



FINDING FAIRNESS IN A HIGH VOLUME STATUTORY ADR ENVIRONMENT: OBSERVATIONS FROM AN AUSTRALIAN WORKCOVER CONCILIATION SERVICE

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Abstract

Pre-hearing compulsory Appropriate Dispute Resolution processes (ADR) is increasingly popular in the Australian judicial system, with expectations of achieving fair, quick and efficient resolution of disputes and a reduction in the number of lengthy expensive court based proceedings. While new jurisdictions are enthusiastically incorporating compulsory pre-hearing ADR there is little research on longstanding institutions. The private nature of these court annexed ADR processes can be an inherent weakness; allowing less rigorous use of ADR processes to go unchecked and potentially lessening achievement of substantive justice for individual appellants.

In Victoria the Accident Compensation Conciliation Service (ACCS) conciliates all disputes between Work Cover insurers and workers as a compulsory step before proceedings can be taken in court. This paper seeks indicators of how well the ACCS is currently achieving the Workplace Injury Rehabilitation and Compensation Act 2013 (the Act)'s Objectives compared to historical outcomes by examining trends in new applications and resolution rates, and levels of human resources. These statistical trends are derived from 10 consecutive Annual Reports. Key areas explored include power imbalances, work intensification, fairness and selection of assessment criteria. This analysis found resolution rates are slowly declining and workloads are intensifying. Questions remain about how these trends will impact on public confidence in these justice processes and what is meant by 'reasonable efforts to bring the parties to agreement'. Developing assessment criteria for conciliation processes is identified as a future industry wide project essential for the credibility of mandatory statutory ADR.

Keywords

Australian workcover conciliation service, Appropriate Dispute Resolution processes, ADR, justice



Introduction

This paper addresses the problem of variability in statutory Appropriate Dispute Resolution processes (ADR) processes by exploring factors influencing the achievement of substantive justice, fairness, for appellants. Fairness is the corner stone of all justice processes, whether formal adversarial processes traditionally associated with western court systems or emerging alternative processes such as mediation and conciliation. Importantly, neurobiology reveals spontaneous changes in the brain in response to the experience of unfairness. We cannot avoid people's reaction to unfairness, but we can better understand reactions and work to reduce unfairness and its impact.

Using a case study approach this paper draws from the author's experience and insights as an ADR practitioner conducting over 1,000 WorkCover statutory conciliations between injured workers and insurers about entitlements to compensation. Data is obtained from publically available Annual General Reports is presented in time series graphs and trends are analysed. Key areas identified as impacting on outcomes include resolution rates, the limited influence Conciliators have over repeat players' behaviours, changes in management priorities and work intensification. These findings raise questions about assessment criteria and start to challenge the assumptions implicit in selecting '*satisfaction*' as the critical criteria measuring success of statutory ADR processes.

Context

In the Australian state of Victoria at least 73 separate pieces of legislation refer to ADR (Arthur, 2014). The *Civil Procedure Act 2010 Vic* introduced a number of themes and objects that aimed to facilitate the *just, efficient, timely and cost-effective resolution of the real issues in dispute* (Sec 1 (1) (1c)). These included proportionality, early settlement of disputes by agreement between the parties, and the efficient conduct of the business of the court. The *Civil Procedure Act 2010* makes reference to the *extent to which the parties have used reasonable endeavours to resolve the dispute and the extent to which the parties have had the benefit of legal advice and representation* (Sec 9 (2)). It further defines proportionality as *minimising delay and dealing with a proceeding in a manner proportionate to the complexity or importance of the issues in dispute and the amount in dispute* (Sec 9 (1)) and amply sets the scene for the spread of statutory ADR processes in Victoria.

