



THE LAW SOCIETY
OF NEW SOUTH WALES

Dispute Resolution Kit

December 2012

Have you reviewed your files for early dispute resolution options?

This Dispute Resolution Kit (the “Kit”) has been designed by The Law Society of New South Wales (“The Law Society”) to disseminate information amongst the legal profession on the use of mediation and other dispute resolution methods to promote the negotiated settlement and early resolution of disputes.

The Kit provides legal practitioners with general information on mediation and other dispute resolution methods. It is not exhaustive of the issues which may be encountered, nor does it constitute legal advice. It is a general guide only and practitioners must take care to fully consider the circumstances of their particular matter and applicable law. While every care has been taken in the production of this Kit, no legal responsibility or liability is accepted, warranted or implied by the authors or The Law Society and any liability is hereby expressly disclaimed.

© 2012 The Law Society of New South Wales ACN 000 000 699

The material contained in this Kit may be reproduced for the purpose of encouraging the principles and practice of mediation and evaluation amongst the legal profession. Acknowledgment of The Law Society should be included in any reproduced material. Except for that purpose or as permitted under the *Copyright Act 1968 (Cth)*, no part of this Kit may be reproduced without the specific written permission of The Law Society.

Message from the President

The Dispute Resolution Kit has been revised and expanded in response to the profession's growing commitment to the range of Alternative Dispute Resolution services offered to clients.

In addition to the Guidelines to assist legal practitioners actively involved in the practice of mediation and precedent documents including the Agreement to Mediate and a Model Clause, the Dispute Resolution Kit contains the Charter on Mediation Practice as adopted by the Council of The Law Society. I commend the Charter to you as a useful guide on the rights and responsibilities of mediators, legal practitioners and parties during the mediation process under The Law Society's Mediation Program.

I am pleased to endorse the Dispute Resolution Kit which I am certain will continue to serve as a ready reference for legal practitioners and their clients whenever considering the resolution of disputes.

PRESIDENT

December 2012

CONTENTS

| | |
|--|----|
| Have you reviewed your files for early dispute resolution options? | 1 |
| Message from the President | 2 |
| I. Introduction | |
| 1. Dispute Resolution Services Offered by The Law Society | 5 |
| 2. Reasons why Legal Practitioners should use The Law Society's Dispute Resolution Services | 7 |
| 3. Accreditation | 8 |
| II. The Law Society Mediation Model | |
| 1. Definition of Mediation | 9 |
| 2. Description of The Law Society Mediation Model | 9 |
| 3. The Law Society Mediation Model | 9 |
| 4. The Law Society Mediation Model Diagram | 12 |
| III. The Law Society Guidelines for those involved in Mediations | |
| 1. Guidelines for Legal Practitioners who act as Mediators | 13 |
| 2. Professional Standards for Legal Practitioners in Mediation | 20 |
| 3. The Law Society of NSW Charter on Mediation Practice – A Guide to the Rights and Responsibilities of Participants | 22 |
| IV. The Law Society Mediation Precedents | |
| 1. The Agreement to Mediate (Including a Confidentiality Agreement) | 26 |
| 2. The Model Clause | 36 |
| 3. Mediation Guidelines | 38 |
| V. The Law Society Neutral Evaluation Model | |
| 1. Description of The Law Society Neutral Evaluation Model | 41 |
| 2. The Law Society Neutral Evaluation Model | 42 |
| VI. The Law Society Neutral Evaluation Precedents | |
| 1. The Law Society Neutral Evaluation Agreement (Including a Confidentiality Agreement) | 45 |

VII. Hybrid Processes

| | |
|------------------------------------|----|
| 1. Introduction | 55 |
| 2. Description of Hybrid Processes | 55 |

Appendix A

| | |
|---|----|
| A selection of government and not for profit organisations which offer alternative dispute resolution | 58 |
|---|----|

I. Introduction

1. Dispute Resolution Services Offered by The Law Society

The Law Society Mediation Program

The Law Society Mediation Program (“Mediation Program”) provides a forum in which the parties may discuss settlement with the aid of a Law Society mediator or co-mediators with a view to achieving resolution of their dispute earlier than might otherwise have been the case. Mediations are held at any time suitable to the parties and the mediator.

Law Society mediators are nationally accredited mediators under the National Mediator Accreditation System who have been appointed to The Law Society’s Mediators Panel (“Mediators Panel”). The mediators appointed to the Mediators Panel are also legally qualified practitioners of a least 5 years standing, many of whom are highly experienced practitioners with more than twenty years mediation experience.

Parties are required to pay \$825 (GST inclusive) each to The Law Society for the cost of providing a mediator for a preliminary conference and a mediation session of up to three hours (\$660 mediator’s fee and \$165 Law Society administration fee). In the case of co-mediators, the fee is divided between them except in cases where a pro-bono co-mediator is appointed. Room hire is not included in this fee. The mediation fee of \$660 is refundable if a party withdraws prior to the preliminary conference. If the withdrawal occurs after the preliminary conference and before the mediation session, half the mediation fee is refundable. In all cases the \$165 (GST inclusive) administration fee received from each party is retained by The Law Society.

Upon receipt of the fees from both parties a mediator (or two mediators in the case of co-mediation) is appointed by The Law Society. The appointed mediator then contacts the referring legal practitioners or self-representing parties to arrange a date, time and place for the preliminary conference. The parties and/or their legal practitioners are required to attend the preliminary conference.

Parties are required to be present in person at the mediation. If a party is not an actual person (for example, a corporation, government organisation, etc) it should be represented at the mediation by a properly authorised person with a written authority to settle the matter.

If you would like to use the Mediation Program, follow [this link](#) to an electronic form which you can use to submit your application online.

The Law Society Neutral Evaluation Program

The purpose of the Neutral Evaluation Program (“Neutral Evaluation Program”) is to give parties a forum in which they can obtain a reasoned, non-binding evaluation of their case on its merits from a third party neutral, acting as an evaluator, who is experienced in the area of the dispute.

The evaluator will be a senior legal practitioner with expertise in dispute resolution who has been appointed to a Law Society alternative dispute resolution panel. The parties are required to pay \$825 (GST inclusive) each, which covers a preliminary conference of up to one hour and a three-hour evaluation session (\$660 evaluators fee and \$165 Law Society

administration fee). The evaluation fee of \$660 is refundable if a party withdraws prior to the evaluation. In all cases the \$165 (GST inclusive) administration fee received from each party is retained by The Law Society.

The Neutral Evaluation Program model requires that the parties exchange essential information and position statements early in the pre-trial period, after which the neutral evaluation session takes place. The evaluator may ask questions and help the parties identify the main issues in dispute as well as areas of agreement. He or she offers an opinion as to the likely incidence of liability and where appropriate, a range of damages. The evaluator has no power to impose a settlement or to determine the pre-trial management of the case. The process, whether or not it results in settlement, is confidential.

With the benefit of that assessment, the parties are encouraged to discuss settlement with or without the evaluator's assistance. They may explore ways of narrowing the issues, exchanging information about the case, or otherwise prepare efficiently for trial. For further detail see the Neutral Evaluation Program Model and the Neutral Evaluation Agreement in this Kit.

If you would like to use the Evaluation Program, follow [this link](#) to an electronic form to submit your application online.

2. Reasons why Practitioners should use The Law Society's Dispute Resolution Services

This Kit has been designed by The Law Society to disseminate information amongst the legal profession on the use of mediation and neutral evaluation to promote the negotiated settlement of disputes and the early resolution of litigated matters.

In addition to the advantages experienced by clients, legal practitioners who have referred matters to the Mediation Program and Neutral Evaluation Program have identified a number of benefits:

- improvement in legal practitioner/client relations through the provision of an appropriate forum for the parties to make decisions, as opposed to hasty settlements made on the court steps;
- expansion of legal practitioners' practices by the provision of an additional service as an alternative to litigation, particularly in situations where litigation is neither cost-effective nor desirable;
- facilitation of the exchange of outstanding information such as updated medical reports, and additional particulars of claim;
- enhancement of the image of the legal profession as a whole when prompt preparation of a client's matter can be followed swiftly by structured settlement negotiations; and
- early recoupment of costs and funded disbursements.

The promotion of mediation to the legal profession and to the community has been high on the agenda of The Law Society's Dispute Resolution Committee since 1990. The Mediation Program and Settlement Weeks to date have resulted in the settlement of proceedings arising from wide ranging areas such as personal injury claims, commercial causes, probate matters, family law matters, defamation actions, construction disputes, and claims in legal or medical professional negligence.

Generally, all types of disputes are suitable for mediation provided all parties and their legal practitioners are prepared to negotiate in good faith and work towards a mutually acceptable outcome.

According to research data collected from mediators, legal practitioners and parties to mediations, as well as anecdotal information offered by participants in the mediation process, the Mediation Program has achieved considerable savings of time and costs for individual parties and for the courts.

Legal practitioners and their clients also have the benefit of resolving disputes under the Neutral Evaluation Program. All types of disputes may be referred to an evaluator, appointed by The Law Society, who will give a reasoned non-binding opinion on the merits of the case.

3. Accreditation

National Mediator Accreditation System

The National Mediator Accreditation System (NMAS) commenced operation on 1 January 2008. The NMAS is a scheme through which mediators can seek national accreditation from mediator organisations known as Recognised Mediator Accreditation Bodies (RMABs) who have agreed to accredit mediators in accordance with the National Mediator Standards.

Copies of the Approval Standards and Practice Standards are available at: http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatisADR_NationalMediatorAccreditationSystem_NationalMediatorAccreditationSystem

The Mediator Standards Board (MSB), an independent industry body, is responsible for implementing, developing and maintaining the NMAS. Information about the MSB is available from their website: <http://www.msb.org.au/>

The purpose of the NMAS is to provide a uniform level of accreditation for all mediators irrespective of their field of work or location.

The Law Society became a RMAB in 2008 and accordingly offers national accreditation to legal practitioner members engaged in mediation practice who meet the criteria set out in the Approval Standards.

National accreditation is a prerequisite for appointment to the Law Society Mediators Panel.

The Law Society Specialist Accreditation Scheme

The Law Society's Specialist Accreditation Scheme offers members accreditation in Dispute Resolution. For further information please contact the department via email on specialists@lawsociety.com.au.

II. The Law Society Mediation Model

1. Definition of Mediation

Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.¹

2. Description of The Law Society Mediation Model

The Law Society's Mediation Model comprises a preliminary conference and a mediation session. The preliminary conference is scheduled to last for up to one hour and a mediation session for an average of three hours. The stages of the preliminary conference and the mediation session are outlined below.

A co-mediation model (where two mediators are appointed instead of one) is available for interpersonal disputes involving family disputes under the *Succession Act 2006*. Co-mediation, which involves no additional cost to the parties, may also be adopted in other appropriate cases such as complex multi-party matters.

3. The Law Society Mediation Model

Preliminary Conference - Stages and Features

The preliminary conference may be divided into seven stages:

1. The Mediator's Role

The role of the mediator is explained in terms of being impartial and being in control of the process with the parties controlling the outcome.

2. Features and Objectives of Mediation

The features of mediation are outlined to the parties (such as voluntariness, confidentiality, and the status of the final agreement reached by the parties). Parties are also alerted to the fact that new information often emerges in the course of a mediation. Objectives of mediation are outlined including:

- seeking common ground and a range of possible solutions; and
- empowering parties to settle their dispute to their mutual satisfaction.

