

---

## In Practice

---

### A MORE EFFECTIVE ACCESS TO JUSTICE MEASURE – SOCIAL INCLUSION AND THE PRE-MEDIATION CONFERENCE

Dr Katherine Johnson\*

The following is a presentation given by Dr Johnson in March 2025 for Legalwise on the topic of *Franchising Code of Conduct: Big Changes in 2025*.

During today's program, we have discussed many of the big changes in detail, so, as the last speaker, I wish to consolidate the *importance of pre-mediation conferences when mediating Franchise and any other civil disputes*. Why the focus on the Pre-Mediation session?

#### PURPOSE OF THE PRE-MEDIATION CONFERENCE

The purpose of the pre-mediation conference is for the *mediator* to understand the parties' worldviews around their losses – that is the mediator should understand what the loss means to each of the parties and how it has impacted their mental wellbeing. If we question why anybody goes either to a solicitor or a psychologist, the answer is to redress some form of loss. For example, psychologically it may be for a lack of self-confidence or legally it could be seeking damages in Court. Similarly, no one goes to mediation unless there is some loss that they wish to redress. In my many years of mediating, I have found that understanding *how the loss affects each party is the crux of forming a settlement*. That is, making sense of the losses enables each party to move forward with their life.

#### PRELIMINARY DUTIES OF THE MEDIATOR

To make sense of loss, however, the mediator must first dispense with all their preliminary duties once appointed. These include notifying both parties of their formal appointment (through *Australian Small Business and Family Enterprise Ombudsman (ASBFEO)*), suggesting a proposed mediation date with the option to change the date and time depending on that date's suitability for the parties; suggesting a neutral venue to hold the mediation; sending the Mediation Agreement which needs to be signed and returned; sending the invoices for payment of fees and sending any documents that need to be completed by the parties and returned to the appointing authority. Once these duties are completed, then the work of understanding the emotional components behind the matter begins.

To understand how the losses have impacted each party's wellbeing, the mediator sets two confidential pre-mediation conference dates to discuss the matter with each party. These conferences can be held either in person at a neutral location, via AVL or via a telephone conference. The important factor is to ensure that these confidential pre-mediation conferences are held with each party in the presence of their lawyer if represented, preferably in their solicitor's office so that the solicitor is aware of everything that has been discussed between the mediator and their client.

My preference is to hold the pre-mediation conferences via AVL, so I send two AVL links, one for each of the pre-mediation conferences at a specific date and time as agreed by each party unless either party prefers to send me a link.

#### THE PRE-MEDIATION SESSION

##### A. Introductions

As mediator, I welcome the party and their solicitor to the pre-mediation conference and explain that this confidential session was set so that I, as the mediator, can better understand how the client came to be in the current circumstances. That is, I explain that I wish to put myself "in the shoes" of the client to understand the thinking behind their decisions to enter the contract. For example, I may say words to

---

\* Mediator and barrister.



the effect that: “I wish to place myself in your shoes and understand from your perspective the reasoning behind your decision to enter the contract and the feelings you had that led you to accept this contract.”

Once the party tells their version of the story, as mediator I clarify with that party what assumptions were behind their expectations about how the contract was to unfold. The party’s response enables me, as mediator, to understand their worldview, especially concerning how the loss has impacted their mental wellbeing and whether that party’s expectations about the initial contract were realistic when entering the contract.

Understanding the impact of the loss on the party’s wellbeing enables the mediator to find a way forward that will respect the party’s current mental health, such that the party does not become more stressed over what is believed to be expected during the mediation. The mediator also assesses whether the party’s expectations about the outcome of the mediation are realistic now, for a successful mediation to occur.

In other words, the pre-mediation session becomes an opportunity for the mediator to reality-test each party’s expectations and feelings around their loss. It is important for each party to freely discuss their feelings during the pre-mediation conference as this enables them to think more clearly during the mediation itself, having been heard and respected during the pre-mediation phase.

Once the party has presented their story, complete with the impact it had on their wellbeing, the mediator can ask questions such as: “Given your current circumstances, what outcome would you consider would make this mediation a success for you?”. Such questions enable the mediator to assess and address any unrealistic expectations the party may have about what the mediation can deliver. It is very important during the pre-mediation phase that the mediator makes clear how the mediation process will unfold with no guarantees as to the outcome except to say that the outcome is dependent on the decisions that can be agreed to by the parties.

