Miranda Woodland (MW): Welcome, everyone. I will start with the traditional acknowledgement. We acknowledge all First Nations people of this land and celebrate their enduring connections to country, knowledge and stories and we pay our respects to elders and ancestors past, present and emerging. Today we recognise their long history on the land on which, we are all on different lands, and the care that they have given to the land for thousands of years.

Firstly, everyone, welcome. My name is Miranda Woodland. I am the secretary of the Downs and Southwest Queensland Law Association. This is one of our first online webinars, that I am aware of, so thank you for joining. I am sorry there is no wine and cheese, to the participants and the speakers, but we are really excited to kick this one off tonight. I just want to give a huge thanks to Tamara from Level Twenty Seven Chambers for arranging this evening's webinar. And a special thanks to Matthew, Rachael, Florence and Timothy for what I expect will be pearls of wisdom coming our way. So thank you very much. I will handover to you, Matt.

Matthew Jones (MJ): Thank you very much. Good evening again to those from the Downs and Southwest Queensland Law Association, and any other guests who I think might have snuck in. I am Matthew Jones. I am a barrister at Level Twenty Seven and I will be facilitating this evening's presentation.

I will just quickly introduce our three panelists. First, on my right, Rachael Field, who is a professor at the Center for Professional Legal Education at Bond University. Rachael has very substantial experience in the issues we are considering tonight, having practiced as a family lawyer, and published widely academically in a number of areas, including dispute resolution and mediation in particular.

To my left, Florence Chen, who has a wide commercial practice but relevantly for tonight, with a particular experience in succession and tax, both scintillating in their own way. I like this joke so I always repeat it (almost a joke)…Florence's intellectual rigor and work ethic, which is serious, is demonstrated by the fact that Florence served as the Associate to Justice Fryberg for two years and Justice Jackson for one year. Quite a remarkable service there.

Then Timothy Stork. While relatively new to the Bar, Tim has long experience in landholder disputes as a solicitor at an international firm, and then a Senior Legal Counsel for Energy Queensland, with responsibility for Ergon and Energex. Again, relevantly for tonight, Tim has wide experience in environmental enforcement, compulsory acquisition, cultural heritage and valuation appeal matters.

The format of the presentation is a facilitated discussion around mediation strategies. We are framing the presentation around the theme of active listening and what flows from that. In

particular, we will be discussing strategies to keep in your professional toolkit to help deal with the wide variety of challenges, and also opportunities that might arise in mediations. Although we may prepare and expect a number of things, no two mediations are exactly the same. And we you know, as in all things, need to be adaptable, and mediation is becoming an essential part of every litigator's practice. I would suggest that gone are the days where mediations were just something you ticked off a list to get to a trial, or where each side just berated each other in a room for a while and hoped that something emerged by way of resolution, but with no real plan to get there.

Mediation is really an opportunity to seize an outcome that might be better than a trial, both in terms of actual substance because judges cannot give everything the parties might want, but also after adjusting for the costs and risks of fighting the matter all the way to an end. I would also suggest that being something workable, good practice of mediation is something that can be learned and developed and honed over time.

It is easy to say that mediation should be planned and prepared and that we should engage in active listening. What does that really mean? What does it really mean in the context of the types of methods which our panelists have experience in, land, succession, family disputes, for example? We will discuss some of the matters that affect planning, like the effect of tax and what types of issues might arise and when they might become pertinent issues, and how to deal with challenging or difficult people and mediations. Therefore, in terms of structure, what I would like to do is invite each of our panelists to work through the issues within their particular area of expertise and then we will move to more of a discussion. There will be discussions, I think, that lead from each of us. I have also got the chat window in Zoom open on an iPad in front of me. I will keep an eye on the questions and try to raise those. We will be leaving probably around twenty minutes at the end for that discussion phase. I should add that the session is being recorded. If you miss anything, please feel free to come back and get a copy.

MEDIATION STRATEGIES & METHODS IN FAMILY LAW DISPUTES

With that introduction in mind, I might then turn first to Rachael as our senior practitioner, in the most positive way, the most experience. With that background in mind, as a voice through the themes that we are talking about today, Rachael, can you give us an introduction to your work on mediation practice, particularly in relation to family aspects for us?

Prof. Rachael Field (RF): Yes, sure. Thank you. Thank you for the opportunity to be here. Thanks, Tamara and to Level Twenty Seven Chambers for hosting this webinar. It is really great to be involved. Thank you, Miranda for your acknowledgement of country on our behalf. It is so important in NAIDOC week that we remember and honour the culture of our First Nations people and their achievements. Also, I think, from a legal perspective, it is critical that we

always acknowledge that sovereignty was never ceded. That Australia was, is and always will be Aboriginal land.

STRATEGY 1 - PREPARATION

RF: I am sitting here to be the family law, family dispute resolution kind of perspective. The two points that I want to raise which go to mediation strategies, specific to family dispute resolution context but also more generalisable, I think, there are two things that I would just like to touch on and raise a discussion. The first is the importance of preparation for family dispute resolution, but for any mediation. That is important, preparation on the part of the mediator, preparation on the part of any legal representative that is in the mediation. But also, the thing that I would like to highlight is preparation of the client for going into mediation. In the family dispute resolution context, we often have a situation where we are advising a client, and they will then go in [to a mediation] on their own, they cannot necessarily always afford to have a legal representative in the family dispute resolution process. The family relationship centers actually do not want lawyers there. That is something to remember.

