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Conciliation: a discussion paper

October 2019

ADRAC
Australian Dispute
Resolution Advisory Council

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Acknowledgment

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The Australian Dispute Resolution Advisory Council (ADRAC) is a voluntary, unaligned, independent council of 13 individuals.

The ADRAC Charter is to provide thought leadership in exploring, researching and promoting better dispute resolution in all areas of Australian life.

ADRAC's heritage is linked to the National Alternative Dispute Resolution Advisory Council (NADRAC).

ADRAC endeavours to provide a voice to government for the ADR community. ADRAC is committed to exploring the ADR field and publishing ADR resources for the whole community.

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Foreword

This conciliation project came to the fore partly as a result of ADRAC's consideration of the description of conciliation in the NADRAC glossary, *Dispute Resolution Terms*, published in September 2003. That glossary did not appear to differentiate between conciliation and mediation. NADRAC acknowledged that there were wide variations in people's understanding of conciliation.

ADRAC's initial research revealed that parliaments across Australia have enacted a wide array of laws which make provision for conciliation as a dispute resolution process. Yet those laws rarely, if ever, define the process, even though disputants are usually required to participate in a process by that name. Absent a statutory meaning the ordinary meaning is, presumably, intended to apply. But what is that "ordinary meaning"?

To a significant extent ADRAC's conciliation project can be regarded as a search for the meaning of conciliation as a form of ADR in contemporary Australia. What features does it have in common with other forms of ADR? What are its distinguishing features? Why is it important to understand its shared and distinguishing features?

All of these questions direct attention in one way or another to the role of a conciliator.

In the course of its inquiry 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 policy-makers (among others) – became more and more important in the course of ADRAC's project.

ADRAC identified and analysed 96 statutes which entrusted a conciliation function to an identified entity, surveyed the statutory entities referred to in those statutes concerning their performance of conciliations, consulted experienced conciliators and conciliation scheme managers from a range of major State and Commonwealth conciliation entities, as well as conducted focus groups of between 10 and 18 conciliators in the major mainland capital cities.

This discussion paper encapsulates the outcomes of ADRAC's research. It contains a number of preliminary findings, results and conclusions on which ADRAC seeks input, including in relation to one of the major outcomes of the project to date – a proposed description and definition of conciliation (the proposed definition is a distillation of the proposed description). ADRAC seeks to explain the multi-dimensional significance of these outcomes in its Discussion Paper.

Following consideration of input, ADRAC proposes to release a final report encapsulating its overall findings, conclusions and recommendations concerning conciliation.

ADRAC calls for comment and submissions on any aspect of the report. Submissions can be sent to office@adrac.org.au preferably by Friday 1 December 2019. ADRAC anticipates releasing a final report in the new year of 2020.

Ruth McColl A.O. S.C.

Chair of ADRAC

22 October 2019

Submissions

WOULD YOU LIKE TO MAKE A SUBMISSION ON CONCILIATION TO ADRAC?

ADRAC welcomes submissions from any interested person or entity on any conciliation topic arising from this Discussion Paper.

Submissions can be made on the basis they are acknowledged in the report and quoted as needed; or they can be made privately so that they are not acknowledged in the report or referred to specifically. When making a submission, please identify any preference.

Submissions can be sent as an email or attached to an email addressed to office@adrac.org.au.

ADRAC would be grateful to receive submissions (ideally) before 4 pm on Friday 1 December 2019.

Inquiries can be made by ringing Jeremy Gormly, a member of the ADRAC Council, on 0400 190 953 or from overseas +61 400 190 953.

Contents

Executive summary of main preliminary findings/conclusions xi

Chapter 1: Introduction 1

Chapter 2: Problems describing conciliation 5

The roots of conciliation 5

The definitional problem 7

The NADRAC definition 9

The ongoing problem of defining conciliation 11

Chapter 3: Methodology of the preliminary report 15

Chapter 4: Preliminary findings, results and conclusions 23

Findings arising from ADRAC's review of laws referring to conciliation 24

Findings/results arising from consultative workshops 29

Findings/results arising from ADRAC's analysis of website information about conciliation 32

Results of ADRAC's online surveys 36

Findings/results arising from the ADRAC focus groups 44

ADRAC's preliminary findings concerning conciliator training, standards and development 47

ADRAC's examination of conciliator advertisements 49

Private conciliation 51

Conclusion 52

Appendixes [THESE APPENDIX TITLES WILL LINK TO THE CONTENT ONLINE AT THE ADRAC WEBSITE]

Appendix 1: Workshop questions

Appendix 2: Websites with substantive information

Appendix 3: Website analysis – 19 questions

Appendix 4: Online survey – 35 questions

Appendix 5: Focus group questions

Appendix 6: Focus group results

Appendix 7: Legislation establishing statutory dispute management, including conciliation

Appendix 8: List of statutory bodies that can conduct conciliation

Appendix 9: Characteristics of selected legislation establishing statutory dispute management

Executive summary of main preliminary findings/ conclusions

1. Conciliation is expressly referred to in a wide array of laws but remains a poorly understood form of alternative dispute resolution (ADR). Nevertheless, it has a unique history, it occupies a distinctive place in the ADR landscape, and although it may be somewhat poorly understood, it appears to be a successful from of ADR (in terms of rates of resolution of disputes and in terms of securing various public interests which underpin legislative frameworks which make provision for conciliation).

2. Conciliation is generally not defined or described in laws which make provision for it. To the extent it is described (including by reference to the role of the conciliator), the descriptions could broadly apply to most forms of ADR.

3. The range of disputes subject to some kind of statutory conciliation process is wide. The nature of disputes subject to conciliation does not shed much, if any, light on its content or meaning.

4. Indeed, it is difficult, if not impossible, to discern any underlying denominator(s) which explain why parliaments across Australia have chosen to subject particular disputes to conciliation.

5. The absence of a legal 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 a distinctive history (including a constitutional pedigree), that history sheds little light on the ordinary meaning of conciliation.

6. While there appears to be general acceptance that most conciliations have some features in common, different points of view exist as to which features are common. There is also a lack of consensus (or even general understanding) as to the distinctive aspects of conciliation, especially when compared to mediation.

7. Ongoing uncertainty attending the meaning of conciliation has various downsides, including:
   a. Uncertainty in the minds of conciliators and disputants as to the nature of the process which is being undertaken
   b. Diminished recognition of conciliation as a distinct and separate form of ADR

c. Non-achievement of the public purposes underpinning those laws which make provision for conciliation.

8. ADRAC considers that one of conciliation's distinctive features is its statutory provenance. Past attempts to define/describe conciliation may have paid insufficient attention to this feature.

9. When a dispute is being conciliated by a public official under a law which, in the public interest, requires adherence to a regulated standard of conduct, the legislature contemplates an outcome which accords with that standard.

10. In this report ADRAC advances a *description* of conciliation and also proposes a definition for consideration and discussion. The ADRAC description and definition of conciliation reflect the statutory provenance and treatment of conciliation; they also accord with feedback received by ADRAC from conciliators to the effect that:

    a. Mediation and conciliation share a number of common features but *they are not two sides of the same coin – they are separate and different*.

    b. Facilitation is an important aspect of conciliation.

    c. Facilitation in conciliation extends to seeking to achieve fulfilment of the public interests underpinning the applicable legislation.

    d. The role of a conciliator can properly extend to the giving of advice to disputants. This feature raises various issue such as: the meaning of advice-giving; how giving advice is different to the provision of information; the extent to which (or circumstances in which) provision of information may constitute advice-giving, etc.

    e. Conciliators are also expected to possess a level of subject-matter expertise.

11. ADRAC's proposed description of conciliation is as follows:

    Conciliation is a non-determinative confidential dispute resolution process which is usually established by legislation, but may also be conducted under a private regulatory system (such as the rules of a club or association). The conciliation process may vary – for instance, it may be compulsory or voluntary; legal representatives may be present or not; and the input of the conciliator may be facilitative, advisory or a mix of different forms. However, three important features of conciliation concern the role of the conciliator.

The first feature is that even though a conciliator's role includes even-handedness in assisting the disputants to resolve their dispute, a conciliator is expected to ensure that the terms upon which a dispute is resolved accord with a particular set of norms or principles embedded in the legislative or regulatory framework under which the conciliation is conducted. To that extent, and for that reason, a conciliator is not entirely disinterested and may be regarded as a system representative. The second (and related) feature of conciliation is that conciliators normally possess expertise in the area under dispute. The third feature is that conciliators may be required to (and often will) provide advice to the disputants, when appropriate, about the implications of the legislative framework under which the conciliation is conducted.

12. ADRAC's proposed definition of conciliation, offered on a provisional basis, for discussion purposes, is as follows:

    Conciliation is a confidential, non-determinative dispute resolution process, usually established by legislation. A conciliator is expected to ensure that the terms upon which a dispute is resolved accord with a particular set of norms or principles applicable to the dispute. Conciliators normally possess expertise in the area under dispute, and provide advice to disputants when considered appropriate.

13. ADRAC's proposed definition may change in the light of input and feedback received after release of this Discussion Paper.

14. Describing and defining conciliation, particularly in provisional terms, might be regarded at first blush as modest outcomes of this stage of ADRAC's study.

15. However, if the ADRAC description and definition attract a high measure of support (either as presently formulated, or in a modified form), a number of very significant benefits may be achieved, including:

    a. enhancing the level of understanding and practice of conciliation, including on the part of conciliators and disputants (thereby resulting in improved outcomes for disputants)
    b. locating a clearer place for conciliation on the ADR landscape, and reducing the level of isolation of conciliators from other ADR practitioners
    c. promoting recognition of conciliation as a distinct and separate form of ADR

d. facilitating development of 'best practice' guidelines, including with respect to standards, training and opportunities for professional collegiality

e. enhancing fulfilment of the public purposes underpinning laws which make provision for conciliation

f. providing more focus for recommendations to be made about conciliation to government and industry stakeholders.

16. Pending achievement of a degree of consensus as to what conciliation is, it is likely to remain difficult to study and even more difficult to understand.

17. ADRAC therefore considers that its proposed description and definition of conciliation are important.

18. Following receipt of input and feedback ADRAC proposes to release a final report encapsulating its overall findings, conclusions and recommendations concerning conciliation.

19. In the meantime ADRAC suggests that consideration be given to the following interim possibilities which have emerged from the data gathered thus far in the course of the project:

a. The possibility of more expansive treatment of conciliation in laws which make provision for it eg, express reference to the role of the mediator and any constraints upon the ability of parties to settle their dispute.

b. The possibility of conciliation entities across Australia, *if they have not already done so*, publishing material explaining what that process entails, and making such material publicly accessible – (or, at least, providing such material to disputants in advance of their attendance at a conciliation).

c. Such explanatory material might usefully include an explanation of the role of the conciliator, including how the enabling legislation impacts upon the role of the conciliator.

d. The possibility of conciliation entities providing prospective and existing disputants with contact details of someone within their agency to field inquiries about the process.

e. The possibility of conciliation entities gathering more data about their conciliation practices and processes, including for research purposes.

f. More attention being given to training and development opportunities for conciliators.

g. The possible introduction of a basic set of overarching standards to guide conciliators and give disputants some reassurance as to the integrity of conciliation as a form of ADR.

h. More being done to overcome the sense of professional isolation which many conciliators reported feeling in the course of ADRAC's project.

