Negotiation and Mediation

Fact Sheet

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Self Representation Service

This fact sheet covers:

- What are negotiation and mediation?
- Strategy for negotiation or mediation
- Negotiation
- Mediation
- Calderbank offers and offers of compromise
- What if your matter settles?
- What if your matter does not settle?

1. What are negotiation and mediation?

Negotiation and mediation are processes that provide an opportunity for people involved in a legal dispute (the parties) to reach a settlement without the uncertainty, cost and time of a court hearing.

Negotiation is generally an informal process where the parties have discussions to try to reach a settlement. Negotiation can occur between parties at any time before a dispute is resolved at court.

Mediation (or conciliation) is a formal, confidential process, and is often used by courts to assist parties to resolve disputes. At mediation the parties have the opportunity to discuss issues and try to agree to a settlement. Nothing that is said by the parties during mediation can later be used as evidence in a court hearing.

BENEFITS OF NEGOTIATION AND MEDIATION

Avoiding a court hearing can have very important benefits that you should consider:

- **Costs** – court hearings can be very expensive, and there is a risk of costs being ordered against you if you lose. There are also non-financial costs of court cases, including stress and anxiety.
- **Time** – court cases can take a long to time to finish. You are likely to have to prepare a number of documents and attend a number of different court hearings. Further, the courts are very busy and sometimes your case might be listed for final hearing over a year after it is started.
- **Creative settlements** – the courts are limited by the law in relation to the types of decisions they can make. Negotiation and mediation are not restricted in the same way, and can lead to more creative settlements which may be more satisfying for everyone involved.
- **Preserving relationships between the parties** – if you need to continue your relationship with the other party, negotiation and mediation are less likely to harm the relationship beyond repair.
- **Certainty –** if your case goes to a court hearing, you cannot be certain as to the decision the court will make. Court cases are risky and there is generally no guarantee that you will win.

2. Preparing for negotiation or mediation

Preparation is the key to a successful negotiation or mediation. Preparation includes 3 key aspects:

- analysing the facts and issues;
- deciding on what you want and what you will accept; and
- getting ready to tell the other party what you want.

2.1 Analysing the facts and issues

It is important to identify a clear timeline of events, and compare this with the other party's version of events. This will help you indeintify the issues in dispute, and the key points of agreement and disagreement. You should look at any evidence you have in relation to the issues in dispute, and consider this evidence against any evidence the other party is relying upon. This will help you understand the strengths and weaknesses of your case.

2.2 Deciding on you want and what you will accept

Before you begin negotiation or mediation, you should think about what you hope to achieve from the process. Negotiation or mediation is a good opportunity to ask for remedies that the court cannot award, such as an apology or an employment reference. You can be creative in what you ask for, but once the negotiation or mediation is over you can only obtain outcomes the court is allowed to award, such as compensation or reinstatement to your job.

Consider what it will take for you to be satisfied with the outcome, taking into account the matters listed in the box above. You may want to think about a 'best case' scenario that you want and 'worst case' scenario that you are willing to accept. It may also be useful to create a list for yourself of the outcomes you are seeking under two headings, *want to obtain* and *need to obtain.*

It is important to remember that settlement is about compromise. You may need to consider accepting something less than you feel you are entitled to, so that you avoid the risks, uncertainty and delay in going to a court hearing. The fact that the other side is willing to settle the matter does not necessarily mean that you have a great case and you will win at hearing – the other side may be offering money because they don't want the expense, time delay or risk of going to court.

2.3 Getting ready to tell the other party what you want

Make sure that you mention everything that you are seeking at the beginning of the negotiation or mediation – that way, you won't create surprises for the other side and harm your chances of reaching a resolution. It is a good idea to make your first offer higher than the amount you would ultimately accept to settle your case. This gives you room to negotiate down. Your first offer should still be reasonable though, or it might discourage the other side from negotiating. When making offers, it's best not to impose unrealistic deadlines to pressure the other side (e.g. by saying that "this offer is only open for ten minutes"). If your matter has been through conciliation at the Fair Work Commission (**FWC**), it's best not to start with a higher offer than you offered at the FWC unless circumstances have

changed, as the other side is unlikely to agree to an offer higher than an offer they have previously rejected.

> **TIP**
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> Don't be surprised, upset or discouraged if the other party makes a very low opening offer, they may also be giving themselves room to negotiate.

3. Negotiation

3.1 Negotiation process

Negotiation can take place:

- face to face;
- in writing; or
- by telephone, video or web conferencing.

Negotiation that is conducted outside of formal court processes such as mediation, takes place between the parties involved in the dispute. It offers an opportunity for parties to resolve their dispute by themselves, without the help of an independent third party. The flexible nature of negotiation means that it is up to the parties to decide how they want to run it.

Negotiation between the parties is generally a confidential process. This means that anything said cannot be revealed outside of the negotiation, including at a court hearing. When you are involved in negotiation you should state to the other side verbally (and in writing if you are writing to the other side) that the negotiation is "without prejudice", this means that the negotiation is to be confidential.

