Contrasting conciliation v mediation in the Land and Environment Court

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Introduction

There are a number of quite distinct and significant differences between the mediation process and the conciliation process as it functions in planning and environmental law in New South Wales. Although each is a creature of statute, the statutes are different and are implemented in a different fashion

In this context, it is important to list and explain the various distinctions between the two processes. Although some mediations are conducted by the Registrar of the Land and Environment Court who is, herself, a nationally accredited mediator, my analysis is generally confined to those who exercise both the conciliation and mediation function on frequent and regular bases, namely the Commissioners and Acting Commissioners of the Court (hereafter referred to collectively as Commissioners).

Differing triggers – the statutory foundations

The conciliation process pursuant to s 34 of the *Land and Environment Court Act* 1979 (the Court Act), is the first step in a potentially conciliation/arbitration model. The identification of a person to conduct a s 34 conciliation conference is a function only able to be exercised by the Chief Judge of the Court pursuant to s 36(1) of the Court Act.

On the other hand, an appointment as a mediator is made pursuant to s 26 of the *Civil Procedure Act* 2005 (the CP Act) and maybe made by any judge of the Court exercising the power of the Court in any proceedings governed by the CP Act.

The personnel

Conciliation conferences can only be presided over by a single Commissioner[1]. Mediations, however can be conducted by any person appointed pursuant to s 26 of the CP Act to undertake that task. The person need not be a Commissioner or, indeed, a present member of the Court in its broadest sense.

Such a mediation cannot be carried out by a judge of the Court and the evolving practice, soon to be mandatory and already adopted by the Court, is that any person appointed to mediate by the Court will be nationally accredited to do so. At the present time, eight of the full-time Commissioners, one of the Acting Commissioners and the Registrar hold such accreditation and there is an ongoing commitment to ensure that all

[1] s 34(2)

full-time Commissioners of the Court and the Registrar, from time to time, will have such accreditation.

What matters fall within the scope of each process?

The matters that fall within the scope of the conciliation conference process are confined, by s 34 of the Court Act, to *proceedings* [that] *are pending in Class 1, 2 or 3 of the Court's jurisdiction*.[2]

On the other hand, references pursuant to s 26 of the CP Act can be made in any proceedings in all of the five civil Classes of the Court's jurisdiction, they being Classes 1 to 4 and Class 8, the mining jurisdiction.

Decision-making powers

If a mediator successfully facilitates an agreement for an outcome in the proceedings in Court, the mediator has no role in giving effect to the agreement. In some instances, the mediation may result in an outcome that does not require any orders of the Court for it to be given effect. In other instances, where orders of the Court are required, the matter will be referred, relevantly, to the Registrar or to the List or Duty Judge, as appropriate, for the making of those orders.

A quite distinctly different position arises where the outcome of a conciliation conference results in orders being made by the Commissioner.

In general terms, a Commissioner conducting a conciliation conference under s 34 of the Court Act potentially has two quite distinct decision-making roles as the process unfolds. First, if the conciliation process is successful, with the parties reaching agreement as to the proposed orders necessary to give effect to the agreed outcome, the Commissioner must be satisfied, prior to the making of those orders, that those orders can lawfully be made[3].

This is not simply a tick-the-box or a theoretical issue. There have been instances, for example, in proceedings pursuant to s 97 of the *Environmental Planning and Assessment Act* 1979 (the EPA Act) where the initial contentions pressed by a council have included the assertion that the proposed development is prohibited. If that contention were to be correct, an agreement to approve it through the s 34 conciliation process, could not lead to the Commissioner being satisfied that the orders could lawfully be made until after the parties had explained why they had reached the conclusion that the initial contention of prohibition was not well founded and the Commissioner being satisfied on that point.

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[2] s 34(1)
[3] s 34(3) – *being a decision that the Court could have made in the proper exercise of its functions*

In at least one instance that I can recollect from my own experience, I considered it appropriate to place on the record [although not necessary to publish as a decision], my reasons for concluding that I did, in fact, have power to make the orders that were proposed as an outcome of the conciliation process.