STRATEGY 2 – MOVE AWAY FROM FACILITATIVE MEDIATION TO ACTIVE MEDIATION

RF: The second point that I wanted to raise was just to challenge our thinking around the dominant model of mediation in the family dispute context, which is facilitative mediation, and just question whether the ethics around that which are the traditional ethics, namely, if the mediator is impartial, party self-determination will be supported. I would like to challenge that, some of you may know my work in this area. I disagree. I think that we have to be active, we have a job to do as a mediator. We are there to help the parties, sometimes that impartial stance will string us up in terms of being able to do the job that the party's done and needing of us.

I offer these views from a long standing, two decades really, writing, in a theoretical way, about this stuff. But actually since 2016, also as a family dispute resolution practitioner. I was finding that people were not actually engaging with some of my theoretical challenges very well. They could dismiss my perspective because I was not in practice. So, I decided I needed to be a practitioner. And so, I am an accredited national mediation accreditation system and mediator. I am also a registered family dispute resolution practitioner and I practice in our clinic at the Bond faculty.

STRATEGY 1 – PREPARATION: THE LANGUAGE GAME

RF: To go to the first one, about party preparation. My colleague, John Crow, Prof. John Crow at Bond and I have written an article called the language game of family dispute resolution. In that article we have drawn on the work of the philosopher Wittgenstein, the German philosopher, and his notion of the language game. I think it really helps us to understand how important party preparation is when we think about it in terms of this language game.

Wittgenstein used the analogy of a chessboard, all the pieces are nicely set out. If you do not know what a pawn can do you can't strategise to use the pawn or the board or any of the other pieces you have to know. The language of the game of chess, you have to know what the elements of it mean and how to go about using the process. So we use that to talk about how if a party is not adequately prepared to go into mediation they are not ready to get the most out of the process.

STRATEGY 2 – MOVE AWAY FROM FACILITATIVE MEDIATION TO ACTIVE MEDIATION: COORDINATED FAMILY MODEL

RF: In the coordinated family dispute resolution model, which, in your context, you would not have come across. But in family dispute resolution that was a model that was trialed in 2010 and 2011. It was piloted around Australia, I was involved in writing the model with Angela Lynch at the Women's Legal Service here in Brisbane. It was a model of mediation specifically designed for matters where there was a history of domestic violence. The model was very resource intensive. I still argue that if we want family dispute resolution to be safe in that context we have to invest resources in it because that is just how much it costs, to have it be safe. The elements of the model that were so resource intensive were all front end. It was a really strong approach to risk assessment, ensuring that the right people are in the process. It was a really dedicated approach to counseling so that people have been able to work through their grief about the loss of the relationship and those sorts of things before going into mediation. Otherwise, you find it just plays out in family dispute resolution, people have not dealt with those issues.

STRATEGY 1 – PREPARATION: LEGAL INFORMATION FOR CLIENT

RF: The next thing was obviously legal advice, ensuring that people have that legal information so that they are not negotiating in a vacuum. They are informed about what the law would say.

STRATEGY 1 – PREPARATION: MEDIATION TRAINING

RF: The final thing that we had as a preparation part of this CFDR model was actual mediation training itself. When you go into the process you will be asked to make an initial statement about what your concerns, needs and issues are, why you are here at mediation. Then the mediator will use your statement to create an agenda, stepping through the facilitative model, each of the steps, and teaching the parties what they needed to do to prepare to be in each of those phases, what to expect of those phases, and how they could make the most of them, have the opportunity to speak.

For example, if you are in a situation where there is a family dispute resolution process with a victim and perpetrator of domestic violence and you did the normal thing, which is just to say

"I'll just open the floor to who which party would like to go first" the victim of domestic violence is not going to go first, the perpetrator will go first. What we know about the first narrative from discourse theory, and the way that that plays out in mediation, is that the party that goes first, even though we then turn to the other party and say "Now, can you give your opening statement, but don't give it in response to the first person, give it on your own starting afresh", you cannot help it, you are the second narrative. The second narrative always comes into the context of the first, even if it said *de novo* it is a response of some sort.

Being cognisant of those things and being able to teach people about those things in preparation for going in and making the most of the process is really important. We found that in the pilot of the CFDR model, which was evaluated by the Australian Institute of Family Studies. Their findings were that, even with all of these resources, FDR can be quite traumatic for the participants, particularly the victims. We need to be mindful of that. As much preparation as can happen as possible, I think, with clients, particularly, if we are not going to be with them in the mediation as a representative. That is important. That was the first thing that I wanted to raise.

STRATEGY 2 – MOVE AWAY FROM FACILITATIVE MEDIATION TO ACTIVE MEDIATION:

RF: The second thing is about the theory of mediation. It plays out in FDR because of the fact that the facilitated model is used so widely. The theory of facilitative mediation, and it is the go to definition of mediation, is the facilitative model. All of the MS training in Australia that happens uses that model. It is the baseline even though we know that in legal contexts, hardly anybody is using the facilitative model, strictly.

