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ETHICS AND THE VCAT CODE OF CONDUCT

The major dilemma, "Does Ethics play a part in Mediation". The definition of "Ethics" is aligned with the definition of "Morality", and both are concerned with "right from wrong"; "good from evil"; vice and virtue". However, Mediation is not about discerning or judging what is right or wrong, it is about bringing the parties together and allowing them to make a decision.

Mediation itself grew out of dissatisfaction with the Adversarial Process. Thus the aim is to take the adversarial element out of the dispute and give the matter back to the best parties to resolve it, the parties themselves. By its very nature and its informality and the fact that there are no overseeing authorities, creates the greatest dangers and brings with it its dilemmas. To quote "Folger & Taylor", Mediation is a consensual process that seeks self-determination and resolution. Mediation, unlike, Litigation, recognises the collision of "Legal Norms" with "Person Orientated Norms".

Thus, a mediated solution does not have to accord with all the rules and requirements of justice, rules of evidence and rules relating to natural justice. Unlike Courts, with checks, balances and appeals, there is little review of Mediation. It relies on the parties and the market place.

An alternate definition of " Ethics" is that it, is a standard of conduct for a given profession.

VCAT, in its wisdom, has set down a "Code of Conduct" for Mediation (re-produced in the Appendix). The "Code", the writer suspects, is not so much produced from the viewpoint of the Mediator but to inform the public, and the users of VCAT system what they can expect at Mediation and from a Mediator. It does not attempt to define what is a "Mediator". Partly, this is due to the different "types" of Mediation or "Alternate Dispute Resolution Processes" practiced in different lists. Whilst Mediation was once a "process" in search of a "theory", it has now been defined in so many different ways and no single definition will suffice.

In practice, the "so-called Mediation process" falls into four (4) broad categories:-

1. ***The Settlement Model***, which is Mediation, intended to encourage incremental bargaining towards a position of compromise; the aim being settlement.
2. ***The Facilitative Model***, tends to focus on the parties' underlying needs and interests;
3. ***The Therapeutic Model***, is when the Mediation is intended to deal with the underlying cause of the parties' problem as a base for solution as opposed to mere settlement of the dispute;

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4. ***The Evaluative Model***, is where there is an expectation from the parties that the Mediator will use expertise and experience to direct a settlement towards an anticipated range of outcome.

Obviously which process is adopted will affect Ethics.

Broadly, most Mediations at VCAT (probably as a result of it being attached to a Judicial Tribunal) are based on the Settlement model with a large dose of the Facilitative Model, i.e. it is a process of assisting the parties to search for a solution after an evaluation of all the options and consequences.

Whilst the definitions of Mediation are many. Broadly speaking the component parts are

a) *Competency*; that is, the Mediator should be able to understand and deal with the matters or issues in dispute;
b) *Impartial*; that is, by being a third party, the Mediator is not involved and is not prejudiced;
c) *Confidential*: allowing the parties to have full and unbridled discussions;
d) *Facilitative*; the Mediator is not an adviser, but is merely to facilitate the process. Expertise and knowledge is for the parties to bring to the Mediation;
e) *Informed*; that parties move to resolution by developing options and considering alternatives. .

With a view to ETHICS we will now review the Code

1. *The Mediator's Role*:

Clause 1 defines the Mediator's role as "must attempt to assist the parties to resolve their dispute" The emphasis is on settlement and not on evaluating or assisting the parties to understand the issues or to learn a new way of communicating. There is nothing here to say that the Mediator is concerned with rights or wrongs, truth or justice.

Clause 1.2 requires the Mediator to give each party "the opportunity to speak". Presumably this emphasises that it is for the parties to have the "stage"; it is for them to put their case and in their own words. The Mediator's ethical dilemmas come about when a party is clearly not articulate, may not have knowledge, may be overwhelmed by legal or other eagles, or just do not want to communicate.

