NEGOTIATING, MEDIATING, CONCILIATING
Skills and Techniques for Young Lawyers

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PART 1 Definitions

1. Alternative dispute resolution is now well entrenched as part of the legal framework in Australia. On 1st August 2011 the federal government's legislation, the *Civil Dispute Resolution Act 2011*, came into force, requiring parties to undertake "genuine steps" to resolve their disputes[2]. Section 4 of the Act provides that such steps may include:

    1) attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.

    2) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;

    3) and, if such a process is agreed to; agreeing on a particular person to facilitate the process, and attending the process.

2. In its "National Principles for Resolving Disputes" report to the Attorney-General in April 2011, the National Alternative Dispute Resolution Advisory Council (NADRAC) set out a Guide for dispute resolution procedures, ranging from; Prevention, Negotiation, Mediation, Ombudsman, Conciliation, Neutral Evaluation, Arbitration and Litigation. This paper will focus on only three of the primary Alternative Dispute Resolution (ADR) methods: Negotiation, Mediation and Conciliation.

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[1] **About the Presenter**

Derek Minus is a specialist in resolving business and interpersonal conflicts. Accredited as a mediator in 1992 he has mediated or conciliated over 1,000 matters. He is dual qualified as a Fellow of the Chartered Institute of Arbitrators by both mediation and arbitration and was a former President of the Australian Branch. He has spent over 10 years as an arbitrator, mediator and conciliator in the New South Wales Local Courts, the District Court, the Consumer, Trader and Tenancy Tribunal and the Workers Compensation Commission. He practises as a barrister, mediator and arbitrator.

2 However, in New South Wales similar legislation, but requiring a lesser standard of "reasonable steps" which was due to commence on 1 October 2011 under Part 2A of the Civil Procedure Act 2005, has been postponed by 18 months to enable NSW to monitor the success of similar provisions that commenced in the Federal courts.

Negotiation

3. Negotiation is nothing more than the age-old practice of bargaining. One of the best definitions of the negotiation process and rationale for its use is provided by negotiation consultant and author[3], Herb Cohen, is as follows:

    1) Everything that you want or need is owned or controlled by somebody else.
    2) Everyone acts in their own self-interest to meet their own needs.
    3) Negotiating is the process of influencing other people to get the things that you (and they) want done.

4. In the 1980's, Roger Fisher and William Ury, both Professors at Harvard University published their seminal book, "*Getting to Yes – Negotiating an agreement without giving in*". It promoted a style of negotiation which has become widely adopted through their, "Harvard Negotiation Project". Often referred to as "Principled Negotiation" it promoted a style of bargaining that had four hallmarks:

    1) A focus on interests, not positions
    2) Separating the people from the problem
    3) Inventing options for mutual gain
    4) Using objective criteria to determine outcomes

5. The Principled Negotiation strategy gave a new emphasis to what people really wanted as opposed to the posturing and rhetoric that had been a pervasive element to negotiation practice up till then. Instead of maintaining a studied indifference, a "Maverick" style, card player's strategy of always keeping one's cards close to the chest, the Principled Negotiator was eager to share their information and stimulate the other side to share theirs. Along with this different style, was a realisation that not every situation involved a "zero-sum game" of a winner and a loser, but that each person's needs and interests were different. Where information was shared there was a chance to create options to maximise opportunity for both to win. Hence the name often attached to this type of negotiation, Win-Win.

6. According to the NADRAC Guide, in order to be a good negotiator, you should:

    Plan appropriately BEFORE the negotiation to:

    - ensure that you talk to the other people before you make any decisions about an outcome (talk first, decide last)

[3] You can Negotiate Anything, 1980

- consider what your needs, goals, wants and desires are
- consider the needs, goals, wants and desires of the other people involved
- avoid getting stuck on one result
- consider options for outcomes that address what everyone wants
- consider what you will do (your alternatives) if you do not negotiate an outcome
- commit yourself to a collaborative or problem solving approach (sometimes called win/win)
- choose a suitable time and place for the meetings and conversations

Manage yourself and the process DURING the negotiation to:

- be hard on the problem – address all the issues completely
- be soft on the person – avoid blame and manipulation of others
- emphasise any common ground you and the other people share, this makes it easier to understand each other
- be inventive in coming up with lots of options
- focus on the issues, not the personalities
- avoid unfair tactics
- manage your emotions
- communicate well - make sure that you and the other people involved understand what each other is saying
- look for a solution that will work for everybody
- be clear about making an agreement with the other people involved and write it down at the end of the negotiation

