Conciliation – "Neither Fish nor Fowl"

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This article traverses the pros and cons of the "neither fish nor fowl" approach to resolving disputes. The suitability of conciliation where particular industry knowledge is available to the disputants will be referred to, and where two experts with differing opinions can access a third expert of standing while being subject to the ultimate discipline of a determination or written proposal.

This ability to make a determination in the absence of agreement is seen as a major advantage over mediation, although very dependent upon the industry or technical knowledge of the conciliator and the skills he or she brings to the process.

Introduction

Private dispute resolution has come of age in New Zealand over the past 15 years or so with the merger of the Arbitrators Institute of New Zealand and the Mediators Institute of New Zealand to form AMINZ, the passing of the Arbitration Act 1996 to align New Zealand practise with international protocols, and the vastly increased use of mediation processes for settling disputes.

The general public are reasonably aware that arbitration involves binding decision making by an independent person or panel after hearing evidence and submissions; and that mediation, although less well understood, is an attempt to reach agreement on the matters in dispute with the assistance of a third party who does not have decision making authority. More recently, the leaky homes scenario[2] has highlighted the role of adjudicators, and in the professional environment expert appraisal and expert determination are often turned to as alternative to formal arbitration.

Conciliation

So where does this rather historical term "conciliation" fit into the spectrum and what exactly does a conciliator do? It would seem that long before the modern emphasis on mediation, a related approach was in common usage, particularly in the field of labour relationships and wage negotiations. Those assisting the parties were in the main closely associated with employers or employees, and often had specific industry knowledge. At the highest level there was a Conciliation and Arbitration Court and this brought down general wage orders, sometimes in direct conflict with the monetary and fiscal policies set by the Government of the day. That wage fixing process was swept away during the economic reforms of the 1980s and the term "conciliation" has dropped off the radar to some extent, except in the area of rural disputes and specifically sharemilking contracts.

Sharemilking

This is a peculiarly New Zealand arrangement and about 30% of the dairy cows in New Zealand are managed by sharemilkers. There are, in the main, two types of sharemilking contracts, being those

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2 Weathertight Homes Resolution Services Act 2006.

that are regulated by statute[3] and subsequent Orders in Council; and those that are not. The first relates to those arrangements where the farm owner retains the herd ownership, the milker being remunerated by a share of dairy proceeds. This is known variously as a statutory, variable order, or lower order agreement, the legislation being put in place near the end of the 1930s depression to provide certain minimum conditions for sharemilkers who did not own the herd.

The second is normally a 50% sharemilking agreement, although the percentage contracted can vary. Here the milker has a direct investment via the ownership of livestock and plant, the farm owner providing the land and the milker the herd, the management, and labour to directly operate the dairy farming business. These contracts are not subject to any statutory oversight with the terms and conditions being an outcome of negotiations between the parties. There are, however, standard contracts that are in common usage, such as the Federated Farmers[4] and FarmWise agreements.[5] Both classes of sharemilking contract adopt conciliation as a necessary step in any dispute resolution process.

Statutory Agreement

Clause 140(b) the Sharemilking Agreements Order 2001[6] states, in relation to a dispute or claim, that "*... the parties must negotiate in good faith and co-operate and use their best endeavours to resolve the dispute expeditiously and the parties may ask an independent third party to assist them to resolve the dispute*". The parties will appoint a conciliator "*The conciliator will be appointed from a national panel. If the parties cannot agree ... the appointment must be made by the chairperson of the panel*".

The subsequent relevant parts of Clause 140 are:

> *(d) the conciliator must convene a hearing within 7 clear business working days of appointment (or any further period that they may agree to in writing); and*
>
> *(e) the conciliator must immediately assist the parties in an independent and impartial manner to reconcile their views on the dispute or difference to reach an amicable settlement or solution; and*
>
> *(f) if they are unable to reach an agreement or solution, the conciliator must produce a written, reasoned proposal for the determination of the dispute in writing; and*
>
> *(g) the proposal is binding on both parties unless, within 7 clear business working days of receiving the proposal, one party notifies the other in writing that they reject the conciliator's proposal; and*
>
> *(h) if the conciliator is unable to convene a hearing because of lack of response from either party or for any other reason, the conciliator must notify both parties that the conciliation has been unsuccessful.*

3 Sharemilking Agreements Act 1937.
4 Federated Farmers Herd Owning Sharemilking Agreement.
5 FarmWise NZ Sharemilking Agreement.
6 Order in Council under the Sharemilking Agreements Act 1937.