The second part of Clause 1.2 requires the Mediator to "as far as possible, ensure that the other party (or parties) listen". Presumably the requirement is that the parties "actively" listen. The dilemma is how far should the Mediator go to ensure understanding. Is it necessary to keep reframing or reworking the argument until the Mediator

virtually becomes the Advocate? Is it understanding of a particular issue or the whole, which is important?

Clause 1.3 allows Mediators to cut across the rules of "natural justice" and allows the Mediator to meet each of the parties separately. Is this ethical? What about the right to respond to allegations? What about outrageous claims or lies? What about just plain bribes?

Clause 1.4 allows the Mediator to pose questions to the parties. Does this not cut across the obligation not to give information, not to be biased, not to influence? The way of asking a question is as important as the answer. The purpose of many questions is not only to gain information but also to put the parties on notice, or possibly getting the party out of the "comfort Zone". Clause 1.4 comes dangerously close to another ethical dilemma and that is, "How far can pressure by used". By asking questions and discussing chances of success or failure, which by definition include, questions of costs, does not the Mediator run the risk of being said to influence or coerce the parties? How ethical is it for the party to be pressured? Does this not allow the Mediator's judgment of the outcome prejudice the Mediation? Does it not allow for the Mediator's bias to come in? Does it allow the Mediator to overwhelm the other party with what the Mediator wants to happen?

Clause 1.5 goes as close to a definition as the Code comes in that it states "The Mediator may assist the parties to develop options and approaches for the settling of disputes". It notes that such "options and approaches is not limited to the type of offers that would be made by the Tribunal" and thus distinguishes Mediation from Litigation. It should put the parties on notice, that a different outcome is possible. By allowing Mediators to assist parties in developing options, there is a dilemma in a Mediator definitional role of allowing the parties themselves to discover their options and develop alternatives. Further, when does the Mediator become a Conciliator, or, when is the Mediator stepping over the line becoming the instigator of the settlement? For example, the power of the Mediator has been likened to the power of a Traffic Policeman. The parties have full control of the vehicles, but where the parties go, how fast they can go, where they must stop, where they must turn, is subject to the Traffic Policeman's signal and moods

2. *The Mediator must be Impartial:*

Clause 2 of the Code states, "The Mediators must be (and must be seen to be) impartial". Whilst being impartial may be easy to judge at the commencement of the Mediation, Ethical questions are more about what if the Mediator becomes aware of possible past acquaintances during the mediation. Or what of situations when what a party may be saying or doing, or their advisers may be saying or doing, or the personal

appearance of the party, gives out negative vibrations or evokes extreme feelings of sympathy. What are the ethics of trying to impress a party of their adviser?

3. *Clause 3 says that the Mediator must not give Advice:*
This picks up the component part of the definition that Mediators are there not to advice but to Facilitate. The clause goes on to say that if the parties need legal or other advice they must obtain it themselves, even though the Mediator might be an experienced professional. It is often strange for parties to come together with a Mediator who they believe has been picked for his or her expertise and find that the first thing the Mediator says is, he cannot advise them. This is especially so for an unrepresented party.
The ethical dilemma here is more of the same, that is, where is the dividing line between advice and assisting parties finding relevant advice? Or when does a lack of knowledge inhibit a parties' ability to understand and negotiate? It must be remembered that Mediation is not about the "right outcome", but what suits the parties in the particular situation. Therefore, how informed must a party be! Is this not a Mediator's value judgment. Can one really ever know everything? Further, should a party be disadvantaged in time and money by allowing another party, who should have been ready at the time, to go off and find out about the law? And what is the situation where a party declines to seek what the Mediator believes is necessary knowledge and advice?
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4. *The Mediator must inform participants that there is no obligation to settle*:
Clause 4 of the code acknowledges that the parties may not have initiated the process or may have been ordered to attend. The Code places an obligation on the Mediator to ensure the parties understand that they may leave at any time. (4.1) In other words, a horse has been led to water, but cannot be made to drink. Studies have indicated that the effectiveness of Mediation is little changed by how the parties got there.
However in 4.2 the Code also requires that the Mediator must inform the parties of the consequences of the failure to settle in that they may be required to attend a Hearing. Is this a form of coercion?

