



BUILDING DISPUTES TRIBUNAL
TE TARAIPUNURA MŌ NGĀ TAUTOHE WHARE

MEDIATION PROTOCOL

**A GUIDE TO THE RIGHTS AND RESPONSIBILITIES OF PARTICIPANTS
IN MEDIATION UNDER THE BDT MEDIATION RULES**

2018 Revision

BUILDING DISPUTES TRIBUNAL TE TARAIPUNURA MŌ NGĀ TAUTOHE WHARE

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MEDIATION PROTOCOL

1.0 PREAMBLE

- 1.1 Mediation is a consensual, confidential, and informal negotiation process in which Parties to a dispute use the services of a skilled and independent person (the **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 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 settlement of 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 international disputes by Mediation under [BDT's Mediation Rules](#) (**Rules**).
- 1.6 The objective of this Protocol is to provide a guide to the rights and responsibilities of all participants in the Mediation process under the Rules.
- 1.7 This Protocol is incorporated into the Mediation process by operation of Rule 1.4 of the Rules. Any word defined in the Rules will have the same meaning in this Protocol.

2.0 INITIATING MEDIATION

- 2.1 Any Party to an international commercial dispute in respect of which the Parties have agreed to refer such dispute to Mediation by BDT, or words to the same effect, may apply for the appointment of a Mediator by completing the relevant online [Application for Mediation form](#) on BDT's website at www.buildingdisputestribunal.co.nz.
- 2.2 On receipt of the Application for Mediation, and payment of the relevant Fee for the Mediation as set out in Appendix 1 to the Rules, BDT will appoint a Mediator in terms of its Rules and make the necessary administrative arrangements for the Mediation.

3.0 APPOINTMENT OF THE MEDIATOR

- 3.1 On receipt of the Application and payment of the prescribed Fee, a Registrar will appoint the most appropriate available Mediator to mediate the particular dispute on the earliest practicable date.
- 3.2 In making that appointment, the Registrar will have regard to but will not be bound by, any preference or agreement as to a Mediator indicated by the Parties in the Application.
- 3.3 The Parties must accept the appointment of the Mediator appointed by the Registrar unless a Party can demonstrate on reasonable grounds that circumstances exist that give justifiable doubts as to the Mediator's impartiality or independence in the eyes of any of the Parties.
- 3.4 The decision as to whether to appoint a substitute Mediator will be made by BDT promptly after giving due consideration to the request. The decision is of an administrative nature and is final and binding on the Parties and the Mediator. It is not subject to appeal to BDT and BDT is not required to state or communicate reasons for its decision.

4.0 THE MEDIATOR'S ROLE

- 4.1 The Mediator is an independent and impartial person in whom the Parties to a dispute place trust, respect, and confidence to assist them to negotiate the 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 which may be seen 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 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 which may be seen 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 BDT of any such disclosure made to the Parties.

- 4.4 If, during the course of the Mediation, the Mediator discloses to the Parties 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, or which may be seen to prejudice or impair the performance of the Mediator's duties in the conduct of the Mediation, the Parties must confer. Unless the Parties agree to continue the Mediation with the Mediator, the Mediator must withdraw from the Mediation and advise BDT immediately.
- 4.5 The Mediator must maintain impartiality towards all Parties at all times during the Mediation.
- 4.6 The Mediator does not have the authority to make binding decisions.
- 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 any manner that the Mediator thinks fit, having regard to the nature and circumstances of the Parties and the matters in dispute.
- 4.9 The Mediator, in consultation with the Parties, will establish basic rules and guidelines for procedure at the outset of the Mediation session. Such rules, may include, but are not limited to:
- (a) the order of the presentation;
 - (b) the right of each Party to speak freely and without interruption;
 - (c) that all participants are to treat each other with courtesy;
 - (d) the right of any Party to take independent legal or expert advice during the Mediation;
 - (e) the right of any Party to talk to legal advisers or Representatives or expert advisers in private during the Mediation;
 - (f) the right of any Party to talk to the Mediator in private at any time during the Mediation;
 - (g) the right of any Party to terminate the Mediation after consultation with the Mediator; and
 - (h) basic common courtesies.
- 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 in dispute.
- 4.12 The Mediator will assist the Parties to endeavour to reach an agreement that 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 during the Mediation. Any information exchanged during those separate sessions will be kept confidential and will not be divulged to any other Party unless the Mediator is specifically instructed to do so by a Party. The Mediator may not conduct separate private sessions with the Parties if the Mediator is also acting as an Arbitrator under the [BDT Arb-Med Rules](#) or [BDT Arbitration Rules](#).