Clause 141 states that the conciliation procedure is terminated:

(a) by the signing of a settlement agreement by the parties; or

(b) by a written declaration of one party to the other and to the conciliator that the conciliation is terminated; or

(c) by a written declaration by the conciliator to the parties that further efforts at conciliation are no longer justified; or

(d) by the parties not objecting to the conciliator's determination or proposal, in writing, within 7 clear business working days.

Finally, Clauses 142-145 of the Order traverse subsequent outcomes as follows:

142. The parties must bear half the costs of the conciliation as well as bearing their own costs of the conciliation procedure.

143. All discussions in the conciliation process are without prejudice and must not be referred to in any subsequent proceedings of any kind.

144. The conciliator must not, unless by consent of the parties, act as arbitrator, witness, counsel, adviser, or representative of any party in any subsequent arbitration or judicial proceedings in respect of any dispute that has been the subject of the conciliation procedure where he or she has been the conciliator.

145. If the dispute is not resolved by agreement within 21 clear business working days of the first written notice from one party to the other of the dispute, the parties' dispute is submitted to arbitration ...

50% Agreement

Specific dispute resolution terms will vary under individual contracts but the Federated Farmers Herd Owning Sharemilking Agreement (October 2007) provides under Clause 39 for similar procedures to the statutory contract. In terms of Clause 39(d) the conciliator must assist in an independent and impartial manner as provided for in Clause 140(e) of the statutory contract but goes on to state "If (the parties) are unable to reach (an amicable) agreement or solution the conciliator may formulate the terms of his/her written reasoned proposal for the determination of the dispute. Such reasoned proposal shall be binding on both parties unless within 5 working days one party notifies the other in writing that it rejects the conciliators determination or proposal".

Clause 39(e) exactly mirrors Clause 141(a)-(d) in the statutory agreement except that the time that the parties have to object to the reasoned proposal is reduced to five days. Subsequent provisions under Clause 39(f)-(i) are again similar, although the time allowance to resolve before referring to arbitration is reduced to 15 days with provision for a waiver if there is agreement to a conciliation date outside the 15 day period.

Why Conciliation Rather than Mediation?

It is clear that the dairy industry in particular prefer conciliation over and above a conventional mediation process when dealing with disputes that arise out of these contracts. To appreciate why this is so the two approaches need to be compared. The characteristics of mediation are relatively well known and the following list is not exhaustive:

- Parties retain ownership of dispute
- Mediator is there to assist not advise or determine
- Strong emphasis on confidentiality
- Recognise and attempt to maintain relationship
- Mediator is impartial and sets out issues, generates options, makes suggestions
- Mediator does not act inquisitorially
- Mediator can caucus separately with parties

Many of these features apply to the conciliation process, in particular confidentiality, impartiality, and the ability to assist by way of clarifying issues, looking at options, and making suggestions. The conciliator will usually have specific industry knowledge or standing that give more weight to suggestions or options put forward.

There are, however, important differences in the way a mediator and a conciliator go about assisting the parties. A conciliator will initially assume the role of a mediator but be somewhat more "hands on" or directional, dependent upon the circumstances of the dispute and the demeanour of the parties. That is, the conciliator is rather more "muscular" in approach than would be the case in a mediation, and as the meeting progresses will tend towards the inquisitorial, seeking clarity from the parties where required to develop recommendations for settlement. In some situations a fact finding site visit will be appropriate but generally speaking the opportunity to separately caucus is not available. The principles of natural justice limit that possibility, bearing in mind that a reasoned proposal or determination may need to be put forward that will become binding in the absence of written rejection. The conciliator must tread carefully from an ethical perspective, but there are situations where the parties see real benefit in separate discussions. Advice based on the conciliator's technical knowledge and dispute resolution experience may be sought in these discussions and the extent of responses is a matter of common sense and judgement.