## WHAT TO EXPECT FROM THE MEDIATION

For example, the mediator explains that assumptions and expectations can affect the personal construct of the parties to the point of stagnation which is usually the relational state in which the parties first attend the mediation. To avoid the state of stagnation where each party knows their own version of the dispute and believes that their version is the only true and correct version, making the other side wrong, the mediator explains that the purpose of mediation is for *each side to place themselves “in the shoes” of the other*.

The mediator suggests that by placing themselves “in the shoes of the other side”, and still recalling how it feels from their own side, a greater worldview can be adopted from which a solution to appease BOTH sides may be found.

### A. Transactional Analysis – Eric Berne’s Model

By placing themselves “in the shoes of the other side” the parties can see the dispute more holistically through the worldview of what Eric Berne calls the “neutral empathic *Adult*”. In Eric Bern’s *Transactional analysis model*, this simple approach encourages the party to move from their own stagnant position of what Berne calls either the *Parent* (“they should do”) or the *Child* (feeling like the victim) to reach the worldview of the neutral, empathic *Adult*.

Berne explains that every person has a *Child*, *Parent* and *Adult* and that the best communication occurs when the *Adult* of one person can speak with *the Adult* of the other. The worldview of the *Adult* allows each party to understand their own values and biases as they individually deconstruct their worldview to accept the needs of their own *Child* and the concerns of their own *Parent* to reach a comfortable place where both can internally move forward to the best of their ability. Offering a safe place for this to happen in the pre-mediation phase, enables each party to explore a more holistic solution that encompasses the needs of both parties during the mediation itself.

That is, the *Child’s* needs and the *Parent’s concerns from both parties* can both be validated and understood from the standpoint of the neutral but empathic *Adult*. Assisting the parties to make this shift to *Adult is the real job of the mediator and begins in the confidential pre-mediation conference*.

It is important to note as stated above, that each party's personal constructs or worldviews, must be *individually deconstructed* and this is best done in the pre-mediation session *with the assistance of the mediator*, to enable a *collective acknowledgment of the losses* via the empathy channel of Berne's *Adult* during the mediation phase. Such a transition to *Adult* of the parties' otherwise entrenched and stagnant positions should happen, whether a resolution is imminent or not.

## B. The Re-constructionist Model

In my thesis, the *Re-Constructionist Model of Mediation*, I explain Bern's model in detail where the *Parent* can be equated with the discipline of Law that sets rules and regulations about how civil society *should* behave and where the *Child* can be equated with the discipline of Psychology which deals with the specific needs of the individual. I discuss how Dispute Resolution is in fact, a continuum with Law at one end and Psychology on the other and that Mediation is akin to a *marriage* between Psychology and Law in that it is the beginning of third party interventions that uses the interdisciplinary approach of both disciplines to resolve a dispute.

In this way of thinking, the mediation process can be likened to Berne's *Adult* in that it is a neutral space where the needs of the *Child* and the *Parent's concerns for both parties*, are considered as important criteria for the settlement of the dispute. And, as previously stated, the mediator's main role is to assist the parties in reaching the mental framework of the empathic *Adult*, where both parties can see the dispute from their own and the other side's perspective, to the best of their ability.

## C. Relational Learning

During the pre-mediation phase, the mediator remains mindful of how well the parties can adjust their worldviews to learn how best to relate with the other side (ie to enable relational learning) and assists them in understanding the dispute holistically wherever possible. The degree to which each party can place itself "in the shoes of the other side", gives the mediator an understanding of what each party has learnt and how best to manoeuvre the next step. For example, if the party has no difficulty in placing themselves in the shoes of the other side, the mediator can move more freely to the next step; whereas, if the party has great difficulty, the mediator may have to accept that a full and final solution may not be possible for all the issues in this mediation.

This does not mean that a settlement will not be reached, nor does it mean the mediation was unsuccessful. If done correctly, I believe that every mediation can be a personal growth experience for the parties such that the mediation process is not a failure. It is the readiness, willingness and ability of the parties to make the best of the opportunity that mediation offers and to learn about their own and the other side's values that lead to the overall success of mediation. This means that if the settlement did not occur, it is not the mediation that failed, but that the parties were either not ready, not willing or unable for whatever reason to reach some agreed understanding about their relationship; and it is for this reason, that the mediator needs to address these factors during the mediation process that begins with the pre-mediation phase.