7. In my experience, lawyers are (with exceptions) generally poor commercial negotiators. A lack of training and fixedness on a "settlement style" often with a single negotiation strategy of "split the difference", means that the benefits of a robust negotiated outcome which engages both parties in creative option generation, is often missing. It is often argued, that as a financial settlement is the only available outcome, this style is most appropriate. However, experience with mediation suggests that there are always more issues that are significant to the resolution of a dispute than are identified in the pleadings. For this reason a mediation, which is at its essence, nothing more than an assisted negotiation, is often a better way to achieve a robust resolution.

Mediation

8. Mediation is a process that lawyers and courts are now well accustomed to, although there are various accepted definitions of the process. Folberg and Taylor's[4] is one of the earliest adopted and most widely quoted:

> "[Mediation] can be defined as the process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach consensual settlement that will accommodate their needs."

9. The Law Society, Definition of Mediation[5] is similarly phrased, although more prescriptive regarding the attributes and activities of the mediator:

> "Mediation is a process in which a mediator independent of the disputants, facilitates the negotiation by disputants of their own solution to their dispute by assisting them systematically to isolate the issues in dispute, to develop options for their resolution and to reach an agreement which accommodates the interests and needs of all the disputants".

10. According to this model:

> The mediator does not impose a solution upon the disputants. It is not his/her function to attempt to coerce a party into agreement nor should he/she attempt to make any substantive decision for the parties. He/she may raise and help the parties explore options for settlement. It is not the mediator's function to give legal advice to the parties.

11. In NADRAC's view it is better to describe dispute resolution processes rather than define dispute resolution terms. NADRAC sees 'descriptions' as an indication of how particular terms are used, whereas 'definitions' refers to the essential nature or key features of specific processes. Mediation is defined by NADRAC as:

> A process in which the parties to a dispute, with the assistance of the mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

4 Mediation: A Comprehensive Guide to Resolving Conflicts without Litigation, Jay Folberg and Alison Taylor, 1984
5 The Law Society of NSW - Updated 1 January 2008

12. However, it is Sir Laurence Street who has identified the three key hallmarks of a mediation process which come closest to a practical guide of the practice of mediation. His description of mediation process is that:

    1) The Mediation is a voluntary, consensus orientated process;
    2) The Mediator is appointed by the parties and is able to confer with each party privately and in confidence;
    3) The Mediator no authority to make a determination

13. In my view it is Sir Laurence, with his vast practical experience of mediation (as probably Australia's foremost mediator) who captures the true practical nature of the mediation process, namely the use of private meetings to advance the mediators "informational power". When meeting privately with the parties, the mediator is under a far greater ethical onus to ensure the confidentiality of any information relayed by a party during a private meeting.

Conciliation

14. The Australia Constitution[6] provides for the process of conciliation (as an adjunct to arbitration) for the "prevention and settlement of industrial disputes extending beyond the limits of any one State".[7] Indeed many States also have complementary legislation dealing with the conciliation and arbitration of industrial disputes, it no doubt being appreciated that judges dealing with these matters needed to attempt to reconcile the parties views in the interests of community harmony, before proceeding to determine the "rights" of the parties in dispute.

15. The term "conciliation" like that of "arbitration" or "arbitrator" is generally undefined in any Australian Act. However, section 4 of the 1899 *Conciliation and Arbitration Act* in New South Wales contains a handy description of the role of the conciliator:

> "If any person or persons be appointed to act as conciliator or as a board of conciliation, he or they shall inquire into the causes and circumstances of the difference by communication with the parties, and otherwise shall endeavour to bring about a settlement of the difference"

16. According to NADRAC the distinction between mediation and conciliation is that 'mediation' is a purely facilitative process, whereas 'conciliation' may comprise a mixture of different processes including facilitation and advice. The

[6] *The Commonwealth of Australia Constitution Act*
[7] Part V, Legislative Powers of the Parliament, Section 51 (xxxv)

term 'mediation' should be used where the practitioner has no advisory role on the content of the dispute and the term 'conciliation' where the practitioner does have such a role. Conciliation is defined by NADRAC as:

> A process in which the parties to a dispute, with the assistance of the conciliator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator has no determinative role on the content of the dispute or the outcome of its resolution, but may advise on or determine the process of conciliation whereby resolution is attempted, may make suggestions for terms of settlement and may actively encourage the participants to reach an agreement which accords with the requirements of the statute.

