



BUILDING DISPUTES TRIBUNAL
TE TARAPIUNURA MŌ NGĀ TAUTOHE WHARE

MEDIATION PROTOCOL

BUILDING DISPUTES TRIBUNAL (NZ) LIMITED
PO BOX 33297 TAKAPUNA 0740 | P + 64 9 486 7143 | F + 64 9 486 7144
E registrar@buildingdisputestribunal.co.nz | W www.buildingdisputestribunal.co.nz

MEDIATION PROTOCOL

1.0 PREAMBLE

- 1.1 Mediation is a consensual, confidential and relatively informal negotiation process in which parties to a dispute use the services of a skilled and independent mediator to assist them to define the issues in dispute, to develop and explore settlement options, to assess the implications of settlement options and to negotiate a mutually acceptable settlement of that dispute which meets their interests and needs.
- 1.2 The Mediator is an independent and impartial person in whom the parties to a dispute repose trust, respect and confidence to assist them to negotiate a settlement of that dispute without giving advice, expressing opinions or making decisions for them.
- 1.3 Generally, all types of disputes are suitable for mediation provided that all parties and their representatives are prepared and committed to negotiate toward settling the dispute in good faith.
- 1.4 The objective of mediation is to enable and empower the parties to negotiate and resolve the dispute promptly, cost effectively and confidentially rather than to have a decision imposed upon them by a judge, arbitrator or adjudicator. Mediation enables the parties to negotiate flexible and creative solutions which need not conform to strict legal rights or general community standards.
- 1.5 The purpose of this Protocol is to promote and encourage the negotiated settlement and early and cost effective resolution of disputes by mediation under the Tribunal's Mediation Programme.
- 1.6 The objective is to provide a guide to the rights and responsibilities of all participants in the mediation process under the Tribunal's Mediation Programme.
- 1.7 This protocol is incorporated into the mediation process by operation of clause 1 of the Agreement to Mediate.

2.0 INITIATION OF MEDIATION

- 2.1 Any party to a dispute in respect of which the parties have agreed to refer such dispute to mediation by the Tribunal may apply to the Tribunal to appoint a Mediator by completing the simple on-line application form on the Tribunal's website at www.buildingdisputestribunal.co.nz and attaching a copy of the parties' agreement to refer the dispute to mediation by the Tribunal.
- 2.2 On receipt of the application the Tribunal will provide the applicant with an Agreement to Mediate for execution by all parties to the mediation. The Agreement to Mediate is a standard Agreement and may be executed in counterpart form – it is not necessary for each party to sign one single document.
- 2.3 Once the Tribunal receives the Mediation Agreement duly executed by all parties and payment of the relevant Base Fee for the mediation as set out in Schedule B to the Mediation Agreement, the Tribunal will make the necessary administrative arrangements for the mediation.

3.0 APPOINTMENT OF THE MEDIATOR

- 3.1 Parties may select a Mediator from the Tribunal's panel by agreement, or if the parties are unable to reach agreement as to a Mediator or simply wish to leave the appointment process to the Tribunal, the Tribunal will appoint the most appropriate available Mediator to mediate the particular dispute on the date(s) that the parties have indicated as their preferred date(s) for the mediation.
- 3.2 Where the parties wish to exercise their discretion to select a Mediator, they are requested to provide up to three (3) names of any persons on the Tribunal's panel whom the parties prefer to mediate the dispute. They may select only one or two if they wish, but in doing so must accept that they may have to be flexible in respect of the date for the mediation.
- 3.3 Where the parties are unable or elect not to agree on any person(s) to act as Mediator and the Tribunal is requested to appoint a Mediator, the parties will accept the appointment of that Mediator.

4.0 THE MEDIATOR'S ROLE

- 4.1 The Mediator is an independent and impartial person in whom the parties to a dispute repose trust, respect and confidence to assist them to negotiate a settlement of that dispute.
- 4.2 A Mediator must not accept an appointment to act as Mediator in a dispute if any circumstances past or present exist that would be likely to give rise to justifiable doubts as to the Mediator's impartiality or independence in the eyes of any of the parties to the mediation or to prejudice or impair the performance of the Mediator's duties in the conduct of the mediation. The only exception to this rule is where, after full disclosure of all relevant facts, the parties to the mediation agree to the appointment of the Mediator.
- 4.3 In accepting an appointment, the Mediator assumes a continuing duty to disclose immediately to the parties to the mediation any circumstances arising in the future likely to give rise to justifiable doubts as to the Mediator's impartiality or independence in the eyes of any of the parties or to prejudice or impair the further performance of the Mediator's duties in the conduct of the mediation, until the mediation is concluded. The Mediator must immediately inform the Tribunal of any such disclosure made to the parties to the mediation.
- 4.4 If during the course of the mediation, the Mediator discloses to the parties to the mediation any circumstances that arise which the Mediator considers might reasonably be likely to give rise to justifiable doubts as to the Mediator's impartiality or independence in the eyes of any of the parties to the mediation or to prejudice or impair the performance of the Mediator's duties in the conduct of the mediation, the parties must confer and unless the parties agree to continue the mediation with the Mediator, the Mediator must withdraw from the mediation and advise the Tribunal immediately.
- 4.5 The Mediator will maintain impartiality towards all participants at all times during the mediation process.
- 4.6 The Mediator has no decision making authority.

