

## MEDIATION: Nutshell and agreement

The dispute resolution process has a number of pathways available to resolve issues. The **Resolution Facilitator** is available to help match the right pathway to your needs.

### Mediation Nutshell - What is it?

Mediation is an informal process with a mediator trained in assisting participants to resolve disputes, without the mediator providing a view.

The goal of mediation is for people to have a safe space and a skilled person to assist their negotiation. This can often result in a resolution.

A mediator is a person trained and accredited to assist people to understand issues and explore options.

### Who is involved?

All those that need to be involved in the solution usually attend. This is decided as part of the mediator's intake process. For intake, a mediator meets with all participants to understand the issues in the dispute and confirm who should be at the table. A mediator will meet with the participants separately or jointly to assess this.

Participants can represent themselves or bring a friend, lawyer, or other support person. The mediator will NOT make a decision - that is the role of the participants.

### What does resolution look like?

Resolution looks different for different people. For some, it is getting a deeper understanding, or being heard. For others it is getting a deal to move forward, documented in a binding way. It is important to consider what constitutes resolution for the participants.



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## **What if it is not resolved?**

If the matter is not resolved during the Mediation then this can be documented in an appropriate format which will often make it easier to find another pathway or suggest a solution. The Resolution Facilitator can assist in exploring alternative ways of resolving the issues.

## **Mediation agreement**

It is important that everyone knows what to expect. This will allow participants to adequately prepare, to know their rights and maximise the chances of everyone feeling satisfied with the process.

The agreement sets out the legal rights in plain English - these are important to understand. The Resolution Facilitator is also available to explain the process and the terms of the agreement.



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## MEDIATION: Agreement

**Between:** Name:  
Address:

Name:  
Address:

(collectively, the “Participants”)

**And**

Name:  
Address:

(the “Mediator”)

### Definitions:

**Adviser** means a legal adviser or support person for a Participant as listed in the Annexure.

**Dispute** means the issue between the Participants as described in the Annexure.

**Mediation** means all steps taken to attempt to resolve the Dispute with the assistance of an appropriately trained professional known as a mediator

### The Mediation

1. The **Mediation** shall comprise all steps taken to attempt to resolve the Dispute by mediation whether prior or subsequent to the execution of this agreement, with the assistance of an appropriately trained mediator.

### Appointment and functions of the Mediator

2. The Participants appoint the Mediator, and the Mediator accepts the appointment, to mediate the Dispute in accordance with the terms of this agreement.
3. The Mediator will assist the Participants to identify the issues between them and to explore options for and, if possible to achieve, the expeditious resolution of the Dispute by agreement between them.
4. The Mediator will not advise a Participant nor make decisions for nor impose a solution on them.



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5. The Mediator will not, unless the Participants agree in writing to the contrary, obtain from any independent person advice, or an opinion as to any aspect of the Dispute. Any such advice or opinion shall be obtained only from such person or persons as may be agreed by the Participants.
6. The Mediator confirms that s/he has no interest in the Dispute, nor any prior dealings with any of the Participants in relation to the Dispute.
7. If in the course of the Mediation the Mediator becomes aware of any circumstances that might reasonably be considered to affect the Mediator's capacity to act impartially, the Mediator will, to the extent that the Mediator may properly do so, immediately inform the Participants of those circumstances. The Participants must then decide whether they wish the Mediator to continue to act as the Mediator under this agreement or whether they wish to terminate this agreement.

## Co-operation, Costs and Mediator's Fees

8. The Participants and the Advisers agree to participate in the Mediation.
9. Each Participant and Adviser will comply with reasonable requests made by the Mediator to promote the efficient and expeditious resolution of the Dispute.
10. Each Participant will meet its own costs of and in connection with the Mediation.
11. Irrespective of the outcome of the Mediation, Mediator's fees and disbursements will be paid as specified in the Annexure.