Although the *Civil Procedure Act 2010* sets out these general expectations, ADR processes are referred to only by titles such as mediation, conciliation, early neutral evaluation, judicial resolution conference, expert determination and arbitration. There is a lack of substantive detail about what these processes actual entail. Conciliation is the statutory ADR process most frequently mandated, and is the focus of this study. In 2003 the National Alternative Dispute Resolution Advisory Council (NADRAC) encouraged greater consistency of ADR terms by providing standardised descriptions of common terms. Conciliation is described as:

The conciliator may advise on or determine the process...make suggestions for terms of settlement, give expert advice on likely settlement terms and may actively encourage participants to reach agreement. (NADRAC, 2003)



This description of conciliation provides only the most general of guidance, leaving much scope for interpretation and little assistance in the selection of process evaluation and assessment criteria. Additionally, this author has not found evidence based research that explores variations in practise nor evidence based attempts to identify correlations between practise models and outcomes. While there are many claims of popularity, satisfaction and benefits, there is little evidence of how particular models of statutory conciliation are associated with settlement rates (Urwin, 2012).

The Victorian Accident Compensation Conciliation Service (ACCS)

Victoria has a statutory no-blame system of insurance (the Workplace Injury Rehabilitation and Compensation Act 2013 *Victoria* (the Act)) for workers who are injured at work. The Act also establishes an independent service (the ACCS) that conciliates disputes between a worker and insurer about entitlements. The Act sets out that Conciliation Officers are independent Governor – in- Council appointments, that is, they are appointed and answerable directly to the Minister and must be persons who can demonstrate the highest level of integrity and impartiality. The Act does not specify any skills or qualifications for these appointments.

Although the majority of matters are superficially a two party dispute, the employer who pays premiums to the selected insurer and the Victorian statutory agency WorkSafe who acts as regulator, are silent partners. In effect the insurer answers to both the employer and the regulator as interested parties. In this is high volume environment approximately 18,000 disputes per year are handled by about 35 Conciliation Officers with the support of administrative staff. This creates a workload of about 12 new disputes per week for each full-time Conciliation Officer position, and hearing rooms scheduled at one and half hours per matter.

The Act is silent on the actual mechanics of the conciliation process, as was its predecessor, but creates conciliation at ACCS as a mandatory step before the worker can proceed to Court. The Act compels injured workers to take reasonable steps to resolve the dispute at the conciliation stage, but there is no corresponding statutory requirement for the Insurer's Agent. This limits the Conciliation Officer's capacity to influence the behaviour of Insurer's Agents and is particularly concerning in light of the power differentials of the parties. Although Ministerial guidelines establish standards of behaviour for Insurer's Agents, and consequences for serious breaches, in reality these have become ineffective because breaches identified by Conciliation Officers can be dismissed administratively before taking effect.

The Act requires that Conciliation Officers maintain confidentiality regarding the substance of the dispute, but is silent about the parties' requirement to keep confidentiality. In practise this means Insurer's Agents can talk freely about a worker's personal injury matters. Confidentiality is considered a cornerstone of ADR processes as it allows the parties to reveal personal and private matters without fear of being publically exposed. In this arena, only one party has personal and private matters, the other party is a professional representing the insurer. Although the Act states that information revealed in conciliation is privileged, the reality is that Insurer's Agents can obtain clues about what corroborating evidence is needed if the matter does not settle and proceeds to Court.



The Act does not establish what processes are considered essential or required characteristics of a conciliation process. Rather it states:

A Conciliation Officer must, having regard to the need to be fair, informal, quick and efficient and having regard to the objects of the Act, make all reasonable efforts to conciliate in connection with a dispute and to bring the parties to agreement
(WIRC, 2013, Sec. 293)

While the Act is silent about the process, successive Annual Reports adhere to the standard process as defined by NADRAC citing conciliation as a process whereby the Conciliation Officer assists the parties to:

- identify the issues relevant to the dispute,
- develop potential resolution options,
- consider alternatives and consequences, and
- endeavour to reach an agreement (ACCS Annual Report 2014/25, 3)

A Conciliation Officer can request medical reports be obtained and may refer a matter to the Medical Panel, which will examine the person and make a binding decision about a medical question. A Conciliation Officer may decide that there is *no genuine dispute*, that is, the insurer has no defence to the worker's appeal. In this situation the Conciliation Officer may issue a Direction for certain benefits to be directed to the worker. This creates a conciliation/arbitration model with specific limitations.