- 4.7 The Mediator's role is to define and manage the conduct of the mediation process.
- 4.8 The Mediator may conduct the mediation in such manner as the Mediator thinks fit, having regard to the nature and circumstances of the participants and the matters in difference.
- 4.9 The Mediator, in consultation with the parties, will establish basic rules and guidelines for procedure at the outset of the mediation conference. Such rules include basic common courtesies and would typically include, but not be limited to: the order of presentation, the right of each party to speak freely and without interruption, that all participants are to treat each other with courtesy, the right for any party to take independent legal or expert advice during the mediation, the right for any party to talk to its advisers or representatives in private during the mediation, the right for any party to talk to the Mediator in private at any time during the mediation and the right for any party to terminate the Mediation after consultation with the Mediator.
- 4.10 The Mediator will assist the parties to define and isolate the issues for resolution.
- 4.11 The Mediator will assist the parties to generate, explore, develop and evaluate options for resolution of the issues.
- 4.12 The Mediator will assist the parties to endeavour to reach an agreement which accommodates their mutual needs and interests.
- 4.13 The Mediator may conduct joint and separate private sessions with any or all of the parties at any time before or during the mediation and any information exchanged during those separate conferences will be kept confidential and will not be divulged to any other party unless the Mediator is specifically instructed to do so.
- 4.14 The Mediator will not give advice, express opinions, direct or coerce the parties into agreement, or make decisions for the parties.
- 4.15 Where agreement has been reached to settle the dispute in whole or in part, the Mediator will discuss with the parties the process for recording and implementing the agreement.
- 4.16 Where a partial agreement has been reached, the Mediator will discuss with the parties the procedures available to them to resolve the remaining issues.
- 4.17 If the Mediator considers that any settlement agreement reached may be illegal or impossible to enforce or uphold, the Mediator should recommend to the parties that they take further independent legal advice.
- 4.18 The Mediator may suspend or terminate the mediation at any time if the Mediator feels unable to assist the parties to achieve resolution of the dispute.
- 4.19 On conclusion or termination of the mediation, the Mediator will destroy all documents and records provided by the parties for the purpose of the mediation.
- 4.20 The Mediator will maintain the confidentiality of the mediation save only for where publication, disclosure, or communication is necessarily required to prevent the safety of any person from being endangered.

5.0 THE ROLE OF A REPRESENTATIVE

5.1 The role of a representative is to assist the party they represent to prepare for the mediation and to participate effectively in the process.

5.2 A representative must cooperate with the Mediator and be courteous to the Mediator and all other participants.

5.3 A representative should act in good faith and advise the party they represent to act in good faith.

5.4 The role of a representative in preparing a party for mediation includes:

- Explaining the meaning of the terms of the Agreement to Mediate.
- Explaining the process including the Mediator's role.
- Explaining the meaning and nature of without prejudice and confidential discussions and negotiations.
- Assisting the party to define the problem and the issues.
- Assisting the party to identify the party's needs and interests.
- Exploring with the party why an issue has arisen and what kinds of things the party would like to see happen to assist with generating possible settlement options.
- Assist the party to evaluate the strengths and weaknesses of its case.
- Discuss how the issues would be dealt with by a court or arbitrator and the possible range of outcomes.
- Assisting the party to consider creative settlement options that would not be available in a court and the legality and feasibility of such options.
- Advising the party of the costs that will be incurred up to and including the mediation and the likely costs if the dispute cannot be settled at mediation.
- Ensuring that the party has arranged for the persons representing it at the mediation to be able to make final and conclusive decisions and to have full authority to settle.
- Assisting the party to prepare a brief analysis of the dispute (generally no more than 4 A4 pages), identifying what legal, technical, and quantum issues are involved for filing with the Tribunal no less than three working days prior to the mediation.

