Conciliation

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What are the origins of conciliation in Australia?

The term “conciliation” in Australia derives from the industrial relations field. In an effort to prevent and resolve disputes between management and employees (and their representative bodies) which had seen major industrial defeats in the 1890s for trade unions to negotiate terms and conditions of employment with employers, the Constitution and then the *Commonwealth Conciliation and Arbitration Act 1904* sought to substitute conciliation (with arbitration in the background) for the “rude and barbarous processes of strike and lockout”.

Conciliation and arbitration became compulsory support mechanisms for industrial regulation in Australia and, unlike in other international contexts where the term “conciliation” is often used interchangeably with “mediation”, conciliation came to be understood as a preliminary, short-sharp, directive dispute resolution process within a jurisdictional or statutory context, and preparatory to an arbitrated or adjudicative determination. Its use spread from industrial relations to other jurisdictions where it has become institutionalised often as a compulsory process: for example, family law, anti-discrimination, workers’ compensation, retail tenancy, health complaints and various courts and tribunals.

One of the key elements of understanding conciliation in the Australian context is its inter-relationship with the subsequent arbitration or determination process that follows. In most conciliation schemes the historic experience is that the effectiveness

of conciliation diminishes over time as the parties and their legal representatives become more and more focussed on the determination of rights rather than the negotiation of rights and interests by conciliation. How legislatures and regulators respond to this drift is reflected in the diversity of conciliation practice that has resulted. In some jurisdictions conciliators are given more powers to conclude matters that do not resolve initially by agreement. For example, in the Victorian workers' compensation scheme Conciliation Officers can direct that payments be made by the insurer if the Conciliation is satisfied there is no arguable case for the decision made by the insurer. In other schemes conciliation remains a more preliminary, sometimes perfunctory, process with no explicit powers beyond facilitated negotiations to conclude matters.

A further contextual factor in conciliation in Australia has been the adoption of facilitative mediation in the development of the accreditation of dispute resolution professionals. The NMAS standards did not make a clear distinction between the profession of mediator and conciliator but instead provided for a form of self-definition by practitioners. Conciliation has thus come to be defined with reference to the facilitative paradigm and so it is often described as a "blended" or "hybrid" process, rather than a practice with a discrete philosophical and practice basis. Given that tens of thousands of conciliation meetings take place each year in Australia and that many (hybrid) forms of mediation practice have also developed to meet market needs or even legislated for in law, the current status of conciliation is an under-recognition of the significance and impact of conciliation in the administration of justice in public agencies, courts and tribunals. It also misrepresents the blurring of conciliation and mediation in practice.

How can conciliation be defined?

Out of the interplay of mediation principles, statutory context and idiosyncratic scheme designs has emerged a matrix of conciliation practices. In some jurisdictions the conciliator provides the short, sharp, powerful attempt to resolve matters prior to investigation and determination; some investigate and conciliate; others only conciliate with an investigation undertaken by another officer; some conciliators have

powers to make directions for a period of time; and in some areas they are conciliator and arbitrators who have dual functions, or conciliate before arbitration by another officer. To add to the complexity, in some courts or tribunals the model is described as mediation (or court supervised mediation) with navigational or educational functions and sometimes “med-arb” (mediation-arbitration).

A key differentiating hallmark of dispute resolution processes is how the conciliation practitioner deals with the *interests* versus the *rights* of parties involved. In 1997 the former National ADR Advisory Council (NADRAC) placed conciliation within the facilitative (interest-based) framework but the definition understood that given the (rights-based) context in which conciliation is often placed the conciliator has advisory and evaluative roles. A definition that sought to address this tension was suggested by the author in 1990: conciliation is “mediation within a legal framework” where the conciliator acts as advocates for the law while remaining impartial to the parties. NADRAC described the conciliator as able to advise on process and suggest terms of settlement and even express a view on likely terms of settlement if the matter were determined. However for the conciliator, the ideal of mediator impartiality is highly problematic because the context in which conciliators work requires the upholding of, or at least reference to rights derived from policy, legislation and other standards.

