# MEDIATION: TIPS AND TRAPS

## A. What is mediation?

1. 'Mediation is a process in which parties to a dispute with the assistance of a neutral third party (the mediator) identify disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or a determinative role in regards of the content of the dispute or the outcome of its resolution, but may advise on or determine a process of mediation whereby resolution is attempted.'[1]
2. As you will hear today in a brief overview of the mediation process, it is not always as simple as the above definition would have us believe.
3. If you had told me ten years ago that I would be standing here advocating the path of mediation as opposed to traditional advocacy, I would have thought you were mad. However, in that time, which coincided obviously with a greater use of the mediation process, I have come to the view that mediation is not only important but is almost an essential step in the adversarial process. The final step in that thought process journey occurred when Warren, Coakes, Connors and I travelled to Victoria last year to undertake the Victorian Bar Mediation Course which was, to say the least, an extremely difficult and draining process. As you know, my practice has been general and in particular in relation to commercial and common law cases, Warren is a senior practitioner in the Industrial Law field, Coakes is a retired Federal Circuit Court Judge having sat in Family Law and Connors , who sat as a Judge in Fiji, now practices almost exclusively in the Land & Environment Court in this State.
4. What the course showed us was that there is an incredible science behind the process of mediation and it is that science which was completely absent from my knowledge prior to undertaking that course. The science has components of psychology, sociology, jurisprudence and methodology.
5. The understanding of the science and the use of it is critical to the success of the mediation process.

[1] NADRAC (National Alternative Dispute Resolution Advisory Committee), alternative dispute resolution definitions, Commonwealth of Australia, Canberra 1997.

**B. How we view mediation.**

6. Most of us in this room have probably been involved in the mediation process, either as mediators or as representatives of parties. We traditionally engage in the mediation process in litigation cases which we have. However, it should be remembered that mediation is applicable to any dispute, eg a backyard dispute, dividing fences dispute, cultural dispute, family dispute and the like. Once you understand the science then the principles are applicable across a wide range of matters. The implementation of the science is what is important and is what, no doubt, enables the very successful mediators to achieve the high percentage of settlements which they claim to have. My own view is that they estimate their success rate too high and that the settlement rate is probably a little lower than they say, but nevertheless, still very useful.

**C. The National Mediator Accreditation System (NMAS).**

7. On successful completion of the course which we undertook, we became eligible for national accreditation. I mention this for a number of reasons:

   i. The accreditation process is an ongoing process and mediators must not only achieve accreditation at first instance, but then each two years must have completed a rigorous program to entitle them to retain accreditation.

   ii. When a mediation is conducted by an NMAS accredited mediator, then the Mediation Agreement must refer to or annexe a copy of the relevant practice standards[2]. The confines of time today do not allow a complete overview of those standards but I should mention two matters in those standards which are important, namely impartiality and confidentiality.

   Impartiality.

   Part iii clause 7 contains, *inter alia,* the following:

   **'7.2 A mediator must identify and disclose any potential grounds of bias or conflict of interest before the mediation, or that emerge at any**

[2] Australian National Mediator System, Approval Standards, July, 2015 available at http://www.msb.org.au

**time during the process.** (SJH: This is very important because there are lay people in attendance at the Mediation. Be clear. Be upfront.)

**7.3 A mediator must not mediate in cases involving a conflict of interest without informed consent of the participants, and then only if, in the mediator's view, the conflict would not impair his or her impartial conduct of the process.'** (SJH: So even if a conflict is revealed by the Mediator and the parties say they are content for the Mediator to continue, it is still incumbent upon the Mediator to satisfy him or herself that it is proper to do so.)

Confidentiality.

