



**Burke & Associates
Lawyers**

Mediation Agreement

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Mediation Agreement

DATED DAY OF 2016

INTRODUCTION

- A. The Mediator has been engaged by the Parties to assist them and seeking to settle the Dispute.
- B. The Parties and the mediator agreed to conduct mediation on the terms of this Mediation Agreement.

THE PARTIES AGREE

1. DEFINITIONS

In this Mediation Agreement the following terms have these meanings:

- 1.1. “**Mediator**” means the person or persons described as such in the Schedule;
- 1.2. “**Parties**” means each of the parties whose particulars are set out in the Schedule;
- 1.3. “**Mediation Venue**” means the venue whose particulars are set out in the Schedule;
- 1.4. “**Respective proportions**” means the proportions payable by the various parties on account of the Mediator’s fees and the Mediation Venue hire charges.

2. THE APPOINTMENT

The Parties appoint the Mediator to assist them to settle:

- 2.1 The dispute;
- 2.2 any other dispute which they might agree, in writing, to refer to the Mediator.

3. CONFIDENTIALITY

- 3.1 Except as all Parties may otherwise agree, anything said or done by any person during and for the purpose of the mediation will be regarded as said or done “without prejudice”. No Party or person present at the time of the mediation will give, or be required to give, evidence of, or disclose anything said or done by any person and for the purpose of the mediation.

- 3.2 If a Party produces at the mediation a document which would otherwise be privileged from production, the Party producing the document does not thereby waive the privilege.
- 3.3 Save as required by law, and as to whether or not the Parties have entered into an agreement resolving the dispute or any part of the dispute, the Mediator shall not disclose to any court, tribunal, Party or any person, or be required by the Parties to disclose to any court, tribunal, Party or any person, any information of which the Mediator becomes aware during and for the purpose of the mediation.

4. CONDUCT OF THE MEDIATION

- 4.1 The mediation will be conducted in accordance with the Law Institute of Victoria's "Mediation Code of Practice" (a copy of which is attached hereto with clause 6.2 deleted) except as the Parties and the Mediator otherwise agree.
- 4.2 The Code of Practice is for guidance only and is not intended to be binding on the Mediator or on the Parties.

5. FEES

- 5.1 The Parties agree to pay the Mediator's fees in equal shares.
- 5.2 If the mediation is cancelled within 72 hours of the date appointed for the mediation, the Parties will pay to the Mediator the Cancellation Fee.
- 5.3 If the mediation is adjourned within 72 hours of the mediation date, the Mediator will not claim the fee for preparation as part of the cancellation fee above, but any wasted out of pocket expenses incurred will be paid as a cancellation fee.
- 5.4 The Parties agree that their liability to pay the Mediator's fees is joint and several.
- (delete 5.4 or 5.5)*
- 5.5 Each party must the pay the respective proportion of the Mediator's fees.

6. MEDIATION VENUE

- 6.1 The Parties agree to hire the Mediation Venue for the pupose of the mediation.
- 6.2 The liability the Parties for payment of the Mediation Venue hire fees is agreed to be joint and several.
- (delete 6.2 or 6.3)*
- 6.3 Each party must pay the respective proportion of the Mediation Venue hire fees.

7. IMMUNITY

- 7.1 The Parties agree that the Mediator shall have the same protection and immunity from suit as he would have under section 27(A)(1) of the *Supreme Court Act 1986* if appointed by an order of the Supreme Court under that section.
- 7.2 Clauses 3.1, 3.2, 3.3 and 7.1 of this Agreement bind each person who takes part in the mediation, whether or not he or she is a Party to this Agreement, and they acknowledge that they are so bound by their signature hereto.
- 7.3 If despite this Agreement the Mediator receives a subpoena or order of like effect ("**subpoena**") from a Party or person who in the opinion of the Mediator represents or has the same interests as a Party, that Party shall:
- 7.3.1 pay all costs on an indemnity basis incurred by the Mediator in relation to that subpoena including all legal costs incurred in opposing the subpoena;
 - 7.3.2 repay to the mediator sum calculated at the Hourly Rate for each hours spent by the mediator; and
 - 7.3.3 indemnify and hold harmless the Mediator in respect of all orders for costs that may be made against the Mediator in relation to the subpoena.

8. AUTHORITY

Without limiting the obligation of the Parties imposed by an Order of the Court referring this dispute to the Mediator, each Party will have in attendance at the mediation, a person or persons who will have the final and ultimate authority to settle the dispute at the mediation, and to enter into binding terms of settlement.

9. CO-OPERATION

- 9.1 Each Party agrees to take part in the mediation in good faith and use their best endeavours to reach a settlement of the dispute, and will comply with the reasonable requests and directions of the Mediator.
- 9.2 The Parties agree that there will be no binding agreement to settle this dispute unless or until the Parties, by themselves or their agents, sign a document setting out the terms of their settlement.

