

Statutory provisions in NSW re Mediation:

Part 20 UCPR
Practice Note SC Gen 6 – Mediation
Civil Procedure Act 2005 – Part 4

CIVIL PROCEDURE ACT 2005

PART 4 – MEDIATION OF PROCEEDINGS

- [25.](#) Definitions
- [26.](#) Referral by [court](#)
- [27.](#) Duty of parties to participate
- [28.](#) [Costs](#) of mediation
- [29.](#) Agreements and arrangements arising from mediation sessions
- [30.](#) Privilege
- [31.](#) Confidentiality
- [32.](#) Directions by mediator
- [33.](#) Protection from liability for mediator
- [34.](#) Mediation otherwise than under this Part

25 Definitions

(cf Act No 52 1970, sections 110I and 110J; Act No 9 1973, sections 163 and 164; Act No 11 1970, sections 21J and 21K)
In this Part:

"mediation" means a structured negotiation process in which the [mediator](#), as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

"mediation session" means a meeting arranged for the [mediation](#) of a matter.

"mediator" means a person to whom the [court](#) has referred a matter for [mediation](#).

26 Referral by [court](#)

(cf Act No 52 1970, section 110K; Act No 9 1973, section 164A; Act No 11 1970, section 21L)

(1) If it considers the circumstances appropriate, the [court](#) may, by order, refer any [proceedings](#) before it, or part of any such [proceedings](#), for [mediation](#) by a [mediator](#), and may do so either with or without the consent of the parties to the [proceedings](#) concerned.

(2) The [mediation](#) is to be undertaken by a [mediator](#) agreed to by the parties or appointed by the [court](#), who may (but need not be) a [listed mediator](#).

(2A) Without limiting subsections (1) and (2), the [court](#) may refer [proceedings](#) or part of [proceedings](#) for [mediation](#) under the [Community Justice Centres Act 1983](#).

(3) In this section,

"listed mediator" means a [mediator](#) appointed in accordance with a practice note with respect to the nomination and appointment of persons to be [mediators](#) for the purposes of this Part.

27 Duty of parties to participate

(cf Act No 52 1970, section 110L; Act No 9 1973, section 164B; Act No 11 1970, section 21M)
It is the duty of each party to [proceedings](#) that have been referred for [mediation](#) to participate, in good faith, in the [mediation](#).

28 [Costs](#) of [mediation](#)

(cf Act No 52 1970, section 110M; Act No 9 1973, section 164C; Act No 11 1970, section 21N)
The [costs](#) of [mediation](#), including the [costs](#) payable to the [mediator](#), are payable:

- (a) if the [court](#) makes an order as to the payment of those [costs](#), by one or more of the parties in such manner as the order may specify, or
- (b) in any other case, by the parties in such proportions as they may agree among themselves.

29 Agreements and arrangements arising from [mediation sessions](#)

(cf Act No 52 1970, section 110N; Act No 9 1973, section 164D; Act No 11 1970, section 21O)

- (1) The [court](#) may make orders to give effect to any agreement or arrangement arising out of a [mediation session](#).
- (2) On any application for an order under this section, any party may call evidence, including evidence from the [mediator](#) and any other person engaged in the [mediation](#), as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.
- (3) This Part does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a [mediation session](#), in relation to the matters the subject of a [mediation session](#).

30 Privilege

(cf Act No 52 1970, section 110P; Act No 9 1973, section 164F; Act No 11 1970, section 21Q)

- (1) In this section, "**mediation session**" includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of a session.
- (2) The same privilege with respect to defamation as exists with respect to judicial [proceedings](#) and a document produced in judicial [proceedings](#) exists with respect to:
 - (a) a [mediation session](#), or
 - (b) a document or other material sent to or produced to a [mediator](#), or sent to or produced at the [court](#) or the registry of the [court](#), for the purpose of enabling a [mediation session](#) to be arranged.
- (3) The privilege conferred by subsection (2) extends only to a publication made:
 - (a) at a [mediation session](#), or
 - (b) in a document or other material sent to or produced to a [mediator](#), or sent to or produced at the [court](#) or the registry of the [court](#), for the purpose of enabling a [mediation session](#) to be arranged, or
 - (c) in circumstances referred to in section 31.
- (4) Subject to section 29 (2):
 - (a) evidence of anything said or of any admission made in a [mediation session](#) is not admissible in any [proceedings](#) before any [court](#) or other body, and
 - (b) a document prepared for the purposes of, or in the course of, or as a result of, a [mediation session](#), or any copy of such a document, is not admissible in evidence in any [proceedings](#) before any [court](#) or other body.
- (5) Subsection (4) does not apply with respect to any evidence or document:
 - (a) if the persons in attendance at, or identified during, the [mediation session](#) and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document, or
 - (b) in [proceedings](#) commenced with respect to any act or omission in connection with which a disclosure has been made as referred to in section 31 (c).