Part iii clause 9 contains, *inter alia,* the following:

**'9.1 A mediator must respect the agreed confidentiality arrangements relating to participants and to information provided during the mediation, except:**

**(a) With the consent of the participant to whom the confidentiality is owed; or**
**(b) Where non-identifying information is required for legitimate research, supervisory or educational purposes; or**
**(c) When required to do otherwise by law; or**
**(d) Where permitted to do otherwise by ethical guidelines or obligations; or**
**(e) Where reasonably considered to do necessary to do otherwise to prevent an actual or potential threat to human life or safety.'**

8. There is insufficient time today to have a proper discussion about questions such as the admissibility of settlement negotiation and in particular in relation to Mediations. However, in terms of confidentiality a number of things can be said briefly. It should not be stressed enough that the foundation of the mediation process is said to be confidentiality. The heart of this lies in the agreement reached between the parties and the mediator and the acknowledgement of anybody attending the mediation of the confidentiality of what is said and done at the mediation itself.
9. Mediation agreements should contain confidentiality clauses. The mediation agreement should also note that the matter is "without prejudice". In that regard any document prepared by the parties for submission to either the Mediator or to each other should be marked "Without Prejudice" and for the purpose of the mediation as specifically described.
10. The parties can waive the confidentiality by consent, but this consent must also come from the Mediator. In *ACCC v Pratt (No. 3) [2009] FCA 407* the Federal Court received

in evidence an affidavit from the Mediator, McHugh QC. This affidavit was tendered by consent.

11. This question is affected by legislation in most states. For example, in this State the *Civil Procedure Act Part* 4 deals with Mediations. Particular reference should be made to s.30 (Privilege) and s.31 (Confidentiality). Subject to the application of the relevant legislation s.131(2) of the *Evidence Act* applies. It is likely however that, despite what is said in the Mediation Agreement, a Court in the interests of justice could admit evidence despite the parties agreeing to what was said or done in a mediation being confidential and therefore prima facie not admissible.[3]
12. It may be that in a mediation (and probably because of the air of confidentiality) that matters such as a risk to public safety or to life or to the safety of another person arises during the course of that mediation. The Mediator would probably have a public duty in those circumstances to report matters within his or her knowledge (see also the NMAS Guidelines). Also where a fraud or crime occurs during a mediation or is acknowledged or admitted during a mediation the same would apply. If misconduct or incompetence is alleged or an allegation that a settlement agreement was unjust, unconscionable, harsh or procured as a consequence of undue influence or by misleading or deceptive conduct or that there was duress then evidence of what took place would be admissible (see the discussion below).
13. The above matters cause us to take a deep breath and realise that, despite the foundation stone for mediations being confidentiality, there are circumstances where despite expressed reservation of confidentiality, this does not always mean what it sounds like. The parties to a mediation should be very aware of that possibility and the mediator needs to be alive to it at all times.

**D. The mediation process itself.**

14. As I have indicated above, the rigorous course which we undertook in particular dealt with the science of mediations and helped us better understand the process. For my part, in all the mediations in which I have either been the mediator or a participant, one thing has been common. That common element has been that a mediator would often call for a position paper from the parties. You would all know that those

[3] Silverfox Company Pty Ltd v Lenard's Pty Ltd (No. 3) (2004) 214 ALR 621 at [36]; Farm Assist Ltd (In Liq) v The Secretary of State for the Environment, Food and Rural Affairs (No. 2) [2009] EWHC 1102 (ccc).

position papers were less than helpful. In my mind they, in hindsight, are useless in terms of furthering the mediation process or assisting the resolution of the issue. This probably stems from the innate desire of we, as legal practitioners, to give away nothing in the negotiating stages of any case. No position paper has ever said "You know what, they are right".