20. ADRAC emphasises that any findings and conclusions expressed in this report are not final, but preliminary – and in some cases may be regarded as quite tentative.

21. ADRAC hopes that presentation of its preliminary findings and conclusions will encourage rather than inhibit discussion and input.

22. Comments and enquiries may be sent by email to office@adrac.org.au

CHAPTER 1

Introduction

1.1. Various aspects of conciliation largely fly under the radar. For many decades parliaments across Australia have enacted a wide array of laws which make provision for conciliation as a dispute resolution process. Yet it remains unsatisfactorily defined; it is often conflated with other forms of alternative dispute resolution (ADR) (in part because its distinguishing features remain elusive); and there are reasons to think it is poorly understood by disputants who find themselves, and their dispute, subject to it.

1.2. Eminent ADR scholars in Australia have consistently raised this definitional difficulty, particularly the problem of distinguishing 'conciliation' from mediation. 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.

1.3. Laws which refer to conciliation rarely define it. Such definitions or descriptions as exist are usually pitched at a very general level.[1] Absent any special or defined meaning, the ordinary meaning of conciliation applies. This gives rise to a conundrum. There is no ordinary meaning.

1.4. When NADRAC[2] published its glossary of ADR-related terms (still widely cited) 16 years ago it acknowledged the difficulty of defining conciliation. The fact that the NADRAC attempt at a definition overlapped so substantially with its definition of mediation exemplified that difficulty.

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1 For example, s 38 of the *Health and Disability Services (Complaints) Act 1995* (WA) states that the role of the conciliator is to 'encourage the settlement of the complaint by (a) arranging for the [parties] to hold informal discussions about the complaint; and (b) helping the conduct of those discussions; and (c) if possible, assisting [the parties] to reach agreement'.

2 National Alternative Dispute Resolution Advisory Council.

1.5. ADRAC, in this report, has sought to identify both the usual features and essential elements of conciliation. In its examination of conciliation, ADRAC pursued three forms of interrelated enquiry, the purpose, detail and scale of which is understood to be unique. First, ADRAC identified and analysed those laws enacted in Australia which refer to conciliation. Second, ADRAC surveyed and analysed material published on the websites of bodies entrusted with a conciliation function under statute, and sought information from conciliation entities via online surveys. Third, ADRAC met with a wide range of conciliators working under those legislative regimes.

1.6. Having decided to conduct an examination of 'conciliation', ADRAC was repeatedly confronted with a dilemma: what, exactly, was it examining? What is conciliation?

1.7. The frequency with which that question arose, and the difficulties ADRAC encountered in answering it, led ADRAC to the view that it is now quite important – for disputants, conciliators, academics, policy-makers, legislatures and others – to seek to achieve a workable umbrella definition or description of conciliation.

1.8. With an agreed workable description:

a. Conciliators in numerous separate statutory areas can provide consistent practice as they undertake their work

b. The range and the extent of variable features of conciliation can be identified and explored

c. The nature and extent of the crossover of variable features of conciliation with other forms of ADR can be identified and explored

d. Disputant understanding of the process is likely to increase.

1.9. Without a degree of consensus about the usual and essential features of conciliation, it will likely remain difficult to study, assess or analyse it – let alone understand it and reach meaningful conclusions about it.

1.10. ADRAC accepts that any umbrella definition/description of conciliation will necessarily give way to any statutory provision which ascribes a more precise meaning in the context of a specific scheme. However, absent a special legislative definition of conciliation in a particular context, there is much to be said for arriving at a general consensus description of conciliation.

1.11. With this in mind ADRAC proposes a description of conciliation, which appears at para 4.1. In arriving at its proposed description ADRAC has sought to strike a balance between accuracy and precision on the one hand and versatility on the other.

1.12. In this report ADRAC also expresses a number of preliminary conclusions about a range of conciliation-related topics such as conciliation and its relationship to mediation, subject areas of legislative references to conciliation, common features of conciliation, and the training and professionalism of conciliators.

1.13. ADRAC hopes that its conciliation project will be of particular assistance to conciliators. In the course of its inquiry ADRAC found that:

a. Conciliators practice largely in isolation from other conciliators and other ADR practitioners, in part due to practising by reference to the framework governing disputes that they conciliate

b. 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)

c. Conciliators appear to accept that legislative imperatives rather than disputant agreement drive a settlement

d. 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.

1.14. ADRAC welcomes comments and feedback on all aspects of this report, including the interim general description proposed by ADRAC. ADRAC anticipates refining and perhaps substantially modifying the proposed description.

1.15. There are some significant issues on which ADRAC would welcome feedback:

a. One aspect of ADRAC's proposed description of conciliation is that it is conducted by reference to a framework of norms or principles which are intended to influence outcomes and the conduct of a conciliator.

b. Other forms of ADR may have this as a feature (eg family dispute resolution of parenting disputes (FDR) is conducted by reference to the interests of the child or children being paramount).

c. ADRAC is interested in feedback as to whether other kinds of ADR – such as FDR – might properly be regarded as coming within the rubric of conciliation.

d. If other ADR processes (perhaps bearing other labels) do come within the rubric of conciliation as described by ADRAC, then the preliminary findings and conclusions expressed by ADRAC in this report may apply to those processes.

e. The implications of this last point may be far-reaching – for disputants, ADR practitioners, policy-makers and legislatures.

f. Considerable uncertainty attends an important scenario: namely, what happens when, in the course of a conciliation, the disputants cannot be dissuaded from pursuing an outcome which is not consonant with the applicable legislative framework under which the conciliation is being conducted. ADRAC welcomes feedback as to whether this scenario is frequent or infrequent, how it is resolved, and whether it is resolved in accordance with a general approach or in a piecemeal way.

1.16. ADRAC emphasises that a fundamental purpose of its study of conciliation, and the publication of this report, is to engender public discussion and comment on its preliminary findings and conclusions. Such discussion and comments may:

a. enhance the level of understanding and practice of conciliation on the part of disputants and conciliators, without loss of its flexibility in managing disputes

b. locate a clearer place for conciliation on the ADR landscape

c. assist conciliators with respect to standards, training and opportunities for professional collegiality

d. achieve greater clarity in the legislative treatment of conciliation

e. result in worthwhile recommendations about conciliation to government and industry stakeholders.

CHAPTER 2

Problems describing and defining conciliation

The roots of conciliation

2.1. The Australian Constitution has been a springboard for early commentary on conciliation. Section 51(xxxv) provides:

> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:*
>
> *... (xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State ...*

2.2. Conciliation was not defined in the Constitution. It relied for meaning on the existing use of the process of conciliation in resolving labour disputes. The founders of the Constitution recognised that widespread, protracted and unresolved industrial disputes were contrary to the national interest – noting, for instance, the economic and productive costs attending them and, at times, the societal disturbance (including violence) associated with them.

2.3. Early laws concerning conciliation usually imposed it as a process on the disputants – again, it would seem, because of a legislative recognition of the public interests at stake. Conciliation then migrated from its industrial roots into diverse and unrelated fields. ADRAC has not undertaken an exhaustive analysis of this historical migration. However, the historical roots and 'spread' of conciliation do illuminate an understanding of it, including identification of its shared and distinctive features as a form of ADR.

2.4. For instance, the migration or spread of conciliation into diverse (indeed unrelated) fields did not occur organically 'from the ground-up' (as some consider has been the case with mediation). Rather, it occurred through the exertion of will by legislatures through the

enactment of laws which continued to recognise that unresolved disputes in various areas raised identifiable and significant public interest. Having regard to this historical context it is perhaps unsurprising that these laws made provision for conciliation as a step (often mandatory) *along the way* to a systematised adjudicated outcome (whether arbitral or judicial). The historical roots and legislative migration of conciliation also help explain other aspects of conciliation: the notions that a conciliator is not completely disinterested, as a system representative, is invested with a level of authority, and may facilitate a settlement by advising the disputants (and/or warning them away from particular outcomes).

2.5. In short, ADRAC considers that the history of conciliation sheds light on its place in the ADR landscape and assists in the identification of its shared and distinctive features (particularly the features it has in common with mediation, and the points of differences between these 2 forms of ADR).

2.6. In 1982, the High Court analysed the conciliation provisions in the principal Commonwealth Act dealing with industrial dispute management, the *Conciliation and Arbitration Act 1904* (Cth) (Conciliation Act). Justice Stephen described the approach of the Conciliation Act in this manner:

> *The Act draws clear distinction between the two processes, conciliation and arbitration ... The procedure for settlement by conciliation is governed by s 26 and ss 28 and 29 are exclusively concerned with the process of conciliation; only when s 30 is reached does the Act turn its attention to arbitration. Section 27, providing for compulsory conferences, thus finds itself in that portion of the Act exclusively concerned with conciliation ... The concept of having the parties to a dispute meet together in conference is of the essence of conciliation and s 27(2), by its reference to the presence at compulsory conferences of those 'having the highest degree of authority on behalf of the parties to the industrial dispute to negotiate for the prevention or settlement of the dispute', reveals that it is the process of conciliation that is in progress when compulsory conferences take place ...*[3]

3 *R v Gough and Anor; Ex Parte Key Meats Pty Ltd* (1982) 39 ALR 507, 515.

