly, but we will not go to Mildura quite as often because the need is not as great in that area. But we are continually looking at the areas we circuit to and we are about to expand that. We are currently looking at utilising the Moorabbin Justice Centre; it has some very good conferencing facilities so we are looking at utilising them. We are also looking at Dandenong, which is a bigger issue because there is nothing quite as purpose built as the justice centre down there.

Of further assistance to our process has been the development of paralegal services to assist workers. The WorkCover authority has actually funded two organisations, Union Assist and WorkCover Assist, to assist workers through the process. They do not have to go to Union Assist if they are a member of a union, but workers who come who are members of a union have the ability to access Union Assist. Those who are not a member of a union are given information about WorkCover Assist, and they will access those agencies. They meet parties prior to conciliation; they will meet a worker prior to conciliation. They will liaise with us about who might be attending at conciliation, and they will then attend and assist the party through conciliation.

The other thing that I do not think is unique to our scheme is that the Accident Compensation Act specifically provides that parties to a dispute are not entitled to be represented by a lawyer at conciliation unless all the parties and the conciliation officer agree. Generally we do not have a problem if lawyers want to attend, but other parties may. But what we actually find is that most parties that attend do have lawyers acting for them, and a lot of our liaison before a conference might be with a lawyer. A number of lawyers will refer their clients to either WorkCover Assist or Union Assist to attend at a conference — —

**The CHAIR** — Sorry, I do not quite understand. You are saying that most of them have lawyers, but you discourage lawyers from participating in it?

**Ms CIBAU** — No, sorry. The legislation specifically provides that lawyers cannot attend conciliation unless the parties agree.

**The CHAIR** — Right.

**Ms CIBAU** — Most parties will have attended a lawyer and will actually have a lawyer acting for them in relation to their injury and be taking advice about whether or not they should be making a common-law claim, whether it is a permanent disability and advice generally about the process, But unless everyone agrees the particular lawyer who is acting for the party does not attend conciliation. What they do is liaise with WorkCover Assist or Union Assist and they will attend in a paralegal form.

**The CHAIR** — Thank you.

**Ms CIBAU** — Other than that the lawyers may also send to conciliation an articled clerk or a paralegal employed by their firm. That happens reasonably regularly. We have a number of ways of measuring the success of the process that we take, and they are referred to in the paper as well.

I would also like to talk about mandatory ADR. Our conciliation within the WorkCover scheme is mandatory if people want to dispute a claim. They cannot go to court unless they have actually come through our process. We find that mandatory ADR is suited to our dispute context for a number of reasons. The disputes arise from legal and administrative decisions in relation to a worker's claim by other parties. We find that regulatory oversight is critical in managing a complex system of interacting factors, and we find that the rights and obligations of all parties are defined so that everybody knows what they are dealing with when they come to us. We think an unrestrained litigious approach would increase costs for the whole system and for the broader economy. We consider it would negatively affect the fundamentals of the WorkCover scheme, and one of those fundamentals is an early return to work. If people are tied up in a litigious process getting back to work is not going to be easy.

Just aligned to that, our system is relatively quick. There are some figures around how long a matter is with us. We find that 70 per cent of matters are resolved within 80 days of lodgement of a request for conciliation, and those figures are a bit different between the country and city.

The next point I want to talk about is maintaining standards. We have a number of methods of testing our standards and testing how our stakeholders feel we are meeting standards. We have an ACCS user group which was set up by the previous minister for WorkCover. Representatives on that user group, aside from us, are the WorkCover

authority, the union movement, an employer group and the Department of Treasury and Finance, and that group meets quarterly. It has not been in existence for very long; it is now getting on its feet and giving us some very real feedback about our process.

