PART IV — MEDIATION

1 AN INTRODUCTION TO MEDIATION

1.1 *Introduction*

1.1.1 *Alternative Dispute Resolution*

Alternative dispute resolution ('ADR') is a process (other than judicial determination) in which an impartial person assists parties to resolve their dispute. The National Alternative Dispute Resolution Advisory Council ('NADRAC') describes three kinds of ADR: 'alternative,' 'assisted' and 'appropriate' dispute resolution. ADR processes can thus be:

- **Facilitative**
  A guided process such as facilitation, mediation, or conferencing
- **Advisory**
  An expert appraisal, mini-trial, or early neutral evaluation
- **Determinative**
  A binding arbitration or expert determination

1.1.2 *Mediation*

Mediation is a form of ADR. Essentially, it is principled negotiation conducted by a third party mediator. Using their assistance, parties negotiate to:

- Identify the disputed issues;
- Develop creative solutions;
- Consider alternatives; and
- Endeavour to reach an agreement

Unlike an advisory or determinative process, the mediator has no advisory or determinative role. The outcome is therefore non-binding except to the extent formally agreed by the parties.

According to Folberg and Taylor, mediation is:

> *A process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.*[1]

See further Astor and Chinkin, *Dispute Resolution in Australia* (1992) 60.

[1] Folberg and Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (1984) 7–8.

1.2 *When is Mediation Appropriate?*

As a general facilitative ADR procedure, the basic presumption is that mediation is probably appropriate. The issue here is whether mediation is likely to be fair and/or successful.

Research into the appropriateness of mediation and other forms of ADR has proved inconclusive. A study by Mack has indicated that most research into the established indicia of appropriateness is contradictory or inconclusive.[2] The following factors have been neither shown to necessarily prevent effective ADR nor indicate likelihood of success; however, they may be relevant in some cases:

1 *The Parties*

- Capacity of parties to participate safely and effectively on their own behalf
  - *NAB v Freeman*: agreement challenged on the basis that Freeman lacked the capacity to participate in mediation
  - *ACCC v Lux*: intellectual disability seen as mitigating in favour of mediation (avoiding court for vulnerable parties)
  - Unmanaged mental illness of intellectual disability may be reason for an advocate to represent the party

- Willingness to negotiate in good faith
  - If unwilling or adamant about their version of events, unlikely that they will be able to negotiate cooperatively
  - If the other party is not genuine in their desire to mediate, it may not be in the client's best interests to proceed
  - Low motivation to settle?

- Ability to negotiate
  - If answerable to an uncompromising third party, mediation may not be possible

- Fear of violence by a party
  - Need appropriate safeguards if ADR is chosen

- Existence of a power imbalance and the extent to which it can be addressed
  - If the imbalance is too severe, ADR will be unfair

- Cultural factors
  - Background of familial or community orientation or concepts of 'face' and 'honour' may impact on ability to participate openly in ADR
  - Gender and race
  - May be able to draw on cultural equivalents to mediation
  - There may be confidentiality concerns

- Legal representation
  - Can significantly limit ADR success: settlement criteria misaligned, object to referral, contributes to power imbalance

- Existence of children
  - Mediation can be more successful where children are involved

- Practitioner skill
  - Practitioner behaviour may significantly impact the prospects of success

[2] Kathy Mack, *Court Referral To ADR: Criteria and Research* (2003) ch 7, 55.

- If the mediator or assisting lawyers are unable to facilitate communication or adequately identify and reconcile the parties' interests, the mediation is unlikely to be successful
- Conflicting research about the influence of adversarialism, however

2 *The Dispute*

- Type of case: family, general civil or specific civil
  - Type of case does not consistently correlate with likelihood of success
  - Are there non-negotiable value differences?
  - Or are they fighting of limited resources?
  - Is the dispute being pursued 'as a matter of principle' (less likely for ADR to be success) or for practical reasons (more likely to be successful)?