2.7. In 1986, the Hon Justice Elizabeth Evatt, then Chief Justice of the Family Court of Australia, wrote on conciliation following its formal introduction into the Court's processes by the insertion of s 16A into the *Family Law Act 1975* (Cth).[4] She noted the industrial and constitutional roots of 'conciliation', and described mediation as '*similar to conciliation*'. Her Honour went on to observe:

> *While little information is available about the conciliation process in [the] human rights field, it seems possible that it may be influenced by policy goals, including that of changing behaviour and attitudes, as well as resolving the issue between the parties. Certainly, under the Australian Bill of Rights*[5] *the conciliator is directed to ensure the recognition of rights and freedoms in any settlement. This implies at least an opinion as to how those rights should operate in a given situation.*[6]
>
> ...
>
> The diverse situations now referred for conciliation and the difference in objectives which could be pursued in that process suggest that careful attention needs to be given to a number of important issues before conciliation is hailed as the panacea to the ills of confrontation in litigation. *These issues include a proper definition of the goals of conciliation, and the role of the conciliator; an understanding of when parties have a need for information and/or independent advice and how that should be provided; an examination of the skills and techniques used in conciliation and of the training needs of conciliation.*[7] (Emphasis added)

2.8. ADRAC's study suggests that her Honour's observations have ongoing contemporary relevance.

The definitional problem

2.9. Some of the earliest text writers in the ADR field, Professor Hilary Astor (the inaugural Chair of NADRAC) and Professor Christine Chinkin, wrote of the use of the term 'conciliation' in an array of legislation:

> 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,

4 The Hon Justice Elizabeth Evatt, 1986, 'Comment on conciliation in Australian law', 11(1) *Sydney Law Review 3*.

5 Then being considered but never passed.

6 The Hon Justice Elizabeth Evatt, 1986, 'Comment on conciliation in Australian law', 11(1) *Sydney Law Review* 1.

7 Ibid at 3–4.

non-adversarial dispute resolution process, an approach that does not distinguish between conciliation, mediation and appraisal.[8]

2.10. They later observed:

> *The distinction between mediation and statutory conciliation in this respect is about the ability of the parties in mediation to avoid the law if they wish to do so.*[9]

2.11. In distinguishing between different forms of ADR in 2014, Spencer and Hardy raised the possibility that the character or provenance of a dispute might inform the role of a conciliator:

> *Complaint conciliation contrasts with dispute conciliation or expert mediation in the sense that in the latter processes there are usually two parties with a mutual dispute. In a complaint, there is usually one party who is aggrieved and a complaint target who, up to a certain point, may not have perceived that a dispute exists, but who may either voluntarily or by statute take part in the conciliation process with the aim of achieving a resolution.*[10]
>
> ...
>
> *In some statutory conciliation programs, the conciliator ... may actively encourage the participants to reach an agreement which accords with their own ideas or the requirements of the statute under which the conciliation is attempted.*[11]

2.12. Spencer and Hardy referred to the lack of definitional consensus in these terms:

> *In Australia, there is, regrettably, little consensus amongst conciliation providers as to what, precisely, conciliation means. This may reflect the diversity and flexibility of this process. This uncertainty may also be a product of historical influences – as society has changed in a century, so too has the context in which conciliation has been needed.*[12]

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8 Hilary Astor and Christine Chinkin, 2002, *Dispute resolution in Australia*, 2nd edn, LexisNexis Butterworths Australia, 85.

9 ibid, 87.

10 David Spencer and Samantha Hardy, 2014, *Dispute resolution in Australia: cases, commentary and materials*, 3rd edn, Lawbook Co Thomson Reuters, 17.

11 Ibid.

12 Ibid, 313.

2.13. Professor Laurence Boulle (a former chair of NADRAC) and Professor Rachael Field have stated as follows on the topic:

> *Conciliation is the most problematic of the DR processes to define because the term is used variably and sometimes indiscriminately in relation to a broad range of processes, and with application to a wide range of disputes. There have been extensive debates over the similarities and differences between conciliation and mediation. Sometimes the term is used generically to include all consensual facilitated and advisory processes without distinction among them, sometimes it is used as a synonym for mediation, and yet in other situations it refers to a process distinct from mediation ...*[13]

The NADRAC definition

2.14. In the introductory text to NADRAC's *Dispute Resolution Terms* in which the NADRAC definition of conciliation is first set out, the following discussion on the distinction between mediation and conciliation appeared:

> *NOTE: 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.*[14]

2.15. The NADRAC definition of conciliation in its *Dispute Resolution Terms* was as follows:

> *'Conciliation' is 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. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely terms, and may actively encourage the participants to reach an agreement.*[15]

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13 Laurence Boulle and Rachael Field, 2017, *Australian dispute resolution law and practice*, LexisNexis Butterworths Australia, 65.

14 NADRAC, 2003, *Dispute Resolution Terms*, Australian Government Attorney-General's Department, 3.

15 Ibid.

2.16. NADRAC went on to add:

> *Note: There are wide variations in meanings for 'conciliation', which may be used to refer to a range of processes used to resolve complaints and disputes including:*
>
> - *Informal discussions held between parties and an external agency in an endeavour to avoid, resolve or manage a dispute; and*
> - *Combined processes in which for example, an impartial party facilitates discussion between parties, provides advice on the substance of the dispute, makes proposals for settlement or actively contributes to the terms of any agreement.*[16]

2.17. NADRAC's definition of conciliation was adopted in Australian Standard AS 4608-2004.[17]

2.18. Commenting on the NADRAC definition, David Spencer has made the following point:

> *... the conciliator takes a more evaluative and interventionist approach to the dispute resolution process. The conciliator may not see the parties together, employing 'shuttle diplomacy' as her or his chosen procedure and, in fact, the process may, like negotiation, not be governed by any set of procedural rules. Often conciliation will not necessarily focus on settlement, rather it may focus on the sharing of information and identification of issues and options for potential settlement.*[18]

2.19. Professor Tania Sourdin, a long-term member of NADRAC, has referred with apparent approval to NADRAC's discussion on the distinction between mediation and conciliation[19] – particularly in relation to categorisation of conciliation as an advisory rather than a facilitative process.[20]

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16 Ibid, 5.

17 Australian Standards Board, 'AS 4608-2004: Dispute Management Systems' (2003, withdrawn 2017) https://www.standards.org.au/standards-catalogue/sa-snz/publicsafety/mb-003/as--4608-2004; Sourdin at [6.15].

18 David Spencer, 2016, *Principles of dispute resolution*, 2nd edn, Lawbook Co Thomson Reuters, 144.

19 Professor Tania Sourdin, 2016, *Alternative dispute resolution*, 5th edn, Thomson Reuters, (Sourdin) at [6.10].

20 Ibid.

1.1. Similarly, in their text on non-adversarial justice, King et al have relied upon this same point of distinction:

> *A conciliator is expected to possess knowledge in the subject matter of the dispute and she or he uses that knowledge to advise parties during the process, whereas a facilitative mediator is not always an expert and should not offer advice on the subject of the dispute. Conciliation has a long history in Australia, although the process has not been practised in a consistent manner.*[21]

The ongoing problem of defining conciliation

2.21. The NADRAC definition of conciliation expressly grappled with the lack of clarity surrounding the essential nature of conciliation but, in ADRAC's view, did not resolve that lack of clarity. In particular, as NADRAC elsewhere acknowledged, focusing predominantly upon a bright-line distinction between facilitation and advice-giving is a somewhat unstable and elusive point of distinction – whether one is defining mediation, conciliation, and/or trying to distinguish between them or other ADR processes.[22]

2.22. Thus, while the facilitative/advisory distinction can be useful in some contexts it may also be problematic. Are those descriptors paradigms or points on a spectrum? At what point does the provision of information become advisory? Are these descriptions binary and mutually exclusive? What of hybrid processes? To what extent does subject-matter expertise play a role in the willingness of conciliators to give advice? And how useful are these descriptors as points of reference in defining conciliation or distinguishing it from mediation?

2.23. As Professors Boulle and Field have observed:

> *Conflating conciliation and mediation is not necessarily helpful and it is sometimes important to be clear about how the two processes are distinct.*[23]

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21 Michael King, Arie Frieberg, Becky Batagol and Ross Hyams, 2014, *Non-adversarial justice*, 2nd edn, Federation Press, 114.

22 NADRAC, 2003, *Dispute Resolution Terms*, Australian Government Attorney-General's Department, 3.

23 Laurence Boulle and Rachael Field, 2017, *Australian dispute resolution law and practice*, LexisNexis Butterworths Australia, 68.

2.24. An important aspect of the ongoing problem with 'conciliation' as a term was described in a recent ADR collection of cases and materials published by Spencer et al (2019):

> *Regardless of inconsistencies in the definition of conciliation, the process is now the most mandated process of dispute resolution. The growth in the use of conciliation across organisations and fields exacerbates the definitional problem: conciliation is now what a piece of legislation, an organisation or dispute resolution provider says it is.*[24]

2.25. This conception of conciliation identified by Spencer et al appears to reflect, to a significant extent, what ADRAC heard (from conciliators) is happening 'on the ground'. ADRAC agrees with Spencer et al that this conception of conciliation is problematic. Where conciliation has legislative provenance it cannot, as a matter of law, simply mean what an organisation or DR provider says it means. Its meaning must derive from the law which makes provision for it. The law in question may ascribe a special meaning or, properly construed, it may 'pick up' the so-called 'ordinary' meaning of the word. That is, in all cases involving conciliation conducted under a law its meaning depends first and foremost on a process of statutory construction. But so to say does not solve the definitional problem – rather, it locates the sources of the problem in (i) the lack of clarity in legislative drafting; and (ii) the lack of clarity in the 'ordinary' meaning of the term. As Professors Boulle and Field have observed:

> *Legislation in these contexts, however, is unobligingly reticent, or inconsistent, in the use of the terms mediation and conciliation, seldom defining them and rarely indicating what is required of respective interveners. Recent tendencies have been for legislatures to favour 'mediation' as an all-purpose term, even when they intend traditional 'conciliation' processes to be applied.*[25]

2.26. This lack of clarity is compounded by the fact that many bodies who are presently entrusted with a conciliation role under laws have not published any, or adequate, material on their websites as to what this process entails. And much of the explanatory material which has been published does not clearly address any constraints

24 David Spencer, Lise Barry and Lola Akin Ojelabi, 2019, *Dispute resolution in Australia: cases, commentary and materials*, 4th edn, Lawbook Co. Thompson Reuters, 268.

25 Laurence Boulle and Rachael Field, 2017, *Australian dispute resolution law and practice*, LexisNexis Butterworths Australia, 67

on the role of the conciliator arising from the enabling law(s) under which the conciliation is conducted.

2.26 A This brings consideration of the definitional problem to an important point – what should be done in the future. In this regard ADRAC offers both a preliminary description, and a definition, of conciliation, for consideration (see Chapter 4, paragraphs 4.1 and 4.2 below). ADRAC invites input and feedback in relation to the formulations proposed by it. If the ADRAC description and definition attract a high measure of support (either as presently formulated, or in a modified form), a number of very significant benefits may be achieved, including:

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

b. locating a clearer place for conciliation on the ADR landscape, and reducing the level of isolation of conciliators from other ADR practitioners

c. promoting recognition of conciliation as a distinct and separate form of ADR

d. facilitating development of 'best practice' guidelines, including with respect to standards, training and opportunities for professional collegiality

e. enhancing fulfilment of the public purposes underpinning those laws which make provision for conciliation.

f. providing more focus for recommendations to be made about conciliation to government and industry stakeholders.

2.27. Pending receipt and consideration of responses to ADRAC's description and definition of conciliation, ADRAC raises the following possibilities for consideration:

- Legislatures across Australia, when enacting laws which make express provision for conciliation, might usefully consider including in those laws a more expansive treatment of conciliation (for example, express reference to the role of the mediator and to any constraints upon the ability of parties to settle their dispute).

- If they have not already done so, conciliators across Australia who are presently conciliating disputes under laws already passed might usefully consider publishing material explaining what that process entails (if they have not already done so). It may be preferable if such material was publicly accessible – or, at a minimum, provided to disputants in advance of their attendance at a conciliation.
- Such explanatory material could usefully include an explanation of the role of the conciliator, including how the enabling legislation impacts upon the role of the conciliator.

