

**Conciliation in the Land and
Environment Court of NSW: History, Nature and
Benefits**

by
The Hon. Justice Brian J Preston
Chief Judge
Land and Environment Court of NSW

A paper presented to:

**ACDC Training Program
for members of the Land and Environment Court of NSW
on s 34 Conferences in the Land and Environment Court**

**3 August 2007
Intercontinental Hotel
Sydney**

The original legislative intention for conciliation

When it was established, the Land and Environment Court was an innovative dispute resolution forum, in many respects far ahead of conventional models of dispute resolution in courts. It still is.

The most well known innovations involved rationalisation and specialisation.¹ Establishment of the Court involved the rationalisation of the myriad of different jurisdictions into one forum to become a “one stop shop” for planning and environmental matters. Specialisation was achieved by the organic coherence of the subject matter of the Court’s jurisdiction and by appointment of persons with special knowledge and expertise in professional disciplines relevant to planning and environmental matters. Rationalisation and specialisation were intended to better enable the Court to exercise its adjudicative functions in a just, quick and cheap manner.

Less publicised, both from its inception and continuing to date, was another innovation in dispute resolution heralded by the *Land and Environment Court Act 1979* (the Act) – the availability of conciliation as a dispute resolution mechanism for the great majority of merits review matters in Classes 1 and 2.

From the inception of the Court, conciliation was required under s 34 of the Act. In its original form, s 34 mandated conciliation in all proceedings in Classes 1 and 2. Section 34(1) then provided:

“(1) *Where proceedings are pending in Class 1 or 2 of the Court’s jurisdiction, the registrar shall, unless otherwise directed by the Chief Judge, arrange a conference between the parties to the proceedings or their representatives, to be presided over by a single assessor.*”

The language is clear – the registrar “shall” arrange a conciliation conference between the parties to those types of proceedings unless the Chief Judge directs otherwise.

Classes 1 and 2 at that time included all of the various appeals under the *Environmental Planning and Assessment Act 1979* (including development application appeals under ss 97 and 98) and under the *Local Government Act 1919* which was then in force (including the building application appeals). Then, as now, proceedings under Classes 1 and 2 comprise the bulk of the Court’s caseload (in 2006, about 66%).

Conciliation, therefore, was established as the primary dispute resolution mechanism for matters in Classes 1 and 2 in the sense that parties were required to engage first in conciliation before they could invoke the adjudicative mechanism of litigation.

In order for the Court to have the capacity to conciliate matters in Classes 1 and 2, the Land and Environment Court provided for the appointment of persons as “conciliation and technical assessors”. The first adjectival description of the assessors – “conciliation” – emphasised the primacy of conciliation in the tasks the assessors were to perform. The Second Reading Speech of the *Land and Environment Court Bill* confirmed this role:

¹ See B Preston and J Smith, “Legislation Needed for an Effective Court” in *Promise, Perception, Problems and Remedies: The Land and Environment Court and Environmental Law 1979-1999*, Nature Conservation Council, Sydney, 1999, p. 103 at pp. 104-107.

“The assessors have a particularly important function under clause 34 in relation to preliminary conciliation conferences where a number of appeals may be expected to be settled by the conciliation process.”²

The second adjectival description of the assessors - “technical” - emphasised that the persons appointed should have technical knowledge and expertise. The nature of conciliation as a dispute resolution mechanism makes it advantageous for the person acting as conciliator to have technical expertise in the issues in dispute. The National Alternative Dispute Resolution Advisory Council (NADRAC) defines conciliation as “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 agreement. The conciliator may have an advisory role in 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 settlement terms, and may actively encourage the parties to reach agreement”.

Hence, the purpose of specialisation for the Court was not only to improve the equitable, effective and efficient adjudication of matters in the Court (the traditional view of the purpose of having Commissioners with special knowledge and expertise in disciplines relevant to planning and environmental matters) but also to enable conciliation of matters by such suitably qualified persons.

Indeed, the role of conciliator was expressly restricted to persons appointed as a conciliation and technical assessor. Judges were (and still are) excluded from acting as a conciliator under s 34.

The establishment of conciliation as the primary means of dispute resolution of matters in Classes 1 and 2 reflected a legislative intention that the preferable outcome for such matters is not one imposed upon participants by the Court but rather one in respect of which the participants have participated and have been able to reach agreement. In language which has acquired some recent currency, the “best community outcome” of a dispute in Classes 1 and 2 is one in which the participants have participated and have had control and in respect of which the parties have reached agreement. It is not one which an expert adjudicator believes, in their expert opinion, is the best outcome for the community and which is imposed upon the parties.

This approach was then, and still continues to be, radical. Prior to the establishment of the Land and Environment Court, planning and environmental matters were all determined by means of adjudication, in adversarial litigation, by a variety of Courts and Tribunals.³ Adjudication in adversarial litigation is part of Western legal culture developed from the habitual practices and patterns of acceptance and expectations assumed by litigants, their lawyers and the courts.⁴

The legislature, however, in establishing the Land and Environment Court and in requiring conciliation for planning and environmental matters in Classes 1 and 2, must be seen to have intended to challenge this prevailing legal culture and to effect

² Second Reading Speech of the *Land and Environment Court Bill*, NSW Parliamentary Debates (Hansard) (Third Series) Session 80, Second Session of the 46th Parliament, 14 November 1979 at 3051.

³ Summarised in P Ryan, “Court of Hope and False Expectations: Land and Environment Court 21 Years On” (2002) 14(3) *Journal of Environmental Law* 301 at 304-308.

⁴ H Astor and C M Chinkin, *Dispute Resolution in Australia*, Butterworths, 1992, pp 34 and 40.

a fundamental change in the means by which disputes involving such matters would be resolved.

Alternative dispute resolution (including conciliation) embodies worthwhile values. Abel expresses these as follows:

“...the preference for harmony over conflict, for mechanisms that offer equal access to the many rather than unequal privilege to the few, that operate quickly and cheaply, that permit all citizens to participate in decision making rather than limiting authority to the professionals, that are familiar rather than esoteric, and that strive for and achieve substantive justice rather than frustrating it in the name of form.”⁵

Alternative dispute resolution has a progressive role in supporting dialogue, emphasising relationships and building a community. Litigation in contrast reinforces the dominance of hierarchy and rights at the expense of connections between people, of context and of responsibility. Achieving the best community outcome in planning and environmental disputes needs to take into account these aspects of connection, context and community.

The legislature, in giving conciliation a primary role in the Court, expressly denounced the prevalent legal cultural view that alternative dispute resolution mechanisms are the poor cousins of litigation. In requiring conciliation of matters in Classes 1 and 2, the Court is not “diverting” cases from the formal justice system. Court annexed conciliation is **part** of the formal justice system. It is an equally legitimate and appropriate mechanism of dispute resolution.

The legislature did not reserve litigation for so-called serious or major matters, diverting minor matters to conciliation. All matters in Classes 1 and 2 were required to be referred to a conciliation conference. Again, the prevailing legal culture skews the concept of seriousness of a matter; it measures seriousness in monetary terms, not in terms of soft, unquantifiable values or in terms of their potential for damage to humans and the environment or for distress, social upheaval or community disintegration.

The evident legislative intention was not to move certain types of cases out of the formal justice system but to adapt that system to the characteristics of those types of cases. The result was and continues to be an innovative dispute resolution forum. Justice Stein described this concept of “a 21st century court” as follows:

*“[it is] to provide citizens with a forum for dispute resolution which should not be confined to traditional judicial adjudication. When a litigant comes through the door of the Court she or he should be informed of the alternative mechanisms available for dispute resolution. These should be provided by the Court and should not be ‘out-sourced’. Litigants should be entitled to choose the means best suited to the particular nature and subject matter of the suit”.*⁶

⁵ R Abel, “The Contradictions of Informal Justice” in R Abel (ed) *The Politics of Informal Justice*, Vol 1, Academic Press, New York, 1982, p 310 quoted in H Astor and C Chinkin, *Dispute Resolution Australia*, 2nd ed, LexisNexis Butterworths, 2002, p 37.

⁶ Justice P L Stein, “Down Under Perspective of the Environmental Court Project”, a paper presented to the United Kingdom Environmental Law Association Seminar on the Final Report on the Environmental Court Project, 27 June 2000, London, p 5.

