



Mediation Guidelines

2008 Edition

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COMPANIES AUDITORS AND LIQUIDATORS DISCIPLINARY BOARD

MEDIATION GUIDELINES

1. INTRODUCTORY MATTERS

1.1 Scope and Purpose

These guidelines are designed to inform and guide parties appearing before the Board and their professional advisers in deciding whether to engage in mediation and how to do so.

The guidelines provide a basic understanding of the matters raised. They do not provide legal advice on any of the matters referred to and professional advice should be obtained where necessary.

These guidelines deal only with mediations in which a Board Member or other person authorised by the Board acts as mediator.

1.2 Definitions

In these guidelines:

- (a) "Applicant" refers to the party (either the Australian Securities and Investments Commission or the Australian Prudential Regulation Authority) which makes application to the Board;
- (b) "Application" refers to the application to the Board by the Applicant;
- (c) "Board" refers to the Companies Auditors and Liquidators Disciplinary Board;
- (d) "Hearing" refers to the hearing of the Application by the Board;
- (e) "Mediation" refers to a structured process for dealing with disputes and other problems in which the parties in dispute are assisted by a third person, the mediator, to facilitate their discussions;
- (f) "Member" refers to the Chairman, the Deputy Chairman, or a Member of the Board;
- (g) "Panel" refers to a Panel of the Board constituted to deal with the Application; and
- (h) "Respondent" refers to the respondent auditor or liquidator under an Application.

2. MEDIATION

2.1 Principles of Mediation

- (a) Mediators do not give legal advice nor make decisions for the parties.
- (b) Mediators do not make recommendations to the parties nor indicate how the Application might be determined if it came to a Hearing before the Board.
- (c) Mediation upholds the principle of party autonomy and mediators facilitate the parties' own decision-making process.

2.2 Purposes of Mediation

(a) Achieving settlement on all issues

Mediation can be used to facilitate the parties making decisions on all issues in contention with a view to settling the dispute between them.

(b) Achieving agreement on all or some disputes of fact

Mediation can be used to facilitate agreement on disputed factual issues to enable the parties to develop an agreed statement of facts that can be used at the Hearing, subject to the consent of the Board. The parties can also agree on ways of resolving outstanding factual differences. Any such agreement may save time and cost at the Hearing.

(c) Settling lists of agreed matters and issues in dispute

Mediation can be used to define the parameters of the dispute by facilitating the production of lists of agreed matters and of issues which are in dispute and require resolution by the Board, but subject to the consent of the Board.

2.3 Mediation and the Board

Mediation will be used as a tool to help refine and isolate issues in dispute between the Applicant and the Respondent, and not to force the parties to settle. This may lead to matters being agreed upon between the parties, reducing the number of contentions needing determination at the Hearing. The mediation may also help clarify issues which remain in dispute. It is then the purpose of the Hearing, as the appropriate forum, to make a determination on the Application having regard to what was achieved at the mediation.

It is important to note that the primary objective of mediation is to help refine and isolate issues in dispute and not to set out to achieve a draft form of orders for consideration by the Board. However, the process of mediation may lead to agreement between the parties on all matters, in which case the parties may submit to the Board a draft form of orders for the Board's consideration.

Mediation *cannot*, and is not intended to, usurp the primary function of a Hearing, that is, to determine Applications. Therefore it must be kept in mind that mediation will not necessarily resolve the existing dispute in the terms agreed between the parties, or at all, although the Board will take those terms into account. Mediation will not circumvent the need for a Hearing, but may result in a draft consent order which the Board, in its discretion, may agree to make.

3. POLICY MATTERS

3.1 Legal rights

The Applicant has the *legal right* to seek a hearing of its Application, it therefore has no legal compulsion to enter mediation. However, the Applicant may see benefit in conducting discussions with the Respondent in a more informal forum where a skilled facilitator is present to facilitate consideration of options for resolution of the dispute.

Mediation may be initiated by either party and the initiation of mediation will not be seen as a sign of weakness and will normally remain confidential to the parties.

3.2 Voluntary nature

In all matters coming before the Board, mediation will be an option which will be exercised if both the Applicant and the Respondent consent. The Board may, if it considers it appropriate, suggest to the parties that they may wish to take part in a mediation but will not coerce or influence the parties to go to mediation.

