

Arb, Med, Arb – Easy As One, Two, Three?

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Arbitrators can wear many hats. Sometimes they can even pop on a mediator's hat. But what happens when they swap hats back and forth? Does the fedora mean they've started arbitrating again and that we are all okay with that or do they just have bad fashion sense? If only there was a way to be sure...

Enter the [decision of the Supreme Court of NSW earlier this month](#). The story starts off simply. A council and a construction company get into a dispute over payment and head to arbitration. Fast forward to lunch time on the last day of a twelve day hearing when the arbitrator suddenly says 'How about I pop on my mediator hat then we all break away and talk settlement'.

Classic Arb, Med. Domestic arbitration legislation allows an arbitrator to switch to mediator if that is what the parties want. In fact, a recent global review by the International Mediation Institute found that parties want more "mixed mode dispute resolution" rather than just adversarial processes.

However, the legislation requires parties to provide written consent to the arbitrator at the point of each...hat change. You can guess where this went so dreadfully wrong. Got written consent Arb to Med, failed to do so Med to Arb. After making the Mediator of the Year Award-worthy suggestion that the parties just 'walk away', the mediation promptly ended and the arbitration resumed. Upon resuming, neither party raised any issue with the arbitrator continuing to act.

But the penny must have dropped at some point so cue Court proceedings. While the Court waxed lyrical about 'what is mediation, even?', the primary issue was whether consent is required in writing. Pretty big deal, as this is the first time a Court has had to consider this issue.

We think that the Court interpreted the legislation correctly, finding that without signed consent, the arbitrator's mandate was terminated following his brief foray as a mediator.

So now the parties will need a new arbitrator (probably for the best), incur further costs and probably be left wondering why immunity from suit was ever granted by legislation to arbitrators.

The key takeaway is that the case was an example of exactly what not to do. If parties and arbitrators want to make Arb, Med, Arb as easy as one, two three, it's as simple as... following the law to the T.

Questions? Give us a call



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