In essence, assuming a continuum or timeline, a transformative mediation focus at one end, moves towards an inquisitorial and recommendation/determination focus at the other. That is, the conciliator can be regarded as a mediator with specific industry knowledge and the power to utilise decision-making capabilities in bringing down a proposal or determination if the parties fail to agree. Neither a mediator nor an arbitrator but somewhere in between – neither fish nor fowl.

Pros and Cons

In my experience farmers, sharemilkers and the proprietors of small businesses generally value finality in dispute resolution. When matters proceed onto arbitration a large number willingly opt out of Clause 5 of the Second Schedule Arbitration Act 1996, which provides for appeals on questions of law. Accordingly, the reservation many have with mediation is that, failing parties coming to their own agreement, the mediator has no decision-making or determination powers. The dairying sector, as a

general rule, therefore prefers an approach where a third party mediates between them initially but with a reasonably interventionist approach, morphing later in the process to a role that is more akin to arbitrating. The speed and directness of conciliation is seen as an advantage over arbitration, to say nothing of the substantial saving in time and costs. That is, the med/arb process gives an opportunity for settlement by agreement in the first instance, plus the fallback of a proposal or determination by the conciliator that becomes binding after a period of time to allow for objection. If one party or the other is in strong disagreement the subsequent arbitration should then be more focussed on the main issues. Conciliation in most instances will have "mopped up" a number of niggling matters that often extend arbitral hearings and create undue extra costs. The ability to appoint conciliators knowledgeable about farming methods and the industry in general is seen as a major advantage by disputing parties and is really a prerequisite if any subsequent proposal or determination is to install confidence.

While the features of conciliation just outlined are attractive to disputing parties, there are some drawbacks in the process. For the appointed conciliator to move through the continuum referred to without offending the principles of natural justice takes care and skill. However, given that the conciliation is conducted with due regard to ethical responsibilities and in a competent manner, the main drawback in the event that a binding written proposal is prepared is that evidence has not been heard and tested. Certainly, material will be put forward by the parties, backed with submissions that may be assisted by a lawyers presence. But there is no provision for evidence under oath or for cross-examination, merely less formal questions and answers that may or may not clarify matters and assist the conciliator in preparing a proposal.

Where the issue is credibility, an often it can be, then – unlike an arbitrator – the conciliator does not have the benefit of observing a witness under cross-examination. It could well be that a conciliators proposal, where the parties fail to agree, will not come to the same conclusion as would an arbitral award by the same decision-maker once the evidence put forward was teased out in full. Obviously a conciliator whose written proposal is objected to (thus triggering arbitration) would not then act as the arbitrator, but the point made is valid. The quality of a conciliators decision-making may well be limited by the lack of formal evidence presentation and cross-examination, and consequently inability in some cases to resolve credibility issues.

Conclusion

Conciliation is similar in many respects to mediation but the differences referred to are significant enough to distinguish the processes. The manner in which mediators and conciliators conduct themselves in dealing with dispute resolution is therefore different with conciliation being more demanding on the practitioner in my opinion.

Conciliation is less easily confused with arbitration but as a mediation based approach proceeds towards the requirement for a written proposal, the conciliator needs to consider the contract entered into and apply that to the ascertained factual situation. This end of the process, with a written proposal or determination that is binding by default, is more akin to arbitration. Bearing in mind that an arbitrator usually has the benefit of a formal hearing, sworn witness statements, cross-examination, and legal submissions (where the parties are represented), it is clear that conciliation can also be more demanding on the practitioner than arbitration.

Where the conciliator is an expert in the industry, or a person of standing whose views the parties respect, then outcomes from conciliation are seen as preferable to non-binding mediation or the more expensive binding arbitral process.

Conciliation can be regarded as neither fish nor fowl, having elements of both mediation and arbitration that particularly suit the resolution of disputes arising from sharemilking agreements, whether subject to statutory oversight or not. Where technical knowledge can assist the parties, and there is a wish to avoid what can be a lengthy and expensive arbitration process, there is scope for conciliation to be more widely used in preference to mediation. Improved awareness of the differences between these processes by the legal profession and other advisors would increase the opportunities for conciliation to be considered an alternative to mediation or arbitration