The recognition that conciliation is an equally legitimate and important mechanism of dispute resolution in the Court has the necessary consequence of recognising that the dispute resolution practitioners undertaking conciliation are undertaking an equally legitimate task as those who adjudicate cases. There is no place for a view that adjudicators are performing a more important or higher status task than conciliators. It should always be remembered that conciliation and conciliators have vital roles to play in the Court's work in providing appropriate dispute resolution services.

The flow in favour of the original legislative intention for conciliation

For the first five years of the Court's existence, the Court implemented s 34 as the legislature intended. Matters in Classes 1 and 2 were referred to conciliation before a conciliation and technical assessor. Early results were favourable: see Appendix A. A significant percentage of matters in Classes 1 and 2 were disposed of at or after conciliation conferences. The years of 1983 and 1984 were the zenith, where 308 (20.9%) and 281 (17.7%) of matters in Classes 1 and 2 were disposed of at or after conciliation conferences.⁷

The ebb away from the original legislative intention for conciliation

Unfortunately, after five years, the tide turned; there was a flow away from the legislative intention for conciliation. The system started to be abused. A lack of commitment and good faith by parties to the conciliation process, particularly by local government authorities in failing to duly authorise their representatives to be able to reach agreement at the conciliation conference, undermined the utility of the conciliation process.⁸ The number of matters disposed of at or after a conciliation conference declined exponentially in 1985 and 1986 (see Appendix A). As a consequence of the abuse of the system, the then new Chief Judge of the time, Justice Cripps, directed that the Registrar not arrange a conciliation conference for matters in Classes 1 and 2 unless the participants expressly requested that the Court do so. Such a direction effected a reversal of the legislative mandate under s 34: instead of all matters in Classes 1 and 2 being required to be conciliated unless the Chief Judge directed otherwise, such matters were not conciliated unless the parties expressly so requested. The number of matters in Classes 1 and 2 referred to conciliation and hence disposed of at conciliation dried to a trickle. In 1987, only 8 matters were disposed of at or after a conciliation conference (0.5%).

On 16 November 1987, the Court issued Practice Direction No 3 confirming the demise of the compulsory conciliation conference under s 34. The Practice Direction provided in relation to s 34 conferences as follows:

- “1. *The registrar shall fix the less complex city appeals* for hearing before a duty assessor without appointing a conference or a callover.*

2. *The registrar shall not arrange a conference unless the application is one which would not be made returnable before a duty assessor and in which both parties request a conference or the court considers that one would be appropriate.*

⁷ See also P Ryan, n3 at p 309.

⁸ See Justice P L Stein, n6 at p 5 and P Ryan, n3 at p 309.

- Note: (i) *Although the court will exercise the ultimate decision as to whether it is appropriate for appeals to be determined in accordance with these arrangements, parties who consider their appeals should be so determined may so elect at the time of filing the appeal.*
- (ii) *There will be two duty assessors and the hearings before them will be conducted on Fridays until further notice."*

Use of conciliation thereafter was paltry (1% or less of matters in Classes 1 and 2 were disposed of by conciliation: see Appendix A).

In 1991, swept along by the wave of enthusiasm for alternative dispute resolution that was sweeping the courts at the time, the Court desired to offer alternative dispute resolution for merits review matters in Classes 1-3. Yet, rather than utilise the existing alternative dispute resolution mechanism of conciliation in s 34, the Court turned to mediation.

On 1 May 1991, the Court issued Practice Direction No 5 – Mediation and Issues Conferences. This Practice Direction introduced an option of a mediation conference for certain types of matters in Classes 1-3 and a compulsory issues conference in Class 4 matters to explore the possibility of settlement and to narrow the issues. The types of matters for mediations were, in Class 1, appeals in respect of development applications; in Class 2, appeals in respect of building applications, demolition orders, refusals to issue s 317AE certificates; and in Class 3, compensation matters.

Mediation was voluntary; each party was required to indicate to the Court in writing that it wished their dispute to be mediated. Mediations were to be conducted at the Court. If objectors were involved, it was anticipated they should attend at the mediation so that the views of all interested parties may be taken into account in any mediated settlement.

The Court stated its expectation that persons appointed to act on behalf of any of the parties to a mediation would have the authority to authorise a resolution of the dispute. The Court noted that if a party does not have that authority, it will substantially weaken the mediation process.

At the conclusion of the mediation, where agreement had been reached, the parties were expected to give effect to the agreement in the best possible way. In most cases, the Court noted, this would involve one of the parties giving consent or agreeing to be bound by terms of settlement. In those cases where the parties saw a need for orders of the Court to be made, it was expected that consent orders would be agreed upon between the parties, and these would be placed before a duty judge.

These arrangements were given regulatory force by amendments to the then in force *Land and Environment Court Rules* 1980. On 24 May 1991, a new Division 6A was inserted into the *Land and Environment Court Rules* 1980. Part 12 Div 6A r 2 provided that the Registrar at callover would, where appropriate, refer proceedings to mediation or conciliation in accordance with the Practice Notes concerning mediation and conciliation.

In theory, this dispute resolution mechanism of mediation was “additional” to the existing mechanisms of adjudication by litigation and conciliation under s 34. But in reality, it was seen to be an “alternative” to the then moribund conciliation conference

under s 34. Hence, in 1991, 16 matters were disposed of at or after mediation but only 6 matters were disposed of at or after a conciliation conference.

On 17 September 1993, the Court issued Practice Direction 1993. The practice of the Court in relation to s 34 conferences stated in Practice Direction No 3 in 1987 was continued. The Practice Direction stated:

*“The Registrar may arrange a s 34(1) conference if the parties request a conference or the Court considers that one would be appropriate”.*⁹

Practice Direction 1993 also dealt with mediation in similar terms to Practice Direction No 5 in 1991.¹⁰

In 1994, a new Part 5A was inserted in the *Land and Environment Court Act*.¹¹ This amendment was part of a widespread legislative agenda to introduce mediation and neutral evaluation into the court system. This permits the Court to refer any matter arising in proceedings before it (other than criminal proceedings) for mediation or neutral evaluation, with or without the consent of the parties to the proceedings.¹² This superseded the Court’s prior Practice Directions that matters would only be referred to mediation with the written consent of the parties.

The mediator or evaluator is to be agreed to by the parties or, if the parties cannot agree, appointed by the Court.¹³ Each party to proceedings the subject of a referral to mediation or neutral evaluation is under a duty to participate, in good faith, in the mediation or neutral evaluation.¹⁴ The Court may make orders to give effect to any agreement or arrangement arising out of a mediation session.¹⁵

The new Part did not deal with conciliation under s 34.

The legislative promotion of mediation, at the expense of conciliation, was reflected in practice. In 1994, whilst 26 matters were disposed of at or after mediation, only 4 matters were disposed of at or after conciliation.

This new legislative enthusiasm for mediation was subsequently implemented in the Court Rules upon the making of the *Land and Environment Court Rules* 1996, effective 29 January 1996. A new Part 18 specified the practice and procedure for referral to mediation; preparation for mediation; attendance at the mediation by a person with authority to settle; and concluding or terminating the mediation. As a consequence of the making of Part 5A of the *Land and Environment Court Act* and Part 18 of the *Land and Environment Court Rules* 1996, the Court issued Practice Direction 1996 which repealed paragraph 12 of Practice Direction 1993 dealing with mediation.¹⁶

In 1998, the name of “Conciliation and Technical Assessor” was changed to “Commissioner”.¹⁷ Among other reasons, the name change reflected the changed function the Commissioners were performing. The then Chief Judge, Justice

⁹ Paragraph 2 of Practice Direction 1993.

¹⁰ See paragraph 12 of Practice Direction 1993.

¹¹ By s 3 and Schedule 1 of the *Courts Legislation (Mediation and Evaluation) Amendment Act* 1994.

¹² s 61D(1) of the *Land and Environment Court Act*.

¹³ s 61D(2) of the *Land and Environment Court Act*.

¹⁴ s 61E of the *Land and Environment Court Act*.

¹⁵ s 61G(1) of the *Land and Environment Court Act*.

¹⁶ See paragraph 3 of the Practice Direction 1996.

¹⁷ See s 3 and Sch 6 of *Courts Legislation Further Amendment Act* 1998.

Pearlman stated the name change was “designed to bring their description into line with the work they actually carry out and to conform to the nomenclature of similar positions in other courts”.¹⁸ No longer was their role seen to primarily involve conciliation and technical assessment of planning and environmental matters, but rather involved adjudication of such matters. Except for a small percentage, all matters in Classes 1 and 2 were being resolved by adjudication in adversarial litigation. This was seen to be the proper role of the Court to resolve such matters.