The current Australian reality is that there is considerable overlap between mediation and conciliation processes. Many users of mediation seek out a practitioner with subject expertise or professional status so that they have the benefit of the mediator’s knowledge or standing to assist resolution of the dispute. Evidence of this shift can be found in the Resolution Institute mediation Code of Practice. While asking the mediator to uphold the fundamental principle of participant self – determination it allows for the mediator to provide advice and/or expert information –

> *25. To provide advice and/or expert information only where it enhances the decision-making of the participants; in circumstances where the participants have contracted before the mediation begins that such advice can be provided; and where practitioners have the appropriate qualifications and expertise.*

Thus, conciliation and mediation share fundamental principles – party autonomy, procedural and substantive fairness – and the core skills of consensual dispute resolution: identifying issues, developing options, considering alternatives and attempting to reach agreement. Where they differ is in the application of the context to the dispute and disputants and the resultant interventional choices made by the conciliator in the “deep shadow of the law”. The importance of context is supported in the seminal text, “Mediation: Principles, Process, Practice” where Boulle chose to use the terms interchangeably except where a specific context or statutory scheme made the differentiation necessary.

With expert knowledge the conciliator role is required to consider, prescribe or introduce knowledge relevant to the dispute, and ensure that any agreement reached does not conflict with such reference points. In so doing the conciliator has facilitative, advisory and even determinative roles. A hallmark of conciliation is the application of pressure and persuasion, information and education, for the purposes of fulfilling the objectives of the legal context in which they function.

What are the principles underlying conciliation practice?

Within the matrix of contexts and models there are core, distinctive principles that define conciliation (as opposed to mediation) practice that apply to interventions in a statutory context: interventions that relate to process, content and outcome. These principles include ***equidistance, partiality, expertise,*** and ***authority.***

Equidistance describes an activist intervention approach that creates symmetry in negotiations between parties. Conciliation is often a mandatory step in the resolution of a dispute or complaint and can have a high level of self-represented parties. In this context, symmetry can be understood to include the importance of an acceptable level of power differential between parties, the presence of good faith negotiations, the management of extreme differences in negotiation strategies (eg multi-national repeat player versus once-off individual citizen), and the disclosure and consideration of critically important information.

Conciliators attempt to create symmetry through judicious use of their own ***partiality***, rather than the exercise of impartiality. They can play this role because the system explicitly or implicitly asks them to: their assigned status continues so long as they act in congruence with the values and goals of the system. However, these values and goals are not always clearly articulated or prioritised by law and so conciliation practice is a balancing act that risks becoming idiosyncratic and inconsistently applied.

Conciliators have ***expertise*** in the context and parameters within which resolutions occur. This knowledge encompasses understanding of the process, people, dispute issues, and the range of workable solutions and can be described as “situated”. Under statute a conciliator is expected to have an educative or illumination role in relation to content and outcomes. There is an aspect of the administration of justice expected of a conciliator in context and so they have norm-generating, norm-educating and norm-advocating responsibilities. The choice for conciliators is to make affirmative interventions based on their knowledge in order to achieve equidistance, or to meet other systemic goals such as speediness, fairness and low cost. In some circumstances where key legal or regulatory goals apply the affirmation of situated substantive expertise is not a choice but an obligation.

Conciliators exercise their ***authority*** vested in the role by the statutory context. They balance a choice to empower a party’s autonomy against the protection of a party’s right under law. The ideal of pure facilitation is questionable in this context because it can lead to distorted and dis-empowering expectations, or the triumph of institutional power, or the inappropriate absence of legal and medical norms. Thus the use of pressure by a conciliator may be required to achieve statutory goals but it is problematic: too much pressure without recognition of the interests of the parties will be perceived as threat. Insufficient pressure can reinforce power differentials and damage the credibility of the conciliation process.

What are core conciliation skills and competencies?