The nature of the process

In a conciliation process, the role of the conciliator is an active one. The conciliator intervenes, not merely to facilitate the conversation between the parties, but to:

- propose options for consideration;
- suggest possible outcomes that may not have been considered by the parties; and/or
- test strengths or weaknesses in the positions of the parties.

In my view, the interventionist nature of the conciliator's role in the s 34 conciliation process is the dominant reason underlying the present statutory preservation of the right of each of the parties to object to the conciliator proceeding to become the arbitrator. This potential veto can also give the conciliator scope during the conciliation element of the process, in a comparatively small and rare number of cases in my experience, to express a robust view about the prospect of one or other party during an arbitral process – in circumstances where that party is not, during the conciliation, taking a realistic view of their prospects of success (or more likely failure) during the arbitral process to follow.

It is for this reason that the Chief Judge, in selecting[4] which Commissioner or Acting Commissioner is to perform the conciliation function, closely assesses the nature of the matter and the best match with these skills within the range of the Commissioners. This is because, given the interventionist nature of the conciliation process, it is both appropriate and desirable that the person undertaking the conciliation has a degree of technical familiarity with the principal issues in dispute between the parties.

On the other hand, such a position does not apply in a pure mediation model.

Indeed, there are those who have advocated the position that, as a mediator is purely empowered to facilitate the conversation between the parties and is expressly not to intervene on any merit matters, the less that the mediator knows about the technical elements of the matters that are in dispute between the parties, the better!

I, personally, do not subscribe to this view as it is my experience that some degree of familiarity with the technical issues that are in dispute can assist in the discussion facilitation without making any merit intervention of any nature.

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[4] s 36(1) of the Court Act

Confidentiality

Although the conciliation phase under s 34 of the Court Act and the mediation process under s 26 of the CP Act each has its own statutory confidentiality protection built into the relevant statute[5], it is my experience that, in the s 34 conciliation process, the parties universally accepted that the statutory protection is a sufficient confidentiality mechanism. This is because the disclosure prohibition applies to all participants – not merely the conciliating Commissioner.

However, this is not the case in mediation references as the disclosure provision only expressly binds the mediator. Therefore, it is usual for a separate confidentiality agreement, ordinarily but not exclusively modelled on the Law Society precedent, to be executed by the parties and by the mediator.

Costs orders

In addition, I should observe that there are two potential cost order aspects that need to be considered arising out of the s 34 process.

The first is that, as part of a s 34 conciliation orders package, a Commissioner can lawfully make a costs order pursuant to s 97B of the EPA Act. However, a Commissioner cannot make, even by consent in s 34 conciliation process, a conventional costs order – even though it may have been agreed by the parties. Under these latter circumstances, the s 34 conciliation orders can note an undertaking by one of the parties to make a costs payment to the other within a specified period of time as this is not a costs order. However, if this is not considered acceptable by one party or the other (as is infrequently the case), a costs order element can be dealt with, including being dealt with in chambers, by consent by the Registrar if it is within the limited financial delegation or by the Duty Judge if it is not within the Registrar's financial delegation.

Obviously, a mediator cannot make any costs orders although the making of such orders may be an outcome from a mediation.

Expansion of the role of Commissioners in the Court's processes

Given that s 34 conciliation conferences are confined by the statutory boundaries in s 34(1) and references to mediations are not so confined, mediations by Commissioners can and have been conducted in civil proceedings in the Court where the Commissioner is not permitted to exercise the Court's adjudication powers.

Although Commissioners are not statute barred from hearing such matters, Commissioners have not exercised an adjudicative function in Class 3 proceedings

[5] s 34(11) of the Court Act and s 31 of the CP Act

involving compensation for compulsory acquisition of land, However, it is the now practice of the Court that Commissioners may conciliate or mediate in such matters.