No party is under any obligation to engage in a mediation.

3.3 Identity of Mediators and Avoidance of Bias

Mediators may be drawn from Members of the Board. A Member who sits as a mediator will not sit on the Panel if the Application goes to a Hearing. This applies also when the parties have submitted to the Board a draft form of consent order – following a mediation.

3.4 Confidentiality and without prejudice status of mediation

In most situations, the without prejudice privilege will apply in respect of mediation proceedings. No evidence can be led in a Hearing as to anything said or done during the course of a mediation. Mediation proceedings are also confidential in that mediators are subject to a duty of confidentiality in respect of any information provided, document initiated or communication made in the mediation, unless disclosure is required by law or agreed to by all parties.

3.5 Roles and Functions of Mediators

While there is wide variety and diversity in the roles and functions of mediators, the following can be regarded as indicative for mediations conducted under these Guidelines:

- (a) To convene the mediation conference and provide a setting conducive to discussion, negotiation and decision-making;
- (b) To assist the parties to communicate accurately, productively and courteously with each other;
- (c) To facilitate constructive discussions in relation to the parties' concerns and assist to resolve problems by such discussions;
- (d) To encourage the parties to come to a settlement without imposing any undue influence or duress on them.

Mediators will not provide legal or other advice or recommend particular solutions. If specifically requested by both parties, they may give an indication of the range of outcomes which could result from a Hearing, but without making a specific prediction or recommending a specific outcome to the parties.

4. PRACTICE MATTERS

4.1 Mediation and hearing procedures

Mediation can be held at different times during the pre-hearing stages of an Application but will not usually take place before at least one pre-hearing conference. This conference will provide an opportunity for the parties to discuss whether or not to proceed to mediation. If then or at any later stage the parties agree to undertake mediation, the Board Registrar is available to assist the parties to arrange for who will be in attendance, to agree on any exchange of documents or statements, and to make other organisational arrangements necessary for the mediation. The Board itself will take no part in the mediation. The extent and results of any mediation are solely a matter for consent between the parties.

4.2 Pre-Mediation Activities

(a) Exchange of documents

The Board's Manual of Practice and Procedure sets out the manner in which documents relating to the Application are to be exchanged between the parties. If the parties decide to undertake mediation, they will, be required to indicate what aspects of the Application (and statement of facts and contentions) have been agreed to be mediated. This indication may relate to only a few issues in the Application, or may relate to the whole of the Application.

Documents required *solely* for the purposes of mediation are not to be filed with the Board, but provided to the Registrar for dissemination to the mediator. If documents already forming part of the Board's file are to be used at mediation, the parties must identify to the Registrar which documents (or part thereof) included in the Board's file are to be used for the mediation.

Generally, any documentation required solely for mediation should be agreed upon by the parties. Any issue relating purely to mediation may be discussed at a pre-mediation conference solely between the parties and the mediator. The Board *will not* direct any documents relating solely to mediation to be filed and served, as mediation is consensual.

As a Hearing date will usually have been set by the Board prior to mediation, the Hearing date will provide sufficient incentive to the parties to move efficiently and expeditiously in the mediation. Mediation will generally not affect the Board's Hearing date except in the most exceptional circumstances.

(b) Exchange of information

The exchange of information *solely* required for the mediation will be agreed by the parties on their own initiative, or by way of agreement at a pre-hearing or pre-mediation conference. There is no need for the Board to make directions as to the exchange of this information. The Registrar, however, will keep records of the parties' progress in the exchange of information.

(c) Mediation Agreement

Having decided to mediate, the parties need to execute a Mediation Agreement prior to the mediation which will:

- (i) confirm the parties' request for mediation;
- (ii) specify the date and time for the mediation;
- (iii) stipulate and confirm the parties' agreement relating to the mediator's immunity and that all information provided in the mediation will be confidential.

A copy of the Board's suggested Mediation Agreement is attached as Annexure A. The parties should also be aware that the mediator will not undertake mediation unless the agreement is executed and the mediator may wish to specify further terms in particular circumstances. If there is no agreement to the satisfaction of the mediator on any point, the mediator may refuse to undertake mediation.