31 Confidentiality

(cf Act No 52 1970, section 110Q; Act No 9 1973, section 164G; Act No 11 1970, section 21R)
A [mediator](#) may disclose information obtained in connection with the administration or execution of this Part only in one or more of the following circumstances:

- (a) with the consent of the person from whom the information was obtained,
- (b) in connection with the administration or execution of this Part, including section 29 (2),
- (c) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any [property](#),
- (d) if the disclosure is reasonably required for the purpose of referring any party or parties to a [mediation session](#) to any person, agency, organisation or other body and the disclosure is made with the consent of the parties to the [mediation session](#) for the purpose of aiding in the resolution of a dispute between those parties or assisting the parties in any other manner,
- (e) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

32 Directions by [mediator](#)

(cf SCR Part 72C, rule 3)

Subject to the [uniform rules](#) and any relevant practice notes, a [mediator](#) may, by order, give directions as to the preparation for, and conduct of, the [mediation](#).

33 Protection from liability for [mediator](#)

A [mediator](#) to whom the [court](#) refers [proceedings](#) has, in the [exercise](#) of his or her [functions](#) as a [mediator](#) in relation to those [proceedings](#), the same protection and immunity as a [judicial officer](#) of the [court](#) has in the [exercise](#) of his or her [functions](#) as a [judicial officer](#).

34 [Mediation](#) otherwise than under this Part

(cf Act No 52 1970, section 110H (2); Act No 9 1973, section 162 (2))

This Part does not prevent:

- (a) the parties to [proceedings](#) from agreeing to and arranging for [mediation](#) of any matter otherwise than as referred to in this Part, or
- (b) a matter arising in [proceedings](#) from being dealt with under the provisions of the [Community Justice Centres Act 1983](#) without having been referred under section 26.

Part 20 UCPR

PART 20 – RESOLUTION OF PROCEEDINGS WITHOUT HEARING

Division 1 – Mediation

- [20.1.](#) Application of Division
- [20.2.](#) Directions
- [20.3.](#) Statements as to proposed referral to mediation
- [20.4.](#) Appointments by mediator
- [20.5.](#) Completion of mediation
- [20.6.](#) Mediation session procedure
- [20.7.](#) Notifications after mediation

20.1 Application of Division

This Division applies to matters referred to mediation under Part 4 of the [Civil Procedure Act 2005](#).

20.2 Directions

(cf SCR Part 72C, rule 1)

The court may give directions regulating the practice and procedure to be followed in a mediation, including the preparation and service of [documents](#).

20.3 Statements as to proposed referral to mediation

(cf SCR Part 72C, rule 2; Act No 9 1973, section 164A; Act No 11 1970, section 21L)

On any occasion that proceedings are before the court for directions, the court may require each active party to state any of the following:

- (a) whether the party consents to referral of a matter arising in the proceedings for mediation,
- (b) whether the parties agree as to who is to be the mediator,
- (c) whether the parties agree as to the proportions in which the costs of mediation are to be borne, and the terms of any such agreement.

20.4 Appointments by mediator

(cf SCR Part 72C, rule 3)

- (1) Within 7 days after being notified that a matter has been referred for mediation, the mediator to whom the matter is referred must appoint a time for the mediation and notify the parties, in writing, of the time appointed.
- (2) The mediator may also appoint a time for a preliminary meeting of the parties.

20.5 Completion of mediation

(cf SCR Part 72C, rule 4)

The parties and the mediator must conduct the mediation with the object, so far as practicable, of completing the mediation within 28 days.

20.6 Mediation session procedure

(cf SCR Part 72C, rule 6)

- (1) The following provisions apply to the conduct of a mediation session unless the mediator, or the court, otherwise directs:
 - (a) the session must be attended:
 - (i) subject to subparagraph (ii), by each party or, if a party is a corporation, by an officer of the corporation having authority to settle the proceedings, or
 - (ii) if the conduct of the proceedings by a party is controlled by an insurer, by an officer of the insurer having authority to settle the proceedings,

- (b) a party may be accompanied by that party's [barrister](#) or [solicitor](#) at the session.
- (2) A person who is required by subrule (1) (a) to attend a mediation session may do so by telephone, video link or other form of communication, but only with the leave of the court or the mediator.