With the advent of national mediation accreditation for virtually all of the Commissioners, it is now possible for Class 4 matters to be subject to s 26 reference to mediation before a Commissioner and, in fact, this has now occurred in a number of cases.

In several of these instances where I have conducted such a mediation, even though no resolution of all of the issues has been possible, the mediation process has achieved considerable narrowing and/or partial resolution of matters that were otherwise in dispute between the parties. In other instances where Commissioners are not empowered to adjudicate, mediation by one of us has enabled the parties to resolve matters.

In addition, there have been a number of instances where, in areas that fall within the statutory scope of s 34 and are thus capable of reference to a conciliation conference, the adjudicative function may not be available for a Commissioner to give effect to an agreement pursuant to s 34 because the Commissioner is statutorily excluded[6] from exercising such a jurisdiction even on a consent orders basis.

In such instances, there may still be utility in a conciliation conference process. It is my experience in a number of cases that the more interventionist conciliation process (rather than a pure mediation reference) has led to such matters being resolved.

In such conciliations I have conducted, particularly where there have been self represented parties, intervention can assist and can subsequently lead to appropriate orders (by the prompt reference of the conciliated outcome and the attendant proposed consent orders to the Duty Judge for that judge to make those orders).

In the instances where I have conciliated such an outcome, the Duty Judge has held a short hearing to satisfy him or herself that the self represented party understood the nature of the proposed consent orders and was freely agreeing to enter into them and, as a result, such orders were made to resolve the proceedings.

Institutionalised schizophrenia

When conducting a mediation, there is never any risk that the mediator will be invited to act as an adjudicator on the matters that are in dispute between the parties. When the mediation concludes, whether by agreement and reference to the Registrar or a Judge for the making of consent orders or by the reference to the Registrar or the List Judge

[6] Proceedings under the *Access to Neighbouring Land Act* 2000 and for applications for imposition of easements pursuant to s 40 of the Court Act.

for the fixing of a hearing of matters unable to be resolved by the mediation, that ends the involvement of the mediator.

However, that is not the case for the conciliator under s 34. One option, as you are aware, is that the parties may, after the termination of the conciliation phase, invite the conciliator to assume the role of arbitrator. At that time, the conciliator is obliged to disregard everything that has taken place in the conciliation except to the extent that the parties agree that all or part of the discussion and all or some documents generated for the conciliation can be carried forward into the arbitrated phase.

This requires a deal of institutional schizophrenia from the conciliator who is now the appointed arbitrator. It is a modestly difficult intellectual exercise to do so – one that I have found that it can be assisted, symbolically by the physical returning of all documents generated for the conciliation process (so that there must be a conscious decision by an advocate to tender that document as part of the arbitral process). Such document return and requirement for forensic decision by the advocate as to whether to tender a document, when coupled with the statutorily required cleansing of the mind, can assist with the discharge of the responsibility required by s 34(11).

I note, in passing, that, as time goes on and greater familiarity is engendered with the process, this is now rarely a matter of concern to advocates and is now second nature to Commissioners. The same cannot be said, entirely, for some expert witnesses who have to be brought back to the straight and narrow if they start straying into matters that have otherwise being discussed during the conciliation process.

Termination simpliciter and termination and reference to a different adjudicator

There are two aspects to the termination of a conciliation process that are distinctly different from the termination of mediation. One arises, generally, and the other only arises if, at the termination of the conciliation process, the parties do not invite the conciliator to adopt the role of adjudicator.

The first of these involves the decision to terminate itself. For mediation, the decision to terminate the mediation lies with the parties. It may be exercised unilaterally by one party deciding that it no longer wishes to mediate or the parties may agree that the mediation should be terminated. Apart from a power of persuasion, the mediator has no basis upon which to extend the mediation.