¹ This is the definition of 'mediation' provided by the National Alternative Dispute Resolution Advisory Council (NADRAC).

3. The Role of Legal Practitioners

The role of legal practitioners in mediation is explained. Their role includes assisting their clients to define their issues and to develop possible solutions.

4. Authority to Settle

In order to provide the other party with the opportunity to make an informed decision whether or not to proceed with the mediation, each party to the mediation is required to define to the other the scope of his or her authority to settle, including any limitation of that authority.

While it is reasonable to come to mediation with a perceived fair settlement figure in mind, full authority means, in principle, the ability to settle up to 100% of the claim if the mediation proceeds.

5. Finalising Approval for Mediation Participants

The same representatives present at the preliminary conference should ideally attend the mediation session. Agreement should be reached as to whether absentees from the preliminary conference (e.g. barristers) will be present at the mediation.

If parties request the attendance of observers at the mediation, their attendance should occur only with the consent of the parties and the mediator. Support persons may attend, provided advance consent is sought and obtained from the mediator and all parties to the mediation. Support persons generally do not take part in the negotiations and are present only to give moral support to the party.

6. Signing the Agreement to Mediate

Signing the Agreement to Mediate allows parties to give informed consent to proceed to mediation and formalises their commitment to mediation. It also provides an opportunity to clarify any questions about the mediation process.

All parties, support persons, observers and legal practitioners will be asked to sign the Confidentiality Agreement.

7. Preparation for Mediation

A timetable is set for pre-mediation undertakings to ensure maximum substantive readiness for the mediation as well as preparation for good faith bargaining. Preparation could include agreeing on the major issues to be dealt with at the mediation and updating and exchanging relevant documents.

Mediation Session - Stages and Features

Stages 1-4 and 6-7 are generally conducted in joint session with all participants present. Stages 1-4 focus on the present and stages 6-7 focus on the future. Stages 1-4 are seen as necessary sequential stages. All seven stages are identified in the diagrammatic representation which follows the description.

1. Mediator's Opening Statement

The opening statement includes brief reminders of the role of the mediator, features of mediation and establishing the protocols and etiquette of participation/conduct. The process of mediation is explained.

2. Parties' Statements and Mediator's Summaries

Each party to the dispute has the opportunity to present a brief statement of their concerns. This may be followed, if appropriate, by his or her legal practitioner commenting on the legal

issues. Parties' statements are noted and summarised back by the mediator checking with the parties for accuracy. The advantages of this procedure include:

- providing the basis for the agenda/issues to be discussed during the exploration phase;
- assuring the parties that their concerns have been heard by the mediator and each other;
- providing opportunities to create an atmosphere conducive to effective negotiation;
- providing two opportunities for an appreciation of each party's perspective; and
- acknowledgement of emerging needs and options for settlement for use later in the mediation.

3. Identification and Listing of Issues (Agenda Setting)

Use of a whiteboard or equivalent allows parties to have their issues and concerns listed by the mediator. The issues are expressed in neutral and, whenever possible, mutual terms. The listed issues form the basis for more effective negotiation and co-operative problem-solving.

4. First Joint Exploratory Session

The focus at this stage is on clarification of issues which contributed to the dispute. Parties are encouraged to select items from the list of issues for exploratory discussion and negotiation. The mediator encourages parties to communicate directly with each other, pinpointing and listing any proposed options emerging from the dialogue.

5. First Private Meeting

Parties are provided with the opportunity to express opinions and explore further issues and options privately with the mediator. The private meeting can also assist parties to rehearse negotiation, generate options and to ensure that particular proposals are realistic. Parties are encouraged to explore options which are both personally and mutually satisfying.

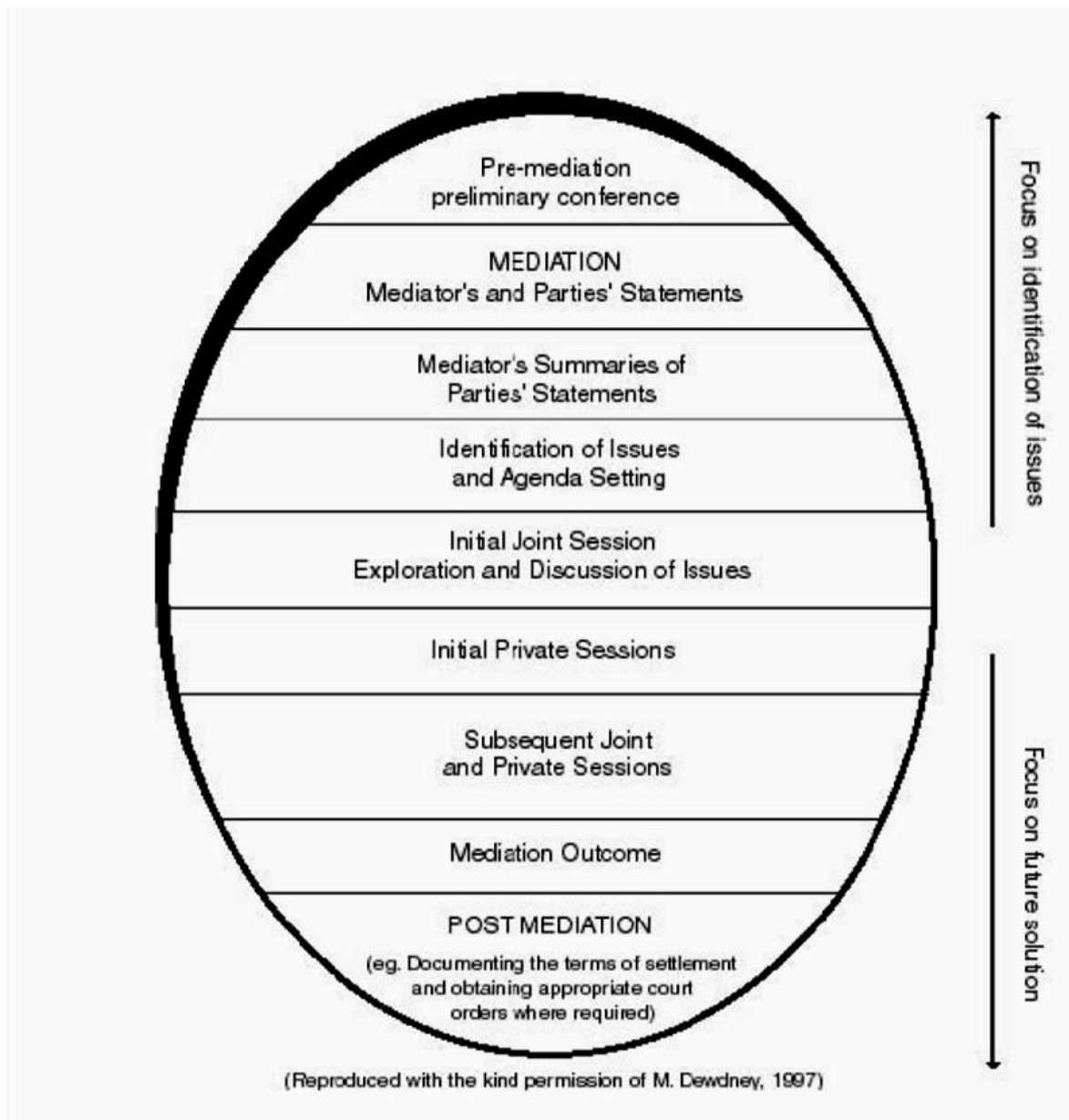
6. Principal Joint Negotiation Session

This provides a forum for making an agreement and can be followed by further private meetings and joint sessions where necessary.

7. Concluding the Mediation

The mediator facilitates final negotiations and terms of agreement, if appropriate. For example: who does what, when and how. Sometimes only a partial agreement may be reached. In such cases it is useful to formulate a statement of unresolved issues. In some cases, the mediation may need to be adjourned or terminated.

4. Law Society Mediation Model Diagram



III. The Law Society Guidelines for those involved in Mediations

1. Guidelines for Legal Practitioners who act as Mediators

The responsibilities of legal practitioners when acting as mediators in the ordinary course of providing legal services in private practice are set out in the following Guidelines.

A legal practitioner insured with LawCover and being the holder of an unrestricted practising certificate who, as part of carrying on business as a lawyer in private practice in Australia, acts as a mediator will be entitled to indemnity pursuant to the terms and conditions of the LawCover Professional Indemnity Insurance Policy issued to that legal practitioner or relevant law practice. In this capacity, mediation is considered a "legal service" within the meaning of the defined term in the LawCover Professional Indemnity Insurance Policy. A legal practitioner on a restricted practising certificate is covered only as an employee of an insured law practice where he/she is supervised when acting as a mediator.

The Guidelines do not purport to prescribe the legal requirements which should be observed by a person who undertakes to act as a mediator. Legal practitioners who intend to practice as mediators in the area of alternative dispute resolution should inform themselves of the licensing provisions of any relevant legislative requirements, including any requirements for national accreditation or alternative insurance arrangements.

The Guidelines

1. Introduction

- 1.1 These guidelines are intended to assist and guide legal practitioners acting as mediators.
- 1.2 These guidelines do not derogate from the usual obligations of legal practitioners.

2. Definition of Mediation

- 2.1 Mediation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. Mediation may be undertaken voluntarily, under a court order, or subject to an existing contractual agreement.²

3. Qualification

- 3.1 No legal practitioner shall act as a sole mediator unless he/she has *satisfactorily completed an approved course* and has obtained *national mediator accreditation* or has such *appropriate mediation experience as may be approved by the Dispute Resolution Committee of The Law Society of New South Wales*.
- 3.2 Italicised terms in 3.1 are defined in Schedule 1.
- 3.3 It is the responsibility of legal practitioner mediators to engage in annual continuing professional development in mediation as part of their CLE program to ensure that their mediation skills are current and effective.

4. Initial Duties of Mediators

The mediator should define and describe the process of mediation and its cost to the parties before they reach an agreement to mediate. He/she should give an overview of the process and assess the appropriateness of mediation for the participants. Amongst the topics covered, it is recommended that the mediator should address the following:

- 4.1 The mediator should define the process in context so that the parties understand the differences between mediation and other means of conflict resolution available to them. It is important that the mediator stress that the process is “without prejudice” and that in general, unless both parties consent, communications during the course of the mediation process cannot be used as evidence in court proceedings.
- 4.2 The mediator should obtain sufficient information from the participants to enable them mutually to define the issues to be resolved in mediation.
- 4.3 The mediator in consultation with the parties, should establish the following procedures:

² This is the definition of ‘mediation’ provided by the National Alternative Dispute Resolution Advisory Council (NADRAC).

- 4.3.1 the right of each party to talk without interruption;
- 4.3.2 the order of presentation;
- 4.3.3 any other conduct protocols of the proceedings as may be appropriate.
- 4.4 It should be emphasised that the mediator may assist in generating options for the participants to consider, such as alternative ways of resolving problems, but that all decisions are to be made voluntarily by the participants themselves.
- 4.5 The duties and responsibilities that the mediator and the parties accept in the mediation process should be agreed upon. The mediator should inform the parties that either of them or the mediator has the right to suspend or terminate the process at any time. It is recommended that the mediator include in any written agreement to mediate, a provision that he/she has a discretion to terminate or suspend the process at any time.
- 4.6 It is strongly recommended that a written agreement to mediate be entered into by the parties and the mediator prior to commencement of the process. The mediator may include a provision in the agreement excluding his/her liability.³
- 4.7 The mediator should explain the fees for mediation and reach an agreement with the parties regarding payment.
- 4.8 The mediator should explain to the parties that he/she might consult with each of them in separate sessions and that information divulged during such separate sessions will be kept confidential unless he/she has that party's specific agreement to disclose to the other party. He/she should reach an understanding with the participants as to the circumstances in which he/she may meet alone with either of them or with any third party.
- 4.9 The mediator should inform the parties that they have the right at any time to obtain, and may need to obtain, independent legal or other professional advice during the mediation process.
- 4.10 The mediator should also raise the matters referred to in 6.5 and 6.6 below.
- 4.11 The good faith provision prevails in all cases, including mandatory referral to mediation.