The significance of *relational learning* throughout the mediation process is to:

- validate the feelings of loss from the past (the *Child*),
- acknowledge the expectations of how things should have been (the *Parent*),
- arrive (through the *Adult*) to an understanding of how things are,
- and to accept how things will be organised in the future (through the *Observer Self*).

These understandings are best explored and handled in the safe, confidential pre-mediation session with the assistance of the mediator.

## D. The Role of the Solicitor in Pre-mediation Conferences

It is also during the confidential pre-mediation conference that the mediator explains that they cannot give legal advice and refers the party to their solicitor for any legal advice required throughout the mediation. This is why the party should have a solicitor at the pre-mediation conference. The mediator

encourages the solicitor to allow the party to tell their own story to the best of their ability during the mediation session unless the party wishes for their solicitor to tell their story.

The mediator encourages the solicitor to explain the constraints of the legal system as to what adequate remedies exist for such matters and encourages the solicitor to explain what would be considered a good outcome, legally, especially if the party's response to what they expect from the mediation is legally inappropriate.

## **E. Adult-to Adult Communications**

During the pre-mediation phase, and throughout the mediation the mediator reminds the parties that the best communication between them occurs when the *Adult* of one party discusses issues with the *Adult* of the other. The mediator assists the parties in their decision-making capacity by engaging the complementary relations of *Adult-Adult* (TA) which enables the best analysis of the parties' values and accommodates the stress arising from their legal obligations.

Traditional mediation can therefore be represented as the *Adult* (understanding how things are from the other's perspective as well as your own); whereas a social constructionist approach to mediation can be represented as the *Observer Self* which states how the "settlement" or agreement, will impact the social relations between the parties and where mediation *consciously becomes* a social change agent for the parties.

## **F. The Observer Self**

A social Constructionist model therefore extends the analogy from the micro-perspective of the individual in the mediation process (which deals with satisfying the psychological needs of Berne's *Child*) to the macro-perspective of the social context in which the individual engages (which deals with implementing the agreement from *Observer Self* to form a new set of social relations between the parties. In other words, the process of engaging in "Observer Self" creates a more sustainable worldview and engages a more healthy mindset to develop personal growth.

The frame of mind that I have called the *Observer Self* enables the parties to implement their agreement where both co-create a new social order via a new contractual arrangement of how they will behave with each other from now on. In this way, the relational learning gained from the mediation merges with meaning reconstruction around the loss, to form a social constructionist approach to mediation which better endures the loss into the future. That is, a social constructionist approach where both parties attempt to see the other's point of view describes how parties *can reconstruct their loss* so that it can be better endured.

The difference then, between "*Observer Self*" and *Adult-Adult transaction* includes the concept of *mindfulness* on a holistic scale. In "*Observer Self*", the process of self-processing enables biases around one's own assumptions and expectations to be reduced to incorporate the assumptions and expectations of the other side. The notion of "*Observer Self*" therefore acknowledges the social aspects of the "game in the making" (macro) as it unfolds with the intrapsychic developments (micro) validated by the *Adult*.

## **G. Bi-sociation Reconstructing Meaning around Loss**

The innovations from *meaning-making* redistribute power between the parties so that real or perceived losses discussed in opening statements change via option generation, into institutional *collective acknowledgment*. This process of innovation to institutional acknowledgment is called bi-sociation and incorporates an organic grassroots change to the fabric of the relationship in which the parties co-relate. Bi-sociation describes how parties *reconstruct meaning* around loss so that the perceived loss, real or otherwise, can be collectively/institutionally better endured with an accompanying sense of justice.

## **H. Social Inclusion**

Social inclusion is about how the individual interacts with society. It proposes that individual responsibility is not sufficient in a social constructionist approach to mediation. Instead, social inclusion proposes that

*relational responsibility* is also required where the individual's decision-making affects the macro world of implementing agreements and *anticipating possible ways to avoid future or ongoing conflict*.

