Conciliation: Connecting the Dots

The Honourable Ruth McColl AO SC*

Introduction

In 2016, the Australian Dispute Resolution Advisory Council ('ADRAC'), of which I became Chair in 2019, embarked upon an ambitious task of searching for the meaning of conciliation as a form of dispute resolution in contemporary Australia. It did so under the leadership of the then Chair, Jeremy Gormly SC,who retired as Chair in 2019.

Why was this task ambitious? To answer that, you need to understand that ADRAC is a not-for-profit association limited by guarantee whose remit is to provide thought leadership in exploring, researching and promoting better dispute resolution in all areas of Australian life. Its activities are undertaken by a voluntary, unaligned, independent council of 13 individuals. The task it undertook was the sort which would ordinarily be undertaken by a law reform commission.

In 2008, the Honourable Murray Gleeson AC, Chief Justice of the High Court described the administration of justice, civil and criminal, as both 'a large part of the raison d'être of most judges and many lawyers' and also 'much more the product of evolution than of planning by a rational intelligence'. He observed that 'while we share general ideas about its strengths and weaknesses, there is not much examination of some of its basic assumptions'. He proceeded to 'raise some issues about the way the system works, and might be changed, in order to test some of those assumptions'.[1]

In a sense, His Honour was broadly describing the environment in which ADRAC embarked upon its search for the meaning of conciliation. As you will hear a process called 'conciliation' is the subject of a large and wide array of legislation. It is the raison d'être of many conciliation entities which provide for a process called 'conciliation', and also for the conciliators who conduct the process. And yet, conciliation is a subject as to which there has not hitherto been 'much examination of some of its basic assumptions'.

The Australian Dispute Resolution Advisory Council decided there that it should investigate whether there was a real distinction between conciliation and other forms of dispute resolution ('DR'),

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* Chair, Australian Dispute Resolution Advisory Council. Speech delivered to the Resolution Institute Conference (Sydney, Thursday 15 July 2021). This speech draws on previous addresses I have made on the subject of ADRAC's Conciliation project to both the NSW Workers Compensation Commission Annual Arbitrators Conference on 6 December 2019 and to the ADR Research Network Roundtable (ADDRN) on 10 December 2019.

1 'The Purpose of Litigation' (The Martin Kriewaldt Memorial Address, Darwin, 12 August 2008).

particularly mediation, with which many saw a considerable overlap. Accordingly, ADRAC tasked itself to explore the basic assumptions of conciliation, to understand its evolution and to suggest what might be changed to enhance conciliation as a DR process.

If it determined there was such a real distinction, ADRAC's goal was to seek to develop a definition of 'conciliation' which could be used for process purposes and, too, as an explanation for practical purposes. ADRAC ended doing more than it set out to do. Its research uncovered a great deal of evidence about how conciliation works in practice, which had not previously been the subject of much comment and was worthy of comment.

The Australian Dispute Resolution Advisory Council research was first explained in its Discussion Paper ('DP') about Conciliation released in October 2019.[2] The final recommendations will be set out in its Final Report, *Conciliation: Connecting the Dots*, which we hope to launch subject to the exigencies of COVID-19 and other logistics in the next two months.

In this paper, I want to address these topics:

(1) What led ADRAC down this path of searching for the meaning of conciliation as a form of dispute resolution?
(2) A short review of the history of the conciliation process;
(3) The research ADRAC undertook and some of the critical findings;
(4) The Discussion Paper;
(5) The Final Report.

What Led ADRAC Down This Path of Searching for the Meaning of Conciliation As a Form of Dispute Resolution?

What led ADRAC down this path?

There are two answers which I advance in no particular order.

First, in 2003 the National Dispute Advisory Council ('NADRAC') published a still widely cited glossary of Dispute Resolution Terms. The glossary was intended 'to assist service users, practitioners, organisations and policy makers and to encourage greater consistency in the use and understanding of

[2] ADRAC, *Conciliation: A Discussion Paper* (October 2019) available at <ADRAC Website - Publications Page via this link> ('DP').

dispute resolution terms'.[3] It was not intended to be a set of definitions.[4] But it did seek to provide a description of the common usage of terms used in dispute resolution in Australia.[5]

Of all the ADR terms NADRAC acknowledged the difficulty of describing 'conciliation'. In its Introduction, the Glossary explained that 'both 'mediation' and 'conciliation' [were] used to refer to a wide range of processes and that an overlap in their usage is inevitable.'[6]