MJ: Which is one of the great secrets when we sign up. Every two years we declare that we do comply with the model.

RF: Well, and it is why I think that there was a move amongst some lawyers associated with the Law Council of Australia to actually have a separate accreditation process and standards because that was going to be quite different from the MS. The MS is being reviewed currently. The Mediation Standards Board is having that reviewed, so who knows what that might look like.

My thinking is that it has been wrongheaded since the start to think that an 'impartial', and the word that we used to use was 'neutral', mediator can effectively support party self-determination, because, in my view, the mediator is impartial and stands back. All that happens is that the power dynamic between the parties will play out. That is not self-determination, because the idea of self-determination and mediation theory is that each party can achieve self-determination, that the outcome is mutually agreeable, and that each

party can live with it. If a mediator is too active then they won't allow that to happen. But if a mediator is not active, they also are not assisting party self-determination.

My PhD was on this very topic. My conclusion was that we needed an ethic that meant that the dominant objective of the mediation process, and I know lawyers are sort of maybe a little bit, you know, anxious about this idea of self-determination, because we want to advise the parties as to the best course of action sometimes, but I do believe that if we are calling something mediation that there has to be this element of party self-determination that is made possible. I think that is the job of the mediator to make that happen. That is how you help the party, to help them achieve clarity, self-determination. That is an important role that lawyers have as representatives in the mediation process, as well as to inform the party's choices and their decision making.

But it is also a role for the mediator, I think. I think that means you cannot just sit back. If anybody is familiar with the PhD thesis of Susan Douglas, she did some work with the Dispute Resolution Branch mediators who were using that strict facilitative model "I can't make suggestions, I can't give any sort of advice, even if I am competent, qualified in that area. I guess I can't make suggestions, I have to leave it to the parties." They were recounting their stories of the interviews that she did with them, of how in some situations, the injustice that they saw play out in front of them was just professionally devastating. They would go away and reflect on that and just feel that they had presided over a travesty and that had they used their expertise and stepped in, or had they even just taken the parties into a private session and done things differently, like to question the direction that things were going. They felt so hamstrung by this theory of impartiality and this commitment to the notion of a fair process. I think that we do really have to rethink mediation ethics and move away.

The core of it for me is party self-determination. A mediator is there to ensure that happens. I am a bit of a contextual ethicist. I think that it is the context that informs the mediator as to what is necessary to support party self-determination. Sometimes being impartial will support party self-determination and that is what you need to do. But at other times, the mediator may need to be a bit more interventionist in terms of providing assistance. I would like in the future, I do practice with Libby Taylor at the Bond FDR clinic in a very facilitative way at the moment, so not making suggestions and that kind of thing, but I would like to see a model where we feel comfortable that that is ethical because it is helping the parties to achieve self-determination.

MJ: What is the conduct or the skill sets of the mediator under the new ethic?

RF: That is experience and its artistry. I think that one thing that the facilitative model gives new mediators is the reassurance that if they just stick to the process, and step through the process, they will be helping the parties to some extent.

MJ: Or at least do no harm. Or at least not make it worse.

RF: Although I think that in the family dispute resolution context, because we know that there are so many matters where DV [domestic violence] and family violence are an issue that do no harm is not something that we can assume.

I guess those were the key things that I wanted to throw into the mix of the discussion and hopefully we will have some good chats about that.

MJ: I am sure we will, I have a list of things to go through. And that is really helpful. Thank you.

MEDIATION STRATEGIES & METHODS IN LAND LAW DISPUTES

MJ: Possibly a change of pace, I am not sure. If I throw to Tim. So land…may seem drier, but it is a topic very close to our hearts. I suspected it will, I think particularly in relation to agricultural properties, dealing with one's land will always excite emotion. So Tim, could you take us through some of the strategies that you found necessary or useful in dealing with difficult mediations, and the heavy expectations that land disputes tend to engender among the parties.

Timothy Stork (TS): I think, just touching on one of the things that Rachael said before, it is a political context, obviously, but land disputes are often highly emotive. Touching on what Rachael said about there being an imbalance, there is often in a way of dispute a financial imbalance where you might have one larger infrastructure provider or government party on one side and a landowner on the other end. Often, if there is not a financial imbalance, then it is settled, which is why if there is a dispute there is a bit of a financial imbalance because money really means something and the land is personal. The other part of that, in my experience, there is a lot of infrastructure fatigue and regulation fatigue, particularly in rural areas where restrictions on vegetation clearing have become heavy and often crisscrossed by various infrastructure providers, which brings with the leave issues and access issues. For example, leaving gates open, which might seem simple to somebody who sits in an office in the city but it is a really big deal on the land.

STRATEGY 1 – LISTENING: SMALLER PARTIES

What I have found works as a strategy, or as an important as a strategy, picking up on the theme of listening is for a smaller party, for the landowner often, listening very carefully to what professionals say to that party, is really important. That means for the party themselves, to what

the solicitor says, but I think as a solicitor, as barristers, or experts in that process, there is a real role to play in listening too. If you are a solicitor to listen to experts, but also what the mediator might say.

