



MEDIATION PROTOCOL

Arbitrators' and Mediators' Institute of New Zealand Inc.

Level 3, Hallenstein House, 276-278 Lambton Quay

P O Box 1477, Wellington, New Zealand

Tel: 64 4 4999 384 Fax: 64 4 4999 387

Email: institute@aminz.org.nz

www.aminz.org.nz

MEDIATION PROTOCOL

1 PREAMBLE

Mediation is a voluntary process in which an independent mediator facilitates negotiation by the parties of their own solution to a dispute, by assisting them to systematically isolate the issues, to develop options, and to reach a mutual agreement that accommodates their interests and needs.

The objective of mediation is to enable the parties to resolve the dispute fairly and promptly by agreement without legal proceedings. This protocol is intended to form part of the contract between the parties and the mediator. The Arbitrators' and Mediators' Institute of New Zealand Inc. maintains a panel of mediators, which is available on the website at www.aminz.org.nz, and can, if requested, assist the parties in selecting a mediator.

Any part of this protocol can be varied by agreement of the parties and the mediator.

2 INITIATION OF MEDIATION

- 2.1 Any party to a dispute may initiate mediation by written request to another party. This protocol will apply if the other party agrees in writing to the request, and both parties agree to its application.
- 2.2 The party requesting mediation shall define the dispute that is being referred to mediation.
- 2.3 Others affected by the outcome of the dispute, such as subcontractors and insurers, may also be involved in the mediation, if they are invited by any party (and agree in writing to abide by this protocol), and if the other parties agree to their involvement.

3 APPOINTMENT OF MEDIATOR

- 3.1 Unless otherwise provided for, the parties shall together appoint a mediator.
- 3.2 If no mediator is appointed by agreement, the parties will accept the appointment of a mediator by the President of the Arbitrators' and Mediators' Institute of New Zealand Inc..

- 3.3 The proposed mediator shall have no personal interest in the matters in dispute and, prior to accepting the appointment, shall disclose any dealings with any of the parties, or acquaintance of the parties, or knowledge of the dispute.
- 3.4 The appointment shall not be complete until agreed to in writing by the parties and accepted in writing by the mediator.

4 ROLE OF MEDIATOR

- 4.1 The mediator is an independent intermediary, and not an advocate for any party. The mediator will act impartially, fairly and objectively, and treat each party in an even-handed way.
- 4.2 The mediator shall commence and conclude the mediation as promptly as is appropriate in the circumstances.
- 4.3 The mediator shall not coerce any party into agreement.
- 4.4 The mediator shall not make a decision for the parties.

5 REPRESENTATION AND ATTENDANCE

- 5.1 A party may choose to be represented by one or more persons. The names and addresses of such persons shall be communicated in writing to the mediator and to the other participants.
- 5.2 The party personally, or a representative (who is the same person throughout) able to answer questions and co-operate in developing and agreeing to an acceptable solution to the dispute, shall be present at each meeting.
- 5.3 Other persons may attend meetings only with the consent of all parties. Consent would normally be given to advisors, such as legal, managerial, technical or resource persons.
- 5.4 By attending the mediation the parties represent that they have full authority to settle the dispute unless they otherwise declare.

6 SUBMISSIONS AND DOCUMENTS EXCHANGED PRIOR TO MEDIATION MEETINGS

- 6.1 Any party may send to the mediator a written submission stating briefly the dispute, the relevant facts, and its interests and concerns.
- 6.2 The written submission may include written statements of factual or expert information.
- 6.3 Copies of relevant documents may be attached to any written submission.
- 6.4 Copies of all submissions and other documents sent to the mediator are to be copied and sent to all other parties.
- 6.5 Parties may communicate confidential information to the mediator on the condition that it is not communicated to the other party without permission.

7 CONDUCT OF MEDIATION

- 7.1 The mediator may conduct the mediation in the manner he or she thinks fit, having regard to the nature and circumstances of the dispute and the wishes of the parties.
- 7.2 The mediator will arrange a timetable and meeting places to suit the convenience of the parties.
- 7.3 The parties shall co-operate in good faith with the mediator and with each other in attempting to settle the dispute. They will comply with the mediator's reasonable directions to attend meetings and to provide documents, information and submissions.
- 7.4 The mediator shall not be bound by any formal procedures or rules of evidence, and may become informed in relation to any matter in such manner as he or she thinks fit.
- 7.5 The mediator may conduct joint and separate meetings with any one or more of the parties.
- 7.6 During the course of the mediation, the mediator may ask questions of clarification and may request the parties to exchange or further explain their submissions. Generally, the mediator will not offer opinion on the validity of information or submissions, except possibly in a separate meeting with the party who provided that information or submission.

- 7.7 It is usually preferable that the mediator does not provide any assessment of matters in dispute (ie: of any factual or legal questions, or the likely outcome of any aspect of the dispute). However, if and when appropriate and if qualified and with prior consent of all the parties, the mediator may provide assessments of the perceived merits of some or all of the issues.

8 SETTLEMENT

- 8.1 The mediator does not have the authority to impose a settlement on the parties, but will try to help them reach a mutually acceptable resolution of their dispute. The parties agree that they have the authority to settle the dispute.
- 8.2 The scope and terms of settlement which the parties may develop are not necessarily limited by the subject matter of the dispute, by any contract, by any rights or obligations of the parties, or by any recommendation of the mediator. The mediator makes no representation that any such agreement between the parties will resemble or equate to any result which might be achieved in a contested arbitration or trial of the dispute.
- 8.3 It is preferable for the parties to make a binding commitment to the settlement of the dispute and all parties should take all necessary legal advice before the mediation commences and have access to any legal advice during the mediation process.
- 8.4 Being involved in mediation shall not prejudice any existing legal right of the parties. However, any settlement agreement may change their legal rights and may be legally enforceable as a contract.
- 8.5 If the mediator considers the agreement being reached may be impossible to uphold or may be illegal, the mediator should recommend to the parties that they obtain independent legal advice.

