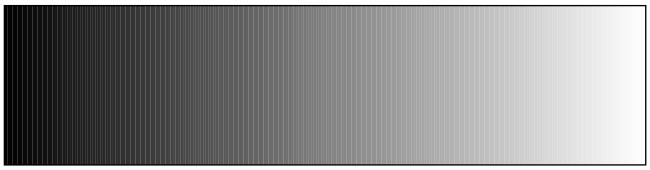

MEDIATION

A PRACTICAL OUTLINE

by
Sir Laurence Street

Fifth Edition, 2003

Sir Laurence Street

AC KCMG QC

Sir Laurence Street had a substantial practice as a commercial QC at the NSW Bar. He subsequently became an Equity Judge of the Supreme Court and later Chief Justice and Lieutenant Governor of New South Wales.

Since leaving those public offices he has carried on a solo practice as a professional mediator and disputes consultant. He

- has conducted well over 1,000 successful mediations principally in major commercial disputes;
- is the author of numerous articles and is a frequent speaker on mediation;
- is associated with a number of leading Australian and international mediation organisations; and
- was the Convenor and Chairman of the inaugural planning committee of the Australian Commercial Disputes Centre.

Amongst other current appointments he is

- Chairman of the Australian Government's International Legal Services Advisory Council;
- ADR Consultant to the Australian Defence Organisation (Defence Legal Office);
- a Court Member of the London Court of International Arbitration and President of the Asia-Pacific Council of that Court;
- an Australian Government Designated Conciliator to ICSID, Washington; and
- a mediator of the Court of Arbitration for Sport, Lausanne.

He has held office as Australian and World President of the International Law Association, London, and is currently a life Vice President.

In recent years he was a Director, and later Chairman, of the major Australian newspaper group John Fairfax Holdings Limited and a Director of the Australian subsidiary of the Italian Bank Monte dei Paschi di Siena.

Sir Laurence is a Companion of the Order of Australia, a Knight Commander of the Order of St Michael and St George, a Knight of St John and a Grand Officer of Merit of the Order of Malta. He is an Honours Graduate in Law from Sydney University and has three Honorary Doctorates in Law and an Honorary Doctorate in Economics from Australian Universities. He is a Fellow of the Chartered Institute of Arbitrators (UK), an Honorary Fellow of the Institute of Arbitrators and Mediators Australia and a Fellow of the Australian Institute of Company Directors.

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1. WHAT IS MEDIATION?

Mediation is an **informal process aimed at enabling the parties to a dispute to discuss their differences** in total privacy with the assistance of a neutral third party (mediator) whose task it is first to help each party to **understand** the other party's view of the matters in dispute and then to help both parties to make a **dispassionate, objective appraisal** of the total situation. As part of the process the mediator talks confidentially with each party. The object is to **help the parties to negotiate a settlement.** The **discussions are wholly without prejudice.** Nothing that is said by either party can be used or referred to in any later proceedings (eg. in a Court case). The **mediator** arranges and chairs the discussions and **acts as an intermediary** to facilitate progress towards settlement. The basic approach and underlying philosophy of mediation discussed in this Outline apply throughout the whole range of disputes.

2. HOW IS A MEDIATION COMMENCED AND CONDUCTED?

(a) The **initiation of the process may be voluntary** or it may follow a contractual or statutory obligation or an order of a court; once initiated, the **actual negotiations in the process are in every respect voluntary** through to the end of the mediation.

(b) Ordinarily the parties **agree in selecting a mediator** or seeking a nomination or appointment by an established mediation organisation. The parties and the mediator agree upon and sign a Mediation Agreement covering such matters as confidentiality and the costs of the mediation. A specimen short form Agreement is annexed. Sometimes a mediation may be initiated and a mediator appointed by a court, tribunal or statutory procedure; special provisions may apply in some such mediations – for example those in which a specific procedure is prescribed.

(c) In most cases there is a **preliminary conference** or teleconference at which procedural matters are arranged. Frequently these include the parties exchanging position papers or appraisals of the dispute prior to the mediation.