## I. What the Mediator Must Be Aware Of

In summary then, at the pre-mediation conference, the mediator must be mindful that:

- Law can benefit by further expanding its conception of the mediation process to include an *interdisciplinary approach* around the construct of *loss* and the emotion of *grief*.
- Using a social constructionist approach, loss can be defined as the period of chaos following the shattering of expectations that was previously held.
- Loss can thus be a catalyst in finding each parties' truth to their own version of social justice, which is individually meaningful on a psychological level and collectively implemented on the legal level. In this way, *Loss fuels the meaning we give to life*.
- A social constructionist approach to mediation that focuses on dealing adequately with the parties' respective losses, assists the parties to better interact with each other socially, economically, politically and environmentally.
- A social constructionist approach offers an opportunity to work in a truly democratic way with an egalitarian outlook that includes the social dimensions of *inquiry and tolerance* for a diversity of viewpoints in a constantly changing world.
- *Individual responsibility becomes relational responsibility* as the parties engage in their "game in the making" by placing their private solutions (agreements) within the broader legal and societal contexts.
- The focus on a more effective access to justice measure is on how one responds to a dispute. A social constructionist approach enables the parties to review their circumstances, measure their hopes against their knowledge of reality, and take stock of what they already have. In other words, it allows the parties to acknowledge that *while their lives are not perfect, they are manageable*.
- A social constructionist approach, *like brief therapy* in psychology is sufficient for some parties to realise that enough of their goals are already achieved to continue without further assistance. This offers an effective model for dispute resolution in all manner of disputes involving ongoing relationships that takes seriously the task of resolving disputes on a deeper level than just settling alone.

### **How Then Does All This Knowledge Appear in a Pre-mediation Conference?**

The answer to this question takes us back to the purpose of the pre-mediation session where the mediator confidentially asks each party "How did you get to where you are?" The confidential aspect is crucial as it creates a safe space where the assumptions made by each party on entering the original contract can be expressed without judgment. Acknowledging the assumptions enables each party to question their expectations and to question those expectations that were not met which ultimately led to the dispute. From each party's perspective, the reason for their attendance at the mediation *during the pre-mediation phase* is to address their perceived losses whether real or assumed and to seek some form of redress.

Each party's answer to the second question "What outcome would you consider would make this mediation a success for you?" tells the mediator how realistic that party is in accepting a commercial decision to resolve the dispute.

Let's see now how this plays out in practice.

In a recent commercial shipping dispute, Party A believed that Party B no longer gave the excellent service it once did before Party B bought out several smaller shipping lines. The subsequent lack of service and automation of Party B's system caused a spiral effect of automatic consequences, raising the price to ship goods more than 50 times the original price, which Party A believed harmed the industry. Party A resented that this action by Party B was legal, considering it instead an abuse of process which should be taken to Court to prevent such abuse from happening again.

The assumptions of Party A were that:

- (1) Their firm had followed all the correct procedures as it had always done and did not do anything wrong on this occasion.
- (2) Party B's system was faulty, hindering Party A from submitting the documents on time and causing an automatic spiral hike to the costs for shipping which Party A believed was deliberate and immoral.
- (3) Party A would not pay the higher automated additional amounts for shipping the goods as it was morally wrong to do so even if Party B was legally within its rights to charge the higher amounts.
- (4) Party B should be punished for rorting the system by automatically raising the prices 50-fold, which harmed the industry.

Party A's answer to question 2 concerning what a satisfactory outcome would be was that:

- (1) Party A was not going to pay another cent to Party B, having already paid what it believed was the correct amount.
- (2) Party A expected Party B to pay all Party A's legal costs.
- (3) Party A was going to take Party B to Court if the above 2 expectations were not met to make an example of Party B being so morally corrupt.

Further difficulties in mediating this dispute were that:

- (1) Party A was self-represented.
- (2) Party A had been in the industry for over 20 years and believed that it had a good grasp of how things work.
- (3) Party A was unwilling to believe that they could be wrong.
- (4) Party A believed that the latest changes to Party B did not serve the industry, but only served the company itself.
- (5) Party A saw itself as the "fixer" for the industry ensuring that major players would not abuse the system just because they were legally within their rights to do so.