5. Impartiality

- 5.1 The mediator shall maintain impartiality towards all participants at all times during the mediation process. Impartiality means freedom from favouritism or bias in word or action. The mediator shall not play an adversarial role.
- 5.2 If the mediator believes, or any one of the participants states, that the mediator's background or personal experiences or relationships would prejudice the mediator's performance or detract from his/her impartiality, the mediator shall withdraw from the mediation unless all parties agree to proceed following full disclosure of all relevant facts relating to the issue of neutrality.

³ The Law Society Agreement to Mediate provides for the exclusion of mediator liability in Clause 25.

- 5.3 If the mediator has at any time prior to the mediation provided legal, counselling or any other services or has had any social or professional relationship with any of the participants, he/she shall not proceed with the mediation. However, if after full disclosure, all parties to the mediation agree, the mediator may proceed.
- 5.4 The mediator shall disclose any circumstances to the participants which may cause, or have any tendency to cause, a conflict of interest. In particular a mediator who is a business partner or an associate of any legal counsel retained by either of the parties should not act as mediator.

6. Confidentiality

- 6.1 The mediator shall not voluntarily disclose information obtained during the mediation process without the prior consent of all parties.
- 6.2 The obligations of a legal practitioner relating to confidentiality as between legal practitioner and client shall apply as between the mediator and the participants.
- 6.3 If subpoenaed or otherwise notified or requested to testify, the mediator shall inform the remaining participants immediately.
- 6.4 Information received by the mediator in private session shall not be revealed to the other parties without prior permission from the party from whom the information was received.
- 6.5 The mediator shall, prior to entering into the mediation process, obtain all parties' agreement that the mediator shall not be required to give, in any subsequent legal proceeding, evidence of or to produce documents concerning the issues to be mediated upon.
- 6.6 The mediator shall inform the parties that, in general, communications between them, and between them and the mediator, during the preliminary conference and the mediation, are agreed to be confidential. In general, these communications cannot be used as evidence if the matter does not settle at the mediation and goes to a court hearing. The mediator shall also inform the parties that they should consult their legal practitioners if they want a more detailed statement or if they have any specific questions in relation to confidentiality.
- 6.7 The mediator shall render anonymous all identifying information when materials are used for research or training purposes.
- 6.8 The mediator shall maintain confidentiality in the storage and disposal of records.
- 6.9 The mediator shall determine from the parties whether they are required to make available a copy of the agreement reached and, if so, to whom. This should be documented in the Agreement to Mediate and/or the final agreement.

7. Disclosure

- 7.1 The mediator should if he/she considers it would facilitate settlement, recommend disclosure of relevant information.

- 7.2 The mediator may encourage participants to obtain independent expert information and advice.

8. Conclusion of Mediation

- 8.1 Where full agreement has been reached, the mediator should discuss with the participants the process for formalisation and implementation of the agreement.
- 8.2 Where the participants have reached a partial agreement the mediator should discuss with them procedures available to resolve the remaining issues.
- 8.3 Where the mediator believes the agreement being reached may be impossible to uphold or may be illegal, he/she should recommend to the parties that they obtain independent legal advice.

9. Termination of Mediation

- 9.1 Each of the parties and the mediator has the right to withdraw from mediation at any time and for any reason.
- 9.2 If the participants reach a final impasse, the mediator should not prolong unproductive discussions, which will merely result in additional unnecessary costs to the participants.
- 9.3 If mediation has terminated without agreement, the mediator should suggest that the parties obtain additional professional services as may be appropriate.

10. Responsibilities to Other Mediators

- 10.1 A mediator may, if the parties desire, act where another mediator is already employed. He/she may consult with the other mediator with the parties' consent.

11. Observers

- 11.1 The attendance of observers should occur only with the consent of all parties and the mediator.
- 11.2 Observers should sign a Confidentiality Agreement.

12. Support Persons

- 12.1 Support persons generally do not take part in the negotiations but are present to give moral support to the party.
- 12.2 Support persons should sign a Confidentiality Agreement.

Schedule 1

1. “*satisfactorily completed*” means that the legal practitioner has been formally assessed during an approved course as able to act as a sole mediator.
2. “*an approved course*” is a mediation education and training course that:
 - a) is conducted by a training team comprised of at least two instructors where the principal instructor[s] has more than three years’ experience as a mediator and has complied with the continuing accreditation requirements set out in Section 6 of the *Australian National Mediator Standards – Approval Standards* for that period and has at least three years’ experience as an instructor; and
 - b) has assistant instructors or coaches with a ratio of one instructor or coach for every three course participants in the final coached simulation part of the training and where all coaches and instructors are accredited; and
 - c) is a program of a minimum of 38 hours in duration (which may be constituted by more than one mediation workshop provided not more than nine months has passed between workshops), excluding the written skills assessment process referred to below; and
 - d) involves each course participant in at least nine simulated mediation sessions and in at least three simulations where each course participant performs the role of mediator; and
 - e) provides written, debriefing coaching feedback in respect of two simulated mediations to each course participant by different members of the training team.

A mediator must also have completed to a competent standard a written skills assessment of mediator competence that has been undertaken in addition to the 38-hour training workshop referred to above, where mediator competence in at least one 1.5 hour simulation has been undertaken by either a different member of the training team or a person who is independent of the training team. The written assessment must reflect the core competency areas referred to in the *Australian National Mediator Standards - Practice Standards*. The final skills assessment mediation simulation may be undertaken in the form of a video or DVD assessment with role players, or as an assessed exercise with role players.

The written report must detail:

- a) the outcome of the skills assessment (in terms of competent or not yet competent); and
 - b) relevant strengths and how they were evidenced; and
 - c) relevant weaknesses and how they were evidenced; and
 - d) relevant recommendations for further training and skills development.⁴
3. “*national mediator accreditation*” means accreditation as a mediator under the National Mediator Accreditation System as administered by the National Alternative Dispute Resolution Advisory Council (NADRAC) and the Mediator Standards Board (MSB).

⁴ This is the definition of the threshold training and education requirements for mediators as set out in the *Australian National Mediator Standards – Approval Standards*.

4. “*appropriate mediation experience as may be approved by the Dispute Resolution Committee of The Law Society of New South Wales*”:

Factors which the Dispute Resolution Committee would take into account when exercising its discretion to approve experience and qualifications other than national mediator accreditation include any one or more of the following:

- a) experience in representing parties at a mediation;
- b) regional factors, e.g. isolation;
- c) relevant legal experience; and/or
- d) public interest factors such as urgency.

Note: Before undertaking a mediation training course and continuing professional development, it is important that legal practitioners satisfy themselves as to whether the course fulfills the criteria in paragraph 2 of this Schedule.

2. Professional Standards for Legal Practitioners in Mediation⁵

The Law Society actively encourages legal practitioners to advise clients of the advantages of alternative dispute resolution.

1. Preparing Clients for Mediation

The legal practitioner's role in preparing clients for mediation includes:

- 1.1 Explaining the process, including the mediator's role (see Law Society Mediation Model);
- 1.2 Assisting clients to identify their needs, interests and issues. As well as the legal issues, the legal practitioner should explore with the client why an issue has arisen and what kind of things he or she would like to see happen. This is often wider than just the legal issues and this wider approach assists in generating options;
- 1.3 Encouraging the clients to prepare their opening statements. If necessary, assisting clients to prepare their opening statement;
- 1.4 Assisting the client in thinking through options for resolution that may be wider than those remedies available in a court. Ensuring the client has information about the feasibility of such options prior to the mediation commencing;
- 1.5 Discussing ways to achieve the client's desired outcomes or priorities;
- 1.6 Explaining that the mediator will not be deciding the matter and that the settlement decision must be their own;
- 1.7 Explaining the nature of a "without prejudice" and confidential discussion;
- 1.8 Advising of the legal costs incurred to date and likely to be incurred if the matter does not settle; and
- 1.9 Discussing the issues that would be considered by the court and the range of possible outcomes.

It is recommended that the above check list be explored with clients prior to the mediation, whether or not a preliminary conference is held.

2. Role of Legal Practitioners during Mediation

Essentially the role of the legal practitioner is:

- 2.1 To assist clients during the course of the mediation;
- 2.2 To discuss with the mediator, with the other party's legal practitioner and with clients such legal and evidentiary, or practical and personal matters as the mediator may raise or the clients might wish. It is likely that once the client has heard the other party's version, the legal practitioner may need to take further instructions from his/her client and perhaps review the legal advice;
- 2.3 To participate in a non-adversarial manner. Legal practitioners are not present at mediation as trial advocates, or for the purpose of participating in an adversarial court room style contest with each other, still less with the opposing party. A legal practitioner who does not understand the non-adversarial settlement focus of their role and participate appropriately is a direct impediment to the mediation process; and

⁵ Contributions to part of this document by Sir Laurence Street, Ruth Charlton and Bernadette Rogers, then Director of Dispute Resolution Queensland Law Society, are gratefully acknowledged.

- 2.4 To prepare the terms of settlement or heads of agreement in accordance with the settlement reached at the end of the mediation for signature by the parties before they leave.

3. Confidentiality

Any words, act or omission by a mediator in private shall not be revealed to the other parties or legal practitioners without prior permission of the mediator.

4. Good Faith Participation

If the legal practitioner forms the view, either before or during the mediation, that the other party and/or their representative is not willing to negotiate in good faith, the legal practitioner should raise this issue with his/her client and/or the mediator.

5. Mediation Conduct Standards

A legal practitioner should:

- 5.1 cooperate with the mediator;
- 5.2 extend professional courtesies to both the mediator and other legal practitioners;
- 5.3 act in good faith and advise their client of the obligations to act in good faith;
- 5.4 withdraw from acting when the client gives instructions or acts in a manner that indicates bad faith; and
- 5.5 act by word or deed in such a manner as not to incite or condone a party to break the law.

A comprehensive description of the mediator's role is set out in the Charter on Mediation Practice and in the Guidelines for Legal practitioners who act as Mediators. It is not the mediator's role to give advice or opinions, make suggestions which may disadvantage a party, propose or endorse outcomes or support either party's view. If the legal practitioner is of the view that these standards, particularly those relating to impartiality, are not being met, he/she should request a private meeting with the mediator immediately.

6. Mandatory Mediation

Where a mandatory referral to mediation has been made, the legal practitioners should continue to adhere to the abovementioned mediation standards.

3. The Law Society of NSW Charter on Mediation Practice - A Guide to the Rights and Responsibilities of Participants

1. Underlying assumptions for the Charter

- 1.1 The majority of mediations conducted under The Law Society Mediation Program involve two-party disputes with a single mediator. It is acknowledged, however, that there are some disputes where more than one mediator, usually two, work together in co-operation.
- 1.2 Multi-party disputes may require a variation to the mediation process which is normally applied in The Law Society Mediation Program.

