TOWARDS AN ADR-LED CULTURAL CHANGE IN WORK HEALTH COMPENSATION

By Tony Fitzgerald

This article is a plea for a major overhaul of the NT Work Health compensation system. Our system doesn't work and it's time for a change.

Victoria and Western Australia have successfully severed all ties with traditional litigation-based systems in favour of schemes grounded in ADR (Alternative Dispute Resolution). We all know why they did it and why they've succeeded – their schemes are cheaper, quicker, fairer, and more accessible than ours.

In the NT we sit on the fence. We've flirted with ADR through a half-baked attempt at incorporating mediation, but what we have now is a system that is still primarily litigious with mediation carelessly tacked onto it.

1. History

When workers compensation insurance commenced it provided simple speedy relief to workers injured in the workplace.

At present the full catastrophe of a contested claim for benefits under the *Work Health Act NT* ("the Act") is anything but simple and speedy – especially at the business end (i.e. the Court).

2. Advent of Mediation

When the NT government was made aware of the quagmire preceding finalization of a work health dispute it banked on ADR (viz. mediation) to both provide opportunities for litigants to resolve their differences outside the adversarial system, and to relieve the system of much of its ever-increasing delay, expense and complexity.

So government amended the Act [creating Part VIA(Dispute Resolution)] to provide for the resolution of disputes between workers, employers, and insurers through mediation [s.103C(2)]. A worker is now not entitled to commence any proceedings under the Act, including proceedings for interim benefits, unless [s.103J]:

> "there has been an attempt to resolve the dispute by mediation, and that attempt has been unsuccessful, and a mediator has issued a certificate to the parties stating that fact"

Compulsory mediation of this kind does not accord with the classic mediation model – where parties attend voluntarily as a demonstration of their genuine intention to settle their differences. Some debate has ensued over whether it is counter-productive to "force" parties to mediate. The sensible approach taken by Giles J(as he then was) in the NSW Supreme Court obviously found favour with the NT Govt. His Honour, and the proponents of 'forced' mediation (including the writer), contended that once the parties are removed from the adversarial strictures of the courts and exposed to procedures designed to promote compromise...

> "...the fundamental resistance to compromise can wane and turn to cooperation...What is enforced is not cooperation and consent, but participation in a process from which cooperation and consent might come."
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> [*Hooper Baillie* (1992) 28 NSW LR 194,206]

The priority, and it's of crucial importance, is to ensure that the parties frankly and confidentially and systematically attempt to negotiate their differences during debate managed by a third party neutral (the mediator).

3. Unmet Potential

Unfortunately a shortage of 'cooperation and consent' is preventing compulsory work health ADR in the NT from reaching its undoubted potential. The problem lies not in the process of ADR but in the drafting of the Act. ADR relies on a full and frank discussion between the parties about issues in dispute before understanding and agreement is reached. The Act brings the parties to the mediation table, but fails to provide mediators with sufficient power to ensure that parties participate earnestly in the process.

In Victoria, as will be seen below, the legislators proved their commitment to ADR by giving mediators greater autonomy and power to intervene and calling them 'conciliators'.

4. Legislative Amendment

The Act requires amendment in five important respects:

4.1 Adjournments

Section 103D of the Act provides as follows:

"103D. Conduct of mediation

(1) A claimant may apply to the Authority to have a dispute referred to mediation

(2) Within 7 days after receiving the application, the Authority must refer the dispute to a mediator

(3) Within 14 days after receiving a referral, a mediator must –

(a) attempt to resolve the dispute

(b) advise the claimant and the employer's insurer of the outcome of the mediation; and

(c) if the mediator has been unable to resolve the dispute advise the parties of further proceedings that may be commenced and the time within which to commence them"

In the Work Health case of *Murwangi Community Aboriginal Corporation v. Carroll(unreported)* Trigg SM., in the course of dismissing an insurer's application to strike out a worker's claim for benefits for failure to comply with s.103J, ruled ex tempore on 17 July 2000 that a mediation must be convened and completed and a s.103J certificate issued within the "21day window" created by section 103D.

The mediator in *Carroll* had purported to adjourn the mediation outside the "21 day window" and the insurer then

contended that the worker was out of time to issue proceedings (worker must issue within 28 days of issue of 103J certificate [s104(3)]). The mediator did what work health mediators had long been doing – granted an adjournment pursuant to an unspecific power bestowed by section 103C(3)(e) of the Act namely "(a power to do things)...necessary...for the purpose of resolving the dispute."

The magistrate ruled that mediators have no power to adjourn outside the 21 days commenting that an adjournment may have been unfair because the worker was not in receipt of benefits. He ventured further that a mediation outside the time limit is not a mediation for the purposes of the Act and that a worker would be entitled to commence proceedings upon the expiration of 21 days – whether mediation has taken place or not.

