MEDIATION

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1. MEDIATION OVERVIEW

Mediation is a consensual process in which an independent and impartial person, the mediator, works with disputing parties to help them explore and, if appropriate, reach a mutually acceptable resolution of some or all of the issues in dispute. The mediator has no decision-making authority regarding the outcome - the mediator therefore has no power to impose a settlement, and should not seek to do so.
Mediation differs significantly from arbitration and litigation. In mediation, neither the parties nor the mediator are limited by what is legally "right" or rules of evidence, and the parties are free to accept or reject terms of settlement suggested during the mediation. By contrast, arbitrators and courts are obliged to decide the particular dispute referred to them according to law, and cannot find a solution elsewhere - they are bound to apply the relevant substantive law and rules of evidence and procedure, and the parties are legally bound by an arbitrator's award or a judgment of the court.

Mediation is especially appropriate where:
Relationships between the parties are important and continuing
. Bad communication and resultant misunderstandings are involved
. Confidentiality is important
. The parties need the opportunity to talk openly and frankly
. Technical or legal uncertainties are involved and warrant discussion
. The parties wish to determine their own outcome
. The parties wish to minimise legal costs and save time

Mediation is a well-accepted technique for resolving disputes. It is commonly used in commercial, employment, housing, construction, environmental, public policy, community, family and other disputes.
The term mediation can take a variety of forms. The term "conciliation" is also used, but for practical purposes that term may be regarded as having the same meaning as "mediation". Other processes similar to mediation include expert appraisal where a third party is asked for an opinion on the merits of a case. This opinion may be by an expert, barrister, engineer, accountant etc. Each may require the parties to recognise the particular outcome in certain ways especially if they are

based by statute.
Investigators are also known as independent experts who report their findings to a party or parties who then rely upon the findings of the investigator to make decisions. A typical example would be an investigation into an employment irregularity, e.g. staff theft or sexual harassment.

Whilst Mediation may involve consideration of the parties' legal obligations, the emphasis, however, is on minimising the need for formal legal procedures, by involving the parties and their advisers as joint problem-solvers to develop acceptable outcomes and enhance their long-term relationships.
In the unlikely event of a dispute still requiring arbitration or litigation, the time and effort put into mediation will still be useful. The parties and their advisers will be better prepared and better able to assist the arbitrator or judge in defining the issues and achieving an efficient and final decision on the outstanding issues (subject to confidentiality). The parties may be able to agree in mediation as to the procedures to be followed such as a choice of arbitrator, issues and process. Thus, time and cost should be saved.

2. THE MEDIATION PROCESS

The mediation process is governed by agreement between the parties themselves or by the mediator, taking account of the general circumstances of the dispute, the relationship between the parties, the parties' wishes and the need for a speedy and economical settlement. There may be two or more parties.
A variety of procedures are available and any one of them or a combination of several may be adopted. These include:
a preliminary meeting to discuss whether mediation would be helpful in the circumstances and, if so, to agree procedures
. written submissions on the key issues and facts, exchanged prior to the mediation meeting
. oral presentations in the presence of both parties at the mediation meeting
. separate meetings between the mediator and each party (i.e. private caucus)
. The mediator may call all the parties together to facilitate agreement where there are many stakeholders
. the mediator acting as a conduit for the exchange of views and/or proposals
The aim of these procedures is to help the parties reach an agreement which is acceptable to them.

3. THE AGREEMENT TO MEDIATE

An original contract between the parties may state that the parties agree to refer any dispute or difference which may arise out of the contract to mediation. The name of the mediator or the procedure for nominating the mediator may be set down in the contract. If there is no written contract or if the contract does not contain mention of mediation the parties are still able to agree to refer their dispute or difference to mediation.
In the event of a dispute arising between parties, the aggrieved party generally notifies the other party, briefly setting out the nature of the dispute and requesting that it be referred to mediation. If the other party agrees, a written agreement between the parties and the mediator can then refer this specific dispute to mediation. This written agreement may be used, whether or not there was a mediation clause in any original contract.
To facilitate reaching agreement on details of the mediation procedure and contractual

arrangements with a mediator, professional dispute resolution bodies such as AMINZ and LEADR have Mediation Protocols written specifically for mediation. These protocols can be modified by the parties (and the mediator) where required. Mediation Protocols can be incorporated into the agreement to mediate.
A mediator can help the parties to agree on mediation proposals and procedures, prior to appointment of a mediator for the dispute itself. As an independent party coming into a dispute situation, the mediator should be indemnified against any legal liability.