4.3 Mediation Participants

Generally, the Respondent will be present personally at the mediation, together with a representative of the Applicant who must have the authority to negotiate and settle issues on behalf of the Applicant. Lawyers and other professional advisers are entitled to participate in the mediation proceedings.

4.4 The Conduct of the Mediation

(a) Opening statement

The mediator makes a short opening statement which outlines the nature of mediation, the roles of the mediator, the parties and their advisers, the steps in the mediation process, and confirms the basic terms and conditions under which the mediation is conducted. The mediator secures the parties' agreement to procedural guidelines and deals with any questions which they may have as to procedure.

(b) Party statements

Each party is then invited to outline their concerns in a short statement which does not go into any detail.

(c) Identification of common ground

The mediator tries to identify areas of agreement between the parties to provide common ground on which subsequent agreements can be reached.

(d) Establishment of list of issues requiring agreement

The mediator assists the parties to define the issues in respect of which agreement is required.

(e) Discussion of issues and negotiations

The mediator assists the parties to exchange information and views on the various issues, to negotiate on them and to reach agreement on the matters in dispute. The mediator assists the parties to work methodically through the issues, to communicate accurately, to negotiate constructively and to try to reach agreement on a final settlement.

(f) Decision-making and recording

The mediator assists the parties to record their agreements in writing, and to decide on what other steps to take, such as, in the case of settlement of all issues in dispute, applying to the Board for orders in terms of the agreement they have reached.

(g) **Conclusion or termination**

The mediator concludes the mediation when all agreements have been reached. The mediator may also terminate the mediation if, in the light of time and resource factors, the mediation does not appear to offer further benefit to the parties, or the mediator forms the view that no agreement is likely on relevant issues.

Either party may terminate the mediation at any time but the mediator may try to prevent the termination of the mediation where he or she thinks that it is in the best interests of the parties to continue.

(h) **Duration and Adjournments**

Mediation must take place within a time range specified by the Board at a pre-hearing conference, and also having regard to the parties' progress at mediation as determined by the mediator. The mediator may adjourn a mediation meeting in certain circumstances, for example where one or both parties provide acceptable reasons for an adjournment or where it is necessary in order to obtain further information or to further the negotiation between the parties.

4.5 Variations in Mediation Procedure

(a) **Separate meetings**

Usually the mediator will meet separately with the different parties, with a view to assessing progress, discussing settlement options and exploring ways of breaking settlement impasses. These meetings will be conducted on a confidential basis and no disclosures will be made by the mediator unless assented to by the disclosing party.

(b) **Shuttle mediation**

Where circumstances require it, or at the parties' request, the mediator may move between the parties while they are located in different rooms and act as the channel of communication between them, which might include the transmission of offers, counter-offers and other messages between them.

4.6 Rules of Procedure, Evidence and Natural Justice

There are no formal rules of procedure or evidence in mediations. The process is conducted on a flexible and informal basis, no formal evidence is led and there is no cross-examination of parties or witnesses. Mediators shall at all times uphold the principles of fairness and natural justice by avoiding any conflict of interests or bias and by acting impartially as between the parties at all times.

4.7 The Role of Professional Advisers

Professional advisers are permitted to assist parties during the course of the mediation. In mediation, lawyers and other professional advisers should have a circumscribed role that involves supporting their clients in making their own decisions and not in acting as advocates or cross-examiners or taking an adversarial stance.

4.8 The Role of Witnesses and Experts

As regards witnesses and experts, should this be relevant in these matters, they may be present at the mediation meeting, may contribute when required by the parties and mediator, and may be asked to confer with one another in order to draw up a list of matters on which they are in agreement and to provide reasons for disagreement in other areas. All third parties will be required to sign the Confidentiality Agreement attached to the Mediation Agreement.

4.9 Liability and Indemnity of Mediators

The mediator will not be liable to the parties severally or jointly, or to any third party for anything done or omitted by the mediator in relation to the mediation, and each of the parties will release and indemnify the mediator from and against any claims for negligence, bias or other misconduct other than actual fraud [see Annexure A].

4.10 Agreements reached in mediations

Agreements reached in mediations where they are intended to be submitted to the Board at a Hearing *must* be reduced to writing. This may be done in either of two ways:

(a) **Amendment of documents**

Where some issues have settled and others remain in dispute at the end of mediation, these are to be embodied in an amended Application and statement of facts and contentions. The Respondent's response is also to be amended. Both the amended Application (and statement of facts and contentions) and response are to be served and filed with the Board.