The other thing we do is regularly survey clients. Generally we find that we get some very good feedback that way. We might get some very high results statistically, but what I find very helpful is looking at what people say. They may be happy about the service they receive; they may have found it easy to come to us. A factor that came out of the last client survey that we had was that workers would actually prefer us to be on the Mornington Peninsula, so we are looking at circuiting down in that area in the near future. We also find that most people think we provide a valuable service, and 90 per cent of workers and 89 per cent of employers gave us feedback that the process was valuable whether or not it resolved their matter.

In relation to standards we also find that a big issue for us is how we employ conciliation officers. The list of core competencies that are relied upon are in the paper, and unless you want me to address any of those core competencies I will just move on.

Aligned to those core competencies and in making sure that everyone is up to standard, we actually have a very detailed professional development program. Each conciliation officer is allocated a two-year budget to use for professional development purposes. As well as that, we provide professional development on a bi-monthly basis through the year to address issues we consider the group might need.

You will probably be aware that national mediators standards have recently been published. We strongly support those standards to the extent that they relate to conciliation practice. We think they are a very good starting point for conciliation practice. But given that we conciliate and do not mediate we think that there should be an overlay in relation to conciliation. Liaison with some researchers and with the committee that set up the mediators standards is something we will take into the future. I do not have anything else to say at this point but am happy to answer any of your questions.

**The CHAIR** — Just going back to the beginning of your contribution, you talked about the resolution rates and the cost and so forth. I wonder if you could just explain to us something about the most common types of disputes that you deal with.

**Ms CIBAU** — Medical and like expenses are a long way ahead of any of the other types of disputes. The next one is rejection of a claim — the initial claim that is made is rejected. Following that is termination of payments after 104 or 130 weeks of compensation. The rest are somewhat lower than those top three or four.

**The CHAIR** — That covers that part. The other part I wanted to open up with you is you said that the conciliation process is required to be mandatory before further proceedings can be embarked upon. Are there clients who that does not benefit — people who suffer through that process and who are not being advantaged in that process?

**Ms CIBAU** — Anita and David might have something to say about that, but what we find is that if it is a matter that we know will not resolve and everyone has agreed that it is something that needs to go to court, we will issue an outcome certificate without actually holding the conference. But everyone will have been spoken to prior to that.

**Ms KAMINSKI** — That is exactly what I was going to say. We have the benefit of being flexible, so if we find for pragmatic reasons there is no point in holding things up and it is simply a rubber-stamping to allow a matter to court, as long as all parties agree we can do that very quickly.

**Mr BRYSON** — I would say your question is a very good one because we only see what comes in our front door, but from a scheme point of view you do need to ask the question. My understanding is about 40 to 50 per cent of matters do not come to us, and why might that be so. It is probably less our concern because we take them once they do come to us. The scheme probably has doubtful research on why that occurs. It might be that it is such a small matter and a person wants to get on rather than enter into a cumbersome workers compensation scheme. It may be that they feel threatened to enter into it. It may be the letter they get and the options they are given are not very friendly as far as they are concerned. There could be access reasons in there. To find out, though, really does require some research on those who have had an adverse decision about their claim and then why they

did not proceed. There may be a multitude of reasons, but I think that would be very interesting to know. But that is probably a scheme regulator's role to find out why that might be so.

**The CHAIR** — Just pursuing that a bit, our primary concern is how consumers are processed through the system, if they get justice. Given that there is this issue that you have just alerted us to, how might the committee find out more about that, if that is not part of what you do?

**Mr BRYSON** — I would have thought the VWA would be a good source, in their research function, in the Victorian WorkCover Authority. It might be that employers would have some understanding of why that occurs, and it might be that unions would have some view of that. So I think some research, probably from the regulator's point of view — if it has been done, I have not seen it, but that would be an interesting question to discern.

**Mr CLARK** — Could I just clarify, you said 40 to 50 per cent do not come to you; 40 to 50 per cent of what? Are we talking about claims that are rejected? Does that imply, therefore, that you know the total number of claims that are being rejected by insurers, you know what number come to you and you work out 40 or 50 per cent from that?

