FEDERAL COURT OF AUSTRALIA

Mediation

What is Mediation?

Mediation is a structured negotiation process in which an independent person, known as a mediator, assists the parties to identify and assess options and negotiate an agreement to resolve their dispute. Mediation is an alternative to a judge imposing a decision on the parties.

What cases are suitable for mediation?

All cases, regardless of their complexity or number of parties, are eligible to be referred to mediation. The types of matters commonly mediated at the Federal Court include commercial and corporations law, intellectual property, industrial law, consumer law, human rights, admiralty, tax and costs.

Some factors about your dispute may indicate that it is particularly suited to mediation, such as:

- a willingness to participate in mediation
- the possibility that a judge's decision will not end the dispute
- the need for parties to find a way to preserve their relationship
- the existence of non-monetary factors and
- the potential for a negotiated outcome that better suits the needs and interests of the parties than a judge's decision

Why mediate?

Mediation offers many benefits over a trial by a judge, including:

- **Time:** ordinarily a dispute can be resolved more quickly through mediation than through a trial.
- **Cost:** if a dispute can be resolved through mediation, the costs of preparing and running a trial can be avoided. Additionally, after a trial the unsuccessful party may be ordered to pay the legal costs of the successful party.
- **Flexibility:** mediation offers parties more control over the outcome. A mediation process which is customised to your needs can be arranged with the mediator.
- **Stress:** mediation is less formal and less intimidating than appearing in court.

- **Confidentiality:** mediation is private. The judge is not informed of the contents of the mediation. It is also usually unable to be used against a party if the case goes to trial. (The Court recommends you discuss mediation confidentiality with your lawyer).
- **Satisfaction:** because the parties decide and agree on the outcome of their dispute they are more likely to be satisfied with the result and to comply with what has been agreed.
- **Finality:** settlement agreements can usually only be modified with the agreement of all parties.

Who attends mediation?

The parties are in ultimate control of any decision to resolve their dispute. It is essential that people attend the mediation with sufficient knowledge of the relevant issues in dispute and the authority to make decisions about how it might settle after the mediation. If attending on behalf of an organisation the Court requires the attendee be an authorised officer who is able to make a decision about how the dispute might be settled and to enter into an agreement on behalf of the organisation.

If you are not legally represented you may ask to bring someone for support.

Who will be the mediator?

The majority of court ordered mediations are conducted by Judicial Registrars who are trained and accredited by the Court under the Federal Court Mediator Accreditation Scheme (FCMAS).

In recognition of the Court's unique model of mediation and commitment to a quality professional development program, the Court became a Recognised Mediator Accreditation Body in September 2015 and implemented the FCMAS which incorporates the National Mediator Accreditation Standards and. In the native title jurisdiction the Court maintains a list, available on its website, of specialist mediators who have current experience in the resolution of complex Indigenous land management disputes.

Parties may agree to use an external mediator at their own expense.

How do I prepare for mediation?

You can improve the quality of your mediation by considering:

- what issues are in dispute, including the facts and sources of conflict
- what is important to you in any resolution of your dispute - the interests that you wish to preserve or pursue may be different to an outcome sought through a trial
- how best to communicate this information, both to the mediator and the other party
- what you would say at the start of the mediation, to assist in resolving the dispute
- what the other party's aspirations might be and how these might be accommodated in any offer of settlement
- possible contents of an offer and methods of communication

- what costs have already been incurred, are likely to be incurred and what part of these might be recovered
- the possible outcomes if the matter were to proceed to a trial, including the dollar value of any damages claimed and any limits on the Court to award these

What happens at mediation?

Before commencing mediation the mediator will consider the best process for mediating your dispute, taking into account suggestions from all parties where possible.

The mediation will commence with an explanation of the process, followed by a discussion about the background of the matter and issues in dispute.

The mediation itself is flexible and can be tailored to the circumstances. Mediators may assist negotiations by asking questions, encouraging open discussion, offering different perspectives and expressing issues in alternative ways. Parties may be encouraged to identify and test the consequences of potential solutions. It is common for the mediator to meet with the parties jointly and separately and further mediation sessions can be scheduled if necessary.

What are the possible outcomes of mediation?

The case may be settled:

- in full
- in part or
- parties may not be able to reach agreement

If agreement is reached about all or part of the dispute, the details of that agreement will usually be recorded and signed by all parties before the end of mediation.

If the dispute is settled in full the mediator will notify the judge that the matter has settled. The mediator will not provide the judge with any details of the mediation discussions or the terms of any agreement the parties reached without the permission of the parties. Once the agreement is finalised the parties will usually formally notify the Court that the case is not going to proceed and the case will be closed.

If the matter is not fully settled there may be discussion about what needs to be done to prepare for trial and the file will return to the judge. The mediator will notify the judge of the outcome but not the content of the mediation. Even when a matter does not settle clarification of the issues often occurs.

Mediating a dispute does not mean there will be a delay in it being heard by a judge.

Sometimes the judge will order that if the matter does not resolve at mediation, then the Judicial Registrar may conduct a case management conference ('CMC'). A CMC is a hearing at which the parties and the Judicial Registrar discuss how the matter can be most efficiently prepared for final hearing, amongst other things. Orders may be made by the Judicial Registrar at a CMC (but not at mediation). Unlike mediation, CMCs are conducted on an open basis, as if the parties were in Court. The mediation will be formally terminated before any CMC begins.

How much does mediation cost?

A modest fee applies to mediation when conducted by a Judicial Registrar and is ordinarily paid by the applicant, unless otherwise ordered. In some circumstances fees can be exempted or deferred.

Further information on fees, exemptions and deferral is available on the Forms & Fees page or from the Registry.

Parties will usually incur the legal costs of their own lawyers preparing for and attending mediation.

Interpreters

If you need an interpreter to understand what is being said at a mediation or arbitration, you will need to arrange for any interpreter that you require.

If you cannot afford to pay for an interpreter, the Court may be able to arrange an interpreter for you. If you want the Court to arrange an interpreter you should contact the Registry as soon as you are aware of the mediation date. If you do not, the Registry may not be able to arrange an interpreter in time.

You can also call **131 450** and speak to the registry through a telephone interpreter.