- 4.14 The Mediator may, at his or her sole discretion, provide an analysis or evaluation of the relevant facts, evidence, and legal merits of the matters in dispute in the Mediation to promote settlement discussions. In providing any such analysis or evaluation, the Mediator will be acting as an independent neutral expert and not as an adviser to the Parties. Any evaluation is not binding on the Parties and any decision the Parties may make for the purpose of settling the dispute, whether in whole or in part, must be based entirely in reliance on their own skill and judgment having taken independent legal advice and having made their own enquiries, and not in reliance on any understandings, statements, opinions, or representations made by the Mediator.
- 4.15 The Mediator will not direct or coerce the Parties into agreement, or make decisions for the Parties.
- 4.16 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.
- 4.17 Where a partial agreement has been reached, the Mediator will discuss with the Parties the procedures available to them to resolve the remaining issues.
- 4.18 If the Mediator considers that any agreement reached may be illegal or impossible to enforce or uphold, the Mediator may recommend to the Parties that they take independent legal advice before signing the agreement.
- 4.19 If no agreement that finally resolves all the matters in dispute is reached within 30 Days of the Commencement Date, or any other period that the Parties agree, any Party may refer the dispute to arbitration for final and binding determination in accordance with the [BDT Arbitration Rules](#).
- 4.20 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.
- 4.21 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.
- 4.22 A Mediator must maintain the confidentiality of the Mediation. To the extent that a Mediator is required to disclose any Confidential Information either by law or otherwise in terms of Rule 7.4, the Mediator must immediately notify the Parties, their Representatives, and BDT, and provide full details of the intended disclosure and the reasons for it.

5.0 THE ROLE OF A REPRESENTATIVE

- 5.1 Parties may be represented at Mediation by any person whether legally trained or not, provided that the engagement of the Representative by a Party does not threaten or bring into question the integrity of the Mediation due to a past or present relationship with any Party or the Mediator, unless none of the Parties object after proper disclosure.
- 5.2 The Mediator may withhold approval for a Representative to attend Mediation where the Mediator, in his or her sole discretion, considers the Representative's attendance could threaten or bring into question the integrity of the Mediation.
- 5.3 The role of a Representative is to assist the Party he or she represents to prepare for the Mediation and to participate effectively in the process.

- 5.4 A Representative must cooperate with the Mediator and be courteous to the Mediator and all other participants.
- 5.5 A Representative should act in good faith and advise the Party he or she represents to act in good faith.
- 5.6 The role of a Representative in preparing a Party for Mediation includes:
- (a) explaining the meaning and effect of the Rules;
 - (b) explaining the process, including the Mediator's role;
 - (c) explaining the meaning and nature of without prejudice and confidential discussions, documents, and negotiations;
 - (d) assisting the Party to define the problem and the issues;
 - (e) assisting the Party to identify his, her, or its needs and interests;
 - (f) 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;
 - (g) assisting the Party to evaluate the strengths and weaknesses of each Party's case;
 - (h) discussing how the issues would be dealt with by a court or arbitrator and the possible range of outcomes;
 - (i) assisting the Party to consider creative settlement options that would not be available in a court or arbitration and the legality and feasibility of such options;
 - (j) 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; and
 - (k) ensuring that the Party has arranged for the persons representing that Party at the Mediation to be able to make final and conclusive decisions and to have full authority to settle at Mediation.
- 5.7 The role of a Representative during the Mediation includes:
- (a) participating in a non-adversarial manner and cooperating with other Representatives, participants, and Parties;
 - (b) conveying to the other Parties such legal, technical, practical, and personal matters as the Party he or she represents may wish the Representative to present;
 - (c) providing legal and/or technical advice;
 - (d) providing counsel, support, and encouragement;
 - (e) assisting the Parties to define the problem and develop possible settlement options; and
 - (f) preparing and recording the terms of any Settlement Agreement that might be reached for signature by the Parties before leaving the Mediation.