> 'We don't really explain because some people don't really know what a conciliator is. We get called many other names, a consultatory, or sometimes I say I'm a mediator because they understand that better.' – Conciliator comment to ADRAC

CHAPTER 3

Methodology of the preliminary report

3.1. One of the first tasks undertaken by ADRAC was to review published articles and texts on the topic of conciliation.

3.2. This review placed conciliation in an historical context, and enabled its development over time to be tracked. The review also assisted the formation of some preliminary views about matters such as:

a. typical areas of dispute in which conciliation is practised

b. trends and themes in academic thinking

c. possible common features of conciliation

d. points of possible distinction from other ADR processes

e. emerging or unresolved issues surrounding other chapters of this report.

3.3. ADRAC then undertook a search of current Australian laws for references to the term 'conciliation' – especially in laws which entrusted some kind of conciliation function to an identified entity. We identified 96 laws as set out in Appendix 7.

3.4. The websites of these 96 entities were then examined in detail by ADRAC. ADRAC was able to locate worthwhile information about conciliation on the websites of 39 of these 96 entities. Those 39 entities and their websites are listed in Appendix 2.

3.5. In relation to the 39 entities which had published significant information on websites, ADRAC organised their information into 19 topics. This enabled comparisons to be undertaken and helped build a snapshot picture of what conciliation looks like in contemporary Australia.

3.6. These 19 topics were as follows:

3.6.1. Is conciliation a large (L) or small (S) part of the body's operations?

3.6.2. Is conciliation voluntary (V) or compulsory (C)?

3.6.3. If conciliation is compulsory, is the compulsion a consequence of legislation stipulation (L) or the making of an order or direction (O/D)?

3.6.4. Is legal representation generally allowed? (Y/N)

3.6.5. If legal representation is allowed, is this as a matter of right (R) or only with leave (L)?

3.6.6. Are conciliations conducted by a third party (TP) or inter-parties only (IP)?

3.6.7. Is a conciliator chosen by the parties (C) or appointed by the body (A)?

3.6.8. Is the conciliator a member of staff (S) or an outsourced provider (OP)?

3.6.9. Is the conciliation directed to dispute resolution (DR) or case management (CM)?

3.6.10. Does the body's website contain an informative explanation of the conciliation process? (Y/N)

3.6.11. Is the subject-matter of the conciliation predominantly rights-based (R) or interests-based (I)?

3.6.12. Is the conciliation process best described as

a. facilitative (F)
b. evaluative (E)
c. directive (D)
d. adjudicative (A)
e. other (O)
f. unknown (U)?

3.6.13. Is the role of the conciliator best described as

a. neutral (N)
b. independent of the parties and the body (IP+B)
c. independent of the parties but not of the body (IPNB)?

3.6.14. Are the disputants likely to know one another? (Y/N or U (unknown))

3.6.15. Are the disputants likely to have an ongoing relationship with another? (Y/N or U (unknown))

3.6.16. Are respondents mainly individuals (I), bodies corporate (BC) or a mix (M)?

3.6.17. If respondents are mainly bodies corporate, are they mainly private (P) or public sector (PS)?

3.6.18. Are conciliation outcomes mainly past-focused (P) or forward-looking (F)?

3.6.19. If the conciliation does not resolve the dispute, is it referred to another body (B) and/or does your agency continue to deal with it by a different process (A)?

3.7. In addition to obtaining information on these 19 topics, more detailed information about conciliation was harvested by ADRAC from 24 of the 39 websites that were found to have such information. Some of this information is canvassed in the next chapter.

3.8. From time to time ADRAC revisited the websites of conciliation entities to ascertain the extent to which the information located on those websites had changed. ADRAC found relatively little change in most cases (but a small amount of change had occurred).

3.9. ADRAC then used an electronic survey tool to elicit additional information from the statutory entities concerning their performance of conciliations.

3.10. The Chair of ADRAC asked each agency, in writing, to complete and return the surveys. The surveys covered topics relating to the use of conciliation, its place, frequency, confidentiality, turnover, attendance, role of policy, qualifications and training of the conciliator, etc.

3.11. Two surveys were used: a shorter-form survey was sent to those agencies which had already published significant information about conciliation on their websites. That survey was directed to eliciting *supplementary* information on various topics. A copy of that survey appears in Appendix 3. A lengthier survey was addressed to those agencies which had not published much (or any) conciliation-related information (if any) on their websites. A copy of that survey appears in Appendix 4.

3.12. Responses to the surveys were received from 39 entities, or 43% of those surveyed.

3.13. The results of the surveys are described in the next chapter.

3.14. The next step in the methodology was ADRAC consultation with well-known and experienced conciliators and conciliation scheme managers from a range of major State and Commonwealth conciliation entities. All conciliators consulted by ADRAC had conducted conciliator training within their conciliation entities. Some had worked in a variety of statutory entities as a conciliator.

3.15. To facilitate those consultations a set of 14 guideline questions was prepared, which appear in Appendix 1.

3.16. The questions and the resulting discussions were exploratory and broad-ranging. The discussions were not recorded but were noted. A prior undertaking was given not to publicly identify persons or their employing entities. This promoted candour and frankness in discussions.

3.17. The next major step in ADRAC's project was to conduct focus groups of between 10 and 18 conciliators, by invitation. These were held and sound-recorded in Brisbane, Sydney, Melbourne, Adelaide and Perth. The focus groups were conducted in October and November 2018. The sessions in each of the five cities were moderated by ADRAC members, usually with assistance from another person. Moderators were asked to avoid involvement in discussion other than to promote it, to clarify, and to move discussion along. Moderators were asked to express no views of their own.

3.18. Nine broad topics were canvassed in the focus groups:

Conciliation

a. How do you explain conciliation to your clients/participants?

b. What do you think is the most effective aspect of conciliation?

Training and education

c. If there is to be training/education, what kinds of training/education have you found/would be effective?

Learning

d. To what extent is conciliation a set of skills that can be learned by experience?

Information, opinion and advice regarding possible outcomes

e. To what extent is conciliators' provision of information, opinion and advice about possible outcomes important for effective conciliation?

Conciliation and mediation

f. In what ways do you think of conciliation as differing from mediation?

Applicable legislation

g. How do you proceed toward resolution by parties when the resolution is inconsistent with the intent of applicable legislation?

Professionalism

h. What are your thoughts regarding conciliators having a professional identity, collegiality and structure?

i. What changes would you recommend?

3.19. The focus groups were conducted on the basis that:

- the discussion was being sound-recorded
- ADRAC sought direct personal experience of conciliators about conciliation
- transcripts were likely to be harvested for quotes in ADRAC reports
- statements made would not be linked to any person or entity
- all attendees were free to leave at any time and the process was entirely voluntary.

3.20. During its planning for this project, members of ADRAC explored but agreed that seeking formal ethics approval was unnecessary. Throughout, ADRAC intended to be, and was, transparent and consistent in its dealings with all participating conciliators, including providing all relevant information prior to and during focus groups, and committing to providing a copy of the final report after it was completed.

3.21. The focus groups were dynamic and energetic. For instance, on one occasion a moderator suggested bypassing questions about training conciliators (questions 3 and 4) in the interests of time, but the group wanted to retain the questions for discussion because of the importance they attached to the issue.

3.22. The results of the focus groups are canvassed later in the report. Some appear as boxed 'callouts' in this report, and a comprehensive summary appears in Appendix 6.

3.23. Another step in ADRAC's project entailed examination of advertisements seeking to recruit conciliators (placed by specialist conciliation entities, ombudsman offices and tribunals with active conciliation roles). ADRAC was particularly interested in the descriptions of the duties and required qualifications of conciliators referred to in these advertisements.

Matters arising from ADRAC's methodology

3.24. ADRAC's methodology focused on gathering and examining 'thematic' information about conciliation – rather than nuanced hard statistical data – with a view to gaining an overall picture of what conciliation generally looks like in Australia today.

3.25. In due course ADRAC proposes to consider:

a. drilling deeper into aspects of the data it has already acquired

b. acquiring further data, particularly on the experience of disputants who have participated in conciliation.

3.26. ADRAC's study has revealed that 60% of entities given a conciliation role or function under Australian laws have not published any significant information on their websites about their performance of conciliation. Whilst this might be considered unsatisfactory, ADRAC notes that in some (perhaps many or most) cases this may be because the number of conciliations conducted by those entities is quite small.

3.27. The surveying process undertaken by ADRAC was illuminating for reasons other than the data gathered.

3.28. A large number of websites did not identify a primary information contact, and, when conducting this report, researchers often found it difficult using web based information to identify a contact person in an agency who could provide information about the agency's conciliation process; in some instances, it required many telephone calls and emails to obtain the information.

3.29. This raises the real possibility that disputants who wish to obtain information about conciliation of disputes may experience similar difficulties in doing so.

3.30. ADRAC therefore recommends that entities conducting conciliation take steps to ensure that prospective and existing disputants are provided with contact details of someone within their agency to field inquiries about the process.

3.31. ADRAC is aware of the World Wide Web Consortium's Web Content Accessibility Guidelines (WCAG) which are generally accepted as best practice for digital content when that content is to be accessible to the broadest audience. Australian Government agencies are expected to meet various website-related standards: see WCAG 2.0 Level AA and the Australian Government Digital Service Standard, which includes an additional standard directed to helping agencies understand the needs of people who use their services (thereby assisting them to build services that work for people). ADRAC's recommendation in the preceding paragraph appears to be more granular than the standards contained in WCAG and the Australian Government Digital Service Standard, but is supported by (and consistent with) the service-delivery objectives underpinning those standards.

3.32. Response rates to the surveys generated a rich amount of data:

a. As noted above, responses were received from 39 entities, or 43% of those surveyed. XX% responded to the shorter-form survey, and YY% responded to the lengthier survey.

b. ADRAC notes that every entity approached is a public body with reporting obligations; most, if not all of them are likely to be busy, with priorities higher than responding to surveys from bodies such as ADRAC. However, ADRAC looks forward to future response rates being higher.

c. Some agencies that did not respond may now be inactive, and/or some may no longer be deploying conciliation as a form of ADR to resolve disputes. There are likely to be other explanations.

3.33. Whatever the explanation(s), to the extent there is a significant disparity between formal legislative frameworks and what is happening 'on the ground', it seems preferable that references to conciliation in laws be operationally relevant.

3.34. Accordingly, ADRAC recommends that governments consider reviewing their laws with a view to ensuring that they are up-to-date and reflective of contemporary practice.

3.35. ADRAC acknowledges, with sincere thanks, those entities that did respond.

CHAPTER 4

Preliminary findings, results and conclusions

4.1. A principal preliminary conclusion arising from ADRAC's study of conciliation consists of its proposed description, which is as follows:

Conciliation is a non-determinative confidential dispute resolution process which is usually established by legislation, but may also be conducted under a private regulatory system (such as the rules of a club or association). The conciliation process may vary – for instance, it may be compulsory or voluntary; legal representatives may be present or not; and the input of the conciliator may be facilitative, advisory or a mix of different forms. However, three important features of conciliation concern the role of the conciliator. The first feature is that even though a conciliator's role includes even-handedness in assisting the disputants to resolve their dispute, a conciliator is expected to ensure that the terms upon which a dispute is resolved accord with a particular set of norms or principles embedded in the legislative or regulatory framework under which the conciliation is conducted. To that extent, and for that reason, a conciliator is not entirely disinterested and may be regarded as a system representative. The second (and related) feature of conciliation is that conciliators normally possess expertise in the area under dispute. The third feature is that conciliators may be required to (and often will) provide advice to the disputants, when appropriate, about the implications of the legislative framework under which the conciliation is conducted.