**Mr BRYSON** — This is a figure that I have dug out somewhere in my history of being in this organisation, and do not — you have to quote me on that 40 or 50 per cent, but I do not know how accurate that is. My understanding is that it is about that amount, but it is in relation to any adverse decisions. So it could be a decision around, 'We are now stopping your physiotherapy', and the worker may feel, 'Well, look, I have not had physiotherapy for a long time. It was not very useful when I had it, so I am not going to appeal'. So it is not just rejection of claims, is my understanding, but any kind of adverse decision. Again it is a complex issue of why we would not get those, but it might just be because it is too much trouble.

On the other hand, a rejection of a claim, which is an adverse decision of a high order, we would probably get the bulk of those, so the split of what we receive is again unknown. I think that does come back to the insured: who is being denied access to this procedure and why?

**Ms KAMINSKI** — And in amongst that, there would be decisions that were made fairly and properly and there was a decision by the injured worker not to pursue on that basis as well, so it is an unknown.

**Mr CLARK** — Yes, it is not really a measure of a systematic failure?

**Mr BRYSON** — Not necessarily.

**Ms CIBAU** — No, not necessarily, it is a measure of a number of things, and I do not think anyone has done the research to find out what it is actually a measure of.

**Mr FOLEY** — I must confess to being a multiple user of your — representative rather than user — of your scheme in a former life, and totally anecdotally to address your last point, David, a lot of the concerns that used to come to us that never made it past were not so much complaints about the conciliation service, it was more people not being happy with, generally speaking, the deal they were getting from insurance companies. Once you got through that series, then there was a whole range of other issues. I have always, anecdotally, found it to be accessible, timely and pretty good. It was a long time ago, but I am sure it has continued on that path.

**Mr BRYSON** — The feedback indicates a very high satisfaction level.

**Mr FOLEY** — In regard to what Susan has described as the difference between your conciliation and mediation — you do not get into mediation — how do you define those two? Because I am not exactly clear in my own mind as to where one — having helped people through your system — starts and the other stops in that sort of technical, ADR sense.

**Ms CIBAU** — Mediation in its pure form is assisted negotiation without the mediator having any input or necessarily having any expert knowledge about the field that the negotiation is about, so they purely facilitate the negotiation. Conciliation, as we define it, is that assisted negotiation between two or more parties, but with the conciliator having expert knowledge and having the ability to input that expert knowledge into the mediation and to make, at times, quite strong suggestions about what that expert knowledge might mean and what their input into the process might mean. Does that make sense?

**Mr FOLEY** — To give strong guidance?

**Ms CIBAU** — Very strong guidance. I call it very strong reality testing.

**Mr BRYSON** — And there are good reasons for that, because it is a mandatory scheme. You have got repeat players who know the law and corporate players. You have got an individual citizen who gets injured and may be vulnerable psychologically or physically. You have got a statute under which this mediation takes place. That has to be recognised, acknowledged and brought into the room: sound, proper decision making; all those kinds of things. It means that we have to wear different hats. We cannot just facilitate a discussion as if the people were equal, which is the kind of model of mediation.

If you entered our room, Martin, you would think for all intents and purposes we were mediating, but if you stayed around a little longer, you would see that concluding it or bringing into the conversation would be a lot of our input, so it does have a significant similarity and a significant difference.

**Mr BROOKS** — Just picking up a point raised in your submission on the bottom of page 4 and the top of page 5 — it is in relation to research into what happens to the cases that go to conciliation and then an outcome certificate is issued. You pointed out there that there is a lack of information and research into where those cases go — do they go to court; if they do go to court, what are the outcomes? Other than seeking that information, how do conciliators in your service inform themselves as to where they should be pegging their advice, I suppose; how do they benchmark their advice?

**Ms KAMINSKI** — Their advice? I am not sure about that.

**Mr BROOKS** — The information that they provide during a conciliation service. I am assuming you need to base where you steer a conciliation with some idea of what the courts are determining if these cases go further. I was just wondering how you do that, in the absence of that information?