(d) Mediation **can be conducted at any place** that suits the convenience of the parties. It requires a meeting room large enough for all participants to sit around a table. Each party needs its own separate room to use as its 'home' during the mediation.

(e) At the mediation ordinarily the **parties meet in a joint session.** The mediator makes an opening statement which explains the mediation process. The mediator then invites each party to outline its view of the matters in dispute. The mediator then assists the parties to identify and

discuss the issues in dispute, to explore options for dealing with them and to seek solutions which suit their interests and needs.

(f) As well as meeting the parties in joint session, **the mediator will confer with each party** in its own room **privately** and in total confidence during the course of the mediation discussions. See Mediation Agreement, Clause 4 on page 10. Frequently the mediator will prepare the groundwork to enable the parties to meet one-on-one to achieve or advance towards a final resolution. Likewise there may be meetings between advisers (if any) of the parties.

(g) Very occasionally feelings between the parties may be so strong that they are not prepared, or for some reason it may be impracticable or inadvisable, to meet in joint session; this does not rule out successful mediation, but it requires a more intensive inter-active role on the mediator's part.

(h) The **process is endlessly flexible** and will be moulded under the guidance of the mediator to suit the particular dispute in hand, the stage it has reached and the personalities of the parties.

(i) The **mediator guides the course of negotiation** but has no authority to make any determination or decision on the subject matter of the dispute. See Sections 4 and 5 on page 5 and Channels of Communication on page 13.

3. HOW IS A MEDIATION ENDED?

(a) Either party is **free at any time to end the mediation** simply by announcing its withdrawal. This does not involve any adverse consequence such as having to pay costs or being prejudiced by anything that may have been said, or even tentatively agreed, in the course of the mediation discussions.

(b) **If the mediation succeeds the parties ordinarily sign a legally binding document** setting out the terms of settlement of the dispute. Oral settlement agreements are to be discouraged as they can themselves give rise to disputes. On the other hand very occasionally parties may prefer not to enter into a legally binding settlement agreement, but to be content with having re-built a relationship or achieved a satisfactory understanding regarding the matters of dispute.

(c) Sometimes, if a mediation does not succeed at the first (or a subsequent) mediation session, the parties may agree simply to **suspend the mediation.** If they agree later to re-activate it, this will enable the discussions to be picked up from where they left off taking into account subsequent events and re-evaluations.

4. WHAT ARE THE CHARACTERISTICS OF MEDIATORS?

They should be **properly qualified as mediators** and experienced in communication and negotiation in order to be able to guide the parties in their negotiations. Familiarity with and experience in the litigation process are of great assistance, but eminence in professions other than mediation is in itself not enough. Expert knowledge of the field of dispute is not essential; the requisite skills are analytical and empathetic person skills. **Mediators need personal qualities** that enable them to relate comfortably to each of the parties. Significant amongst these personal qualities are the **humility to be non-judgemental** in relation to each party's mind-set and the **readiness to empathise** with their respective points of view. Understanding and responding to (but not necessarily agreeing with) their individual perceptions are important pre-requisites to building with each party the relationship of trust and confidence in the mediator that will transcend into trust and confidence in the mediation process. Once the parties have developed **trust and confidence in the mediator and the mediation process,** the mediator will be better able to guide them along the **path towards consensus.**

5. HOW DOES A MEDIATOR CONTRIBUTE TO THE RESOLUTION OF A DISPUTE?

The mediator is an independent neutral who serves both parties jointly and each party separately. The object of the mediator is to inter-act with the parties (jointly and separately) and to move them through three stages:

- **the first stage** focuses on opening up **channels of communication** between the parties; see Channels of Communication on page 13;
- **the second stage** focuses on using the channels of communication to develop **bridges of understanding** between the parties of each other's perceptions of the dispute and their respective strengths and weaknesses;
- **the third stage** focuses on the **emergence of a negotiated resolution** of the dispute.

