

MEDIATION GUIDELINE AS

A METHOD OF MEDIATION DISPUTE RESOLUTION

What is Mediation

1. Mediation is a confidential and informal process in the presence of an independent third party, which is designed to allow parties who are in dispute to, by negotiation and discussion, resolve their differences.
2. The task of the mediator is:
 - 2.1 to assist each party to understand the other party's view of the issues;
 - 2.2 once the parameters of the dispute are established, to assist the parties to resolve the dispute by an unemotional objective assessment of the whole of the dispute.
3. The mediator usually speaks confidentially to each party alone, in order to understand the issues that each party has.
4. The focus of the mediation process is using the mediator to assist the parties in negotiating a resolution of their differences.
5. The discussion, either directly between the parties or between the parties and the mediator, are wholly without prejudice and cannot be used in any subsequent Court or other proceedings. The mediator acts as a facilitator, although from time to time may, in confidential discussions with a party in the absence of any other party, express a view as to the strength or weakness of the position of one party or other.

Commencement of a Mediation

6. A mediation may be commenced in a number of ways:
 - 6.1 voluntarily by the parties agreeing to attempt to mediate their dispute;
 - 6.2 by a contractual or statutory obligation imposed on the party;
 - 6.3 by an order of a Court, which pursuant to the Court's powers, may refer the whole or part of the dispute to mediation.
7. If and when the parties commence negotiations in a mediation, the process is entirely voluntary until the mediation is brought to an end either:
 - 7.1 by a party declining or refusing to participate further;
 - 7.2 when it becomes obvious to the mediator that no further negotiation will achieve a resolution.

Selection of a Mediator

8. Usually the parties will agree on a mediator.
9. Alternatively, the contractual or statutory provision or Court order may require that, in the event that the parties are unable to agree upon a mediator, they may, voluntarily or as a result of their obligations, have the nomination or appointment of the mediator carried out by a mediation organisation.

The Steps in a Mediation

The Mediation Agreement

10. Because it is a consensual agreement, the parties and the mediator agree upon and sign a mediation agreement, which contains provisions including:
 - 10.1 an acknowledgement by all parties that the mediation process is confidential; and
 - 10.2 the costs of the mediation.
11. At Annexure 1 is a precedent for a Mediation Agreement.
12. If a mediation is required by Court or other order, or is contained in a statute, special provisions may apply to the mediation. For example, a particular procedure may be prescribed by the Court or statute.
13. Usually a preliminary conference occurs. This can be either face-to-face or by teleconference.
14. Procedural matters are discussed and agreed upon, including:
 - 14.1 the content of the bundle of documents to be delivered to the mediator;
 - 14.2 the exchange by the parties of position papers or appraisals of the dispute before the mediation commences.
15. Other matters that are dealt with at the preliminary conference include the people who are to attend the mediation, for example:
 - 15.1 support people;
 - 15.2 occasionally an expert appointed by both parties to answer any questions about their field, such as an accountant to advise on accounting aspects.

Venue

16. A mediation can occur at any place that suits the parties. But there are some basic requirements:
 - 16.1 a meeting room large enough for all participants in the mediation to sit at a table;
 - 16.2 separate “breakout” rooms for each party, large enough to accommodate the members of the party.

The Mediation usually commences with the Mediator and Parties meeting at a joint session

17. The mediators usually explain the mediation process and emphasise to the parties:
 - 17.1 the need to remain objective; and
 - 17.2 the need to be prepared to compromise.
18. Each party then outlines its position on the issues that are the subject of the dispute.
19. The mediator commences to assist the parties to identify the issues that are really in dispute, and to discuss/explore ways of resolving the issues serving the interests and needs of the respective parties.
20. Throughout the process, from time to time, the mediator will meet each party in its own breakout room privately and in complete confidence so that a party need not be concerned that anything said in a private session will be conveyed to another party, unless the mediator is expressly authorised to do so.