Whilst the decision may have been sound on the facts it failed to recognise that mediations, like court proceedings, need to be adjourned sometimes to assist the negotiation process. For instance, mediators may need to adjourn matters if the parties fail to produce the "specified written information" referred to in para.4.3 below, if a medical report needs updating, if the parties do not come to mediation with authority to settle, or if the parties need legal advice. Even more fundamental was the magistrate's failure to account for local conditions – that is, the lengthy delay in obtaining medical reports (usually way beyond the 21 days), the necessity to seek appropriate medical opinion interstate (more delay), and the antipathy of some lawyers and insurers towards mediation (could it be that these recalcitrants are desirous of exceeding the 21-day limit to escape the mediation net?).

Ninety five percent of work health mediations experience delays in 'the obtaining of information'. Without all the information the conclusion of the mediation within a 21-day time frame is possible in only superficial fashion – anathema to successful mediation which demands in depth discussion between fully informed parties. Indeed, even if the parties have the necessary information, some mediations require several sessions before conclusion (equals understanding and agreement) is reached.

The upshot is that unless the Act [s.103C(3) is the power conferring section] is amended to provide mediators with specific discretionary power to adjourn beyond the 21 days in appropriate circumstances, the impact of mediation on the resolution of disputes is minimal and Part VIA is virtually unworkable. It follows that 103D(3)(supra) must be made subject to 103C(3).

In Victoria workers' compensation disputes are not heard in court in the first instance. Instead the WorkCover Conciliation Service provides workers, employers and insurers with a service that facilitates the resolution of disputes by involving all parties in a streamlined informal process to achieve a fair agreement. The process is governed by the *Accident Compensation Act 1985 (Vic)* and presided over by a statutory officer called a Conciliation Officer who even has power to issue directions where agreement cannot be reached and where there is no 'arguable case' (eg. where the insurer's decision is not supported by the information available). The Victorian Act wisely contains no mediation time limits so adjournments are not a problem.

4.2 Interim Benefits

The Work Health Court will not entertain any applications for relief unless the parties to the dispute have first received a mediation certificate (s.103J). At present this includes applications for interim benefits by workers.

In *Carroll* (supra) the magistrate enforced a strict mediation time limit to prevent adjournments causing hardship to workers without benefits. A better way to avoid hardship – and also avoid tampering with the ADR process – is to permit workers to seek interim benefits prior to the issue of a mediation certificate.

If parliament accepts that successful ADR depends inter alia upon a power to adjourn (supra) and grants mediators that power, then logically parliament must also amend the Act to allow applications for interim benefits before a mediation certificate issues. Entitlement to benefits should be based on need and not liability, so that applications for interim benefits could be heard by mediators rather than the court. Workers who fail to reach agreement through ADR and then lose in court would be required to refund 'interims' in the normal way.

4.3 Disclosure of Information (especially surveillance reports and videos)

Section 103C(3)(c) of the Act empowers a mediator to require production by a party of "...specified written information...on which...[the party] relies (including a medical report or any other report)."

Section 110B(2) removes legal professional privilege from medical and hospital reports and other medical documents.

Insurers argue that despite the breadth of 103C(3)(c) (ie."medical report or any other report"), the failure of the Act to specifically mention "surveillance reports" in that section means that production of the latter is not mandatory. The insurer is comforted by 110B, which (the insurer argues) only removes privilege for medical reports not surveillance reports.

Insurers and/or their lawyers presently maintain that surveillance reports are privileged and refuse to produce them. Surveillance videos are withheld even more zealously.

The Act should mandate the production at mediation of all information upon which a party relies. This reform is designed to facilitate the ADR process; withholding relevant information hampers it. Reform would also avoid the tedious procedure involved in introducing video evidence to court and then hearing evidence in rebuttal. The whole ugly business could take place informally at mediation! The parties suffer no disadvantage if the matter fails to resolve and subsequently goes to court because after disclosure their bargaining positions are protected by ss.103C(4)(c) (confidentiality of mediation) and 103K(inadmissibility of mediation-generated evidence).

In Victoria surveillance reports and videos are regularly produced and shown with great success at WorkCover conciliations! Faced with the fruits of surveillance at conciliation, workers either 'fess' up or manage to explain away their dexterity on the monkey bars whilst incapacitated with a lumbar disc prolapse.

Stricter disclosure requirements are needed under the Act, and – as is the

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case in Victoria – any failure to disclose information (especially surveillance videos and reports) should prevent the party at fault from tendering that information in court. Of course a party should retain the right to subpoena to court information of benefit to that party which the opposing party has failed to produce at mediation.

