

Guidelines for Commercial Mediation

Effective 1 March 2019

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Introduction

Parties can often best resolve business disputes with the assistance of a neutral third party, the mediator. Mediation promotes the goal of enabling the parties to settle their own dispute to their mutual satisfaction. Mediation is a voluntary process. The mediator does not impose a decision on the parties or make decisions for the parties. The mediator's role is to facilitate discussions between the parties by identifying and clarifying the issues in dispute, and assisting the parties to resolve the dispute by exploring alternatives and searching for solutions. If it is not possible to resolve all issues between the parties, the mediator may be able to assist in narrowing or defining the issues in dispute, developing options to resolve them and satisfying the interests of the parties. The aim of mediation is to reduce adversity and to achieve a timely and cost-effective solution for the parties.

Parties may agree to mediation at any stage of a dispute, irrespective of whether litigation or other proceedings have commenced. These Guidelines may be invoked by the parties referring the dispute to ADC voluntarily, by Court order, or as a consequence of an ADC (or Australian Commercial Disputes Centre, 'ACDC', a prior registered name of ADC) mediation clause in the contract which governs the subject of the dispute. If the parties to a dispute invoke these Guidelines by any of the above means, they will be deemed to have agreed to be bound by the terms and conditions of these Guidelines and shall fully co-operate to participate in the mediation process.

In the event that there is a conflict or inconsistency between the Mediation Agreement and these Guidelines:

- (a) the Guidelines shall prevail if the conflict or inconsistency relates to any matter set out in clause 4(b), 9, 12 or 13 of the Guidelines;
- (b) otherwise the Mediation Agreement shall prevail.

Mediation can be used prior to, or in conjunction with, other forms of dispute resolution such as expert appraisal, expert determination, arbitration and litigation.

For more information about Commercial Mediation or other ADC dispute resolution methods, please ring ADC (Australian Disputes Centre) on (02) 9239-0700.

Address:

**Australian Disputes Centre
Level 16, 1 Castlereagh Street
Sydney NSW 2000**

Email: info@disputescentre.com.au

PROCEDURES

1. Notification of Parties to the Dispute

- (a) If these Guidelines have been invoked by referring the dispute to ADC, the aggrieved party must give written notice to the other party (or parties) setting out the nature of the dispute, how the dispute arose and the solution it seeks to the dispute (the "Notice of Dispute"). There is not a standardised form of Notice of Dispute, although it must be apparent on the face of the document that it is a notification of a dispute.
- (b) Within seven (7) days of receipt of the Notice of Dispute, the parties must take reasonable steps to confer and try to resolve the dispute.
- (c) If the dispute is not resolved within seven (7) days or within such further period as the parties agree, then any one of the parties can refer the dispute to ADC for mediation. At the same time each party will:
 - (i) pay half (or such other proportion as may be agreed by the parties and ADC) of the ADC registration fee set out in Clause 13 and Schedule 1 in force on the date the dispute is referred to mediation (or such other time as ADC in its absolute discretion considers appropriate); and
 - (ii) provide ADC with a brief statement of the key facts and issues that each consider will arise in the mediation and the contact details of all involved parties.

2. Selecting a Mediator

- (a) Upon receiving the registration fee and the statement(s) referred to in Clause 1(c) from the parties, ADC will select two or more appropriately qualified mediators and provide the parties with details of each person's qualifications, experience and fees.
- (b) Within seven (7) days of receiving the details and information concerning the fees, each party shall provide ADC with a list of preferences in relation to the proposed mediators. If any party believes that a person whose details have been provided is unsuitable to act as the mediator of the dispute, the party should notify ADC accordingly.
- (c) Upon receipt of the list of preferences, ADC will determine whether the parties have identified a preferred mediator. If so, ADC will appoint the preferred mediator.
- (d) If the parties failed to identify a preferred mediator, and the agreement made by the parties has provided for an alternative method of appointing the mediator, ADC will follow that method. If the parties have not specified any alternative method, or the alternative method does not result in the appointment of a mediator within a reasonable time, ADC will, in its absolute discretion, appoint a mediator.
- (e) Upon appointment of a mediator, ADC will provide the mediator with the details of the dispute provided by the parties and request the mediator to advise ADC if there may be any conflict of interest or any reason for perception of bias in that person

acting as mediator of the dispute. If so advised, ADC will inform all parties. If the parties still wish to continue with that mediator, they must provide ADC with a statement, in writing, that they are aware of the conflict of interest or facts that may give rise to a perception of bias but wish to proceed with the appointment of that mediator (see Clause 3). If the parties do not wish to continue with that mediator, ADC will, in its absolute discretion, appoint another mediator.

