Edmund Barton Chambers Seminar Series

24 March 2010

Additional Resolution Processes – Meeting the Needs of the Parties

1 All legal practitioners have an ethical duty to consider and advise on the best procedure to meet the client's reasonable needs and aspirations. The first step therefore is to consider the alternatives available. Apart from litigation, alternatives to be considered include mediation, neutral evaluation, arbitration, conciliation, expert determination, facilitation or a hybrid (eg mediation and expert determination of specific issues).

In choosing an appropriate process the following questions arise:

(a) What are the goals of the parties and which process is most likely to achieve those goals?

(b) What are the impediments to resolution and which procedure is most likely to overcome them?

Goals may include minimising costs; speed; privacy; maintaining or improving relationships; vindication; neutral opinion; precedent; maximising or minimising recovery.

2 A suggested three-step process to determine the choice is:

(a) Prioritise objectives/goals of all parties;

(b) Which process is likely to have a procedural advantage in achieving those goals?

(c) Which process will overcome likely impediments, eg emotional issues, factual disputes, multiple parties, psychological barriers, capacity to negotiate effectively, unrealistic expectations and power imbalance? [1]

3 Mediation is fast becoming the preferred procedure, as:

"It has the greatest likelihood of overcoming all impediments except different views of facts and law and the jackpot syndrome. Furthermore a skilled mediator can often obtain a settlement without the necessity of resolving disputed questions of fact or law ... mediation, if it is a procedure that satisfies the parties' goals, should, absent some compelling indications to the contrary, be the first procedure used." [2]

4 Mediation can achieve most goals where the parties do not require a result imposed on them by a third person and even if the parties require partial independent determination. As discussed hereafter, the need to evaluate disputed facts can also be addressed.

5 <u>What types of dispute can be mediated</u>?

All private disputes are amenable to mediation. But even disputes that require the exercise of a discretion by the court can be mediated subject to the Court's approval, for example where civil penalties may be imposed under environmental legislation, or action by ASIC under the *Corporations Act.*

6 <u>When to mediate</u>

Some practitioners have entrenched views that there is no point in mediating until the parties' positions are clearly articulated in pleadings and the discovery process is complete. Obviously the knowledge gained is important. But that

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1 Sander FEA and Goldberg SB, *"Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure".*

2 Sander FEA and Rozdeiczerd, *"Matching Cases and Dispute Resolution Procedures": Detailed Analysis Leading to a Mediation Centred Approach"* (2006).

doesn't mean parties should wait until vast sums have been expended to achieve that knowledge. Parties can provide draft points of claim/defence and fast track disclosure of documents as part of the mediation process. Some commercial disputes require speed and confidentiality, eg intellectual property issues. The starting point is not litigation unless that is the only process that will reasonably meet the needs of the parties.

7 The pre-mediation process

Some mediations proceed without a pre-mediation conference where the advisers are experienced in the process. However, if there are specific impediments then a pre-mediation conference may be important.

For example, if a party is wary about the process, is intimidated by one of the other parties, has reservations about the mediator or wants to understand the procedure proposed by the mediator, a confidential conference with the mediator is an option that works well. The other parties should be advised first to ensure they don't object. If a party objects then ask for a pre-mediation conference with all parties and address the topic again. The mediator can assist to allay concerns;

If there is to be a pre-mediation conference, who should attend? Ordinarily this doesn't occur. But the parties may wish to and should be allowed to attend.

8 Issues to address at the conference include:

(a) Mediation agreement; who is to prepare it, who is to contribute to the costs of the mediator/venue?

(b) Venue, date, time of commencement, whether more than one day needs to be allocated, particularly in the case of multiple parties and where third party process needs to be explored before dealing with the primary dispute;

(c) Can the mediator/parties continue past normal working hours if necessary?

(d) Will the parties be represented by a person having full authority or if not, is such a person available over the phone or by teleconference?

(e) There is no doubt that success is more difficult to achieve if a person with authority is not present at the mediation. Should your client insist on the attendance of others with authority?

(f) If insurers are involved, should the insured also attend because of a residual interest or to assist in presenting the insurer's position?

(g) Do the parties have an open mind about resolution; are they genuine. If a crucial party intends to insist on its costs being paid or to contribute nothing, is the process worthwhile?

(h) Should some of the parties nevertheless proceed because there is utility in achieving a partial resolution. For example, a third party in proceedings may change its view if the extent of the claim is known?

(i) Should a party seek an order of the Court that the parties mediate and that the mediator be obliged to report to the Court as to whether the parties have conducted themselves in good faith? This question arises both in the case where a party refuses to mediate and where the parties agree to mediate but good faith is doubted. In either case, the mediation is not necessarily lacking reasonable prospects of success if it is court imposed. Parties often change their minds if the process is conducted appropriately to meet the needs of that party.

(j) What role does the mediator adopt: facilitation only, advisory opinions or a shade between? You need to know beforehand. The mediator may be prepared to adapt to the wishes of the parties.