The same is not the position with respect to a conciliation conference. The Court Act gives a clear inference[7], in my view, that, even if the parties reach a conclusion that they wish to terminate the conciliation conference because they consider that further participation will not achieve anything, there is no obligation on the presiding Commissioner immediately to give effect to such agreement.

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[7] s 34(4) - *If no such agreement is reached, the Commissioner must terminate the conciliation conference*

Indeed, in my own experience, on a number of occasions I have formed the conclusion, contrary to the view of the parties, that all possible options for resolution had not been considered and I required the parties to continue the conciliation process. In the limited number of instances where I have reached that opinion, the continued conciliation has, in fact, lead to s 34(3) agreement and complete resolution of the matters in dispute.

The second significant difference that arises occurs when a conciliation conference is terminated and the parties do not agree to the conciliator adopting the role of arbitrator.

In such circumstances, s 34(4)(a) requires the conciliator to prepare a report to the Court that sets out the issues that, in the opinion of the conciliator[8], remain in dispute between the parties.

Whilst it is my practice to discuss with the parties the nature of such a report, there is no obligation on the conciliator to reflect the opinion of either or both of the parties as to what are the issues that remain in dispute.

Whilst there may be some narrowing of the issues and there may be an agreed position as to what are the issues that remain in dispute, it is nonetheless open to the conciliator, having regard to all of that which has occurred during the conciliation process, to reach a view that differs from that of the parties as to what remains to be disposed of in the proceedings.

Whilst this is comparatively rare and, in my experience when I have done so, it has been disclosed to and explained to the representatives of the parties, it is nonetheless possible that the report to the Court pursuant to s 34(4)(a) may reflect narrower issues than the parties consider remain in dispute between them. On the very rare occasions that this might occur, it is, obviously, important that the report of the Court is couched in terms that does not, either expressly or by implication, reveal anything that might have been discussed during the course of the conciliation process.

Self-evidently, such questions do not arise in a mediation as the only notation that will appear on the cover of the Court file is simply a notation that the mediation has been terminated and the matter has been referred to the next relevant and appropriate officer of the Court for the further necessary procedural steps to be effected.

A conciliator's perspective of outcomes

In conclusion, I would note one aspect of a conciliation process that is, occasionally, disconcerting for the conciliator.

As I earlier noted, the mediation process is one where the mediator is entirely disengaged from the merits of the particular matter. As a consequence, it is less likely

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[8] s 34(4)(a)(ii) – *setting out what in the Commissioner's view are the issues in dispute between the parties*

that the mediator will form any strongly held opinions about the merits of the matters being dealt with (although, notwithstanding this observation, it is likely that some view will be formed but not expressed about outcomes).

However, that is not the case when acting as a conciliator pursuant to s 34.

The necessity to become involved in the interstices of the merits of the matter means that, inevitably, whether expressed or not during the course the conciliation, the Commissioner or Acting Commissioner will form a view about what is the appropriate merit outcome of the proceedings. Whilst that might not be of any particular moment in, say, a s 34 conciliation conference concerning an appeal against a statutory valuation under the *Valuation of Land Act* 1916, a similar position does not apply when dealing with development application appeals under s 97 of the EPA Act.

In dealing with such matters, I find it personally disconcerting, in the discharge of my statutory responsibilities, to assist the parties to reach a conciliated outcome to which I can lawfully give effect and to do so in circumstances where the resulting development consent is not one that I would determine to approve on the merits, under any circumstances whatsoever, if I were to be undertaking an adjudicative role.

Such a reaction must be tightly held as an internal and un-articulated [either by voice or body language] opinion of the conciliator.

However, as I have had occasion to remark – entirely in abstract and conceptual terms and without giving any clue as to what might have been the proceedings that gave rise to these circumstances – I am significantly grateful that, whether by evolution; intelligent design; or divine intervention, I have two hands that are capable of operating independently – one to sign the s 34 orders to give effect to the outcome and the other one, at least metaphorically, to hold my nose while I am doing so!

Tim Moore
Senior Commissioner

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