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## MEDIATION SERVICE

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### What is mediation?

Mediation is a process of dispute resolution which encourages the parties in a dispute to isolate the issues, to develop possible settlement options, and to negotiate a resolution which is acceptable to them. Instead of having a judge, magistrate or arbitrator impose a decision, an impartial person – the mediator – facilitates the process and, if the dispute is resolved to the parties' satisfaction, the mediator helps the parties to set out their solution in the form of a written agreement which will be legally enforceable.

In mediation the parties never hand over the power to make decisions to anyone else. The mediator cannot make or impose decisions on the parties. Settlement occurs only if the parties agree.

Although both mediation and "without prejudice" settlement negotiations are ways of resolving legal disputes, mediation differs from "without prejudice" settlement discussions in the following ways:

- a. Mediation provides a way for parties to resolve their disputes by focussing on their interests and concerns. On the other hand, "without prejudice" settlement negotiations are concerned with reaching a compromise based on legal rights and obligations.
- b. Mediation requires the parties to meet face-to-face rather than leaving them to communicate via their legal representatives. This allows all areas of concern to the parties to be dealt with, and helps keep the problem in the control of the parties.
- c. Independent mediators help the parties to identify precisely what the issues are between them, and encourage them to resolve these. Having an impartial person taking part in the dispute resolution process allows the parties to air their views in a non-confrontational way.

### How is mediation different from arbitration?

Although both of these processes are alternatives to litigation, they are very different in method.

*Arbitration:* the parties agree to be bound by the decision of the arbitrator and the arbitrator is bound to make a decision. Therefore, an arbitrator's decision can be difficult to appeal from if you are not happy with it. Arbitration is also generally a much more formal process.

*Mediation:* the parties make the decision by striking a legally enforceable agreement with each other, which is facilitated by the mediator. If an agreement cannot be reached, the option to go to Court is still available. If an agreement is reached, and a party breaches it, the other may take the matter to Court. Mediation is a more accommodating process and offers maximum flexibility to enable the parties to reach an agreement.

## **What's so good about mediation?**

### **Mediation is:**

#### **1. cost and time effective**

Mediation is usually much less expensive than going to court because:

- a. preparation work required for a mediation is minimal compared to preparing for a court hearing;
- b. a mediation can usually be arranged at relatively short notice. This is a particular advantage given that significant delays are common in Australian courts;
- c. a dispute which may take several days to resolve in court can often be done much quicker because the process is not bound by the rules of evidence.

#### **2. voluntary**

All parties have the right to withdraw from mediation at any time.

#### **3. informal**

The parties and the mediator agree to certain rules of conduct before the mediation to ensure that each party is given a full and fair hearing. There are no rules of evidence to restrict what is discussed.

#### **4. controlled by the parties**

There is a famous saying by a United States judge that "it is a rare litigant who recognises his case in court". With a court hearing, parties depend on their legal representatives to put their case for them, they are bound by the complex and technical rules of court procedure and are limited by the restricted range of solutions a court can offer. In contrast mediation is flexible, informal and always remains within the control of the parties: a "successful" mediation is because the parties have reached an agreement which satisfies them both.

#### **5. private and confidential**

Before the mediation begins the mediator and the parties agree in writing that they will not disclose to anyone else what is discussed in the mediation, and that no party will issue a subpoena to any other party or the mediator to produce documents or give evidence if the mediation fails and the dispute is dealt with in court at a later stage. Court proceedings, on the other hand, are generally open to the public and the media.

## **6. "privileged"**

Unless ALL parties agree, nothing which is said at or in connection with the mediation can be repeated by the parties or the mediator in court if the mediation fails, and no documents produced at or in preparation for the mediation (such as correspondence between the parties concerning the mediation, mediation position statements, calculations or similar documents) can be used in court proceedings.

However, if the mediation results in the parties reaching agreement, and subsequently a party wishes to take court action against another for breach of the agreement, matters dealt with in the mediation, or which are incidental to it, may be raised in court proceedings.

