



## Franchising Alert

### June 2008

## Reflections of a Mediator

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### Franchise disputes

Franchise disputes are the types of dispute that are made for mediation. The parties often have an interest in continuing a long term relationship and need to get their immediate issues onto the table and resolved before they can go on. Frequently concerned with complaints about systems and operational issues, franchise disputes often also result in innovative solutions to past problems.

This Alert describes briefly what goes on in a mediation and suggests that parties should consider mediation well before the issues in dispute have become intractable. My experience as a mediator is that more often than not, even difficult disputes will be resolved. However, if the dispute has festered and escalated before the mediation, the parties will often have taken positions and committed to courses of action that limit their options at mediation and make it much harder to achieve a workable solution that will help both parties and preserve their relationship. The key premise of this Alert is to suggest that parties engage in mediation early and perhaps often and not solely through the use of the processes prescribed in the Franchising Code.

### What is mediation?

Mediation is a form of assisted negotiation, usually confidential, in which the parties seek a negotiated resolution of their dispute, with the active assistance of an independent and neutral third party – the mediator. The mediator convenes the mediation itself and manages the process. The mediator does not make a determination of any issues in the dispute nor does the mediator make any recommendations or give legal advice.

### What goes on in a mediation?

The process of mediation is driven by the mediator who is trained in dispute resolution processes. Prior to the mediation, the mediator will usually meet (or at least speak to) the parties separately and confidentially to gain a general understanding of the nature of the dispute and what outcome the parties hope to achieve.

The mediation itself generally begins with a joint meeting between all parties and the mediator. The mediator will usually begin by outlining and reminding the parties of the reason for the mediation, the process that they have agreed upon and their obligations to each other during the course of the mediation.



The mediator will then invite the parties to each describe what brought them to where they are now, and what they want to achieve. Based on those discussions, an agenda will be agreed and the mediator will encourage the parties to continue to discuss items on that agenda in the joint session for as long as that discussion is productive.

Frequently, a party or the mediator will then suggest that there be a break and that the parties go into separate rooms. Here the parties can discuss with the mediator – in strict confidence - how they see the mediation proceeding and explore options for settlement of their dispute.

Some mediators may then act as a go-between – taking an offer made by one party to the other side (“Shuttle mediation”).

My preference is that the parties put offers to each other. Not only does that ensure the offer is accurately conveyed, but it gets the parties talking and allows exploration of nuances that may lead to further options for resolution. However, if the relationships between the parties are poor, shuttle mediation may be the only approach. Even then, it is not uncommon for the negotiation process to reach a point at which it is constructive to bring the parties back face to face. This is particularly useful if the negotiation is showing signs of stalling or, in mediations in which the parties have their lawyers present, the mediator believes direct discussion between the parties might result in a breakthrough.

## The Mediation Dynamic

### Psychologically, what is going on?

I find that in the initial stages, the parties are looking back at what went wrong - they want a chance to have their say or vent their spleen. I believe that this is a useful part of the process and should not be avoided just because it is emotional. (I draw the line at verbal abuse that is intimidatory but do not seek to stop emotion. Sometimes it helps for a party to see first hand how the dispute is affecting the other).

After a time, usually 2-3 hours, there is a subtle shift and the parties start to look to the future and consider their options more realistically:

- > Is my demand likely to be successful if I go to court?
- > What are my chances in court? No-one offers guarantees and the courts are full of winners and losers!
- > How long will it take, what will the court cost be even if I win?
- > What damage might it do to my life, or to the franchise system?
- > Is there something I can trade in return for taking less money?

How successful a mediation is often depends on the work that has been done beforehand. Like any negotiation, the more preparation, the better.

- > What are my options? What are the strengths and weaknesses of those options? Which is my preferred option? What are the other side’s options?

- > How does this dispute look like from their side?
- > What information do I need to have access to – for example, legal advice, costs, valuation of assets, taxation consequences?