A key characteristic of this statutory conciliation process is the predominance of repeat players. These repeat players are the insurers' professional staff, i.e. the Insurer's Agents, and the worker's representatives. While very few workers have more than one conciliation conference it is estimated there about 200 individual repeat players, each of whom may participate in many conciliations per week. There is anecdotal evidence of the impact of repeat players on the way the conciliation is conducted, what content is discussed, what offers and counter offers are made and what outcomes are reached. The behaviour of this group is not bound by statute and may be influenced by organisational motivations such as performance bonuses and promotions. The growing criticisms of insurers' behaviour and decisions led to the Victorian Ombudsman's recent investigation where it found that insurers persistently maintained unreasonable decisions at conciliation (Victorian Ombudsman, 2016).

Literature Review

Notwithstanding this statutory focus on ADR processes there is little, if any, agreement in practise about what processes are actually used. Bayliss (1999) identified random variation in processes that are unrelated to the characteristics of the dispute. These included whether or not the process was voluntary or mandatory, limits to confidentiality and privilege, the agency's role in enforcing the settlement and whether or not there is a determinative role. There were also marked variations in the prescribed



characteristics of the ADR practitioner, regarding the requisite skills, qualifications and the nature of the appointment. Appointments varied from independent roles via a judicial or Governor in Council appointment, to in-house employees or external contractors. Bayliss (1999) also found a wide variation in practise around the giving of advice and guidance on substantive matters.

Despite these variations in practise, it would be bizarre in a statutory context for the conciliator not to comment on the substance of the dispute or not to put forward options for resolution. Similarly, the statutory independence of the ADR practitioners is considered essential to the impartiality and absence of bias required to achieve fairness and justice (Van Gramberg, 2006).

Privatisation of justice: power differentials and the delivery of fairness

Achieving a fair outcome relies to a certain extent on each individual's understanding of fairness within their social context. However, the private nature of statutory conciliation limits access to knowledge about what is considered a fair and reasonable entitlement. This primarily affects workers, who have limited access to information about what other workers might settle for. The repeat players, Insurance Agents and Workers Representatives, have access to volumes of information about settlements. This places the burden on the Conciliation Officer to reveal to the worker the normal range of outcomes in the presenting circumstances. However, if the Insurance Agent does not act reasonably during the conciliation, refuses to undertake a proper review, provide relevant information or unreasonably challenges the worker's credibility there is little leverage that the Conciliation Officer has to moderate this conduct. The Conciliation Officer has limited authority to moderate the negative impact of the power differentials and relies primarily on the good grace of the Insurance Agent. The resulting outcome may then fall short of what is considered fair and reasonable.

Power differentials exist in every society, part of the role of a justice process is to ensure that these power differentials do not impact on the delivery of fair outcomes. In 1985 the Commissioner for Equal Opportunity identified that power differentials were impacting on the types of settlement being achieved. The Commissioner found that:

the more vulnerable the person, the more likely to experience discrimination and to have fewer resources to combat, this being the case the worker has no alternative but to accept whatever the conciliator is able to negotiate for them.

(Commissioner for Equal Opportunity 1985, in Scutt, 1988, 508)

Large insurance corporations, who send professional representatives to conciliation, are joined with the employer and to a lesser extent the WorkSafe regulator who keeps a watchful eye on the payments of benefits, with a focus on trends and outliers. On the other side is the individual worker, who may or may not have the support of a Worker's Representative. Ignoring these power differentials can only serve to strengthen the party with the greatest power, in this case the insurer (Scutt, 1988), with the effect of reducing the prospect of fair outcomes being consistently achieved.



Delivering fairness requires attention to the outcomes not just the process. The ADR profession has emerged in recognition of the limits and potential disadvantages of the adversarial justice processes. These are legitimate and real concerns. However, this enthusiasm for procedural justice and an informal approach, has been at the expense of attention to fairness of outcomes. Sensitivity to interactional justice has led to an over emphasis on the positive impact of respectful and empathetic interactions with the ADR practitioner (Papari Sangareddy, 2009). It is generally accepted that meeting expectations of procedural justice, i.e. consistency, impartially and the right of reply, will positively influences parties' belief that the outcome is fair irrespective of normative ideas of fairness (Tyler, 1988). However, neither interactional nor procedural justice is a substitute for substantive fairness (Webster 2010). Neurobiological research has found that our reactions to fairness, or its lack, are hardwired (Singer, et al, 2006). More than procedural and interactional justice, parties need and want distributive, otherwise known as substantive, justice.