The first two stages – communication and understanding – overlap to a greater or lesser extent. Both are directed towards enabling the parties to discuss their dispute, to exchange views and thus more fully to understand their own and, very importantly, the other party's points of view. The mediator's task is to guide and facilitate the flow of communication and to assist the parties to gain a sufficient understanding of the total dispute and of each other's respective

points of view that will enable each party to make a **dispassionate, objective appraisal** of the total dispute situation. This can be described as taking a 'helicopter overview' of the black–grey–white continuum that constitutes the dispute. See 'The Symbolism of the Logo' on page 14. From that point, **assisted by the guidance of the mediator,** the parties move towards a negotiated resolution of their dispute.

6. WHO SHOULD ATTEND A MEDIATION?

It is of great importance that **each party to the dispute participates in person** in the mediation. A company, corporate entity or public authority should be represented by a senior officer with **full authority to negotiate and settle** the dispute. In cases **where it is impossible or impracticable** to have the ultimate authority present at the mediation (eg. in the case of a Government Minister or Departmental Head, a foreign chief executive or an overseas insurer) **there must be adequate authority** to make a contingent commitment that can responsibly be expected to be confirmed by the ultimate authority.

7. DO THE PARTIES NEED PROFESSIONAL OR OTHER ADVISERS?

This is a **matter of choice for each party.** Each party is free to bring whoever it wishes to support, assist, advise or speak for it. In simple disputes one or both parties may prefer to handle the discussions themselves under the guidance of the neutral mediator with or without the supporting presence of a friend or non-professional helper. In **disputes of any complexity** both parties usually wish to have their **professional advisers** (eg. lawyers, accountants, industry experts) present and this can be of considerable assistance in achieving a settlement. The place of professional advisers, if they are brought in, is **at the elbows of their client,** advising and supporting their client. If a client so wishes the professional adviser can act as spokesperson at particular stages or on particular aspects or even on the whole of the dispute.

8. ARE MEDIATION OUTCOMES BINDING?

Yes. The outcome of a successful mediation is usually an agreement for settlement. Once this is signed it is as **binding and enforceable as any other contract.** If the parties prefer not to enter into a legally binding settlement agreement, they are entirely free not to do so. See Section 3(b) on page 4. If the mediation does not succeed neither party's rights are affected in any way.

9. WHAT ARE THE PROSPECTS OF SUCCESS IN MEDIATION?

In the significant majority of mediations the parties reach a settlement. In the small number of mediations that fail are some in which, even though no settlement has been reached, the mediation may have clarified and narrowed the issues in dispute.

Ultimately it is for the parties to decide what settlement they can accept rather than pursuing whatever other courses that may be open to them. Each party has to ask itself **whether the available mediated outcome,** although disappointingly worse than it had hoped for, **is nevertheless an outcome it can live with,** rather than pursuing other courses open to it. The often-mentioned **'win-win'** ordinarily comes **not from the terms** of the settlement **but rather from the fact** that the settlement **enables both parties to put the dispute behind them.**

10. WHAT IF MEDIATION DOES NOT SUCCEED?

Parties automatically have all their rights reserved when they go into mediation. The discussions in the mediation will remain confidential and the parties can freely pursue their rights unhampered by any 'baggage' from the mediation if it has not succeeded. This could include going to a court, to a tribunal or to arbitration in which a third party will impose a binding decision on the parties. Sometimes a failed mediation will produce a **clearer and narrower set of issues for later decision.**

11. WHAT ARE THE MAIN STRENGTHS OF MEDIATION?

Mediation has a **range of potential benefits.**

- It can take place **quickly** and often with **relatively little expense** in contrast to taking the dispute to a court, to a tribunal or to arbitration.
- It focuses on the parties' **real commercial interests** and emotional and psychological **needs** and not just on their legal rights.
- It gives the parties an **opportunity to participate directly and informally** in resolving their own dispute.
- It gives the **parties control over the process** itself **and the outcome.**
- It **exchanges the unpredictable outcome** of litigation or arbitration **for the certainty of a negotiated consensus.**
- It produces **outcomes which are likely to endure** because the parties themselves have chosen them.