Party A engaged a solicitor who pulled out at the last-minute and did not attend the mediation. Nonetheless, Party A was willing to settle, at the pre-mediation conference but it was a willingness based on its terms alone. Party A eventually changed its position *but not because it understood Party B's perspective*. Party A continued to say that they did not know where they went wrong and despite spending one whole day exploring these issues on the day of the mediation, the answers given by Party B did not satisfy Party A. This left Party B at a loss to know how else to explain the facts from their perspective, and such situations demonstrate how assumptions, often mistaken for facts, lead to unmet expectations and mutual blame that escalate disputes. Such situations are also proof that the "truth" is a difficult concept to understand in any situation. Both parties were adamant that their version of the events was the only correct and true version and that the other was just being self-serving.

Party A bemoaned the fact that it was no longer easy in the industry to find a person with whom one could quickly "fix" things at the last-minute because extreme automation created anonymity of transactions within the shipping industry. Party A initially believed that such extreme automation was deliberately designed to "rip off the public" and that the authorities needed to clamp down on such "rorts".

Party B insisted that their firm hired complaints-handling officers who were available daily to fix last-minute things. Party B believed that the fall-out on this occasion was because Party A did not submit documents on time as expected in the industry. Party B insisted that being a long-term player in the industry, Party A should have known the system and should have acted better to avoid the circumstances in which they found themselves.

Despite the technical arguments about who did what, and when, the real loss in this case for Party A was the *loss of personal relationship* and *personal regard* for each other. Party B considered that they had accommodated the need for personal contact by hiring complaints handlers. Party B considered that no further action was necessary to form a profitable business and that their cost structure was a well-known fact throughout the industry causing no surprise to the regular players, which they considered Party A to be. Party B were equally as keen to take Party A to Court to make an example of that organisation and that doing so would vindicate their actions to automate their system from both a legal and moral stance.

So, although on 1 April 2025, *the Competition and Consumer (Industry Codes – Franchising) Regulations 2024* (Cth) (*the New Code*) will come into effect, it will not change the worldviews of the parties in either Franchise or other civil liability disputes as they enter the mediation process.

And, although the current Franchising Code of Conduct (the Current Code) will continue to exist and apply to agreements entered into before 1 April 2025, until such time as they are transferred, renewed or extended, the mediator needs to be mindful of the interdisciplinary nature of mediation as expressed in this talk, and should not lose sight of the human element in mediation. Understanding the parties' worldviews assists the mediator in organising a plan for the way forward that can benefit both parties, even if the parties do not understand each other's worldview.

The matter discussed above was eventually settled. Before the final signing of the settlement deed, however, Party A raised many options, especially about how the transfer of the agreed sum was to take place. At first, Party A did not think the mediation was a success because the explanations given by Party B about how they could have avoided the automated rise in costs, did not satisfactorily explain to Party A, how Party A was allegedly at fault.

What was obvious from this and all other mediations is that:

- (1) Disputes arise when expectations are not met.
- (2) The breakdown of expectations leaves a vacuum regarding the loss of meaning. Throughout the pre-mediation conference and the mediation itself, Party A struggled to make sense of how the extra losses occurred, that is, Party A struggled to individually deconstruct the losses, choosing instead to blame the other side totally for their loss.
- (3) As the mediator I attempted to assist Party A to make sense of the loss which led to an analysis of Party A's expectations. In other words, to make sense of the loss, I assisted both parties in determining how the original meaning they attributed to their loss fitted into their personal construct or worldview about their business.
- (4) By assisting both sides *in deconstructing their loss during the pre-mediation phase*, the parties became better equipped to deal with each other's perspectives during the mediation phase, even if they did not agree with each other's perspectives. The fact that Party A was unable to understand where it went wrong, despite attempts to explain, highlights how deeply entrenched our beliefs about our worldview can be, thus minimising any relational learning that can occur from placing yourself "in the shoes of the other party".
- (5) That is, Party A could not individually deconstruct its loss, yet this was no barrier to the settlement because the more pressing underlying value for Party A was its need to establish a personal, respectful relationship with Party B in the hope of recouping some of its settlement costs and establishing a better long-term relationship with Party B for its business. This hints at the significance of social inclusion as a more effective access to justice measure on how one responds to a dispute.
- (6) Assigning new meaning to the loss allowed Party A and Party B to move forward. Given that the alleged amount owed by Party A legally was in the hundreds of thousands, Party B initially felt strongly that it had to recoup half the amount and made offers to that effect which Party A refused.
- (7) By reconstructing the loss through the process of relational learning throughout the pre-mediation and mediation processes, Party B was prepared to finally accept the offer of Party A as a full and final settlement of the dispute without any admission as to fault by either side. And because the solicitor for Party B incorporated the amendments to the settlement deed made by Party A, Party A felt heard and respected and was prepared to sign off on the settlement.
- (8) Although relational learning did not seem to occur as Party A did not change its worldview about Party B, sufficient learning from Party A occurred to request an alternate contract with Party B where the two companies could have what Party A called a win-win situation, hoping to recoup some of the costs it paid for the settlement.
- (9) Learning how to relate better with each other throughout the mediation, enabled Party A to raise its consciousness to actively plan for its future relations with Party B by developing a new contract as their own "game in the making" which allowed for more social inclusion for Party A with Party B.