- Is the matter a dispute over facts?
  - Evidentiary procedures, expertise, and discovery involved in litigation may be more well-adapted
  - However, mediation can still occur in technical disputes – experts may need to be present, however

- Intensity of conflict
  - Amount of money involved
  - High level of anger renders mediation less likely to be successful

- Where there are multiple parties (conflicting research concerning results)
  - Where there are multiple or complex issues (studies conflicting)

- Financial implications
  - Relative costs of ADR and litigation (benefits of each)
  - Costs of 'losing'

- Appropriateness or desirability of a flexible outcome
  - Relevant court orders

3 *The Context*

- The public interest
  - Is a formal, public and binding outcome desirable?
  - Is an authoritative application of the law required?
  - Are parties beyond those to the negotiation going to be affected? Could they also be wanting to take action in the matter?
  - Examples of public interest disputes:
    - Important questions of statutory or constitutional interpretation (need for judicial determination)
    - Consumer fraud allegations (need for precedent)
    - Product liability claims
    - Public condemnation of dangerous or unacceptable conduct (eg, prominent negligence class action)
    - Disputes which may lead to further claims by third parties, or criminal prosecution

- The stage of the dispute

- The later mediation is attempted in a dispute, the less likely it is to be successful in procuring a settlement
- Parties become more entrenched in their positions the further the dispute proceeds, particularly if it has already reached litigation
- Parties become financially (and emotionally) invested in their positions, affecting their ability to negotiate cooperatively

It should be emphasised that these are reasons for caution rather than reasons to dismiss the appropriateness of mediation. There is no single factor which excludes any possibility of success. The results of Mack's study are certainly interesting – it is not nearly as clear which cases should not go to mediation as it was once thought. Given that there is little if any empirical basis on which to prejudge the likely success of mediation, there is no real substance to the argument that some cases are less suitable for mediation than others.

An example of the manner in which unsuitable cases are identified in practice may be found in order 25A of the *Family Law Rules 1984*, which requires the following factors to be considered:

- Degree of inequality
- Risk of child abuse
- Risk of family violence
- Emotional and psychological state of parties
- Whether mediation is being used as a delay or discovery tactic
- Other relevant matters

Importantly, however, mediation is not always voluntary. Many courts order mediation despite resistance by the parties. It is not always confidential, either.

1.3 *Characteristics of Mediation*

Mediation is conducted by an independent and impartial third party. It is:[3]

- **Facilitative**
  The mediator neither determines the outcome of the dispute nor gives an opinion on their desired outcome of the dispute;

- **Flexible**
  Many different styles of mediation exist; special arrangements can be made as the circumstances dictate;

- **Accessible**
  The mediator facilitates communication and principled negotiation between the parties;

- **Voluntary**
  The disputants are free to withdraw from mediation at any time; and

- **Confidential**
  Mediation proceedings can be 'without prejudice'.

1.4 *Stages of Mediation*

A typical mediation process includes the following stages:

[3] Adapted from Ross Hyams and Susan Campbell, *Practical Legal Skills* (1998) 94.

- Opening statement and procedural matters
- Setting the agenda and identifying issues
- Identifying interests
- Generating settlement options
- Assessing settlement options
- Bargaining and negotiation
- Formalising an agreement

The mediator regulates this process by modelling the desired behaviour. Norms of conduct are created which are principled (and not positional or adversarial).

1.4.1 *Opening Statement*

In this phase, the mediator sets the ground rules for the session, explains their role and outlines the format of the mediation.

Because most parties are not familiar with mediation, it is important to clarify the role of the mediator. It should be emphasised that the mediator's primary duty is to maintain the fairness of the mediation process,[4] and that the mediator will not express any judgment or vindication about who is 'right'.

Example: "My job today is to help you discuss the issues"

The mediator should also outline the structure and content of the session, explaining the procedure, stages and answering any questions. Part of this is to facilitate equal communication (by equalising parties with different levels of experience with mediation).

Rules of conduct (eg, no interruptions, expectation of good faith) should be outlined and agreed to by both parties. Confidentiality and any other issues are also dealt with at this stage. Under VCAT legislation, for example, things said and done in mediation are inadmissible as evidence if no agreement is reached. Where the proceedings are not statutorily protected, a non-disclosure clause should probably be agreed upon at the outset. However, this is riskier because it may not be enforceable in all circumstances.