4.4 Commutation of Benefits and Contracting Out of the Act

Section 74(3) restricts the maximum commutation of benefits payable under the Act to 156 times average weekly earnings. With a current AWE of $810.10 maximum permissible commutation is a miserable $124,815.60! Section 186A voids any agreement that purports to exclude or limit entitlements under the Act.

The combined effect of these two sections is to prevent workers negotiating settlements whereby they forego future entitlements under the Act in return for attractive and realistic final lump sum payments in excess of $124,815.60. These deals would also please insurers because potential insurer liability over the life of the worker far exceeds the negotiated lump sum paid here and now. In the parlance of the mediator, settlements of this type are 'win-win'.

Resourceful lawyers have created the 'Hopkins Deed' – so named because it was first approved on 21 May 1997 by Angel J in the matter of *Hopkins v. Collins/ Angus & Robertson Publishers P/L [LA 4 of 1997 (9202305)]* – to enable these deals to proceed. Pursuant to the deed the worker agrees to adjourn his/her claim 'sine die' and not to revive the claim without first repaying the lump sum received. In this way the worker's rights are not extinguished (ie.186A is observed), the worker receives the lump sum and the insurer receives an assurance that the claim is 'closed'(not to be re-opened unless the worker repays the money).

The deed of course is a blatant legal fiction. No worker would or could contemplate paying back several hundred thousand dollars at some future date. Even if the asset was preserved it would most likely be too difficult to convert for repayment. So for all intents and purposes the worker's entitlements are extinguished and therein lies the fiction.

There's no need to resort to fiction and/or the expensive drafting of deeds. If the Act is amended to enable commutation in excess of the present statutory amount and to enable parties to 'contract out', then all negotiations could take place within the appropriate ADR framework (eg. mediation, conciliation etc.). The obvious advantages of a legislatively sanctioned ADR negotiation in this context are that it is much cheaper, much quicker, informal, transparent, less complicated (how many parties to Hopkins Deeds actually understand them?) and, fundamentally, that it recognises the primacy of ADR. The rights of the parties are protected by s.108(3) of the Act which requires judicial scrutiny of agreements.

Failure to correct this deficiency means that the ambit of settlement negotiations is proscribed by the Act. The essence of ADR is that its free and untrammeled and anything less is a contradiction in terms. What's the point of mediated negotiations that are sanctioned by the Act yet are not fair dinkum?

5. Legal Advice

Legal advice is essential for successful outcomes. The parties can't negotiate in a vacuum; they need a legal yardstick. Also, fully informed parties make better negotiators.

Usually insurers and employers are properly advised prior to mediation; workers, who are often without benefits, should be similarly briefed to avoid a power imbalance at mediation. Legal aid, or private firms who subscribe to the '$55-00-advice-only-first- interview'scheme (or an attractive, sensible variation thereof), should ensure that experienced lawyers are available to provide the service.

6. Change the Culture

The government, supported by the community, has shown an intention to discard the old adversarial style of dispute resolution in workers' compensation and replace it with a mechanism to achieve fair agreement through ADR.

Legislative action was required to bring litigants to the mediation table. It is now apparent that the mediation process established under the Act needs improvement before the anticipated reform and simplification of the workers' compensation system through ADR is realized. After the Act changes the modified ADR process might be more appropriately described as 'conciliation' rather than 'mediation'. So be it. The aim of the exercise is to facilitate the operation of ADR.

We're dealing with cultural change – a difficult process that will not be complete until ADR, rather than the Work Health Court, is regarded as the primary dispute resolution mechanism.

At present mediation is treated as a trifling side-show to be endured or tolerated before the main game in court. Several comments about mediation made by the magistrate in *Carroll* provide interesting examples of prevailing attitudes (my brackets)...

> "Once proceedings are commenced in the court there is nothing to prevent parties from pursuing whatever other alternate dispute resolution they may wish to seek."
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> "If a mediator proceeds beyond the 21 days, that would then probably move into a voluntary mediation...not an Act mandated one such that the mediator would not have the protection of the Act or the powers under the Act..."
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> "It would seem to me to be contrary to the aim of the Act as a whole...that a worker could be frustrated and prevented from coming to the court if in fact he was being delayed by people and persons (the dreaded mediator) beyond his power and control."
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> (Transcript pp.6,7)

The challenge for government is to change the workers compensation culture by diverting disputes away from court and enhancing opportunities for dispute resolution through ADR. In Victoria 75% of disputes now resolve at conciliation, 18% go to court and the rest walk away. Victoria changed its culture over the last fifteen years by comprehensive legislative enactment. A similar approach is required in the Northern Territory.

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