4. SELECTION OF THE MEDIATOR

Ideally a person considered for appointment as a mediator should possess the following characteristics:
Independence and impartiality - i.e. having no personal relationship with the parties, nor any interest in the subject matter or outcome of the dispute. Any circumstance likely to create bias (or even the impression of bias), should be disclosed to the parties, and the mediator should act only if all parties subsequently agree.
. Training and experience in the skills of mediation. No one should hold himself or herself out as a mediator without first having undergone recognised education and training in mediation. Good interpersonal, communication and mediation - process skills are important attributes for a mediator.
. Knowledge in the field of the subject matter of the dispute. Depending on the nature of the dispute, it may be helpful if the mediator is able to understand any technical issues involved and the range of possible outcomes that could arise from arbitrating or litigating the dispute. However, this is not always necessary. The mediator should be chosen by agreement between the parties. Where the parties are unable to agree upon a mediator they may request a professional body such as AMINZ to appoint one.
Whilst this guide/protocol assumes there will be one mediator, the use of co-mediators or a mediation team may be more appropriate for certain types of disputes (e.g. family or multi-cultural issues).

5. MEDIATION MEETINGS

Arrangements for the date, place and time of mediation meetings are for the parties and mediator to agree amongst themselves. There is no set procedure for conducting mediation meetings. Rather, it is important to adopt a flexible approach. The mediator should have wide freedom to develop and implement a process appropriate to the specific circumstances of the dispute and the wishes of the parties. The process should be informal, but still one that is understood and preferably agreed to by the parties. Face-to-face meetings of the parties are usual. They help to defuse personal antagonism and promote the communication and understanding toward achieving settlement. In certain situations there are pre-mediation meetings and sometimes a series of meetings may be needed. There may be joint sessions with the mediator and all the parties, and separate sessions between the mediator and one or more of the parties. The objective is to narrow and resolve the issues that separate the parties. The mediator facilitates the joint meetings, at which each party should be present and be ready to make binding agreements.
In the case of a corporate party, there should be a management-level representative. The management representative should have authority to agree to a settlement, although this may not always be possible if the representative has to refer back to a governing body.

6. MEDIATORS ROLE

The mediator's role is to guide the process, so that the issues are defined, relevant information is produced and options are explored without undue delay or legalistic procedures. A trained mediator may use a variety of techniques.
When disputants are hostile or overly emotional, the mediator may need to address these feelings. When the problem seems intractable, the mediator may help with its analysis and seek to break any impasse. When the parties make progress, the mediator builds on it. When the parties are stuck on matters of principle, the mediator may help to split up or re-define the issues. When the parties are fixed in positions, the mediator may help to shift their attention to their respective interests.
The mediator does not have the authority to impose a settlement on the parties, but will attempt to help them to resolve their dispute in a way which is acceptable to each of them. When a solution seems feasible to the mediator, but has not been seen by the parties, the mediator may gently point the way. A mediator may, in a caucus meeting, question the strengths and weaknesses of a party's case as a way of encouraging them to reach settlement.

7. PRIVACY

Mediation meetings are private. The parties and/or their nominated representatives attend mediation meetings with the mediator. Other persons may attend only with the consent of all parties. Consent would normally be given to advisors, such as legal, managerial, technical or resource persons.

8. CONFIDENTIALITY

Mediation is intended to be a "without prejudice" process, which means it is confidential and with limited exception may not be referred to in any subsequent arbitration or court proceedings. The parties are required to maintain that confidentiality and may not (without the consent of the other parties) rely on or introduce as evidence in any other proceedings:
. documents prepared for the mediation
. admissions made by a party in the course of the mediation proceedings
. views expressed or suggestions made by a party with respect to a possible settlement of the dispute
. proposals made or views expressed by the mediator
. the fact that a party had or had not indicated willingness to consider a proposal for settlement.
The general law may extend a duty of confidentiality on others attending the mediation. To put this beyond doubt, the parties may wish to have any managerial, technical or other resource people involved sign a memorandum of confidentiality.
Similarly, information must not be divulged by the mediator. However, the mediator should not keep confidential any knowledge of a serious crime to be committed or of a physical danger to any person (this is a general principle of law, and not something dependent on the agreement of the parties).
Because of the confidential nature of mediation, the mediator should refuse to divulge information or to testify in regard to the mediation in court or in any other forum, unless compelled to do so by law. It should be noted however, that whilst information disclosed at the mediation is itself confidential, it may still put the other party on alert as to issues that may arise in any subsequent adversarial hearing and in respect of which additional evidence might be necessary. Documents or

other evidence produced for the purpose of arbitration or litigation, which are produced at mediation will not be covered by mediation confidentiality. The confidentiality is targeted towards concessions made for the purposes of settlement.

