TO MEDIATE OR NOT TO MEDIATE: THAT IS THE QUESTION!

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What cases should go to mediation, and when is it more appropriate to bypass mediation and proceed straight to litigation, if ever?

In this topic, I look at the factors which influence decisions made about the conduct of legal proceedings. Sometimes, mediation is viewed as "just another step" that parties have to go through before they can get a matter set down for hearing by a Court or Tribunal. Others counter that mediation is used as a delaying tool to increase costs and to draw out time. Some suggest that parties should engage separate lawyers to conduct their mediation as opposed to their litigation. Still others suggest that all of the above can be true, depending on the circumstances.

Of course, others argue that interest-based negotiation is the only way to lasting agreements, and that mediation should therefore be a mandatory, early step in all litigation matters.

Briefly in this paper and in more detail in my oral presentation, I will draw on personal experiences as a Negotiator of some of the largest, most politically sensitive matters, faced in Australia's legal history Native Title related disputes. I will also comment from the other side of the fence now as a member of the Judiciary determining when matters should or should not be referred to mediation, and also from my perspective as a Mediator.

Like many others, I view "Getting to Yes" by Roger Fisher and William Ury as a cornerstone work fundamental to the modern day understanding of principled, interest based negotiation. However, all too often I believe that not enough attention is given to a caution which is to be found in Fisher and Ury's answer eight to "Ten Questions People Ask". They say, in part, as follows:

> "**When does it make sense not to negotiate?** Whether it makes sense to negotiate and how much effort to put into it depends on how satisfactory you find your BATNA and how likely you think it is that negotiation will produce better results. If your BATNA is fine and negotiation looks unpromising, there is no reason to invest much time in negotiation. On the other hand, if your BATNA is awful, you should be willing to invest a little more time even where negotiation looks unpromising to test whether something more satisfactory might be worked out. …… Don't assume either that you have a BATNA better than negotiating, or that you don't. Think it through. Then decide whether negotiating makes sense."[1]

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[1] Fisher & Ury "Getting to Yes" Second Edition Random House 1999 pp 172-3

Take the example of two parties who have had a long history of working together, even if somewhat reluctantly. Both parties know that they will have to work together for a considerable period of time into the future. However, due to an interpersonal conflict, both parties retreat to "hard" bargaining positions. Lawyers get deeply involved, and a fundamental point of law without precedent is identified. Should the parties enter into voluntary negotiation? Should orders be made forcing the parties to mediate? Or should the point of law be determined without further delay?

Consider also the next scenario. Three distinct parties, each with very different interests, are very keen to mediate a working agreement between themselves. Though their case is of course particularly relevant to each of them, their matter is also one of many like matters across the nation, and the parties are members of peak groups who have very different ideas as to what outcomes are or are not acceptable. If the matter is mediated, the mediated agreement may well be against the interests of their peak interest group, but could completely meet the personal interests of each of the individual parties. Any mediated agreement would create national news and clearly be used as a precedent (even given that the detail of the agreement would be confidential). Should the parties continue to mediate?

If you believe the answers to these questions are easy, then in my view you have failed to fully grasp the core of this topic and the point that Fisher and Ury were making. Hopefully, as we explore these issues during my oral presentation to the Centre of Legal Studies conference on "The Law, the Lawyer and Alternative Dispute Resolution" in Heidelberg, Germany (22-25 May 2003), the answers will become a little clearer for all of us.