

# Facilitation

- John Tyrill\*

An interesting development from the author's mediation practice over the last few years has been the increasing public and private sector demand for assistance in the facilitation of:

- contract negotiations;
- contract re-negotiation for changed circumstances;
- joint venture negotiations;
- corporate plan workshops;
- corporate policies workshops;
- strategic objectives workshops;
- Partnering workshops and meetings;
- a contentious annual general meeting.

Like mediation, facilitation involves the use of an independent neutral, who has no vested interest in the issues under consideration or their outcome. Facilitation requires a combination of both management and mediation like dispute resolution skills to assist the participants by - focusing and managing the session; identifying and elucidating issues; assisting exploration of differing opinions, disputes, alternatives and potential solutions; and building consensus decisions.

This increasing trend to meeting and decision facilitation is perhaps most notable on the part of government departments and professional and industry associations. Perhaps, the cynical might suggest the "new age" consciousness includes an incapacity for decision making and that facilitation is required where responsibility for decision making has been abdicated. But such a jaundiced view ignores the difficulty of multi-participant or multi-party processes and decision making. The marked success of mediation in dispute resolution might be matched in time by wide-spread and successful use of facilitation for decision making.

Facilitation can be particularly helpful where there are - a considerable number of people involved; where the participants are from different constituent organisations; where the participants are from different disciplines; where the participants have different interests or objectives; and where the personalities or politics are difficult.

Generally (though subject to the level of contention

and the personalities involved), small scale facilitations can be easier than large scale processes. And facilitations are easier when the parties generally have a mutuality of interests and objectives.

The author's large scale facilitations have included:

- (a) a corporate plan workshop involving about 60 people (some of whom were in career distress) from some 30 constituent organisations (not all of which were to continue to exist);
- (b) a number of corporate policy and strategic decision making workshops involving (in each case) about 30 people from some 12 to 15 organisations. (In one instance, two of the organisations were in significant long-standing dispute, with some bitterness between the key personnel.); and
- (c) partnering workshops including one which, perhaps unusually, involved over 50 people.

The very dynamics of meetings involving many people and differing agendas demands planning, facilitation and, at times, the skills of the mediator to resolve differences and disputes and to develop and build consensus.

## Contract Negotiations

In the commercial arena, the use of facilitators can be helpful in contract negotiations, e.g. where the parties are positional on issues and are bogging down, or their lawyers are being overly positional, tactical, defensive or adversarial in their negotiations etc.

Albeit at times indistinguishable from mediation, there is also a role for facilitators to assist in the re-negotiation of contracts and in the restructuring of projects, which have become problematic or where the contract no longer matches the significantly changed circumstances.

## Joint Ventures

Decision making amongst joint venture "partners" is often cumbersome and difficult at the best of times. Joint venturers do not always have a complete mutuality of interest. Nor do they always bring to the table equal

skills, resources or bargaining power. Decisions positively affecting the role, position and interests of one participant might have a negative effect upon other participants. Disputes amongst joint venturers are not uncommon.

These usual joint venture problems are often compounded by cultural and communication difficulties where the participants are different nationals. The differences of language, culture, expectations and needs often extend to differences in management and decision making styles.

Whilst outsiders are not often drawn into the confidential dealings of joint venturers, it does occur in mediation of disputes between joint venturers and parties with whom they contract and in the case of mediation of disputes between joint venturers. In cases of difficulty in internal joint venture negotiations or decision making, there is also sometimes a place for facilitators (like mediators, bound by confidentiality undertakings) to assist the joint venturers explore the issues, potential problems and solutions, and reach decisions.

**Partnering**

Facilitation is most important for Partnering of construction, manufacturing, maintenance, and other commercial projects. The partnering facilitator’s role includes assisting in the management of the partnering workshop process and in assisting the parties:

- (a) to develop trust and cooperation;
- (b) in the identification of:
  - (i) project objectives, issues and risks;
  - (ii) strategies for risk avoidance, risk management and enhanced project efficiency;
  - (iii) methods of problem solving;
- (c) to agree upon methods and lines of communication;
- (d) to agree upon methods of quickly elevating issues up the management chain for decision;
- (e) to agree upon methods of quickly elevating disputes up the management chain for speedy cost-effective dispute resolution.

Whilst many partnering facilitators focus on relationship building and communication, the skills of a construction lawyer / facilitator experienced in disputes can assist in risk identification. Often at the beginning of projects, there is a tendency on the part of polite and optimistic project participants to gloss over the hard issues rather than taking the difficult (and almost offensive) path of identifying and discussing them. Yet, those experienced in disputes will more readily identify the vulnerable aspects of a project where the risks are high and the potentials for dispute or even catastrophe are significant. By the facilitator encouraging the parties to identify and discuss these high risk aspects of their project, contractual and management strategies can sometimes be agreed to avoid or reduce these risks, or to minimise and manage them if they occur.