17. These terms mediation and conciliation are used interchangeably in many forums. Indeed, Sir Laurence Street has expressed the view that:

> "At times well-intentioned efforts are made to distinguish between different modes of carrying into effect the underlying philosophy of seeking a consensus-oriented resolution of the dispute. ... But none should be seen as constituting a separate genus, as for example is litigation or arbitration. It will be found on analysis that all the various specific consensus-orientated techniques are in truth mediations within the conceptual formulation outlined previously.
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> A common misconception is that there is a distinction between mediation and conciliation. In the view that I put forward, the two words are frequently used interchangeably and are synonymous. Mediation is the preferred description in the United States and the Asia Pacific region, including Australia. Not only is there no distinction in substance, but indeed there is not even a cosmetic difference between mechanisms propounded as conciliation and those propounded as mediation."

18. If we accept the definition of a mediation as a process which has (or may have) private meetings, than the practice of conciliation particularly by arbitrators who are required to make a binding determination is in one respect, significantly different from the mediation process. Where a dispute resolver has the dual role of conciliator of determining the matter as an adjudicator or arbitrator, the conciliator will always meet with one party in the presence of the other.

19. Because arbitrators are under a duty to "act judicially", they must observe the requirements of "natural justice" or procedural fairness. A party has a right to know what evidence is presented to the arbitrator, at a hearing. Where that evidence is adverse to their case or prejudicial, they have to be given an opportunity to respond

to it, or rebut it. An arbitrator should therefore only conciliate by meeting with parties together at same time. If an arbitrator conducts private meetings as part of the conciliation process and then goes on to hear and decide the matter, any decision they reach is likely to be set aside on the grounds that the process was procedurally unfair.

PART II Mediation Features and Mediator Functions

20. What cases are suitable for mediation? It is possible to construct a long list of matters that are suitable or unsuitable for mediation for various reasons. In fact Part 2A Section 18B of the *Civil Procedure Act 2005*, will when enacted, set out a list of "excluded disputes" that are considered unsuitable. Generally, all commercial matters are suitable for mediation, particularly where there is a history of bad relationships and a breakdown in communications, between the parties. However, a mediator with the skills to handle disputes characterised by high emotion and angry aggrieved parties, is required.

21. Is a Settlement Conference a mediation? There is a unique advantage in having a mediator present at a dispute resolution process. Apart from the specific training and experience they have, the mediator is (or should be) completely "neutral" as to the outcome of the dispute. Aside from having no pecuniary interest in the outcome, they are also emotionally disengaged in a way that an advocate or adviser can not be. I am therefore always surprised when lawyers tell me that they went to "mediation" to resolve their dispute, when it was really nothing more than a settlement negotiation.

22. Are there different Types of Mediation? The practice of mediation has grown up with different camps of purists and practical resolvers. For the purists mediation consists only of a facilitative process in which the mediator plays no role whatsoever in the generation of options nor do they provide any advice as to the likely outcome. On the practical side, evaluative mediators (often highly skilled ex-judges) can provide the parties with a "short-cut" to the rounds of claim/decision/counterclaim/award/appeal process that litigation often involves.

23. The Australian National Mediator Practice Standards for mediators operating under the National Mediator Accreditation System (September 2007) identify that:

> "Some mediators may use a 'blended process' model whereby they provide advice. These processes are sometimes referred to as 'advisory mediation', 'evaluative mediation' or 'conciliation'. Such processes may involve the provision of expert information and advice, provided it is given in a manner that enhances the principle of self-determination and provided that the participants request that such advice be provided. Mediators who provide expert advice are required to have appropriate expertise (see Approval Standards at Section 5 (4)) and to obtain the consent of participants prior to providing any advisory process.

24. **When should you Mediate?** In the early days of mediation in New South Wales, many lawyers claimed that to offer to mediate was a sign of the weakness of your case, therefore any attempt at settlement should be left to the last moment, generally at the door of the courthouse. That may have also been the only time when counsel had taken the opportunity to thoroughly read through the brief. Given that judges no longer have any concern about allocating matters to mediation (having seen the successful results that can be obtained, particularly with, cases that are difficult to try because the evidence is purely of the form "he said/she said") matters are being sent to mediation much earlier. In fact there is no reason to wait until all the evidence is in to begin the discussion of what are the real issues in the case. Often there are matters that can be dealt with immediately (e.g. credits for unused stock or returned items) that do not involve any sort of legal decision making but can use up large slabs of time in analysis. A mediation organised early in the dispute resolution process can bring the parties together as a "team" with the object of clarifying the evidence before people become positional.

