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Myths, Propaganda and Reality
- Negotiating Dispute Settlements with the National Government

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- Myth: "A traditional narrative reflecting popular ideas which are, in whole or part, fictional."

- "I know what they say, but I also know what they do." (Anon)

Background – The Tension Between Negotiation Types

Negotiation literature and research emphasizes the tension between "positional" and "interest-based" bargaining; between "claiming value" and "creating value"; between the bad cop and the good cop; between threat and consequence; between risk and goal; between adversarial and "problem-solving" processes. No solutions are offered to these overlapping tensions of the human condition. Rather highly competent negotiators are observed diagnosing suitability, planning, performing and switching skillfully between BOTH procedures and subtle hybrids.

Anecdotes and legends abound about hawkish or dove-like negotiators who chose the wrong process, by habit, laziness, lack of skills, or pressure from constituent groups or "systems".

These topics and tensions are found on a daily basis in newspapers, on the internet and in conversations about parenting, work conditions, buying cars, governmental decision-making and international diplomacy – and of course, about the real and mythical behavior of lawyers.

Some people, due to willful ignorance or strategic choice, pontificate that there is or should be no such duality:

- "You can't negotiate about crime"
- "The tax office does not negotiate; it only applies legal rights"
- "It is wrong to negotiate about child safety"
- "Tough love is the only way for juvenile delinquents"
- "Violent dictators understand only one message – the barrel of a gun"
- "Insurance companies can only be broken by a war of attrition"
- "The Commonwealth government standardly avoids the appearance of nepotism or weakness by litigating"
- "Middle managers need the cover of a judicial decision or a QC's opinion"
- and of course "It is a matter of principle".

Any small anecdotal or systematic scratch into such persistent rhetoric invariably reveals delusion, dogma and complexity.

Conversely, the reverse over-simplification towards "problem-solving" is currently fashionable:

- "Families should avoid litigation at all costs"
- "The 'adversary system' causes disputants to be unreasonable"
- "If we sit around a table, we will work it out"
- "They will see sweet reason if we make ourselves clear"

The myth has existed for many years that the dynamics of negotiating the settlement of disputes with the (Australian) government is somehow "substantially" different to similar conflict negotiations with other large organizations. Does reality differ from the myth? To what extent?

Anecdotally or systematically:

(1) What are the "normal" dynamics and pressures when negotiating with large "public" organizations?
(2) To what extent are these negotiation dynamics the same/different when negotiating with various departments of the Australian government?
(3) What are the possible advantages and disadvantages of preserving the myth of "difference"? To whom?

Legislative (and other) Pressures to Change Negotiation/Dispute Behaviour

There is a proliferation of necessarily vague Australian legislation which attempts to reduce the transformation of conflict into legal categories; and attempts to reduce the use of court filings and interim court procedures as standard negotiation levers; and attempts to reduce the use of certain standard negotiation strategies.

For example:

- "Good faith" during negotiations is mandated in over 150 Australian statutes (in various shades of meaning) which reached a peak in *Western Australia v Taylor* (1996) 134 FLR 211.
- "Reasonable prospects of success" is a required certification by lawyers (split the team; put the lawyers at risk; emasculated by case law) – eg s.198J of the *Civil Liability Act* 2002 (NSW).
- *Civil Dispute Resolution Bill* 2010 – requires "genuine steps to resolve" (GSTR) BEFORE filing.
- *Family Law Act* – "genuine effort to resolve" certificates issued by mediators as a pre-requisite to filing in children's disputes.
- *Legal Services Directions to the Commonwealth*: Appendix B, "Model Litigant" Clause "participating in alternative dispute resolution processes where appropriate".

The following table also suggests legislative patterns which attempt to reduce the use of certain standard negotiation strategies – file fast; delay; start offers in insult zone; hide transaction costs; send juniors; use data chaos; attempt ambush; use dueling experts etc.

