WHEN IS MEDIATION NOT COLLABORATIVE?
COLLABORATIVE MEDIATION
IN COMPLEX CASES

BY

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In June 2006 it was my great pleasure to speak at a Centre for International Legal Studies conference in Salzburg, Austria on the topic "collaborative mediation in complex cases". In preparing for my speech, I had some difficulty coming to grips with exactly what the term "collaborative mediation" actually means. At least, when I made my presentation, I was heartened that my fellow mediators from around the world also had some trouble defining the term. As I said in my written paper in Salzburg, I wonder if we need some mediators to work out for us exactly what collaborative mediation is!

What follows is taken extensively from my Salzburg paper, with the addition of additional material that has arisen out of the conference and my own research since.

Living, as I do, "down under" in Australia, where can I start my research to unravel the meaning of "collaborative mediation"? The definition of collaborate in the Macquarie Dictionary, Federation Edition, gives us some clue as to what this topic might be about. It describes collaborate as "to work, one with another, also; cooperate, as in literary work". I also note that the Macquarie Dictionary goes on to also refer to collaborate as "cooperate treacherously: *collaborating with the Nazis"*. For the purposes of this paper, I think I prefer the first definition!

I next turn to that most trustworthy of tools, the internet. When I ask for a search of the words "collaborative mediation", what I get is a large number of

hits, almost all United States based sites. One particular site[1] has what I think is a very useful statement:

> "***Collaborative Mediation*** is a style of mediation where two or more people are encouraged to work toward resolution in a transparent and peaceful manner. The goal is to support you to unfold the issues and create fair agreements that will stand the test of time."

The topic now begins to make some sense. What appears to be the case is that, to show a distinction between positional type mediation (the type of mediation/negotiation typically done by an adversarial lawyer) and interest based mediation, some places have created a new term "collaborative mediation". From my perspective, "interest based mediation" and "collaborative mediation" are essentially interchangeable terms.

Where does my perspective come from, you may well ask. Well, for a couple of decades, I was a classic lawyer, involved in some of the largest cases in Australia's legal history, including the groundbreaking Mabo native title case. Further, like all good lawyers, I was also sure that I was a great negotiator and mediator. In truth, and with the benefit of hindsight, I can see that I was actually a classic "positional based" mediator/negotiator.

In 1997 I was honoured to be awarded a Churchill Fellowship, which enabled me to travel to North America to study indigenous issues in Canada and the United States in depth. As part of the Fellowship, I also undertook negotiation training at Harvard, under the direction of the world renowned Roger Fischer. Well, were my eyes opened.

I was fortunate to be able to put the training I received at that and a subsequent trip to Harvard into practice during real interest based mediation as part of the negotiation and mediation process for native title disputes in Australia. I conducted training sessions for many potential mediators and

[1] Sydney McDowell Collaborative mediation
http://www.confidentialmediation.com/Right_CollaaborativeMediation.htm

negotiators, and I am very happy to say that their success in mediation is continuing to this day.

My life changed again somewhat in the year 2000 when I returned to a more formal legal role as Deputy President of the then newly created Land and Resources Tribunal in Queensland. This is a judicial position equivalent to a Queensland District Court judge. Pleasingly, the Tribunal set about incorporating mediation as a fundamental aspect of dispute resolution in the Tribunal processes. In this regard, the Tribunal owes a debt of gratitude to the then other Deputy President, (herself a highly trained mediator) Judge Fleur Kingham, who, with the encouragement of the President of the Tribunal, drafted the bulk of the Tribunal's still current mediation processes. What followed was the adoption of a classic interest based mode of mediation. Full details of the mediation processes undertaken in the Tribunal can be found at www.lrt.qld.gov.au.

Of course, one of the real chestnuts for mediation is a fundamental question as to whether or not members of the judiciary should ever be involved in mediation as a mediator, particularly in the jurisdiction in which they are a decision maker. In this regard, I am particularly mindful of the American Bar Association's *Model Code of Judicial Conduct* Canon 4 F which states:

> "Service as Arbitrator or Mediator. A Judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorised by law."

The ABA's Canon clearly must be read in context, given that the Canon is headed "A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations". Further, the ABA's commentary specifically says that 4F "does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of judicial duties". Although this would seem to make it clear that in the ABA's view judges can perform mediations within their own jurisdiction, it is fair to say that in some parts of the world, particularly my friends from the United States, the fact that I, as a member of the judiciary, conduct

mediations within my own jurisdiction, is more often than not met, not just with amazement, but a degree of bewilderment. Thankfully, this issue has not, to date, been a cause of concern in mediations conducted by Tribunal members in the Land and Resources Tribunal in Queensland, Australia.

In December 2004 I was also appointed as a member of the Land Court of Queensland. As part of the Land Court's processes, it also has classic interest based mediation. Additionally it has a process of preliminary conferences, which are like a mediation, in that the parties are brought together around a table to see if the matter can be resolved in classic mediation style, the twist being that the Land Court member or judicial registrar who conducts the preliminary conference is permitted to be quite interventionist, in that they can express their opinion as to the merits of the arguments; the likely outcome of those arguments should they proceed to a hearing; and can suggest outcomes. A paper that I have prepared for the Land Court which gives some more detail of preliminary conferences is Attachment A to this paper.