Picking up on what Rachael said, I did not know she was going to say this, but I have always tried to get mediators who are experienced Silks or in resumption type disputes, ex-Land Court members because you get a really good feel for whether you are on to a hiding for nothing with your position in a mediation. I have been on both sides of that, have had the screws put on a couple of times, but also have known that I am not getting any pressure and the other side is getting that pressure. If you prepare your client well in advance by telling them "This is the mediator, this is what their role is, this is who they are and what they've done as well." Getting somebody who is very, very well respected, that can really help with preparing a client to be reasonable.

I have seen it not work where a solicitor has not listened to what a former Land Court member is saying about deposition in this case, and it was a legal point being taken. It flowed into a big financial impact into whether the claim is worth more or not. The mediator was firmly on my side on that point. The other side just would not concede on that, would not even listen on the point, not prepared to put any sort of faith in what the mediator was saying about it.

MJ: Not really treating it as a risk factor.

TS: Not treating it as a risk factor. It should have settled but didn't. What it meant was that the client was not prepared in terms of their expectations and it is really difficult to change a client's expectations in the room or in a room outside of the mediation.

STRATEGY 1 – LISTENING: LARGER PARTIES

TS: When acting for a larger party in a dispute, listening takes a bit of a different focus. I think you still need to listen to the mediator, still listen to professional advice, as well as listen to experts as well. But in land disputes there is often a lot of history of tension, that comes from those things I mentioned before, about infrastructure fatigue or regulation fatigue, or something that somebody has done on the land two years ago, that really has triggered the way somebody might approach a dispute and listening for what that the other party says. They might say the plan is about X, Y, and Z. But they mentioned A,B,C, and you think this seems to be really driving where the distrust or the frustration or is stimulating this dispute.

I think you listen to that for two reasons. One, so you can understand what that is. If it is something simple and relatively simple, it could be like use of the correct access tracks, making sure gates are left as they were found, appropriate control or something like that,

those are things that you might be able to deal with without necessarily having to deal with them financially.

The second reason you should listen to both things is because sometimes just getting something off their chest is enough, or at least helps with making somebody calmer in this dispute resolution process. That is easier for you, but importantly, it is easy for the solicitor. It makes it a lot easier for their solicitor to talk with them about what a resolution might look like.

MJ: Felt like they are being heard.

TS: Felt like they are being heard. It is both practically sensible but also tokenistic and sensible as well for that reason. It may not change your view on something but it will make things easier, I found, in either the mediation or dispute resolution, or the long term in the matter as well.

STRATEGY 2 – PREPARATION: SETTING CLIENT EXPECTATIONS

TS: One other thing I was going to say, and it comes into his preparation of your client as solicitors. I don't think, they or consultant experts should be fire starters. By that I mean writing inflammatory, or emotive letters, even if a client wants them. I see a lot of that in land disputes, a lot of really long letters that go over a really long history of things. I don't think it works because it fires the client up in a way that might not necessarily be appropriate or necessary. It is very rarely well received by the court. If you are on the other side of an application, and you have got an affidavit with one of these letters in, one of the very first things to do is take the court to that. Sometimes the work will be done by the letter and what the judge thinks of a letter.

It is also not persuasive because a large corporate or government organisation is not emotive, they are people but it is not their money. You are not really going to change somebody's view on an emotional level like that. You might also find that entrenches a view where people think this is my point. There is no point, we can't deal with this on an emotional level because it does not matter for us, so we can't help somebody. A well-reasoned and non-emotive short letter, I say short because someone is going to respond to it, is a better way of dealing with those things. I know that is not about what is in a dispute resolution process or in the mediation, but there is a lead up to it which is important as well. Part of that is about giving realistic expectations as well to your client in advance.

MJ: Structuring the idea of a matter of being resolvable in advance so that by the time you reach mediation people are in that mindset that it might actually be a worthwhile use of time.

TS: And you have thought about possible outcomes and talked it through with the client, why something might be acceptable and not acceptable. That is about practical things like gates, weeds, access, and that sort of stuff. You can respond much better in the mediation than you might otherwise. Part of that is also not giving inflated views to the point and making sure that you are a bit of a barrier if you have got a consultant because sometimes clients can be egged on by consultants, to try and refuse that as well. I always say it is better to get an expert, a true expert, rather than somebody more aligned who acts like an advocate. That can be really hard to try and pull everybody back from that position.

MJ: In a sense, rather than treating mediation as a discrete step in a proceeding, it is building your whole work in a matter around getting to a mediated resolution, rather than having an inflamed matter then trying to poke in a mediation out of the blue and expect it to suddenly be capable of resolution.

TS: 100%. If it resolves at the dispute resolution stage perfect but if you have thought about these things when you are going to trial, the trial is probably going to be more reasonable and better prepared. You know you are putting up a better case and reasonable proposition to the court.

MJ: Very interesting.

MEDIATION STRATEGIES & METHODS AND TAX ISSUES

MJ: On that topic, one of those things that often gets in the way at the last minute when you least expect it is tax. Flo has a book in front of us called 'Death and Taxes'. There is nothing more certain than tax. Yet somehow it is so often 430 in the afternoon of a mediation where someone raises taxes for the first time. Often, that might make a deal 1/3 or so, depending on tax rates, more or less attractive to somebody. Tax really fits into the preparation narrative, doesn't it? We might jump to that to finish setting the framework for the discussion to come.