5.5 The role of a representative during the mediation includes:

- To participate in a non-adversarial manner and co-operate with other representatives, participants and parties.
- To convey to the other participants such legal, technical, practical and personal matters as the party they represent may wish them to present.

- To provide legal and or technical advice.
 - To provide counsel, support and encouragement.
 - To assist the parties define the problem and develop possible settlement options.
 - To prepare and record the terms of any settlement that might be reached for signature by the parties before leaving the mediation.
- 5.6 All representatives of the parties will be required to sign the Confidentiality Agreement (Schedule A to the Mediation Agreement) as a condition of their attendance at the mediation.
- 5.7 All representatives must maintain the confidentiality of the mediation save only for where publication, disclosure, or communication is necessarily required:
- [a] For the purpose of enforcing any settlement agreement reached in the mediation; or,
 - [b] When compelled to by court order or subpoena; or,
 - [c] To a professional or other adviser of any of the parties after that person has executed the Confidentiality Agreement for advisers and support persons at Schedule B to the Mediation Agreement; or,
 - [d] Where publication, disclosure, or communication is necessarily involved for the protection of a party's legal rights in relation to a third party; or
 - [e] Where publication disclosure or communication is necessarily required to prevent the safety of any person from being endangered,
- provided always that such publication, disclosure or communication is no more than what is reasonably required for those purposes.
- 5.8 To the extent that a representative is required to disclose any information either by law or otherwise, the representative must immediately notify the parties.

6.0 THE ROLE OF A PARTY

- 6.1 A party must sign the Agreement to Mediate and pay the relevant Base Fee for the mediation as set out in Schedule B to the Mediation Agreement in order to initiate the process.
- 6.2 A party will accept the appointment of a Mediator where the parties are unable, or elect not, to agree on any person(s) to act as Mediator, and the Tribunal is requested to appoint a Mediator.
- 6.3 A party must prepare a brief analysis of the dispute (generally no more than 4 A4 pages), identifying what legal, technical, and quantum issues are involved to be provided to the Tribunal no less than three working days prior to the mediation.

- 6.4 A party must provide the Tribunal with the names of those persons who will be accompanying that party at the mediation no less than three working days prior to the mediation.
- 6.5 A party must attend the mediation.
- 6.6 A party should be prepared to present an opening statement about the facts of the case, the issues in dispute, the relief sought and other relevant factors and participate in the mediation process in good faith with the intention of seeking settlement.
- 6.7 A party must cooperate with the Mediator and be courteous to the Mediator and all other participants.
- 6.8 A party must comply with reasonable requests and directions made by the Mediator to promote the fair, prompt and cost effective resolution of the dispute before and during the mediation conference.
- 6.9 A 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 who is able to make final and conclusive decisions and who has full authority to settle the dispute.
- 6.10 A party must maintain the confidentiality of the mediation save only for where publication, disclosure, or communication is necessarily required:
- [a] For the purpose of enforcing any settlement agreement reached in the mediation; or,
 - [b] When compelled to by court order or subpoena; or,
 - [c] To a professional or other adviser of any of the parties after that person has executed the Confidentiality Agreement for advisers and support persons at Schedule B to the Mediation Agreement; or,
 - [d] Where publication, disclosure, or communication is necessarily involved for the protection of a party's legal rights in relation to a third party; or
 - [e] Where publication disclosure or communication is necessarily required to prevent the safety of any person from being endangered,
- provided always that such publication, disclosure or communication is no more than what is reasonably required for those purposes.
- 6.11 To the extent that a party is required to disclose any information either by law or otherwise, the party must immediately notify all other parties.
- 6.12 A party must pay the Tribunal within two (2) working days of receipt of any invoice from the Tribunal for additional attendances by the Mediator or for expenses incurred in relation to the mediation.
- 6.13 Each party will meet its own costs of the mediation regardless of the outcome.

7.0 THE ROLE OF A SUPPORT PERSON

- 7.1 The role of a support person is to provide moral and emotional support for a party.