(b) **Settlement draft orders**

Where an agreed settlement covers all issues and it is proposed that the terms of settlement will be submitted to the Board, the parties *must* do so in the form of a draft order under section 1292 of the Corporations Act, under which the Board can make determinations on the Application. The draft order should contain an admission by the Respondent that there has been a failure to comply with the specific criteria within section 1292 alleged, and setting out the Board's order, eg. suspension for a specified period, reprimand, undertakings, etc.

The Board is not obliged to approve any such draft order, and may vary or reject the agreed terms. Further, the Board may withhold its approval if the terms of a mediated agreement are beyond its jurisdiction or otherwise unacceptable. As with any other order made by the Board, details of the order once formally made by the Board *must* be published in the Commonwealth of Australia Gazette (pursuant to section 1296 of the Corporations Act). This is a mandatory legislative requirement and publication is not a matter which may be negotiated. Further, the Board will not vary its practice of dissemination of the gazetted consent order to interested persons, such as the professional accounting bodies.

The Mediation Agreement (Annexure A) contains the parties' acknowledgement that the views of the Member mediator are personal views, and do not in any way represent the Board's view on the proposed order.

As it may not be possible at the mediation for the parties to amend documentation previously filed with the Board, such as the Application and the Respondent's response, the parties should put in writing the terms of the agreed resolution of the dispute. As mediation is separate from Board Hearing procedures, if one party or both subsequently refuse to honour the agreement, before the Board determines the Application, then the agreement lapses. Nothing said or done at the mediation may be raised at the Hearing, and no evidence may be led that a written agreement created during the mediation was subsequently abandoned.

4.11 Costs and Costs Orders

Each party will bear its own costs in relation to the mediation proceedings, including the costs of preparation and professional representation. The parties will bear in equal shares the costs incurred in hiring a mediation venue and associated expenses. Where a Board mediator is engaged the Board shall bear the cost of provision of the Board mediator but in exceptional circumstances the Board may require any draft form of orders resulting from the mediation to provide for payment of that cost. Where parties choose to mediate matters privately, ie. without a Board appointed mediator, the parties accordingly bear all costs of such mediations, including the cost of the mediator. The Board mediator has no power to make costs orders but the parties are able to negotiate on costs themselves.

Annexure A – Mediation Agreement

MEDIATION AGREEMENT

AGREEMENT dated [*] 200[*] between:

1. **Australian Securities and Investments Commission (ASIC)**
2. [*] *(Respondent)*
3. [*] *(Mediator)*

RECITALS

- A. ASIC is the Applicant to the Companies Auditors and Liquidators Disciplinary Board (**the Board**) in respect of the Respondent in a matter numbered [*] (the Matter).
- B. ASIC and the Respondent (**the Parties**) have requested the Mediator, and the Mediator has agreed, on the terms and conditions of this Agreement to assist the Parties to resolve, if possible, issues of contention between the Parties (**the Issues**).

IT IS AGREED as follows:

1. APPOINTMENT OF MEDIATOR, VENUE AND DATE

- 1.1 The Parties appoint the Mediator, and the Mediator accepts the appointment, to mediate the Issues (*the Mediation*) on the terms and conditions of this Agreement.
- 1.2 The mediation shall take place at the offices of [*] commencing at [*] on [*] 20[*] and continuing until terminated hereunder.

2. DUTIES AND RESPONSIBILITIES OF THE MEDIATOR

- 2.1 The Mediator will conduct the mediation impartially and fairly.
- 2.2 The Mediator will assist the Parties to explore options for and, if possible to achieve the expeditious resolution of some or all of the Issues by Agreement between them.
- 2.3 The Mediator will not make decisions for a Party or impose a solution on the Parties.
- 2.4 The Mediator will not, unless the Parties agree in writing to the contrary, obtain from any person who is not a Party or the representative of a Party advice or an opinion as to any aspect of the Issues and then only from such person or persons agreed by the Parties.

3. FEES AND EXPENSES

- 3.1 The Costs of the Mediation (including any costs of the venue, secretarial or reporting services, telephone, facsimile, photocopying and copying and the Mediator's fees) are to be shared by the Parties equally.
- 3.2 Any additional expenses or disbursements incurred by the Parties prior to or at the Mediation are to be borne by the Parties who incur them.