15. Following the completion of the course I formed the view that in any mediation which I did conduct in future, I will throw out the process of position papers. Instead, I think it is a better alternative to simply call for a list of issues from each of the parties without then calling on each party to say they are right or wrong about any particular issue and in an oblique way, why that is so. The reason for this is that once the issues are out in the open then the real contest and the real conflict is exposed in all its glory. It is important to recognise that mediation is not just for whole case. The mediation process can be engaged during a case on particular issues. This may help shorten trials and indeed, if a particularly tricky issue is ultimately resolved, it may be the catalyst for the whole proceedings to be resolved. That process was in part embarked upon in the very expensive litigation which you would all be familiar with, *Seven Network Ltd v News Limited* [2007] FCA 1062 which was a case involving costs estimated to be up to $200 million. In that case, Sackville J stated:

> **"[19] Mega-litigation creates formidable challenges for any court required to manage the case and to decide it within a reasonable timeframe. The presiding judge can make efforts – perhaps strenuous efforts – to confine the scope of the litigation and thereby limit its cost both to the parties and to the community. For example, the parties can be encouraged or even directed to undertake mediation or other forms of dispute resolution with a view to resolving their differences or at least narrowing the areas of dispute. They can also be directed to take measures designed to identify matters not genuinely in dispute. But there is a limit to what the judge can do without compromising his or her role as an independent and impartial judicial officer.**
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> **[20] In the present case, I repeatedly encouraged the parties to enter mediation, if not to settle the proceedings, then at least to narrow the issues. In fact the parties did undertake mediation on more than one occasion, but apparently with only limited (but by no means negligible) success. Later in the proceedings, I directed the parties to prepare an agreed chronology and encouraged them to agree on a template for written submissions. However, the responses illustrate that parties to mega-litigation are often able effectively to ignore (albeit politely) directions made by the court, if they consider that their forensic interests will be advanced by doing so.'**

16. The above comments are not only relevant to mega-litigation. They are relevant to all disputes and are something which we all should consider in any case. For example, take the case where a plaintiff is injured in a motor vehicle accident in New South Wales and qualifies as a permanent participant in the Lifetime Care and Support Scheme. That scheme as you know entitles the plaintiff to a lifetime of attendant care and medical services. This means that the only remaining areas of dispute in terms of damages are non-economic loss and economic loss. If the issues look something like this:
    i. Non economic loss – parties not too far apart.
    ii. Past economic loss – not long since the plaintiff was injured and therefore the quantum is not great. This means that there would be very little issue about the past loss and the calculation of past superannuation loss.
    iii. Future economic loss – if the plaintiff was young and her pre-accident employment prospects were uncertain one could imagine that this issue would have some significant uncertainty about it.

17. If the parties went to mediation and the issues were itemised as above then clearly the issue to be focussed on would be future economic loss. The parties could frame the issue and then a range of damages could be posited by each side. This would clearly identify the range of the dispute and the effort could be then put into settling that particular issue. If that were done the whole case would in all likelihood resolve. This is a simplified example but the principle is the same in any case.

18. The effect of exposing it as a real issue and getting the parties to concentrate on the reasons why they are not in agreement about it, then it becomes easier to reach a resolution. Once that resolution is reached then it may impact well by resulting in a settlement of the whole proceedings. Of course, that reasoning process is applicable to all disputes.

**E. The time taken to mediate.**

19. The other thing that became patently obvious to me, when undertaking the course, was that the approach to mediation was too rushed by most practitioners. This is no better demonstrated than by the appointment of a mediation to commence, for example, after lunch on a given day. There is simply not enough available time to effectively invoke the process of mediation as I have now come to understand it. Believe it or not, this is analogous to cross examination in litigated matters. Rarely does an effective cross examination conclude quickly. The process of cross examination generally requires an in depth testing of various matters and various subjects with a view to homing in on what in reality are the core issues. This cannot be achieved quickly just as the mediation process in all probability cannot be concluded quickly.
20. The parties must be prepared, assuming they are prepared to mediate in good faith, to spend the time to properly ventilate and then agitate the issues. This will not always work of course, because there are court ordered mediations and one or other of the parties might be dragged along kicking and screaming and with the intention not to engage in any meaningful discussion at all. In those circumstances, the skill of the mediator is very much required, although to be fair in those types of cases is not always successful.
21. Looking back now, I understand that there have been mediations in which I have been engaged in, which appeared to have no prospect of resolution, but ultimately later in the day, did resolve. On reflecting on those cases following the completion of the course, I realised it was because the parties were prepared to continue the discussions no matter how futile they might have appeared to have been during the course of the day. This can only be achieved, as I have said above, if there is a proper allocation of time. With that in mind, the following process, might be applicable and these steps are relevant to both mediators and parties.

