

# MEDIATION



## **What is mediation?**

Mediation is a voluntary, confidential structured negotiation process designed to assist parties to resolve their dispute. The parties to a dispute agree to seek the assistance of an independent person (the mediator) to help them explore the issues and look for ways of resolving them.

## **What is the role of a mediator?**

The mediator is a neutral and impartial person. The mediator's role is to help facilitate negotiations between the parties. The mediator will not give legal advice to the parties or make decisions for them.

## **When is mediation appropriate?**

Mediation is suitable for most disputes where the parties are committed to reaching a settlement. In mediation each party to a dispute must be prepared to negotiate and work towards a mutually acceptable compromise.

## **What are the benefits of mediation?**

Mediation is:

- ***Controlled by the parties***

The parties agree to mediate. In the mediation they control the outcome. The mediator does not impose a solution on the parties. In other forms of dispute resolution an unrelated party, for example, an arbitrator or a judge, imposes a solution.

- ***An opportunity to be heard and understood***

Mediation provides an opportunity for the parties to educate each other about how they see the dispute.

- ***A preserver of relationships***

The co-operative nature of the mediation process helps to preserve and may enhance relationships between the parties.

- ***Capable of producing creative results***

Mediation allows for a wide range of creative solutions to be explored.

- ***Confidential and without prejudice***

Mediation is confidential and without prejudice to any rights. If mediation is unsuccessful other means of dispute resolution may be used.

## **Fast and inexpensive**

Settlement of a dispute may be achieved within a relatively short period and at less expense than litigation.

**Certain**

In mediation the parties agree to a solution they can live with. The agreement between the parties is binding and enforceable by a Court.

**Conclusion**

Mediation is not an easy alternative nor should it be seen as an indicator of readiness by either side to "**give in**". It takes courage to face someone with whom you are in dispute across a small room, and it can be more comfortable to hide behind a lawyer and take the dispute to court.

In our opinion the mediation process has much to commend it because it contains the potential for the parties to resolve the conflict. Skills acquired in doing so will assist them to deal successfully with any future conflict.

## WHEN IS MEDIATION APPROPRIATE?

Mediation may be suitable in any situation where a structured discussion could result in a decision to end the dispute. It is generally considered to be particularly appropriate where some of the following factors are present:

- The parties have a history of co-operation and successful problem solving on some issues.
- The parties do not have a long history of adversarial relations or prior litigation.
- The number of parties is limited and the dispute has not spread to tangential persons or groups.
- Issues in dispute are not overwhelming in number and the parties have been able to agree on some issues.
- The parties' hostility and anger toward each other is moderate or low.
- The parties have or may have, an ongoing relationship.
- The parties' desire for the settlement of the dispute is high.
- The parties accept the intervention and assistance of the third party.
- There is some external pressure to settle (time, diminishing benefits, unpredictable outcome etc).
- There are adequate resources to effect a compromise.
- The parties have some leverage on each other (ability to reward or harm).
- Those cases which may not be considered to be suitable for mediation include cases where:
  - The parties or one of them, seek an authoritative determination of principle, eg clarification of a statute's meaning.
  - One or more of the parties sees a benefit in continuing the conflict.
  - Fundamental conflicts of values are an issue so that an authoritative decision is desirable in the public interest.
  - There are severe and irremediable power imbalances between the parties.
  - The parties need state sanctions, for instance in proceedings for an injunction to prevent particular conduct.

## THE MEDIATION PROCESS

The usual steps in the mediation process are as follows:

### 1. **Agreement in principle to mediate**

Mediation is voluntary. The parties decide whether, and when, to mediate and any party may terminate the process at any time. Therefore the agreement of both or all parties to mediate is required.

### 2. **Appointment of mediator**

The mediator is approached by one of the parties or their solicitor with a request to assist. The mediator may discuss with the parties or their solicitors, the costs, venue, who will attend, documentation to be provided, pre-mediation meetings and availability for the mediation. The mediator will usually require a mediation agreement to be signed by the parties.

### 3. **Preparation for mediation**

Preparation for a mediation is an essential part of the process. The parties may be encouraged to prepare a brief statement of the issues. This may incorporate possible options for settlement and be confidential to the mediator.

### 4. **The mediation**

It is necessary for each party to be represented by a person with authority to settle the dispute. The mediation is likely to incorporate the following steps:

#### **(a) *Opening statement by the mediator***

This statement is an opportunity for the mediator to establish a rapport with the participants and to explain his or her role in the process. The parties should be encouraged to raise any questions they have about the process at this time.