21. The parties may meet, with or without the presence of a mediator, in order to further the resolution process. Similarly, if there are advisors for the parties, they may also meet, with or without the mediator.
22. The opening session may be dispensed with if having the parties in the same room will be counterproductive. The mediation may still be resolved without a joint session. The parties remain in their “breakout” rooms with the mediator moving between each room in an attempt to facilitate resolution.
23. There is no hard and fast method in the process. A flexible approach can be used, which is either agreed to by the parties or identified by the mediator as being the best way to resolve the dispute, having regard to the interests of the people involved.
24. Mediators generally fall into two categories:
 - 24.1 facilitative;
 - 24.2 determinative.
25. The mediator has no power to make a determination that is binding upon the parties.
26. The mediator can assist the parties to resolve the dispute by facilitating dialogue between them in a structured way and from time to time making suggestions of a particular way to resolve a dispute.
27. Alternatively and in addition to the facilitative role that the mediator has, the mediator may, from time to time, but only with the express consent of the parties, express a view about the merit of the position of each party in the determination of the mediation. Consent is essential because mediation is a voluntary process, subject to the statutory and court obligations referred to above.
28. A mediation can be terminated by:
 - 28.1 a binding settlement; or
 - 28.2 a party withdrawing from the process.
29. If the parties reach agreement, unless there are special circumstances, they will sign a document that records the settlement and is legally enforceable.
30. Oral agreements to resolve disputes should be avoided as they tend to give rise to further disputes.
31. If the parties have an ongoing relationship and the dispute between them has been resolved, then the parties may be content to not enter a written settlement agreement.
32. A mediation may be suspended, to enable the parties to:
 - 32.1 consider their positions; or
 - 32.2 obtain expert advice, for example, from an accountant or engineer.
33. The parties must agree to later resume the mediation, to enable the discussion to continue after the further steps are taken.

The Mediator

34. A mediator should have the qualification to be a mediator by having undertaken a recognised mediation course.
35. They should be a good communicator and have experience in negotiations to facilitate their part in the negotiation.
36. Expert knowledge of the subject matter of the dispute is not essential for a mediator, but the underlying expertise needs to be:

- 36.1 analytical skills; and
- 36.2 interpersonal skills.
- 37. The mediator needs to understand and respond appropriately to each respective party, whether the mediator agrees with the party or not, in order to build their trust and confidence.
- 38. The trust and confidence of each party to the mediation process is needed to enable the mediator to facilitate the mediation process, the ultimate end of which is to achieve a resolution of the dispute.

The Steps

- 39. The mediation will usually involve three stages:
 - 39.1 Identification of the issues in dispute through each party communicating with the other, which enables each party to understand the whole of the dispute, and, in particular, the contentions of the other party;
 - 39.2 identification of the respective strengths and weaknesses of the position of the other party;
 - 39.3 identification of and discussion about ways to resolve the whole or part of the dispute.
- 40. The mediator facilitates these communication and understanding processes.
- 41. The aim is to move each of the parties to an unemotional or objective consideration of the dispute.

Negotiation Techniques

- 42. The two essential types of negotiations are:
 - 42.1 position based; and
 - 42.2 interest based.

Position Based Negotiation

- 43. In position based negotiations, the parties focus on the actual issue being negotiated.
- 44. Each party chooses a position and defends it. As a result, each party becomes self-serving and attempts to beat the other party.
- 45. Their positions are predetermined and the process creates conflict and often escalates the dispute.
- 46. Particularly if there is an ongoing relationship, such as a building contract for the supply of goods and services, the escalation of a dispute can lead to a climate of ongoing conflict and resentment.

Interest Based Negotiation

- 47. Merit based negotiation or interest based negotiation is a method of negotiation by which acceptable solutions are achieved through identifying which needs of a party are inflexible and which are flexible for the negotiators.

48. It is “non-adversarial bargaining” and is based on five underlying propositions:¹
- 48.1 separate the people from the problem;
 - 48.2 focus on interests not positions;
 - 48.3 invent options for mutual gain;
 - 48.4 insist on using objective criteria; and
 - 48.5 know the best alternative to negotiating agreement.
49. Interest based negotiation attempts to identify and meet the needs of the parties.

Participant to the Mediation

50. In a mediation, each party to the dispute should participate in person.
51. Corporations or public institutions should be represented by a person with full authority to negotiate and settle the dispute.
52. Where it is not possible to provide the person who attends the mediation with full authority to negotiate and settle the dispute, for instance in situations where a board of directors needs to ratify the settlement or a senior public official, such as a minister or departmental head needs to approve the settlement, then the person who attends must have authority to make a conditional agreement that can reasonably be expected to be ratified by the decision maker.