- 5.8 A Representative must maintain the confidentiality of the Mediation. All Representatives must sign the [Confidentiality Agreement](#) attached as Appendix 3 of the Rules as a condition of their attendance at the Mediation.
- 5.9 If a Representative is required to disclose any confidential information either by law or otherwise in terms of Rule 7.4, the Representative must, save for where the safety of any person is endangered, immediately notify the Parties, the Mediator, and BDT, and provide full details of the intended disclosure and the reasons for it.

6.0 THE ROLE OF A PARTY

- 6.1 A Party must provide BDT, the Mediator and every other Party with the names of those persons (if any) who will be accompanying that Party at the Mediation no less than three Days prior to the Mediation session.
- 6.2 A Party who is a natural person must attend the Mediation session in person.
- 6.3 A Party should be prepared to make a brief statement about the facts of the case, the issues in dispute, the outcome sought and other relevant factors, and to participate in the Mediation process in good faith with the intention of seeking settlement.
- 6.4 A Party must cooperate with the Mediator and be courteous to the Mediator and all other participants.
- 6.5 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 session.
- 6.6 A Party must pay BDT's Fees prior to delivery of the service or otherwise within three Days of demand.
- 6.7 Unless the Parties agree otherwise in writing, each Party will meet its own costs of the Mediation regardless of the outcome.
- 6.8 A Party must maintain the confidentiality of the Mediation. To the extent that a Party is required to disclose any confidential information either by law or otherwise in terms of Rule 7.4, that Party must immediately notify every other Party, the Mediator, and BDT and provide full details of the intended disclosure and the reasons for it.
- 6.9 A Party must pay the relevant Fees and Expenses for the Mediation as set out in the Rules.

7.0 THE ROLE OF A SUPPORT PERSON

- 7.1 The role of a Support Person is to provide reassurance and emotional support for a Party.
- 7.2 The Mediator may withhold approval for a Support Person to attend Mediation where the Mediator, in his or her sole discretion, considers that person's attendance could threaten or bring into question the integrity of the Mediation.
- 7.3 A Support Person is not entitled to intervene or to participate in the Mediation process in any other capacity whatsoever.



- 7.4 If a Support Person wishes to discuss any aspect of the process with the person they support, 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 reassurance and/or emotional support or counsel as may be appropriate.
- 7.5 A Support Person must maintain the confidentiality of the Mediation. All Support Persons must sign the [Confidentiality Agreement](#) attached as Appendix 3 to the Rules as a condition of their attendance at the Mediation.

8.0 THE ROLE OF AN OBSERVER

- 8.1 BDT 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, BDT will from time to time, as a function of its overarching quality assurance and training programme, send a person or persons to observe the conduct of Mediations conducted under its Rules (**Observer**).
- 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 BDT for the purpose of measuring and monitoring the professional development and performance of its Mediators.
- 8.5 An Observer must maintain the confidentiality of the Mediation. An Observer must sign the [Confidentiality Agreement](#) attached as Appendix 3 to the Rules as a condition of his or her attendance at the Mediation.
- 8.6 Any Party may request that no Observer attends the Mediation. The Mediator and BDT must uphold that Party's request.

9.0 THE ROLE OF BDT

- 9.1 The role of BDT 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, BDT will:
- (a) maintain a comprehensive, informative, and effective website;
 - (b) maintain a panel of competent, experienced, and respected Mediators; and
 - (c) provide a fully administered international Mediation service through the office of its Registrars, who will:
 - (i) select suitably qualified, experienced, and respected persons for its panels;
 - (ii) 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

- (iii) provide all administrative functions necessary for the professional and competent delivery of its Mediation services.

9.3 BDT 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 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 signing of a Settlement Agreement in respect of the matters referred to Mediation.

10.4 The termination of the Mediation does 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 set out in Appendix 1 to the Rules.

10.5 If no Settlement Agreement that finally resolves all the matters in dispute is reached within 30 Days of the Commencement Date, or any other period that the Parties agree, any Party may refer the dispute to arbitration for final and binding determination in accordance with the [Arbitration Rules](#) of the Building Disputes Tribunal.





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Disclaimer

This Protocol is intended to provide a guide to the rights and responsibilities of participants in the Mediation process under BDT's Mediation Rules. 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. BDT, its agents and its employees, do not assume any liability to any person 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 any other duty, and any and all such liability is expressly disclaimed.

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