    (1) Preparation.

    - Properly assess what the dispute is about – itemise the issues. This requires from the representatives an innate understanding of the case well prior to the actual mediation.

- Determine, who are the necessary parties in the process and who, outside the parties (if any), ought to be involved in the mediation process.
- Conduct a meaningful preliminary conference. This does not have to be a joint face to face preliminary conference. It can be done via the phone and can be done more than once to enable proper preparation.
- Reference the relevant evidence including any expert material when detailing the relevant issues.
- Prepare the mediation agreement.
- Settle the question of costs and determine who is responsible for them.
- Organise an appropriate location, date and time for the mediation to take place.
- Ensure that the parties will not have any time constraints on the day of the mediation.

(2) Process at the commencement of the mediation.

- Ensure everybody is introduced and comfortable.
- Always have an opening statement by the mediator to discuss things such as the nature of the mediation, the role of the mediator and the parties, the various steps that will occur, the question of potential conflict of interest or bias (see NMAS guideline), confirm the agreement to mediate, discuss the confidentiality and privilege questions, confirm that there are no time constraints, establish the ground rules for the conduct of the mediation, confirm what the status of any agreement reached will be noting the requisite for a binding agreement. This gives everybody a framework but the structure is most important for the lay people for whom this is probably an alien environment.
- Make sure that the parties expectations are clear.
- Ensure that there is someone present from each party with authority to settle the dispute and execute an agreement.

(3) Statements by the parties.

- This must be explained by the mediator in a way that fits the relevant mediation. In other words, this is just a foundation step and not a debating session.
- The parties should be invited to describe and explain their perspectives without going to the debate at hand.
- The mediator should clarify, or at least to assist the parties to clarify, what their perspectives are. This continues the process of clearly identifying the issues.
- The ground rules of course dictate that the mediator is to control the process and the parties are to control the content of the dispute.
- At the conclusion of this phase the mediator should simply summarize in a general way so that the parties understand what the ground rules are, their perspectives on the mediation, and have a general understanding of the issues that will be engaged.

(4) Establishing the issues.

- Listing all those matters which should have been provided following the preliminary conference. By this stage the parties will have thought about what the issues are and this should be a relatively easy process.
- The parties should be asked to contribute further to the list of issues as they may have thought of things between the earlier period of time and the present and the parties should then agree that those are the issues the subject of the debate. It should be noted that the content of the dispute to be mediated is often set out as an annexure to the Mediation Agreement. Again this serves the purpose of early issue identification.

(5) Explore the issues agreed upon.

- This is the critical time, because it is at this phase that the issues which are the real cause for the dispute become obvious.

- It is difficult but the parties should be encouraged to engage in a dialogue about the issues so that each party's perspective is available to and understood by the others. It is this aspect of the mediation which is probably hardest to achieve, takes a lot of time, and will require perseverance by the parties who may simply see too many insurmountable problems to continue. Again, the mediator must assist that process by his or her training or experience.
- It is critical to keep any simmering emotion at bay and controlling and reframing language is part of the technique to do that.

(6) Private sessions with each of the parties.