Professional or other advisors

53. Whether a party needs a professional or other advisor at a mediation is really a matter for the party.
54. A party may be accompanied in a mediation by anyone whom the party seeks for support or assistance in advocacy.
55. The smaller the dispute, the less likely the party is to need professional or other advice.
56. The mediator assists both parties in reaching a settlement, and, if a party is not legally or otherwise represented, can terminate the mediation if the party feels uncomfortable with the process or needs independent advice.
57. Complex disputes usually require the parties to have professional advisors, such as lawyers; accountants; engineers or other experts. The presence of the expert, as noted above, often assists to resolve the disputes.
58. Professional advisors can act as an advocate about particular issues or in the whole of the dispute.

Legally Binding Resolutions of Mediations

59. If a settlement is achieved at mediation, it should be resolved by a written settlement agreement.
60. A properly drawn settlement agreement, once executed, is legally enforceable, like any other contract.

Mediation Outcomes

61. Most mediations result in a resolution.

¹ Roger Fisher and William Ury (1992). Getting to Yes: Negotiating Agreement Without Giving In; additional authorship Bruce Patton

62. Even if an overall resolution is not achieved in the mediation, some measure of agreement is often reached, which:
 - 62.1 may result in the matter resolving at a later time; or
 - 62.2 substantially minimises the hearing time of the dispute in a Court.
63. A favourite expression is that both parties should leave the mediation “mildly satisfied”, on the basis that each has made compromises, which produced the resolution of the dispute.
64. If the mediation does not succeed, then:
 - 64.1 nothing in the mediation can be used outside of the mediation process;
 - 64.2 there is agreement on some aspect of the mediation; and/or
 - 64.3 the parties agree that it may be used in future negotiations of the dispute.

Benefits of Mediation

65. Mediation has a number of benefits:
 - 65.1 a mediation can be arranged quickly;
 - 65.2 the cost compared to litigation is low;
 - 65.3 the mediation focuses on the parties’ interests;
 - 65.4 the parties have an opportunity to participate informally in resolving their own dispute;
 - 65.5 the parties have control over the process and the outcome;
 - 65.6 it provides the parties with an opportunity to create an outcome that a court or tribunal may not necessarily be able to achieve;
 - 65.7 it produces certainty for the party;
 - 65.8 the outcome is likely to be respected by both parties because they have chosen it;
 - 65.9 the settlement reduces the potential for further conflict and ongoing hostility that almost always is produced by an imposed “decision about the dispute” by litigation.
66. Where the parties have an ongoing relationship, minimising the potential for conflict and hostility is important. A discussion held in a mediation can improve the communication between the party and provide the parties with a better understanding of each other.

Inequality of Bargaining Power

67. In many disputes, one party is much stronger than the other.
68. Mediation has the advantage of using the mediator, who is usually experienced and unintimidated by the stronger party, to address the stronger party, rather than the weaker party addressing it.
69. Mediation levels the playing field by:
 - 69.1 creating a neutral environment and providing each party with a forum to speak and to be heard by the other party;
 - 69.2 creating an informal environment that is non-threatening;
 - 69.3 having an impartial; non-confrontational; independent mediator facilitating the process;
 - 69.4 enabling any party to at any time withdraw from the process, such that if the party feels threatened; oppressed or intimidated, it can simply walk away. The

opportunity for a party to withdraw from contact with the more powerful party, and to use the mediator as a conduit to convey points of view; interests or merits, as described above under the heading of Negotiation Technique, is an important part of the mediation process that levels the playing field.

69.5 The availability of a “break out” room to avoid intimidation and abuse of power.

The Types of Disputes that may be Mediated

70. Mediation deal with a wide range of disputes, including those involving commercial and business (both domestic and international); family law property, contact and parenting; local government and planning; insurance; professional negligence; construction; personal injury; succession, including family provisions; will construction and testamentary capacity.
71. Mediation caters equally for two party and greater than two party disputes.

The Time for Reference to Mediation

The time when a dispute should be referred to mediation varies according to the circumstances and needs to be considered against a number of aspects:

- 71.1 whether the parties are in an ongoing relationship, be it commercial or otherwise;
 - 71.2 the effect the dispute has, or is having, on the parties, whether they are commercial or otherwise;
 - 71.3 whether Court; tribunal or arbitration proceedings have been commenced, and the stage that those proceedings have reached, for example whether all of the evidence of the parties is presented, to enable an assessment of the strengths and weaknesses of their cases;
 - 71.4 the motivation of the parties, that is, a dispute having occurred, whether the parties seek to have it immediately resolved;
 - 71.5 whether a party or the parties seek to avoid the payment of significant costs.
72. The commencement of litigation does not preclude a matter being successfully mediated.