4.2. If that description of conciliation is accurate, it raises the possibility of defining conciliation along the following lines:

Conciliation is a confidential, non-determinative dispute resolution process, usually established by legislation. A conciliator is expected to ensure that the terms upon which a dispute is resolved accord with a particular set of norms or principles applicable to the dispute. Conciliators normally possess expertise in the area under dispute, and provide advice to disputants when considered appropriate.

4.3. The matters set out in this chapter explain the basis upon which, and why, ADRAC has arrived at the point of proposing this description, and this definition, of conciliation.

Findings arising from ADRAC's review of laws referring to conciliation

4.4. All Australian parliaments have enacted laws which make provision for conciliation.

4.5. Virtually every Act enabling conciliation provides no definition or description of conciliation.[26]

4.6. The majority of laws which make provision for conciliation do so by entrusting a conciliation function to an identified public entity.

4.7. Most entities entrusted with a conciliation function have a number of other dispute management powers expressly conferred upon them.

4.8. The range of disputes subject to some kind of statutory conciliation process is wide. A table of laws that refer to conciliation is at Appendix 7. A non-exclusive list of subject areas includes:

- Aboriginal land rights
- Access to information
- Anti-discrimination
- Apprenticeships and vocational training
- Building disputes
- Complaints against architects
- Consumer affairs
- Disability services
- Equal opportunity
- Essential services (operations and access)
- Family disputes
- Health care complaints
- Human rights
- Land and environment
- Liquor licencing
- Native title

26 See para 1.3 above, and footnote 1 referred to therein.

- Occupational safety
- Offences by children
- Privacy
- Public sector employee grievances
- Road freight issues
- Small business disputes
- Strata titles
- Superannuation
- Surveyor complaints
- Telecommunications industry
- Tenancy
- Threatened species protection
- Workers' compensation
- Workplace relations.

4.9. It is very difficult, if not impossible, to discern any underlying denominators which explain why parliaments have chosen to subject these kinds of disputes to conciliation – and not others.

4.10. Nevertheless, ADRAC considers that two preliminary points emerge: first, any definition or description of conciliation cannot be tied to particular areas of dispute – as can be seen from the range of areas set out above, conciliation has versatility in its present-day application under laws enacted across Australia; second, past attempts to describe or define conciliation may have paid insufficient attention to an important feature of it – its legislative provenance.

4.11. On this second point, ADRAC considers that close attention to the various laws which make provision for conciliation enables various 'themes' to be identified which necessarily inform consideration of what conciliation is. Those themes include the following matters:

a. The conferral of a conciliation function takes place under laws which may broadly be described as regulatory. That is, the laws in question impose norms or standards which people are required or expected to adhere to.

b. In many, but not all, cases the norm or standard is imposed in a context which gives a private person a right or entitlement to enforce adherence to the norm or standard.

c. In the majority of cases the entity upon whom a conciliation function is conferred has some form of enforcement function over the stipulated norm or standard. Often the entity in question is also given an educative role (to proselytise adherence to the norm or standard).

d. The 'strength' of the enforcement role given to the conciliation entity varies widely and often depends upon the status of the entity in question. Sometimes the enforcement role is 'soft'; sometimes it is combined with an adjudicative role (enforcement of which may depend upon registration of the entity's decision in a court); sometimes administrative power is involved; and sometimes the adjudicative role involves the exercise of judicial power. But a basic point remains: although the status of the entity which is given a conciliation function may influence how and by whom it is conducted, conciliation is performed by all sorts of entities under laws enacted across Australia.

e. ADRAC considers that the legislative conferral of a conciliation function upon an entity reflects a legislative judgment that the public interest is served or advanced by (at least) each of 3 things: first, the stipulation of the norm or standard; second, requiring adherence to the norm or standard; and third, conferral of the conciliation function.

f. In most, if not all, cases the factors mentioned in the preceding sub-paragraph appear to be based, in turn, upon a legislative recognition that non-resolution of disputes in that identified area of dispute is attended by significant public downsides. Public interests are involved.

4.12. ADRAC considers these public interest considerations inform what conciliation is, and should be reflected in any description of it.

4.13. In this regard ADRAC notes the following additional matters, all of which are tied to the legislative provenance of conciliation:

a. As Bozin, Ballard and Eastsea[27] have noted, freedom to agree in mediation can allow parties to resolve on terms which might be considered by some to be unjust.

b. The same is generally true of other forms of ADR.

27 Doris Bozin, Allison Ballard and Patricia Easteal, 2019, 'ADR: championing the (unjust) resolution of bullying disputes?', 29 *ADRJ* 162.

c. Different considerations arise, however, when a dispute is being conciliated by a public official under a law, enacted in the public interest, which requires adherence to a stipulated set of norms or principles. In such cases, the legislation contemplates outcomes which accord with the norms and principles enshrined in the statutory scheme.

4.14. An example of the above factors in play can be given. Suppose a female ambulance driver were to lodge a complaint of sexual harassment or sexual discrimination against her employer based on (i) male co-employees displaying pornographic pictures of women on the station walls; and (ii) the employer refusing to take any steps to remove the pictures. Were such a complaint to be conciliated before a human rights body, it is almost inconceivable that the conciliator would consider the concurrent display of pornographic images of men to be an appropriate outcome. Such an outcome would not accord with the legislative scheme, and would be likely to provoke further complaints (from male and female employees). And even if all current employees were to favour that outcome it is highly likely that the conciliator would advise strongly against it and seek to persuade the disputants not to go down that track. The conciliator may even refuse to allow such an agreement to be reached, perhaps by withdrawing from or terminating the process. Examples could be given of other outcomes which a conciliator would be reluctant to endorse, even if they happened to satisfy a particular complainant: eg moving the photos to the male toilets, or the photos remaining in a shared space on the basis that the complainant would be paid 'compensation' to endure that outcome.

4.15. The above analysis of laws dealing with conciliation has had a significant influence on the drafting of ADRAC's proposed description of conciliation.

4.16. In addition to considering the public interests underpinning statutory conciliation provisions, ADRAC analysed other aspects of those provisions to see if they shed further light on what conciliation is. In this regard ADRAC has drawn the following preliminary conclusions:

a. The common model of conciliation involves conferral of that function upon a specialist statutory entity which is also given a dispute resolution in the particular field. However, there are a number of administrative tribunals handling a great array of disputes which have a conciliation function reposed in

them – familiar examples include review tribunals such as the AAT, NCAT, VCAT, and QCAT. Similarly, a number of specialist courts, such as the Land and Environment Court of NSW, the Family Court of Australia and the Federal Circuit Court, are given powers to direct disputants to participate in conciliation – usually conducted by a senior member of court staff, but not always.

b. Some laws which make provision for conciliation expressly stipulate that any outcome of that process must align with what could have been ordered by way of a contested adjudicated outcome – that is, in the proper exercise of coercive power by the entity in question: see, for instance, s 34(3)(a) of the *Land and Environment Court Act 1979* (NSW).

c. Some laws refer to a 'conciliator', but most do not (referring, instead, to a process called 'conciliation').

d. Some laws make participation in conciliation compulsory; some laws make it voluntary; some laws authorise the entity in question to require participation.

e. The suite of accompanying powers varies widely: some laws simply give conciliators the power to report to a more senior authority if settlement does not occur; some laws permit the entity in question to move to an arbitration process or to register agreements if settlement occurs, but many laws do not deal expressly with the topic of settlement.

f. Most laws are silent on the topic of advice-giving by a conciliator; some laws expressly enable a conciliator to engage in advice-giving; some laws make provision for the entity in question to give directions to conciliators about performance of their roles (including as to the giving of advice). [In the focus groups, dealt with below, conciliators often referred to how fine the line was between advice-giving and providing information.]

g. Some laws 'bundle' conciliation with other ADR processes, such as mediation and conferencing. In most cases those laws do not expressly distinguish between the different ADR processes referred to – nor do they expressly identify the factors which the entity in question is to take into account in choosing to pursue one form of ADR rather than another.

h. None of the laws examined made express provision for dissemination of information about the process of conciliation.

i. Most statutes were silent as to a method of selection and/or appointment of a conciliator.

j. Most of the laws examined contemplate that a conciliation is conducted by a public official – usually as a member of staff of the entity in question.

k. As noted above, most of the laws examined do not *expressly* require a conciliator, when conducting a conciliation, to adhere to the norms and standards enshrined in the statutory scheme – but, in most cases, such a requirement appears to emerge by way of an implication from a consideration of the overall statutory scheme (including its objects and purposes). [The focus groups confirmed that conciliators generally see themselves as being bound to know and to follow their enabling legislation.]

4.17. An illustrative table of features of 7 selected laws, reflecting many of the above points, appears at Appendix 9.

4.18. Ultimately, ADRAC reached a preliminary conclusion that the differential treatment of conciliation in laws referring to it militated against inclusion of additional features in ADRAC's proposed description – that is, beyond those which appear in the formulation which appears in para 4.1.

Findings/results arising from consultative workshops (cf focus groups, which are dealt with below)

4.19. ADRAC makes the following preliminary observations concerning conciliators who assisted ADRAC in its consultative workshops:

a. All participants had worked as conciliators for periods in excess of a decade, and in some cases over two decades.

b. Virtually all participating conciliators had been trained as mediators.

c. All participating conciliators thought that their conciliation training was useful; some considered that it had been too closely tied to the legislation governing their work.

d. Nearly all participating conciliators felt that they operated largely in isolation from other parts of the ADR world.

4.20. A much-discussed topic upon which different views were expressed concerned the points of similarity and points of difference between mediation and conciliation. This issue also exercised the collective mind of ADRAC over the course of its study. ADRAC's

overall preliminary findings on this issue, having regard to the consultation workshops, are as follows:

a. There was a degree of consensus among conciliators consulted by ADRAC to the effect that mediation and conciliation share some common features – including as to the skills of the DR practitioner involved, such as a need for empathy, the need to address power imbalance, listening skills, judgment, framing and re-framing of issues etc.
b. Significantly, however, there was also general agreement among participating conciliators that mediation and conciliation are not 2 sides of the same coin; they are not subsets of each other; there is a difference between the 2 processes.
c. Nevertheless, there was no general agreement among participating conciliators as to the essential difference(s) between mediation and conciliation. Some considered that evaluative mediation came close to conciliation.
d. Most conciliators considered that facilitation is an important feature of both mediation and conciliation.
e. Views were expressed to the effect that the difference between mediation and conciliation was hard to identify – partly because there was a multiplicity of practices among both mediators and conciliators.
f. Some considered that conciliation allowed a more robust level of intervention on the part of the conciliator. Some felt that this gave rise to a potential for abuse and/or the risk of application of undue pressure on disputants; others considered that more robust intervention was consistent with the institutional and procedural authority of a conciliator, and with the need for conciliated outcomes to accord with the legislative framework under which the process was being conducted.
g. There was *general* agreement that facilitating fulfilment of the public interest policy underpinning the applicable legislative framework was part of a conciliator's role. A view was expressed that conciliators were 'advocates for the Act' and the differences between conciliation and mediation should be 'acknowledged and protected.'
h. Most participating conciliators felt that conciliators were also required to possess a level of subject-matter expertise (which was not necessarily or generally required of mediators).

i. Some participating conciliators felt that, from time to time, it is part of a conciliator's proper role to give advice to the disputants – which reinforced the need for a level of subject-matter expertise. However, the nature and extent to which advice could or ought to be given was not something upon which there was general agreement – partly because it was considered that the risks and benefits of giving advice in conciliation depends heavily upon the facts and circumstances surrounding the disputants and their dispute.

j. ADRAC heard suggestions that position papers are not used as frequently in conciliations as they are in mediations.

k. A greater percentage of conciliations appear to be followed by adjudicated outcomes than is the case with mediation.