25. **Should you hold a Preliminary Conference prior to the mediation?** Some lawyers (and clients) baulk at the additional expense for holding a separate conference, additional to the mediation conference. My experience has been that the preliminary conference is the time to ensure that everyone is on the "same page". It is always a mistake to assume that parties understand the mediation process, even if they have attended mediations previously. The preliminary conference can cover such matters as:

    1) Who will be attending (and do they have knowledge of the case)
    2) How the mediation will be conducted (e.g. shuttle or with the parties in the same room). This will also dictate what facilities are required.

3) Where the mediation will be held. Sometimes a party will offer to provide rooms (and lunch), sometimes this is acceptable and other times it is not.
4) Will attendees have full authority to settle the dispute.
5) Identify any steps or preparation that needs to be attended to (e.g. filing a defence, calculating the amount of the trailing commission stream) for the mediation to be successful.

26. **Do mediations only take One day to complete?** Somehow the practice has developed (probably from the Settlement Week Mediation programs run in the early 1990's) and the style of some prominent mediators to keep parties "locked up" for the day, until they reached agreement (often through sheer exhaustion and hunger) for a mediation to be completed in one day. And this practice seems to have persisted. It has never been clear to me how a trial that is set down for three weeks, because of complexities with the evidence, will take the same time as an insurance settlement of a single (uncomplicated claim). Maybe it is a variation of Parkinson's Law that "work expands to fill the time available for it's completion".

27. Sensible practitioners will plan for contingencies and missing information, to return to a following mediation session at a later date. Also, although the idea is accepted that mediation parties need to be worked hard to produce a result, in my view the opposite holds true as well. People make better decisions were they are rested and an agreement that cannot wait until the next day to finalise, is unlikely to last.

28. **Should pressure be brought to bear on the parties by the mediator or their lawyers?** The case of *Studer v. Boettcher*[8] provides an example of what can go wrong in a mediation. In the case at first instance, Young J. in the NSW Supreme Court held that:

> "Whilst things may be a little different in this less paternalistic age, I believe it still is the rule that it is proper and appropriate for solicitors to put pressure on clients to do what is, in the lawyer's view, in the clients' own interest. Of course, there must come a point where the client is just behaving as an automation and if the matter gets to that point then the solicitor should know that he or she should not proceed at least without an independent person speaking to the client to make sure that the client understands. However, on the facts that is not this case."

[8] Studer v Boettcher [1998] NSWSC 524

29. In the Court of Appeal, Handley JA held at paragraph [74] that[9]:

> "Broadly, and not exhaustively, a legal practitioner should assist a client to make an informed and free choice between compromise and litigation, and, for that purpose, to assess what is in his or her own best interests. The respective advantages and disadvantages of the courses which are open should be explained. The lawyer is entitled, and if requested by the client obliged, to give his or her opinion and to explain the basis of that opinion in terms which the client can understand. The lawyer is also entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interests. The advice given and any attempted persuasion undertaken by the lawyer must be devoid of self-interest. Further, when the client alone must bear the consequences, he or she is entitled to make the final decision."

30. The case even made its way to the High Court[10], although by then the plaintiff was unrepresented. At the application for special leave, Hayne J had little difficulty in disposing of the matter, and said:

> "The trial judge, having heard the witnesses give their evidence, concluded that the settlement of which the applicant complains was not brought about by what his Honour described as any "undue pressure" by the respondent. That finding was based on evidence that what was alleged to be the "pressure" consisted only of statements intended to persuade the applicant of the wisdom of settling the dispute which were statements made over an extended mediation."