The Glossary's 'description' of 'conciliation' was lengthy. It started promisingly, explaining 'conciliation' to be a 'process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement'. But thereafter, there were a lot of 'mays',which indicated the difficulty NADRAC had in describing precisely what 'conciliation' entailed. In ADRAC's view, '[t]he fact that the NADRAC attempt at a definition overlapped so substantially with its definition of mediation exemplified [the] difficulty' in describing concisely what 'conciliation' is.[7]

Secondly, the comparative uncertainty manifested in the NADRAC Glossary was reflected in academic writings in which '[e]minent ADR scholars in Australia have consistently raised this definitional difficulty, particularly the problem of distinguishing "conciliation" from mediation'.[8]

For example, some of the earliest text writers in the ADR field, Professor Hilary Astor (the inaugural Chair of NADRAC) and Professor Christine Chinkin, wrote in 2002 that:

> Defining conciliation is one of the most problematic of all processes because the term is used variably to refer to a broad range of processes. It can be regarded as a generic term for any consensual, non-adversarial dispute resolution process, an approach that does not distinguish between conciliation, mediation and appraisal.[9]

'Yet a dispute resolution process called conciliation exists and plays a significant role within statutory entities across Australia, and possibly in private spheres as well.'[10] It has done so for a long time.

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3 NADRAC, *Dispute Resolution Terms* - The use of terms in (alternative) dispute resolution (September 2003) available at <https://web.archive.org.au/awa/20191107002237mp_/https://www.ag.gov.au/LegalSystem/AlternateDisputeResolution/Documents/NADRAC%20Publications/Dispute%20Resolution%20Terms.PDF> 1.

4 Ibid 4.

5 Ibid.

6 Ibid 3.

7 ADRAC, DP (n 2) 1 [1.4].

8 Ibid 1 [1.2].

9 Ibid 7-8 [2.9], referring to Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (Lexis Nexis, 2nd ed, 2002) 85; see also Professor Laurence Boulle and Professor Rachael Field, *Australian Dispute Resolution Law and Practice* (Lexis Nexis, 2017) 65.

10 ADRAC, DP (n 2) 1 [1.2].

A Short Review of the History of the Conciliation Process

Consistent with Carl Sagan's observation that '[y]ou have to know the past to understand the present' it is important to understand the evolution of conciliation as a DR process in Australia.

Conciliation was enshrined in s 51(xxxv) of the *Constitution* which conferred on the Australian Parliament power to make laws for the peace, order, and good government of the Commonwealth with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.

As Gleeson CJ explained in *Re Pacific Coal*, that provision had its genesis in the:

> growing acceptance, during the latter part of the nineteenth century, of the idea that governments should make provision for what would now be called dispute resolution in relation to industrial differences [with legislation being enacted] [b]efore Federation in Australia, in England, New Zealand, and two of the Australian colonies, setting up public tribunals for the purpose of settling industrial disputes by conciliation and arbitration.[11]

The Australian Parliament used its constitutional head of power in 1904 soon after Federation by enacting the *Conciliation and Arbitration Act 1904* (Cth) ('1904 Act'). The 1904 Act empowered the Court of Conciliation and Arbitration to exercise its jurisdiction, in part, by conciliation with a view to amicable agreement between the parties and, absent agreement, by arbitration. There was no reference in the Act to any formal process of 'conciliation' or 'arbitration', let alone any attempt to define 'conciliation'.

In 1902, shortly before the 1904 Act was enacted, the Encyclopaedia Britannica ('Arbitration and Conciliation in Labour Disputes', vol 25) explained the ordinary usage of the terms 'conciliation' and 'arbitration' as being:

> If the parties agree beforehand to abide by the award of the third party,the mode of settlement is described as 'arbitration'. If there be no such agreement, but **the offices of the mediator** are used to promote an amicable arrangement between the parties themselves, the process is described as 'conciliation'. The third party may be one or more disinterested individuals, or a joint-board representative of the parties or of other bodies or persons.[12] (emphasis added)

One can see that that description reflects a common meaning of the term 'mediator' as 'a person who attempts to make people involved in a conflict come to an agreement.' And for a long time, that may

[11] (2000) 203 CLR 346, 354 [1].
[12] See *New South Wales v Commonwealth* (2006) 229 CLR 1, 133 [234] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

have been an adequate description. As I have already indicated, it is the advent of 'mediation' as a distinct DR process which has thrown a spanner in the works.

However judicial authority in the early days of the construction of the 1904 Act of what the processes of 'arbitration' and 'conciliation' entailed is sparse.[13] In 1923 Isaacs J described 'conciliation' as having been 'openly preferred by the Legislature as being the simpler, surer and happier method, and most conducive to better understanding and mutual goodwill—perhaps the greatest asset in industrial operations'.[14] That preference has continued it would appear in the legislative mind having regard to its adoption in much legislation to this day.