Florence, can you enlighten us a little bit on how tax considerations might be usefully included in preparation of mediations and in mediations on the day.

STRATEGY 1 – INFORMATION TO PREPARE BEFORE MEDIATION: GST, DUTIES & CDT

Florence Chen (FC): Absolutely. The importance of tax implications of a settlement cannot be mistaken, it cannot be overlooked. It should definitely not be left until 430 to determine whether or not the parties will settle or not. When should this be considered? Absolutely when you are in the mediation, you should be looking at your offers that you are making, but also what offers the other side are making and to work out what the tax implications of those offers are in advising your client whether or not to accept it. Better yet, the time to look at tax implications is probably in the preparation stage because a lot of the times the tax

implications require other information and requires values from your accountant, how much is the historical cost base of the CDT asset and the life? Those kinds of financial informations if they are not at the fingertips of your client at mediation could completely derail mediation. It could mean that the parties do not have certainty as to what they are signing up to and refuse to sign a settlement deed.

How much are we talking about? Well duties, that is up to 5.5% GST, you know how much that is. more importantly, CGT and income tax can be up to 45%. If your client does not know if they are going to take away 100% or 55% of an amount of money in their hand, that is a very difficult proposition for a client to either accept or refuse.

I could not possibly deal with all of the tax implications, or deal with all the major tax issues that may arise in a mediation, but I just want everyone to walk away with an appreciation of what are the main tax liabilities, and those are GST, duties and CDT.

GST

Looking at GST first, I think all of us deal with it on a daily basis. It is the 10% that you pay for any transaction on goods and services. There are things called GST free supply or input tax credited ones. Those ones do not attract GST. But when in a mediation do you need to think about it? Hopefully, you will have already prepped your client, talked about some possible settlement offers that you could make and really thought about, are there any GST indications? Once you are at mediation, if you have not thought about it in advance, when do you need to think about? Firstly, if any of the parties are registered for GST then we will have to think about it. Secondly, if the substance of the claim is in relation to the supply of goods or services then anything that you sign up to in the settlement deed could create a taxable supply. Also, you need to think of whether or not the taxable supply has already occurred.

For example, if you have got a case of specific performance - one company has already supplied goods and services and the other side is refusing to pay - then you have already had your taxable supply. Those are just some things you need to think about.

What are some examples that might arise in a mediation? A lot of commercial matters might involve the sale of commercial property. Is that a taxable supply? It is. When you are counseling the seller, they need to remember that 1/11 of the settlement amount that they are receiving has to go to the taxman. So, 10% of that could be off a million dollars, that could be a lot of money.

But what about the sale of businesses as a going concern? I had a mediation that involved a prawn farm, it was being sold as a business. Is that a GST supply? It is not. Businesses of a going concern are not a GST supply.

The one that occurs in every single segment is legal fees. We know that legal fees are a GST taxable supply, but what effect does that have on assignment? So, you have got party A and party B. Party A has already paid $11,000 for their solicitor's fees, they get party B to pay their fees under a settlement deed. But how much should it be? Should it be $11,000 or $10,000? '

MJ: $20,000, if you are doing it well.

FC: Bit of profit there.

[Panel laughs]

FC: Absolutely. You have to think about whether or not the parties are registered for GST. If the party who paid the legal fees was a registered GST entity then they got a $1,000 input tax credit already. If in fact their legal fees are going to cost them out of pocket $10,000 and if party B paid them $11,000, they have made a bonus of $1,000. If you were for that party advising Party B then you really should be advising them that the only amount of tax you have to be paying. That is right, the only amount of legal fees you should be paying is up to $10,000. That happens in almost every settlement.

There is a very helpful GST tax ruling, if you ever have really boring night in then have a read of it. It is called GST Consequences of Court Orders and Out of Court Settlements, it deals with some of the GST supplies under settlements.

DUTIES

The second tax I wanted to touch upon was duties. Duties arise on dual transactions. A dual transaction is defined very broadly, it is any transfer or agreement to transfer. It is a vesting by law, it is a trust acquisition of dutiable property. What is dutiable property? That is things like land, business property, business assets, chattels, and the like. Something to think about for duties, it is a state based tax, so where the location of that dutiable property is actually will determine which state's duties act applies. You have to take care, if the land you are looking at under your mediation happens to be in New South Wales it is not the Queensland Duties Act that applies.

In a mediation you could be having a dispute between families or businesses, that could be about land, or it could be about business assets. That is when duties might apply. What is relevant about duties, and that is something that you need to be talking about with your

client, gathering some information about what their situation is and whether or not they can apply for an exemption from the ATR, it is things like is this matter about a matrimonial dispute? If it is, then there is matrimonial exemption under the Duties Act. That is a more narrow exemption that only relates to personal assets like cars, furnitures and those kinds of assets, as well as the principal place of residence. There is a broader exemption under the Family Law Act, under s 90, s 90 L. If you get a court order that says a party a has to transfer three properties to party B, all of those are duty exempt, i it is under a court ordered act.

For the succession practitioners out there, what are the duty implications at a mediation? Fortunately, it is pretty simple. There is an s 124 exemption, so any property that you receive under will is deemed duty exempt. It is pretty good.