2. Objectives of the Charter

- 2.1 To set the highest standards of practice in accordance with the principles of mediation and to formulate guidelines consistent with the [Law Council of Australia Ethical Guidelines for Mediators](#).
- 2.2 To inform parties of the principles and practice of mediation and of the role of mediators.
- 2.3 To provide guidelines to the parties for their role in mediation.
- 2.4 To provide opportunities for mediators and parties to give feedback on their experience as participants in mediation in order to foster and maintain the highest standards of mediation practice.

3. What parties can expect of the mediator

- 3.1 **The mediator is experienced in assisting communication and negotiation**
The role of the mediator is to guide the communication process so that a useful discussion can take place. The mediator will do this by asking you questions to assist in identifying and clarifying the issues in dispute, to help you sort out misunderstandings and to talk about what is important to you. The mediator aims to help you talk and negotiate with each other directly.
- 3.2 **The mediator must be impartial**
The mediator is not there to establish facts or to decide which of you is right or wrong, nor to take sides. The mediator will therefore not agree or disagree with statements you make, nor put pressure on you to follow a particular idea or suggestion. The mediator must treat all parties equally.
- 3.3 **The mediator is not a representative**
The mediator will not give legal or other professional advice.
- 3.4 **The mediator respects confidentiality**
What is discussed in mediation is confidential unless disclosure is required by law. This means that in nearly all cases, confidentiality will be maintained. Mediators cannot be called as witnesses in any court proceedings which may take place in the

future. The mediator will not mention anything discussed by you during a private session to other parties during the mediation (unless you request the mediator to let the other parties know), or to anyone else following the mediation.

3.5 **Options for settlement**

The mediator will encourage you to consider a range of options for settlement and to evaluate them for the purpose of reaching a mutually satisfying outcome for all of you. The mediator will not express any opinion about the merits of the options but will encourage you to assess their implications.

3.6 **The mediator is not a decision-maker**

3.6.1 You need to decide what is best for you, as the mediator will not impose or suggest final outcomes for you. The mediator has nothing to gain in any way from the outcome of the mediation, whether agreement is reached or not.

3.6.2 The mediator controls the mediation process but not the content of the discussions or the outcome of the dispute.

3.6.3 The mediator will encourage you:

- to take an active part in the mediation and to speak freely and with no interruptions from others present;
- to discuss issues which are important to you, not issues which the mediator may consider to be relevant or significant; and
- to treat each other with courtesy.

3.7 **The role of your legal practitioner at mediation**

If your legal practitioner attends the mediation, the mediator will still encourage you to participate actively in the discussions and negotiations. You will, however, be given the opportunity, if you wish, to allow your legal practitioner to speak and negotiate on your behalf if you feel more comfortable with that arrangement. The mediator will also provide you with opportunities for breaks to allow you to consult with your legal practitioner in the course of the mediation or on the telephone if your legal practitioner is not present.

4. What parties can expect of the mediation process

4.1 The Law Society encourages mediators on its Mediators Panel to follow a standard mediation process. However the parties can suggest variations provided the important principles of mediation are adhered to. The Law Society mediation process normally consists of two sessions – a preliminary conference and a mediation session. Occasionally, the two sessions are merged into one.

4.2 **What parties can expect at the Preliminary Conference**

4.2.1 What mediation is and the mediator's role

The mediator will explain the features of mediation – its confidential nature and the role of the mediator as a neutral third party facilitator, not a representative or decision-maker. Whether attendance at a mediation is voluntary or mandatory, it can be terminated at any stage by either party or the mediator without the need to give reasons.

4.2.2 The process of mediation

The mediator will outline the stages of the mediation process and you will be able to ask questions about it.

4.1.3 *Preparing for the mediation session*

The mediator will confirm that everyone is ready for the mediation session. An Agreement to Mediate will be signed by all participating in the mediation session. A timetable will be set for all outstanding matters relevant to the mediation to be finalised prior to the mediation session including documents to be prepared and exchanged, and arrangements for the payment of fees. The mediator will try to ensure that all parties to the mediation have authority to negotiate and settle.

4.3 **What parties can expect at the Mediation Session**

4.3.1 *Opening Statements*

The mediator will ask you to make a brief opening statement outlining your individual concerns and the issues which have brought you to mediation whether you are accompanied by your legal practitioner or not. If your legal practitioner is with you, you may, if you wish, ask him or her to make the opening statement on your behalf. The mediator will ensure that you get equal time to make your statement and that you do so uninterrupted.

4.3.2 *Mediator's Summaries*

The mediator will then summarise parties' opening statements and extract issues for discussion which emerge from the opening statements. You will be able to correct any errors or omissions you believe the mediator may have made when summarising back your opening statement. You will also be asked to check and agree on the list of issues for discussion.

4.3.3 *Direct Communication*

The mediator will then facilitate direct communication between you and the other party and discussion of the issues. You will be encouraged to communicate directly with the other party, asking each other questions to explore and clarify the issues extracted from your opening statements. The mediator will also facilitate your discussions so that you have the opportunity of becoming aware of each other's point of view.

4.3.4 *Private Sessions*

The mediator may hold private and confidential sessions with each of you. During any private and confidential session you may have with the mediator you can raise any matter you consider relevant to the mediation.

- 4.4 The mediator will facilitate negotiations, settlement and agreement formulation. You will be able to discuss options and negotiate freely with the other party in order to reach a mutually satisfying resolution of your dispute.

5. **What the mediator can expect of the parties**

5.1 **Attendance at the mediation in good faith with the intention of seeking settlement**

The mediator expects that all parties are attending mediation in good faith with the intention of seeking settlement.

5.2 **Attendance at both the preliminary and mediation sessions**

The mediator will expect you to attend the Preliminary Conference as well as the Mediation Session to ensure that the same information is imparted to all parties at the same time.

5.3 **Preparing for the mediation session**

It is very helpful to the mediator if you maintain realistic goals when entering negotiations. You can prepare yourself for the negotiations by doing calculations and background work beforehand and bringing relevant documents to the mediation session. The mediator will expect you to have authority to negotiate and to settle.

5.4 **Setting the scene for a constructive mediation session**

5.4.1 It is easier for everyone if both parties observe the normal courtesies of listening to each other in a fair and open-minded way. Even if you do not agree with what is being said, it will be helpful to you to listen to and appreciate each other's point of view.

5.4.2 It is very helpful if a positive, practical and forward looking approach is adopted when negotiating as this can assist in achieving agreement. An agreement which is satisfying to all parties is only possible if you agree to give and take rather than insist on one particular set of demands.

6. Observers

6.1 The attendance of observers should occur only with the consent of all parties and the mediator.

6.2 Observers should sign a Confidentiality Agreement.

7. Support Persons

7.1 Support persons generally do not take part in the negotiations but are present to give moral support to the party.

7.2 Support persons should sign a Confidentiality Agreement.

The Opportunity for Feedback

As participants in a mediation conducted as part of The Law Society Mediation Program you may have the opportunity, if you wish, to comment on your mediation experience by forwarding your comments in writing to The Law Society of NSW.

Your positive, constructive and informed feedback will help us to maintain the highest possible standard of service provided by the Mediation Program.

For more information on any aspect of the Charter please contact the The Law Society's Dispute Resolution Legal Officer on (02) 9926 0214.

IV. The Law Society Mediation Precedents

1. The Agreement to Mediate (Including a Confidentiality Agreement)

This Agreement is provided by The Law Society as a guide only and should be modified to suit the dispute.

It is the responsibility of the participants to the mediation to ensure that the agreement meets the needs of the dispute.

During the preliminary conference the participants are asked to sign the Agreement to Mediate (The Agreement). The Agreement (reproduced in full on the next page) sets out the procedure followed during the preliminary conference and mediation.

The Agreement details the role of the mediator, the parties' commitment to co-operate with the mediator, the agreement to maintain confidentiality with respect to information disclosed during the mediation and agreement that certain matters will be privileged, including any settlement proposal.

The Agreement may be modified with the consent of all parties.

The Agreement to Mediate

THIS AGREEMENT IS MADE ON(day)(month)(year)

BETWEEN THE FOLLOWING PARTIES (In this Agreement called “the parties”)

Name of party (please print):

Address:

Name of party (please print):

Address:

Name of party (please print):

Address:

Name of party (please print):

Address:

Name of party (please print):

Address:

AND THE MEDIATOR/S (called “the mediator/s”)

Name of mediator (please print):.....

Address:.....

Name of mediator (please print):.

Address:.

Appointment of the Mediator

1. The parties appoint the mediator to mediate, in accordance with the terms of this Agreement, the dispute between them. The dispute is briefly described in Schedule 1 to this Agreement (the "Dispute"). The mediator accepts the appointment as set out in Schedule 2 to this Agreement.

Role of the Mediator

2. The mediator will be impartial. The mediator will assist the parties to attempt to resolve the Dispute by helping them to:
 - 2.1 systematically isolate the issues in dispute;
 - 2.2 develop options for the resolution of these issues;
 - 2.3 explore the usefulness of these options; and
 - 2.4 consider their interests and needs.
3. The mediator may meet with the parties together or separately.
4. The mediator will not:
 - 4.1 give legal or other professional advice to any party; or
 - 4.2 impose a result on any party; or
 - 4.3 make decisions for any party.
5. The mediator will not accept an appointment or act for any party in relation to any proceedings concerning the Dispute.
6. Neither party will take action to cause the mediator to breach Clause 5.

Conflicts of Interest

7. The mediator must, before the commencement of the mediation, disclose to the parties to the best of the mediator's knowledge any prior dealings with any of the parties as well as any interest in the Dispute.
8. 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 must immediately inform the parties of these circumstances. The parties will then decide whether the mediation will continue with that mediator or with a new mediator appointed by the parties.

Co-operation by the Parties

9. The parties will use their best endeavours to carry out the tasks set out in Clause 2 of this Agreement.
10. The parties will comply with reasonable requests and directions made by the mediator about the conduct of the mediation.

Conduct of the Preliminary Conference

11. As part of the mediation the mediator may schedule a preliminary conference at a time and place convenient to the parties to establish an agreed timetable for the mediation. Many preliminary conferences are done via telephone, video conferencing or electronically.

Authority to Settle and Representation at the Mediation Session

12. Parties must attend the mediation session. If a party is not a natural person it must be represented, at the preliminary conference and the mediation conference, by a person with full authority to make agreements binding on it in settling the Dispute (such authority to be evidenced by a written authority to participate).
13. At the mediation each party may have one or more other persons, including legally qualified persons, to assist and advise them.

Communication Between the Mediator and the Parties

14. Any information disclosed to a mediator in private is to be treated as confidential by the mediator unless the party making the disclosure states otherwise.

Confidentiality of the Mediation

15. The participants will not disclose to anyone not involved in the mediation any information or document given to them during the mediation unless that person, has signed the prescribed Confidentiality Agreement in the form attached to this Agreement.
16. The participants agree that, subject to Clauses 22 and 23, the following will be privileged and will not be disclosed, or be the subject of a subpoena to give evidence or to produce documents, in any proceedings in respect of the Dispute:
 - 16.1 any settlement proposal whether made by a party or the mediator;
 - 16.2 the willingness of a party to consider any such proposal;
 - 16.3 any statement made by a party or the mediator during the mediation; and,
 - 16.4 any information prepared for the mediation that is communicated to another party during the mediation.

