



Karen Stott – ADR & Mediation Services

Solicitor and Nationally Accredited Mediator (NMAS)

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2022

MEDIATION PROTOCOL

The Parties have requested the Mediator, and the Mediator has agreed, on the terms and conditions of this Protocol, to assist the Parties in their attempts to resolve this Dispute.

The terms of this Protocol are in accordance with various standard terms suggested by the Law Society of NSW and the Resolution Institute (NMAS).

The Mediation

1. Mediation essentially comprises a meeting between the parties to a dispute, (including their legal representatives and those with a legitimate interest in the dispute), and convened by the Mediator.
2. The Mediation provides a platform for the parties to communicate and negotiate the issues with a view to resolving the dispute on agreed terms, so that the matter does not have to go to Court trial. Alternatively, the issues in dispute may be narrowed by agreement at Mediation so that any Court trial time is minimised.
3. The Mediator is a neutral and independent party who assists the parties both jointly and separately through all stages of the process.
4. "The Mediation" shall comprise all steps taken to attempt to resolve the Dispute by Mediation whether prior or subsequent to being in receipt of this Protocol.

Appointment and functions of the Mediator

5. The Parties and their instructing solicitors appoint the Mediator, and the Mediator accepts the appointment, to mediate the Dispute in accordance with the terms of this Protocol.
 6. The Mediator will assist the Parties and participants 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.
 7. If the Mediator is of the view that it may assist the parties in their discussions then, as well as facilitating negotiations between the parties and if requested by either or each of the parties, the Mediator may also evaluate the merits of the dispute and provide suggestions as to its resolution. In doing so, however, the Mediator will not:
 - (i) impose a resolution on any party; or
 - (ii) be unduly coercive of parties in attaining a resolution; or
 - (iii) make any decision on behalf of any party.
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8. Should the Mediator express any opinions, statements and recommendations, these are not binding on the parties and do not constitute advice.
9. The Mediator must, prior to the commencement of the Mediation, disclose to each of the parties to the best of the Mediator's knowledge any prior dealings with the parties, as well as any actual or potential interest in the Dispute or its resolution.
10. 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 decide whether the Mediation will continue with that Mediator or with a new Mediator appointed by the parties.
11. 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.
12. The Mediator will not accept anything of value from any party or support person before, during or after the mediation, other than the Mediator's fees.
13. The Mediator will not accept an appointment to act for any party in relation to proceedings concerning this dispute.

Co-operation, Costs and Mediator's Fees

14. The Parties and all participants agree to participate in the Mediation with a view to negotiating in good faith towards achieving a settlement of this Dispute.
15. Each Party and their representatives will comply with reasonable requests made by the Mediator to promote the efficient and expeditious resolution of the Dispute.
16. Each Party will meet its own costs of and in connection with the Mediation, unless agreed otherwise.
17. Irrespective of the outcome of the Mediation, the Parties will pay the Mediator's fees and disbursements as specified in Schedule 1, in the proportions there stated.
18. In the event of default in payment by a Party within the time frame for payment of the Mediator's tax invoice, the defaulting Party's solicitor (law firm) on the record at the time of booking and/or participating in the mediation, undertakes to pay the fee outstanding.
19. The Parties agree that if the Mediation does not result in an agreement to resolve the dispute, the costs of the Mediation will be "costs in the cause". That is, costs of the Mediation (including those of the legal practitioners, experts and any other professionals to attend the mediation as applicable in the circumstances) will be treated as part of the overall costs in subsequent court proceedings, which are generally payable by the losing party.

Authority & Representation

20. Each party must be represented at the Mediation by a person or persons having or able during the course of the mediation to obtain authority to settle the Dispute

Court-Ordered Mediation

21. If the parties come to the Mediation pursuant to an Order of the Court, whether or not by consent, the following legislative provisions also apply:
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- Civil Procedure Act NSW 2005 – Part 4;
- Part 20, Uniform Civil Procedure Rules NSW;
- Practice Note SC Gen 6 – Mediation (in relation to Supreme Court matters);
- Practice Note 1, Part 11 – regarding Alternative Dispute Resolution (re District Court matters).

22. These provisions include but are not limited to, the following obligations:

- (i) The Mediator may, by order, give directions as to the preparation for and conduct of the mediation;
 - (ii) The parties to attend and participate in good faith;
 - (iii) In respect of each party, the Mediation must be attended by a person/s having authority to settle the proceedings. Attendance by telephone, video link or other form of communication may be permitted with leave of the Court or the Mediator;
 - (iv) All communications in respect of the mediation (eg admissions or concessions) are privileged and therefore not admissible in evidence in any proceedings before any court or other body; and
 - (v) The Mediator will inform the Court within 7 days of the Mediation to advise the date/s and times on which the mediation started and concluded.
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Conduct of the Mediation

23. 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), for example in relation 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, and other key evidence;
 - (iv) provision to the Mediator of any such outlines, reports and key evidence.