The Chief Judge of the time, Justice Pearlman, described this view of the Court’s role as follows:

*“...the Court was created to be a court that is part of the administration of justice of the State and that its role is to carry out functions which courts conventionally undertake such as judicial interpretation of legislation. It was not created to set policy, nor to lobby for the reform of the law, nor to act as a planning or environmental consultancy, nor to undertake research. Its role is to administer justice in the adjudication and resolution of disputes and in the prosecution of offenders. It acts, as all courts do, independently and according to the law. The hearings before it are adversarial proceedings at the end of which the judge or commissioner reaches a decision on the evidence adduced on the hearing and only that evidence, and in that result there will be a winner and a loser”.*¹⁹

This description of the Court and its role is apt for proceedings in Classes 4-7 where the Court exercises judicial functions, but is less apt for merits review matters in Classes 1-3 for three reasons. First, the legislative mandate in s 34(1) of the Act requires conciliation, not adjudication, as the first mechanism to be used in an endeavour to resolve matters in Classes 1 and 2.

Secondly, the legislature requires, by s 38 of the Act, that proceedings in Classes 1, 2 or 3 of the Court’s jurisdiction are to be conducted with as little formality and technicality and with as much expedition, as the requirements of the Act and other statutes and as the proper consideration before the Court permits²⁰; that the Court is not bound by the rules of evidence but may inform itself of any matter in such manner as it thinks appropriate and as the proper consideration before the Court permits²¹; that the Court may obtain the assistance of any person having professional or other qualifications relevant to any issue arising for determination in the proceedings;²² and that, in respect of a matter not dealt with by the Act or the Rules, the Court may give directions as to the procedure to be followed at or in connection with the hearing.²³

Thirdly, the function the Court is exercising in merits review proceedings in Classes 1-3 is administrative, not judicial. The Court exercises afresh the discretionary, administrative power of the person or body whose decision is the subject of the appeal.²⁴ The Court’s decision becomes the final decision of that person or body.²⁵ In so doing, the Court acts as a type of administrative appeals tribunal exercising administrative not judicial powers. Its role is inquisitorial rather than adversarial. The

¹⁸ Justice M L Pearlman, Speech delivered at the Royal Australian Planning Institute Congress 2000 Conference, 5 October 2000, Sydney, p 3.

¹⁹ Justice M L Pearlman, n18 at p 1.

²⁰ s 38(1) of the *Land and Environment Court Act*.

²¹ s 38(2) of the *Land and Environment Court Act*.

²² s 38(3) of the *Land and Environment Court Act*.

²³ s 38(4) of the *Land and Environment Court Act*.

²⁴ s 39(2) and (3) of the *Land and Environment Court Act*.

²⁵ s 39(5) of the *Land and Environment Court Act*.

description of the Administrative Appeal Tribunal's function in merits review appeals by the Federal Court in *Benjamin v Repatriation Commission*²⁶ is equally apposite to the Land and Environment Court in Classes 1-3:

“Proceedings before the tribunal sometimes give the appearance of being adversarial but, in substance, a review by the tribunal is inquisitorial. Each of the commission, the board and the tribunal is an administrative decision maker. Each is under a duty to arrive at the correct or preferable decision in the case before it, according to the material before it. An inquisitorial review conducted by the tribunal is one in which the tribunal is required to determine the substantive issues raised by the material and evidence advanced before it. In doing so, it is obliged not to limit its determination to the “case” articulated by an applicant if the evidence and the material it accepts, or does not reject, raises a case on a basis not articulated by the applicant...”²⁷

Indeed, as the Second Reading Speech of the *Land and Environment Court Bill* noted, the procedural reforms and lack of technicalities required by s 38 of the Act and the lay tribunal nature of the Court when exercising the merits review functions in Classes 1, 2 and 3 were intended by the legislature so as to create a novel dispute resolution forum:

“The Court is a novel concept bringing together in one body the best attributes of a traditional court system and of a lay tribunal system. In consequence, the Court will be able to function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice permit in accordance with clause 38.”²⁸

An emphasis on resolution of disputes in Classes 1 and 2 by adjudication in adversarial litigation, rather than conciliation, has a number of adverse consequences. Preparing a case for adjudication in adversarial litigation takes considerable work and time. The time period between filing and hearing expands when parties prepare for an adversarial contest at the hearing. The time for the hearing itself also expands with the discrete and sequential running of each party's case typical of traditional, adversarial litigation. The increased work and evidence and the increased time necessary to adjudicate a case in adversarial litigation necessarily also causes costs to increase.

Adjudication of merits review matters by the Court in adversarial litigation also can lead to a perception that the Court is usurping the role of the elected government bodies in resolving the disputes, substituting for their decision the unelected, expert opinion of the Court. Whilst this perception may be based on a misunderstanding of merits review by a court or tribunal (the court or tribunal is obliged to make what it believes is the correct or preferable decision on the material before it), it nevertheless more commonly arises where the mechanism used for resolving the dispute is of an adjudicative rather than consensual nature. Hence, the more the Court resolves disputes by adjudication rather than consensus (as is involved with conciliation), the greater the likelihood that a party or parties will perceive themselves to be alienated

²⁶ (2001) 70 ALD 622 at 633; [2001] FCA 1879 at [47].

²⁷ See also *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 526[18], 531[37], 540-541[71] and *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35 (2 August 2007) at [30] in relation to merits review proceedings before the Refugee Review Tribunal not being adversarial.

²⁸ Second Reading Speech of the *Land and Environment Court Bill*, NSW Parliamentary Debates (Hansard) (Third Series) Session 80, Second Session of the 46th Parliament, 14 November 1979 at 3051.

from and lacking control over both the process and the result and resent the imposition of the Court's decision on them. This is particularly so where the Court directs the use of, rather than the parties electing to use, adjudication as the dispute resolution mechanism. In the former situation, the parties do not participate in selecting the process of resolution of their dispute but in the latter situation the parties agree to the process to be used to resolve their dispute. In the latter situation, the parties are more likely to accept the legitimacy of the dispute resolution process and the result of the process. Acceptance will be even greater where the parties have first been able to engage in a consensual dispute resolution mechanism (such as conciliation) in which they have had the opportunity to resolve their dispute themselves but then, when consensus is not able to be achieved, elect to their dispute being resolved by adjudication by the Court.

These adverse consequences of resolution of disputes in Classes 1 and 2 by adjudication in adversarial litigation were being experienced by parties in the late 1990s. They led to a growing chorus of criticism of the Court and its role in the determination of development applications under the *Environmental Planning and Assessment Act 1979*.

One of the Court's responses was to revise its practice and procedure for adjudication of merits review appeals. On 12 August 1999, the Court issued the Pre-Hearing Practice Direction 1999 to provide guidance to parties engaging expert witnesses to give evidence in the Court. This Practice Direction was amended on 1 October 2002 in relation to joint conferencing of experts. As the name of the Practice Direction suggested, the sole focus was on preparing the dispute for adjudication by the Court. It did not address alternative dispute resolution including s 34 conciliation conferences.

Nevertheless, the criticism of the Court's role in resolution of merits review appeals, particularly in relation to development applications, continued. Ultimately, the criticism led to the Attorney General of the day, the Hon J W Shaw QC MLC, announcing on 7 April 2000 the establishment of a working party to review the manner in which the Court resolved disputes in relation to development applications under the *Environmental Planning and Assessment Act 1979*. One of the specific terms of reference was "whether greater reliance could be placed upon alternative dispute resolution mechanisms in resolving disputes in relation to development applications".²⁹ The Working Party recommended, in its report published September 2001 that

*"greater use should be made of alternative dispute resolution (ADR) for the settling of development disputes and that the mechanism should be considered at every stage of the development application and review process. The term ADR encompasses a wide range of mechanisms, including mediation. The Working Party was of the opinion that even where ADR does not prevent a matter being litigated, it may serve to reduce the number of issues in dispute, and therefore the time required for hearing and the costs of both parties".*³⁰

The Working Party recognised the benefits of ADR. In its report it stated:

"Clearly, alternative dispute resolution offers significant social benefits in that it has the potential to reduce conflict in relation to development applications.

²⁹ Report of the Land and Environment Court Working Party, p i.

³⁰ p iii and see Recommendation 3, p vii and p 19.