Documentation

17. The mediator will return/destroy (*delete as applicable*) all documentation other than the Agreement to Mediate and the signed Settlement Agreement.

Suspension or Termination of the Mediation

18. A party may terminate the mediation at any time after consultation with the mediator.
19. The mediator has the discretion to terminate or suspend the process at any time.

20. The mediator may terminate the mediator's involvement in the mediation if, after consultation with the parties, the mediator feels unable to assist the parties to achieve resolution of the Dispute.
21. If agreement is reached at the mediation, either the heads of agreement or terms should be written down and signed by the parties before they leave the mediation.

Enforcement of the Settlement Agreement

22. If the Settlement Agreement is expressed to be binding on all parties, any party may enforce the terms of the Settlement Agreement by judicial proceedings.
23. For the purposes of enforcing an agreement of the mediation, any party may call evidence of the Settlement Agreement including evidence from the mediator and any party to the mediation.
24. Subject to Clauses 22 and 23 the Settlement Agreement is confidential unless otherwise agreed by the parties.

Exclusion of Liability and Indemnity

25. The mediator will not be liable to a party for any act or omission in the performance of the mediator's obligations under this Agreement unless the act or omission is fraudulent.
26. The parties, together and separately, indemnify the mediator against any claim for any act or omission in the performance of the mediator's obligations under this Agreement unless the act or omission is fraudulent.

The Cost of the Mediation

27. The parties together and separately will be liable to the mediator for the mediator's fees described in Schedule 3. The parties will share equally all the other costs of the mediation described in Schedule 3.
28. 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, i.e. costs of the mediation (including those of the legal practitioners to attend the mediation) will be treated as part of the overall costs in subsequent court proceedings which are generally payable by the losing party.
29. If the mediation does result in an agreement to resolve the Dispute, the costs of additional time (Schedule 3) in the mediation must be paid within 30 days from the receipt of the invoice.

Schedule 1: Description of the Dispute

The Dispute is the subject of proceedings (if applicable):

No: of in the Court

and/or a brief description of the Dispute:

.....

.....

.....

.....

.....

.....

.....

.....

Schedule 2: Date and Venue of Mediation Conference

The mediation of the Dispute will be held on :/...../..... (Date)

at: (Venue of mediation)

Schedule 3: Costs of the Mediation⁶

| | |
|--|---|
| 1. Mediator's Fees and Expenses: For the preliminary conference, all preparation time and the first 3 hours of the mediation session. | \$660 per party (including GST), to be paid in advance (unless otherwise agreed). ⁷ |
| 2. Additional Time Fee Estimate: Time beyond the first 3 hours of the mediation session. | In the event that the mediation session exceeds 3 hours, the mediator's fee will be \$..... ⁸ per hour thereafter. |
| 3. The Law Society's Administration Fee: | \$165 per party (including GST), to be paid in advance (unless otherwise agreed). ⁹ |
| 4. Room Hire: | At cost. |

⁶ Schedule 3, as written, is applicable to The Law Society Mediation Program.

⁷ The Mediator's Fees and Expenses (incl. GST) are to be paid in advance to The Law Society unless otherwise agreed prior to the mediation.

⁸ The Mediator to complete this section with the applicable hourly rate.

⁹ The Law Society's Administration Fee (incl. GST) is to be paid in advance to The Law Society unless otherwise agreed prior to the mediation.

Signing of the Agreement to Mediate

The parties,¹⁰ legal practitioners and the mediator have signed this Agreement to Mediate as follows:

Date:/...../.....

| | |
|--|---------------------------|
| Name of Party | Signature |
| Name of Legal Practitioner | Signature |

| | |
|--|---------------------------|
| Name of Party | Signature |
| Name of Legal Practitioner | Signature |

| | |
|--|---------------------------|
| Name of Party | Signature |
| Name of Legal Practitioner | Signature |

| | |
|--|---------------------------|
| Name of Party | Signature |
| Name of Legal Practitioner | Signature |

| | |
|----------------------------------|---------------------------|
| Name of Mediator | Signature |
|----------------------------------|---------------------------|

¹⁰ Where a party is an authorized representative of a company and that party signs an Agreement to Mediate, a Confidentiality Agreement and/ or a Settlement Agreement that party binds all servants and agents of the company.

Confidentiality Agreement for observers or support persons

Name of participant present at the mediation:

.....

(Please print)

I UNDERTAKE to the parties to the mediation, in exchange for being permitted by them to participate at the mediation, as follows:

1. I will not disclose to anyone any information received by me during the mediation, unless required by law to make such a disclosure.
2. I will not disclose to anyone involved in the mediation any information received by me during the mediation from a party to the mediation unless expressly authorised by the disclosing party to do so.
3. To the extent that I am required to disclose any information either by law or otherwise, I will immediately notify the other participants of this requirement.

.....

(Signature of participant)

...../...../.....

(Date)

.....

(Address)

2. The Model Clause

- 1 If a dispute arises from this contract, a party to the contract must not commence court or arbitration proceedings relating to the dispute unless that party has participated in a mediation in accordance with paragraphs 2 and 3 of this clause. This paragraph does not apply to an application for urgent interlocutory relief.
- 2 A party to this contract claiming that a dispute has arisen from the contract ("**the Dispute**") must give written notice specifying the nature of the Dispute ("**the Notice**") to the other party or parties to the contract. The parties must then participate in mediation in accordance with this clause.
- 3 If the parties do not agree, within seven days of receipt of the Notice (or within a longer period agreed to in writing by them) on:
 - 3.1 the procedures to be adopted in a mediation of the Dispute; and
 - 3.2 the timetable for all the steps in those procedures; and
 - 3.3 the identity and fees of the mediator; then:
 - 3.4 the President of The Law Society of New South Wales will appoint the mediator and determine the mediator's fees and determine the proportion of those fees to be paid by each party (to be in equal shares unless otherwise agreed by the parties);
 - 3.5 the parties must mediate the Dispute:
 - 3.5.1 with the mediator appointed under paragraph 3.4;
 - 3.5.2 with a genuine commitment to participate; and
 - 3.5.3 in accordance with the Mediation Guidelines of The Law Society of New South Wales.
- 4 If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief, that party must consent to orders under section 26 of the *Civil Procedure Act 2005* that the proceedings relating to the Dispute be referred to mediation by a mediator.
- 5 If the parties do not agree on a mediator within seven days of the order referred to in paragraph 4, the mediator appointed by the President of the Law Society of New South Wales will be deemed to have been appointed by the Court.
- 6 If a party:
 - 6.1 refuses to participate in a mediation of the Dispute to which it earlier agreed; or
 - 6.2 refuses to comply with paragraph 3.5 of this clause, a notice having been served in accordance with paragraph 2; then
 - 6.3 that party is not entitled to recover its costs in any court proceedings or arbitration relating to the Dispute, even if that party is successful; and
 - 6.4 that party is deemed to have consented to a decree of the Supreme Court of New South Wales that it will specifically perform and carry into execution paragraph 3.5 of this clause.

Notes to the Model Clause

The traditional remedy for failure to comply with an agreement to mediate was a stay of proceedings that were commenced in breach of the agreement to mediate. As a result of the enactment of section 26 of the *Civil Procedure Act 2005*, all Courts in New South Wales now have the power to order that proceedings be referred for mediation whether the parties consent or not. Accordingly, parties do not need to rely on the traditional remedy. Paragraph 4 provides that a party that commences proceedings in breach of the clause must consent to the making of an order under section 26.

Where a party to a contract refuses to mediate a dispute but does not itself commence proceedings, the traditional remedy of a stay of proceedings is of no use. Further, in this situation there are no proceedings in which an order under section 26 can be sought. What is needed by the party who wishes to mediate is an order that the other party participate in a mediation. Cases decided since *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*¹¹ and *Elizabeth Bay Developments Pty Limited v Boral Building Services Pty Limited*¹² strongly suggest that the Court would grant specific performance of an agreement to mediate that does not require supervision by the Court. Paragraph 5 provides for deemed consent to an order for specific performance.

Close analysis of *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*, *Elizabeth Bay Developments Pty Limited v Boral Building Services Pty Limited* and later cases, and the existence of an obligation under section 27 of the *Civil Procedure Act 2005* to participate in Court-referred mediation in good faith, both suggest that an agreement to mediate in good faith is enforceable. Paragraph 3.5.2 requires the parties to participate in the mediation in good faith. If not enforceable, the paragraph should be severable.

This clause is applicable for use in Law Society documents. The language in paragraphs 3.4 and 4.2 should identify the President of The Law Society as appointor of the mediator.

The language in paragraph 4 provides that a party in breach “*must consent to*” rather than “*must not oppose*” orders that the proceedings be referred to mediation.

¹¹ (1992) 28 NSWLR 194.

¹² (1995) 36 NSWLR 709.

3. Mediation Guidelines

Functions of the Mediator

1. The mediator will assist the parties to explore options for and, if possible, to achieve the expeditious resolution of their dispute (“the Dispute”) by agreement between them.
2. The mediator will not make decisions for a party or impose a solution on the parties.

Conflicts of Interest

3. The mediator must disclose to the parties to the best of the mediator’s knowledge any prior dealings the mediator has had with either of them and any interest the mediator has in the Dispute.
4. 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 immediately inform the parties of those circumstances. The parties will then confer and, if agreed, continue with the mediation before the mediator.

Co-operation in the Mediation

5. The parties must co-operate with the mediator and each other during the mediation to seek a mutually satisfying outcome to their dispute.
6. Each party must use its best endeavours to comply with reasonable requests made by the mediator to promote the efficient and expeditious resolution of the Dispute.

Authority and Representation

7. If a party is a natural person, the party must attend the mediation conference. If a party is not a natural person it must be represented at the mediation conference by a person with full authority to make binding agreements.
8. Each party may also appoint one or more other persons, including legally qualified persons, to assist and advise the party in the mediation and to perform such roles in the mediation as the party requires.

Conduct of the Mediation

9. The mediation, including all preliminary steps, will be conducted in such manner as the mediator considers appropriate having due regard to the nature and circumstances of the Dispute, the agreed goal of an efficient and expeditious resolution of the Dispute and the view of each party as to the conduct of the mediation.
10. The mediation conference shall be held within such period as the parties may agree.

11. The mediator may give directions as to:
 - 11.1 Preliminary conferences prior to the mediation conference.
 - 11.2 The exchange of experts' reports, the meeting of experts and the subsequent preparation of a joint experts' report with a view to identifying areas of agreement, narrowing the area of disagreement and clarifying briefly the reasons for disagreement.
 - 11.3 The exchange of brief written outlines of the issues involved.
 - 11.4 Service on the mediator prior to the mediation conference of any such reports and outlines.

Communication between the Mediator and a Party

12. The mediator may meet as frequently as the mediator deems appropriate with the parties together or with a party alone and in the latter case the mediator need not disclose the meeting to the other party.
13. The mediator may communicate with any party orally and/or in writing.
14. Any document relied upon by a party should be served by the party on the other party.
15. Information, whether oral or written, disclosed to the mediator by a party in the absence of the other party may not be disclosed by the mediator to the other party unless the disclosing party permits the mediator to do so.

Confidential Information

16. All confidential information disclosed during the mediation, or prior:
 - 16.1 May not be disclosed except to a party or a representative of that party participating in the mediation or if compelled by law to do so; and
 - 16.2 May not be used for a purpose other than the mediation.

