ETHICS and 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".

The word 'ETHICS", if one is to look it up in the Dictionary, has a number of circular definitions. he Webster It is –

1. **The study of standards of conduct and moral judgement, moral philosophy standards.**
2. **The system or code of morals of a particular philosopher, religion, group or professions.**

Looking up the word 'MORAL" in Webster's, the following meaning

Principles and practice in regard to right ,wrong and duty; ethics general conduct behaviour, especially in sexual maters

My law dictionary interestingly has no definitions of the terms

In Mediation, however, there is no right or wrong outcome. No good or bad. The process is about parties resolving their own disputes and whichever solution the parties come to is the right one. Therefore, the question must be posed, in its essence, is Mediation ethical .

Mediation is not a process that seeks to sift through the evidence. The Tribunal does not know what went on and usually will also not know the terms of any agreement. Yet the Tribunal is the organization the parties have come to for a resolution. The Tribunal cannot go behind the Mediation and all it can do is check to see if a settlement was actually made.

The current desire for Mediation has grown out of the feeling that the Judicial Process is unfair. However, with all its faults litigation does have rules of how to play, the decision maker must justify the decision on the basis of what has been put before that person, the judgment is there for all to see and is open to scrutiny and appeal. The Adversarial Process is about finding out who is right and who is wrong and is also very much about ensuring that each party is given a "fair go" and there is Justice.

Mediation is about compromise and negotiation; negotiation between the parties of unequal strength, needs and with very different motives.

It is conducted behind closed doors with the emphasis on confidentiality. The only scrutiny is "was there an agreement" and there is no appeal.

VCAT has the core belief that before the Tribunal decides, the parties should be given an opportunity to explore their own possible solutions. This is especially so given that it is a low-cost entry Tribunal and the over-the-counter staff are not there to scrutinize in detail the way the case has come in, that is, no initial pleadings.

An alternate definition of " Ethics" is that it, is a standard of conduct for a given profession.
VCAT has developed a Code of Conduct but this is, I suspect, more for the public to assist them in understanding the process than to address the ethics of Mediation itself. Let us examine the code and the ethical dilemmas it brings up for Mediators.

The code has 9 parts which roughly coincide with a definition of Mediation.
"a process by which a impartial third-party facilitator assists the parties in a confidential setting to come to terms with their issues and to move to resolution by developing options and considering alternatives, which will meet their needs".

The Code parts are

1 The role of the Mediator is to assist the parties to resolve.
2 The Mediator is impartial.
3 The Mediator does not give advice.
4 That the parties are there freely.
5 That the Mediation Process is fair.
6 That the Mediator cannot later hear the case.
7 That the process is confidential.
8 Encouraged to record
9 That the Mediators have immunity

Whilst there are a number of Mediation models, the one that appeared to fit VCAT or VCAT Mediations generally, is the Settlement Model. This is logical given that VCAT is a Tribunal to resolve disputes. For the Tribunal it is important to keep statistics on how many matters settled at Mediation.

Individual Mediator styles do include the facilitation and therapeutic models of Mediations but in the end, the Mediator who does not settle, may find that they will not last even if all the parties come out with glowing reports. There would also be a serious cost consideration if there was a slow or low settlement rate. What are the ethics of the various methods of mediation is a debate for another day

Whilst the theory may be that Mediation is about win-win, in many cases, it is about stopping the "bleeding", having a reality check and allowing the parties to move to the future. At Best the therapeutic element is allowing the story to be told and having someone to hear it and having had the day in Court.

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?
What are the ethics of ending a mediation?

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 and confusing for parties to come together with a Mediator who they believe has been picked for his or her expertise and finds 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 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? Can a mediator fulfil the function of assisting to resolve if there is not full knowledge or understanding?

Whilst mediation is not about a "right outcome", but what suits the parties in the particular situation, 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 4.1 of the code acknowledges that the parties 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? Pictures of certain Members would help focus the parties to settle

5. *The Mediation must be fair*:

Clause 5.1 of the code is concerned with the concept of "fairness". A motherhood statement. 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' concepts about "fairness" differ and change. A cry so many times heard in Mediation is "I am only trying to be fair" or "is that not reasonable". 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 what are the ethics of mediation proceeding if the parties are 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 is important and often is 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.

*I*t 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. 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. Especially lawyer representatives the mediator will often know the representative. are there ethical issues here ?

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. Who ,What Where? Again the ethics of stopping a mediation to allow consultation

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 border.

What of the view that if agreement is reached it should be written up.

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. But is this ethical? The requirement cuts across natural justice and transparency. Further should not any order of the tribunal be open to scrutiny?

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. Is this practical? What is the boundary between Discussion and negotiation and confidentiality.,. Especially in Shuttle mediation?

Some recent cases, and inquiring Governments questions 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 preforming 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 danger of any code is codification. Mediators must continue to act as Mediators not as judges.

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