31. **Is a mediation a Confidential process?** Mediation agreements generally provide that anything that is said or done in a mediation is strictly confidential. These clauses require that a lawyer must maintain the confidentiality required by the parties and by any mediation agreement. In addition, where matters are referred to mediation from a court, the mediation will be subject to the requirements of the law and any relevant Rules of Court. All information and documents disclosed during the mediation, including any settlement or draft offers and counter-offers, are confidential and privileged between parties to the mediation and their legal representatives. For example, the NSW *Civil Procedure Act 2005* provides in section 30(4) that:

> "(a) evidence of anything said or of any admission made in a mediation session is not admissible in any proceedings before any court or other body, and

[9] Studer v Boettcher [2000] NSWCA 263
[10] Studer v Boettcher S298/2000 (14 December 2001)

(b) a document prepared for the purposes of, or in the course of, or as a result of, a mediation session, or any copy of such a document, is not admissible in evidence in any proceedings before any court or other body."

32. **Do mediators have to be Neutral AND Impartial?** The NSW Law Society definition of the mediation is that it is a neutral and impartial process:

> 5.1 Impartiality: The mediator shall maintain impartiality towards all participants at all times during the mediation process. Impartiality means freedom from favouritism or bias in word or action. The mediator shall not play an adversarial role and shall maintain a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement.
>
> 5.2 Neutrality: If the mediator believes or any one of the participants states that the mediator's background or personal experiences or relationships would prejudice the mediator's performance or detract from his/her impartiality, the mediator shall withdraw from the mediation unless all parties agree to proceed after full disclosure of all relevant facts relating to the issue of neutrality.

33. **How should lawyers behave at a mediation?** A good source of information is the paper produced by the Law Council of Australia (March 2007) on "Guidelines for Lawyers in Mediations". The paper covers a range of topics, including the Lawyers Role in the mediation, Ethical issues, like confidentiality, acting in good faith, selecting a mediator and preparing for the mediation, assisting your client at the mediation and any post-mediation conference.

Mediator Styles

34. Just as in that old advertisement that said "oils ain't oils" so mediations are not all the same. It is important to recognise that mediation has developed over the last twenty years, into different styles of practice. Academics make distinctions between facilitative mediation (where the mediator just assists the negotiation between the parties) and evaluative mediation (where the mediator also evaluates the merits of the dispute and provides suggestions as to its resolution).

35. Mediations conducted by prominent ex-judges, court registrars and many senior legal practitioners are unrecognisable from the processes that are taught and recommended to new mediators. How? Lawyers have evolved a style of legal "settlement" mediation where the parties are in separate camps in separate

rooms, with the mediator moving back and forth between them, exchanging offers and imposing their viewpoint on the likely success or otherwise of the party's case. The mediator's activity has been characterised by one wit as, akin to that of a 'human email'.

36. Often in these mediations, lawyers play a protective, cocooning role, preventing their clients from speaking even on those brief occasions when they are together with the other side. This destroys one of the greatest features of mediation - the ability of the parties to play a direct role in their own dispute. Replaced by their legal representatives, some ex-judge mediators, exercising a degree of control unknown by many mediators, have decreed that here will be no opening statements as the (barrister) representatives "talk too much".

37. Although termed a mediation, where the mediator provides expert views on the possible success of the party's legal case and puts pressure on the parties by disclosing the mediator's personal view of the evidence and the law and postulating as to that party's ultimate success in the court, the process is much more like an adjudication. Many ex-judges and legal practitioners are more comfortable with this process with which they are familiar than dealing with the parties' angst and anger. In fact, it is often the unabashed intention for selecting this process and this style of mediator in the first place.

38. Often a lawyer wants as mediator, some prominent ex-jurist, who will "tell" their client that they are being unreasonable and ought to settle. But this approach can backfire. It can be an unpleasant experience for the client's lawyer, when the lawyer is subsequently castigated by the client for telling them that their case was winnable when the eminent ex-jurist, now mediator selected by them, has told the client that they will lose.

39. The settlement style is also known for cramming the mediation into a single day, then mediating without a break, with significant pressure brought to bear on a party to decide on a settlement before they are allowed to leave. Once an "agreement" is reached it has to be recorded then and there in case the parties have a change of mind. This is the antithesis of a good resolution. A good agreement is strong enough to last until the following day, after a party has gone

home, after they have had the chance to "sleep on it" and after they have told the influential people in their lives about it. If the agreement reached at mediation cannot pass that test then it will not last in the longer term.