20.7 Notifications after mediation

Within 7 days after the conclusion of the last mediation session, the mediator must advise the court of the following:

- (a) the time and date the first mediation session commenced, and
(b) the time and date the last mediation session concluded.

PRACTICE NOTE SC Gen 6

Supreme Court - Mediation

Commencement

1. This Practice Note was issued on 10 March 2010 and commenced on 15 March 2010.

Application

2. This Practice Note applies to proceedings in the Court of Appeal, the Common Law Division (civil cases only) and the Equity Division. This Practice Note does not apply to proceedings in the Court of Criminal Appeal or criminal proceedings in the Common Law Division.

Definitions

3. In this Practice Note:

CPA means the *Civil Procedure Act 2005*

UCPR means the *Uniform Civil Procedure Rules 2005*

Introduction

4. The purpose of this Practice Note is to explain the Court's mediation procedures and its expectations of parties in proceedings that have been referred to mediation.

Referrals generally

5. Part 4 of the CPA permits the Court at any stage of the proceedings, by order, to refer parties to mediation where, in the opinion of the Court, mediation appears appropriate. The Court's power does not depend on the consent of the parties, or of any of the parties.

6. It is not the intention of the Court that mediation will be ordered in all proceedings.

7. The parties themselves may, at any time, agree to mediation, nominate a mediator and request the Court to make the appropriate orders.

8. The Court may consider ordering mediation on the motion of a party, or on referral by a registrar, or on the Court's own motion. Where mediation is ordered, the parties will usually agree on the person to be the mediator. If they do not:

- the Court may select the mediator to be appointed or may appoint the mediator pursuant to the Joint Protocol set out in this Practice Note;
- the Court may refer the proceedings to a registrar or other officer of the Court certified by the Chief Justice as a mediator to meet with the parties to discuss mediation and report back to the Court with a recommendation as to whether the proceedings are suitable for mediation; or
- the Court may decide against ordering mediation.

9. The Joint Protocol describes the expected course but its terms are not mandatory.

10. The Court requires the parties to inform the Court of the outcomes of mediations ordered by the Court. Also, the mediator must, within 7 days after the conclusion of the mediation, advise the Court of the time and date the mediation session commenced and was concluded (r20.7 UCPR). Where a mediator is appointed under the Joint Protocol, the Court also requires the parties to provide the Joint Protocol Evaluation Information referred to in the Joint Protocol, which should be sent in writing to the Principal Registrar.

Referral to a registrar or other officer

11. Where the Court refers proceedings to a registrar or other officer, that person will notify the parties of the time and place for an information session. It is anticipated that the information session will take no more than 15 to 30 minutes. Parties as well as their representatives must attend the session.

12. At the conclusion of the information session, if the parties agree to mediation, the officer will make the necessary orders. If the mediator is to be a registrar, directions may be given for the filing and serving of position statements and any documents, reports, valuations etc that will assist the parties and the mediator. A direction will generally require all parties to the mediation to exchange relevant material not less than seven days before the mediation.

13. Where the parties do not agree to mediation or to a mediator, the officer will report to the Court the outcome of the information session with his or her recommendation.

Proceedings case-managed by registrars

14. A registrar may, at his or her discretion, refer proceedings that in the opinion of the registrar are suitable for mediation, to the Court notwithstanding that the parties, or any one of them, do not consent to mediation.

Mediators

15. A person may be appointed by the Court as a mediator if the person:

- consents to being appointed; and
- agrees to comply with the provisions of Part 4 of the CPA and the provisions of this Practice Note.

16. The Chief Justice may certify registrars or other officers of the Court as qualified mediators.

17. Section 33 of the CPA describes the exoneration from liability that exists for mediators appointed under the provisions of this Practice Note.

Form of order for referral to mediation

18. Where proceedings are referred to mediation under section 26 of the CPA, the Court's order should provide one of the following:

- if the parties agree on a mediator or if the Court appoints a specific mediator (for example, where specific expertise is considered desirable), an order should be made that the proceedings be referred to that mediator; or
- if the Court appoints a registrar or other officer as the mediator, the order should be that the proceedings be referred to that person for mediation; or
- otherwise, the order should be that if the parties cannot agree on a mediator within a specified time (say 14 days) after the referral under section 26 of the CPA, the Joint Protocol described in this Practice Note then will apply and the mediator will be the person appointed under the Joint Protocol.