The core facilitative mediation skills as detailed in national codes and accreditation standards apply to conciliators as they first seek resolution by consensus. The

application of pressure or persuasion however requires other skills. For example, the conciliator has a particular ***diagnostic analysis*** in how they define at the outset the dispute (for example, in relation to statute) and what choice of approach they take. In practice this results in a number of actions for the practitioner: scrutiny of the grounds for the claims that give rise to the dispute; identification of the gaps in expert information and the ability to demand this information; prepare parties prior to conference to address significant legal, medical or administrative issues that have surfaced in the diagnosis; and differentiate between what may be legally relevant to the dispute and what the parties' interests may demand.

The conciliator requires an ***objective empathy*** with the parties that acknowledges personal goals but introduces relevant demands and expectations of the statute that may limit the scope of what outcomes can be achieved. This skill means the conciliator maintains equidistance with participants, being an active, affirming process by which partiality to the statute is used to create symmetry of negotiating power. The conciliator attempts to achieve an appropriate balance between interventions emphasizing participant rights and responsibilities within the scheme and empowering them to make decisions for themselves and introduces expert knowledge of the standard, acceptable legal and administrative options available in the jurisdiction.

The conciliator uses their ***expert knowledge*** of the legislative context and applies the relevant provisions of the law to challenge positions or raise relevant issues for consideration such as the sustainability of a case in court, or the legislative objectives. The conciliator therefore needs to have a working knowledge of relevant court decisions in the jurisdiction. While most conciliation practice reinforces the primary facilitative goals of dispute resolution and party control of decisions and outcomes, the conciliator uses navigational knowledge of the law or system to inform party decision-making. For some conciliators the statute expects them to effectively oversee that parties negotiate in good faith or fulfil other statutory or regulatory obligations, like sound and proper decision making.

The conciliator ***manages multiple roles*** (facilitative, advisory, determinative) and so must clarify their roles throughout the process and signal transitions when they

occur. The decision to change roles is linked to statutory or case requirements and so involves an appreciation of due process and the implications of intervening more forcefully. Where conciliators are given powers to make directions or decisions if agreement cannot be achieved they must have ***sound decision-making*** skills and not stray beyond the statutory role prescribed; the ability to demonstrate impartiality, transparency and accountability; and understanding of the application of the principles of natural justice as it applies to, for example, apprehended or actual bias.

Finally, a conciliator must possess ***self-efficacy*** to manage the balancing act of interests and rights. Conciliators define the limits of what is possible within the scope of conciliation and therefore carry a responsibility for the legal and policy context. They will inevitably experience challenges to their interpretation and criticisms of how they carry out of this duty. Given that most conciliators in Australia work on panels or within an agency as employees there is an opportunity to develop a culture of reflective practice and peer-learning and support that is denied mediators working privately. The aim of self-efficacy is conciliator resilience based on competency and respect earned, rather than positional authority or the imposition of status.

What are the current issues for conciliation in Australia?

Research into the diversity of conciliation practice

For the development of conciliation as a profession there is a need for comprehensive research into the various forms of statutory ADR (conciliation and mediation) to address such questions as: what models of conciliation currently exist and how do they actually operate? How is conciliation designed into a statute and what policies apply? What training exists for conciliation as a discrete ADR practice? What is conciliation best practice and what guidelines are there for legislatures contemplating its introduction?

Recognition, accreditation, standards

The conciliation profession should be recognised for its dispute resolution expertise and its contribution to the Australian community in general. Currently there is no

accreditation scheme that is specific to conciliation only the provisions of the NMAS to allow conciliators to be included under its rubric.

Professional development

There are few examples of tertiary or professional training specifically in conciliation or workshops for senior conciliation practitioners. Agencies, courts and tribunals no doubt conduct their own training or make as a prerequisite that practitioners obtain mediation accreditation as a base level requirement. The principles and skills identified in this paper could be a useful starting place for a conciliator competency-based training program.

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