Our understanding of the delivery of justice via ADR processes needs to take into account power differentials and how they impact on decision-making, and refocus our attention back to achieving fairness.

Methodology

Using a case study approach, a review was conducted of publically available data from a single statutory ADR organisation. Statistics from 10 consecutive ACCS Annual Reports, 2004/5 to 2014/15, were collated and presented as a time series graphs. Stakeholder surveys was also reviewed, however these survey changed significantly in 2014 and 2015 thereby reducing their usefulness in a undertaking a time series study. The analysis was informed by the author's experience as a statutory conciliation at ACCS, conducting over 1,000 conciliations and maintaining a settlement rate of 10% higher than average over a 2½ yearperiod.

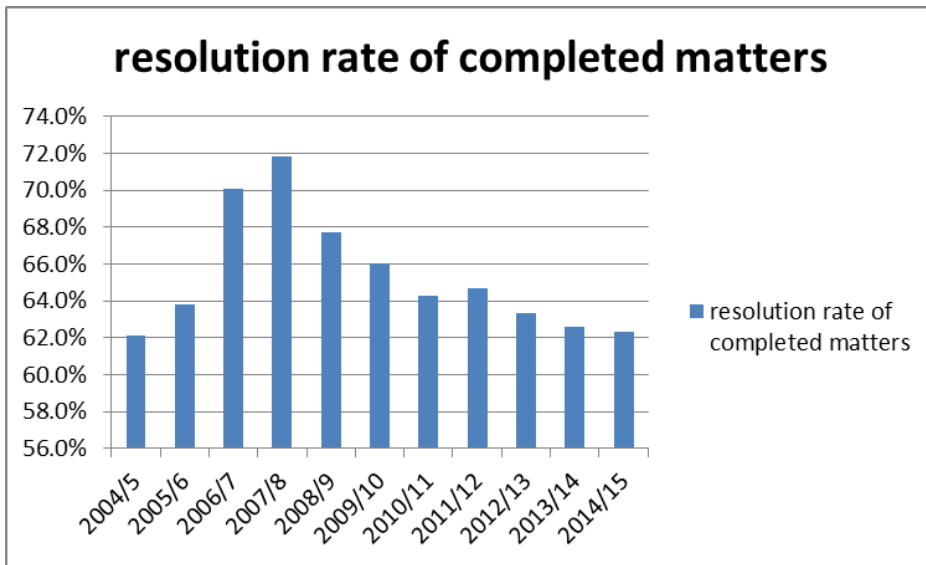
A time series comparative analysis was chosen to explore whether or not there were any co-relational trends between internal variables. The variables of interest were the resolution rates, time taken to complete matters, ADR staffing levels and the full-time part-time mix. The study included the Conciliation Officers and excluded administrative staffing levels in order to obtain an understanding of the impact, if any, of ADR work rate on resolution rate.

Findings and Analysis

The analysis focuses on the work rate of the Conciliation Officer in relation to the resolution rate. The first time-series graph is of the overall ACCS resolution rates of completed matters. A completed matter is a dispute that has been conciliated and finalised with or without a resolution. Matters not resolution may proceed to Court. There has been a steady decline in the resolution rates, from a high of 71.8% in 2007/08 to the current low of 62.3% in 2014/15. This means there are either unhappier workers or more matters are proceeding to Court, or both.