4.21. Regarding what conciliation is (or is not), the overall preliminary conclusions drawn by ADRAC from its consultation workshops were as follows:

a. Conciliation is a process which shares common features with mediation, but it is a distinct and separate process.

b. It is preferable to avoid defining conciliation simply by reference to its similarities and points of difference with mediation. Mediation is a useful but non-defining reference point.

c. At least 3 points of difference should, however, find mention in a free-standing description of conciliation: first, the need for subject-matter expertise on the part of a conciliator; second, it is part of a conciliator's role to facilitate fulfilment of the public interests underpinning the applicable legislative framework; and third, the possible need for conciliators to provide advice and/or to persuade the disputants of the implications of the applicable statutory framework.

4.22. The third point raises (or at least involves) a difficult issue: namely, what does happen (and/or should happen) if a conciliator has given advice and sought to persuade the disputants against a particular outcome on the basis that it is not consonant with the applicable statutory scheme, but the disputants wish to proceed with the outcome?

a. As things stand ADRAC does not feel it has sufficient data to form a preliminary view as to how conciliators presently deal with such a scenario.

b. Indeed, ADRAC does not know whether there is a general practice in such situations (and if so, what types of exceptions might arise) or whether current practice varies greatly (and if so, why).

c. ADRAC would be very grateful to receive feedback from conciliators on this important issue.

Findings/results arising from ADRAC's analysis of website information about conciliation

4.23. As noted in the previous chapter, ADRAC undertook an analysis of the websites of entities entrusted with a conciliation function. That analysis was carried out by reference to 19 different topics, which are set out in Appendix 3.

4.24. The main purposes in carrying out this exercise were to enable an assessment to be undertaken of common and/or essential features of conciliation as described by the providers of conciliation services; and to create a picture of what conciliation looks like as practised in contemporary Australia.

4.25. Of those websites which contained significant information about conciliation (numbering 40), set out below is a summary of responses to a selection of 7 of the topics:

a. 30 of the 39 websites contained a detailed explanation of the conciliation process; 9 websites did not; 1 website provided information about 'Dispute resolution'.

b. In all 40 websites examined, the conciliator was appointed by the entity entrusted with the conciliation function.

c. In relation to 30 of those 40 websites, the conciliator was a staff member; in 6 cases, the conciliator was outsourced or there was a combination of staff and outsourcing; for the balance of 4 websites, there was uncertainty as to how the conciliator was selected/sourced.

d. The conciliation process was best described as: both facilitative and evaluative in 10 of 40 cases (25%); facilitative only in 13 cases (32.5%); evaluative only in 5 cases (12.5%); directive in 3 cases (7.5%); adjudicative in 1 case (2.5%); and in 6 cases, no description was given (15%).

e. The role of the conciliator was best described as: 'independent of the parties but not the entity' in 28 of 40 cases (70%); 'independent of the entity' in 3 of the cases (7.5%); and as 'neutral' in 8 of the 40 cases (20%).

f. The disputants were likely to know one another in 31 of the 40 cases (77.5%); were unlikely to know one another in 7 of the cases (17.5%), and in the remaining cases the position was unclear.

g. The disputants were likely to have an ongoing relationship in 21 of the 40 cases (52.5%); were unlikely to have an ongoing relationship in 9 of the 40 cases (22.5%); and in the balance of cases the position was unclear.

4.26. ADRAC now sets out some examples of the sort of information about conciliation which is contained on some of the websites examined. The purpose of setting out these examples is to show the range of different approaches taken.

a. First example

Conciliation is a process of negotiation between the parties in which the [conciliator] proposes options for the resolution of issues and proposes terms for agreement. It is a voluntary process that requires agreement from both parties to proceed. It is an alternative to legal proceedings and does not involve formal hearings or the making of findings or rulings.

The [conciliator] does not advocate for either party, take sides or discipline [a party]. The [conciliator] will encourage both parties to listen to and consider each other's perspectives.

b. Second example

If the Board considers there is proper cause for disciplinary action, it may refer a complaint to a committee for conciliation. Members of the committee will include at least one Board member.

The function of this committee is not to act as an arbitrator, but to act as conciliator and to encourage settlement of the matter. The committee will act by arranging discussion between the persons concerned, or their representatives, and assisting in those discussions. The committee will give advice and make recommendations to assist in reaching a settlement.

c. Third example (a tribunal with expansive jurisdiction)

[Conciliation is] a process in which the parties to a dispute, with the assistance of a Tribunal member, officer of the Tribunal or another person appointed by the Tribunal (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.

d. Fourth example (a specialist tribunal)

Conciliation is a voluntary process to help an employer and employee resolve a ... dispute. It is an informal method of resolving the ... claim that is generally conducted by telephone and can avoid the need for a formal conference or hearing.

In a conciliation, each party can negotiate in an informal manner and explore the possibility of reaching an agreed settlement. In a conciliation any outcome is possible provided both parties agree to it. But in a hearing the outcomes are limited and strictly controlled by law.

Conciliators are independent and impartial – they are not on the 'side' of employees or employers. The conciliator's job is to:

- *help the parties reach a resolution*
- *lead the discussion and provide guidance*
- *ensure conversations remain polite and on-topic, and*
- *explore the issues involved.*

The conciliator does not:

- *give either party legal advice*
- *argue on behalf of either party*
- *judge the facts of the case, or*
- *make any type of decision or recommendation.*

e. Fifth example (a court)

Conciliation is a process in which the parties to a dispute, with the assistance of an impartial conciliator, identify the issues in dispute, develop options, consider alternatives and endeavour to

reach agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely terms, and may actively encourage the parties to reach agreement.

...

If the parties are able to reach agreement on the terms of the decision in the proceedings that would be acceptable to the parties, and that decision is one the court could have made in the proper exercise of its functions, the [conciliator] must dispose of the proceedings in accordance with the decision and set out in writing the terms of the decision.

f. Sixth example (another large administrative review tribunal)

Conciliation is a voluntary process where parties negotiate and attempt to settle the dispute themselves ...

Who is involved in the conciliation?

Generally, only the people involved in the dispute attend the conciliation. An agent, advocate or interpreter may also be present. At our larger hearing venues a conciliator may be available to help with your conciliation discussions.

Why is the conciliator not present at all times during the conciliation?

Where a conciliator is available, their role is to assist a number of conciliating parties at the same time. It is not possible for the conciliator to spend all their time in one conciliation session.

4.27. ADRAC's preliminary conclusions based on the above data, definitions and descriptions are as follows:

a. Conciliation, as it is practised in Australia today, has an elusive quality. Its practice and many of its features appear to vary – both in terms of hard content (a particular feature may be present in some cases, and in other cases it may not be) and by reference to matters of emphasis (eg as to the need, and extent, of intervention by a conciliator).

b. The absence of a generally accepted description or definition of conciliation might be thought to be a virtue as it might be thought to 'speak' to its versatility and adaptability.

c. However, there is a central core of conciliation that can be recognised, defined and reproduced.

d. More importantly, consultations with conciliators and analyses of conciliator websites suggest that perambulatory descriptions of conciliation can be problematic, for various reasons:

- they may lead to uncertainty in the minds of conciliators and disputants as to the nature of the process which is being undertaken
- they may lead to unfulfilled expectations or misinformation on the part of disputants
- they might possibly mask a lack of focus and sub-optimal practice
- they may inhibit recognition of conciliation as a distinct and separate form of ADR
- they may play a role in the isolation of conciliators from other ADR practitioners
- they may impede worthwhile analysis, development and reform in line with 'best practice', including on the part of policy-makers and legislators
- they might, in some instances, diminish the overall effectiveness of conciliation as a process and thereby contribute to non-achievement of the public purposes underpinning those laws which make provision for it.

4.28. In light of uncertainties which arose from early consultation workshops and ADRAC's website analyses, ADRAC decided to gather additional data via the conduct of two surveys directed to entities entrusted with conciliation functions under Australian laws – the methodology of which is explained in the previous chapter.

Results of ADRAC's online surveys

4.29. Much of the information obtained by ADRAC through the online surveys is quite granular.

4.30. ADRAC is not presently in a position to present results on every survey question. ADRAC may undertake a more detailed and comprehensive statistical analysis of survey results in the future, subject to resources.

First survey results

4.31. The results of particular questions are presented below. For ease of reference, the questions as set out below have been abbreviated (the full questions, as asked, are at Annexure 4).

a. ***Written procedures or flexible procedures? (Q1)***
47.6% of 42 survey respondents have written procedures in place; 52.4% apply procedures flexibly.

b. ***Other ADR procedures used? (Q2)***
61% of 36 survey respondents also use mediation; 25% also use arbitration; 36% also use settlement conferences.

c. ***Usual Length of a conciliation? (Q3)***
7.1% of 42 survey respondents took more than a day; 42.9% took 'around 2 hours'.

d. ***Is the result confidential? (Q4)***
76.2% of 42 survey respondents said 'yes'. It is unclear whether, and to what extent, conciliated outcomes for the balance remain confidential.

e. ***Is conciliation conducted privately or in public? (Q5)***
92.9% of 42 survey respondents said privately.

f. ***Is confidentiality protected by statute? (Q6)***
92.9% of 42 survey respondents said 'yes'.

g. ***Do conciliators discourage settlement inconsistent with legislation? (Q7)***
73.2% of 41 survey respondents said 'yes'; 26.9% said 'no'.

h. ***Proportion of matters referred to conciliation? (Q9)***
41% of 39 survey respondents said up to 25% of matters are referred; 30.8% said referrals occurred in 50–75% of matters; 15.4% said there was a 100% referral rate.

i. ***Proportion resulting in complete or partial resolution? (Q10)***
59.55% of 37 survey respondents said that 50–75% of matters achieved complete or partial resolution at conciliation; 21.6% of respondents said that more than 75% of matters achieved complete or partial resolution at conciliation; and 5.4% of respondents said that more than 75% of matters achieved complete or partial resolution at conciliation.

j. ***Proportion of conciliators who are part-time? (Q13)***
40% of 30 respondents said that around 25% of their conciliators are part-time; 26.7% said that between 25% and 50% of their conciliators are part-time; 13.3% said that between 50% and

75% of their conciliators are part-time; and 13.3% said that more than 75% of their conciliators are part-time.

k. ***Proportion of conciliators doing other duties as well? (Q14)***
24.2% of 33 survey respondents said that around 25% performed non-conciliator duties as well; 57.6% said that more than 75% of their conciliators did other duties as well.

l. ***Are your conciliators required to be trained in conciliation, mediation or other ADR? (Q15)***
42.9% of 21 survey respondents said their conciliators were trained in conciliation; 75% said their conciliators were trained in mediation.

m. ***Does your entity: (Q16)***
   - **provide continuing professional development (CPD) in-house?**
     44.8% of 29 survey respondents said they provide CPD for their conciliators.
   - **require, allow or arrange CPD from external providers?**
     86.2% of 29 survey respondents said they arrange CPD from external providers.

n. ***Does your entity require conciliators to engage in structured CPD? (Q17)***
37.1% of 35 survey respondents said 'yes'; 62.9% said 'no'.