Privilege

17. The following will be privileged and thus not admissible in proceedings before any court or other body:
 - 17.1 Evidence of anything said or of any admission made in a mediation conference; and
 - 17.2 A document prepared for the purposes of, or as a result of, a mediation conference.

Paragraphs 17.1 and 17.2 do not apply to any evidence or document if:

 - 17.3 The persons in attendance at, or identified during, the mediation conference and, in the case of a document, all persons specified in the document, consent to the admission of the evidence or document;
 - 17.4 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.

- 17.5 Disclosure is being sought merely to assert the fact that an agreement has been reached in mediation and/or to clarify the substance of the agreement.

Subsequent Proceedings

18. The mediator will not accept appointment as an arbitrator in, or act as an advocate in, or provide advice to a party to any arbitral or judicial proceeding relating to the Dispute.

Termination

19. A party may terminate the mediation immediately by giving written notice to each other party and to the mediator at any time.
20. The mediator may immediately terminate the engagement as mediator by giving written notice to the parties of that termination, 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 the Dispute.

Settlement

21. If settlement is reached at the mediation, heads of agreement or the terms of the settlement must be written down and signed by the parties and the mediator before any of the participants leave.

Enforcement

22. In the event that part or all of the Dispute is settled either party will be at liberty to enforce the terms of the settlement by judicial proceedings.

Exclusion of Liability and Indemnity

23. The mediator will not be liable to a party except in the case of fraud by the mediator for any act or omission by the mediator in the performance or purported performance of the mediator's obligations in the mediation.
24. The parties shall jointly and severally indemnify the mediator against all claims, except in the case of fraud by the mediator, 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 in the mediation.

Costs

25. The parties will share equally and be liable together and separately to the mediator for the mediator's fees for the mediation. The mediator may, at any time and from time to time, require each party to deposit with the mediator such sum as the mediator considers appropriate to meet the mediator's anticipated fees and disbursements.
26. If the mediation does not result in an agreement to resolve the Dispute, the costs of the mediation will be costs in the cause.

V. The Law Society Neutral Evaluation Model

1. Description of The Law Society Neutral Evaluation Model

Neutral evaluation is a process whereby parties obtain a non-binding, reasoned evaluation of their case on its merits from an experienced neutral third party acting as an evaluator.

The Law Society model requires that the parties exchange essential information and position statements early in the pre-trial period, after which the neutral evaluation session takes place which typically lasts three hours. The evaluator may ask questions and help the parties identify the main issues in dispute as well as areas of agreement. He or she offers an opinion as to the likely incidence of liability and where appropriate, a range of damages.

The evaluator has no power to impose a settlement or to determine the pre-trial management of the case. The process, whether or not it results in settlement, is confidential.

With the benefit of that assessment, the parties are encouraged to discuss settlement with or without the evaluator's assistance. They may also explore ways of narrowing the issues, exchanging information about the case, or otherwise preparing efficiently for trial. Law Society evaluators are senior practitioners with expertise in the area of dispute resolution who have been appointed to a Law Society alternative dispute resolution panel.

2. The Neutral Evaluation Model

1. Pre-evaluation preparation

Prior to a neutral evaluation session being conducted, the following steps are to occur:

- 1.1 The parties sign the Neutral Evaluation Agreement;
- 1.2 The evaluator sets a time, date and place for the evaluation process, in neutral territory e.g. evaluator's office, a court (meeting) room;
- 1.3 The evaluator establishes that the parties have the authority to settle;
- 1.4 The evaluator establishes that the parties must be accompanied by legal practitioners;
- 1.5 Seven (7) calendar days before the evaluation session, each party is required to forward to the evaluator and all other parties a written evaluation statement not exceeding 10 pages (double spaced) outlining:
 - 1.5.1 anything which may assist in reducing the issues in dispute or resolving of the dispute including liability and damages claimed; and
 - 1.5.2 any discovery or other procedural process which will assist in expediting case preparation and in equipping the parties to assess the strengths and weaknesses of their positions;
- 1.6 The evaluator draws attention to the limitations of the evaluation process and to the existence of other alternative dispute resolution processes which the parties may wish to consider;
- 1.7 The evaluator obtains the signed Neutral Evaluation Agreement; and
- 1.8 The evaluator advises the parties that the evaluator will have no further involvement in the dispute once the Evaluation Report has been delivered.

NOTE: If both parties agree, the evaluator may conduct the evaluation 'on the papers' (i.e. without a face-to-face evaluation session).

2. The Evaluation Process

2.1 Evaluator's Opening Statement

- 2.1.1 Sets out goals and procedure of the session;
- 2.1.2 Suggests constructive and co-operative problem solving approach by the parties;
- 2.1.3 Outlines the role of evaluator;
- 2.1.4 Sets ground rules (including no interruption during parties' statements);
- 2.1.5 Reminds parties that all oral communications are privileged and that the process and the evaluation are confidential;
- 2.1.6 Reminds the parties that there are no rules of evidence, no testimony or cross-examination;
- 2.1.7 Reminds the parties that opportunities for a negotiation session will be provided before the evaluator gives the evaluation.

2.2 Parties' Statements

- 2.2.1 Parties in turn outline their views on areas in dispute on the facts and give a summary of evidence for 15-30 minutes.
- 2.2.2 Each party may use documents during the statement if appropriate, to explain or support contentions.
- 2.2.3 The evaluator may interrupt to ask clarifying questions.

2.3 Evaluator's Summary of Party Statements and Outline of the Working Session Procedure

- 2.3.1 The evaluator identifies actual or potential areas of substantial agreement.
- 2.3.2 The evaluator identifies key facts that have not been established in the following categories:
 - (i) unknown to the parties; and
 - (ii) disputed.
- 2.3.3 The evaluator enters into the working session with the parties exploring the areas of dispute (including joint fact finding).
- 2.3.4 The evaluator asks questions of the parties as to the strengths and weaknesses of the evidence of each party.
- 2.3.5 At the conclusion of that working session the evaluator reminds the parties of the function of neutral evaluation and reminds the parties of the availability of a plan which is entered into if the evaluation process does not reach settlement, in order to ascertain and exchange further relevant information (refer 2.4.4).

2.4 Presentation of Evaluation

- 2.4.1 If sufficient information is available the evaluator leaves the session room and drafts an evaluation summarising the strengths and weaknesses of each party's case, the legal opinion and the potential litigation outcome.
- 2.4.2 Throughout the evaluation process, the parties are encouraged to explore possibilities for settlement. Providing all of the parties request it, the evaluator may then chair a discussion of settlement prospects with all parties and legal practitioners present. The evaluator, when acting as chair, will not disclose any part of the evaluation and will not act as a mediator or a conciliator or undertake a mediation process (e.g. option generation). If settlement is reached, the evaluator commits it to writing and encourages the parties to sign it.
- 2.4.3 When delivering the evaluation, the evaluator provides the evaluation on the information available at that time, predicts the probability of success by each party (including the legal position, liability and quantum range), reduction through contributory negligence, if any, the prospect of other remedies and the likely cost of completing discovery and hearing. These views may be expressed conditionally (eg. if X is accepted then A but if Y is accepted then B).
- 2.4.4 The evaluation is given in the presence of all parties and legal practitioners.
- 2.4.5 The evaluation is usually given orally on the day of evaluation or if that is not possible, very soon after the evaluation by telephone to each party.

- 2.4.6 The evaluation is given in writing at a later date if necessary.
- 2.4.7 If settlement is not reached, the evaluator may, in appropriate cases by mutual consent, record for each party a plan to ascertain and exchange further relevant information which may include:
- (i) formal or informal discovery;
 - (ii) the sharing of additional evidence on the most significant aspects of the case;
 - (iii) additional evidence from key witnesses;
 - (iv) expeditious discovery of crucial documents; and
 - (v) information about other dispute resolution processes and facilities.
- 2.4.8 The evaluator will advise the parties that the evaluator will have no further involvement in the dispute once the Evaluation Report has been delivered.

3. Evaluation Report

- 3.1 The parties are provided with written confirmation that the evaluation has taken place. Details of the evaluation discussions/findings are not disclosed.
- 3.2 If requested by the parties or the court, the evaluator reports to the court the fact that the evaluation has taken place but not the details of the evaluation.

4. Re-evaluation or Other Available Processes

- 4.1 At the conclusion of the initial evaluation, if agreed by the parties, a re-evaluation session or any other process including mediation is possible. Any other process including mediation would not be undertaken by the evaluator who conducted the neutral evaluation process.
- 4.2 Alternatively, the further session might be limited to a party responding, by a date stipulated:
- (i) to a request for certain information about the merits of the case or discovery of documents; or
 - (ii) to an offer or demand that was made at the initial Neutral Evaluation session.

VI. The Law Society Neutral Evaluation Precedents

1. The Law Society Neutral Evaluation Agreement (Including a Confidentiality Agreement)

This Agreement is provided by The Law Society as a guide only and should be modified to suit the dispute.

It is the responsibility of the participants to the evaluation to ensure that the agreement meets the needs of the dispute.

Developed by The Law Society's Dispute Resolution Committee, the Neutral Evaluation Agreement (reproduced in full on the next page) sets out the procedure to be followed during the preliminary conference and the evaluation session.

This Agreement details the role of the evaluator, the parties' commitment to co-operate with the evaluator, the agreement to maintain confidentiality with respect to information disclosed during the evaluation session and agreement that certain matters will be privileged.

The Agreement may be modified with the consent of all parties.

The Evaluation Agreement

THIS AGREEMENT IS MADE ON(day)(month)(year)

BETWEEN THE FOLLOWING PARTIES (In this Agreement called “the parties”)

Name of party (please print):

Address:

Name of party (please print):

Address:

Name of party (please print):

Address:

Name of party (please print):

Address:

Name of party (please print):

Address:

AND THE EVALUATOR

Name of Evaluator (please print):

Address:

Signature:

Appointment of Evaluator

1. The parties appoint the evaluator and the evaluator accepts the appointment to evaluate the dispute, briefly described in Schedule 1 to this agreement (the "Dispute"), in accordance with the terms of this agreement. The evaluator accepts that appointment as an expert and not as an arbitrator.

Role of the Evaluator

2. The evaluator will express his/her views of the likely outcome of the Dispute if resolved by a court based on the material (oral or written) put forward in the course of the evaluation session.
3. The evaluator may only meet with or conduct a conversation with a party in the presence of the other parties.
4. The evaluator may chair, if requested by the parties to do so, settlement negotiations between the parties after the party statements and before the working sessions are concluded.
5. The evaluator will **not**:
 - 5.1 Impose a result on any party; or
 - 5.2 Make decisions for any party; or
 - 5.3 Obtain from any independent person any advice or opinion as to any aspect of the Dispute; or
 - 5.4 Accept any subsequent appointment in any proceedings relating to the Dispute.
6. Neither party will take action to cause the evaluator to breach Clause 5.

Conflicts of Interest

7. The evaluator must immediately, on appointment, inform the parties of any circumstance which might reasonably be considered to affect the evaluator's capacity to act impartially. The parties will then decide whether the evaluation will continue with the evaluator or with a new evaluator appointed by the parties.

Co-operation by the Parties

8. The parties must co-operate with the evaluator and each other during the evaluation and will endeavour to comply with reasonable requests by the evaluator or other parties to promote the efficient and expeditious completion of the evaluation.
9. A party must provide to the other party/parties a copy of any document provided by it to the evaluator.