3. Neutrality of Mediator

- (a) The mediator is independent and impartial and has no vested interest in the outcome of the settlement of the dispute.
- (b) If the mediator becomes aware at any stage of any circumstances that might reasonably be considered to affect adversely on their capacity to act independently or impartially, the mediator must inform the parties immediately. The mediator must in such circumstances terminate the proceedings in accordance with Clause 10, unless the parties agree otherwise.
- (c) The mediator will not later act for any party in, or relating to, any arbitral or court proceedings or expert determination in respect of the dispute.

4. Mediation Agreement / Fees / Conduct of Mediation

- (a) Within fourteen (14) days of appointment, the parties and mediator will sign a Mediation Agreement. A draft Mediation Agreement will be provided to the parties after the matter is registered with ADC. The Mediation Agreement shall be incorporated into and form part of these Guidelines.
- (b) Following execution of the Mediation Agreement by the parties and the mediator, ADC will provide the parties with an estimate of the fees that will be incurred by the mediator and ADC in the mediation. Unless otherwise agreed between the parties, the mediator and ADC, within fourteen (14) days of receiving the fee estimate, the parties will provide ADC with the requested security deposit. The security deposit must be paid prior to the commencement of the mediation. The security deposit may be utilised in accordance with Clause 13 of these Guidelines.
- (c) The parties shall confer with each other and the mediator to determine what further steps (including production of further documentation to the mediator) need to be taken.

5. Date, Time and Place of Mediation

- (a) The mediation will take place as soon as practicable after ADC receives the security deposit and any further documentation agreed to be provided has been forwarded to the mediator. The mediation will be fixed for a date and time agreeable to the parties and the mediator.
- (b) The place for holding the mediation shall be at the Australian Disputes Centre or such other neutral venue as the parties might agree. In the event that the ADC is not available and the parties cannot agree to another neutral venue, the ADC shall

nominate the venue. The parties agree to be bound by the ADC's decision and will do all things necessary to enter into any agreement to secure use of that venue.

6. Authority of Mediator

- (a) Each party to the dispute must co-operate with and abide by any reasonable directions given by the mediator and ADC with the aim of efficient resolution of the dispute.
- (b) The mediator does not have the authority to impose a settlement on the parties, but will attempt to help them to reach a satisfactory and fair resolution of the dispute. The mediator is authorised to conduct joint and separate meetings with the parties as and when the mediator considers appropriate.
- (c) If necessary, the mediator may seek the consent of the parties to enable the mediator to obtain expert advice concerning specialist technical aspects of the dispute. If the parties agree to the appointment of such an expert and agree to be responsible for the expenses of obtaining such advice, ADC will, in consultation with the parties and the mediator, make the arrangements for appointing the expert.
- (d) If the parties select a dispute resolution process that provides for the dispute to be referred to expert determination in the event that the mediation is unsuccessful, the parties and the mediator agree that the mediator cannot act as the expert.

7. Representations and Attendance

- (a) If a party is an individual, that individual must attend the mediation. If the party is a company, a representative authorised by the company must attend the mediation. The representative must have authority to settle the matter.
- (b) Each party is entitled to bring its legal representative and any other person with information or knowledge relevant to the resolution of the dispute. Unless the parties and ADC otherwise agree, each party shall inform ADC at least seven (7) days prior to the mediation on the identity of the legal representative.

8. Separate Sessions

- (a) Each party (with or without their advisers) may meet separately with the mediator.
- (b) Any information discussed in those separate sessions will not be revealed to the other parties by the mediator, unless otherwise agreed by the party.

9. Confidentiality

- (a) The parties agree that as far as possible, the mediation is confidential and that all persons attending the mediation will sign a confidentiality agreement. This agreement extends to any settlement proposal, statement made during the mediation or information prepared for the mediation. However, the requirement of confidentiality will not prevent a party from making necessary disclosures of information to its legal advisers, insurers or other necessary parties such as a party's board of directors or its employers, or to other members of a group making up a

party to the mediation. In the event that a mediator is to act as an arbitrator in proceedings involving the parties, the requirement of confidentiality in Clause 9 will not prevent the mediator from disclosing confidential information before conducting subsequent arbitration proceedings in accordance with the applicable legislative provisions allowing for a mediator to act as arbitrator.

All parties must understand at the outset that exceptions to confidentiality exist and if necessary, the parties should seek their own advice on these exceptions.