(k) What documents are to be provided to the mediator? Ideally all documents necessary to inform the mediator of the real issues between the parties, not necessarily confined to issues in pleadings but with judicious culling of lengthy documents. That is, no more than is necessary, having regard to the cost of the exercise and the amount or issues in dispute. Usually one party will prepare an index and the others contribute. One party will then provide the book of documents to the mediator. The cost of the exercise and who is to contribute to it may need to be addressed depending on the circumstances. Some documents might be provided confidentially to the mediator. This can be done before or at the mediation.

(l) Position statements are usually provided, normally short, articulating the real issues, not merely repetitious of the pleadings, and addressing the claims of the parties in money or other terms. Sometimes the person making the claim agrees to provide its position paper to allow the others to respond. However the process should not be allowed to descend into a pleadings type process.

(m) Should key experts be in attendance at the beginning of the mediation? If parties are wedded to their expert's conclusions the mediator can assist to allow the parties to understand why they are apart. The mediator asks the questions; it is not a process for cross-examination by the lawyers although they can suggest questions. This allows the clients to understand the residual underlying differing factual and other assumptions. Empowered with that knowledge, the clients are often able to assess the risk of adverse factual findings if the matter was to proceed to court.

(n) Processes can also be explored for neutral evaluation of key witnesses. For example, in conference with only the witnesses and the mediator present where, for example, those persons were present at a conversation

where a representation is alleged but disputed in a TPA claim. Evaluation of the process by the mediator in private can then be undertaken. The object is to allow the parties to be better informed to allow risk assessment.

(o) Usually one party will agree to prepare a draft settlement agreement and provide a copy to the other parties prior to the mediation. Agreed clauses on such issues as CGT, GST, release and indemnity can save valuable time at the mediation. If the formula for resolution is known, the whole agreement can be prepared but for, by way of example, the monetary amount. This process can assist focus on the real issues. If Court consent orders are proposed, the appropriate document can likewise be prepared. The fact that Court approval of a compromise is required does not alter the position, only the terms of the draft agreement or consent order. Thus, ordinarily an agreement subject to Court approval (in the case of a party suffering a disability) will be signed by the litigation guardian and by the legal advisers, all of whom can agree to recommend approval to the Court and use best endeavours to achieve that result;

(p) Who is going to attend the mediation other than the parties? In some circumstances a party may wish a friend, relative or business adviser to attend. If the other parties object, there are options; for example limited attendance in a break-out room only: access over the telephone if the other person signs a confidentiality agreement. This may change during the mediation if the mediator considers the presence of the person will be beneficial to resolution; commonly, such persons are beneficial to the process;

(q) Are there any documents in the possession of one party but needed by another to make an informed decision? Merely because the discovery process in litigation has not been reached does not mean parties should refuse to hand over relevant documents reasonably needed by the other

to make sensible decisions at the mediation. On occasions where documents are privileged, a party may agree to a limited waiver of privilege solely for the purpose of the mediation either before or at the mediation itself. Identification of an author can be excluded, and the document may be viewed only and returned during the mediation. Or, the mediator may be asked to view the document and make limited disclosure. Sometimes a party may only agree to this process when the other party has shown good faith at the mediation.

(r) Should the parties come to the mediation armed with advice on issues of CGT, GST, stamp duty, business or asset valuation, can the parties agree on an independent adviser? If tax issues will inevitably arise, the mediation will have to be adjourned if the necessary advice has not been obtained before then.

9 The mediation process

Usually, the mediation commences with a joint session of all the parties but not always:

(a) In some cases a party or parties may be unwilling to be in the same room or alternatively, may be prepared to listen to opening remarks by the mediator but adjourn to break-out rooms without speaking to their positions in the joint room;

(b) The parties may have had extensive prior negotiations and see no need for traversing well understood positions.

If appropriate, a prior meeting can be held between the advisers to discuss the utility of a joint session and to discuss an alternative process.

10 If a joint meeting does take place, what should be said on behalf of a party?

First, it is inadvisable to take the opportunity to address another party directly. The advisers of the other party may object. The mediator will probably

discourage it. If it is done, invariably the party will protest, engage in argument and the session can end in turmoil – not a good start!

11 Second, what is said and how it is said could help to make or break the mediation. The process is not adversarial. If the parties are there in good faith, they want the mediation to be successful if reasonably possible. That is not to say strengths of the parties' positions should not be highlighted albeit softened by concluding comments about good faith. If a party has strong views, its position can be communicated at the pre-mediation conference. Often, if justified, the parties will continue with the process knowing that party's position.

12 Should the parties themselves speak at the joint session? Some parties want to speak directly to the other parties, not just through their legal advisors, and should be allowed to do so provided there is no detriment to the mediation process. After all, it is the parties' mediation, not the advisers nor the mediator's. On occasions the legal adviser speaks first then invites the party to comment on matters previously agreed on. If unsure about what to do, the party can enlist the mediator's help before the joint session.