40. Opposed to the settlement style is a "**transformative**" style. Here the real value of the mediation lies in the ability of the mediator to keep the parties together and talking to each other. There is a recognition that is the parties that know far more about the dispute than their lawyers will ever find out, because it is the parties who know the entire history of the relationship, the nuances and undercurrents. Remember the parties at some earlier time made the decision to enter into a commercial and contractual relationship for their mutual gain. Keeping the parties together, also provides a stimulus for them to become involved in the process of resolution. It is far more satisfying for the parties to have the opportunity to "have their say", then it is for them to sit in a separate room asking their lawyer "what will happen next".

41. Every dispute has many dimensions. Putting the parties to the dispute in close contact with each other allows them to explore the range of significant and influential aspects of the relationship. A skilful mediator will be able to follow the parties around long enough to share with them the different perspectives of the reason for the breakdown and then lead them jointly to explore the bases for the possible settlement of their dispute. This "transformative" style of mediation aims to be people centred. It is widely practised in the United States but virtually unknown by senior legal practitioners in Australia.

42. Rather than a search for a single answer, the transformative style allows for parallel, personal and multiple "truths" to co-exist. Each person's perspective or narrative is welcomed and accepted. There is no fact finding by the mediator and the only people who are at liberty to question a party's perception of the truth (and only then to the extent that the response is useful in assisting with resolution of the dispute) should be another party. The mediator should be chiefly concerned with managing expectations and sharing and examining options to resolution.

PART III The Conciliation-Mediation distinction

43. Professor Hilary Astor and Christine Chinkin[11] have observed that:

> "Defining conciliation is the most problematic of all ADR 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."

44. However, they also note that conciliation is used in another distinct way in Australia:

> "It is used to describe a dispute resolution process that is provided for, or is required by, statute, for example in family, discrimination and other disputes."

45. It is in this context that the word was used historically in connection with arbitration and any tribunal legislation which uses the arbitration model as the basis for making determinations. Prior to the introduction of the *Civil Procedure Act 2005* in New South Wales, court referred arbitrations were arranged pursuant to the *Arbitration (Civil Actions) Act 1983* (now repealed). Section 9 of the later act, provided that an Arbitrator was required to attempt conciliation:

> (1) An arbitrator shall not make an award in a referred action until the arbitrator has brought, or has used his or her best endeavours to bring, the parties to the action to a settlement acceptable to all of them.
>
> (2) Where a referred action is settled, whether or not pursuant to subsection (1), the arbitrator shall make an award that gives effect to the terms of settlement.

46. This use of conciliation is true in many (older) acts where arbitration processes are employed. In both section 147 of the *NSW Mining Act 1992* and section 69J of the NSW *Petroleum (Onshore) Act 1991,* the process of conciliation is similarly described:

> (1) An arbitrator is not to make a determination until the arbitrator has used his or her best endeavours to bring the parties to a settlement acceptable to all of them.
>
> (2) If the parties come to such a settlement, the arbitrator must make a determination that gives effect to the terms of the settlement.

11 Dispute Resolution in Australia, Second Edition 2002.

47. An Arbitrator in the Workers Compensation Commission is required to attempt conciliation. This requirement is contained in s.355 of the *Workplace Injury Management and Workers Compensation Act 1998*, which provides as follows:

> (1) The Commission constituted by an Arbitrator is not to make an award or otherwise determine a dispute referred to the Commission for determination without first using the Arbitrator's best endeavours to bring the parties to the dispute to a settlement acceptable to all of them.
>
> (2) No objection may be taken to the making of an award or the determination of a dispute by an Arbitrator on the ground that the Arbitrator had previously used the Arbitrator's best endeavours to bring the parties to the dispute to a settlement.

48. This statutory duty to attempt to conciliate a dispute prior to imposing a binding decision is not unique to the NSW worker's compensation jurisdiction. A similar provision also exists in s.54 of the *Consumer, Trader and Tenancy Tribunal Act 2001* NSW which provides:

> **54 Tribunal to promote Conciliation**
>
> (1) Before making an order to determine any matter that is the subject of proceedings, it is the duty of the Tribunal to use its best endeavours to bring the parties in the proceedings to a settlement acceptable to all of them.
>
> (2) If such a settlement is reached, the Tribunal must make orders that give effect to the settlement to the extent permitted by this Act.
>
> (3) Any statement or admission made before the Tribunal or any person at a meeting or proceeding held for the purposes of subsection (1) is not admissible at a hearing of the matter concerned or in any other legal proceedings.