- (b) Subject to Clause 11, the following will be privileged and the parties agree not to call upon or seek to subpoena the mediator or any officer, employee, or agent of ADC to give evidence or to produce documents or to rely on or introduce as evidence in any arbitral or judicial proceedings:
- (i) views expressed or suggestions made by the mediator or either party with respect to a possible settlement of the dispute;
 - (ii) admissions made by either party;
 - (iii) proposals for settlement of the dispute made by the mediator or either party;
 - (iv) the fact that either party has indicated a willingness to accept a proposal for settlement made by the mediator;
 - (v) documents presented at the mediation, such as position papers, unless those documents are otherwise discoverable, or notes made within the mediation by the mediator or by any party;
 - (vi) any matter arising in connection with the mediation.
- (c) The parties agree not to seek to join the mediator or any officer, employee, or agent of ADC to any legal proceedings brought by third parties, whether or not the proceedings relate to this dispute.
- (d) Every aspect of every communication within the mediation is without prejudice. However, if the dispute is settled, then the agreement which is reached shall be recorded in writing in a Settlement Agreement, signed by all the parties to the dispute. The parties agree that any such Settlement Agreement may be relied upon by the parties as evidence of the settlement of the dispute.
- (e) No statements or comments, whether written or oral, by any person at the mediation or by any officer, employee, or agent of ADC in preparation for or in the course of the mediation shall be relied upon to initiate or maintain any action for defamation, libel, slander, or any related complaint against those persons listed above. The parties agree that this document may be produced and relied upon as a complete defence to any such action.
- (f) No transcript of records is kept of the mediation or a pre-mediation meeting.

10. Termination of the Mediation

The mediation may be terminated:

- (a) by a party giving written or oral notice to each party to the mediation and the mediator;
- (b) upon execution of a written Settlement Agreement in respect of the dispute;
- (c) by the mediator giving written or oral notification to the parties if, after consultation with the parties, the mediator forms the view that he or she will be unable for whatever reason to assist the parties to achieve resolution of the dispute. If the mediation is terminated in accordance with this clause, and the parties so request, ADC shall appoint a further mediator to complete the mediation.

11. Enforcement of the Settlement Agreement

In the event that one or more of the disputed issues are settled, any party to the mediation may enforce the terms of the Settlement Agreement reached at the mediation by judicial proceedings.

12. Liability

Except in the case of fraud:

- (a) the parties shall release ADC, its officers, employees and agents, and the mediator from any liability of any kind whatsoever arising out of or in connection with the mediator's appointment and/or the mediation.
- (b) the parties jointly and severally indemnify, and will keep indemnified, ADC, its officers, employees, servants and agents, and the mediator for and against any claim for negligence or breach of any trade practices or fair trading legislation which may arise in connection with or resulting from the mediator's appointment or any act or omission arising out of or in connection with the mediation. The indemnity is expressly given for the benefit of the parties indicated and may be enforced by them individually if necessary.

This document may be produced and relied upon as a complete defence to any such claim.

13. Fees

- (a) For each mediation, ADC charges a non-refundable registration fee as specified in Schedule 1.
- (b) The parties agree they are equally responsible for the costs of the mediation, including room hire, ADC's non-refundable registration fee, any further administration fees due to ADC as specified in Schedule 1, and the mediator's fee (of which 15% is payable to ADC) and any other disbursements.
- (c) The parties must forward to ADC their half share or other such proportion of the security payment as required by these Guidelines.

- (d) The parties must forward to ADC their half share or other such proportion of the room hire payment as required by these Guidelines.
- (e) The mediator and ADC may submit progressive invoices to the parties which can be drawn down against the security deposit.
- (f) In the event that the security deposit is insufficient to cover the anticipated fees and disbursements of the mediator or ADC, the parties agree to submit such further security deposit as may be reasonably requested by ADC or the mediator.
- (g) If further security deposit is not received by ADC within seven (7) days of ADC's or the mediator's request (or such shorter period as ADC or the mediator reasonably require), the mediator and ADC may suspend provision of their services in the mediation until such time when further security deposit is received.
- (h) In the event that the mediation is suspended in accordance with any of the above clauses, the parties agree that neither ADC, its officers, employees, servants, or agents nor the mediator shall have any liability whatsoever to the parties and the parties will indemnify ADC, its officers, employees, servants and agents and the mediator from and against any such claim by any person. This document may be produced and relied upon as a complete defence to any such claim.

SCHEDULE 1

1. For each mediation, ADC charges a registration fee as follows:
 - a. \$1,500.00 (inclusive of GST) which covers registration and the first 5 hours of administration by ADC; or
 - b. in the case of a mediation involving more than two (2) parties, ADC may in its absolute discretion charge each party \$750.00 (inclusive of GST) which covers registration and the first 5 hours of administration by ADC.
2. ADC may in its absolute discretion charge a further administration fee at the rate of \$250.00 (inclusive of GST) per hour after the first 5 hours of administration covered by the registration fee.

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