4. CONFLICTS OF INTEREST

- 4.1 The Mediator acknowledges that he has disclosed to the Parties to the best of his knowledge any prior dealings he has had with either of them and any interest he has in the Issues.
- 4.2 If in the course of the Mediation the Mediator becomes aware of any circumstances that might reasonably be considered to affect the Mediator's capacity to act impartially the Mediator will immediately inform the Parties of those circumstances. The Parties will then confer and if agreed continue with the Mediation before the Mediator or terminate the Mediation.

5. CO-OPERATION AND GOOD FAITH

- 5.1 The Parties must co-operate in good faith with the Mediator and negotiate in good faith with each other during the Mediation.
- 5.2 Each Party must use its best endeavours to comply with reasonable requests made by the Mediator to promote the efficient resolution of the Issues.

6. AUTHORITY & REPRESENTATION

- 6.1 Each of the Parties must either attend the Mediation personally or be represented at the Mediation by an officer or other person with authority to make decisions and agreements binding on that Party in settlement of the Issues, or any of them.
- 6.2 Each Party may also appoint one or more other persons including legally qualified legal advisers actively to assist and advise the Party in the Mediation.

7. CONDUCT OF THE MEDIATION

- 7.1 The Mediation, including all preliminary steps, shall be conducted in such manner as the Mediator considers appropriate having due regard to the nature and circumstances of the Issues and the agreed goal of an efficient and expeditious resolution of the Issues.
- 7.2 Without limiting the Mediator's powers under Clause 7.1, the Mediator may give directions as to:
 - (a) the exchange of experts' reports, the meeting of experts and the subsequent preparation of a joint experts' report with a view to identifying areas of agreement, narrowing the areas of disagreement and clarifying briefly the reasons for disagreement;
 - (b) the exchange of brief written outlines of the Issues;
 - (c) service on the Mediator prior to the Mediation of any such reports, outlines and other documents; and
 - (d) preliminary conferences prior to the Mediation.
- 7.3 If specifically requested by both Parties, the Mediator may give an indication of the range of outcomes which could emanate from a Board hearing, but without making a specific prediction or recommending a specific outcome to the Parties.
- 7.4 Any views expressed by the Mediator are personal views and do not in any way represent the Board's view or its likely attitude towards a proposed resolution of the Issues.
- 7.5 The mediation will be conducted on a confidential and without prejudice basis.

8. COMMUNICATIONS BETWEEN THE MEDIATOR AND A PARTY

- 8.1 The Mediator may meet as frequently as the Mediator deems appropriate with the Parties together or with a Party alone and in the latter case the Mediator need not disclose the meeting to the other Party.
- 8.2 The Mediator may communicate with a Party or the Parties orally and/or in writing.
- 8.3 Subject to Clause 8.4, any document relied on by a Party and provided to the Mediator will be immediately served by that Party on the other Party.
- 8.4 Information, whether oral or written, disclosed to the Mediator by a Party in the absence of the other Party can only be disclosed by the Mediator to the other Party with the disclosing Party's prior consent.

9. CONFIDENTIALITY OF THE MEDIATION

- 9.1 The Parties and the Mediator agree in relation to all confidential information disclosed to any of them during the Mediation, including the preliminary steps:
- (a) to keep that information confidential;
 - (b) not to disclose that information except to a Party or a representative of that Party participating in the Mediation or if compelled by law to do so; and
 - (c) not to use that information for a purpose other than the Mediation.
- 9.2 The Parties agree that any person present at the Mediation, except for the Parties or their representatives or their legal advisers, should sign and be bound by the Confidentiality Agreement, a copy of which is attached to this Agreement.

10. PRIVILEGE

The Parties and the Mediator agree that, subject to Clause 3, the following will be privileged and will not be disclosed in or relied on or be the subject of a subpoena to give evidence or to produce documents in any arbitral or judicial proceedings in respect of the Issues:

- (a) any settlement proposal, whether by a Party or the Mediator;
- (b) the willingness of a Party to consider any such proposal;
- (c) any admission or concession made by a Party; and
- (d) any statement made or document produced by the Mediator.