Joint Protocol: obligation of the plaintiff(s)

19. Where the Court's order requires a mediator to be appointed pursuant to the Joint Protocol, the plaintiff sends to the Principal Registrar a copy of the pleadings, or a copy of the summons if there are no pleadings, and informs the Principal Registrar of the **Joint Protocol Referral Information**. The plaintiff gives the Principal Registrar this information by letter within seven days of the Court's order and at the same time gives each other party a copy.

20. The Joint Protocol Referral Information is:

- the Court's order referring the proceedings to mediation;
- the nature of the proceedings; and
- the identity of the parties.

Joint Protocol: role of the Principal Registrar

21. The Principal Registrar keeps a list of proceedings in which the plaintiff(s) has informed him or her of the Joint Protocol Referral Information.

22. The Principal Registrar sends the Joint Protocol Referral Information and accompanying documents to one of the nominating entities listed at paragraph 24, with a request for nomination of a person as the mediator in the proceedings. The Principal Registrar sends the information on the day of receiving it or the following day.

Nominating entities in the Joint Protocol

23. The Court's Alternative Dispute Resolution Steering Committee keeps a list of professional associations that accredit mediators and provide mediation services suitable for Supreme Court proceedings.

24. The initial nominating entities are:

- the NSW Bar Association;
- the Law Society of New South Wales;
- the Institute of Arbitrators and Mediators Australia;
- the Australian Commercial Disputes Centre;
- LEADR; and
- the Australian Branch of the Chartered Institute of Arbitrators.

The nominating entities' fees for mediation

25. The Court may request that the President or Chief Executive Officer of any of the nominating entities consider providing mediation on a reduced or no fee basis.

Role of the nominating entity

26. Each of the nominating entities establishes a panel of suitable persons to whom Court ordered mediations may be referred. Each nominating entity regularly reviews its panels.

27. Within seven days of receiving the Joint Protocol Referral Information the President, the Chief Executive Officer or a delegate nominates in writing a person who:

- is a suitably qualified and experienced person, and
- consents to the nomination as the mediator in the proceedings.

The representative of the nominating entity then provides the telephone number, facsimile number and email address of the mediator to the Principal Registrar.

28. The person nominated is a person named on the panel of a nominating entity, but not necessarily on the panel of the nominating entity to which the Principal Registrar sent the Joint Protocol Referral Information.

29. Where the Court has requested mediation on a reduced or no fee basis the nominating entity endeavours to nominate a mediator who will provide mediation services on this basis.

30. A co-mediator can also be nominated if the President, Chief Executive Officer or delegate considers that this is warranted.

Effective date of appointment of mediator

31. On receipt of a nomination under paragraph 27 (and under paragraph 29, if applicable), the Principal Registrar promptly, by letter, facsimile or email, informs the parties to the proceedings of the name, telephone number, facsimile number and email address of the mediator (and any co-mediator).

32. When the Principal Registrar has dispatched the notifications referred to in paragraph 31, the person nominated by the President or the Chief Executive Officer of the nominating entity as the mediator (and any co-mediator so nominated) is deemed to have been appointed the mediator (and the co-mediator, if applicable) in the proceedings under section 26 of the CPA.

Request for review of appointment of mediator

33. A party to the proceedings may request the judicial officer who made the order referring the proceedings to mediation to review the appointment of the mediator (and the co-mediator, if applicable). Such a request should:

- be in writing;
- be received by the Principal Registrar within 10 days of dispatch of notifications under paragraph 31;
- state with specificity the objections that the party has to the mediator that has been appointed; and
- be served by the party making the request on the other parties to the proceedings.

Evaluation of referral of proceedings to mediation and entry of any consent orders

34. Within 14 days after the conclusion of the mediation, the plaintiff in writing informs the Principal Registrar of the following ("**Joint Protocol Evaluation Information**"):

- the name and file number of the proceedings;
- the name of the mediator;
- the date(s) of the mediation;
- the number of hours occupied by the mediation;
- whether the parties were represented at the mediation by solicitors;
- whether the parties were represented at the mediation by counsel;
- whether the parties agreed to settle, or partly settle, the proceedings or whether no resolution of any issues was achieved;
- to the extent that any terms of settlement are not confidential to the parties, the terms of settlement; and
- if the parties agreed to the Court making orders, a signed consent order in a form suitable for entry by the Registry.

35. On receipt of the Joint Protocol Evaluation Information, the Principal Registrar will forward a copy of that information to the relevant nominating entity.

J J Spigelman AC
Chief Justice of New South Wales
10 March 2010