1.4.2 *Setting the Agenda*

At this stage, the mediator invites each party in turn to identify issues that they wish to discuss. This will often be given in a narrative form (giving each party the opportunity to tell their story). The mediator should enforce the ground rules agreed to in 1.4.1 (particularly so as to prevent parties interrupting one another).

Example: "What are the issues from your point of view?"

Having articulated their interests, parties should agree upon an agenda (a list of mutual issues for discussion) set by the mediator. This might be structured chronologically (short-term, medium-term, long-term issues), by priority (low, medium, high) or in order of contentiousness (least to greatest) so as to ease into the proceedings.

[4] Ibid 95.

1.4.3 *Identifying Interests*

Here, the mediator invites parties to identify what they want from the session. The mediator may need to ask questions to probe interests underlying each party's position. The mediator may reframe parties' comments better to identify interests.

> *Example: "So you need to have the situation resolved soon?"*

In this way, underlying interests are uncovered from the parties' statements; the focus should always be on interests rather than positions. The mediator should look beneath the parties' stated interests to identify their needs. Positions are antithetical to principled negotiation and can frustrate attempts at resolution.

> *Example: "Why does that matter?" or "What does this mean to you?"*

Reframe answers to ensure that other parties can understand the matter about which the answering party is concerned. Constructive framing allows a mediator to alter the course of a discussion without appearing to change what the parties are saying.

1.4.4 *Generating Options*

The mediator now asks parties to suggest different ideas which could solve the dispute. This is a creative brainstorming exercise, so it should be emphasised that proposals are not binding in any way; options should not be critiqued at this stage.

Try to generate as many ideas as possible; to facilitate this, no criticism of ideas should be allowed until the end of the process. In other words, separate the idea generation process from the idea evaluation stage. Ideas should emerge from the parties' interests.

> *Example: "How might you achieve that?"*

An atmosphere of trust and cooperation is most conducive to parties offering constructive solutions. While the mediator does not normally make suggestions, he or she may ask questions that develop and further articulate existing options. The intention is to make parties realise what it is they must do to come to a settlement.

1.4.5 *Assessing Options*

The mediator assists parties to assess the strengths and weaknesses of the options by reference to their interests. A private session ('caucus') with each party may be used to help parties 'reality check' their options and alternatives.

> *Example: "How do you think that would work in practice?" or "Is this really what you want?"*

While a mediator might modify an option to better meet interests, they should not propose new options.

1.4.6 *Bargaining and Negotiation*

The mediator now asks the parties to conceptualise their preferred option. The mediator may ask parties to refer to objective standards in support of an option. The mediator may ask parties to consider whether an option is operational or durable.

> *Example: "Could you both live with that as a solution?" or "Is that consistent with its market value and the likely legal outcome?*

Options must be effective — they should be able to work in practice without continued supervision in the future.

1.4.7 *Formal Agreement*

At this point, the mediator summarises any agreements reached. Parties may reach some agreement (eg, on particular issues or facts) even if an overall settlement is not achieved. If parties do settle, the mediator will usually prepare a written agreement for signing. However, a formal mediation agreement will rarely be signed without review by each party's lawyer.

> *Example: "Then that's what you've agreed?"*

Although the mediator is not responsible for the outcome, they can influence the process. In particular, they may test the limits of any agreement which sounds untenable. A good mediator will rarely assume an advisory role. However, they should ask questions (eg, "Is that illegal? What do your regulatory guidelines about that say? Do you think this is realistically durable?").

Should a mediator help a weaker party avoid an unfair solution? Certainly, they should make sure both parties are free to propose and consider options. They should ask questions of the agreement and ensure that the process itself is equal. However, if one party is clearly dominating the proceedings, it may be worth separating parties to compensate for the differences in their verbal or other capabilities. In this sense, the mediation process is inherently equalising. Whether a mediator should be more proactive in ensuring fairness is an unclear and somewhat controversial topic.

1.5 *Outcome of Mediation*

Mediation does not need to result in an agreement to be successful; it may lay the groundwork for future ADR or settlement. It is, however, especially effective where a party agrees to strike out a claim, receive consent judgment, or contract to reach an alternative agreement.