What happens if you are at a mediation that is involving a family provision application? Can the transfer of property, if you enter into a settlement agreement, an FPA mediation, will that be duty exempt? The answer is yes. What happens in FPA, if you can get an agreement, you can then go to the court and ask the court to vary the will. If it is a court varied will, then again, the transfer will be duty exempt.

Something to think about is whether or not under the will there is a power of appropriation. If the parties can negotiate, come to a settlement at a mediation, it is possible that the executor has a power under the will to simply appropriate, get the property to a particular beneficiary. If the executor has that, well again, it will be duty exempt.

Talking about succession, I found one good textbook, I make no money from this. There is a book called 'Death & Taxes: Tax Effective Estate Planning', I found that it is quite detailed. It deals with all the major taxes as well as a lot of issues, a lot of different assets, a lot of timing issues. I commend that book to you if you are thinking about succession law and tax issues.

Another major exemption that you can apply against any duty tax liability is a family business exemption for primary production or a prescribed business. That is really helpful. That became very helpful in a recent mediation that I had. It was the classic cattle farm family in which the son stayed behind, worked the land, was promised all the properties from his parents. When it came to reading the will, unfortunately, he did not receive all the properties he thought he was going to receive. He could not make a family provision application because he was independently wealthy. We were challenging the will on the basis of a constructive trust or promissory estoppel. We were able to, thankfully, successfully negotiate the obtaining of that very valuable piece of country. However, our guy had to pay a million dollars for it, there was more of a purchasing or a transaction for the property. That was not covered under the will. We were faced with the issue of, is my client going to have to pay duty on a $1 million+ purchase of land from his parents? Fortunately, he was able to obtain the exemption for the

primary production business. Asecause the land came from his family, from his parents, and it was operated as part of the cattle farm, they were able to avoid having to pay duty.

CDT

The third and final tax that I just wanted to touch upon was CDT. A tax arises on the sale of, or disposal of, a capital asset. Those include shares, real property, or land. The CDT event usually occurs when you enter the agreement. When do you have to think about it in a mediation? It is before your client signs the settlement deed. If you have signed the settlement deed, it is too late, the CDT event has occurred on that day. Why is it important? CDT timing can actually be varied. If you had a mediation that was around 30 June, by entering into the agreement, pre-30 June versus post-30 June actually means the CDT event can fall into a different financial year. How can you use that to the advantage of your client? Say, for example, you know that under the settlement deed that your client will make a capital gain, that capital gain is then recognised in their income tax. I would ask your client whether or not their income tax was going to be more in this current financial year or more than the following financial year. You will pick the one that was lower. Or you might even know that your client's retiring next year. It would be significantly more beneficial to incur a CDT event in the following financial year.

When else should you be thinking about CDT in mediations? It is really listening to your client, finding out what is their motivation? What is their current situation? Or, if they are running a business, ask them about what how their business is going. Maybe they made a huge capital loss this year, or will they incur one next year. That piece of information, listening to them, can be helpful in reducing their tax liability.

MJ: It is very active listening, to the point of actually seeking out, proactively asking them to start talking.

FC: Yeah. You possibly should have done this in the preparation stage to know.

Something to think about at the mediation is what kind of CDT exemptions might apply. There are, of course, exempt assets such as your principal place of residence, but also personal things like cars and furnitures, but also businesses depreciating assets. They are also exempt. You can have rollover relief. You can also have concessions. One of the most amazing things that I saw was whether or not a family trust should be selling their share in their business. It looks like if they sold it under the settlement deed they would be incurring significant capital gains, but we knew that a trust can get a 50% discount for holding the shares in the business in the company for more than 12 months, so they only had to pay half the capital gains. They halved it again, because it was a small business, they got an extra 50% for active assets. Then, they are almost at retirement so they decided to roll over a $500,000 of that into their superannuation fund. They ended up not having to pay a lot of CDT. Because they knew that,

they were happy to enter into the settlement deed. They did not have this uncertainty of thinking "Now I'll have to pay a lot of tax on that" and the like.

The final thing I just want to touch on is for the succession practitioners. What are the CDT implications at a mediation? There is a general discount for CDT if properties, CDT assets, are transferred under will, that is under division 128, so that is exempt. What is really important from a succession point of view is that if a beneficiary attains a CDT asset, when is the cost base of the asset? Essentially, it is being rolled over from one person to another and it will depend on when the deceased person purchased the asset, but it could be at the date of when they passed away, or it could be when they first purchased the asset. There are also CDT implications from an executor, which is interesting. If an estate simply transfers the shares, some shares in BHP or something, to a beneficiary, that is not seen as the CDT event. However, if an estate sells the BHP shares to pay for some of the liabilities of the state, they will in fact incur the CDT event then. These kinds of CGT issues could arise either at a mediation or just in the general administration of the state.

MJ: Very interesting.