It is also a far less expensive means of resolving disputes than Court proceedings. Even where alternative dispute resolution does not prevent litigation, it may serve to reduce the number of issues in dispute, and therefore the time required for hearing and both parties' costs. This is not only beneficial to councils, but also to ratepayers, in that a local council which spends less money defending appeals has more money to spend on other matters such as improving public amenities".³¹

One of the reasons for the Working Party recommending greater use of ADR was that the adversarial, adjudicative mechanisms employed by the Court had resulted in excessive costs. The Working Party noted that the average cost of a two day hearing (including lawyers and experts) was between \$20,000 and \$25,000 for each party. The Working Party was of the opinion that such costs were excessive.³²

The Working Party recommended different dispute resolution mechanisms should be employed for different matters, depending upon their size and importance. Minor matters should be dealt with in a different way to major matters. "Minor matters" were defined by the Working Party to be matters "where the value of the development is less than half the median house price in the local government area, and the development raises no general public interest concerns".³³ The Working Party recommended that minor matters should be dealt with by way of a compulsory conference under s 34 of the Act. The Commissioner presiding over such a conference should have the power to make a binding decision if conciliation failed to result in the parties reaching agreement.³⁴

The Working Party made a recommendation to address the problem of representatives of local government not having appropriate delegation to be able to reach agreement in conciliation or mediation. The Working Party quoted with approval a submission in relation to this problem:

"There is also a need to address the general reluctance of councils to provide staff with sufficient delegations to enter into agreements to settle reached at mediation with the authority of the council. This has placed limitations on the effectiveness of mediations as an alternative to hearings... We would encourage the Court to ensure that a representative has appropriate authority to settle. This would be a discretionary matter which perhaps could be supported by a role of the Court".³⁵

The Working Party recommended that "Councils are encouraged to make appropriate delegations, including the power to negotiate and settle matters, so as to enable their representatives to participate effectively in ADR facilitated by the Court (that is, preliminary conferences [under s 34] and mediation)".³⁶

In relation to matters that were not able to be resolved through alternative dispute resolution mechanisms and would need to be resolved by adjudication, the Working Party recommended that "the formality of proceedings should be reduced and matters should be dealt with in a less adversarial manner".³⁷ The Working Party

³¹ pp 31-32.

³² p iv and p 57.

³³ p iv and p 65 and Recommendation 25.

³⁴ pp iv, xi and 65 and Recommendation 26.

³⁵ p 74.

³⁶ Recommendation 32, p 74.

³⁷ p iv.

stated that it accepted “the need to de-judicialise planning appeals and to eliminate aspects of the adversarial mode of trial that are not conducive to the fair determination of an administrative appeal”.³⁸ The Working Party recommended that:

“In accordance with s 38(1) of the Land and Environment Court Act 1979, the Court should discourage legal formality and technicality in dealing with development applications.

If adopted, the Working Party’s recommendations in relation to minor matters [Recommendations 25 and 26] should dispense with much of the formality currently associated with planning appeals”.³⁹

In 2002, Parliament responded to the Working Party’s report.⁴⁰ Parliament adopted the recommendation of the Working Party that minor and major matters be dealt with differently, but not the recommended manner of resolving such matters. Minor matters under the legislation are to be dealt with by way of an on-site hearing. An on-site hearing is to be conducted “by means of a conference presided over by a single commissioner”.⁴¹ Although the matter is to be dealt with “on site” and by the informal means of a “conference”, it is nevertheless still a hearing and therefore involves adjudication of the dispute. It stands in contrast to the recommendation of the Working Party that such minor matters should be dealt with through the means, firstly, of a conciliation conference under s 34 of the Act, with the capacity of adjudication by the Commissioner if conciliation fails to reach agreement (the binding component).

Indeed, the adjudicative model was emphasised by the amendment of s 34(1) to remove the facility of a conciliation conference for matters which are required to be dealt with by an on-site hearing under s 34A and 34B of the Act.

The consequence was that the very types of matter which would most benefit from using conciliation rather than adjudication – minor matters – were precluded from employing conciliation as a dispute resolution mechanism.

Hence, the approach selected by the legislature was a continuation of the adjudicative model of resolution of minor matters, rather than that of conciliation as recommended by the Working Party and s 34 as originally enacted.

The amendments to the *Land and Environment Court Act* came into effect on 10 February 2003.

The Court’s 2003 Annual Review noted that a nine month review of the operation of on-site hearings revealed that “despite the informal nature of on-site hearings, legal representation was high and the expert reports were regularly lengthy and excessive in their content”.⁴² More generally, the adversarial, adjudicative approach to resolution of merits review matters continued to cause problems. The then new Chief Judge, Justice McClellan, noted in the Introduction to the 2003 Annual Review that:

³⁸ p 62.

³⁹ Recommendation 22, p x.

⁴⁰ see *Land and Environment Court Amendment Act 2002*.

⁴¹ s 34B(1) of the *Land and Environment Court Act*.

⁴² p 5 of the *Land and Environment Court Annual Review 2003*.

“It is apparent that over time merit review hearings in the Court have grown in both length and complexity, the number of witnesses is greater and the intensity of the forensic contest has increased. Merit review has become a more formal process with increased costs burdens for all involved. Instead of the object of merit review being to achieve the best community outcome many cases become a contest where the object is to win, sometimes whatever the cost.”⁴³

Elsewhere, Justice McClellan elaborated on the problem:

“The intention of the legislature is clear. When providing an administrative review function within the structure of the Land & Environment Court it was intended that by the appointment of persons with expertise in relevant areas, decisions in merit matters would be made, if possible, without the conventional trappings of adversary litigation. The Court was provided with authority to make its own enquiries and obtain information, subject of course to the right of the parties to respond to any information which is obtained in this manner.

In recent years it became increasingly apparent that the expectations of the Parliament have not always been fulfilled. In large part this is the fault of the legal profession. It comes from our inability to contemplate the resolution of any dispute without the conventional adversarial processes. This has meant that merit review is often an intense forensic contest in which there are “winners and losers”, when the legislation intended instead that public and private resources would be applied to achieving the “best community outcome”.

Because merits review has come to be seen as an adversarial contest, there has been an investment of significant political and intellectual capital in achieving a “win”, very often irrespective of the cost in terms of time, money and other resources. Solutions to problems are secondary, the primary object being to beat the opposition. One consequence is that many cases are visited with a plethora of experts, sometimes each party calling more than one expert on the same issue. The purpose of this evidence is, in some cases, to influence the Court by providing a weight of opinion, without recognising that the Court is more likely to be influenced by the intrinsic quality of the opinion. The purpose for which expert evidence is admissible in proceedings is often lost. Rather than the evidence being tendered to inform the Court about an area of special learning, where the Court may need assistance, it is designed to found a submission which says that the number or weight of opinions in one direction should determine the outcome of the case”.⁴⁴

As a consequence, the Court repealed the Pre-Hearing Practice Direction 1999 and replaced it with Practice Direction No 17, effective 1 March 2004. This Practice Direction established new practices and procedures for proceedings in Classes 1 and 2, and in Class 4. The purpose was to save costs and time by avoiding unnecessary appearances before the Court and to conduct proceedings efficiently. Alternative dispute resolution including conciliation conferences was not addressed.

⁴³ p 2 of the Land and Environment Court Annual Review 2003.

⁴⁴ Justice P D McClellan, “The Recent Experience of the Land and Environment Court”, a paper presented to the 22nd ALJA Annual Conference, “Proportionality – cost-effective justice?”, 17-19 September 2004, Sydney, pp 3-4.

The Court also issued Expert Witness Practice Direction 2003, effective 2 February 2004. This also replaced Practice Direction 1999 dealing with expert witnesses. Expert evidence was again addressed in 2005. This time the Court issued Practice Direction No 1 of 2005 on Court Appointed Experts, effective 1 February 2005.

The reforms may have improved the manner in which matters in Classes 1 and 2 were adjudicated but they resulted in a further decline in the use of conciliation conferences. In particular, the legislative changes to s 34(1) increased the use of on-site hearings and decreased the use of conciliation conferences (see Appendix A).

The return of the flow towards the original legislative intention for conciliation

The restriction on the availability of s 34 conciliation conferences for planning and environment matters, particularly the minor matters that are required to be dealt with at on-site hearings, as well as for other matters in Class 3, was addressed by legislative amendment by the *Crimes and Courts Legislative Amendment Act 2006* effective 29 November 2006. This amendment reversed the 2002 amendment which restricted the availability of conciliation for matters which were required to be dealt with as an onsite hearing. Subsection 34(1) was reinstated to its original form of making mandatory conciliation conferences for matters in Class 1 or 2 of the Court's jurisdiction, unless otherwise directed by the Chief Judge.