## **7. an opportunity for the parties to preserve or resurrect their relationship**

Very often a dispute occurs between parties who have had a good working relationship until one disagreement threatens to destroy it. Because a court is an adversarial forum resulting in a "winner" and a "loser", even a "successful" party will almost always suffer the demise of that relationship as a result of pursuing their claim. Mediation, on the other hand, is designed to minimise the disruption (both commercial and personal) to party's relationships.

## **8. a means of dispute resolution which is additional to going to court**

Even if a mediation does not result in the parties reaching a binding agreement, the process will almost always have given the parties a clearer insight into the dispute, and often makes subsequent "without prejudice" settlement negotiations easier. And if all else fails the last resort option of going to Court is still available.

## **What exactly does a mediator do?**

The easiest way to answer this question is to start by saying what a mediator does **not** do. The mediator does not impose a solution on the parties. The mediator cannot make any decisions for the parties. The mediator does not give legal advice (if the parties reach an agreement which the mediator considers would be unenforceable they will advise the parties to obtain legal advice). What the mediator does is to raise settlement options to assist the parties, and to discuss these. The mediator uses their training to facilitate the parties to reach their own agreement.

## **How does the Arts Law Centre of Australia's mediation service work?**

If you call the Arts Law Centre with a legal dispute (whether or not litigation has already begun) and the lawyer you speak to assesses that it might be suitable for mediation; or if the Arts Law Centre contacts you and suggests that mediation may be worth considering as a means for resolving a dispute, the Arts Law Mediation Service might be appropriate. Before considering mediation, you should seek legal advice as to your legal rights and how mediation works.

Arts Law has a panel of mediators who offer their services for the purpose of providing a low cost mediation service to artists and arts organisations. It is designed for parties who are not represented by lawyers at the mediation. The service is limited and Arts Law's ability to organise a mediation session is contingent upon the availability of a mediator.

## **Do I need to be a subscriber to Arts Law?**

Yes. Whilst the Arts Law Centre of Australia does not charge any fee for its mediation service, if you are the person calling Arts Law and requesting a mediation session, you must be an Arts Law subscriber before Arts Law can organise a mediation session. For more information on subscription and the cost of subscription please contact Arts Law or go to the Arts Law website ([www.artslaw.com.au/Subscriptions/](http://www.artslaw.com.au/Subscriptions/)).

## **Are there any costs involved?**

Yes. The fee payable to the mediator by each party is \$100 per hour (exclusive of GST). Mediation (including a preliminary conference to set the procedure for mediation) may last between 3 to 5 hours, so each party should be prepared to spend at least \$300 (exclusive of GST). The parties are encouraged not to have legal representation at the mediation as this will escalate the costs and may interfere with the aim that both parties work together to find a solution to their problems. However both parties are strongly encouraged to get legal advice before the mediation. Subscribers to the Arts Law Centre can get this advice from one of the Centre's panel lawyers.

## **What happens next?**

If you decide to mediate your dispute, and once a mediator has been chosen, all parties and the mediator will be given a mediation agreement to sign. This agreement covers issues such as how confidentiality will be maintained, payment of the mediator, and a release which the parties give to the mediator in relation to taking legal action against him or her.

The mediation itself begins with introductory remarks from the mediator, who explains the process and how it differs from other forms of dispute resolution such as arbitration, and lays down ground rules for the conduct of the mediation which the parties agree on to ensure that everyone gets a fair hearing. Each party then has an opportunity to explain how they see the dispute. This enables the problems to be defined before settlement options are considered. A "joint session" follows, at which issues are identified and settlement options explored. The mediator may then consult separately (and confidentially) with the parties: this is called "caucusing". The purpose of caucusing is to enable the mediator to understand how each party perceives their strengths, weaknesses and particular grievances in the absence of the other parties, which may help in developing settlement options.

The mediation might then proceed to a further joint session and caucusing as the parties and the mediator think appropriate, until an agreement is reached or it becomes clear that agreement will not be reached.

## Need more help?

Contact Arts Law if you have questions about any of the topics discussed above

Telephone: (02) 9356 2566 or toll-free outside Sydney 1800 221 457

Also visit the Arts Law website ([www.artslaw.com.au](http://www.artslaw.com.au)) for more articles and information sheets.

## Disclaimer

The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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