I use the term “game in the making” as that is what the process of any mediation is – namely a game that unfolds as the parties share their experiences grounded in their loss to redress their circumstances. A social constructionist approach to mediation enables the parties to review their circumstances, measure their hopes against their knowledge of reality, and take stock of what they already have. In other words, it allows the parties to acknowledge that while their lives are not perfect, they are manageable and the parties can CONSCIOUSLY co-create a better working relationship for the future, whether together or apart.

- (10) Through the process of social inclusion and reconstructing the meaning attributed to the loss, both parties A and B became agents for social change as they considered how best to change their existing contract.
- (11) The way parties reconstruct their sense of social justice to better handle their loss impacts directly on the way they can move forward with life. This requires the mediator to have an interdisciplinary approach to making sense of loss and demonstrates that even if Party A could not understand the total machinations of how Party B operated, it conceded that it was in its best interests to maintain a workable contract with Party B for its own future development.
- (12) The interdisciplinary approach used in this mediation allowed Party A’s concerns to be heard, and offered the opportunity for emotional growth and relational learning, contributing to the settlement even if not to the overall understanding of how Party B operates. It seems that Party A understood enough to establish a new manageable contract for social inclusion with Party B on a long-term basis.
- (13) This example demonstrates that an interdisciplinary approach to mediation or, social constructionism in action, allows for social inclusion and can transform the process of dispute resolution into an agent for social change.
- (14) It also demonstrates that every conflict takes place *within a relationship* not only between individuals but also in context, culture and environment and that no relationship is conflict neutral. Instead, every relationship contributes often in veiled yet significant ways to the nature, intensity, duration, influence and meaning of conflict. The pre-mediation conference is designed for the mediator to be made aware of these elements and to acknowledge how they may interact within any mediation - hence the significance of the pre-mediation session.

The time allocated for a pre-mediation conference is usually one to one and a half hours depending on the complexity of the matter, and how effectively each party tells their story. The solicitor’s involvement also affects the time taken for the pre-mediation conference. The solicitor is encouraged to present a position paper to the other side and is also encouraged to speak minimally at the mediation unless the client prefers the solicitor to present their case.

Once the pre-mediation conferences are held with both parties, the parties are encouraged again to place themselves in the shoes of the other side during the mediation and are informed that their expectations and attendant assumptions will usually constitute their opening statements within the mediation. This is the level of “coaching” done by the mediator for each party to ensure that both stay on the same page for the duration of the mediation process.

It is also important to note that even when the mediation day ends, the mediator will follow up with both parties to ensure that no further misunderstandings occur until the settlement documents are signed. Throughout the mediation, the parties are encouraged to engage as grounded theorists to change their expectations and attendant assumptions. The above example demonstrates how mediation, as opposed to litigation, can empower each party by untangling perspectives and fostering understanding. Despite changes to the Franchising Code of Conduct, these core issues remain central to franchise disputes, making mediation a constructive approach to resolution.

A new definition for mediation can be proposed, namely, a social constructionist approach to mediation is the process where the parties and mediators, as joint relational learners, co-create a means of everyday social justice that anticipates conflict with which to better endure their losses into the future. This approach is called, *social constructionism in action*.