STRATEGIES FOR DEALING WITH HUMAN EMOTIONS AT MEDIATION

MJ: I was just thinking while Florence was speaking, tax is inhumane, both in its effect and in its technical details sometimes. Thinking about the element of humanity, I was thinking about the human element that we have all spoken about, I think tonight. Particularly picking up from Rachael's comments early on, you have a lot of human elements. You may have a mediator who may be active or passive, too active or too passive, a client who may be very emotionally attached to an issue, or maybe surprised by bad news breaking for the first time on the day. I have always been interested in managing those difficulties of the psychology and the human side. I am wondering what are the practical things that we can actually plan on doing when you are caught in that trap of managing lots of different human elements, like a mediator who is not quite the person for the job, or a client who is not quite ready to settle on the day, but you want to do your best to get there. Practically, what are we doing?

RF: I really liked how you were talking Tim about the interests of the party. So much in law is about the positions of the parties. It is "Let's take this position, have this argument". When you focus on positions, i.e. basically what a person wants, you do not necessarily ask the question "Why do you want it?" Value on the table is not just about the money, people value things differently. If you can find the emotional element that has value, and that can be put on the table as something, then that is where you start to be able to get to creative option generation. You speaking about that Tim in the context of land disputes was really eye opening for me because you might think about those sortS of disputes as being just about the money but they are so much more complex than that. Parenting disputes, for example, are

not about the money at all. There are so many reasons why you have to ask that question, "Why?" in a in a parenting matter.

I think for all matters if we as lawyers, if we just allow ourselves to sit comfortably with the position, so we know what our client wants but listen and explore that with them more, ask why, get to really understand what the needs and interests that underlie the position are, then you can deal with the position better, you can also manage expectations and perhaps offer alternative solutions that the client may not have thought of.

MJ: I think part of the training I got was on the job training and mediations. We are always told to try to get rid of the emotion because it gets in the way, it makes things too hard. Really what you want, I think the better view is, is that the emotion has to be dealt with, indeed harnessed and used as a pathway to get to a resolution.

RF: If you have got parties that are going off with each other in a family dispute resolution process for example, you will use your ground rules to reign them in. You might use a private session, take them outside. Normally in family dispute resolution we are wanting to have the parties face to face because the benefits of that direct communication outweigh…they are just so much more than if you are relaying a message backwards and forwards. Also, there is danger in shuttle, we sometimes think of shuttle as being the safer option where there is a history of DV, but perpetrators can use the mediator in the passing of messages that the mediator would not even know that they are dangerous or provocative or menacing. We have got to be careful about thinking about what is safe.

MJ: Very interesting.

Practically, when the bad news breaks on the day, and you are still trying to get a deal, what do you do to help people get there emotionally?

TS: I think you can lean on the mediator, when you can, to get to a position. That is less about you trying to change a client's mind and more of the mediator trying to assist them.

If you have more than one client, so to speak, whether it is a husband and wife, or a family, or some sort of trusted advisor that is there as well, as I have had in cultural heritage negotiations, you might lean on the person who seems more reasonable or less entrenched in a view and try and work things out through them. They can do part of your job in terms of persuading the client as well. You have to do a job as well but there are strategies that you can adopt to try and make that work.

Part of that is also expectations. I think the other thing is do not be afraid to try and just get something out of them. I don't mean that in terms of just settling for not very much money. In a land dispute or Planning & Environment Court dispute you might get a mediation agreement about one issue when there are ten issues, or three issues out of ten, which offers a way to come back to mediation. Or what information can be provided between parties to try and help resolve those things? Often, that is about information, not money, and you can facilitate that.

DEALING WITH PARTIES AFTER A LONG DAY IN MEDIATION

MJ: There is a party agency issue there, I think, sometimes as well. Ethically, you want to try to stop the legal spend, you want to try to get an outcome. But if a party feels like they are not in control of the process and they are being persuaded upon too much, you can actually have an adverse effect. Practically, there is often quite a science that relies on experience to know what is the level of discussion and persuasion, when is the point to call it and try to come back on another day? What are those matters where you just do need it to end, so that little bit more pressure is applied? Those are all really difficult questions. They probably only come with a combination of experience, but then a real understanding of the ethics.

RF: It does come back to listening and understanding your client asking the right questions, being prepared, managing expectation.

FC: That is a really interesting point. You were talking about, you get to the end of the day, should you be settling or should you be walking away. There is, I find, that sometimes we have a bit of a tension because we are listening to what our client is saying. They are saying, "I want out of this litigation but they look fatigued. Are they just agreeing to the settlement deed because that is what they want to get out of it? Or should we be calling the mediation and just saying we all need to cool, we can settle tomorrow, we can settle in a week. What do you think about that tension? I guess it will take experience. I have found that it has been a bit difficult sometimes when you are at five o'clock, do you push the client to get the deal done? Or is it in your client's best interest to cool their jets?

RF: Cooling off periods are controversial. They could just mean that the matter drags on and on if you don't get it sorted out. On the other hand, as a part of party self-determination, I would argue that there has to be informed consent and when a party is tired and really lost all energy that they could be making decisions that aren't properly informed or that are rushed.

MJ: I think it is a real danger for practitioners. I say to people, if I get the sense that someone appears to be pushed or bullied, I say "no dice". You come back another day. Self-interestedly, the last thing I want is to be defendant in collateral litigation. I do not want there to be collateral litigation at all about whether the agreement should be set aside. Often, those

are very difficult decisions to make given the pressures that are applied. That tends to reinforce again, I think, the need of active listening, to really understand what is going on in the thoughts of the parties because I think the mediator really has to keep an eye on what is going on and to be alert to those things. Difficult judgment call to call off a mediation, to avoid a collateral complaint, when you might create a complaint and call it off. It's really not easy.