- Once again, the confidentiality question must be explained. However, the word 'confidentiality' does not guarantee that anything said will not have an adverse impact. This is evident from the NMAS guidelines referred to above. Something might be said in a private session which might cause a conflict of interest or might reveal a potential for harm to human life. This would cause a mediator problems and in accordance with the NMAS guidelines in all probability the mediation would go off the rails. Further, it may have consequences down the track if the mediator becomes aware of facts which he should or may be required to disclose in subsequent proceedings. This session therefore, must be handled very carefully.
- The real value of the private session is that not only can the parties be allowed to work through the issues away from the opposition, but they can also have their view of those issues tested. This is called a reality test. The mediator should explore with each party what is the best alternative to a negotiated outcome and what is a worst alternative to a negotiated outcome and make the parties confront those two matters to see where the real range of settlement options are and the utility of those settlements bearing

in mind those two things. Doing this in private session can be very useful.

(7) The parties resume, hopefully, to negotiate outcomes.

- Following the private sessions, the parties can then look at the various list of issues.
- Those issues can be evaluated by each side.
- By this point the real point of difference on the particular issues which are the problem will be obvious and meaningful negotiation can then take place. It may be that there is only one real area of dispute in the whole case but this can only be exposed if the process is allowed to develop over the appropriate time.
- Momentum is very important at this stage. If there are a number of issues and it turns out that one particular issue is really not the subject of a contest then that issue can be highlighted to give impetus to the negotiation because the parties will feel that they are making some headway. This will allow the momentum to build and continue. This demonstrates the utility of considering the mediation not as a whole but as a number of component parts.

(8) Agreement is reached.

- Any agreement must be carefully clarified.
- The agreement must be checked as to its workability and deal with any contingencies that might arise. For example, there may be a financial consequence from the proposed agreements, such as a tax implication, which is not strictly a matter for the dispute itself, but might be a consequence of the resolution reached. The realisation of and disposal of those issues is a matter for the parties. It must be remembered that the Mediator is not there to advise. It should not be lost on anybody that in some cases there might be an imbalance in representation if, for example, one party is legally represented and the other is not, because there may be issues such as this which do arise and which the ordinary lay person

would not be alive to. If something like this occurs the Mediator must handle the matter very carefully.

- The details of the implementation of the agreement should be included in that agreement,
- The formalisation of the agreement is important. The question is whether the agreement is intended to be binding. If so:
  - The intention must be clear.
  - The terms must be:
    - Certain
    - In writing (preferably should be)
    - Executed (preferably should be).
  - There must be no fraud or misrepresentation. There is no magic to an agreement reached at mediation. It is a contract. An agreement is reached and the usual rules in relation to contracts apply.
- The parties should then agree on any terms for either its disclosure or non-disclosure. Often there is a commercial advantage in disclosing or announcing an agreement because parties to these disputes are often in business and need to satisfy their customers and the like that all is good in the commercial field, and therefore avoid any tarnishing of reputation.

(9) Implementation review and revision.

- This is not always necessary. But if a review has been found to be necessary before a final execution of the agreement then the parties should meet to discuss that.
- Once that is done, then the binding agreement can be executed.

22. The above process seems both voluminous and time consuming. You will see, however, that when it is set out in the way I have done above, that there are two critical aspects:
    i. An understanding of the process and an engagement by the parties in a non time limited way.
    ii. A clear understanding of the issues that are causing the real conflict in the matter."

**F. Traps: Cases that ring alarm bells**

23. Surprisingly there are a large body of cases dealing with mediations. The time constraints today prevent me from traversing too many of them, but some relevant and interesting cases are as follows:

24. *Stillman v Rusbourne* [2015] NSWCA 410

i. In this case the applicant for leave to appeal before the Court of Appeal had been (with another) a defendant in equity proceedings.

ii. The applicant had engaged the respondents who were a firm of solicitors to advise and represent them in those proceedings.

iii. On 11 July 2007 a court appointed mediation took place.

iv. Following the mediation and on the advice of the respondents the applicant (and other defendant) accepted an offer of settlement proffered by the plaintiffs. The applicant and the other defendant were unable to fulfil the terms of the resultant Deed of Settlement. Subsequently, the other defendant was placed into liquidation and the applicant's estate was sequestrated in July 2008.