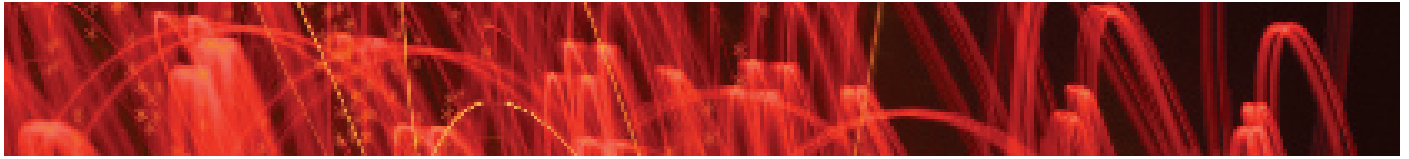
### Will other people hear about what went on in the mediation?

To the extent the parties agree (which is usual) and the law permits what goes on in the mediation, it is to be treated in confidence. The parties, including the mediator, are therefore usually bound by express confidentiality provisions set out in the mediation agreement. People other than the parties who attend the mediation are required to sign a separate confidentiality agreement. If the parties reach an agreement, that agreement may, subject to its terms, become public. Frequently though, the terms of the settlement are themselves confidential to the parties.

Most mediators will spell out clearly that, until an Agreement has been signed, there is no agreement. This helps ensure that there are no arguments later as to whether an agreement was in fact reached.

### What will it cost?

Most franchise mediations are concluded in about 8 hours and will include some additional preparation time. The OMA fixes a fee scale for the mediators it appoints, with the current maximum fee being \$250 per hour (plus GST) so an average mediation will cost around \$3000 (plus GST). In the usual case, that cost is split equally between the



parties. Parties may have additional expenses in relation to legal and accounting advice, room hire, travel and catering.

### **The role of lawyers**

Generally, the mediator will permit lawyers to attend the mediation and advise their clients. Some mediators will require the lawyers to sign a confidentiality agreement – others are content to rely on the lawyer’s general duty to the client and in litigation to preserve the confidence of the mediation.

The role of the lawyer in the mediation is (ideally) limited to helping their client make a decision and to providing legal advice relevant to that decision. I expect the lawyers to take a background “good faith” role in helping the parties settle, while leaving it to the parties to speak to each other as far as is practicable. I sometimes meet with the lawyers in private if I think it may help in discussion of technical issues. I will also invite the lawyers to step back if I believe their conduct, however well intentioned, may be inhibiting the process.

### **Must you have a lawyer?**

Most definitely not. But it does help if you have had a discussion as to your legal position beforehand and have access to legal advice on the day in case there are any points you may want to discuss during the mediation.

It is often also useful to have a lawyer available to formally record the terms of the settlement arrived at.

### **If the mediation fails, can the other side use any offers that I put on the table in court against me?**

Mediations usually take place in confidence and are “without prejudice”, meaning that the offers put and things said in the course of a genuine attempt to achieve a settlement cannot be used against you in later proceedings. Of course if an agreement is reached, that agreement may, if necessary, be enforced by court proceedings and will then become public.

### **What are the benefits of mediation?**

- > It is flexible. The parties can mould a settlement in the form that best fits the solution to their dispute.
- > It is usually private and the resolution is confidential.
- > It can lead to a refreshed and stronger relationship between the parties.
- > It is almost always more cost and time effective than litigation.

### **So what next?**

While the Franchise Code of Conduct provides for a formal mediation process, it seems to me that the process is used primarily when relationships are already in serious trouble.

I urge franchises and franchisors to consider using mediation before that stage is reached. Sometimes problems seem intractable and it is easy to believe that resolution will only be achieved through litigation.

However, there is another venue for airing concerns – and it is available cheaply and very quickly. Having a neutral and independent mediator involved at the early stage of a dispute or difference may help break a deadlock, will not necessarily involve lawyers and should not take very long.

Remember, a mediator can be appointed under the Code or independently by contacting a mediator direct.

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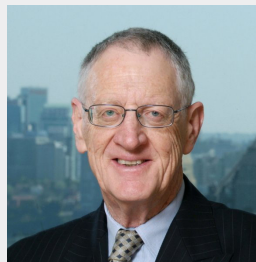
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