**Ms CIBAU** — What we were talking about in the paper is the fact that we do not actually have the data. We have the act, and we are strongly guided by the act, because we have to be. And we are certainly strongly guided by legal decisions, so we generally know when matters go to court. We keep research happening in relation to legal decisions so that we have a basis of knowledge when we are going into the conciliation.

We also know what various WorkCover projects are happening at the time, so we know if, for example, they are targeting stress cases for intense management, we might find that we get a lot of stress cases coming through. We keep in touch with the WorkCover authority as well, and we keep in touch with some of our stakeholders. A lot of our stakeholders give us information about what is happening as well.

**Mr BRYSON** — What we do not know, Colin, is if the person comes to conciliation and it is unresolved, why do they not take it to court, or why did they take it to court, or why did they go so far along the line and then drop out?

We do not know necessarily, if they came with a rejection of the claim and it was unresolved with us — about 30 per cent — and then it went to court, what similarities are there with what they brought to us and what they took to the courts, and therefore what can we learn from what happened in terms of the judgement? That is the gap, just to clarify that.

**Ms KAMINSKI** — But there are some statistics — or certainly anecdotally — of the number of cases that resolve at the door of the courts, and the solicitors are quite happy to provide us with feedback on whether certain cases really only ever reach the door of the court and they have got that in mind when they leave the conciliation with a genuine dispute certificate which enables them to go to court. There is every expectation that it is never going to go through fully. In fact, I do not think a lot of cases do actually go through to the courts, compared to what we actually allow through.

**Ms CIBAU** — In a former life I was a litigation lawyer, and it seems to be a standard litigation statistic that only 3 to 5 per cent of matters ever actually end up in court at a hearing, and that is reflected here as well. The number of cases that get through would be something less than 5 per cent, and most lawyers practice on that basis.

**Mr BRYSON** — I think that is a very important scheme element. Not to get on one of my hobbyhorses, but the relationship between a conciliation or ADR service and the court as the next stage, is a very crucial link, and

in some models around workers compensation and others they have brought them into the same kind of context, and in others they have them separate. So that gap is quite important, because you conciliate in the shadow of that.

Is it easy to access the courts? Then you might find a drift away from the conciliation process. If it is hard, for various reasons, then you might find the focus on conciliation. The scheme structure is very important in relation to understanding how ADR works, and that is why it is hard to compare scheme with scheme, because we refer to medical panels, and we have a court which is separate to our system, whereas others may not. The stats are tricky to try to compare.

**Mr CLARK** — Could I ask if you could give us any data on the composition of the 70-odd per cent of cases that are resolved? For example what proportion of the insurers/employers would accept liability; to what extent would the workers accept that the case is unjustified and drop it; to what extent do you propose a solution that the parties accept; et cetera, et cetera?

**Ms CIBAU** — I actually do not think we keep those figures, but I can have a look for them and send them to you — if I could? If we keep the figures, I will certainly send them.

**Ms KAMINSKI** — Nothing comes to mind that would indicate a trend or a specific type of dispute. It really depends on the issue, the nitty-gritty, if you like, and each case is so individual that any type of dispute has the potential to resolve or not. I do not think there is a particular pattern, unless you would say medical and like expenses, perhaps, which are less impacting on the worker's livelihood.

**Mr BRYSON** — I would say that with the 70 per cent resolved, there has to have been some change. Someone has had to change their view on what has happened, and it might be to a major extent, so an insurer or an agent might say, 'We have rejected your claim. Now we are accepting it', or it might be that they have negotiated some deal that suits everybody. There has to be some change. The 70 per cent is agreement of some nature.

My own understanding is that there is more likely to be change where it is around smaller stuff, like medical — physio, chiro, GPs and medications. There is quite a deal of change around rejection of matters, because they are often referred to a medical panel because it is a medical question, and there is less of a resolution around final termination of the claim after 130 weeks, which is a big black-and-white decision which agents normally spend a lot of resources to get sort of right. I suspect our resolution around that is less.