In addition, the availability of conciliation conferences was extended to all matters in Class 3 of the Court's jurisdiction. Back in 1991, when the *Land Acquisition (Just Terms Compensation) Act 1991* was introduced, s 34 of the *Land and Environment Court Act* was amended to make available the facility of a conciliation conference for proceedings in Class 3 in respect of a claim for compensation by reason of a compulsory acquisition of land. A new provision, subsection (1A), was inserted effecting this change. However, the Registrar could only arrange a conciliation conference for such matters at the request of all the parties to the proceedings. (This legislative amendment also inserted a new subsection (9) which permitted the Registrar (in addition to Commissioners) to preside over a conciliation conference under s 34.)

The further amendments in 2006 extended the facility of a conciliation conference under s 34 to all proceedings in Class 3 of the Court's jurisdiction and extended the power of the Court to arrange a conciliation conference for such matters, not only on the application of the parties, but also on the Registrar's own motion.

The original intention of the legislature for resolution of matters in the merits review Classes of the Court's jurisdiction has therefore been reinstated and, to an extent, widened.

Following on from these legislative amendments, the Court issued in 2007 new Practice Notes for various types of merits review matters in Classes 1, 2 and 3 and proceedings in Class 4. In relation to alternative dispute resolution, the Practice Notes create a presumption in favour of referring matters to a conciliation conference unless the parties demonstrate a reason to the contrary.

Practice Note – Class 1 Development Appeals, effective 14 May 2007, requires parties, in preparation for the first direction hearing, to complete an information sheet.⁴⁵ Question 3 of that sheet asks:

⁴⁵ Schedule E to Practice Note – Class 1 Development Appeals.

- “3. *Is there any reason for the proceedings not to be fixed for a preliminary conference under s 34 of the Land and Environment Court Act 1979? If so, provide reasons [point form only].*”

At the first directions hearing, the parties are to hand to the Court the completed information sheet.⁴⁶ The parties are to inform the Court if there is any reason for the proceedings not to be fixed for a preliminary conference under s 34.⁴⁷ If the parties do not satisfy the Court that there is a good reason the proceedings should not be fixed for a preliminary conference under s 34, then, in the ordinary course, the proceedings will be fixed for a preliminary conference. For short matters, the conference will be fixed before the Duty Commissioner on the next available Friday. For other matters, the conference will be fixed within 14 days, subject to the availability of the Court.⁴⁸

Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals makes similar arrangements for conciliation conferences for matters with which that Practice Note deals.⁴⁹

Practice Note – Class 3 Valuation Objections takes the requirements for alternative dispute resolution further. It establishes a pre-action protocol for alternative dispute resolution. Paragraph 12 and part of the attached note provide:

- “12. *If reasonably practicable, before the first directions hearing in the matter, the applicant and the Valuer-General (or their authorised representatives) are either to:*
- (a) *meet for the purpose of formal or informal mediation on a “without prejudice” basis for the purpose of determining whether the objection may be resolved; or*
 - (b) *confer in order to nominate a time for such a meeting to occur so that this time may be notified to the Court at the first directions hearing.*

Note: Except with leave of the Court, parties will not be permitted to proceed to a hearing of valuation objections unless and until the parties have engaged in an informal or formal process of mediation to ascertain whether the valuation objection may be resolved other than by a hearing before the Court. Parties may proceed to a preliminary conference under s 34 of the Land and Environment Court Act 1979 instead of mediation.”

The Practice Note requires parties in preparation for the first directions hearing to complete an information sheet.⁵⁰ The information sheet asks:

- “3. *Have the parties sought to resolve their dispute by mediation? Yes/No [Give details of the steps taken to resolve the dispute]*
4. *Is there any reason for the proceedings not to be fixed for a preliminary conference under s 34 of the Land and Environment Court Act 1979? If so, provide reasons [point form only].*

⁴⁶ paragraph 15 of Practice Note – Class 1 Development Appeals.

⁴⁷ paragraph 13 of Practice Note – Class 1 Development Appeals.

⁴⁸ paragraph 14 of Practice Note – Class 1 Development Appeals.

⁴⁹ see paragraphs 8, 9, 10 and the information sheet (Schedule B, paragraph 2) of Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals.

⁵⁰ Schedule A to Practice Note – Class 3 Valuation Objections.

The Practice Note makes similar arrangements, at the first directions hearing, for the parties informing the Court if there is any reason not to fix the proceedings for a preliminary conference under s 34⁵¹ and for the Court to fix such a conference.⁵²

Practice Note – Class 3 Compensation Claims addresses the ADR mechanisms of mediation, neutral evaluation and reference to a referee, but not conciliation. The reason is that, historically, virtually all proceedings involving compensation claims in Class 3 have been dealt with by a judge, not a Commissioner. Judges are precluded from acting as a conciliator under s 34. Further, until legislative amendments in November 2006, matters could only be referred to conciliation with the consent of the parties and at their request.

Under Practice Note – Class 3 Compensation Claims, parties are required to give consideration prior to and throughout the course of the proceedings to whether the proceedings or any questions are appropriate for mediation or neutral evaluation or for reference to a referee.⁵³ The obligation to consider the appropriateness of ADR is also imposed on the legal practitioners:

“It is expected that legal practitioners, or litigants if not legally represented, will be in a position to advise the Court at any directions hearing or mention:

- (a) whether the parties have attempted mediation or neutral evaluation; and*
- (b) whether the parties are willing to proceed to mediation or neutral evaluation at an appropriate time.⁵⁴*

The Practice Note requires parties to ensure that a person with authority to settle attends the mediation or neutral evaluation.⁵⁵ The Practice Note specifies the procedure for reference to mediation, neutral evaluation or reference to a referee.⁵⁶

The Practice Notes also require parties to provide to each other information before matters are fixed for a conciliation conference. This has the benefit of enabling parties to conciliate on an informed basis.

Practice Note – Class 1 Development Appeals requires applicants, before the first directions hearing, to ensure that any plans of any development accompanying the development appeal application satisfy the requirements in Schedule A.⁵⁷ Before the first directions hearing, on request, a respondent who is a public authority or public official is to provide the other party with access to the documents relevant to the development application or modification application and its decision (if any) within 14 days of the request.⁵⁸

The respondent consent authority is required also before the first directions hearing to file and serve a statement of facts and contentions in accordance with Schedule

⁵¹ paragraph 16 of Practice Note – Class 3 Valuation Objections.

⁵² paragraph 17 of Practice Note – Class 3 Valuation Objections.

⁵³ paragraph 42 of Practice Note – Class 3 Compensation Claims.

⁵⁴ paragraph 43 of Practice Note – Class 3 Compensation Claims.

⁵⁵ paragraph 44 of Practice Note – Class 3 Compensation Claims.

⁵⁶ paragraphs 45 and 46 of Practice Note – Class 3 Compensation Claims.

⁵⁷ paragraph 6 of Practice Note – Class 1 Development Appeals.

⁵⁸ paragraph 11 of Practice Note – Class 1 Development Appeals.

B.⁵⁹ The statement of facts and contentions is divided into two parts. Part A Facts identifies the proposal, the site, the locality, the statutory controls and the actions of the respondent consent authority. Part B Contentions identifies each fact, matter or circumstance that the consent authority contends require or should cause the Court in exercising the functions of the consent authority, to refuse the application or to impose certain conditions.

All parties are required, in preparation for the first directions hearing, to complete the information sheet in Schedule E and to hand up the completed information sheet to the Court at the first directions hearing.⁶⁰ The completed information sheets provide further information of benefit to the parties at any conciliation conference.

Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals makes similar arrangements for provision of information by parties before and at the first directions hearing. Before the first directions hearing, on request, the respondent who is a public authority or public official is to provide the other party with access to the documents relevant to the application and its decision (if any) within 14 days of the request.⁶¹ In preparation for the first directions hearing the parties are to complete the information sheet in Schedule B and hand the completed information sheets to the Court.⁶²

Practice Note – Class 3 Valuation Objections requires the Valuer-General (who is always the respondent in these matters) before the first directions hearing, to provide the applicant with access to (and copies of, if requested) documents within the possession, custody or control of the Valuer-General that were relevant to the Valuer-General's consideration and determination of the valuation the subject of the objection.⁶³ The applicant, in turn, is required before the first directions hearing, to notify the Valuer-General of the valuation for which the applicant contends.⁶⁴

Both parties, in preparation for the first directions hearing, are required to complete the information sheet in Schedule A and hand to the Court the completed information sheets.⁶⁵

These various requirements facilitate the early referral of matters to conciliation.