1 The resolution rate of completed matters



ACCS Annual Reports; series 2004/5 to 2014/15

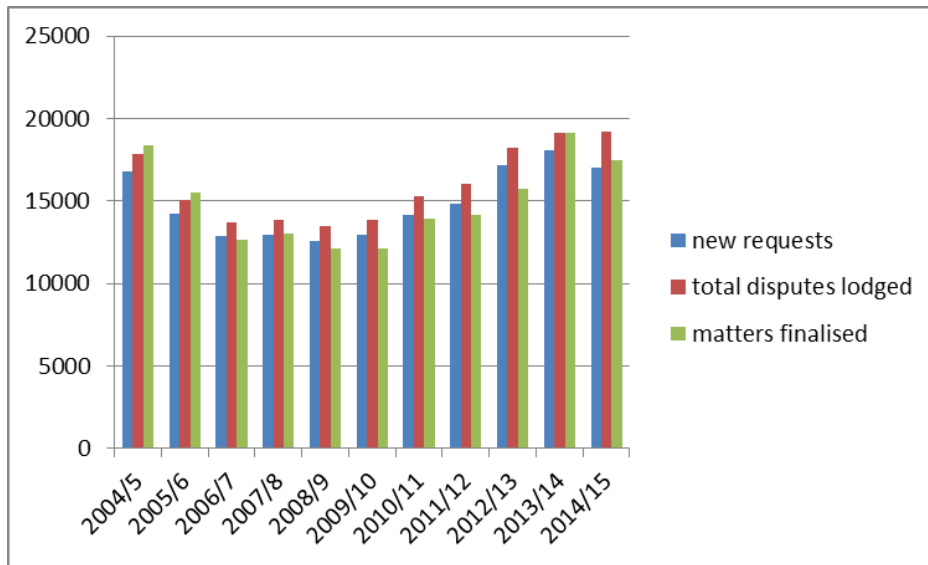
There are a number of factors which may be impacting on the Conciliation Officers’ capacity to bring the parties to agreement. Some of these are external, such as the reasonableness of the Insurance Agents’ conduct and decision-making or the legal complexity and ambiguity of the matters. Worker’s expectations regarding their entitlement and their attitudes to proceeding to Court will also influence the resolution rates. Other external factors may relate to the organisation of the ACCS; such as the volume of work allocated and pressure to complete matters within short time frames irrespective of possibilities for resolution, the allocation of complex or simple matters, the capacity of individual Conciliation Officers to work part time and the administrative support available.

Internal factors include the ADR skills and expertise of each Conciliation Officer and their willingness to exercise those skills. This would also include their personal preference for finalising matters quickly, their ability to assist the worker to articulate their interest, and their ability to craft options that would meet parties’ expectations.

The next graph shows the decline in numbers of new requests from 16,791 in the year 2004/5 to 12,592 in the year 2008/9, and then the gradual increase in new requests to a peak of 18,039 in 2013/14 with a slight decline to 16,982 in 2014/15.



New requests, reopened requests and finalised matters.



ACCS Annual Reports; series 2004/5 to 2014/15

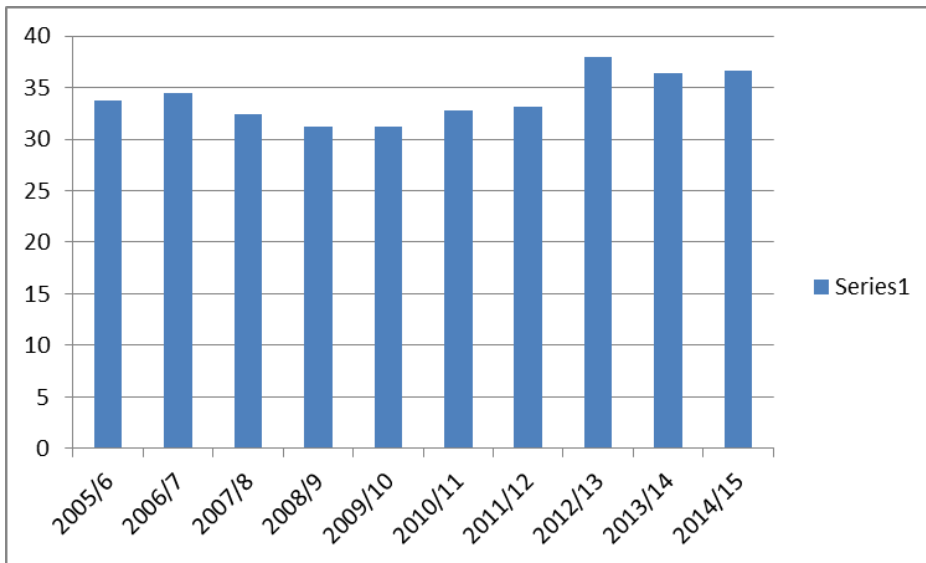
The difference between new requests and total requests are files that are reopened. The number of re-opened matters doubled from 1,120 in 2013/14 to 2,215 in 2014/15. A managerial directive about when to suspend a matter, thereby administratively reducing the completion time, was made in 2014. Prior to 2014 Conciliation Officers decided when to suspend a matter. For instance, if the Worker was not ready to proceed but wanted the opportunity to conciliate the matter at a later date.