#### **(b) *The parties statements***

After the opening statement, the mediator will usually ask each party in turn to tell those present what needs to be discussed at the mediation and what has happened between the parties that has led to the need for these issues to be addressed.

#### **(c) *Defining the issues***

With the mediator's assistance the parties will identify the issues which are in dispute.

#### **(d) *Setting the agenda***

The mediator may seek the agreement of the parties to the order in which the issues should be addressed.

#### **(e) *Joint session***

The issues will then be explored. The mediator's aim during the joint sessions is to facilitate discussion between the parties so that they educate each other about how they see the dispute.

**(f) *Private meetings***

Private meetings may occur where the mediator meets on a confidential basis with one party at a time. There are a number of reasons for holding private meetings. These include giving the parties a break from the tension, an opportunity for the parties to give confidential information to the mediator, or to enable the mediator to assist in exploring or testing any proposed settlement options. The mediator will not, unless specifically authorised to do so, disclose anything said in a private session by one party to another.

**(g) *General options***

The parties and their solicitors will be encouraged to generate all the options that could contribute to the resolution of the issues without necessarily deciding on the best one.

**(h) *Negotiations***

Negotiations can take place in joint sessions, in private meetings, or by the mediator taking offers and counter-offers between the parties.

**(i) *Reaching agreement***

The parties may reach an agreement. If possible, this agreement will be reduced to writing and photocopied so that each party can take away their own copy. Where no agreement is reached, the parties may agree on the outstanding issues to be resolved or on the future process to be followed, such as a resumption of the mediation or obtaining reports or valuations before further negotiation.

**5. The mediator's role**

The mediator is an independent, neutral person who facilitates the parties' discussions by encouraging them to educate each other about their points of view. The mediator does this by hearing a brief statement from each party outlining his or her concerns and by helping the parties to identify the disputed issues. The mediator then encourages the parties to discuss the issues and to generate options for their resolution. Mediators do not give legal advice; nor do they decide the outcome of the dispute.

**6. The legal representative's role at the mediation**

Mediation provides the parties with an opportunity to engage in a free and protected exchange of views about the dispute and the ways in which it may be able to be settled. The parties are central to the dispute and the mediator will encourage them to actively participate in the mediation.

Legal representatives play an important role in advising their clients during the course of the mediation. In addition to giving advice on the process, the issues and the options generated for resolution of the dispute, legal representatives may be required to prepare

the terms of settlement or heads of agreement in accordance with the settlement reached.

## **HOW YOUR LEGAL REPRESENTATIVE WILL PREPARE FOR MEDIATION AND ROLE AT MEDIATION**

### **Arrangements for mediation**

- Select and appoint a mediator by agreement with other party/parties.
- Review mediator's agreement.
- Make financial arrangements with mediator and other party/parties.
- In liaison with mediator, make arrangements regarding the venue and facilities required for the mediation.
- Consider with the mediator the need for a preliminary conference. Preliminary conferences are useful to address:
  - Whether issues statements are to be exchanged or provided on a confidential basis to the mediator.
  - Commitment of parties to settle.
  - Mediation agreement in order.
  - Who will attend the mediation.
  - The need for confidentiality agreements for non-parties attending the mediation.
  - Authority to settle.
  - Whether any further steps need to be taken in the litigation in advance of the mediation, eg exchange of documents, discovery, expert reports.
- Consider with you who should attend the mediation and who should be present from the other party.
- Advise you on the mediation agreement and arrange for it to be signed.
- Arrange for any non-parties, who it has been agreed will attend, to sign confidentiality agreements.

### **Preparing your for the mediation**

- Explain the process to be followed, emphasising that it is for you to make the ultimate decision on resolution.
- Educate you on the differences between mediation and litigation/arbitration.
- Determine roles for each person attending the mediation.

- Consider with you the best ways to educate the other party/parties and the mediator.
- Assist you to prepare an opening statement.
- Assist you to identify your needs and objectives.
- Generate possible options for resolution which meet identified needs.
- Consider the likely reaction of the other party/parties to the options and ways to overcome their objections.
- Advise you on the best, worst and most likely outcomes if resolution is not achieved at the mediation.

### **Role at the mediation**

- Observe and listen to the other party/parties.
- Assist you to focus on the interests and concerns of the other party/parties
- Provide you with all the legal advice you require.
- Review the strengths and weaknesses of your case in light of the information provided by the other party/parties.
- Re-assess the best, worst and most likely alternatives to a negotiated agreement.
- Assist you to generate new settlement options or rework old options.
- Assist you to maintain the focus on your needs, interests and objectives.
- Advise you on settlement options ensuring that all issues have been addressed.
- Record any agreements reached.