Whether the agreement is enforceable depends on whether the mediation is court ordered. If the mediation did occur by referral, then a consented judgment means that the claim will be struck out (discontinued). However, if the mediation was not compulsory, then the contract is only binding to the extent that it would be enforceable in a court.

A party may attempt to contest the mediation agreement, but courts are generally reluctant to set them aside (since they are the product of voluntary negotiation). The exceptions to this are where the agreement is unconscionable or one of the parties was unduly influenced or operating under an impaired capacity which should have been obvious to the other. However, these vitiating factors are rarely successful in a mediation context.

1.6 *Summary*

These stages present a structure designed to assist an impartial mediator facilitating negotiation. Used correctly, mediation can allow parties to improve their relationship, identify their interests, reality-check their alternatives, develop options, identify relevant criteria and standards, communicate effectively, and reach some form of settlement.

2 MEDIATION IN PRACTICE

2.1 *Prominence of Mediation*

Over 90% of civil and family law disputes are settled by either negotiation or mediation procedures. Mediation is a prominent process in:

- Courts
  - Eg, Supreme, District and Magistrates' Courts
- Specialist Tribunals
  - Eg, Work Cover Authority, Victorian Civil and Administrative Tribunal
- Federal Courts and Tribunals
  - Eg, Federal Court, Family Court, Administrative Appeals Tribunal, National Native Title Tribunal
- Industry Schemes
  - Eg, Banking, Insurance, Telecommunications

2.1.1 *Court-Ordered Mediation*

Many Australian courts are able to refer matters to ADR without the parties' consent to the process.

For example, the Federal Court can order mediation without the parties' consent (*Federal Court of Australia Act 1976* s 53A). Similarly, the Victorian Supreme Court, County Court and the Civil and Administrative Tribunal can refer disputes to mediation irrespective of the parties' wishes; see:

- *Supreme Court Rules 1996* ch 1, rule 50.07
- *County Court Rules of Procedure 1999* rule 34A.21
- *Victorian Civil and Administrative Tribunal Act 1998* s 88

By contrast, the Magistrates court will only refer disputes to mediation with bipartisan consent (*Magistrates Court Act 1989* s 108).

Eligibility for ADR referral is often dependent upon judicial appraisal of 'appropriate circumstances'. As noted in *Higgins*, the Court should consider 'all relevant circumstances going to the exercise of the discretion', including (perhaps), whether:

- Previous settlement attempts have failed (*ACCC v Collagen*);
- The parties are separated by distance (*Hopcroft*; *Barrett*);
- There are too many parties or lawyers (*Kilthistle*; *Barrett*);
- The issues are too complex or numerous (*Hopcroft*; *Rajski*);
- Mediation would add additional cost and delay (*ACCC v Collagen*; *Morrow*);
- Liability is contested (*Barrett*);
- The dispute is commercial and not emotional or irrational in nature (*Morrow*); and
- The factual dispute is about complex facts (*ACCC v Lux*; *Hopcroft*).

Which circumstances actually make mediated success less likely is unclear. In any case, the referral is highly discretionary.

2.1.2 *Relevance of Consent to Mediation*

- The view that 'there [is] no point in a mediation engaged in by a reluctant party' is not always true
  - See Barrett J in *Morrow v Chinadotcom Corp* (2001)
- Mediations without party consent have been known to succeed
- Parties often maintain an outward appearance of reluctance to mediate in an attempt to avoid showing weakness, yet still engage successfully when required

See *Remuneration Planning Corporation Pty Ltd v Fitton* (2001).

2.2 *The Role of Lawyers*

Lawyers can play an important role in ensuring the effectiveness of mediation. However, studies also show that they can be highly disruptive to the process, and don't always assist parties in identifying and satisfying their own interests (after all, parties generally know better). Lawyers also often fail to generate creative options (though they may be highly skilled in bargaining about or assessing them).

2.2.1 *Before Mediation*

Before mediation, they should consider whether mediation is appropriate. It might be cheaper to settle through direct, unmediated lawyer-to-lawyer negotiations. The case might be unsuitable for mediation (see above). If parties are able to negotiate, there is no need to go to mediation. The reason for mediation is thus because of some failure to negotiate a settlement (as where the BATNA of a party is very high and options are limited or difficult to identify and express).