Mediation Costs

73. A successful mediation substantially reduces the costs and cost exposure of the parties than if they embark on litigation.
74. The costs of a mediation are:
 - 74.1 the costs of a mediator, which is usually shared equally between the parties;
 - 74.2 the costs of the venue;
 - 74.3 the costs of having advisors at the mediation.
75. Most mediators are prepared to provide an indication of his or her costs to enable the parties to make a decision as to the amount they are prepared to outlay in order to have the mediation.

Conclusion

76. A mediation attempts to explore the middle ground between the best positions of the respective parties to the dispute.
77. Litigation, be it in Court; before a tribunal or at an arbitration usually produces one outcome, that is one party is successful and the other party(s) are unsuccessful, usually with the consequences that the unsuccessful party(s) bear the costs of the successful party.
78. Mediation can be used to resolve an almost infinite range of disputes of various complexities and involving multiple parties.

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Annexure 1

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MEDIATION AGREEMENT

Date:

Parties:

and

("the Parties")

Mediator: GREG LAUGHTON SC

("the Mediator")

Recitals:

- A. A dispute, as briefly set out in Schedule 1, has arisen between the Parties ("**the Dispute**").
- B. The Parties have requested the Mediator, and the Mediator has agreed, on the terms and conditions of this agreement to assist the Parties in their attempts to resolve the Dispute.

AGREEMENT:

The Mediation

1. “**The Mediation**” shall comprise all steps taken to attempt to resolve the Dispute by mediation whether prior or subsequent to the execution of this agreement.

Appointment and functions of the Mediator

2. The Parties appoint the Mediator, and the Mediator accepts the appointment, to mediate the Dispute in accordance with the terms of this agreement.
3. The Mediator will assist the Parties to identify the issues between them and to explore options for and, if possible to achieve, the expeditious resolution of the Dispute by agreement between them.
4. The Mediator will not advise a Party, nor make decisions for nor impose a solution on the Parties.
5. The Mediator will not, unless the Parties agree in writing to the contrary, obtain from any independent person advice or an opinion as to any aspect of the Dispute. Any such advice or opinion shall be obtained only from such person or persons as may be agreed by the Parties.
6. The Mediator confirms that the Mediator has no interest in the Dispute, nor has the Mediator had any prior dealings with any of the Parties in relation to the Dispute.
7. If in the course of the Mediation the Mediator becomes aware of any circumstances that might reasonably be considered to affect the Mediator’s capacity to act impartially, the Mediator will, to the extent that the Mediator may properly do so, immediately inform the Parties of those circumstances. The Parties will then confer and the Mediator will continue to participate in the Mediation if the Parties so agree.
8. If, after consultation with the Parties, the Mediator forms the view that the Mediator will be unable to assist the Parties to achieve resolution of any of the Dispute the Mediator may terminate the appointment as Mediator by giving written notice to the Parties of that termination.

Co-operation, Costs and Mediator’s Fees

9. The Parties agree to participate in the Mediation.
10. Each Party will comply with reasonable requests made by the Mediator to promote the efficient and expeditious resolution of the Dispute.
11. Each party will meet its own costs of and in connection with the Mediation.
12. Irrespective of the outcome of the Mediation, the Parties will pay the Mediator’s fees and disbursements as specified in Schedule 2, in the proportions there stated.

Authority & Representation

13. Each party must be represented at the Mediation conference by a person or persons having or able during the course of the mediation to obtain authority to settle the Dispute.
14. Any persons other than the Parties (including legally qualified persons) attending the Mediation to assist and advise a Party in the Mediation shall sign an acknowledgement and undertaking as to confidentiality as specified in Schedule 3.

Conduct of the Mediation

15. The Mediation, including all preliminary steps, shall be conducted in such manner as the Mediator considers appropriate having due regard to the view of each Party as to the manner in which the Mediation should be conducted, and the mediator may give directions as to:
 - (i) the holding of preliminary conferences;
 - (ii) the exchange of written outlines of the views of the Parties on the issues raised by the Dispute;
 - (iii) the exchange of experts' reports, the meeting of experts and the preparation of a joint experts' report;
 - (iv) service on the Mediator of any such reports and outlines.

Communication between the Mediator and a Party

16. The Mediator may communicate with a Party or the Parties orally or in writing.
17. The Mediator may, as frequently as the Mediator deems appropriate, meet with the Parties together or separately.
18. Information, whether oral or written, disclosed in confidence by a Party to the Mediator need not be disclosed by that Party, and may not be disclosed by the Mediator to any other Party unless the Party by whom that information was disclosed consents to such disclosure.