## Conduct of the Mediation

12. The Mediation, including all preliminary steps, shall be conducted in such manner as the Mediator considers appropriate, and the Mediator may suggest:
  - (i) the holding of preliminary conferences;
  - (ii) the exchange of written outlines of the views of the Participants on the issues raised by the Dispute;
  - (iii) the exchange of information or reports.

## Communication

13. The Mediator may as frequently as s/he thinks appropriate, meet with the Participants and their respective Advisers together or separately. The Mediator may communicate with a Participant or Adviser orally or in writing.
14. Information (whether oral or written) disclosed in confidence by a Participant or Adviser to the Mediator may not be disclosed by the Mediator to any other Participant or Adviser without the express consent of the person by whom that information was disclosed.



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## Confidentiality

15. The Participants, Advisers and the Mediator will not unless required by law to do so, disclose to any person not present at the Mediation, nor use, any confidential information furnished during the Mediation unless:
  - (i) such disclosure is to obtain professional advice, or
  - (ii) is to a person who has been named and all of the other Participants have consented, and
  - (iii) the person to whom the disclosure is made is advised that the confidential information is confidential.
16. The Mediator agrees to keep confidential all information furnished by a Participant or Adviser to the Mediator on a confidential basis, except with the consent of the Participant who furnished such information not to disclose the information to any other Participant.

## Privilege

17. Subject to clause 20, in any arbitral or judicial proceedings the following will at all times be kept confidential and will be privileged, and the Participants and the Mediator will not disclose nor rely upon them nor issue nor cause to be issued any subpoena to give evidence or to produce documents concerning them:
  - (i) any settlement proposal;
  - (ii) the willingness of a Participant to consider any such proposal;
  - (iii) any statement, admission or concession made by a Participant;
  - (iv) any statement made or document prepared by the Mediator.

## Termination

18. Any of the Participants or the Mediator may at any time terminate the Mediation by giving written notice terminating the Mediation to each other and to the Mediator.
19. In the absence of notice by a Participant terminating the Mediation, the Mediation will be terminated on execution of a written settlement agreement in respect of the Dispute. Any settlement agreement will be drawn up and executed at the earliest possible time after the terms of settlement have been agreed.

## Enforcement

20. Any Participant will be at liberty:
  - (i) to enforce the terms of a settlement agreement;
  - (ii) in any enforcement proceedings, to adduce evidence of and incidental to the settlement agreement, including evidence from the Mediator and any other



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person engaged in the Mediation.

- 21. Following the Mediation, the Mediator will not accept appointment as an arbitrator in, or as an advocate in, any arbitral or judicial proceeding relating to the Dispute, nor provide advice to a Participant in relation to the Dispute.
- 22. The Participants will not do anything to cause the Mediator to breach clause 21.

## Exclusion of Liability and Indemnity

- 23. The Mediator will not be liable to a Participant for any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement unless the act or omission is fraudulent.
- 24. Each Participant indemnifies the Mediator against all claims by that Participant or anyone claiming under or through that Participant, arising out of or in any way referable to any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement, unless the act or omission is fraudulent.
- 25. No statements or comments, whether written or oral, made or used by the Participant or the Advisers or the Mediator within the Mediation can be relied on to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded as a bar to any such action.

Signed: .....

Signed: .....

Name: .....

Name: .....

Date: .....

Date: .....

Signed by Mediator: .....

Name: .....

Date: .....



## ANNEXURE

**1. Advisers**

Adviser of [Insert Participant name]:

Adviser of [Insert Participant name]:

**2. The Dispute** (please provide a short description) [EG: ownership of “dog eat Dog”]

**3. Mapper’s Fees and Disbursements:**

Mapper’s fees:

Estimated disbursements:

Paid by: (note proportion of payment by each participant)

**4. The Resolution Facilitator**

Name: Shirli Kirschner

Address: PO Box Paddington NSW 2021



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Current as at  
January 9, 2020

DATE	COMMENT
3 December 2019	Reviewed by Sarah Nicholson
9 January 2020	Reviewed and amended by Chris Johnson (APRA Legal)