Later High Court authority referred, for example to '[t]he concept of having the parties to a dispute meet together in conference [as] of the essence of conciliation',[15] and to the distinction between the conciliation functions being directed to assisting the prevention or settlement of industrial disputes by 'amicable agreement' as opposed to the arbitration functions involving the making of binding awards which are not consensual in their nature.[16]

What these observations lack in the case of conciliation in particular, is that they do not identify in what manner the conciliator undertakes the conciliation task, one clearly intended to be very different from the adjudicative arbitral process. Understanding how that role is to be discharged is important both for the conciliator seeking to adopt a uniform approach under the legislative remit, and, too, for the transparency of the process for the disputing parties.

In 2004 in a speech delivered on the centenary of the creation of the Conciliation and Arbitration Court, the Hon. Michael Kirby AC CMG observed that 'the High Court, need[ed] to look more closely at that word "conciliation"', observing, somewhat elliptically that '[i]t has been in the *Constitution*, and the Act, from the start. But its full potential has never been realised.'[17]

The High Court touched on the history of s 51(xxxv), including the 'ordinary usage of the terms 'conciliation' and 'arbitration' at the time of the adoption of the *Constitution* in the 2006 case concerning the constitutional validity of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). However, it did not examine in any detail what the process of conciliation entailed.

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13 This was acknowledged in *Federated Clothing Trades (Cth) v Archer* (1919) 27 CLR 207, 213 (Isaacs and Rich JJ).
14 *Monard v H M Leggo & Co Ltd* (1923) 33 CLR 155, 166 (Isaacs J).
15 *R v Gough; Ex parte Key Meats Pty Ltd* (1982) 148 CLR 582, 593 (Stephen J); (Brennan J agreeing).
16 *R v Bain; Ex parte Cadbury Schweppes Australia Ltd* (1984) 159 CLR 163, 176 (Brennan and Deane JJ).
17 The Hon Justice Michael Kirby AC CMG, 'Industrial Conciliation and Arbitration in Australia - A Centenary Reflection', (Speech to the Opening Plenary Session of The Centenary Convention Conciliation and Arbitration in Australia, Melbourne, 22 October 2004) 27.

The Research ADRAC Undertook and Some of the Critical Findings

In its research, ADRAC sought to identify both the usual features and essential elements of conciliation. It pursued four interrelated enquiries. First, ADRAC identified and analysed 96 statutes which entrusted a conciliation function to an identified entity. Secondly, ADRAC surveyed and analysed material published on the websites of bodies entrusted with a conciliation function under statute. It also sought information from conciliation entities via online surveys. Thirdly, ADRAC met with a wide range of conciliators working under those legislative regimes. Fourthly, ADRAC conducted focus groups of between 10 and 18 conciliators in the major mainland capital cities.

It was apparent from ADRAC's research that conciliation has moved far away from its industrial roots. The Australian Dispute Resolution Advisory Council identified over 90 conciliation entities whose remit covered areas as diverse as aboriginal land rights, access to information, anti-discrimination, apprenticeships and vocational training, building disputes, complaints against architects, consumer affairs, disability services, equal opportunity and native title.[18] It was difficult to discern any commonality which explained why parliaments have chosen to subject these kinds of disputes, but not others, to conciliation.[19] Perhaps it is still, as Isaacs J suggested, a belief that conciliation is 'the simpler, surer and happier method, and most conducive to better understanding and mutual goodwill',[20] in those categories of case.

Nevertheless, it was possible to identify some 'themes' across the conciliation legislation. These were that:

(1) conferral of a conciliation function takes place under laws which may broadly be described as regulatory; ie the relevant laws imposed norms or standards to which people were required or expected to adhere.

(2) the entity upon whom a conciliation function is conferred has some form of enforcement function over the stipulated norm or standard.

(3) the legislature has formed the view that the public interest is served or advanced by (at least) each of three things: first, the stipulation of the norm or standard; secondly, requiring adherence to the norm or standard; and thirdly, conferral of the conciliation function.[21]

What was notable was that almost none of the legislation enacting conciliation as a DR process gave any definition or description of what it entailed. I shall return to this.

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18 ADRAC, DP (n 2) 24-5 [4.8].
19 Ibid 25 [4.9]
20 *Monard v H M Leggo & Co Ltd* (1923) 33 CLR 155, 166 (Isaacs J).
21 ADRAC, DP (n 2) 25-6 [4.11].