HOW TO PURSUADE RELUCTANT PARTIES TO ENTER MEDIATION

MJ: We have a question from the chat box, which is probably the opposite, when we were talking about when people really want to mediate and want a resolution, when do you stop them? "How do you sell the idea of a mediation to a client who thinks that mediation is a waste of time?" What is the pitch about, how do you get a recalcitrant party to try to engage in this process?

FC: 100%, I would say I, as a percentage, a very high number of mediations that I have attended, at least in a commercial context, settle, even higher in succession. Things like succession easily 90% of matters, 95% settle at mediation. I guess a client might be a bit afraid of the unknown. Maybe they do not understand the process and they cannot see the benefit of it. I think, as you mentioned Tim, explaining to your client why this mediator would be good, because they are an ex-Land Court judge or they are an ex-Supreme Court or High Court judge or a preeminent Silk in succession, that they will be able to facilitate the negotiation between the parties. They know the law, the other side will not be able to cover their eyes about anything. I think you can sell it like that, that there is in fact often a high chance of success.

Secondly, you involve a mediator who is very skilled in the area.

Thirdly, it could mean the end of legal fees, it could end that day. I think that can be very attractive to clients.

MJ: The hard commercial advantage pitch?

RF: Also, I think the statute helps us because in family matters, in so many other matters, you are required to show genuine effort before you can even file in a court. You can use that to sell because why would the civil justice system emphasise the process coming before litigation, so heavily now, if there was not benefit in that? Again, it comes to cost and time and emotional energy, all of those things you can use to persuade your client to go to mediation.

FC: I think earlier you [Matthew Jones] mentioned, you can settle for something that a court would not give you.

RF: Yeah, your remedies. It is like Carrie Menkel-Meadow talks about, how the remedies available, the 'remedial imagination' is her term, which I really love, that you can have a remedial imagination, because there is so much that is out there that you could package things up. The things that have value on the table can be put together in different ways to actually make what the parties want.

MJ: You do not have to destroy things on the way through, you might be able to salvage everything.

TS: Picking up what you [Rachael Field] said about the statute book, you have to do it. I don't know about every jurisdiction but I would be very surprised if you can get away with going to trial without some form of dispute resolution. Certainly, the ones ideal that I deal with, you have to.

RF: The thing is, if you get to court with that then the judge will probably send you back to mediation.

TS: Yes. And if you have got to go, you have got to spend some money doing it.

The other side of this is speaking to the client, the claim might be whatever but there is very little chance of you getting that in court. You could get that, you could get zero. You might as well hear what somebody has got to say. Also, sometimes people tell you some things in mediation that are strategically useful for you in the litigation, can be the other side, the client, the solicitors or an expert. It is worth listening in because you find out how they run their case somewhat, sometimes, or what they think their weaknesses are that you might not have thought about.

MJ: It might not be free information but it might be relatively affordable information in a timely way. I think even with the most anti-settling person there is a pitch and I probably even suggest ethically I think we really ought to be trying to settle. I think in 99% of mediations both parties are genuinely trying to settle.

RF: The ACR and the Bar rules require us to talk to clients about alternatives to litigation. It is an ethical obligation on all legal practitioners.

I think, if I could just say, law schools need to do a better job. I am loving the conversation that we are having and you are demonstrating such a deep level of understanding of the benefits of the mediation process but I don't hear that is widely appreciated in the profession yet. There is still a very adversarial approach taken by many. In family law that can be devastatingly

problematic. I think we need to do a better job at law school ensuring that any graduate that comes out with a law degree has a proper understanding.

MJ: The winds of change are definitely strong.

FC: I think ADR when I went through law school was an elective.

RF: It still is. There are some law schools that have it as a compulsory subject but because the Priestley 11 continue to dominate the curriculum it is very hard to have space in the curriculum for that.

TS: One thing that sort of fell out of that which I really wanted to say is, you should set expectations of your client about how you want to prepare or present in mediation, because some people expect you to be a table basher. I tell people I am not a table basher. I will get a little bit fired up about things but I will not be a terrible person, I am not going to come in here and do that, because I hate him. I don't think it works, it is not my style.

RF: I think if the other side is the table basher, you call it, let them do it. You name it. If you are not happy with that and if you do not want to engage with that then you have to relook at how things are going to work.

MJ: I am mindful of the time. I think that was thundering along. We have hit on a new way to do CPDs, a structured and sort of discussion. I found it really interesting and we have covered some ground. I know nothing about family apart from what I have heard tonight.

RF: It wasn't really about family.

MJ: I would like to thank all three panelists for joining. I would like to thank the Association for organizing. I would like to thank Level Twenty Seven people who are standing behind the camera for doing some very important admin for this, and all of our participants for joining in, both the live participants and those who will watch on video in the future.

I hope this has been helpful. I think it was. I think we would all look forward to doing something similar again in the future. If you have any feedback or further comments or suggestions for round two, I think that is something that we would be very open minded to.