

## **Ian Nosworthy – Mediation/Arbitration Basics**

### **1. Preliminaries**

- 1.1 For parties unfamiliar with my experience as a mediator or arbitrator, I attach a copy of my current CV.
- 1.2 If I am to be appointed as mediator or arbitrator, one or both of the parties should confirm by letter or email to me, copied to the other side if appropriate.

#### 1.3 *Mediation Agreement*

The parties should agree who will prepare the Mediation Agreement. Normally this will be the claimant or plaintiff.

My standard form Mediation Agreement is consistent with the Law Society approved Mediation Agreement, and I attach a copy which the parties may choose to use if they wish.

The Australian National Mediator Standards contemplate that before mediating a mediator shall ensure that an outline of the mediation process has been given to the participants. Persons contemplating mediation would be well advised to go to the NADRAC website ([www.nadrac.gov.au](http://www.nadrac.gov.au)), and look at mediation in particular and the other ADR options, for the sake of gaining a better understanding of the process. I will always be happy to discuss with the parties the way in which mediation may be conducted, but the Law Society approved agreement seeks to comply with the National Mediator Accreditation Standards, and I am nationally accredited pursuant to those standards.

The Mediation Agreement must be completed before the mediation commences, and persons who are not lawyers must either sign the Mediation Agreement because they are a party or represent a party, or alternatively the confidentiality clause contained in the Agreement.

Lawyers representing parties are not required to sign because they are officers of the Court, and have overriding ethical obligations to keep confidential anything said or done at the mediation.

### **2. Preparing for Mediation**

#### 2.1 *Book of Documents*

Ordinarily one party will prepare an index, and upon agreement with the other party as to the documents to be included, a book of documents will be prepared for me as mediator.

That book should contain an acceptable minimum number of documents which will permit a proper understanding of the factual and legal issues in dispute. It may include pleadings, affidavits, documents, witness statements, reports and correspondence. If there is an argument about a document, it should be included rather than left out, so that I may better understand what is in dispute.

The book of documents and each side's position statement should be provided to me at least two days before the mediation, or by lunch time on the Friday prior to the mediation if it is on a Monday.

## 2.2 *Position Statements*

These should ideally be two or three pages only, and not repetitive of the pleadings. The statements should concisely identify the factual and legal issues. They should be exchanged at an agreed time, and not provided in some staged process.

If the parties are unfamiliar with preparing for mediation, my article on Preparing for Mediation published in *The Arbitrator and Mediator* in April 2008 (Vol 27, Number 1) is attached.

## 2.3 *Venue*

Ideally, three individual rooms or areas should be available. I am comfortable mediating at the offices of one of the solicitors if that is acceptable for the other party, provided sufficient space is available.

I understand that the parties have agreed to mediate at the Law Society and I am comfortable with that as a venue.

## 2.4 *Draft Deed of Release*

Either the defendant or the person in the position of the defendant should prepare a draft settlement agreement, which should be provided with their position statement, and contain appropriate clauses dealing with the granting of a release and all other formal issues, which can be dealt with without knowing the precise terms of settlement.

If the mediation venue has computer facilities available, a soft copy of the draft deed of release should be available so that amendment and revision can occur efficiently.

## 2.5 *Pre-mediation conference*

If the parties work through these notes, a pre-mediation conference should be able to be dealt with very expeditiously, but I consider that such a meeting is always useful.

## 3. **Conduct of the mediation**

### 3.1 *Date for mediation and commencement time*

Parties should think about the amount of time which might be required to present their respective positions. There can be agreements as to the time to be taken. Often a 1.00pm or 2.00pm start is appropriate to avoid a few hours wasted in positional negotiation. Parties need to be willing to remain at the mediation until a reasonable but not oppressive hour in the evening if necessary. I am happy to start at any reasonable hour agreed by the parties.

### 3.2 *Attendance of the parties experts*

The parties may consider it appropriate to have their experts available, at least for a limited period probably at the commencement of the mediation. This is not the occasion for a fishing expedition, or cross examination, but it may help for the parties themselves to hear what the opposition expert concludes and why they reach that conclusion.

### 3.3 *Persons with authority to attend and remain throughout the mediation*

In most circumstances it is essential that persons with sufficient authority to resolve the matter at all levels should attend and remain throughout.

Sometimes it may be appropriate for an insurer to be represented by a person on the telephone, perhaps interstate, but that is less satisfactory.

Immediate access to the decision maker is essential.

### 3.4 *Good faith negotiation*

My mediation agreement requires the parties to use their best endeavours to resolve the matter, and negotiate in good faith. This requires the presence of good faith, and it is not appropriate to attempt to use the mediation as a fishing expedition. Absence of good faith is often surprisingly easily established. See Sumner DP in *WA v Taylor* (1996) 134 FLR 211 at 224-5.

4. **What if we can't agree – is a simplified arbitration appropriate?**

- 4.1 Sometimes parties who are obliged to continue to deal with each other find mediation itself potentially negative. They may just want a decision by someone who is seen as independent, on limited but sufficient materials quickly, finally, and at a fraction of the cost of litigation or a full blown arbitration.
- 4.2 Provided the parties are in agreement to do so it is possible to undertake a simplified arbitration, even “midstream” in a mediation.
- 4.3 Obviously the parties have to have an agreement in writing to arbitrate their dispute, but where the parties have entered into a mediation agreement, this can be done simply, and the powers under the Commercial Arbitration and Industrial Referral Agreements Act 1986 particularly in relation to the reception of evidence may be used to deal with the matter expeditiously.
- 4.4 In such circumstance the parties may wish to enter into an exclusion agreement excluding rights of appeal. I attach a sample exclusion agreement which parties may choose to use in an endeavour to have an arbitration which is both short and final.

5. **My commercial terms**

- 4.1 My fees are \$ per hour plus GST for all aspects of preparation, and \$ plus GST per day for the conduct of a mediation or arbitration up to a maximum of 12 hours. Any fees for room hire or other disbursements are in addition.
- 4.2 I require an assurance from the solicitors for the parties that they are holding sufficient funds in trust to attend to payment of my fees, or that they accept responsibility for meeting those fees. I can provide a trust account facility for security deposits if necessary, and naturally will refund any excess fees unused.

**Ian Nosworthy**