A lawyer should also consider their client's best alternative to negotiated agreement ('BATNA'), as well as that of the other parties. Doing this before mediation helps assess which options are likely to be attractive to each. If the best alternative is a legal action, the costs to the client — both financial and psychological — must be considered along with any prospects of legal success.

Procedure:

- Is the case suitable for mediation or ADR?
- What are the facts and law relating to the case?
- Is the client familiar with the key features of mediation?
- What are the client's primary interests, preferred options and BATNA?
- Is there any information which should be kept confidential?

2.2.2 *During Mediation*

During mediation, a lawyer does three things:

- Help the client participate in the mediation;
  - Act a resource for your client on issues that arise regarding facts or law
- Consult with the client about issues raised by the other parties; and

    - Do not take over your client's role

- Assist the client to consider settlement proposals made by the other parties, including advising them of any legal implications.
    - Review terms of mediation and any proposed agreement

A lawyer should not argue in an adversarial manner with the other 'side'. If anything, lawyers should play a secondary role in the proceedings. Aggressive tactics are to be avoided; separate the people from the problem and listen to the interests of all parties.

Where necessary, a lawyer should keep their client focused on the future (rather than past events); they should refrain from critical appraisal of options put forward by the other parties until an appropriate time.

Lawyers should, however, assist clients to articulate and formalise any confidentiality provisions concerning matters revealed during mediation. There are several options:

- The mediation might be protected by a statutory provision creating an obligation of confidentiality or rendering discussions inadmissible as evidence;
- The mediation might be specified as 'without prejudice' by both parties (preventing admission into any subsequent legal proceedings); or
- The settlement agreement may incorporate a non-disclosure clause.

2.2.3 *Following Mediation*

At the conclusion of mediation, a lawyer should assist their party to assess the options for settlement. Legal implications should be considered, including whether the agreement would be void for illegality. Practical implications of which the client is not aware should also be mentioned. The party must fully understand the proposal.

This being the case, the lawyers (perhaps in conjunction with the mediator) will create a formal, legally enforceable agreement. Parties may sign either at the end of the session or at some stage subsequent to its conclusion.

Lawyers may need to assist parties to carry out their obligations under the agreement, such as by entering or varying secondary contracts.

Procedure:

- If settlement is reached, ensure that an agreement is signed and any actions required to be taken are taken; however
- If no agreement is reached, advise your client on whether to continue settlement discussions or another form of ADR.

2.3 *Evaluating Mediation*

Mediation is a simple but effective process. While not all cases are suitable for mediation, the vast majority are. Principled mediation offers a framework for guiding and assessing the success of mediation.

Other sources of criteria also exist. For example, transformative mediation judges the outcome of a session by reference to how progress in the parties' understandings of themselves and one

another (see Felter and Fulch). The justification for this performance metric is that it improves the ability of parties to solve similar disputes in the future.

By contrast, court-ordered mediation has settlement as its focus. Success is evaluated by reference to claim throughput: *mediation efficiency*.

Mediation offers significant benefits:

- Achieves high settlement rates
- Usually delivers quick results (certainly more rapid than litigation)
- Can be arranged at short notice (again unlike litigation)
- Being voluntary and party-focused, parties retain greater control over the process
- Parties have a larger range of more flexible outcomes
- Usually offers reduced costs
- Party satisfaction is higher than litigation

Mediation facilitates dispute resolution by assisting parties to identify and select a solution from a range of options. This places parties in a better position to help themselves to ensure future disputes are resolved non-coercively and amicably.

However, the following barriers may militate against the use of mediation:

- Risks of violence or harassment
- A restraining order
- Lack of capacity (eg, intellectual disability) restricting the ability of a party to negotiate on their own behalf
- Any extreme power imbalance between parties
- The need for precedent (eg, where the dispute concerns issues of public policy or affects a broader class of parties than those represented at the mediation)
- Cultural factors
- Confidentiality concerns

Mediation is the dominant form of ADR and is likely to be part of your legal practice. Mediation is a form of facilitated negotiation that does not involve a determinative or advisory role. However, you should first assess cases for suitability for mediation.