Recently, the Court issued a note to parties and their legal practitioners clarifying some aspects of conciliation conferences under s 34. First, the conferences involve conciliation and are not merely preliminary meetings. The text of the section makes this clear. The heading to the section may be "Preliminary conference" but the heading is not part of the Act.⁶⁶ The only sense in which the conciliation conference is "preliminary" is that for matters in Classes 1 and 2 it is required to precede any adjudication of those matters (unless otherwise directed by the Chief Judge).

Second, parties should be prepared and have sufficient instructions and authority to engage in meaningful conciliation at the conference whether or not they agree to the Commissioner later resolving the dispute by adjudication if agreement is not reached.

⁵⁹ paragraph 8 of Practice Note – Class 1 Development Appeals.

⁶⁰ paragraph 15 of Practice Note – Class 1 Development Appeals.

⁶¹ paragraph 6 of Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals.

⁶² paragraph 10 of Practice Note – Classes 1, 2, and 3 Miscellaneous Appeals.

⁶³ paragraph 10 of Practice Note – Class 3 Valuation Objections.

⁶⁴ paragraph 11 of Practice Note – Class 3 Valuation Objections.

⁶⁵ paragraph 14 of Practice Note – Class 3 Valuation Objections.

⁶⁶ see s 35(2)(a) of the *Interpretation Act 1987* (NSW).

To this end, the Court will make a direction, when a matter is fixed for a conciliation conference, that:

"All parties must be prepared and have sufficient instructions and authority to engage in meaningful conciliation at the conference".

Third, the parties and their legal practitioners should consider the option provided for in s 34 that, if the parties after participating in good faith in conciliation are not able to reach agreement as to the terms of a decision, the parties can still agree to the Commissioner disposing of the proceedings by adjudication, with or without a further hearing. The Court requests parties and their legal practitioners to inform the Court at the first directions hearing (when matters can be referred to a conciliation conference) of their respective positions on utilising this option. If the parties agree to this course, the Court asks the parties to have available at the directions hearing draft short minutes of order to enable the conciliation conference to proceed in the agreed, sequential manner (first, conciliation and then, if conciliation is unsuccessful, adjudication). Of course, even if the parties do not agree in advance of the fixing and holding of the conciliation conference to the option of the Commissioner disposing of the proceedings by adjudication, there is still worth in the parties participating in the conciliation conference. The parties may be able to resolve their dispute themselves or they could change their mind after conciliation and agree to the Commissioner disposing of the proceedings.

The dispute resolution model under s 34

A hybrid process

The dispute resolution model embodied in s 34 is a combined or hybrid dispute resolution process involving, first, conciliation, and then if the parties agree, adjudication. Combined or hybrid dispute resolution processes are processes in which the dispute resolution practitioner plays multiple roles.

Sometimes, the hybrid process – like a true hybrid – combines in the one process different elements derived from heterogeneous dispute resolution mechanisms. Concilio-arbitration is an example. The concilio-arbitrator receives information from the parties at the commencement of the process, either through written submissions or individual meetings. The concilio-arbitrator as quickly as possible after receiving the information provides an opinion as to the probable outcome of the dispute, if litigated. The draft opinion is circulated to the parties. They may make comments on it before it is finalised. This gives the parties a second opportunity to present their case or correct perceived misconceptions. The concilio-arbitrator then produces a final opinion which is binding on the parties, unless either dissents within a fixed period.⁶⁷ This is **not** the model adopted by s 34 of the Act.

Other times, the hybrid process retains the individual character of the different dispute resolution mechanisms but arranges them so that they may be dealt with progressively and sequentially. Med-arb is an example. The dispute resolution practitioner first uses one process (mediation) and then, by agreement of the parties, a different one (arbitration). This **is** the model adopted by s 34 of the Act. The process may be described as “conciliation-adjudication” – first, the dispute resolution practitioner uses conciliation and then, by agreement of the parties, adjudication.

⁶⁷ H Astor and E M Chinkin, n 4 at p 144.

This progressive and sequential use of two dispute resolution mechanisms needs further explanation.

Conciliation process

As noted above, the conciliation involves a Commissioner with technical expertise on the issues relevant to the case acting as a conciliator in a conference between the parties. The conciliator facilitates negotiation between the parties with a view to their achieving agreement as the terms of a decision in the proceedings that would be acceptable to the parties.

The parties are under an implied duty to negotiate in good faith. This involves more than mere attendance at the conference; it goes towards the conduct of the parties.⁶⁸ The essential core content of an obligation to negotiate or conciliate in good faith involves, first, to undertake to subject oneself to the process of negotiation or conciliation and, secondly, to undertake in subjecting oneself to that process, to have an open mind in the sense of a willingness to consider such options for the resolution of the dispute as may be propounded by the other party or by the conciliator, as appropriate, and a willingness to give consideration to putting forward options for the resolution of the dispute.⁶⁹ The parties must also be in a position to reach agreement by having the necessary authority.

If the parties are able to reach agreement, the conciliator, being a Commissioner of the Court, is able to dispose of the proceedings in accordance with the decision in respect of which the parties have reached agreement.⁷⁰

The only restriction is that the decision as to which the parties have reached agreement is one that the Court “could have made in the proper exercise of its functions”.⁷¹ This does not require the Commissioner to determine whether the decision is one which the Commissioner “would have” made in the proper exercise of the Court’s functions, rather that it is one which the Commissioner “could have” made in the proper exercise of the functions. It is a check on the legality of the agreement, not its planning or environmental acceptability. The Court, in disposing of the proceedings in accordance with the decision reached by agreement of the parties, is not exercising for itself adjudicative functions. It is merely implementing the statutory mandate that proceedings be disposed of in accordance with the decision in respect of which the parties have reached agreement.

In checking on the legality of the decision, the Commissioner ought to address the Court’s jurisdiction to make the decision (the matter is one listed in ss 17-19 of the Act); that the decision is a type that may be made under the statute in which the power is vested (for example, under s 121ZK(4) of the *Environmental Planning and Assessment Act 1979* or s 9 of the *Trees (Disputes between Neighbours) Act 2006*); that any legal pre-conditions to making the decision have been satisfied (such as mandatory notification requirements or requirements that applications be accompanied by statutory documents such as an environmental impact statement); and any other matters relevant to the power of the Court to make the decision.

After satisfying itself that the decision is one that the Court could have made in the proper exercise of its functions, the order the Court would make would simply be in

⁶⁸ *Aiton Australia v Transfield Pty Ltd* (1999) 153 FLR 236; [1999] NSWSC 996 at [92].

⁶⁹ *Aiton Australia v Transfield Pty Ltd* (1999) 153 FLR 236; [1999] NSWSC 996 at [156].

⁷⁰ s 34(3)(a) of the *Land and Environment Court Act*.

⁷¹ s 34(3)(a) of the *Land and Environment Court Act*.

terms of the decision reached by agreement of the parties. This could be done by an order to the effect: "By consent of the parties, the Court makes orders in accordance with the attached short minutes of order signed by the parties or their duly authorised representatives". The attached orders would be the terms of the decision which the parties have agreed the Court should make. For example, in an appeal in relation to a development application, the orders might include an order that the appeal be upheld and that development consent be granted to the development on conditions specified.

Adjudication process

If the parties are not able to reach agreement as to the terms of a decision in the proceedings that would be acceptable to the parties, they can nevertheless agree to the Commissioner disposing of the proceedings by adjudication, whether with or without a further hearing.⁷² This shows the hybrid dispute resolution process: the parties move from conciliation to adjudication. Once the parties agree to the Commissioner disposing of the proceedings, the Commissioner's role changes from conciliator to adjudicator. This has a number of ramifications.

First, the Commissioner must thereafter conduct the process as an adjudication. This means the Commissioner should mark the transition from conciliation to adjudication by announcing the commencement of the hearing. The Commissioner should deal with any party's application to adjourn the matters to a further hearing (this course being contemplated in s 34(3)(b)(ii)).