5. *The Mediation must be fair*: *Clause 5.1* of the code is concerned with the concept of "fairness". Whilst this is not usually spelt out in the definition or the components of Mediation, it may be said to be inferred from the requirement that Mediators be impartial Facilitators and the parties be informed. Defining "fair" is even harder than defining "ethics". Parties conceptions about "fairness" differ and change from hour to hour. A cry so many times heard in Mediation is "I am only trying to be fair". The code does attempt to define the term in *Clause 5.2*, Clause *5.3* and *Clause 5.4,* and these can be summarised as follows: -
Clause 5.2: is about a Mediator not allowing abuse of process. Presumably, parties fishing or refusing to participate are unfair. Similarly, if there is a

large power imbalance that can be seen as unfair. But again the boundaries can be blurred depending on what the Mediator believes is fair. And what of cultural and cross-generational issues.

Furthermore, power imbalances are a fact of life, and are part and parcel of commercial reality. Thus why would a Mediator not proceed if the weaker party is given a reality check as to what is to come? Knowing who is your opponent and understanding their strengths and weaknesses is part of the case and will be an underlying motive to go to Mediation.

Clause 5.3: acknowledges the fact that legal and other types of "representation" are a part of the VCAT Mediation Process. The Code notes, there is not an automatic right to representation, and appears to leave it to the Mediator's discretion or for the Mediator to mediate. However it has been argued that having "Experts" at the Mediation stops the parties from actually participating. Often it is the Expert, with the legal, or other professional background, who puts the case and does the negotiations. This is said to cut across the object of Mediation, in not allowing the party to have a say. However, it is these professionals who come with knowledge and the experience of negotiating. The fact is the Tribunal is a legal tribunal, dealing with legal and legislative issues. Thus, Mediators on the whole probably prefer to see a concise argument rather than unthought through factual dissertations. Ethical dilemmas persist as to how far the parties should become participants when there are professional advisors. Whether there is a point at which the "Experts" should be asked to leave or whether the Mediator should see the "Experts" without the parties.

It is noted in the Clause, that the emphasis seems to be on the parties. Thus it takes the emphasis off the Mediator.

Clause 5.4: requires the Mediator to give reasonable opportunities to consult.

Clause 5.5: requires the Mediator to avoid any conduct, which could place a party under duress to reach a settlement. However, just by being at a Tribunal Mediation Hearing when one has never been before; having to put a case, listening to someone else put a case or spin on the same fact situation; being queried; being told of worst or best alternatives; being told about costs; being given a reality check. Whatever definition is used, this places the party under duress. The ethical dilemma is where is the fine bordering mark.

6. *A Mediator must not hear and determine the matter:*

Clause 6 of the Code requires the Mediator who is involved in a Mediation not to also sit on a Tribunal to hear the proceedings. The question must be raised "Why not" if the Mediator has already heard all the arguments and spoken to the parties at length why should he or she not then give a judgment if the parties cannot agree. The Arbitration

Act, Section 27 allows for an Arbitrator to conduct a Mediation. However this discussion is for another day. For the purposes of the Code, the purpose of the Clause is to go to the impartiality and confidentiality of the process.

7. *Confidentiality*

Clause 7.1 of the Code states the purpose of having confidentiality in Mediation is to allow all parties to put all points of views and for all alternatives to be canvassed. Confidentiality is often sited as the major advantage of Mediation over Litigation. It is certainly part of the reasons given for Mediations. The VCAT Act confirms the Requirement as to confidentiality.