9. AGREEMENTS REACHED AT MEDIATION

So as to avoid future misunderstandings of the agreements reached in the mediation, it is crucial for a mediation to culminate in the parties signing a written agreement which sets out the outcome. During the mediation, a draft settlement agreement can be used to clarify what needs to be resolved and to narrow the issues in dispute. The mediator, with the help of the parties, may progressively draft and edit the required terms. The parties may have the proposed settlement agreement independently reviewed by their legal advisers (who may or may not be present). If helping to draft a settlement agreement, the mediator should be seeking to record the facts, issues and outcomes identified by the parties, rather than be seen as imposing any opinion as to what the outcome should be. This is important, if the parties are to 'own" the ultimate outcome. Where the parties' lawyers attend the mediation meetings, it may be preferable for them to take responsibility for this drafting from the outset.
Another possibility is that agreement reached in mediation is simply recorded as a memorandum of understanding or as heads of agreement, and the parties sign these to indicate that they accurately record the agreements reached. Their signatures may not be intended to be legally binding, and if this is so it should be expressly stated. In order to have a formal agreement, they instruct their lawyers to draft a binding agreement incorporating the terms of the memorandum. Once signed, this will bind the parties. To the extent that it forms a new contract, a settlement agreement will be binding on the parties and subject to legal enforcement remedies in the event of any default by either party. The settlement agreement should be signed by the parties and may be witnessed.

10. TERMINATION OF MEDIATION

The mediation process may be terminated:
. when full or partial resolution of the issues has been reached
. at the suggestion of the mediator, for whatever reason, or
. if a party advises that it is withdrawing from the mediation proceedings (parties cannot be forced to continue with a mediation against their will).

11. EXPENSES AND FEES

Mediators generally charge fees on an hourly ,half day or full day basis . It is usual for the parties to equally share the costs of the mediator but parties are individually liable for the full fee of the mediator. The mediator and the parties should agree on a fee before the appointment of the mediator is confirmed and also to deposit the estimated costs of the mediation in the Mediators bank account as stakeholder. The parties generally pay their own legal expenses for the mediation.

12. GLOSSARY

The following terms are commonly used when discussing mediation or during the course of a

mediation:
Advocate: An advocate is a party's representative who assists the party during the course of the mediation.
Agreement to Mediate: This means an agreement by the parties to submit their dispute or difference to mediation, It is sometimes referred to as the submission.
AMINZ: Arbitrators' and Mediators' Institute of New Zealand Inc. AMINZ is the professional body for dispute resolution professionals and the provider of qualifications for arbitrators and mediators.
Claimant: The Claimant is usually the party who initiates the mediation process and who has a claim against the other party (the respondent).
Code of Ethics: These are a list of professional standards that arbitrators and mediators (who are members of professional groups such as AMINZ & LEADR) must meet when acting as an arbitrator or mediator. Breaches of these Codes are disciplinable by AMINZ & LEADR.
Enforcement: The process by which the defaulting party is made to abide by their agreement.
Interlocutories: These are pre-mediation procedural steps which may be taken during the course of the reference and prior to the mediation meeting.
Mediated Agreement: The agreement that is achieved between the parties as a result of the mediation.
Mediation: Mediation is a consensual method of resolving disputes and differences between two or more parties whereby the parties are assisted by a mediator to reach agreement as to the matters in dispute. Mediation may occur, by the mutual consent of the parties, as an alternative to an action at law, or by Order of the Court.
Mediator: The Mediator is the third party neutral person who assists the parties to reach settlement over the matters in dispute.
Parties: The parties are the persons who agree to refer present or future differences to mediation (or the persons who are compelled by order of the Court or by statute to refer their differences to mediation).
Reference: The reference is the referral of a dispute or difference to a mediator.
Respondent: The respondent is the party to a mediation who responds to the claims made by the claimant.
Settlement: The agreement as to the resolution of the dispute and the payment or other action that has been agreed to.
Stakeholder Account: The stakeholder account is for the purpose of holding the mediators fees in trust until the mediation is finished.
Submission: This means the agreement to mediate. The word submission is also used to refer to the presentation of a party at the mediation.
"Without Prejudice" documents which are also "Privileged “documents- see below- relate specifically to all negotiations(including Mediation) genuinely aimed towards a settlement between the parties. Genuine "Without Prejudice" documents do not necessarily need to be marked "Without Prejudice" to retain their "Privileged" status (although it is always safest to mark the letter "Without Prejudice" in any event), but documents that are not genuine "Without Prejudice" documents but are (irrespective of that) marked "Without Prejudice" do not have "Privileged" status. Other than with the agreement of both parties, "Without Prejudice" documents cannot be disclosed even in respect of the consideration of costs.
"Privileged" documents are those that a party is not obliged to disclose during the disclosure and inspection process of an arbitration or litigation action. "Privilege" normally attaches to the right of a single party, and, therefore, that party can waive that "Privilege" if it so wishes and can disclose the document in question.