9 CONFIDENTIALITY

- 9.1 Mediation is a private procedure. The parties and the mediator shall maintain the confidentiality of the process, and not discuss the dispute with others, who are not involved with the process.
- 9.2 At a separate meeting with a party, the mediator may hear information which is to be kept confidential from other parties. If so, provided there is no apparent physical danger to any person or serious criminality involved, the mediator shall keep the information confidential and may not disclose it without the consent of the party.

- 9.3 The mediation shall be without prejudice to the dispute and shall not be referred to or relied upon in any other proceedings. The parties shall not, without the written consent of all other parties, introduce as evidence in any other proceedings:
- documents prepared for the mediation
 - admissions made by a party in the course of the mediation proceedings
 - views expressed or suggestions made by a party with respect to a possible settlement of the dispute
 - proposals made or views expressed by the mediator
 - the fact that a party had or had not indicated willingness to consider a proposal for settlement.
- 9.4 Unless directed by a Court, the mediator shall not divulge any aspect of the mediation in any other proceeding. If subpoenaed to testify in any other proceeding, the mediator shall immediately inform the other parties. Unless the parties waive confidentiality, the mediator shall inform the Court or Tribunal of the situation, and shall not divulge any matters disclosed in the mediation unless directed to do so.
- 9.5 The mediator shall not subsequently accept appointment as advocate or expert witness or otherwise provide assistance to any of the parties in connection with any related proceedings, except for purposes of proving any settlement agreed to by the parties.

10 COSTS, FEES & PAYMENTS

- 10.1 Parties shall meet their own costs of the mediation.
- 10.2 Unless otherwise agreed between the parties and the mediator, the mediator's fees shall be charged as agreed, for instance on a time basis at an hourly rate to be agreed in writing with the parties prior to commencing the mediation, plus expenses at cost plus GST. The parties, jointly and severally, agree to pay the mediator's fees.
- 10.3 The mediator may from time to time invoice the parties for fees and expenses incurred and may require a payment by way of security for future fees and expenses. Any invoices shall be paid within 14 days.
- 10.4 The mediator may require payments by way of security to be deposited into the stakeholder account of the Arbitrators' and Mediators' Institute of New Zealand Inc., PO Box 1477, Wellington, New Zealand.
- 10.4 The parties undertake to pay equally the amounts invoiced or required by the mediator. Alternatively, with the prior consent of the mediator, one or more parties may agree to pay invoices in such unequal shares as to achieve payment in full.

Failure to pay an invoice shall suspend the mediator's obligations until payment in full is made.

11 EXCLUSION OF LIABILITY

- 11.1 Any comments, suggestions or assessments by the mediator are not intended to be relied upon as professional advice.
- 11.2 The Arbitrators' and Mediators' Institute of New Zealand Inc. shall not be liable to any person, including the parties, for any act or omission including negligence or breach of confidentiality or for any advice associated with the mediation. Each of the parties agree to indemnify the Arbitrators' and Mediators' Institute of New Zealand Inc. in respect of any such claim.
- 11.3 The parties agree that while appointed pursuant to this agreement and working under the terms of the agreement and this protocol, the mediator shall not be in any way liable to the parties for negligence or otherwise and the parties agree to indemnify the mediator in respect of any such claim.

12 TERMINATION

- 12.1 Any party may withdraw at any time from the mediation.
- 12.2 If the withdrawal of one or more parties effectively terminates the mediation after the parties had agreed that the mediator should provide a written opinion, the mediator may, if considered appropriate by the mediator in the circumstances and at the request and cost of one or more of the other parties, provide to all parties a written preliminary assessment on any matter in dispute.
- 12.3 The mediation may be terminated at any time by agreement between the parties or by the mediator.
- 12.4 The mediator may terminate the mediation if he or she considers that a party's safety, or his or her own safety, is at risk.
- 12.5 The mediation shall be terminated automatically upon execution of a settlement agreement in respect of the dispute referred to mediation.
- 12.6 Termination shall not relieve the parties from their obligation to pay the mediator's fees and expenses.

13 VARIATION

13.1 The parties may vary this protocol by agreement.

© AMINZ 2004
PO Box 1477, Wellington, New Zealand
www.aminz.org.nz

COPYRIGHT

The Arbitrators' and Mediators' Institute of New Zealand Inc is and remains the copyright owner in respect of this Protocol. Material precedents and information in this Protocol may be used or reproduced for the purposes intended by the Institute, including the use by Associate and Fellow members of the Institute in the course of their professional duties, but with that exception, the Protocol may be reproduced in whole or in part only with the prior approval of the Institute in writing and with such acknowledgement as the Institute may from time to time require. In particular, the use of this Protocol for promotional purposes without the prior approval and consent of the Institute is absolutely prohibited.

DISCLAIMER

These materials are intended to provide an outline of procedures for arbitration or mediation or adjudication, as the case may be, and are not intended to be, and do not attempt to be, comprehensive, nor to be a substitute for legal advice. All parties must rely exclusively on their own skill, knowledge and judgment when making use of this document and in any doubt about the law and practice of any particular dispute resolution process parties should obtain independent advice or assistance. Neither the Arbitrators' and Mediators' Institute of New Zealand Inc. nor any other contributor assumes liability to anyone for any loss or damage caused by any error or omission whether such error or omission is the result or negligence or any other cause. Any and all such liability is disclaimed.