Confidentiality

19. The Parties and the Mediator will not, unless required by law to do so, disclose to any person not present at the Mediation, nor use any confidential information furnished during the Mediation unless such disclosure is to obtain professional advice or is to a person within that Party's legitimate field of intimacy, and the person to whom the disclosure is made is advised that the confidential information is confidential.
20. The Mediator agrees:
 - (i) to keep confidential all information furnished by a Party to the Mediator on a confidential basis;
 - (ii) save with the consent of the Party who furnished such information not to disclose the information to any other Party.

Privilege

21. Subject to Clause 24, in any arbitral or judicial proceedings the following will at all times be kept confidential and will be privileged, and the Parties and the Mediator will not disclose nor rely upon them nor issue nor cause to be issued any subpoena to give evidence or to produce documents concerning them:
- (i) any settlement proposal;
 - (ii) the willingness of a Party to consider any such proposal;
 - (iii) any statement, admission or concession made by a Party;
 - (iv) any statement or document made by the Mediator.

Termination

22. A Party may at any time terminate the Mediation by giving written notice terminating the Mediation to the other Party and to the Mediator.
23. In the absence of notice by a Party terminating the Mediation, the Mediation will be terminated only upon execution of a written settlement agreement in respect of the Dispute. Such settlement agreement shall be drawn up and executed at the earliest possible time after the terms of settlement have been agreed on.

Enforcement

24. Any Party will be at liberty:
- (i) to enforce the terms of a settlement agreement;
 - (ii) in any enforcement proceedings, to adduce evidence of and incidental to the settlement agreement including evidence from the Mediator and any other person engaged in the Mediation.
25. The Mediator will not accept appointment as an arbitrator nor act as an advocate in, nor provide advice to a Party to, any arbitral or judicial proceeding relating to the Dispute or any of them.
26. The Parties will not do anything to cause the Mediator to breach Clause 25.

Exclusion of Liability and Indemnity

27. The Mediator will not be liable to a Party for any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement unless the act or omission is fraudulent.
28. Each party indemnifies the Mediator against all claims by that Party or anyone claiming under or through that Party, arising out of or in any way referable to any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement, unless the act or omission is fraudulent.

29. No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded as a bar to any such action.

Legislative Provisions

30. The terms of this agreement are subject to the provisions of any legislation that may be applicable to or govern the mediation, and in the event of any inconsistency the provisions of the legislation will prevail.

Schedule 2

Mediator's Fees and Expenses

1 For all preparation including the preliminary conference \$ per hour

2 For the mediation \$ per day

3 Allocation of costs

Party 1 50%

Party 2 50%

Schedule 3

ACKNOWLEDGEMENT and UNDERTAKING

and

(“The Parties”)

and

GREG LAUGHTON SC

(“The Mediator”)

have entered into a Mediation Agreement dated _____ 20__ in accordance with which the Mediator will conduct a mediation.

1. The undersigned acknowledge by their signatures that they attend the mediation on the basis of their agreement to the terms of clause 2 and 3 below.
2. Each of the undersigned undertakes to the Parties and the Mediator:
 - (a) to keep confidential to themselves and any persons to whom by reason of the terms of their employment or any contract of insurance they may properly communicate it, all information disclosed during the Mediation including the preliminary steps (“**confidential information**”);
 - (b) not to act contrary to the undertaking in sub-paragraph (a) unless compelled by law to do so or with the consent of the Party who disclosed the confidential information;
 - (c) not to use confidential information for a purpose other than the Mediation.
3. Each of the undersigned undertakes to the Parties and the Mediator that the following will be privileged and will not be disclosed in or relied upon or be the subject of any subpoena to give evidence or to produce documents in any arbitral or judicial proceedings between the Parties to the Mediation:
 - (i) any settlement proposal;
 - (ii) the willingness of a Party to consider any such proposal;
 - (iii) any admission or concession made by a Party;
 - (iv) any statement or document made by the Mediator.

SIGNED by)

in the presence of:)

)

.....)

Signature of witness)

)

.....)

Name of witness (block letters))

)

.....)

Address of witness)

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.....)

Occupation of witness)

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Signature of

SIGNED by)

in the presence of:)

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.....)

Signature of witness)

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Name of witness (block letters))

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Address of witness)

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.....)

Occupation of witness)

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Signature of