The category *'matters finalised'* refers to the completed matters whether resolved or not. These matters have been issued an Outcome Certificate which sets out the terms of the resolution or, if not resolved, states that the worker has made reasonable steps to settle the dispute and may now proceed to Court. The graph above shows that there is a widening gap between the total number of matters and those finalised. In 2013/14 matters finalised almost equalled total matters, catching up some of the gap opened in 2012/13. In 2014/15 this gap of about 1,500 matters outstanding again appeared.

The Annual Reports provides a calculation of Equivalent Full-time (EFT) Conciliation Officers. The sharp increase in disputes lodged in 2012 and in 2013 was matched with increase of 4.8 EFT Conciliation Officers in late 2013. Since then the EFT Conciliation Officers has declined.



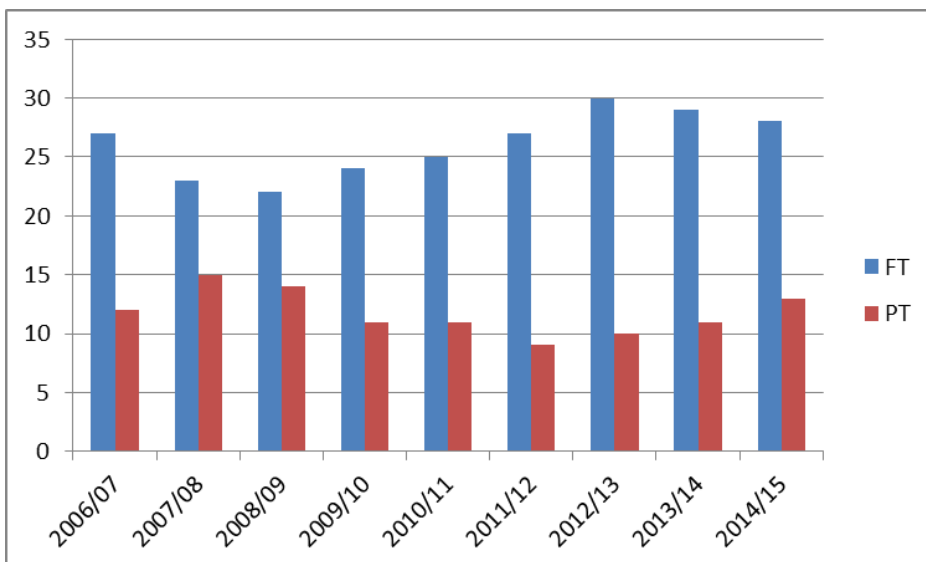
Equivalent Full-time Conciliation Officers



ACCS Annual Reports; series 2004/5 to 2014/15

This next graph shows a reducing proportion of part-time Conciliation Officers, noting that this information was not reported in the 2005/06 ACCS Annual Report.