The preliminary conferences conducted by the Land Court fall classically within the collaborative style of mediation set out in the topic under discussion. In conducting preliminary conferences, I generally allow the parties to proceed in a classic mediation style. Once the interests (and positions!) of the parties are clear to all concerned, I then work collaboratively with the parties to find a solution. I am entitled to bring to the process all of my experience, views, and opinions. It is not done in a judicial manner however, but in a manner of working with the parties and explaining processes. An interesting twist in this regard is that many of the parties who appear are not legally represented, and in fact have probably never been in a court before in their lives. They are basically "mums and dads" who feel aggrieved by a process of government. This is where my collaborative role really comes to the fore. In the scheme of life, these matters may at times not seem complex, but to the people concerned they certainly are. By working through complex legislation and issues, what can be a daunting process, in the vast majority of cases, becomes relatively easy.

On the other hand, I also conduct preliminary conferences where each side is represented by senior counsel or highly experienced lawyers, experts, and the like. It is quite easy in those cases to feel as if one is actually sitting in a hearing! Amazingly, though, when the same collaborative approach is taken, even involving matters of great complexity and concerning multiple millions of dollars, solutions are very often reached.

That said, I always find it difficult to refer to "success" of a mediation process. I well remember, prior to my judicial appointment, my heavy involvement over a period of about 6 months in an extremely complex, and nationally significant, mediation. I was a negotiator in that matter for one of the parties, and of course over a period of time went through all of the emotions from despair to elation to hope to despair. At the end of the mediation, just when it looked like some form of resolution may be possible, the mediation failed. The mediator said to me "don't worry Paul the mediation didn't fail. The mediation was completely successful. We ran a perfect process. It just didn't get a mediated result".

In light of that comment, I hesitate to say what success is in a mediation context. However, statistics can sometimes reveal some element of truth! Currently, having undertaken a very large number of preliminary conferences, approximately 90% of all matters that I conduct end in resolutions satisfactory to all of the parties. That means, a very large number of matters which would otherwise proceed to formal court hearings and the resultant costs in both money and human emotion terms are avoided.

I know of some instances world wide that conduct something similar to the preliminary conferences of the Land Court, but I am not aware of anything that quite approaches the concept of all embracing mediation with a collaborative approach by the mediator wearing a judicial hat in the way it is done in the Land Court. I commend the process to all of you for your consideration.

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ATTACHMENT "A"

LAND COURT OF QUEENSLAND

PRELIMINARY CONFERENCES

A GUIDE FOR PARTICIPANTS

By Paul Smith
Member, Land Court

Background

One of the roles of the Land Court involves hearing appeals arising out of land valuations made by the Department of Natural Resources and Mines (NR&M). The system can basically be described this way. NR&M makes an assessment of the value of land. The landholder, if unhappy with the valuation, may lodge an objection against the valuation with NR&M. NR&M will then make a decision on the objection, known as an Objection Decision. The landholder may, if still dissatisfied, appeal against that decision to the Land Court. Important time limits apply to each step of this process.

Offer to attend a Preliminary Conference

Once the Land Court has an appeal, an offer will be made to both the landholder and NR&M to attend a Court Supervised preliminary conference. Attendance at a preliminary conference is voluntary, and a preliminary conference will not be held unless both parties agree to participate.

What is a Preliminary Conference?

A preliminary conference is a formal meeting type process which is held between the landholder and NR&M. It is common practice for NR&M to be represented at the preliminary conference by a valuer aware of the details of the land valuation the appeal relates to. However, the parties may be represented in any way they choose.

The preliminary conference is held in a hearing room at the Land Court premises at 259 Queen Street, Brisbane; a regional Court House; or such

other suitable location as notified by the Court. The preliminary conference is Court supervised. This means that the preliminary conference is conducted by either a Member of the Land Court, or the Judicial Registrar of the Court. What is said at a preliminary conference is confidential, and the preliminary conference, unlike hearings before the Land Court, is not usually recorded.

A preliminary conference is usually scheduled to run for about 1 hour. Of course, appeals which go to a hearing before the Court may take several days and include complex valuation and other evidence. What occurs at the preliminary conference can therefore best be described as a "snapshot" of the case. If a preliminary conference is conducted by a Land Court Member, that Member cannot hear the appeal of the matter without the agreement of the parties.

How to prepare for a Preliminary Conference

At a preliminary conference, both the landholder and NR&M are expected to come prepared with the essence of the points that they would want to make at the hearing of the appeal. It is not necessary to have formal affidavit type material to support their argument. However, material such as photographs of the subject land; details of any heritage listings; details of easements; valuation material; etc. can be particularly useful during the preliminary conference.

What happens during a Preliminary Conference?

A Court Officer will usually announce the matter. After that, the Member or Judicial Registrar will conduct the preliminary conference. The Member or Judicial Registrar is part of the Judiciary in Queensland.

After an introduction, the Member or Judicial Registrar will invite the landholder to make their points relating to the appeal, followed by the NR&M valuer. A free flow of communication and information will be encouraged. Unlike what happens in most mediations, the member or judicial registrar may express views on what is said by both parties, and make suggestions to the parties. Any views expressed or suggestions made by a Member or Judicial Registrar cannot be used by either party at the hearing of the appeal.

If the parties reach agreement during the preliminary conference, the Member or Judicial registrar may make Consent Orders which will bring the matter to an end. In particular, the landholder will not be required to

file any more material, or send any further letters, to the Land Court. Also, the parties can agree to the Member or Judicial Registrar making a formal decision in the matter on the basis of what has occurred in the preliminary conference.