- It **eliminates the conflict and hostility** that nearly always accompany the compulsory decision of the dispute by a court, tribunal or arbitrator.
- It can **improve understanding** between parties with an ongoing relationship.

12. CAN MEDIATION COPE WITH DIFFERENCES IN BARGAINING POWER?

Differences in power between the parties are a **reality in many conflicts,** and all dispute management procedures have difficulty in dealing with this reality. It has to be recognised that in some cases mediation might involve weaker parties conceding some of their rights but, as against this, any power imbalance is likely to be less oppressive at the mediation table than in a court, tribunal or arbitration. **Mediation attempts to deal with power differences**

- by providing an unthreatening environment;
- by allowing each party the opportunity to speak to and to be heard by the other party;
- by minimising through informality oppressive or intimidatory behaviour;
- by the mediator's neutral and impartial behaviour;
- by not forcing any party to agree to a settlement.

The separate meetings with individual parties can serve to reassure weaker parties and to suggest to them approaches or proposals that might advance the prospects of settlement. The process of mediation and the **mediator's techniques and skills are conducive towards preventing an abuse of power.**

13. WHEN IS MEDIATION APPROPRIATE?

(a) Mediation is appropriate in a **wide range of disputes.** In fact there are few, if any, fields of civil dispute in which mediation can be ruled out as inappropriate. For example, and without limiting its scope, mediation is used extensively in business and commercial disputes, in local government and planning disputes, in insurance disputes, in partnership disputes, in industrial disputes, in professional negligence disputes, in construction disputes, in personal injury disputes and in family disputes. It is equally as well suited to multi-party disputes as it is to two-party disputes.
It is increasingly being used in international commercial disputes.

(b) It is impossible to generalise as to the **time when a dispute is ripe** for mediation. Some are ripe very soon after they erupt and before the parties become deeply entrenched in oppositional positions and incur

expenditure on costs in consolidating those positions. Some are not ripe until the parties have fought them out to the point of a judgment or award in a court or an arbitration. Between these two extremes is a continuum. The mere fact that litigation or arbitration has commenced, and even is in the course of a current hearing, does not preclude mediation being conducted concurrently. What is important is that **both parties are ready to strive to arrive at a resolution** through mediation, and that they are **ready to strive to make a dispassionate, objective appraisal** of the total dispute situation.

14. DOES MEDIATION DIFFER FROM CONCILIATION AND ARBITRATION?

There is **no difference in principle between mediation and conciliation**; both are often described as ADR – Alternative Dispute Resolution. Both are consensus-oriented mechanisms serviced by a neutral facilitator in which **ultimate control of how to resolve the dispute rests with the parties.** Some say that conciliation involves a more positive, 'hands on' approach in which non-binding expressions of opinion or suggestions may be provided by the neutral facilitator. If the parties require this approach, it can be adequately encompassed within the inherent flexibility of the process.

There is a **fundamental difference between consensus-oriented mechanisms aimed at ending in the parties themselves agreeing to resolve** their dispute on the one hand, and, on the other hand, **arbitration** (and **litigation)** in that the **arbitrator (or judge) imposes on the parties a decision** of the matter in dispute.

15. WHAT ARE THE COSTS OF A MEDIATION?

Each party will pay whatever costs it may incur if it chooses to bring a professional adviser to the mediation. Neither party can be made to pay costs to the other party. The **mediator's fee and the costs** of hiring rooms in which to conduct the mediation are **usually agreed in advance to be divided equally** between the parties. The mediator's fee varies according to the experience and stature of the mediator and is comparable to a lawyer's fee. The mediator will always quote a fee in advance and it will be included in the Mediation Agreement.

MEDIATION AGREEMENT

The parties signing this Agreement hereby appoint Sir Laurence Street (the Mediator) to mediate in the dispute described in the Schedule and the Mediator accepts such appointment upon the following terms and conditions:

1. The parties or their advisers will participate in a Preliminary Conference or Teleconference with the Mediator in order to discuss and agree upon the arrangements appropriate to enable the mediation to proceed.