Perceived Problem in Culture of Negotiation	**Standard Legislative Response**
1. Opening negotiations with a positional or ambit offer	1. Only *one* offer must be filed in court with a short time limit after a formal claim is made
2. Employing "duelling experts" who inevitably are paid to give opposite conclusions	2. Only one joint expert can be initially appointed.
3. Client ignorance of transaction costs of continued conflict or of a "court" hearing	3. Mandatory forms filed setting out a range of estimated client costs
4. Filing formal claims as a routine and inflammatory method to open negotiations	4. Once filed, strict time limits and case management push the conflict quickly towards a hearing (ie client loses control)
5. A junior person attends formal negotiations	5. Mandatory attendance by a senior officer with authority to settle
6. Lawyer or skilled helper unnecessarily escalating conflict due to ambit claims, emotional entanglement, jargon, "no-stone unturned" discovery and cross-examination or sloppiness	6. Traditional "lawyers" excluded from the hearing and mediation rooms
7. Chaotic data	7. Mandatory filing at an early stage of alleged facts and evidence; and of issue summaries
8. Withholding of key information and witnesses in order to "ambush" later	8. Mandatory early disclosure; mandatory exchange of witness statements; exclusion of all undisclosed evidence
9. Strategic stalling and inaction in order to avoid facing a problem, or to cause inconvenience, expense or attrition	9. Mandatory time limits
10. Unwillingness to focus and made or respond to a "reasonable offer"	10. Vigorous awarding of costs in favour of reasonable offers; against ambit offers; mandatory single, filed, early written offers

How is negotiating about disputes with the Commonwealth "different" to negotiations with large "Western" organisations?

Possibilities?

(1) Middle managers will not take responsibility for settlements out of fear of being reprimanded.

(2) Middle managers like to request "legal" advice in order to have someone else to "blame"/to be "responsible".

(3) "Legal" advice is necessarily slow and conservative; as time is needed to collect various versions of facts; and lawyers want to protect their own reputations.

(4) "Legal" advice does not include organizational goals/risks. This is a second layer of advice to be sought/systematized at a later date.

(5) Complementing (1) above, middle managers and their departments are not "punished" by loss of wages; or loss of funding when they negotiate clumsily; or incur major legal expenses "unnecessarily".

(6) Government departments do not have limited and defined "conflict" or "litigation" budgets which are reduced each year.

(7) Government has many departments which may need to be consulted; therefore more delay and complex logistics.

(8) It is difficult to keep government negotiations confidential; and politicians are fearful of media sensationalism about nepotism and/or lack of compassion – especially in election years.

(9) People negotiating with government experience high levels of frustration and anger as delay is interpreted as intentional or clumsy stonewalling.

(10) Government has more rules to know and comply with than a private organization.

(11) Government has more bodies "supervising" its behavior and ticking boxes.

(12) Other?

Questions

(a) Tick those factors which you consider are influential.

(b) What other factors may/do create "difference"?

(c) Are any of these factors likely to change in the near future?

(d) Apart from factor (8), are these factors any different to those operating when negotiating with Chinese or French corporations?

Some Legislative Provisions Which Reflect the Inevitable Tension/Balance for the Australian Government Between….

Focus on Predictions/Guessses/Ranges of Court Outcomes ("Legal Rights"??)	Focus on Organisational Goals/Risks
• [Report to AG where] "a significant precedent for other agencies could be established" (*Legal Services Directions*, 2005, Part 3.1 (d)) • "Claims are to be handled and litigation is to be conducted by the agency in accordance with legal principle and practice, taking into account the legal rights of the parties and the financial risk to the Commonwealth…" (LSD 4.3)	• "Ensure the delivery of efficient and effective [legal] services" – *Legal Services Directions*, 2005 (Part 1.1) • [Report to AG where there are] "sensitive legal, political or policy issues" (LSD, Part 3.1)

• "Some *examples* of handling claims and conducting litigation in accordance with legal principle and *practice* are:
  • Acting in the Commonwealth's financial interest to defend fully and firmly claims brought against the Commonwealth where a defence is properly available, subject to the desirability of settling claims wherever possible and appropriate (LSD, 4.3 – spot the weasel words above?)
  • "An FMA agency is not to start court proceedings unless the agency has received written legal advice from lawyers whom the agency is allowed to use in the proceedings indicating that there are *reasonable grounds* for starting the proceedings." (LSD, 4.7)
 	
Does 4.7 suggest ONE threshold process; or ONE of several thresholds?
 	