Conduct of the Preliminary Conference

10. The evaluator will schedule a preliminary conference, usually by telephone, at a time and venue convenient to the parties and the evaluator will establish a timetable for the evaluation and the procedures to apply for the evaluation.
11. The evaluator, the parties and their representatives who are to attend the evaluation session must attend the preliminary conference.

Representation at the Evaluation Session and Authority to Provide Information for the Purpose of the Evaluation

12. The parties must attend the evaluation unless otherwise agreed with the evaluator. Parties who attend must have authority to provide the information required by the evaluator for the purposes of the evaluation.
13. At the evaluation each party may have one or more other persons, including legally qualified persons, to assist and advise them and to perform such a role or roles as the parties and the evaluator require for the purposes of the evaluation.

Conduct of the Evaluation

14. The parties or their representatives will in turn outline their respective cases on liability and damages and any other remedies sought and produce any related evidence by which they intend to prove their case.
15. The evaluator will then leave the parties to prepare the evaluation providing his/her view on:
 - 15.1 the likelihood of any claim made by a party to the evaluation succeeding if the claim is determined in court; and
 - 15.2 the likely range of damages recoverable.
16. The evaluator will then join the parties. If the parties indicate to the evaluator that they wish to proceed to settlement negotiations, the evaluator may offer his/her services as a chairperson.
17. If parties do not proceed with settlement negotiations, the evaluator will provide them with the evaluation. The evaluation will include reasons for the evaluator's conclusions. The evaluation may be confirmed or expanded upon later in writing.
18. The evaluator may also:
 - 18.1 formulate a discovery plan and record it for each party; and/or
 - 18.2 provide information about other dispute resolution options.
19. The parties may then decide on subsequent action which may include adopting one of these other dispute resolution options.

Termination of the Evaluation

20. A party may terminate the evaluation at any time after consultation with the evaluator.
21. The evaluator may terminate any involvement in the evaluation if, after consultation with the parties, the evaluator feels unable to assist the parties in providing an evaluation of the Dispute.

Confidentiality of the Evaluation

22. The participants will not disclose to anyone not involved in the evaluation any information or document given to them during the evaluation unless that person has signed the prescribed Confidentiality Agreement in the form attached to this agreement.
23. The parties and the evaluator agree not to use any information produced for the evaluation for a purpose other than the evaluation.

Privilege

24. The parties and the evaluator agree that, subject to Clause 25, the following will be privileged and will not be disclosed or be the subject of a subpoena to give evidence or to produce documents in any proceedings in respect of the Dispute:
 - 24.1 Any statement made by a party or the evaluator during the evaluation;
 - 24.2 Any information prepared for the evaluation that is communicated to the other party during the evaluation;
 - 24.3 Any settlement proposal whether made by a party or the evaluator; and/or,
 - 24.4 The willingness of a party to consider any such proposal.

Settlement of the Dispute in the course of the Evaluation

25. If the parties settle their dispute in the course of the evaluation, the terms of settlement must be written down and signed by the parties before they leave the evaluation.

Exclusion of Liability and Indemnity

26. The evaluator will not be liable to a party for any act or omission in the performance of the evaluator's obligations under this agreement unless the act or omission is fraudulent.
27. The parties together and separately indemnify the evaluator against any claim for any act or omission in the performance of the evaluator's obligations under this agreement unless the act or omission is fraudulent.

The Cost of the Evaluation

28. The parties together and separately will be liable to the evaluator for the evaluator's fees described in Schedule 2. The parties will share equally all the other costs of the evaluation described in Schedule 2.

Schedule 1: Description of the Dispute

The Dispute is the subject of proceedings:

No: of in the Court

Insert brief description of the Dispute:

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

Schedule 2: Costs of the Evaluation¹³

| | |
|--|--|
| 1. Evaluator's Fees and Expenses: For the preliminary conference, all preparation time and the first 3 hours of the evaluation session. | \$660 per party (including GST), to be paid in advance (unless otherwise agreed) ¹⁴ |
| 2. Additional Time Fee Estimate: Time beyond the first 3 hours of the evaluation session. | Assuming the evaluation session exceeds 3 hours, the evaluator's fee will be \$..... ¹⁵ per hour. |
| 3. The Law Society's Administration Fee: | \$165 per party (including GST), to be paid in advance (unless otherwise agreed) ¹⁶ |
| 4. Room Hire: | At cost. |

¹³ Schedule 2, as written is applicable to The Law Society Evaluation Program.

¹⁴ The Evaluator's Fees and Expenses (inc GST) are to be paid in advance to The Law Society unless otherwise agreed prior to the evaluation.

¹⁵ The Evaluator to complete this section with the applicable hourly rate.

¹⁶ The Law Society's Administration Fee (inc GST) is to be paid in advance to The Law Society unless otherwise agreed prior to the evaluation.

Signing of the Evaluation Agreement

The parties,¹⁷ legal practitioners and the evaluator have signed this Evaluation Agreement as follows:

Date:/...../.....

| | |
|----------------------|------------------|
| | |
| Name of Party | Signature |

| | |
|-----------------------------------|------------------|
| | |
| Name of Legal Practitioner | Signature |

| | |
|----------------------|------------------|
| | |
| Name of Party | Signature |

| | |
|-----------------------------------|------------------|
| | |
| Name of Legal Practitioner | Signature |

| | |
|----------------------|------------------|
| | |
| Name of Party | Signature |

| | |
|-----------------------------------|------------------|
| | |
| Name of Legal Practitioner | Signature |

| | |
|----------------------|------------------|
| | |
| Name of Party | Signature |

| | |
|-----------------------------------|------------------|
| | |
| Name of Legal Practitioner | Signature |

| | |
|--------------------------|------------------|
| | |
| Name of Evaluator | Signature |

¹⁷ Where a party is an authorised representative of a company and that party signs an Evaluation Agreement, Confidentiality Agreement and/or a Settlement Agreement that party binds all servants and agents of the company.

Confidentiality Agreement

Name of participant present at the evaluation:

.....
(Please print)

I UNDERTAKE to the parties to the evaluation that, in exchange for being permitted by them to participate at the evaluation as follows:

1. I will not disclose to anyone any information received by me during the evaluation, unless required by law to make such a disclosure.
2. I will not disclose to anyone involved in the evaluation any information received by me during the evaluation from a party to the evaluation unless expressly authorised by the disclosing party to do so.
3. To the extent that I am required to disclose any information either by law or otherwise I will immediately notify the other participants of this requirement.

.....
(Signature of participant)

...../...../.....
(Date)

.....
(Address)

VII. Hybrid Processes

1. Introduction

Arbitration is designed to determine the issues in dispute but may leave unidentified and unaddressed the underlying interests of the parties.

Mediation as practised under the Law Society Mediation Model is designed to elicit those interests and to enable the parties to craft their own agreed solutions, which may render determination of those issues unnecessary.

Combining the two processes with the same practitioner acting as both arbitrator and mediator can save time and money and may preserve or restore relationships.

There are several ways by which these processes may be combined.

2. Description of Hybrid Processes

Arb-Med-Arb

Concerns regarding using the same person as arbitrator if the mediation was unsuccessful have been addressed in section 27D of the *Commercial Arbitration Act 2010 (NSW)*. The section allows an arbitrator to mediate if the parties give their written consent, either in the arbitration agreement or otherwise, in which case the arbitrator may, as mediator, hold private sessions with each party.

The value of private sessions is that, apprised separately by both sides of their underlying interests, the mediator often sees room for progress that the parties do not. The parties will need to decide what information they disclose privately to the mediator and, in light of the possibility of the mediator subsequently arbitrating, they are likely to be unwilling to disclose their “bottom line” lest that disclosure affect the eventual arbitral award.

Accordingly, the kind of dispute best suited to this hybrid process is one with discrete legal issues to be arbitrated, but which also indicates creative possibilities, not dependent on a determination of quantum or of who is right and who is wrong, so that the creative possibilities can be the primary focus of attention in the mediation. Likewise, a mediator with arbitration experience or an arbitrator with mediation experience would be best suited as the neutral.

If the mediation is terminated without resolving the entire dispute, section 27D requires the parties again to give their written consent before the arbitrator may proceed to arbitrate and requires the arbitrator, before taking any further steps in the arbitration, to disclose to the parties any confidential information learned during the mediation which the arbitrator considers material to the arbitration. The purpose of this requirement is to ensure procedural fairness in the arbitration and the enforceability of the arbitral award by enabling the parties to know the case they have to meet. The provision echoes comparable legislation in Hong Kong¹⁸ and Singapore.¹⁹

¹⁸ See sections 2A-2C of the *Arbitration Ordinance* (Cap 341) (Hong Kong).

Since the parties cannot be expected to consent to the mediator proceeding to arbitrate without knowing beforehand what confidential information of theirs, if any, the mediator proposes to disclose, they should seek that information privately from the mediator before they decide whether or not to give their consent and, if unhappy with the answer, should refuse their consent, in which case the information will remain confidential and another arbitrator must be appointed.

In this way the section preserves the potential value of the private session in the mediation while ensuring the integrity of the arbitration and affording the parties the opportunity to opt out of using the mediator as arbitrator once the mediation is terminated.

Although there can be savings in both time and money in having the same person fulfil both roles, if the mediation is not successful and one party declines to agree to the mediator proceeding to arbitrate, at least some and, possibly all, of the costs of the arbitration to that point will be lost. Accordingly, the appropriate time to move from arbitration to mediation is shortly after the arbitration has commenced, once the issues to be arbitrated are clear.

It is important that those issues be clear before the mediation begins, to enable the mediator and the parties to appreciate whether or not any confidential information, which the parties choose to disclose during the mediation, is material to the arbitration.

Although hybrid processes have been used in Australia to an extent, section 27D should prompt more parties and their advisors to adopt this process, knowing they can withdraw after the mediation phase if they feel uncomfortable with the mediator resuming the arbitration. The section should also stimulate mediators to learn to arbitrate, arbitrators to learn to mediate and advisors to learn to choose the process to suit the dispute and the parties. The outcome should be the swifter and cheaper resolution of disputes, as distinct from the mere settlement of cases.

Med-Arb

If there is no arbitration agreement and the parties contemplate a mediation followed by arbitration by the same person of any unresolved issues, section 27D of the *Commercial Arbitration Act 2010 (NSW)* does not apply, so the parties may choose to incorporate into their mediation agreement a provision reflecting the procedure contemplated by the section, along the following lines:

“If at the conclusion of the mediation the parties wish to consider appointing the Mediator to determine any unresolved issues as arbitrator, the Mediator shall identify privately to each disputant from whom confidential information was received by the Mediator such of that disputant’s confidential information as the Mediator considers material to the arbitration. If the parties wish to proceed with the appointment, then all parties shall so appoint the Mediator in writing, expressly acknowledging that they have had the opportunity of obtaining legal advice before making the appointment; that they have no objection to the Mediator acting as arbitrator; and specifying any institutional rules under which the arbitration is to be conducted. The Mediator may decline the appointment if the Mediator considers that he or she is unable impartially to determine any of the unresolved issues. If the Mediator accepts the appointment, before taking any steps in the proceeding the Mediator must disclose to all parties any confidential information obtained in the mediation that the Mediator considers relevant to the arbitration.”

¹⁹ See section 17 of the *International Arbitration Act (Cap134A)* (Singapore), which followed the Hong Kong Arbitration Ordinance in this regard.

