

Pre-Mediation: The Social Inclusion Key to Meaningful Justice

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Much of the conversation around dispute resolution in 2025 continues to focus on legal reform, particularly changes to the Franchising Code of Conduct. However, I believe we risk missing the forest for the trees. Real access to justice goes far beyond legislative updates. It lies in how individuals experience the mediation process, and most critically, in the pre-mediation conference.

Over decades of mediating franchise and civil disputes, one thing has become clear: disputes don't only arise from breached clauses—they arise from breached expectations. And, expectations are grounded in assumptions. When those assumptions are unmet, they create a sense of loss. That loss—often psychological, sometimes financial, always personal—must be understood if a dispute is to be meaningfully resolved.

The Power of Pre-Mediation

Too often, mediation is treated as a one-day event. But mediation is a process, and its foundation is laid well before the formal session. The pre-mediation conference is not just about logistics. It's a vital opportunity for the mediator to understand each party's worldview: What does the loss mean to them? How did they get to this point? And what outcome would they consider a success?

By asking those two core questions, I invite each party into a space of reflection and personal narrative. From there, we can begin the real work—deconstructing assumptions, exploring expectations, and gently reality-testing their goals for the mediation.

Seeing Through Another Lens

My approach, grounded in a social constructionist framework, views mediation as more than a legal mechanism—it's a human one. Drawing from Eric Berne's Transactional Analysis model, I help parties move from rigid positions of blame (the Parent) or helplessness (the Child) into a more neutral, empathetic Adult state. This isn't just psychology—it's practical. Solutions emerge only when parties can step into the shoes of the other, even briefly, and see the dispute through a wider lens.

The "Adult" state allows for greater flexibility and creativity in negotiation. It also provides space for what I call "relational learning"—understanding not just the other party's point of view, but the nature of the relationship itself. This shift can't happen effectively on mediation day alone. It begins in the pre-mediation phase.

Case Study: When Automation Meets Expectation

Let me illustrate this with a recent commercial shipping dispute. Party A, long-standing in the industry, believed Party B's automated pricing system had unfairly penalised them, spiking shipping costs fiftyfold. Though the system was legally valid, Party A felt morally wronged. They were prepared to take the matter to court—not just to win, but to make an example.

What became clear in the pre-mediation conference was not only Party A's technical frustration, but a deep sense of betrayal. They missed the human element—the personal contact once common in the industry. Their sense of justice was tied to personal respect and longstanding norms, not just the contract terms.

Party B, by contrast, believed they had done everything by the book. They had systems in place for customer support and saw no reason to deviate from automated processes. They were equally adamant and equally ready to litigate.

Despite both parties holding tight to their version of truth, the matter settled. Not because one side convinced the other, but because the pre-mediation work helped each party understand what they *really* needed. For Party A, it wasn't just about money—it was about being heard. And for Party B, it was about restoring a relationship that still held business value.

Social Inclusion: Beyond the Mediation Room

This case, like many others, points to a deeper need: social inclusion in dispute resolution. It's not enough for parties to be represented; they must feel seen, heard, and understood. Social inclusion asks us to look beyond individual responsibility and toward relational responsibility—how our decisions affect others and how we interact with the systems around us.

When mediation is approached as a space to reconstruct meaning around loss, it becomes transformative. It becomes, in effect, a tool of social change.

A New Definition of Mediation

What if we redefined mediation not simply as a path to agreement, but as a collaborative exercise in social justice?

In this light, mediation becomes a process where the parties—and the mediator—co-create a new understanding of fairness. We acknowledge the psychological experience of loss (Berne's Child), the legal expectations (the Parent), and the negotiated reality (the Adult). From this triangulation comes the "Observer Self"—a mindset that allows parties to move beyond their entrenched positions and reimagine their future interactions.

This is the heart of what I call *social constructionism in action*: a mediation model where resolution is not just about compromise, but about reimagining relationship, fairness, and justice in the everyday.

Conclusion: Access to Justice, Redefined

As the new Franchising Code comes into effect and legal practitioners focus on compliance, let us not forget the human element. The pre-mediation conference—when done thoughtfully—is a profoundly effective access to justice measure.

By facilitating empathy, surfacing unspoken assumptions, and fostering relational learning, we offer parties more than a legal outcome. We offer them a way to understand their own story, their counterpart's perspective, and how to move forward with greater awareness and dignity.

In 2025 and beyond, let us remember: mediation is not a destination. It is a journey of meaning-making, of social inclusion, and, if done well, of healing.