Second survey results

4.32. Results are presented below of responses received from 14 entities whose websites were among those which *did not* contain much information about conciliation.

4.33. The second line of information below refers to the results obtained from ADRAC's website review of entities that *did* publish significant conciliation material on their websites. This information is presented as a comparison.

a. ***Is conciliation a large or small part of your entity's operations?*** (Q18)

64.29% of second survey respondents said conciliation was a large part of their operations.

On the website review 52.78% of identified entities were found to have a large conciliation function.

b. ***Within your entity is conciliation voluntary or compulsory? (Q19)***
42.86% of second survey respondents said attendance is voluntary.

On the website review, 57.14% of identified entities conducted conciliation on a voluntary basis.

c. ***Is compulsion to attend conciliation by statute or order/ direction? (Q20)***
62% of second survey respondents said legislation.

On the website review, 9.09% of 22 identified entities indicated that attendance was compulsory under legislation.

d. ***Legal representation at conciliation allowed? (Q21)***
71.43% of second survey respondents (11) said 'yes'.

On the website review, 62.5% of 22 identified entities allowed legal representation.

e. ***Is legal representation by right or by leave? (Q22)***
60% of second survey respondents (10) said legal representation is 'by right'.

On the website review, 37.5% of 32 identified entities said that parties had a right to legal representation.

f. ***Are conciliations conducted by third party or only inter-party? (Q23)***

42.86% of 14 second survey respondents conducted conciliation via a third party.

On the website review, 92.11% of 38 identified entities conducted conciliation via a third party.

(ADRAC considers this question in the survey may have been misinterpreted – the website review is the most likely reflection of usual practice.)

g. ***Is the conciliator chosen by the parties or by your entity? (Q24)***
100% of 14 second survey respondents said conciliators were chosen by the entity – same result as in the website review.

h. ***Is the conciliator a member of staff or an outsourced provider? (Q25)***
92.31% of 14 second survey respondents said member of staff.

On the website review, 93.94% of 33 identified entities indicated member of staff.

i. ***Within your entity is conciliation directed towards dispute resolution or case management? (Q26)***
100% of 14 second survey respondents said dispute resolution.

On the website review, the result was almost the same with 2 of 37 reviews answering, in effect, both.

j. ***Within your entity, is the subject of conciliation predominately rights-based or interests-based? (Q27)***
78.57% of 14 second survey respondents said rights-based.

On the website review, 88.89% of 36 entities indicated rights-based.

k. ***Within your entity, is the conciliation process best described as facilitative, evaluative, directive, adjudicative or other? (Q28)***
14.29% of second survey respondents did not know; the balance of 78.57% said facilitative; 7.14% said 'evaluative'; no second survey respondent said 'directive' or 'adjudicative'.

This surprising result may derive from two problems. First, the options did not include 'advisory'. Secondly, ADRAC noted reluctance by some conciliators to accept that advice-giving was a role in conciliation even when authorised.

On the website review, the result was different. Of 38 websites examined, 33.33% indicated a facilitative approach in conciliation, 12.82% indicated that conciliations were evaluative, and 7.69% indicated that conciliations were directive. The entries for both 'other' and 'don't know' were respectively 25.64% and 17.96% – perhaps, again, reflecting the absence of 'advisory' as an option.

l. ***Within your entity, is the role of the conciliator best described as neutral, independent of the parties and your entity, or independent of the parties but not your entity? (Q29)***
7.14% of 14 second survey respondents said neutral; 21.43% said independent of the parties and the entity; 71.43% said independent of the parties, but not the entity.

On the website review, 20.51% indicated that conciliations were neutral, 7.69% indicated independence of the parties and the entity, and 71.79% indicated independence of the parties but not the entity.

m. ***In conciliations within your entity, are the disputants likely to know one another? (Q30)***
78.57% of second survey respondents said disputants are likely to know one another.

On the website review, 79.49% of 39 identified entities indicated disputants are likely to know one another.

n. ***In conciliations within your entity, are the disputants likely to have an ongoing relationship with one another? (Q31)***
57.14% of 14 second survey respondents said 'yes'.

On the website review, 52.5% of 40 identified entities indicated 'yes'.

o. ***In conciliations within your entity, are respondents mainly individuals, bodies corporate, or a mix? (Q32)***
78.57% of 14 second survey respondents said disputants were a mix, and 21.43% said they were bodies corporate, and nil said they were exclusively individuals.

On the website review, 35% of 40 entities disputants were mainly individuals, 2.5% said disputants were mainly bodies corporate and 62% said they were a mix.

p. ***If the disputants are mainly bodies corporate, are they mainly private or public sector? (Q33)***
46.15% of 13 second survey respondents said body corporate disputants were mainly private.

On the website review, 50% of 16 entities said that body corporate disputants were mainly private.

q. ***Within your entity, are conciliation outcomes mainly past-focused or forward-looking? (Q34)***
25% of 12 second survey respondents said outcomes were past-focused and 75% said forward-looking.

On the website review, 59.46% of examined entities indicated that outcomes were forward-looking, 40.54% said past-focused.

r. ***If the conciliation does not resolve the dispute, is it referred to another body, and/or does your entity continue to deal with it by a different process? (Q35)***

28.57% of the 14 second survey respondents referred unresolved disputes to another body, 71.43% continued to deal with the dispute.

On the website review, 66.67% of examined entities indicated they refer unresolved disputes to another body and 33.35% continued to deal with the dispute.

4.34. ADRAC's preliminary conclusions based on matters revealed in its online surveys are as follows:

a. There is room for conciliator entities to do more to document their conciliation practices – for the sake of conciliators and for the sake of disputants.

b. Statutory confidentiality of the process of conciliation is almost universal. Given, however, that confidentiality is a 'default' feature of nearly all forms of ADR (noting application of without prejudice privilege), this is not a distinguishing feature.

c. The fact that the disputants do not choose (or have input into the choice of) their conciliator appears to be a somewhat distinctive feature.

d. Conciliation appears to be more 'rights-based' in its focus than mediation.

e. There is a relatively high level of legal representation of parties engaged in conciliation. The extent to which this reflects the complexity of the disputes which are subject to conciliation warrants further consideration.

f. A surprising percentage of conciliator entities (nearly 27%) do *not* discourage settlements which are inconsistent with the applicable legislative framework. This requires further analysis to determine if the type of conciliation entity and/or legislative framework is influential.

g. If ADRAC's present view is correct – namely, laws which make provision for conciliation contemplate outcomes which uphold rather than confound the public interests underpinning them – the survey data raises the possibility that some conciliation entities may not be conducting conciliations in conformity with legislative intent. This is something which ADRAC recommends be reviewed by relevant stakeholders (first and foremost, the conciliation entities in question). ADRAC looks forward to input on this issue following distribution of this report.

h. Conciliation achieves a very high level of dispute resolution. It appears to be very effective on this metric.

i. Conciliators and conciliator entities readily identify their processes as facilitative. Despite the previously mentioned issues with questionnaire design, this finding is unexpected. One interpretation is that conciliators see value in the facilitative approach and prefer to remain in this mode whenever possible.

This issue warrants further investigation. ADRAC's preliminary view is the facilitation in the context of a mediation may look and feel different to facilitation in the context of a conciliation – including with respect to the provision (and timing) of information and advice.

j. It is interesting that entities report that over half (up to 57%) of participants have an ongoing relationship. In one sample only 22.5% of disputes involved clients with no ongoing relationships. This challenges the view that conciliation is a mechanism that is designed to produce settlements in unique single-event disputes. This characteristic may in part explain the preference for the facilitative approach. Parties with ongoing relationships are more likely to have long-term benefits from facilitative outcomes that they have agency in constructing.

k. Demographic attributes of conciliators (eg % who are part-time, % performing other duties) warrant further examination.

l. Conciliators are more likely to have training in mediation (75%) than conciliation (43%). This suggests that mediation may be base training, with additional specialist conciliation training received by a minority. This is consistent with the views expressed in the focus groups and suggests there is a need for wider specialist training.

m. Only a third of entities (37%) required their conciliators to undertake structured professional development and training. Taken together with the low levels of specialist conciliation training, it would appear that conciliators may benefit from greater training and development opportunities. Such training could cover practices, techniques, features in common with other forms of ADR, and points of distinction between conciliation and other forms of ADR - including in relation to such matters as the provision of information and advice, so-called 'reality-testing', what 'facilitation' may mean in different contexts, and how far a conciliator should go in warning against (or even opposing) outcomes which are not consonant with the norms underpinning the applicable legislative framework.

Findings/results arising from the ADRAC focus groups

4.35. The focus groups conducted with conciliators were a very interesting aspect of ADRAC's study. They were characterised by high levels of energetic participation and thought-provoking insights.

4.36. Reproduced below is a sample selection of the comments made during the recorded focus group discussions, in response to questions asked. The sample is not intended to, and does not, encapsulate points of consensus. A more substantial coverage of the focus group discussions is set out in Appendix 6.

1. How do you explain conciliation to your clients/participants?	
Brisbane	'We don't really explain because some people don't really know what a conciliator is. We get called many other names, a consultatory – or sometimes I say I'm a mediator because they understand that better.'

2. What do you think is the most effective aspect of conciliation?	
Sydney	'Every bad conciliation I've ever seen, in the years I've been training conciliators, has been when they've gone too quickly into open session.' '... if the parties can solve those problems themselves they wouldn't need conciliation, they wouldn't come to this point in the process ... it's more dealing with them individually rather than necessarily getting them to hear each other, because that's more mediation than conciliation.' 'I see a conciliator as an enabler of someone making decisions.'

3. What kinds of training/education have you found effective?	
Sydney	'The best conciliation training I've had is with other conciliators.'
Adelaide	'There might be legislation specific training, legal knowledge ... but I would say that would be on top of basic mediation training.' 'Mediators don't necessarily need subject matter knowledge to effectively facilitate or mediate a dispute ... With conciliators, especially in some jurisdictions, I think subject matter knowledge and legal training is actually important.'