Secondly, the Commissioner needs to identify the material upon which the adjudication is to proceed and the Commissioner's decision is to be based. Anything said or admissions made by parties in the course of the conciliation conference is not admissible, unless the parties consent, at the hearing of the proceedings.⁷³ In relation to documentary evidence, a distinction needs to be drawn depending on the time at which and the purpose for which it was brought into existence. If the document was brought into existence only for the purpose of the conciliation, it would not be admissible in evidence at the hearing unless all of the parties consent. However, if the document was brought into existence for other purposes, although it may have been referred to in the course of the conciliation, it would still be admissible to be tendered at the hearing. The mere reference to the document in the course of the conciliation cannot sterilise or render the document immune from subsequent consideration by the court.⁷⁴

The parties, therefore, need to identify and tender the evidence upon which they wish the Commissioner to rely in making the decision. Documentary evidence should be tendered as exhibits in the normal course. Oral evidence should be adduced in the hearing, even if this involves some repetition of facts or opinions stated in the conciliation conference (provided, of course, there is no disclosure of any without prejudice communications or admissions).

At the conclusion of the evidence, the parties should be afforded the opportunity of making submissions, based on the evidence tendered, as to the decision the Commissioner should make.

⁷² s 34(3)(b)(ii) of the *Land and Environment Court Act*

⁷³ see s 34(7) and *Lukies v Ripley [No 2]* (1994) 35 NSWLR 283 at 289

⁷⁴ see *AWA Ltd v Daniels*, unreported, Supreme Court of New South Wales, Rolfe J, 18 March 1992, p 6 and *AWA Ltd v Daniels* (1992) 7 ACSR 463 at 468 per Rogers CJ in CommD.

The Commissioner then makes the decision that the Commissioner considers is the correct or preferable decision in the proper exercise of the Court's functions, including in exercising the functions of the consent authority or person whose decision is subject to appeal.⁷⁵ In the case of an appeal from a council in relation to a development application, this involves consideration of the matters in s 79C(1) of the *Environmental Planning and Assessment Act 1979*.

The decision should be expressed in the terms usually used for disposing of proceedings in Classes 1-3. In the case of an appeal in relation to a development application, this includes upholding or dismissing the appeal and in case of the former, granting development consent to the development subject to the conditions specified. The Court's orders would be in the usual form.

The Commissioner is required to give written reasons for the decision⁷⁶. If the decision is given *ex tempore*, the reasons can be stated orally at the time of the decision, however, they would need to be recorded and transcribed so that written reasons can be provided subsequently. If the decision is reserved, a written judgment recording the decision and the reasons can be delivered at a later date.

Referral back to Court for litigation

If the parties are not able to agree either on the terms of the decision in the proceedings that would be acceptable to the parties⁷⁷ or that the Commissioner should dispose of the proceedings, whether with or without further hearing⁷⁸, the proceedings are to be referred back to the Court for the purpose of being fixed for a hearing before another Commissioner. In that event, the conciliation Commissioner makes a written report to the Court setting out that fact as well as stating the Commissioner's views as to the issues in dispute between the parties to the proceedings.⁷⁹ The requirement to report "as to" the issues in dispute is merely to state the issues not to express the Commissioner's views of the merits of the issues. This is still a useful outcome, as it scopes the issues and often will result in the proceedings being able to be heard and determined expeditiously with less hearing time and with less cost. These benefits were recognised by the Working Party in its report.

After delivery of the written report under s 34(3)(b)(i), the Registrar is required, as soon as practicable, to furnish a copy of the report to the parties.⁸⁰

Confidentiality in the conciliation process

To ensure the confidentiality of information and statements provided by the parties in the conciliation process, and to thereby encourage parties to be full and frank in their discussions, s 34 requires a quarantining of information and communications at the conciliation in three ways.

First, the written report of the conciliation Commissioner under s 34(3)(b)(i) is required to be confined to stating the fact that no agreement was reached and the

⁷⁵ see s 39(2), (3) and (4) of the *Land and Environment Court Act*.

⁷⁶ s 34(3A) of the *Land and Environment Court Act*.

⁷⁷ s 34(3)(a) of the *Land and Environment Court Act*.

⁷⁸ s 34(3)(b)(ii) of the *Land and Environment Court Act*.

⁷⁹ s 34(3)(b)(i) of the *Land and Environment Court Act*.

⁸⁰ s 34(6) of the *Land and Environment Court Act*.

Commissioner's views as to the issues in dispute and no more. Secondly, evidence of anything said or admission made in the course of the conciliation conference is not, unless the parties consent, admissible at the hearing of the proceedings.⁸¹ Thirdly, the conciliation Commissioner is disqualified from further participation in the proceedings (including being the Commissioner hearing and determining the proceedings or case managing the proceedings after the conference), unless the parties otherwise agree.⁸²

Benefits of conciliation

Reducing cost

Reducing the costs of and associated with the resolution of a dispute is clearly a desirable goal. The costs of dispute resolution vary not only in magnitude but also in type and extent with the different types of dispute resolution mechanisms. Litigation results in financial costs to the parties to the dispute, both the legal costs of the proceedings and consequential financial costs such as opportunity costs, deferral of revenue, holding costs and interest costs; costs to third parties flowing from the costs to the parties, such as to ratepayers of local councils (eg increased rates and charges in or reduction or deferral of services and public amenities in order to fund litigation costs) or shareholders (eg reduction in profits or dividends); unquantifiable costs to parties, witnesses and public officials such as lost working hours, stress and health effects; costs to the court system including building and maintenance costs, staffing costs, including judicial and other salaries, and costs of producing documentation including transcript and records.⁸³

These costs ought to be, but rarely are, proportionate to the scale and importance of the dispute. There is a substantial component of costs that is incurred in all litigation, regardless of the scale and importance of the dispute. This results in litigation costs being disproportionately higher for minor matters. The effect can be to reduce access to justice because the disproportionate cost of litigation compared to the value and importance of the dispute makes it uneconomic to litigate.

Differential case management can assist in reducing the costs of litigation and endeavouring to achieve proportionality, but it can only go so far.

Conciliation may reduce costs and ensure proportionality to the value and importance of the dispute. Matters can be conciliated earlier without the full expenditure that is necessary for preparing a matter for trial.

The time taken for resolution of matters by conciliation is usually less than for resolution by adjudication. Each of the types of costs incurred in litigation referred to above is reduced.

Reducing delay

Delay causes financial costs to parties (referred to above). It also causes emotional cost to parties and witnesses. Delay affects other litigants by increasing queuing and time taken for resolution of other litigants' disputes. Delay causes costs to the court system, including increasing management and administration.

⁸¹ s 34(7) of the *Land and Environment Court Act*.

⁸² s 34(8) of the *Land and Environment Court Act*.

⁸³ H Astor and C Chinkin, *Dispute Resolution in Australia*, 2nd ed, LexisNexis Butterworths, 2002, p 52

Conciliation may reduce delay. Matters can be referred by the Court to conciliation at the first direction hearing (which is usually 28 days after filing of the applications commencing the proceedings). For short matters, the conciliation conference can be before the Duty Commissioner on the next available Friday or for other matters, the conciliation conference can be within 14 days. These are far shorter periods than the period ordinarily taken before a hearing if the matter is litigated.

Informality, participation and control

Court practices and procedures regulate the preparation for and conduct of hearings. The practices and procedures are intended to achieve a just result by fair means. Although litigation of merits review matters in Classes 1-3 of the Court's jurisdiction is required to be conducted with less formality and technicality and the rules of evidence do not apply⁸⁴, nevertheless the process remains structured, ordered and regulated. The procedures followed in a court hearing contrast to ordinary conventions of social interaction.

Even the most informal court hearing is still perceived by users and the public as formal compared to usual social interaction. The court procedures regulate who can participate and when they can participate. The procedures regulate the content and the manner of participation. Courts are controlled by judges or commissioners and by lawyers who are familiar with the norms. Lay people may feel they are playing a minor role, even in their own cases. Court hearings can, therefore, be experienced as alienating.⁸⁵

Courts can be intimidating for people who are not familiar with courts. Litigation and court proceedings can provoke or increase pressure on litigants.⁸⁶

The conciliation process, in contrast, is more informal and familiar to participants. It allows participation to a greater extent and in a manner that accords with usual conventions of social interaction. It does not marginalise participants. Participants believe they have greater control over the process and the result.⁸⁷

Expanded scope of claims and remedies

Litigation imposes restrictions on the scope of claims and remedies. For planning and environmental matters, to a large extent, the restrictions are dictated by statute. For example, the ability to obtain a development consent will be regulated by the *Environmental Planning and Assessment Act 1979*, the *Environmental Planning and Assessment Regulation 2000* and the relevant environmental planning instruments. However, within those legal parameters, there is flexibility. Development for a particular purpose may be permissible with consent and the form of development may have to satisfy certain development standards, but there still would be a range of developments that could meet these requirements.