11. SUBSEQUENT PROCEEDINGS

- 11.1 The Mediator will not sit as a Member of a Panel in the matter nor accept appointment as an arbitrator in or act as an advocate in or provide advice to a Party to any arbitral or judicial proceedings relating to the Issues.
- 11.2 Neither Party will take action to cause the Mediator to breach Clause 11.1.
- 11.3 If all the Issues are not resolved and the Parties proceed to a hearing of the Board or any other court or tribunal:
- (a) evidence shall not be given at the hearing of any of the discussions at the Mediation or of the existence or contents of any document brought into existence for the Mediation;
 - (b) nor shall the Parties compel the Mediator to attend the hearing to give any evidence concerning the Mediation; and
 - (c) no evidence may be led at a hearing that a mediated Agreement was subsequently abandoned; except that:
 - (i) any Party shall be entitled to rely on, or to produce, at any subsequent proceedings, any document or information that they have prepared or obtained for the purposes of presenting their case in the Mediation;
 - (ii) with the written consent of both Parties, information about, or emanating from, the Mediation may be disclosed; and
 - (iii) disclosure of information may be made as required by law or an order of court.

12. TERMINATION

- 12.1 A Party may terminate the Mediation immediately by giving notice to the other Party and to the Mediator.
- 12.2 If, after consultation with the Parties, the Mediator forms the view that he will be unable to assist the Parties to achieve resolution of the Issues he may immediately terminate his engagement as Mediator by giving written notice to the Parties of that termination. The Mediation will only be terminated in that event if one Party gives notice to that effect to the other Party. If no such notice is given the Parties shall appoint a new Mediator.
- 12.3 The Mediation will be terminated automatically on signature of a settlement Agreement in respect of the Issues pursuant to clause 13.

13. SETTLEMENT

- 13.1 If settlement is reached at the Mediation, the terms of the settlement shall be recorded in a written Settlement Agreement which shall contain the substance of clauses 13.2 & 13.3 (Settlement Agreement) and shall be signed by the Parties and the Mediator before any of the Parties leave the Mediation conference.
- 13.2 The Parties acknowledge that the Settlement Agreement is produced for the purpose of submission to the Board, which shall determine the Matter in accordance with its statutory powers and responsibilities. Having taken note of the terms of the Settlement Agreement, the Board is not bound to make an order in the same terms as that agreement, or at all.
- 13.3 The Settlement Agreement is enforceable by any Party to the Settlement Agreement to the point of submission to the Board, but will be superseded by any order of the Board made in the Matter, and will be of no effect thereafter.

14. EXCLUSION OF LIABILITY AND INDEMNITY

- 14.1 The Mediator will not be liable to any Party, except in the case of fraud by the Mediator, for any act or omission by him in the performance or purported performance of his obligations under this Agreement.
- 14.2 The Parties jointly and severally release and indemnify the Mediator from and against all claims (except in the case of fraud by the Mediator) arising out of or in any way referable to any act or omission by the Mediator in the performance or purported performance of his obligations under this Agreement.

15. GOVERNING LAW AND JURISDICTION

This Agreement is governed by the laws of the State in which the Mediation takes place.

16. COUNTERPARTS

This Agreement may be executed in any number of counterparts. All counterparts together will be taken to constitute one instrument.

EXECUTED at:

PARTY

SIGNED by the said) _____

Signature

[*]) _____

Print Name

in the presence of:) _____

Witness

Print Name

PARTY

SIGNED by the said) _____

Signature

[*]) _____

Print Name

in the presence of:) _____

Witness

Print Name

MEDIATOR

SIGNED by the said) _____

Signature

[*]) _____

Print Name

in the presence of:) _____

Witness

Print Name

CONFIDENTIALITY AGREEMENT

Name of person present at the mediation (not being a Party or the representative or lawyer of a Party).

(Name of person. Please print)

I UNDERTAKE to the Parties to the Mediation that, in exchange for being permitted by them to be present at the Mediation:

1. I will not disclose to anyone any information received by me during the Mediation, unless required by law to make such a disclosure.
2. I will not disclose to anyone involved in the Mediation any information received by me during the Mediation from a Party to the Mediation unless expressly authorised by the disclosing Party to do so.

(Signature of the person)

(Date)

(Address)