2. (a) The Mediator and the parties and all persons brought within the mediation by either party shall each sign and comply with the Confidentiality Agreement in the accompanying form.

   (b) None of the documents brought into existence for the mediation or documents discussing the events within the course of the mediation and none of the oral exchanges within the mediation can be introduced as evidence or relied on in any arbitral or judicial proceedings or otherwise used in any way for or against any party to the Mediation Agreement.

   (c) Every aspect of every communication within the mediation shall be without prejudice.

3. The parties will not be bound by any comments, opinions, suggestions, statements or recommendations put forward by the Mediator.

4. Throughout the whole course of the mediation the Mediator will be free to discuss the dispute privately with any of the parties or other persons brought within the mediation by them including their professional advisers **PROVIDED ALWAYS** that the Mediator will preserve absolute secrecy of the content of any such discussions and will not convey any knowledge of such content to any other party or person unless specifically authorised to do so.

5. The making or using of any statement or comment, whether written or oral, by the parties or their representatives or the Mediator within the mediation shall not be relied upon to found or maintain, or be used in any way in, any action for defamation, libel, slander or any related complaint. This clause can be pleaded in bar to any such action.

6. The parties jointly and severally release, discharge and indemnify the Mediator in respect of all liability of any kind whatsoever (whether involving negligence or not) which may be alleged to arise in connection with or to result from or to relate in any way to this mediation.

7. The parties jointly and severally agree to pay to the Mediator an all-inclusive fee of $…… per day of up to 8 hours plus GST and $…… per hour plus GST for extension beyond 8 hours and for other attendances including preliminary conferences and preliminary consideration together with travelling and accommodation costs.

   (a) Such payment and other expenses of the mediation such as room hire will be shared equally between the parties.

   (b) For the purpose of sharing the fee, costs and expenses pursuant to this clause where there are multiple parties, all who participate as a single group shall be deemed to constitute a single party. In any case of doubt or dispute the ruling of the Mediator on this point shall be final and binding.

8. Each party will pay its own costs and expenses of the mediation.

9. Each party recognises that the prospects of success in the mediation are essentially dependent on both parties negotiating in good faith towards achieving a resolution of the dispute.

SCHEDULE

(Briefly identify the matter in dispute)

……	……	……
Name (Block Letters)	Signature	Date

……	……	……
Name (Block Letters)	Signature	Date

……	……	……
Name (Block Letters)	Signature	Date

MEDIATION BETWEEN:

AND:

CONFIDENTIALITY AGREEMENT

As the condition of being present at, participating in, or receiving information regarding communications and the course of proceedings within, this mediation of the dispute described in the Schedule, all of the signatories to this Confidentiality Agreement severally agree with each other that they will unless otherwise compelled by law preserve total confidentiality in relation to all communications and the course of proceedings within this mediation that may come to their knowledge. This agreement does not restrict any person's freedom to disclose and discuss communications and the course of proceedings within this mediation within the organisation or legitimate field of intimacy of the party on whose behalf or at whose request such person is present at the mediation including the advisers and insurers of that party **PROVIDED ALWAYS** that any such disclosures and discussions will only be on this same basis of confidentiality.

SCHEDULE

(Same description as in Schedule to Mediation Agreement)