49. In NADRAC's view, 'mediation' is a purely facilitative process, whereas 'conciliation' may comprise a mixture of different processes including facilitation and advice. NADRAC considers that the term 'mediation' should be used where the practitioner has no advisory role on the content of the dispute and the term 'conciliation' where the practitioner does have such a role. NADRAC notes, however, that both 'mediation' and 'conciliation' are now used to refer to a wide range of processes and that an overlap in their usage is inevitable. The definition proposed by NADRAC emphasises the purely facilitative role of the mediator:

> "the mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution"

50. Conciliation differs from normal mediation processes in a number of ways. These are:

1) Unlike mediation, which is voluntary, the parties are obliged to attend conciliation before an Arbitrator or Tribunal.

2) The Arbitrator in conducting the conciliation facilitates the settlement discussions. But unlike mediation, his or her role is more circumscribed. The conciliator will have discussions with both parties, but only together. Unlike mediation, there are no separate and private discussions by which the conciliator can come to understand the "real" motivations of the parties. The reason it is not appropriate for the Arbitrator to hold private sessions with unrepresented parties is that the conciliator will eventually be called upon to settle the matter by determination, if the parties are unable to reach an agreement between themselves.

3) Where an Arbitrator acting in the role of a conciliator, meets separately with each party then there is the risk of apparent bias as:

- the informality and full and frank nature of discussions in of a private session can be misunderstood or misconstrued and a party may view the Arbitrator as partial to their case;
- a party may view the Arbitrator's decision as based primarily on information revealed only in the private session which they were not aware of, or if aware did not have an adequate opportunity to rebut;
- even where there is no 'additional' information on which the Arbitrator has relied, a party may harbour an unreasonable suspicion that the other party has been favoured by special treatment, particularly where there is a disparity in the time spent by the Arbitrator in a private caucus with the other side, or familiarity, as there often is, between the Arbitrator and the other party's representatives.

4) Unlike mediations in respect of general, especially commercial disputes where the parties have the opportunity of settling the dispute on a variety of bases of their choosing, where conciliation is conducted within a statutory framework, the parties are constrained by the nature and type of their settlement. So while parties may still reach "their own solution" as opposed to one imposed by the Arbitrator, that solution must be one that conforms with the legislative outline. Conciliators therefore play an advisory role, unlike a

pure mediator, to the extent of delimiting the area in which the parties will be able to finalise their agreement as it will still be the responsibility of the Arbitrator to make orders in relation to the agreed settlement reached. This is particularly the case where the parties have chosen not to be legally represented.

PART IV Conciliation/Mediation together with Arbitration

51. Mediation, Conciliation and Arbitration are considered to be generic ADR processes. Of these processes, arbitration has a long history, but has fallen into disfavour in recent years as it has come to more closely mirror litigation both in terms of expense and delay. Mediation is a recent favourite of both governments and customers of legal services, as, compared to litigation, it is inexpensive, quick and user friendly. Conciliation, as discussed above, although sometimes seen as the same as mediation, has a distinctly different context when used, particularly in tribunals.

52. The very attractiveness of mediation, that it is a voluntary process, means that many times when not all issues between the parties are able to be resolved, the mediation fails entirely. Although arbitration is unfavourably compared today with litigation in terms of expense and delay, it is a process which produces a binding result with finality due to the limited rights of appeal. Also arbitrators, not being bound by the rules of evidence, are empowered to use inquisitorial processes to better get to the nub of a dispute.

53. Often mediations fail, because the parties want someone to determine "who is right". Not in respect of all issues, but maybe just the fundamental difference between the parties. Where a dispute involves some technical aspect (e.g. why an asphalted road base cracked or whether an overseas patent applies) the parties may want a binding determination on that point. Once that issue is decided, they are quite able to resolve the remaining matters between them (cost of rectification, quantification of lost profits) or with the assistance of a mediator.

54. There are obvious advantages then in combining these two processes. Both mediation and arbitration have their basis in party autonomy. It is the parties that

choose the person they consider to be the most suitable mediator or arbitrator for their dispute. But with a mediation-arbitration, you can get both flexibility and finality.

55. In Australia there has been a significant growth in the establishment of administrative tribunals (there are now over 70). The hallmark of administrative tribunals is a divergence from the court adjudication model to one that is based on inquisitorial processes. The arbitrator/tribunal member is not bound by the rules of evidence but is required to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms in determining a matter. Generally Tribunals are bound by the rules of natural justice but not by the rules of evidence or the "practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures". A tribunal, as is true for all arbitral bodies, is able to inform itself on any matter as it sees fit.