- 7.2 A support person is not entitled to intervene or to participate in the mediation process in any other capacity whatsoever.
- 7.3 If a support person wishes to discuss any aspect of the process with the person they support, or to express an opinion on any matter under discussion, the proper approach is to suggest to the party that they support to request of the Mediator time out in private for the purpose of offering such moral and/or emotional support or counsel as may be appropriate.
- 7.4 All support persons must sign the Confidentiality Agreement (Schedule A to the Mediation Agreement) as a condition of their attendance at the mediation.
- 7.5 A support person must maintain the confidentiality of the mediation save only for where publication, disclosure, or communication is necessarily required:
- [a] For the purpose of enforcing any settlement agreement reached in the mediation; or,
 - [b] When compelled to by court order or subpoena; or,
 - [c] To a professional or other adviser of any of the parties after that person has executed the Confidentiality Agreement for advisers and support persons at Schedule B to the Mediation Agreement; or,
 - [d] Where publication, disclosure, or communication is necessarily involved for the protection of a party's legal rights in relation to a third party; or
 - [e] Where publication disclosure or communication is necessarily required to prevent the safety of any person from being endangered,
- provided always that such publication, disclosure or communication is no more than what is reasonably required for those purposes.
- 7.6 To the extent that a support person is required to disclose any information either by law or otherwise, the representative must immediately notify the parties.

8.0 THE ROLE OF AN OBSERVER

- 8.1 The Tribunal is committed to delivering professional and effective mediation services to the parties and to the ongoing training, support, mentoring and professional development of its Mediators.
- 8.2 Accordingly, the Tribunal will, as a function of its overarching quality assurance and training programme, from time to time send a person or persons to observe the conduct of mediations conducted under its aegis.
- 8.3 An Observer may observe the whole, or part, or any number of parts of any mediation, but an Observer has no powers or rights whatsoever in relation to the conduct of any mediation and no aspect of the matters at issue or the mediation process should be discussed by any participant with an Observer.
- 8.4 The sole function of an observer is to report to the Tribunal for the purpose of measuring and monitoring the professional development and performance of its Mediators.

8.5 Any observer must sign the Confidentiality Agreement (Schedule A to the Mediation Agreement) as a condition of their attendance at the mediation.

9.0 THE ROLE OF THE TRIBUNAL

9.1 The role of the Tribunal is to manage and administer the mediation process in a professional, consistent and certain manner and to provide support and guidance to the parties and Mediators in respect of the mediation process.

9.2 In pursuit of those objectives, the Tribunal will:

- Maintain a comprehensive, informative and effective website; and,
- Maintain a panel of competent, experienced and respected Mediators; and,
- Provide a fully administered nationwide mediation service through the office of its Registrars, who will:
 - Select suitably qualified, experienced and respected persons for its panels; and,
 - Appoint Mediators who are competent, experienced and capable of discharging their duties to the parties independently and impartially in any particular case, and in the event that a Mediator becomes unable to act for any reason, appoint a substitute Mediator ; and,
 - Provide all administrative functions necessary for the professional and competent delivery of its mediation services.

9.3 The Tribunal will provide the parties with each other party's analysis of the dispute identifying what legal, technical, and quantum issues are involved, prior to the mediation.

9.4 The Tribunal will advise the parties of the names and details of those persons who will be accompanying the parties at the mediation conference, prior to the mediation conference.

9.5 The Tribunal will maintain the confidentiality of the mediation.

10.0 TERMINATION OF THE MEDIATION

10.1 The mediation may be terminated at any time by a party after consultation with the Tribunal or the Mediator.

10.2 The mediation may be terminated by the Mediator at any time if the Mediator feels unable to assist the parties to achieve resolution of the dispute.

10.3 The mediation will be terminated upon the signing of a settlement agreement in respect of the dispute referred to mediation.

10.4 The Termination of the mediation will not relieve the parties of their obligation to pay the fees and expenses of the mediation incurred to that date in accordance with the schedule of fees and the conditions in Schedule B to the Mediation Agreement.

DISCLAIMER

This Protocol is intended to provide a guide to the rights and responsibilities of participants in the mediation process under the Tribunal's Mediation Programme. This Protocol is not intended to be comprehensive or a substitute for independent legal advice and parties must rely entirely on their own skill knowledge and judgment when using this Protocol. Whilst every effort has been made to ensure that the information in this Protocol is correct, all persons wishing to use this Protocol should take independent legal advice. Building Disputes Tribunal (NZ) Ltd, its agents, and its servants, do not assume any liability to anyone for any loss or damage caused by any error or omission herein and expressly disclaim any and all such liability whether involving negligence, breach of contract, breach of fiduciary duty, or breach of statutory duty or otherwise and any and all such liability is expressly disclaimed.

COPYRIGHT

This Protocol is for the use of parties to mediations undertaken by the Building Disputes Tribunal only and is subject to copyright. No part of this document may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopied or otherwise without the prior approval of the Tribunal. In particular, the use of the Protocol for any commercial or promotional purpose without the prior approval of the Tribunal is absolutely prohibited. All rights including translation reserved.

© Building Disputes Tribunal (NZ) Ltd, 2010.