The litigation process, however, focuses, and thereby limits, the debate between the parties. Court procedures require the identification of issues. Formerly this was required to be done for matters in Classes 1 and 2 by a statement of issues, now under the current Practice Notes it is done by a statement of fact and contentions

⁸⁴ see s 38(1) and (2) of the Act.

⁸⁵ H Astor and C Chinkin, n 83 at p 61.

⁸⁶ H Astor and C Chinkin, n 83 at p 62.

⁸⁷ See generally, L Boule, *Mediation: Principles, Process, Practice*, LexisNexis Butterworths, 2005, pp 65-67.

and any reply. Either way, there is a joining of issues between the parties. These issues set the agenda for evidence at the hearing, and the adjudicative judgment.⁸⁸

Conciliation, however, can expand the scope of the debate between the parties. Although the outer parameters of legality remain, the inner parameters of the issues joined between the parties do not confine the dialogue between the parties. Parties can discuss and resolve other aspects of the dispute. There may be a number of adjectival issues which parties need to address.⁸⁹

Conciliation's integrative processes can be transformative. Relationships between the parties, between the parties and neighbours, or between the parties and the community can be established or enhanced. This can be beneficial in preventing and resolving future disputes, a likelihood given the on-going nature of planning and environmental disputes and relationships in the community.⁹⁰

Enlarging concepts of success

The adversarial litigation approach defines success in terms of winners and losers. The party that wins – receives judgment in their favour – is successful. But as noted earlier, merits review is not about winners and losers. The court in exercising merits review determines the correct or preferable result on the material before it.

Conciliation is a means by which the parties to a dispute reach what they agree is the correct or preferable result. That can be a different result to one that an expert adjudicator such as the Court considers to be correct or preferable. That the parties are able to reach consensus on the result is a success. The terms of the settlement do not need to be evaluated by the Court to determine whether they are acceptable in planning or environmental terms (as distinct from the legality of the settlement).

Conciliation processes can also be successful even where consensus is not able to be reached. The parties may agree to the conciliator changing roles to become the adjudicator so as to determine the dispute. That agreement is itself a successful outcome, not just because the dispute will be resolved through the adjudication but because the parties have agreed upon the means by which their dispute is to be resolved and have agreed to abide by the result of that process.

Even where neither of these forms of agreements are able to be achieved, the parties through the conciliation process may scope the issues of the dispute. Reduction, clarification and focusing of issues can significantly reduce the time required for preparation for hearing and the hearing itself, and limit the nature and scope of preparation, including evidence required. Facts may also be able to be agreed. Savings in costs necessarily follow.

The process of conciliation can also be successful in establishing dialogue between parties who have become estranged or non-communicative, or are otherwise in relationship conflict. It can kindle in the parties understanding of and empathy for each other's position and underlying interests. Conciliation can be a therapeutic intervention.

⁸⁸ *Segal v Waverley Council* (2005) 64 NSWLR 177 at 201-202.

⁸⁹ See generally as to responsiveness to parties' need and interests, L Boule, n 87 at pp 63-65.

⁹⁰ C Napier (ed), *Environmental Conflict Resolution*, Cameron & May, London, 1998, p 38. On the transformative potential, see B Moore and J M McDonald, *Transforming Conflict*, TJA, 2000, pp 29-30 and L Boule, n 87 at pp 73-74

Conclusion

The Court operates as a de facto form of multi-door court house⁹¹ in two respects. First, it offers, under the one roof, an array of dispute resolution services. In-house, it offers adjudication, conciliation, mediation and neutral evaluation. The availability of different dispute resolution services facilitates the Court being able to “fit the forum to the fuss”.⁹² The different services can also be individually tailored. For example, the forum for adjudication in Classes 1 and 2 matters can be an on-site hearing or a court hearing. Dispute resolution services can be combined such as conciliation-adjudication under s 34.

Secondly, there is a central intake and screening and sorting mechanisms to direct disputants to the appropriate dispute resolution service. The Practice Notes assist in explaining and exhorting use of appropriate dispute resolution mechanisms. The Registrar and List Judges at callovers and directions hearings act as de facto screeners and sorters, guided by the Court Act, Rules and Practice Notes.

In the case of conciliation, there is a legislative presumption in favour of using conciliation for matters in Classes 1 and 2. Disputants need to show good reason for the registrar not to arrange a conciliation conference as the first means of endeavouring to resolve the dispute. For matters in Class 3, the Court urges the parties to consider carefully the benefits of conciliation and its appropriateness to their circumstances and the circumstances of the dispute.

Preferably, referral to conciliation will be by consent of all parties. However, there is still a place for court-ordered conciliation. The opposition of one or both parties to a court-ordered conciliation or mediation is a relevant consideration but is not conclusive.⁹³ The compulsory referral power is directed to disputants “who are reluctant starters but may become willing participants”.⁹⁴

Through these processes, the Court is able to offer and the parties can utilise the “appropriate dispute resolution” mechanism for their dispute. In this wider sense, the Court truly does offer ADR.

⁹¹ For an explanation of the multi-door courtroom concept, see L Ray and A Clare, “The Multi-Door Courthouse Idea: Building the Courthouse of the Future...Today”, (1985), 1 *Ohio State Journal on Dispute Resolution* 7; L Finkelstein, “The DC Multi-Door Court House” (1986) 69 *Judicature* 305; G Kessler and L Finkelstein, “The Evolution of a Multi-Door Courthouse”, (1988) *Catholic University Law Review* 577; and J Stempel, “Reflections on Judicial ADR and the Multi Door Court House at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?” (1996) 11 *Ohio State Journal on Dispute Resolution* 297

⁹² See L Ray, “Emerging Options in Dispute Resolution”, (1989, June) *American Bar Association Journal* 66 at 67 and F Sandler and S Goldberg, “Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure” (1994) 10 *Negotiation Journal* 49

⁹³ *Harrison v Schipp* [2002] NSWCA 27 (15 February 2002) at [14] and *chinadotcom corp v Morrow* [2001] NSWCA 82 (5 April 2001) at [4].

⁹⁴ See Justice Spigelman, “Mediation and the Court” (2001) 39(2) *LSJ* 63 at 65; *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 427 (23 May 2001) at [40], [47]; *Remuneration Planning Corp Pty Ltd v Fitton; Fitton v Costello* [2001] NSWSC 1208 (14 December 2001) at [3]-[4].

APPENDIX A: Section 34 conferences and onsite hearings

Year	Classes 1 and 2 matters disposed of at s 34 conference ¹	Total disposals Classes 1 and 2	% disposed of at s 34 conferences
1980	57	478	11.9%
1981	217	1223	17.7%
1982	266	1501	17.7%
1983	308	1475	20.9%
1984	281	1592	17.7%
1985	72	1479	4.9%
1986	25	1370	1.8%
1987	8	1641	0.5%
1988	11	1455	0.8%
1989	16	1657	1.0%
1990	13	1445	0.9%
1991	6	1150	0.5%
1992	7	1113	0.6%
1993	8	1031	0.8%
1994	4	1165	0.3%
1995	19	1351	1.4%
1996	40	1189	3.4%
1997	47	1086	4.3%
1998	62	1259	4.9%
1999	58	1215	4.8%
2000	54	1394	3.9%
2001	93	1454	6.4%
2002	61	1321	4.6%
2003	48 (76) ²	1344	3.6% (5.7%)
2004	39 (226)	1320	3.0% (14.7%)
2005	17 (184)	1166	1.5% (13.5%)
2006	29 (175)	1212	2.4% (11.4%)

Note 1: Section 34 conferences were available for compensation claims in Class 3 after the insertion of s 34(1A) in 1991 but only by consent of the parties. They became available for all class 3 matters when s 34(1A) was amended in November 2006. However, the figures for s 34 conferences in Class 3 matters have not been separately identified.

Note 2: The figures and percentages in brackets for 2003 to 2006 are the total of s 34 conferences and on-site hearings (which were introduced by legislative amendment in 2003).