.....	.....	.....
Name (Block Letters)	Signature	Date

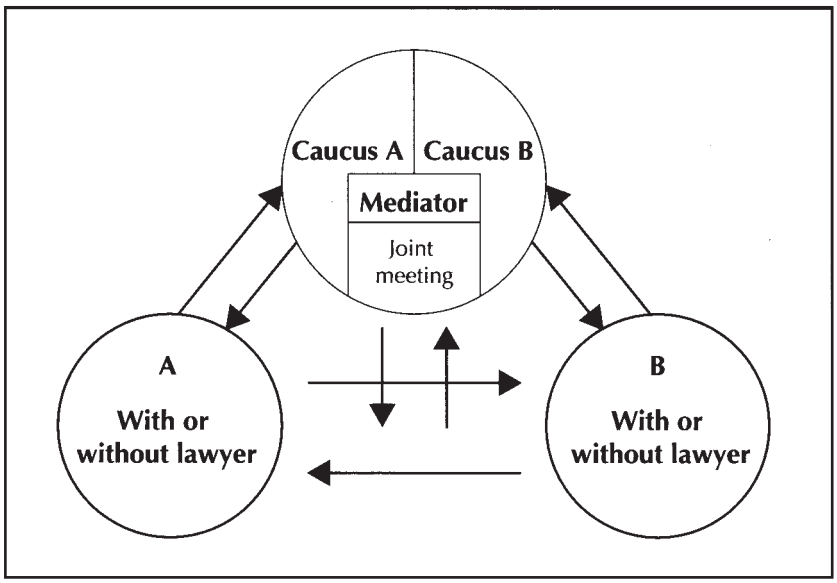
CHANNELS OF COMMUNICATION

Establishing a free flow of communication is an essential first step in a mediation. But this is not an end in itself. The **flow of communication** is a precursor to reaching the core of a mediation: assisting the parties to achieve a **better and fuller understanding** of the total dispute and to appraise it dispassionately and objectively. The following diagram illustrates the significance of the pairs of channels of communication in a mediation, and exposes the **valuable dynamism inherent in the guided use of those pairs of channels.** They comprise:

- each party communicating directly with the other;
- the mediator participating in joint meetings so as both to receive communications from them and to feed communications back into them;
- each party sending and receiving communications to and from the mediator through discussion in private meetings (caucuses).

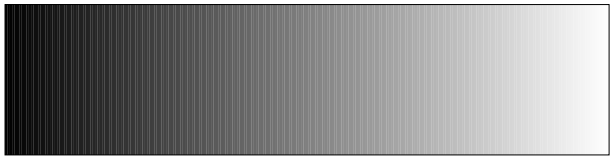
If the parties bring lawyers, their presence provides the capability of a separate and subsidiary series of similar communication flows involving the mediator and the lawyers **plus an extra pair of channels** to and from each party and its lawyer.

The mediator sits at the epicenter and is privy to the course of these dynamic communication flows. The mediator is thus uniquely situated to bring to bear skill and experience in stimulating, guiding and (particularly in the caucus) fine tuning the flows in those interactive channels towards the end best calculated to enhance each party's objective understanding of where it and the other party stand in relation to the whole dispute, and how best to achieve a consensual resolution.



THE SYMBOLISM OF THE LOGO

THE BLACK-GREY-WHITE CONTINUUM OF A DISPUTE

Mr Black  Ms White

ONLY TWO OUTCOMES ARE POSSIBLE ON EACH ISSUE THROUGH AN EXTERNALLY **IMPOSED DECISION** AFTER ADVERSARIAL LITIGATION OR ARBITRATION

Mr Black
100% or 0%

(Grey area is 'off limits')

Ms White
100% or 0%

"At the end of a trial, at the end of an appeal, the judge will be compelled to reduce a complex slice of human experience, with all its subtlety, to what is, in essence, a one line answer: 'A wins; B loses'."

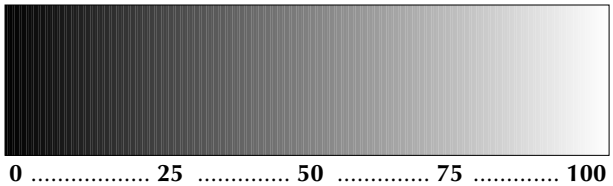
(The Hon Justice K M Hayne, High Court of Australia, 74 ALJ 377)

MEDIATOR LEADS PARTIES INTO GREY AREA WHERE A VARIABLE RANGE OF PARTY-SELECTED OUTCOMES IS AVAILABLE TO ACHIEVE A MEDIATED **CONSENSUAL RESOLUTION**

Mr Black

Mr Black selects gray area in which to negotiate an outcome he can live with

100 ..... **75** ..... **50** ..... **25** **0**



0 ..... **25** ..... **50** ..... **75** **100**

Ms White selects gray area in which to negotiate an outcome she can live with

Ms White