The Australian Dispute Resolution Advisory Council focus groups were conducted with conciliators, almost all of whom had worked in that capacity for periods in excess of a decade, and in some cases over two decades. In addition, virtually all participating conciliators had been trained as mediators.[22]

The Australian Dispute Resolution Advisory Council found from the focus groups that by and large:

(1) Conciliators practice largely in isolation from other conciliators and DR practitioners, in part due to practising by reference to the framework, usually statutory, governing the disputes they conciliate.
(2) Conciliators see themselves as carrying out functions distinct and quite different from mediation (although it appears to be widely accepted by conciliators that mediation training has value for them).
(3) Conciliators appear to accept that legislative imperatives rather than disputant agreement drive a settlement.
(4) Conciliators identify two professional needs: increased professional collegiality and the promulgation of professional standards, each of which is likely to be facilitated by increasing the level of understanding as to what conciliation is.
(5) There was much discussion, but no consensus about the essential difference(s) between mediation and conciliation.[23]

A sense of the disparate views across the conciliation community can be gleaned from the variety of views as revealed by ADRAC's focus groups. Here are some of the comments made by the participants first in seeking to describe conciliation as a process, or a specific approach to DR:

- *conciliation is a 'without prejudice' discussion attempting to resolve a complaint;*
- *conciliation is an opportunity for people to come together to talk about the issues, and work out a way that they themselves, with the assistance of a conciliator, can resolve the matter;*
- *conciliation is informal, flexible and voluntary;*
- *conciliation is about having enough information to make a decision about the issues that have brought the parties to the process; it differs from an investigation;*
- *if the matter is not resolved in conciliation, it can be referred to other processes, usually provided by the same entity.*

[22] Ibid 29 [4.19].
[23] Ibid 29-30 [4.20].

Secondly, in describing conciliation in terms of the conciliator again a variety of views were expressed:

- *there's an impartial conciliator who helps the parties identify the issues and options and negotiate an outcome they can agree on; the conciliator might be impartial, but they do not treat the parties the same way;*
- *the most valuable aspect of conciliation is the conciliator role: the conciliator has authority and a 'big stick', in that the matter goes to court if not settled; and*
- *the conciliator is an evaluator.*

This variety of views can clearly be attributed to the absence of any legislative definition or description of conciliation in the enabling legislation pursuant to which the conciliators conducted their work, and the absence within the conciliation entities in which they worked to the precise process in which they were engaged. It clearly has the potential to lead to a lack of uniformity in dealing with disputes the subject of the same legislative scheme.

The Australian Dispute Resolution Advisory Council hopes that its conciliation project will be of particular assistance to conciliators in giving clarity to their role, the process conciliation entails and its operation from mediation.[24]

The culmination of ADRAC's research was its Discussion Paper on Conciliation.

The Discussion Paper

The Discussion Paper explained the research in much greater detail than I have outlined.

It concluded from that research that while conciliation is expressly referred to in a wide array of laws it was a poorly understood form of dispute resolution. It identified one of the reasons for this as being the fact that conciliation is generally not defined or described in laws which provide for its use as a DR process. To the extent it is described (including by reference to the role of the conciliator), the descriptions could usually apply to most forms of DR.

The absence of a definition in laws dealing with conciliation means that, in the vast majority of cases, the ordinary meaning of that expression is likely to apply. However, considerable doubt attends its ordinary meaning. And whilst conciliation has the distinctive history I have outlined, that history sheds little light on the ordinary meaning of conciliation.[25]

[24] Ibid 3 [1.13]
[25] Ibid xi [5].

The Australian Dispute Resolution Advisory Council considered that the absence of any legislative definition or description of conciliation had various downsides, including:

(1) uncertainty in the minds of conciliators and the disputing parties as to the nature of the process which was being undertaken;
(2) diminished recognition of conciliation as a distinct and separate form of DR;
(3) non-achievement of the public purposes underpinning those laws whichmake provision for conciliation.[26]

Despite this, in ADRAC's view conciliation appeared to be a successful form of DR in terms of rates of resolution of disputes and in terms of securing various public interests which underpinned the legislative frameworks which made provision for its use.