So there is a difference of what is resolved and why it is resolved, but we should add, I think, and Susan or Anita have imparted this — that the 30 per cent that did not resolve could also be resolved, because a worker could come, the decision is explained, and they go away thinking, 'Well, now I understand it and now I am not going to pursue it', so in a sense the 70 per cent is probably the minimum rate of resolutions. There is probably a higher percentage.

**Ms KAMINSKI** — And that would be a large part of why we see ourselves as being so beneficial to injured workers — that intangible of having an opportunity to really understand what is going on, which they do not often have whilst they are dealing with the agent.

**The CHAIR** — We are nearly out of time. Could I just ask a few questions of a more general nature. The first one is the question of whether you think that participation in the Australian national mediator accreditation system should be compulsory for all ADR providers.

**Ms CIBAU** — A personal view?

**The CHAIR** — Yes. Just a view.

**Ms CIBAU** — I think it should be, but the standards as they currently are cover mediators; they do not cover conciliators. They do not cover early neutral evaluation. They do not cover anything more than mediation.

**The CHAIR** — You mentioned that before, about how you are doing some work on that.

**Ms CIBAU** — Yes, and we are really now at the beginning stages of looking at the standards, seeing what they cover and seeing where the gap is between what we do and what mediation is. The next step for us is to actually start liaising with generally the people who wrote the standards to see what we could do in relation to conciliation.

Having said that, when we went through the standards, as a base standard for mediators, I think all of our conciliation officers would meet that standard, and when I looked at it, it is the way we would make recommendations to the minister about who should be appointed as a conciliation officer during a selection process. The competencies that I mentioned kind of fit with all those standards as well. So as a base I think they are excellent. There has been a lot of discussion in the ADR field for a long time around standards. I think finally we have got them. Hallelujah!

**The CHAIR** — Thank you. Lastly, should ADR suppliers such as yourselves be regulated in the same way as external dispute resolution schemes and other ADR suppliers?

**Mr BRYSON** — In what way are they regulated?

**The CHAIR** — For example, the external schemes are regulated through ASIC.

**Ms CIBAU** — Well, we are regulated.

**Mr BRYSON** — I am not quite sure, Johan.

**Mr FOLEY** — You are really kind of already covered by that by courtesy of your legislative requirements under the act, I would have thought.

**Ms CIBAU** — We are regulated.

**Mr BRYSON** — Yes, it is not quite a fit. I think you are talking about a kind of private system, whereas we are a kind of mixture of a statutory body and an industry scheme, so we have got all of that written into the act.

**Ms CIBAU** — Yes.

**Mr FOLEY** — I think the act catches you on that sort of stuff.

**The CHAIR** — So it is effectively regulated?

**Mr BRYSON** — Yes, well there is a regulator of the scheme of which we are a part, so I suspect it is.

**Mr FOLEY** — Who controls a lot of your destiny.

**Ms CIBAU** — Yes. Thank you for that.

**Mr FOLEY** — And standards and everything else.

**Mr O'DONOHUE** — You made reference to trying to do more circuit work. Do you do all your circuit work at Magistrates Courts or local or regional courts?

**Ms CIBAU** — We try to avoid the courts, because we try to avoid the message that we are part of that whole system. The message we try to send is that this is a low-key way to resolve your matter.

**Mr O'DONOHUE** — Yes. That is the reason I asked the question.

**Ms CIBAU** — The use of the Moorabbin Justice Centre is kind of a step away from some of that, but because it is set up as a justice centre and it has some really good purpose-built facilities, we thought we would give it a go. We thought we would run it as a pilot and see how it works.

**The CHAIR** — Thank you very much for your time and also for your submission. As I have said, you will receive a copy of the Hansard transcript, and if there are any follow-up questions, you will be contacted.

**Witnesses withdrew.**