Arb-Med

This is the reverse of Med-Arb. The arbitrator's award is sealed and is not revealed while the arbitrator proceeds to mediate. If the mediation is successful, the settlement agreement between the parties governs the resolution of the dispute and the award is never unsealed. However, if mediation fails to settle all issues, the arbitrator-mediator will unseal the arbitral award and deliver it to the parties to resolve the dispute.

This process avoids any disclosure of confidential information and also ensures that the arbitral award is uninfluenced by anything that transpired in the mediation. The parties embark upon the mediation with a strong incentive to settle since they know that if they fail to reach agreement, whatever is in the sealed award will bind them.

Provided that the arbitration is strictly contained within a tight time frame, the "wasted" costs of the arbitration, if the parties reach agreement in the mediation, are minimised.

APPENDIX A

A selection of government and not for profit organisations which offer alternative dispute resolution

| Mediator Panel Providers | |
|---|---|
| <p>The Law Society of NSW 170 Phillip Street Sydney NSW, 2000 DX 362 Sydney</p> <p>Tel: (02) 9926 0333 Fax: (02) 9231 5809 Email: lawsociety@lawsociety.com.au</p> <p>http://www.lawsociety.com.au/community/disputesandmediation/index.htm</p> | <p>NSW Bar Association Selborne Chambers 174 Phillip Street Sydney NSW 2000 DX 1204 Sydney</p> <p>Tel: (02) 9232 4055 Fax: (02) 9221 1149</p> <p>http://www.nswbar.asn.au/BarADR</p> |
| <p>LEADR Level 1, 13-15 Bridge Street Sydney NSW 2000</p> <p>Tel: (02) 9251 3366 Fax: (02) 9251 3733 Email: leadr@leadr.com.au</p> <p>http://www.leadr.com.au/</p> | <p>Institute of Arbitrators and Mediators Australia Level 9, 52 Phillip Street Sydney NSW 2000 DX 15 Sydney</p> <p>Tel: (02) 9241 1188 Fax: (02) 9252 2911 Email: nsw.chapter@iama.org.au</p> <p>http://www.iama.org.au</p> |
| <p>Chartered Institute of Arbitrators Level 16, 1 Castlereagh Street Sydney NSW 2000</p> <p>Tel: 02 9230 0677 Email: info@ciarb.net.au</p> <p>http://www.ciarb.net.au/</p> | |

Court and Government Mediation Services

Local Court of NSW

143-147 Liverpool Street
Sydney NSW 2000

PO Box A4
Sydney South NSW 1235

Tel: 1300 679 272
Fax: (02) 9267 2963
Email:

local_court_downing_centre@agd.nsw.gov.au

<http://www.localcourt.lawlink.nsw.gov.au/localcourts/adr.html,c=y>

District Court of NSW

John Maddison Tower
86 Goulburn Street
Sydney NSW 2000

District Court Civil Registry
PO Box K1026
Haymarket NSW 2000

Tel: 1300 679 272
Fax: (02) 9377 5800
Email: ag_sdc_civil@agd.nsw.gov.au

http://www.districtcourt.lawlink.nsw.gov.au/districtcourt/alternative_dispute_resolution.html,c=y

Supreme Court of NSW

Law Courts Building, Queens Square
184 Phillip Street
Sydney NSW 2000
DX 829 Sydney

Tel: 1300 679 272
Fax: (02) 9230 8234
Email: supreme_court@courts.nsw.gov.au

http://www.lawlink.nsw.gov.au/lawlink/supreme_court/l_sc.nsf/pages/SCO_mediation

Federal Court of Australia

Level 17, Law Courts Building
Queens Square
184 Phillip Street
Sydney NSW 2000
DX 613 SYDNEY

Tel: (02) 9230 8567
Fax: (02) 9230 8535
Email: nswdr@fedcourt.gov.au

<http://www.fedcourt.gov.au/litigants/mediation/mediation.html>

Community Justice Centres NSW

Community Justice Centres provide free mediation services throughout NSW.

Locked Bag 5111
Parramatta NSW 2124

Toll Free: 1800 990 777 (Australia only)
Fax: (02) 8688 9616
Email: cjc_info@agd.nsw.gov.au

http://www.cjc.nsw.gov.au/cjc/com_justice_mediation.html,c=y

Office of Legal Services Commissioner

GPO Box 4460
Sydney NSW 2001
DX 359 Sydney

Tel: (02) 9377 1800
Fax: (02) 9377 1888
Email: olsc@agd.nsw.gov.au

<http://www.lawlink.nsw.gov.au/olsc>

| | |
|---|---|
| <p>Administrative Appeals Tribunal Level 7, City Centre Tower 55 Market Street Sydney NSW 2000 DX 10200 Sydney Stock Exchange</p> <p>Tel: (02) 9391 2400 (metropolitan area) Tel: 1300 366 700 (country areas) Fax: (02) 9283 4881 Email: Sydney.Registry@aat.gov.au</p> <p>http://www.aat.gov.au/LawAndPractice/AlternativeDisputeResolution.htm</p> | <p>Administrative Decisions Tribunal Level 10, John Maddison Tower 86-90 Goulburn Street Sydney NSW 2000</p> <p>Tel: (02) 9377 5711 Fax: (02) 9377 5723</p> <p>http://www.adt.lawlink.nsw.gov.au/adt/administrative_easy_guide/administrative_reach_agree.html</p> |
| <p>Consumer, Trader & Tenancy Tribunal Level 12, 175 Castlereagh St GPO Box 4005 Sydney NSW 2001 DX 11638 Sydney Downtown</p> <p>Tel: 1300 135 399 Fax: 1300 135 247 Email: ctttenquire@cttt.nsw.gov.au</p> <p>http://www.cttt.nsw.gov.au/Dispute_resolution.html</p> | <p>NSW Fair Trading PO Box 972 Parramatta NSW 2124</p> <p>Tel: 13 32 20 Fax: (02) 9895 0222</p> <p>http://www.fairtrading.nsw.gov.au/</p> |
| <p>Land and Environment Court of NSW GPO Box 3565 Sydney NSW 1043 DX 264 Sydney</p> <p>Tel: (02) 9113 8200 Fax: (02) 9113 8222 Email: lecourt@agd.nsw.gov.au</p> <p>http://www.lawlink.nsw.gov.au/lawlink/lec/ll_ec.nsf/pages/LEC_adrsummary</p> | |

Family Mediation Services

Relationships Australia (NSW)

Relationships Australia NSW provides various Mediation and Family Dispute Resolution Services across NSW and Australia.

Tel: (02) 8874 8010

National line: 1300 364 277

Email: mediation@ransw.org.au

<http://www.nsw.relationships.com.au/ourservices/mediation.aspx>

Family Relationship Centre

Family Relationship Centres run Centres dedicated to family dispute resolution across NSW and Australia.

Tel: 1800 050 321

For the contact details for a specific Centre located near you, please check the link below.

<http://www.nsw.relationships.com.au/contact-us/frc.aspx>

Adolescent Family Therapy and Mediation Service

Relationships Australia NSW runs two Adolescent Family Therapy and Mediation Services: RAPS in North Parramatta, and Touchstone in Wollongong.

RAPS:

Tel: (02) 9890 1500

Toll free: 1800 654 648

Touchstone:

Tel: (02) 4221 2000

Toll Free: 1800 240 231

Email: illawarra@ransw.org.au

<http://nsw.relationships.com.au/en/ourservices/services-library/adolescent.aspx>

Family Court of Australia (Mediation Services)

1- 3 George St
Parramatta NSW, 2150

National Enquiry Centre
GPO Box 9991
Parramatta NSW 2150

Tel: 1300 352 000

Fax: (02) 9893 5600

Email: enquiries@familylawcourts.gov.au

<http://www.familycourt.gov.au/>

Interrelate Mediation Service

Interrelate run Mediation Service Centres across NSW.

Tel: 1300 736 966

For the contact details for a specific Centre located near you, please check the link below.

<http://www.interrelate.org.au/>

UNIFAM – Counselling and Mediation

Level 6, 146 Marsden Street
Parramatta NSW 2150

PO Box 3156
Parramatta NSW 2124

Tel: (02) 8830 0777

Fax: (02) 9633 5610

Email: unifam@unifamcounselling.org

<http://www.unifamcounselling.org/>

Family Mediators

An online service run by First Law Promotions Pty Ltd

PO Box K 1328
Haymarket NSW 1240

Tel: (02) 9211 1881

Fax: (02) 9387 6710

Email: promotions@mediatorlocator.com.au

<http://www.familymediators.com.au/>

Family Dispute Resolution Register

An online service run by the Commonwealth Attorney-General's Department.

Tel: 1800 025 255

Email: fdrregistration@ag.gov.au

<http://www.fdr.ag.gov.au/Search.aspx>

Australian Institute of Family Law Arbitrators and Mediators (AIFLAM)

GPO Box 1989
Canberra ACT 2601

Tel: (02) 6246 3758

Fax: (02) 6248 0639

Email: mail@familylawsection.org.au

<http://www.aiflam.org.au/aiflam/>

| Other Disputes | |
|--|---|
| <p>Mediate Today Ground Floor, 3 Spring Street Sydney NSW 2000</p> <p>Tel: 1300 760 225 Email: mediate@mediate.com.au</p> <p>http://www.mediate.com.au/</p> | <p>Mediator Standards Board (MSB) This MSB provides an online list of Recognised Mediator Accreditation Bodies which keep registers of mediators.</p> <p>Email: info@msb.org.au</p> <p>http://www.msb.org.au</p> |
| <p>InterMEDIATE Dispute Management</p> <p>Tel: 1300 367 330 Email: Available via their website.</p> <p>http://www.intermediate.com.au/</p> | <p>The Accord Group Level 2, 370 Pitt Street Sydney NSW 2000</p> <p>Tel: (02) 9264 9506 Fax: (02) 9264 8268 Email: codedisputes@accordgroup.com.au</p> <p>http://www.accordgroup.com.au/</p> |
| <p>Health Care Complaints Commission Level 13, 323 Castlereagh Street (corner of Hay St) Sydney NSW 2000</p> <p>Locked Mail Bag 18 Strawberry Hills NSW 2012 DX 11617 Sydney Downtown</p> <p>Tel: (02) 9219 7444 Toll Free: 1800 043 159 (Sydney only) Fax: (02) 9281 4585 Email: hccc@hccc.nsw.gov.au</p> <p>http://www.hccc.nsw.gov.au/</p> | <p>The Royal Institution of Chartered Surveyors (RICS) Suite 2, Level 16 1 Castlereagh Street Sydney NSW 2000</p> <p>Tel: 1300 953 459 Fax: 1300 953 529 Email: Available via their website.</p> <p>http://ricsdrs.com.au/dispute-resolution/</p> |
| <p>Rural Assistance Authority – Farm Debt Mediation Services 161 Kite St Orange NSW 2800 DX 3037 Orange</p> <p>Tel: (02) 6391 3000 Fax: (02) 6391 3098 Toll Free: 1800 678 593 Email: rural.assist@raa.nsw.gov.au</p> <p>http://www.raa.nsw.gov.au/fdm</p> | <p>Arts Law Centre of Australia The Gunnery 43-51 Cowper Wharf Road Woolloomooloo NSW 2011</p> <p>Tel: (02) 9356 2566 Fax: (02) 9358 6475 Toll Free: 1800 221 457 Email: artslaw@artslaw.com.au</p> <p>http://www.artslaw.com.au/info-sheets/info-sheet/mediation-service/</p> |