13 In some cases, there can be a positive benefit in allowing the other party to gauge an opponent's credibility. For example, in the case of an insurer who knows nothing of the opposing party a credible statement on specific and important issues can be devastatingly effective. In other cases, a well-timed and genuine apology by one party can change the mood of the other party. Alternatively, a party's statement that he or she is sorry that something has happened (even if it is not their fault) can be helpful. All these possibilities can be discussed if necessary with the mediator before the joint session.

14 In other cases, it might be important to have a key witness at the mediation. If it is alleged that an employee made a representation which gives rise to the claim by another, again a credible, short statement can be important. If it is important to the parties, the mediator can be asked to speak to the witnesses alone and provide an appraisal of a party's witness in private. If a party's witness makes a

concession in such a session when discussing a critical conversation, it is better to know at the mediation. Likewise, if the witness clearly appeared uncomfortable when in the presence of a credible assertion by the other witness, the mediator can report on the effect it had on the mediator as a third party unbiased observer.

15 There are some advisers who subscribe to the view that a mediation is not a forum for discussion about the facts or the law because *"that is for the Court process"*. That view is misconceived and assumes that mediation is confined to negotiation processes only. If that view is put, the assistance of the mediator can be sought to overcome the resistance. However there are sometimes cases where the parties agree that they need only a facilitation negotiation process.

16 The joint session is also useful to explore what the other parties want. In the case of continuing commercial or other relationships, money is not necessarily the objective but even if it is, the potential terms can vary widely. For example, time to pay is but one consideration. Method of payment could be a percentage increase in goods supplied, variation of interest terms, provision of services, to mention but a few. The relationship between the parties will define the possibilities. The parties' preferences need to be understood before embarking on solutions. Valuable time can be wasted on solutions which will never be accepted by one of the other parties.

17 Even where the parties do not want a joint session, it may be appropriate to have one, but limited to opening remarks from the mediator. This often helps to establish an appropriate atmosphere. Issues raised will include confidentiality, the process proposed, the need for good faith and to establish the level of understanding the mediator has of your case. It must be remembered that the mediation is an alternative to a formal process which addresses the parties rights and obligations. They are entitled to a process which can be seen by them to be a suitable replacement and which is respectful of their needs.

18 The continuing process after a joint session should be flexible depending on what is needed to meet the parties expectations and to overcome barriers. In private session with the mediator there is an opportunity to discuss merits if needed and to ensure confidentiality of those issues which are not to be divulged to others. The mediator can be educated on important merit issues that justify the position a party takes.

19 At some point in the mediation the mediator may suggest a conference with the parties absent legal advisers. There may be reasons for not doing so. However, if the parties agree, the process is usually effective in breaking deadlocks. In cases where the parties themselves are working cooperatively to achieve a solution this will not be necessary. In such cases the mediation might never move out of joint session. Where it is appropriate, usually the party/mediator conference will only occur because there is no alternative. However, multiple such conferences may only alienate the parties, so timing is important. The mediator should explain to the parties how the session will be conducted.

20 If deadlock occurs, that is not necessarily the end of the mediation depending on the reasons. Some mediations are adjourned:

(a) to ‘allow the dust to settle’;

(b) to ensure the parties have thought through a proposed agreement;

(c) because parties are tired/emotional and are not making informed decisions;

(d) to obtain further information/advice/documents;

(e) to allow an issue of law to be determined by an expert or the court or to be arbitrated by fast track process;

(f) to allow a third party to be contacted to join the mediation;

(g) to allow a formal document to be prepared;

(h) to allow confidential discussion by the mediator with a person with greater authority in the case of a corporate client.

21 If resolution occurs it is wise to agree that nothing is binding on the parties until either:

(a) a binding heads of agreement is signed;

(b) a final formal document is signed at the mediation.

Generally it is best that the parties sign a binding document at the mediation. If not done, there is a risk that parties will be influenced by persons outside the process who know nothing of the mediation process and why the solution is practically and commercially sensible. If this cannot be done, it is wise to keep the mediation open to deal with any issues arising out of the wording of the document. Often problems can be dealt with over the phone.

22 In complicated commercial cases it may be necessary to adjourn to prepare a detailed formal agreement even though the parties have not yet agreed on the essential items. This process helps focus on the issues that remain for decision having regard to such issues as tax effectiveness and the “bottom line” for the client.

Conclusion

23 Perceptions as to the role of mediation and how it should be conducted vary widely, however once it is recognised that the goal must always be to meet the needs and expectations of the parties, the correct process for a particular mediation can be crafted. Particularly in cases where the only issue is a claim for money and the parties had no relationship prior to the dispute, it is necessary to meet the need to enable informed decisions by the parties. This may mean that the parties need to address the merits of the case, understand the formal assumptions made by their experts and make their own assessment of critical witnesses, albeit that this may not be the norm. In such cases, the parties should

insist on a pre-mediation conference to discuss goals and expectations of the parties, and the procedures necessary to meet them.

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24 March 2010