Comparison of Full time and Part time Conciliation Officers



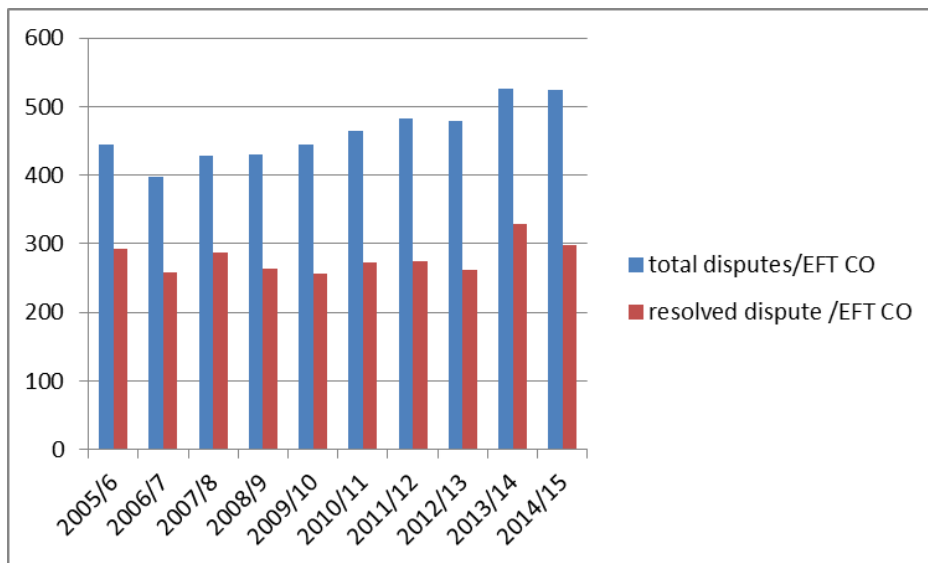
ACCS Annual Reports; series 2006/7 to 2014/15



Comparing this graph with the resolution rate graph shows a correlation between the smaller proportion of part-time Conciliation Officers and the declining resolution rate. One explanation may be found in the high stress nature of the work and the relentless constancy of the workload. A continual high level of stress has a negative impact on an individual’s decision making capacity and efficacy (van Bos 2009). Further exploration of this phenomenon would provide better information leading to targeted strategies that would protect individual Conciliation Officers from the health impacts of ongoing stress and achieve better outcomes for disputants.

The final graph shows the annual number of disputes allocated to each EFT Conciliation Officer has steadily climbed from a low of 398 in 2006/7 to last year’s high of 526. As the numbers of disputes per EFT Conciliation Officer has steadily climbed, there is widening gap between the numbers allocated and the numbers resolved. The smallest gap was 141 unresolved matters per Conciliation Officer EFT in 2006/7 and 2007/8. This gap has blown out to 227 unresolved matters per Conciliation Officer EFT in 2014/15.

Comparison of Total disputes/EFT Conciliation Officer to resolved disputes/EFT Conciliation Officer



ACCS Annual Reports; series 2004/5 to 2014/15

This graph clearly shows the increasing work load with a corresponding increasing gap between allocated matters and resolved matters per EFT Conciliation Officer. Work intensification, from both an increased number of disputes allocated per EFT and the diminishing proportion of part-time Conciliation Officers, would undoubtedly be a contributing factor. Additionally, the effects of no independent mechanisms to set standards of behaviour for the repeat players, the Insurance Agents, will compound over time. As Agents test the boundaries of poor behaviour, finding no repercussions from the ACCS, their behaviour can only deteriorate. This will lead to further declines in resolution rates, more unhappy workers and more disputes heading towards the Courts.



Implications

The key aims of statutory ADR as set out in the Act are fairness, informality, quickness and efficiency, and are therefore the measures of the success of the ACCS. This study is interested in fairness in ADR and, while carefully avoiding delving into the nature of fairness, attempts to bring fairness to the forefront of the ADR professional's mind. Historically the ACCS reports on but has not set targets for resolution rates, stating that this is influenced by external factors such as the decision-making of the insurance agent and the attitude of workers to appealing to the Court. However, resolution rates do not necessarily equate with fairness, nor does '*satisfaction*', despite being a traditional evaluative measure of ADR processes and outcomes.

Resolution may not be indicative of a worker's satisfaction with the settlement. In my experience workers will frequently be guided by the Conciliator or their Workers Representative and will accept a settlement offer they may not think is fair but consider it is the best they will get without going to Court. A settlement may not be fair. Some workers simply do not know what a reasonable entitlement is in the circumstances. They may be satisfied and the dispute may settle, but an external objective observer may question the fairness of the outcome. Additionally, the relief and pleasure felt when treated with respect and dignity throughout the process, i.e. being afforded interactional justice, will influence a worker's reporting of their satisfaction levels. But clearly, satisfaction with a process or an outcome does not necessarily equal fairness or achieve justice.