Clause 7.2: Clause 7.1 and Clause 7.2 are direct prohibitions on the Mediator. Clause 7.2 being prohibition on the Mediator telling the other party anything that went on in a private Mediation, unless authorised to do so. However, with recent cases, and inquiring Governments question as to the confidentiality of what is said in a Mediation are being put to the test. Certainly according to the Code, the Tribunal couldn't delve into the matter but does this stop another Court, say The Supreme Court or another Authority, say, Taxation Department, As far as we understand, this has yet to be tested but inroads are being made.

And if what is said in either the Mediation or as a consequence of a private meeting with one of the parties, the Mediator believes that a crime or a conspiracy is taking place, or a third party business or health may be at risk. Is it still an ethical requirement to "Stay silent"?

Clause 7.3: seems to give protection, although there are some limited circumstances, pursuant to the Act, which are exceptions.

Is it also for the Mediator to keep quiet if he has revealed to him matters, which, if they had been revealed to the other side, would have resulted in a very different course of behaviour or settlement? Furthermore, something, which the Mediator learns from one side but cannot tell another side, may effect the Mediators impartiality or could result in process not being "fair".

8. *Settlement:*

Clause 8.1 of the Code requires the Mediator to "encourage" the parties to make a written record. The clause however appears to indicate that the Mediator, apart from providing maybe a precedent, not be involved in the settling or the writing up of the settlement. This can be highly problematical where the parties do not have the skill to draw up an agreement, or after a lengthy Mediation, parties require the Mediator to check any agreement to ensure it covers what has actually been agreed and discussed. It would be unethical for a Mediator not to ensure that was actually down on paper was what the parties agreed and that it had covered all aspects. Again, where is the ethical boundary?

As part of the Confidentiality, Clause 7.4, all the Mediator needs to do is to advise the Tribunal if the matter is settled or not settled. Thus, there is no

one but the parties who can say if the Mediation was actually conducted fairly, within the rules, ethically, etc. In fact, the Tribunal has no way of knowing how settlement was reached, if it was fair to the parties, if it was unjust. All the Tribunal can do is either put a tick or cross next to the Mediator's name. However pursuant to *Clause 8.2* the Tribunal may make Orders as to Terms agreed to. However, it would be a brave Tribunal, to refuse to give effect to an agreement, it had sent to Mediation. How could it now insist of having all the facts before it? All the Tribunal can do is to see that the Agreement is not illegal or completely illogical. But even it is completely illogical, what right has the Court to interfere?

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9. *Immunity of Mediators:*

Clause 9 warms the heart of every Mediator as it gives them Immunity when doing Mediations. In effect, it recognises that Mediation is not about Win/Win but often about Lose/Lose. As such one or both parties may be very unhappy with the end result, especially after reflection and time. The ethical issues include why the conduct of the Mediator should not be scrutinised, or if the Mediator somehow acts outside the Code are they performing a function which may be outside their performance as a Mediator and so lose their protection from Suit

The above is a tour of the Code, Mediation and Ethics. The Code does attempt to pick up all the elements of the Mediation directly referring to –

1. Partiality
2. Confidentiality,
3. That Mediators should not give advice but are Facilitators
4. and that the parties should be given every opportunity to be informed and to receive information.

However the Code does not address the competency of the Mediator. By definition, if a Mediator is appointed by VCAT, VCAT has an obligation to ensure that that Mediator is competent and competent to hear the case. There is an ethical dilemma in this matter as to how competent does a Mediator have to feel to mediate complex matters outside their specialised knowledge, dealing with emotions or cross cultural matters.

Again these are usually not obvious at the start of the Mediation and may develop during a Mediation.

The purpose of the tour is to evoke discussions and ideas as to re-assessing or improving the Code and the Ethical Conduct of Mediators who by definition are all ethical.
The Editor would certainly be pleased to hear the readers' ideas and comments about the Code, especially as part of her ethical duty to ensure that Mediators are provoked and continue to think as Mediators and not as Judges.

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