4. To what extent is conciliation a set of skills that can be learned by experience?	
Melbourne	'Most people come to conciliation from advocacy or litigation, so in fact they didn't have to grapple with that problem ... I mean, how do you have any authority in the room if the lawyers think you're an idiot that doesn't know the laws.'

5. To what extent is conciliators' provision of information, opinion and advice about possible outcomes important for effective conciliation?	
Brisbane	'You're using subject expertise, you're not actually giving an opinion.'
Perth	'I think it is essential because you may be the first truly impartial person this person has spoken to throughout this process because friends, family told them things that they think they'd want to hear, their solicitor may have then encouraged them to push forward with this thing ...'

6. In what ways do you think of conciliation as differing from mediation?	
Brisbane	'Conciliation is mediation apart from the legal aspect ... mediation with a tick.'
Perth	'One of the distinctions for me is that I think there's some assumed subject matter knowledge in conciliation. I think you can mediate on almost any dispute, regardless of your level of subject matter knowledge.'
Melbourne	'The value over mediation that conciliation offers, is that we can provide some context and outlooks without prejudicing our objectivity ... it's a slightly better format for people who don't have a genuine discussion and when they say "What do you think?" well I'll say, "I can't tell you what I think but these are the issues" and you present it back to them in a way that is perhaps more hopeful than they might get in a strict mediation format.'

7. How do you proceed if a resolution is inconsistent with the intent of applicable legislation?	
Brisbane	[multi-statute tribunal] '... we're still not seeing our role there as to be advisory. Most of the matters that are going to conciliation, where we're selecting those case groups because they go through to multi-day hearings, so our conferencing process will sort out 80 to 90% of that.'

8. What are your thoughts regarding conciliators having a professional identity, collegiality and structure?	
Brisbane	'[The] debriefing process is paramount for conciliation and without it you just explode.'
Melbourne	'I'm really grateful of the value of mentoring in its context ... it's really invaluable and the ability to observe, to sit in, to observe, to have people observe you, peer review, peer observation ...'

9. What changes would you recommend?	
Perth	'For some people sitting around a table like this, in a formal conciliation, is very intimidating and people will not speak – so you have to spend time and make sure first that the environment is neutral and impartial, but also too, you need to address those power imbalances as a conciliator.'

4.37. The focus groups were very valuable to ADRAC in each of two ways:

a. The focus groups did not generate information which caused ADRAC to depart from the preliminary conclusions arising from:

- the review of those legislative regimes which make provision for conciliation: see para 4.15
- the consultative workshops: see paras 4.19–4.21
- the websites review: see para 4.26
- the online surveys: see para 4.33.

b. In important respects, the focus groups generated information which ADRAC considered supported the preliminary conclusions referred to in the preceding sub-paragraph.

4.38. Accordingly, the brevity with which the focus groups are dealt with here does not reflect the value that ADRAC derived from them. Readers of this report are asked to go to the paragraphs referred to in 4.36 above in order to gain an understanding of the overall value of the focus groups as a source of reinforcement of the conclusions expressed.

4.39. There is one particular issue (or a bundle of related issues) upon which the focus groups were an invaluable source of information: training, conciliator standards and the professional development of conciliators.

ADRAC's preliminary findings concerning conciliator training, standards and development

4.40. There are as many as 90 conciliating entities across Australia, employing hundreds of conciliators (often part-time, and in circumstances which involve the performance of duties other than conciliation).

4.41. Many, and probably most, conciliators with whom ADRAC engaged had mediation training, qualifications and experience.

4.42. ADRAC heard evidence that conciliation-specific training is principally done by conciliation entities. Such training appears to focus on the legislation that conciliators need to operate under.

4.43. There appear to be few, if any, organised conferences or training seminars specially developed for conciliators, although the recent National Mediation Conference (2019) had some coverage of conciliation.

4.44. There also appears to be no recognised system of professional development.

4.45. Conciliators spoke in focus groups of the importance of watching others conciliate and being able to access assistance from other conciliators.

4.46. Standards of practice appear to be a concern within individual conciliation entities. Conciliators have no national standards directly applicable to their work as conciliators.

4.47. As conciliation has no institutional peak body or overarching standards, and its distinguishing features are somewhat elusive, it has little 'brand' recognition as an industry, or even as a recognised skill set. By way of contrast, mediation has the non-statutory but widely accepted Mediation Standards Board (MSB) and it has the National Mediator Accreditation System (NMAS), a set of practice and training standards that have been widely accepted in that field. The current NMAS standards are not commonly referenced by conciliators as a guide to practice.

4.48. ADRAC's preliminary conclusions on the topic of training, standards and professional development of conciliators is as follows:

a. There should be a basic set of overarching standards to guide conciliators and, perhaps, to give disputants some greater level of reassurance of the integrity of conciliation as a form of ADR.

b. The current NMAS standards do not comfortably accommodate, or apply to, conciliation (noting that it is far from self-evident that conciliation is a hybrid/blended process within the meaning of NMAS).

c. Conciliators appear to have different levels of exposure to conciliation training, often relying upon informal interactions with other conciliators and mediation training.

d. Similarly, there appears to be limited relevant professional development opportunities for conciliators and low expectation of continuing education by conciliator entities.

e. Reliance solely upon mediation training and professional development is not sufficient.

f. Conciliation entities might usefully consider providing greater training and development opportunities to their conciliators. Such training could cover practices, techniques, features in common with other forms of ADR, and points of distinction between conciliation and other forms of ADR – including the specific matters noted at paragraph 4.34(m) above.

g. More could be done to overcome a sense of professional isolation which many conciliators reported feeling. A high-functioning network of conciliators – operating across conciliation entities – could be a good start.

4.49. Finally, ADRAC wishes to place on record that it is extremely grateful for the assistance given by those conciliators who gave up their time to participate in the focus groups.

4.50. Before concluding this chapter, ADRAC now turns to two other matters briefly considered in the course of its study.

ADRAC's examination of conciliator advertisements

4.51. ADRAC searched for and inspected advertisements seeking to recruit conciliators, in case they shed light on the nature of conciliation generally, or within particular entities.

4.52. The following are 4 of the many available examples of public sector advertisements for conciliators.

4.53. An advertisement of March 2017 by the Energy and Water Ombudsman (EWOV) calling for conciliators, contained the following passages:

Responsibilities:

- *Adhere to EWOV's complaints handling policies and processes, including EWOV's Best Practice Procedures (BPPs), focussing on efficient and effective progression and resolution*

  ...

- *Ability to work according to and understand the concept of independence and the concept of Alternative Dispute Resolution*

- *Knowledge of or the ability to rapidly acquire knowledge of the electricity, gas and water regulation/legislative framework*

  ...

4.54. The Victorian Accident Compensation Conciliation Service (SCCS), advertised on 13 August 2018 using the following terms:

- The SCCS is currently recruiting ADR professional/s to be Conciliation Officer/s with both experience and the dedication required to contribute to a high performing service organisation.
- Key Conciliation Officer Requirements
  - ADR Experience is essential;
  - Experience as a conciliator in an accident compensation setting and/or knowledge of the Victorian Workers Compensation system is highly desirable.

4.55. The Fair Work Commission (Commonwealth) in July 2016 called for full time conciliators in the following terms:

- *The Conciliators Team work within a framework consistent with the* Fair Work Act 2009 *(FW Act) and its delegated legislation, to conduct conciliations to assist parties to unfair dismissal applications explore whether agreement can be reached to resolve applications at an early stage. Unfair dismissal applications are conducted over the telephone and in face-to-face meetings*
- *Qualifications and/or practical experience in conciliation/ mediation, workplace relations, law and or human resource management are required.*

4.56. The Victorian Public Transport Ombudsman (PTO) in March 2017 advertised for conciliators. The following are extracts from the advertisement:

- *The aim of the scheme is to resolve complaints independently, effectively and efficiently, taking into account:*
  - *Current laws, guidelines and regulations; and*
  - *Good industry practice;*

  ...
- *The majority of complaints are received and progressed over the telephone ...*

- *The conciliator's role encompasses:*
  - *Undertaking ... complaint investigations and assisting parties to resolve complaints, through the use of conciliation and other dispute handling policies and processes.*
  - *... providing general information to the customer ...*
  - *Proactively seeking advice from the Senior Conciliator, Manager Policy and Research for the operations manager about difficult or sensitive cases.*
- *All PTO officers support and promote PTO's Cultural Values ...*

4.57. What is notable in each advertisement is the emphasis given to the conciliator having experience in the statutory field in which the conciliation was to be undertaken. That is broadly consistent with preliminary conclusions expressed elsewhere in this report by reference to other information considered by ADRAC.

Private conciliation

4.58. The term 'private conciliation' is sometimes used to refer to forms of mediation that are said to look or feel like conciliation.

4.59. ADRAC came across very little information concerning private conciliation in the course of its study.

4.60. It is clear, however, that not all conciliation takes place under statutory regimes.

4.61. For instance, although replaced by the Australian Financial Complaints Authority (AFCA) since the commencement of this study, both the Financial Ombudsman Service (FOS – see https://www.fos.org.au/) and AFCA are examples of non-statutory entities adopting conciliation as an available dispute resolution procedure. The FOS was bound by a set of private rules promulgated by the industries that promoted the FOS. The AFCA is a not-for-profit company limited by guarantee that is governed by a Board of Directors (which include equal numbers of industry and consumer representatives). AFCA's role includes assisting consumers and small businesses to reach agreements with financial firms about how to resolve their complaints.[28]

28 www.afca.org.au/about-afca/ (accessed 1 July 2019).

4.62. ADRAC is conscious that non-statutory entities such as clubs, churches, sporting bodies, political parties, cooperatives, private corporations and even some internal areas of publicly listed corporations have put in place dispute resolution mechanisms for internal disputes which include conciliation.

4.63. It seems reasonable to call conciliations conducted in these contexts 'private conciliation'. As a topic, private conciliation is worthy of a detailed, stand-alone study.

Conclusion

4.64. In this Discussion Paper ADRAC canvasses:

- the historical roots and development of conciliation as a distinctive and successful form of ADR
- features which conciliation has in common with other forms of ADR
- points of distinction between conciliation and other forms of ADR
- difficulties which have arisen over many decades in describing and defining conciliation
- various downsides which will continue to exist if the elusive character of conciliation is not clarified by adoption of a generally accepted description and definition
- a number of preliminary findings, conclusions and recommendation, for consideration and feedback.

4.65. ADRAC very much encourages input and feedback on all of the issues and matters raised in this Discussion Paper.

4.66. In due course ADRAC proposes to publish a final report on this important topic, reflecting the data it has gathered, consultations it has had with stakeholders (and may have in the future), and any input and feedback received. ADRAC earnestly hopes that presentation of its preliminary findings and conclusions will encourage rather than inhibit discussion and input, and eventually lead to improved outcomes for disputants and other stakeholders.

4.67. Comments and enquiries may be sent by email to **office@adrac.org.au**.