The inherent power imbalance of the current system can lead to workers accepting lower settlements than they could be entitled to, and a reluctance to take the matter further. Unexamined assumptions about power can also lead to the conciliator using their skills to persuade the less powerful to accept a lower settlement. This may not seem like coercion, but it is (Scutt, 1988).

This analysis challenges the view that participant satisfaction is a valid measure of success of a conciliation process.

What then are the criteria by which the ACCS service is to be judged? Surely one must be the standard of conduct and actions of the conciliation process. Dunn (2013) raises problems inherent in selecting '*made a reasonable effort*' as the primary measure of whether the service has met its statutory duty to be mindful of fairness. It is not enough that a professional ADR practitioner has done something.

A *reasonable effort* does not necessarily mean reasonable offers and counter offers have been made, or that accepted ADR sub-processes such as identifying issues and exploring underlying interests and concerns are undertaken to a professional level. A *reasonable effort* may simply be that the Conciliation Officer contacted each party, or a worker attended the conciliation conference. There are nationally accepted standards of practice for conciliation, recently revised by the Mediator Standards Board (NMA 2015), that can be measured. Enquiries can be made about the form and content of what is done in a conciliation process.

Satisfaction of the stakeholders is not mentioned in the Act, either in the objectives nor in the Conciliation Officers duties. The Act refers to fairness. Measures of stakeholder satisfaction do not necessarily correspond to the achievement of fairness. If satisfaction is used as a standard, then



impracticable and unreasonable offers and counter offers could be made and accepted because the worker believe themselves to be effectively powerless to achieve a better result. Similarly, reasonable proposals and offers could be rejected, because the insurer is not negatively impacted by a lack of resolution. In both instance a conciliation still be considered to be have been conducted and the Conciliation Officer to have made reasonable efforts to bring the parties to settlement.

With the current standard of scrutiny, Insurers Agents have incentives to block and resist reasonable proposals and there is no recourse available to Conciliation Officers, while worker's only recourse is the expense and stress of Court. The lack of statutory restraints on the behaviour of the insurers, may limit the opportunity for the weaker party, the worker, to have their issues and concerns given full consideration, leading to less favourable outcomes.

Issues of power-imbalance are real problems, but better understanding their impact on the conciliation process and outcomes can be used to lift standards. Similarly, difficulties related to the evaluation of the conciliation process and its impact on the achievement of fairness is too important to be set aside easily.

Conclusions

This paper has raised questions about the practise of ADR in conciliation, the ability of Conciliation Officers to manage the conduct of repeat players, the motivations of repeat players to make reasonable offers and counter offers, and the impact of power differentials on the weaker party's capacity to reach a fair settlement. The analysis throws light on the increasing intensification of work, already a high stress and high volume environment, for Conciliation Officers. The overall resolution rate is slowly declining, suggesting that this work intensification is somehow impacting on the Conciliation Officer's efforts to bring the parties to agreement. Investigation of the conduct and decision-making of repeat players in statutory conciliation and the effect it has on achieving fairness and settlements is warranted.

As the ADR profession matures, steps to ensure that fairness and justice are upheld in these private arenas can be taken. Properly conducted research and the establishment of standards and criteria that reliably and validly measure fairness are within the professional expertise of the industry. This exploratory study provides some support for embarking on rigorous testing of ADR processes and for deeper analysis of the structural impediments to achieving fairness.



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Practising since 1990, her statutory roles include Conciliation Officer at the Accident Compensation Conciliation Service where she conciliated over 1,000 disputes. Since 2003 Penny has taught subjects in Management and Business with a speciality in Conflict, Negotiation and Mediation at Master's level for Universities in Victoria, Australia, including at the University of Melbourne and at RMIT. She was a Principal Trainer in the Mediation Practitioner's Certificate for the Institute of Arbitrators and Mediators Australia from 2006 until it merged to become the Resolution Institute in 2015. Penny has designed and facilitated numerous workshops and training sessions, and has had continual involvement as a Board member of NFP organisations with a focus on social justice. Dr Webster is currently a Director of Wilson and Webster Consultancy Services (wilsonandwebster.com.au) which specialises in assisting organisations with complaints, grievances and related matters.