(Note the power given by LSD, 4.7 to certain lawyers as initial gatekeepers to spending taxpayers money?)
 	
• "A defence based on the expiry of an applicable limitation period is to be pleaded by an FMA agency, unless approval not to do so is given by the Attorney-General (LSD, 8.1)
• Monetary claims covered by this policy are to be settled in accordance with legal
	• "[significant claims are] not to be settled without the agreement of the A-G" (LSD, Part 3.2)
	• Commonwealth agency "is not to start legal proceedings unless it is satisfied that litigation is the most suitable method of *dispute resolution*" (LSD, 4.2)
	
	• The Chief Executive of an FMA agency is responsible for ensuring that:
	  (a) The agency's arrangements for legal services, especially any litigation for which the agency is responsible, are handled *efficiently* and *effectively* (LSD, 11.1)
	  (c) Lawyers … providing legal services to the agency are aware of, and are required to assist in ensuring that the agency complies with these Directions (LSD, 11.1(c)) [Lawyers are thereby mandated to take a broad organizational goal/risk advisory role?]

principle and practice" (LSD, Appendix C, clause 2) • "A settlement… requires… *at least* a meaningful prospect of liability being established" (ibid) (ie a threshold requirement!) [S]ettlement is not to be effected merely because of the *cost* of defending what is clearly a spurious claim" (LSD, *ibid*) • [The obligation to avoid legal proceedings wherever possible] … does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute! (LSD; Model Litigant, Appendix B, clause 2)	• "If there is a meaningful prospect of liability, the factors to be taken into account in assessing a fair settlement amount include: (c) any prejudice to Government in continuing to defend or pursue the claim" (LSD, Appendix C, clause 2) • "If an agency considers that a claim raises exceptional circumstances which justify a departure from … (LSD, Appendix C, clause 5)

Therefore??... government disputants and their lawyers are obliged to use language and behavior on both sides of the "rights"/"goals" tension (normal double speak and code).

It is either due to laziness, ignorance, lack of skills or initial strategic choice to suggest that government officials *must* begin negotiations with "rights rhetoric". The statutory rules clearly support more complexity and sophistication.

The New Equity?

Apart from the standard and mandated use of legal predictions AND organizational goals and risks to determine the size of settlements with government, there is a second doorway for claims and settlements against governments. This is arguably another "new equity". It is not governed by the Lord Chancellor's conscience or length of his foot, but rather by the budgets, "morality" and pragmatism of government departments – no doubt already constrained by emerging new visible or secretive precedents.

Promoting consistency, and reducing floodgates and forum shopping means that precedent is essential. This also provides new opportunities for online reporting and tables of "DGC" – discretionary governmental compensation? Negotiation in the shadow, not of the law, but of DGC's.

Discretionary Governmental Compensation powers are currently set out under *five headings:* (See *Australian Government Finance Circular* No 2009/09)

- Payments made under the scheme for Compensation for Detriment Caused by Defective Administration (the CDDA scheme)
- Act of grace payments made under s.33 of the *Financial Management and Accountability Act* 1997
- Waiver of amounts owing to the Commonwealth under s.34(1)(a) of the *FMA* Act
- Ex gratia payments
- Section 73 of *Public Service Act* – "special" payments

It is unclear what statistics reveal about historic application and payment rates under DGCs. Use is not “encouraged” as existence of the schemes is not well-known; government obviously does not want a floodgate of claims opening; there are no appeals into judicial system; paperwork is onerous; and lawyers as document drafters and advocates are discouraged by the uncertainty of awards, and absence of compensation for legal costs.

Exercise

(1) What is your experience of DGCs?

(2) What rate of application in what areas?

(3) What rate of payment, in what time frames, for what amounts?