Communication between the Mediator and a Party

24. The Mediator may communicate with a Party or the Parties orally or in writing.
25. The Mediator may as frequently as the Mediator deems appropriate meet with the Parties together or separately.
26. 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

27. Any persons in addition to 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, or "Confidentiality Agreement", as specified in Schedule 2.
28. The Parties, all persons participating in and/or attending the Mediation 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.
29. 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.
30. The Parties understand that some documents given by them to the Mediator for the Mediation may always have been discoverable by a party in Court proceedings, and the mere fact that they have been introduced into the Mediation process does not make them confidential.
31. No party to the mediation shall use any recording devices during the Mediation whether audio or visual and a breach of this agreement shall render the contents of any recording of no effect for any purpose and inadmissible as evidence of any part of the Mediation.
32. The Parties agree that they shall not at any time before, during or after the Mediation, call the Mediator or anyone associated with the Mediator as a witness, nor subpoena them, nor to demand the Mediator disclose any of the documents and/or information produced in the Mediation, nor to demand the production of any records, notes or the like of the Mediator in any legal proceedings concerning the dispute between the Parties.
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Documentation

33. The Mediator will return or destroy all documentation other than the Mediation and Confidentiality Agreement and any settlement agreement.

Privilege

34. Every aspect of every communication within the Mediation, including those referred to within (i) to (iv) below, shall be without prejudice.
35. Subject to Clause 40, in any court 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

36. If during the course of the Mediation the Mediator determines that it is not appropriate to continue with the process for any good reason, the Mediator may terminate the Mediation, without specifying such reason. The Mediator will advise each of the parties in person and later confirm such termination in writing.
37. Either of the Parties may terminate the Mediation at any time but each Party hereby agrees that, before doing so, they will discuss their intention to terminate with the Mediator in a private individual session.
38. In the absence of such notice by a Party or the Mediator 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

39. If the settlement agreement arising out of the Mediation is expressed or agreed to be binding on all the parties, any party may enforce the terms of the settlement agreement by judicial proceedings.
40. For the purposes of enforcing an agreement of the Mediation (as referred to above), any party may call evidence of the settlement agreement including evidence from the Mediator and any party to the Mediation.

Exclusion of Liability and Indemnity

41. The Mediator will not be liable to a Party for any views, opinions or recommendations expressed by the Mediator, nor 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.
 42. The Parties together and separately indemnify 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.
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43. 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

44. The terms of this Protocol 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.



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SCHEDULE 1

Mediator's Fees & Expenses from January 2022

	Item	Cost
1	1 day Mediation – 2 parties 1 day Mediation – 2 or more defendants* *Applicable where the additional defendants have separate legal representation where no sharing agreement has been reached prior to briefing the mediator	\$4,200.00 + GST \$4,500.00 + GST
2	Any applicable expenses – eg: venue hire, courier, Accommodation and travel expenses (economy class) for any travel over 50km from Sydney CBD	At cost

Particulars:

1. The Mediation fee is charged at a flat rate and is inclusive of all preliminary conferences (in person or by telephone), reading, preparation and travel time in respect of any travel that does not require self-driving.
2. Note re cancellation: the parties will be liable for their respective shares of the mediator's costs if cancellation occurs less than 10 business days before the mediation date.
3. The costs are to be shared equally between the parties (that is, each party with separate legal representation) and billed on a pro-rata basis, unless agreed otherwise.
4. Half day rates are to be discussed and agreed in advance, and will be based on the type of matter, preparation issues and the requested commencement time. As a guide, half day rates may comprise an hourly rate of \$500 + GST applied to all preparation and mediation time, with the total charge not to exceed the daily flat rate.





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SCHEDULE 2

CONFIDENTIALITY AGREEMENT on the MEDIATION: _____ (date)

1. The undersigned acknowledge by their signatures that they attend the mediation on the basis of their **agreement to confidentiality**, in accordance with the terms of clauses below.
2. Each of the undersigned undertakes to the Parties and the Mediator:
 - (i) 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**”);
 - (ii) not to act contrary to this undertaking unless compelled by law to do so or with the consent of the Party who disclosed the confidential information;
 - (iii) 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.
4. 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.

Signed by the Parties and attendees of the Mediation on _____ (date):