v. In 2013 the applicant commenced proceedings against the respondents (the solicitors) alleging that they had been negligent in their advice and representation in the course of the mediation.

vi. The respondent sought an order in 2014 pursuant to Uniform Civil Procedure Rules 2005 (NSW) 13.4 that proceedings be dismissed on the basis that they disclosed no reasonable cause of action. At first instance the Court held that the conduct complained of was work leading to the conduct of the case in court and was therefore subject to advocate's immunity. From that decision the applicant sought leave to appeal.

vii. Gleeson JA and Simpson JA refused leave to appeal, holding the following:

a) That the work done by the solicitors fell within the orthodox understanding of advocate's immunity being work that led to a settlement and thus affected the conduct of the case in court;

b) That while mediation does not, of itself, involved the exercise of judicial power, it is a step in the process towards the exercise of judicial power, which is exercised when judgment is entered.

viii. Importantly, however, Basten JA dissented in a very strong judgment and this sends a warning note to practitioners who will engage in mediation in the future. His

Honour held that advocate's immunity was rooted in the fundamental need of the administration of justice for finality of judicial determination of controversies between parties. In the present case the Consent Orders were, His Honour found, entered prior to commencement of a trial, reflecting a settlement reached by the parties out of court.

ix. It followed that the judicial determination of the controversy on its merits did not take place and therefore there was no justification for extending advocate's immunity to the conduct of the respondents in the course of the mediation which led to the settlement.

x. His Honour said at [30] the following:

> **"The nature of a mediation for the purposes of reaching an agreement as to an existing dispute does not invoke the exercise of judicial power, nor anything analogous to judicial power. There is no assessment by an independent tribunal of the merits of each party's case, nor any ruling on those merits. Taken in isolation there would be no reason to deny a party who was negligently advised in the course of a mediation a right to bring proceedings against his or her lawyers."**

xi. There has been an ongoing attack on advocates immunity. I do not think we have heard the last word on this and it is a matter that every practitioner should be wary of.

25. *Tapoohi v Lewenberg* (No 2) [2003] VSC 410

i. This was a case that involved the construction of the terms of the contract appointing a mediator and raised the question of whether a mediator acts for the parties, advises them, promises to use due care and skill and whether a mediator owes a duty of care to the parties. The potential of this case raises frightening issues for practitioners who are engaged in the mediation process.

ii. The plaintiff in the proceedings and the first defendant were the daughters of the deceased. The will of the deceased devised certain real estate in a particular way. Following the death of the deceased disputes arose about a number of matters and eventually the plaintiff commenced proceedings against her sister and a company.

iii. On 20 September 2001 the parties to those earlier proceedings attended a mediation with a view to resolving their disputes. The submission to mediation was pursuant to an agreement made between them and was not pursuant to any court order. This is

important in terms of any indemnity which might be available to a mediator. The mediator selected by the parties was George Gulvan QC. At the mediation, the plaintiff was represented by counsel who was instructed by a solicitor. The plaintiff was not present at the mediation but was in attendance by telephone from Israel. The defendant was present and was represented by James Merralls QC and also junior counsel and solicitors.

iv. At the conclusion of the mediation a handwritten document entitled 'Terms of Settlement' was executed by or on behalf of the parties to the earlier proceedings and by a number of other companies and individuals which or who were affected by the allegations made by the plaintiff. The execution of the terms by the plaintiff was achieved by faxing the document to her in Israel and she faxed back a copy bearing her signature and a notary's seal. The terms, *inter alia,* provided for mutual releases and for the parties to consent to orders disposing of the earlier proceedings.

v. In this case, the plaintiff sought to set aside or avoid the settlement. The plaintiff then joined her solicitors. Those solicitors, then by means of a Third Party Notice, sought contribution from the plaintiff's counsel (that they had briefed) and from the Mediator pursuant to s.23B of the *Wrongs Act, 1958*. It was alleged that if the Terms of Settlement did constitute a concluded agreement binding on her, then the plaintiff had suffered damages as a consequence of a breach by her counsel and by the mediator of a contractual duty and a tortious duty owed by each of them to her and that, by implication, this damage was the same damage that she suffered as a consequence of the solicitors' breach of duty. Accordingly, it was alleged that the solicitors were entitled to contribution from each of the third parties. I repeat that the third parties were the plaintiff's own Counsel and the Mediator.