Without going to detail, several of the author’s

partnering facilitations have included identification of the following (as examples, but with amended descriptions) high risk issues:

- (i) one project involving several component engineering parts was critically sensitive to the performance of a waste chemical treatment plant. If the treatment plant were defective in operation (due to design, equipment, manufacturing, installation or commissioning), the purpose and function of the entire project would be at risk as the entire plant would not be permitted to operate until the effluent plant was completely and satisfactorily operational. In the partnering workshop, it was agreed that a further workshop would be held of the key design and environmental consultants with management participation by both parties to thoroughly review the design (including about the fundamental design strategies which were key to the efficacy of the treatment plant). It was also agreed that external consultants would attend for briefing purposes and that they would audit the design of the treatment plant;
- (ii) timely completion and effective performance of a project was dependant upon the timely delivery and performance of a large, complex and expensive machine being manufactured and assembled in Europe. Considerable monies had been spent on progress payments for this equipment. It was decided that prudent risk management required that key executives from both parties should travel to the country of manufacture to review manufacturing progress against the programme (and progress claims), performance and contract compliance of this equipment;
- (iii) on a design and manufacture contract for hundreds of large and expensive mechanical components, a variation had been directed to compress time by paralleling in service trialling of a sample batch of the mechanical equipment with manufacture of the stock required for the contract. The partnering workshop identified the significant potential delays, which could result from any defect in design or manufacture thereby evading early detection, due to the potential need for re-design, the cessation of production for a period and rectification of the existing manufactured stock. With the facilitator’s assistance, the parties also identified the significant potential dispute which might result from this worst-case scenario with respect to responsibility, liability and entitlements to remedy and relief. Such a dispute might have involved tens (and,

possibly, even hundreds) of millions of dollars. The parties agreed to conduct further workshop sessions solely on this issue and its potential consequences, with the objective of a thorough reconsideration of the desirability of the variation and, if it proceeded, to pre-agree how the problems (if they arose) would be managed, how responsibility and liability would be attributed and what remedy and relief would be applicable.

There is also benefit to be derived from re-partnering facilitation, where the partnering agenda on a mid-term project has come adrift. In some instances, the original partnering facilitator might be appropriate to revisit the parties and their distressed project. Whereas, in other instances, a new partnering facilitator might be more appropriate to examine where the parties have done well in their partnered project and where they have done badly, to elucidate strategies to overcome problems (which might include changing some of the project personnel and communication methods) and to gain anew a real commitment from all the project participants to partnering the project.

### Public Issues - Development and Environmental Disputes

Although it has not often been so used to date in Australia (the author is aware of one multi-participant environmental and planning dispute in Victoria which was assisted by a mediator / facilitator), facilitation has been extensively used in the United States for development and environmental issues, difficulties and disputes, where there are numerous parties or interest groups and inherent difficulties in the conduct of any meeting process, in the identification of issues, in decision making and in dispute resolution. According to the American Arbitration Association (in a pamphlet about its services):

*“Often times planning or project commencement results in public uproar in spite of and often because of the nature of a public hearing process. Facilitated meetings on public policy and planning matters can be extremely beneficial as people perceive they are included in a fair proceeding conducted by neutrals. Facilitated meetings can defuse anger and frustration, allow everyone to air legitimate concerns while allowing progress to be made. Facilitated meetings allow a wide ranging, free and open discussion to take place in a manner a public hearing cannot. Public understanding can be increased, and fears allayed. Facilitated meetings have an ability to bring widely disparate opinions together and build consensus understandings. Formats can range from small workshops to larger gatherings. By using facilitated meetings as a conflict prevention device, environmental litigation can be avoided and support, rather than protest can be generated.*

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*Facilitated public meetings have been found to be invaluable in the environmental area when public accusations of environmental degradation as a result of project construction has occurred, or in the industrial area where there have been public outcries over such matters as chemical or waste discharges. Such a public meeting allows concerned community members to air their grievances, while allowing a company or agency a forum to communicate concerns, mitigations, and future preventative plans.”*

### Multi-party disputes

Although not often so used in the author’s experience, there might be potential in multi-party disputes for facilitation of strategies for arbitration, litigation or mediation, where there are say multiple defendants with some similarities of interest and some contending interests, which might render common and cooperative strategies difficult for those co-defendants.

### The Facilitator’s Toolkit

The good facilitator is (theoretically) invisible and simply creates an environment where the parties sort it all out themselves. However, this approach requires the parties to set the agenda and to struggle through it at their own pace. Often the parties cannot, or will not, allow sufficient time for this potentially slow and frustrating process to occur. Consequently, many facilitations require a pro-active facilitator who pushes the agenda and encourages the parties to (or confronts them with) the key issues (usually gleaned from extensive consultation, examination of background documents and other homework and, sometimes, also from the facilitator’s own experience and expertise), but who takes a backseat when the parties are grappling with their own issues and making their own decisions.

Whilst it is possible to conduct facilitation on an ad hoc basis without preparation, successful facilitations often require considerable research, preparation and pre-negotiation, particularly where there are numerous participants and complex or difficult issues at stake.

Simple tools used in facilitation are overhead transparencies or computer projection to raise topics and issues and an electronic whiteboard to record the issues and ideas discussed and the decisions reached. Printouts from the whiteboard can be readily copied for participants to take away as a record of the event and to assist those (sometimes the facilitator) who have responsibility for development of the outcomes document (e.g. a corporate plan).

It can be useful for facilitations involving large numbers to break the group up into sub-groups to consider particular issues and to feed their comments, views and suggestions back into the main group for consideration and decision.

### Further Development

Illustrative of the development of facilitation in the United States, the American Arbitration Association promotes and provides "*experienced neutral facilitators to keep negotiations on track, or to facilitate successful public meetings and workshops*".

Presently, facilitation in Australia is somewhat ad hoc and is yet to reach the stage of development in the United States.

### Conclusion

Facilitation will find increasing use in governmental and corporate decision making and negotiations, due to the benefits which it can bring to process management and decision making. It also has a role in multi-party matters, such as some local or environmental disputes and complex commercial disputes where there are numerous co-defendants. Facilitation of partnering of construction and other commercial contracts can greatly assist in co-operative decision making and dispute avoidance and resolution. There is also facilitation potential in disputes boards of review or by the engagement of a project dispute resolution adviser.

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