SCHEDULE

Item	Heading	Details
1	Mediator	
2	First Party	
3	Second Party	
4	Third Party	
5	Mediator's fees	(a) Half day fee: \$ (b) Daily fee: \$ plus GST (c) Preparation and reading fees: \$ per hour plus GST, capped at \$ (d) Cancellation fee: \$ plus GST
6	Dispute	
7	Mediation date	
8	Mediation venue	
9	Respective Proportions	First party: []% Second party: []% Third party: []%

EXECUTED BY THE PARTIES

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LAW INSTITUTE OF VICTORIA - MEDIATION CODE OF CONDUCT

1. Principles of Mediation

- 1.1 In this Code “**participants**” means the Parties to the mediation and the Mediator.
- 1.2 Mediation is a process designed to assist Parties resolve their dispute by agreement. The Mediator is an independent neutral third Party who does not make a decision for the Parties but facilitates honest, open and frank discussions between them on all the matters raised.
- 1.3 **Mediation is voluntary**, and any Party or the Mediator(s) may terminate it at any time.
- 1.4 Notwithstanding that a Mediator may be a solicitor, barrister, accountant or other professional, the Mediator does not act in that professional capacity but specifically as a mediator, and mediation is not a substitute for each participant obtaining independent legal, accounting, tax or other professional advice.
- 1.5 The Mediator(s) try to assist the Parties to reach a conclusion of the dispute which is appropriate to their particular circumstances, and not necessarily the same conclusion that might be arrived at in the event of adjudication by the Court. This allows the Parties to explore and agree upon a wider range of options for settlement than might otherwise be the case.
- 1.6 The Mediator(s) may meet the Parties individually and/or together. They assist the Parties, for example, by identifying areas of agreement, narrowing and clarifying areas of disagreement, and defining the issues; establishing and examining alternative options for resolving any disagreement; considering the applicability of specialised management, legal, accounting or other assistance; examining the basis for continuing any existing relationship, or helping the Parties to agree how and on what terms to end that relationship; and generally facilitating discussions and helping them to try and to resolve their differences.
- 1.7
- 1.7.1 In order for the mediation process to have integrity it is important that mediators be impartial and be independent of the Parties and the matter throughout the process.
- 1.7.2 Any factor which may be seen as affecting the impartiality of the Mediator must be immediately and fully disclosed by the Mediator.
- 1.7.3 In general a mediator who has some connection with a Party or the matter should decline to act.
- 1.7.4 However a mediator who has a connection with a Party or the matter may act provided that:
- 1.7.4.1 There has been full disclosure to all Parties;

1.7.4.2 All Parties have freely consented after full disclosure;

1.7.4.3 The Mediator is satisfied that he or she will act impartially and will be able to properly discharge the functions of a mediator.

2. Confidentiality and Privilege

2.1 All participants in the mediation are at all times to maintain confidentiality about all matters arising in the mediation, except to the extent that such matters are already public or to such extent as may be agreed between all the participants or as required by law.

2.2 All discussions and negotiations during the mediation will be on a privileged, 'without prejudice' basis, unless such privilege is waived by the participants by agreement, either generally or in relation to any specific aspect. No participant is to refer in any proceedings to any such privileged discussions and negotiations, or require the Mediator(s) to do so, nor may any Party have access to any of the Mediator's notes or call any mediator as witness in any proceedings.

3. Duty of Impartiality

3.1 The duty of impartiality by the Mediator(s) is inherent in the mediation process.

3.2 If a mediator believes that any participant is abusing the mediation process, or that power imbalances are so substantial that the mediation is unlikely to result in a mutually acceptable resolution, or that the Parties are proposing a result which appears to be so unfair that it would be a miscarriage of justice, then the Mediator(s) may inform the Parties accordingly, and may terminate the mediation.

4. Information and Documents

4.1 The Mediator(s) will assist the Parties, so far as appropriate and practicable, to identify what information and documents would help the resolution of any issue(s) and how best such information and documents may be obtained.

4.2 Mediation does not provide for the disclosure and discovery of documents in the same way or to the same extent as required by Court Rules. The Parties may voluntarily agree to provide such documentation, or any lesser form of disclosure considered by them to be sufficient. This may be considered and discussed in the mediation.

4.3 The Mediator(s) have no power and do not purport to make or require independent enquiries or verification to be made in relation to any information or documentation sought or provided in the mediation. If this may be material to the resolution of any issues, consideration will need to be given in the mediation to the ways in which the participants may obtain any such information, documents or verification.

5. Relationship with Professional Advisors

- 5.1 Professional advisors for the individual Parties may, with the consent of all of the participants, participate in the mediation process. The professional advisors may be involved in discussions and meetings in such manner as the Mediator(s) may consider useful and appropriate. Unless so agreed by the participants, the Mediator will not communicate about the merits of any dispute with the professional advisors, other than formal matters of procedure, costs or timetable.
- 5.2 Professional advisors representing all the participants collectively, such as the accountants of a partnership whose partners are mediating their differences, may be asked to assist in the mediation in such manner as may be agreed.
- 5.3 Participants are free to consult with their individual advisors as the mediation progresses. On some occasions the Mediator(s) may make recommendations to the participants as to the desirability of seeking further assistance from professional advisors such as lawyers, accountants, expert valuers or others.

6. Recording of Proposed Agreement

At the end of the mediation, or at any interim stage if required, the Mediator(s) and the Parties may prepare a written summary of any agreement reached by the Parties, which may where considered by the participants to be appropriate comprise draft heads of such agreement for formalisation by the legal advisors acting for the Parties.

7. Ancillary Matters

- 7.1 The Parties will be required to sign an agreement with the Mediator(s) agreeing to the mediation taking place in accordance with this Code Practice, to comply with any directions of the Mediator(s) as to the conduct of the mediation, and also agreeing to the basis on which fees will be charged to them.
- 7.2 The Mediator(s) do not act as solicitor(s), accountants or in any other professional capacity, but as mediators in an individual capacity, and do not act on behalf of any firm with which they may be associated or at whose premises the mediation may take place. Consequently, no such firm has any interest in such mediation, and no responsibility will attach to such firm in connection with the mediation; nor does the Law Institute of Victoria have any responsibility for any solicitor when acting as a mediator.