vi. By summons the mediator sought summary judgment. Alarmingly, this was refused. His Honour Habersberger J examined the terms of the retainer of the mediator and in the course of his judgement said the following:

> **"[49] It was further submitted that I should strike out terms (c) and (d). This I will not do, given the allegation, which I must accept, that the retainer of the mediator was one to act for the disputing parties and to advise them. There seemed to be no dispute that terms (e) to (g) were likely to be implied terms of the mediator's retainer. With respect to term (g), it was not suggested that this is any part of the mediator's function to coerce the parties or any party to settle its dispute. This is not to say that some encouragement from the mediator would be always out of place, but the decision to settle must always be the free decision of the disputant. The point taken on behalf of the mediator was that the term as pleaded was objectionable in as much**

**as it imported the idea that the obligation not to do so arose only where there was a real or substantial risk that the settlement would be contrary to the interests of the parties or any of them. But where the contractual term conceded is wider than that pleaded, this will not assist the present application."**

vii. In relation to the tortious duties alleged His Honour examined the law and realized that it was an evolving matter. He said:

**"[54] Therefore, given the present uncertainty which attends the law in this area, I would be very loathe to strike out a pleading on the basis that the mediator owed no duty at all to the parties in the mediation."**

viii. In reference to the terms set out in [49] above the relevant terms referred to (found in [43] of the judgment) were as follows:

(a) Reasonably protect the interests of the Parties;

(b) Not act in a manner patently contrary to the interests of the Parties, or any of them;

(c) Act impartially as between the Parties;

(d) Carry out his instructions from the Parties by all proper means and further or alternatively;

(e) Not coerce or induce the Parties into settling the Earlier Proceedings, when, at the relevant time or times, there was a real and substantial risk that settlement would be contrary to the interests of the Parties or any of them.

ix. Alarmingly, these findings are made in the face of the mediator's letter prior to the mediation which contained the following passage:

"**I confirm that the aim of the Mediation Conference is to assist the parties in reaching a settlement of their dispute by the involvement of an impartial mediator. It is not the role or function of a mediator to impose a settlement on the parties. It is up to the parties to arrive at their own resolution of the dispute. The purpose of the mediator is to assist the parties to define the issues, eliminate obstacles to successful communication, explore settlement alternatives, and generally work with the parties to achieve a negotiated resolution."**

*26. <u>Weimann v Allophones Retail Pty Ltd (No 2) [2009] FCA 1230</u>*

i. In this case the parties had been locked in substantial disputation for some time over the terms of a franchising agreement. As part of the process an extensive mediation was conducted as a result of which documents were produced which one party asserted constituted a binding agreement. His Honour Justice McKerrarcher concluded that the documents did not provide sufficient evidence of a binding agreement. As part of the mediation between the parties they had signed a document titled 'Agreed Outline of Mediation Settlement, 12 October 2009 – New Agreement.' Only the mediator had signed this agreement. In concluding that it did not constitute a binding contract His Honour commented:

> **"[73] . . . I do not wish to be accepting that describing the document ultimately produced from the mediation (but not signed by anybody) as an 'offer' is accurate. Indeed, the title to the document which was a composite title achieved by joint contributions is in turn non-specific. Even the title 'Agreed Outline of Mediation Settlement – New Agreement' does not bear the precision which one might expect if firm agreement had been reached on each of the component elements of that which still had to be resolved. While the agreed outline may have been agreed, it is an outline that was agreed rather than an agreement, even in principle, as to every element in dispute. Some significant parts of it were still outstanding for determination.**
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> **[74] . . . A Statement that the complex litigation had settled from either party given that there had simply been oral exchanges perhaps evidenced by a jointly produced outline which left a number of matters outstanding does not, as a matter of objective fact, constitute a binding agreement."**

ii. I indicated above in terms of formalising the agreement that it was important to have terms that were certain. However, as his Honour pointed out in this case it would be a very artificial exercise to say that at every mediation before there could be a binding agreement the parties needed to ensure that every detail was contained in that agreement. His Honour said:

> ***"[85] Nor does that expectation accord with the law. The question is one of weight to be given to the outstanding factors especially in a complex commercial matter. Did the parties intend to make a concluded bargain? (Lesabar Pty Ltd v Hogan (1989) 4 BPR 9498 at [18] per Gleeson CJ and Masters v Cameron … (1954) 91 CLR 353). In Australian Broadcasting Corporation v XIVth Commonwealth Games Limited (1988) 18 NSWLR***

***540 the NSW Court of Appeal discussed the issue of whether parties to negotiations have agreed upon sufficient matters to produce the consequence that perhaps by reference to implied terms or by resort to*** considerations of reasonableness a court will treat their consensus as sufficiently comprehensive to be legally binding. That concept, the Court ***of Appeal said was not the same thing as deciding they intended to make a completed bargain."***

iii. His Honour then went on to analyse Masters and said that where parties who have been in negotiations reach an agreement upon terms but agree that the subject matter of the negotiation is to be dealt with at another time by a formal contract then the case may belong to one of three categories summarised by his Honour as follows:

a) A case in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect.
b) A case in which the parties are completely agreed upon all the terms of their bargain and intend no departure from it but despite this have made performance of one or more of the terms conditional upon the execution of another formal document.
c) A case where it is the intention of the parties not to make a concluded bargain at all unless and until they execute a formal contract.

iv. His Honour then went on to add that there was perhaps a fourth category being a variation to the first, namely where the parties intend to be bound immediately by the terms upon which they have agreed but expect to make a further contract in substitution for the first containing by consent additional terms: see *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd (1986) 40 NSWLR 622 at 628.*

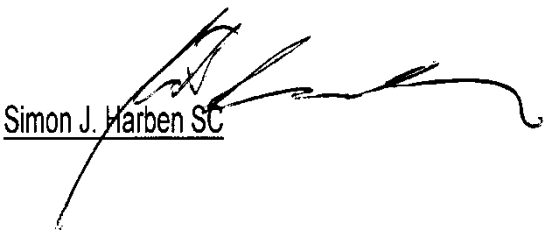
v. The above decision makes it patently obvious that the question of the parties reaching final agreement or not is ultimately a question of their intention. This is to be **OBJECTIVELY** ascertained from the language the parties have used or which may be inferred from their conduct. The **SUBJECTIVE** intention has a very limited role if any to play on this topic unless expressed as part of the exchange said to form or

contribute to any oral agreement. At all times the issue is primarily one of the construction of the language of the parties whether it has been expressed orally or in writing. It is for these reasons that I have suggested above that the formalisation of any agreement is of vital significance.

**G. Conclusion:**

27. In reality this paper barely scratches the surface of this topic and related topics.
28. The process that I have dealt with seems on its face, time consuming, very formal and also quite complex. It should also be said that one view of it would be that a high degree of skill was required. All of these things are of course correct to some degree but there are many mediations which are less formal and less complex.
29. The trick (for want of a better word) is to have an understanding of the complex process but be prepared to simplify its execution. This will involve, by necessity, the parties engaging in good faith in the process and the development of the issues to enable their discussion and hopeful resolution in a clear and ordered way.
30. As I said right at the start, my view of mediations has changed. My view of the process of mediations has changed. Hopefully, by following a few of the tips and being wary of the evident traps the mediation process can be implemented in a meaningful and successful way and I hope that is the same for each of you.

Dated: 19th February, 2016.



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