As I have said, ADRAC's research indicated that most conciliators (of those consulted by ADRAC) consider that conciliation proceeds against a backdrop of statutory norms or standards enshrined in the laws which refer to it – even though those laws usually do not expressly require a conciliator to adhere to those norms or standards. This aspect of conciliation – and its implications for conciliation entities, conciliators, disputants, and policymakers (among others) – became more and more important in the course of ADRAC's project.[27]

The Australian Dispute Resolution Advisory Council concluded that one of conciliation's distinctive features is its statutory provenance and that past attempts to define/describe conciliation may have paid insufficient attention to this feature.[28]

In the DP, ADRAC proposed both a description and a definition of conciliation. They reflected the statutory provenance and treatment of conciliation as well as according with feedback received by ADRAC from conciliators.[29]

The Australian Dispute Resolution Advisory Council expressed the view that if its description and definition of conciliation attracted a high measure of support (either as presently formulated, or in a modified form), very significant benefits may be achieved, including:

(1) enhancing the level of understanding and practice of conciliation, including on the part of conciliators and disputants (thereby resulting in improved outcomes for disputants);

26 Ibid xi-xii [7].
27 Ibid v.
28 Ibid xii [8].
29 Ibid xii [10]

(2) locating a clearer place for conciliation on the DR landscape, and reducing the level of isolation of conciliators from other DR practitioners;
(3) promoting recognition of conciliation as a distinct and separate form of DR;
(4) facilitating development of 'best practice' guidelines, including with respect to standards, training and opportunities for professional collegiality;
(5) enhancing fulfilment of the public purposes underpinning laws which make provision for conciliation;
(6) providing more focus for recommendations to be made about conciliation to government and industry stakeholders.[30]

I will not repeat either the description or definition of conciliation proposed in the DP, because having regard both to its research and the input of submissions received in response to the DP, ADRAC has now formulated a suggested definition of conciliation in its Final Report. However, that fact does not detract from the force of the views ADRAC expressed in the DP as to the utility of adopting a definition of conciliation.

The Final Report

The Australian Dispute Resolution Advisory Council's Final Report is close to launch. It encapsulates its proposed definition of conciliation and its overall findings, conclusions and recommendations.

In it, ADRAC has set out a proposed definition of conciliation whose adoption by legislatures across Australia it hopes can be used to connect the dots between the legislative schemes which provide for conciliation as a DR mechanism, the conciliation processes undertaken pursuant to those schemes,those who participate in them – both the conciliators and the disputing parties – as well as the DR community and the community at large.

The Australian Dispute Resolution Advisory Council hopes that the definition of 'conciliation' it has formulated in this Final Report advances conciliation without harming its flexibility.

Its core was set out in the Discussion Paper which submissions made after the Discussion Paper widely endorsed. it includes that part of the description from the Discussion Paper which identified the conciliator's role. However, ADRAC has expanded the definition to emphasise the legislative imperatives which govern all involved in the process. It has eschewed the use of a description to avoid confusion and to seek to make the definition of the process self-contained. In doing so, its structure

[30] Ibid xiii [15].

conforms to the approach NADRAC took to defining DR processes, that is to say, of proffering a stand-alone definition without an accompanying description.

The Australian Dispute Resolution Advisory Council's proposed definition points to the facilitative nature of the process, the role the conciliator plays in helping resolve the dispute in accordance with legislation or other binding rule which places obligations on conciliators and the disputing parties to comply with the norms and standards required by that context.

In its Final Report, ADRAC recommends that legislatures and statutory conciliation entities consider the adoption of ADRAC's definition of conciliationin the interests of connection, communication and collegiality among conciliators and in the interests of certainty for the disputing parties. Insofar as the legislatures are concerned, ADRAC recommends they consider adopting ADRAC's proposed definition both in existing and any future legislation making provision for conciliation as a DR process.

The Final Report also makes many other recommendations of which I will mention a few:

(1) That conciliation entities and conciliators review their procedures to ensure that conciliated resolution of disputes occurs consistently with the norms and standards of the statute that governs the dispute being conciliated.
(2) That conciliation entities explain conciliation in plain English and also in in languages other than English both on their websites and in brochures to be provided to the disputing parties as part of any enquiries about the process and/or for the purposes of their participation in it.
(3) That conciliation entities endeavour to coordinate and achieve consistency of approach in the content of conciliation training.
(4) That conciliation entities coordinating and cooperating to agree on standards to govern the conciliation process and the role of conciliators.
(5) Conciliation entities ensuring conciliators undertake professional development courses.

The Australian Dispute Resolution Advisory Council hopes that at a time when the community demands transparency and accountability, connecting those dots by adopting ADRAC's definition and other recommendations will enable legislators to assure the community that it is sensitive to the need for clarity in DR processes for which legislation provides,and the need for conciliated disputes to be determined in accordance with the norms and standards of the enabling legislation. In addition, uniform legislative adoption of ADRAC's definition will ensure consistency of understanding the process for conciliating entities, for those acting as conciliators and for the disputing parties as well as the community generally.