

Mediation in the Family Court of Australia: A legal framework

By Richard Bell

The *Family Law Act 1975* (Cth) makes specific provision for primary dispute resolution (PDR) as an alternative to formal litigation.

Part III of the Act provides a framework for PDR. The object of this part is to

encourage people to use primary dispute resolution mechanisms (such as counseling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made under this Act.

Section 19BA gives the Family Court a general power to advise the parties to ‘seek the help of a family and child mediator’. Further, the court may adjourn proceedings to enable mediation: sec 19BA(2).

Clause 63(1)(a) of the *Family Law Regulations* describes the process of mediation:

(a) The process of mediation is one by which the parties involves, together with the assistance of the mediator:

- i. isolate issues in the dispute; and
- ii. develop and consider options to resolve those issues; and
- iii. if appropriate – attempt to agree to one or more of those options; and
- iv. if a child is affected – attempt to agree to options that are in the best interests of the child....’

It is recognised that there are some cases in which mediation is not appropriate. Both parties must be willing and able to enter into meaningful negotiations; in some family law cases this is not always possible due to a variety of factors, including non disclosure of assets or income or a history of fraud, a history of family violence, child sexual abuse, or prior history of default on the part of one party.

The PDR services are court annexed and the Family Court places great emphasis on mediation and other associated processes such as conciliation as being appropriate diversions from litigation in family disputes.

Mediation generally

It is now no longer necessary to emphasise the significance of mediation in everyday practice.

It has gone far beyond occasional utilisation of the procedure. It now affects all manner of practice beyond the mediations themselves from the greater use of round table

conferences and a flexible approach generally.

Family and industrial law were the pacesetters but it is now universal.

The matrimonial practice over the long term however has made its approach culturally different. For a long time the approach has favoured gearing listings and evidence and procedure towards resolution, with hearings being those cases which could not be settled.

The significance of mediation was acknowledged by Austin J in *Albarran & Anor v Envirostar Energy Limited & Anor* (2002):

Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of courts and lawyers to achieve (quoting from *Dunnett v Railtrack plc* (2002) per Brooke LJ).

Mediation is a useful tool in resolving family disputes where intense feelings lie between the parties and the costs, both financial and emotional, of litigation are not in the best interests of those involved. Mediation allows ‘people to remain in control of their lives through a decision making process that encourages mutually acceptable solutions’ whilst providing a ‘constructive model of dispute resolution that the parties can fall back on’ if future problems arise.¹

Mediation is helpful in family law as the aim is towards resolution of issues between parties, not simply an outcome. Seventy five per cent of court mediation clients reach full or partial agreement through a process which assists the parties understand each other’s needs and options, to communicate effectively, and develop a framework which establishes a satisfactory ongoing relationship.²

In my own experience the skilled lawyer representing a client does not seek to trivialize the ‘personal and emotional’ but may separate it from other issues. Lead footed lawyers will simply say ‘you have to be commercial’; others however will look at further solutions to add on such as grief counseling, alcohol counseling, anger management etc. This should not be seen as merely emotional. Many a captain of industry has messed up family money by not addressing the problems.

Process of mediation

Mediation is offered before, at the commencement and after proceedings have been filed. Mediation will also be considered at other times, particularly at pre-hearing conferences.

There are four discrete stages of mediation.

- Information session

- Individual interview
- Joint interview
- mediation session

At the information session the role of the mediator is explained to the parties, as are the features and objectives of the mediation process. The mediator must comply with cl 63 of the *Family Law Regulations* which requires *inter alia* the giving of a written statement to the parties that sets out the factors listed in sub-cl 1(a); this includes a directive that a party has a right to obtain legal advice at any stage in the mediation process, and that anything said during the mediation is not admissible in any court or proceedings. A mediation agreement is entered into and a timetable is set for pre-mediation undertakings. Preparation may include agreeing on the issues to be dealt with during the mediation.

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The mediation session follows a general structure which involves the following steps:

- opening statements by mediators;
- opening statements by clients;
- setting the agenda for the mediation (generally with reference to the timetable entered into at the initial stage);
- prioritising issues;
- outline of history between the parties;
- exploring the needs, interests and concerns of the parties and children (if applicable);
- outlining available options based on the facts disclosed;
- determining the most workable solutions;
- reducing the agreement(s) to writing;

- referral for independent legal advice; and
- further sessions where necessary.

General practical

Mediators act as facilitators of a mutually acceptable decision making process between the parties. They are responsible for the processes and the context in which the discussions and negotiations take place but do not control the content of the mediation.

The mediator has a number of primary roles to fulfill including:

- neutrality; the use of the co-mediation model, with a male and female combination of social science and legal backgrounds, is employed to reinforce this;
- assist both parties to listen to one another and value and appreciate both parties' contributions;
- articulate the essential elements of the dispute, reframing them if necessary;
- guide parties to discussing their present and future needs

as opposed to focusing on unresolved issues from the past;

- promote the raising and consideration of proposed solutions to the various aspects of the dispute; and
- maintain confidentiality.

Many of these are consistent with mediations generally however given the Court's overriding concerns for children there are differences. The *Family Law Amendment Bill 2003* flags the possibility of certain disclosures.

Personal suggestions

In my own experience clients regard these processes as helpful. Information sessions with other courts may be worth trialing.

I prefer the Family Court's mediation to some external alternatives, although outside providers can be quicker. Although there are excellent and committed private services I tend to find the agreements realised in the court's mediations are more practical. This is particularly so with children's matters. Some less-experienced external services seem to me to proceed too quickly to 'an agreement', rather than the most practical one. For example, one often sees alternate week about arrangements agreed to in such sessions which many clients (and their partners) soon find unworkable. That said, even an unsuccessful start can reduce the antagonism in a hearing.

Although I have seen many robust conciliations involving practitioners, I have never seen untoward use of that process in family law. For some reason the walkouts, in-your-face comments to other parties and histrionic performances concerning underlying emotional issues which should be dealt with discreetly are not used in matrimonial proceedings as I have seen in other places. I suspect but cannot be sure that it is because it may backfire on the solicitors who have to routinely go back and who can see it does not assist anyone.

1 Brown, Dr C Family Mediation and Conciliation Counselling in the Family Court, Paper presented to the International Conference on Mediation, Singapore August 1997

2 Nicholson, The Hon Justice A, 'Mediation in the Family Court' Law Institute Journal v65 n1-2 p61-62