To conclude the negotiation process, the parties may agree on terms of settlement. However, it is important to remember that negotiation is a voluntary process and the parties are not required to agree on a compromise.

> **EXAMPLE OF AN OFFER OF SETTLEMENT MADE THROUGH NEGOTIATION**
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> If you would like to try to settle your claim through negotiation you could, for example, call the other side and say, "I would be happy to settle my claim for $5,000. This offer is made without prejudice and is open until 13 February 2016." After making the offer, the other side may respond straight away or get back to you by accepting your offer, rejecting your offer or making a counter-offer.

4. Mediation

4.1 Role of the mediator

A mediator is a specially trained, impartial third party whose job is to assist the parties to narrow the issues between them and try to reach a settlement on some or all of those issues.

4.2 Mediation process

Usually, a mediation begins in a large room with the mediator, the parties to the legal dispute and their representatives, and any support people. The mediator will explain the process for the mediation and ask the parties to give a short summary of their cases, usually starting with the applicant (the person who has brought the claim to court). Each party takes a few minutes to highlight the key parts of their case. Try not to interrupt too much during this process so that both parties have the opportunity to speak. While you can ask questions (and questions can be asked of you), you are not compelled to answer any questions and you cannot make the other party answer your questions.

When speaking, try to maintain eye contact with all the representatives from the other party, if there is more than one – it may not be clear who the decision-maker is.

When each party has had the opportunity to speak, the mediator might work with the parties in the same room or separate the parties by asking them to move into private rooms. The mediator will then visit each party individually, discussing potential issues and trying to reach a resolution. Usually, one side will make an offer, the other side will make a counter offer, and so on until the matter settles or the mediator decides that there is no chance of reaching settlement. Don't be frightened to make the first offer – it's usually good to have the offer process started.

4.3 How to prepare

Prepare a short document, no more than a couple of pages, that you can read when asked to highlight the key issues in your case. Some mediators ask for a document like this, also known as a 'position paper', before the mediation so they aware of the issues on which the parties do not agree.

If there are any documents that are necessary to your case, you should bring copies to the mediation in case you are asked to give them to the other side or the mediator. Be prepared that you may be confronted with new information over the course of the mediation, so you will need to be flexible and adjust your expectations as the mediation goes on.

5. Calderbank offers and offers of compromise

A party to a dispute may decide to make a written offer of settlement in an attempt to resolve a court claim. The offer may take the form of a "Calderbank offer" or an "offer of compromise". These types of offers create a risk that a party which rejects an offer and later receives a court decision that is less favourable than the offer, will be ordered by the court to pay the legal costs of the party that made the offer. Accordingly, any offer of settlement that is identified as a Calderbank offer or offer of compromise should be considered very carefully.

6. What if your matter settles?

If you reach a settlement through negotiation or mediation, it is likely that you will be asked to sign a document called a 'Deed of Release' or a 'Deed of Settlement' (**Deed**). This document outlines the terms of the settlement you have reached and prohibits you from taking further action in relation to your claim. It will usually contain terms about:

- **Payment** - this may include details of any agreed payment of funds, how it will be paid, what bank account it should be paid to and by what date it should be paid.
- **Release and discharge** - this will state that both parties have no rights to bring future claims against one another in relation to the matter that was in dispute, except for certain rights that may be excluded from the release.
- **Indemnity clauses** - this may require you to pay for any claims which may be made by you or third parties against the other party in respect of the same subject matter. The primary purpose of this clause is to protect the other party from third party claims. If you are concerned by this clause, you can ask for it to be removed from the Deed.
- **Non-admission of liability** - the parties agree that the Deed is made without admission of any liability. This means that the other party does not admit to breaching the law. This clause is commonly used in deeds. If you want the other party to admit that they breached the law then you may have to prove this in court and obtain a judgment in your favour.
- **Confidentiality** - this will state that the terms of the agreement between the parties are to remain confidential and not to be disclosed to any third parties, unless a party is required to under law or if they are disclosing to their lawyer or financial advisor.
- **Non Disparagement** - this will state that neither party can disparage or denigrate the other party. This means that you cannot say disrespectful or derogatory things about the other party.

You should read the Deed very carefully before signing it. If there are terms you don't understand you may wish to get legal advice before signing. The Deed is a binding agreement which requires the parties to comply with the terms of settlement. If either party breaches a term of the settlement (e.g. by not providing the agreed payment) an application can be made to court to enforce the Deed.

The case will finish when the Deed is signed by both parties and proposed consent orders or a notice of discontinuance is signed and filed with the court. Proposed consent orders will ask the court to dismiss the claim on terms agreed by the parties. Alternatively, a notice of discontinuance can be filed by the party who initiated the court proceedings, this is a notice to the court that the applicant is withdrawing their court claim.

For an example Deed, please visit the NSW Government – Law Access website at this link: http://goo.gl/PrFWXN.

7. What if your matter does not settle?

If your matter does not settle through negotiation or at mediation, your can continue your case to a court hearing.