56. In a speech given in 1999 dealing with adversarial and inquisitorial justice, Sir Anthony Mason a former Chief Justice of the High Court, opined that:

> "Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties."

57. To the extent that that is accepted as a correct characterisation of the functioning of the Australian court system, at least in so far as it applies to commercial disputes, arbitration has the ability to provide a more wide ranging and robust process. Arbitrators are not bound by the rules of evidence and therefore have a greater power to "pursue the truth" than a judge.

58. In New South Wales, Court matters were previously referred to arbitration under the *Arbitration (Civil Actions) Act 1983*. Section 9 of this act required arbitrators, appointed by the court, to act as conciliators in an attempt to settle a dispute before determining it. However, with the reform of the civil procedure in NSW and enactment of the *Civil Procedure Act 2005*, the "ADR" functions were split between the appointment of a mediator (Part 4) and an arbitrator (Part 5).

59. The *Commercial Arbitration Act 2010* ("the CAA") made provision for conciliation in section 27D. The Law Reform Commission, writing in 1976 were prescient as to the benefits of having a conciliator available, and wrote of conciliation in the following terms:

> "People may settle their differences by agreement rather than by arbitration or litigation. It is better in their own interests that they should do so. Time and money are saved. Hostility is likely to be dispelled rather than exacerbated. It is better in the interests of the State that differences should be settled by agreement rather than by litigation: the work of the courts is to that extent reduced. There is a case for saying that the law should, therefore, do what it can to promote such agreements. One way of aiding agreement is to have a third person look at the cases of both sides and mediate between the parties and persuade them to accept a settlement. This is the process of conciliation and the third person is a conciliator.[12]

60. They continued, that conciliation, "would encourage disputants to look dispassionately at their cases at an early stage and thus promote early settlement of differences, rather than settlements at the door of the court after much time has passed and much money has been spent".

61. The terms mediation, conciliation and arbitration are not defined in the CAA. Experienced practitioners who regularly work with hybrid processes, understand mediation as a facilitative process, which provides for private meetings or caucus with the parties, whereas conciliation is a facilitative process which does not have private caucusing. Where private meetings are held, issues of procedural fairness can arise when an arbitrator goes on to hear and determine a matter after a mediation, which do not arise with conciliation.

62. However, clause 27D in the CAA, provides that the effect of the arbitrator undertaking these different processes is the same. Namely that if "mediation proceedings" are terminated by a party then an arbitrator who has acted as the mediator in mediation proceedings may not conduct subsequent arbitration proceedings without the written consent of all the parties to the arbitration. Now the term "mediation proceedings" is not defined but pursuant to clause 27D(8) a reference to a mediator includes a reference to a conciliator. This reading is also consistent with the Attorney-General's statement to Parliament that: "If, however, a

[12] Paragraph 15.1, p 227.

mediation or conciliation is not successful an arbitrator is prevented from resuming as an arbitrator without the written consent of all parties."

63. There is no reason, neither as a matter of policy nor practice, why an arbitrator having conducted a "conciliation" (a process where there has been no private meetings with the parties) should be prevented from continuing to act as an arbitrator without the explicit approval of the parties. Not to allow an arbitrator to continue with the arbitration after a conciliation, without the written consent of the parties is a retrograde step. As clause 27D is currently framed, if the arbitrator embarks on a process of conciliation, which is terminated by a party withdrawing consent [clause 27D(3)(b)] then, the arbitrator may not conduct subsequent arbitration proceedings without the written consent of all of the parties [clause 27D(4)] and, if the parties do not consent, the arbitrator's mandate is terminated [clause 27D(6)]. The combined effect of these provisions is that, a private arbitrator, who has often been through a long process of selection, will avoid attempting to conciliate (let alone mediate) any dispute by using his or her best endeavours to bring the parties to an acceptable settlement. If the arbitrator attempts to conciliate, a recalcitrant party can engage in the conciliation, terminate it and then refuse to provide consent for the arbitrator to continue, thereby terminating the arbitrator's mandate and leading to his or her substitution by another arbitrator with the subsequent delay that it entails.

64. As currently framed, clause 27D will lead directly to making arbitration under the CAA a more formal and legalistic process as arbitrators will avoid trying to simplify or resolve a dispute by using their best endeavours for fear of having their mandate terminated.
