



## **PRACTICE NOTE 2**

# **GUIDANCE FOR PARTIES ON PRE-HEARING MEDIATION**

**April 2020**

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**GLOSSARY**

Expression	Description
<i>Defined terms appear in bold type throughout this practice note</i>	
<b>AAT</b>	Administrative Appeals Tribunal.
<b>Administrative Matter</b>	An <b>Application</b> to <b>CADB</b> with respect to an administrative complaint (see definition paragraph 4.5 of <a href="#">PN1</a> )
<b>Agreed Fact</b>	Any fact that the <b>Applicant</b> and <b>Respondent</b> agree is not, for the purposes of the <b>CADB Proceedings</b> , to be disputed, that is stated in an agreement signed by the <b>Parties</b> or their legal representatives and tendered to the <b>CADB Panel</b> as evidence in the <b>CADB Proceedings</b> .
<b>Applicant</b>	The body (either <b>ASIC</b> or <b>APRA</b> ) applying to <b>CADB</b> under s1292 of the <b>Corporations Act</b> .
<b>Application</b>	An <b>Application</b> made to the Board under s1292 of the Act.
<b>APRA</b>	Australian Prudential Regulation Authority.
<b>ASIC</b>	Australian Securities and Investments Commission.
<b>ASIC Act</b>	Australian Securities and Investments Commission Act (Cth) 2001 (as amended).
<b>ASIC Regulations</b>	Australian Securities and Investments Commission Regulations (Cth) 2001 (as amended).
<b>CADB</b>	Companies Auditors Disciplinary Board.
<b>CADB Hearing</b>	The hearing by a <b>CADB Panel</b> relating to an <b>Application</b> .
<b>CADB Panel</b>	A Panel convened in accordance with Section 210A <b>ASIC Act</b> .
<b>CADB Proceedings</b>	The course of an <b>Application</b> to <b>CADB</b> to its conclusion.
<b>Case summary for Hearing</b>	Annexure J and paragraphs 10.12-10.14 and 18.4 <a href="#">PN1</a> .
<b>Chair</b>	The <b>Chairperson</b> of <b>CADB</b> .
<b>Conduct Matter</b>	An <b>Application</b> regarding a conduct complaint (see paragraph 4.6 <a href="#">PN1</a> ).
<b>Corporations Act</b>	Corporations Act (Cth) 2001.as amended
<b>Deputy Chair</b>	The deputy <b>Chairperson</b> of <b>CADB</b> .
<b>Determination</b>	A <b>CADB Panel's</b> written findings outlining the reasons for deciding whether the matters alleged in an <b>Application</b> have been established.
<b>Draft Costs Order</b>	A draft consent order as to costs agreed by the Parties.
<b>Federal Court Costs Scale</b>	<a href="#">Federal Court Costs Scale</a> in force at the time an application is commenced.
<b>Final Decision</b>	The <b>CADB Panel's</b> decision incorporating the reasons for its findings and final orders on sanction delivered following a <b>Determination</b> .

<b>Final Hearing</b>	The reconvened <b>CADB Hearing</b> to hear Parties' submissions and evidence, to the extent relevant, on sanctions, costs and publicity.
<b>GPN-Costs</b>	Federal Court Costs Practice Note dated 25 October 2016 <a href="#">GPN Costs</a> (as amended).
<b>Issues Summary</b>	A document to be prepared jointly by the <b>Parties</b> in accordance with paragraphs 8.2 and 8.3 <a href="#">PN1</a> which delineates the issues in dispute between them, to be provided to <b>CADB</b> at the <b>pre-hearing conference</b> and to be updated by the <b>Parties</b> as necessary and appropriate prior to the commencement of the <b>CADB Hearing</b> so that it continuously accurately reflects the disputed issues between the <b>Parties</b> requiring <b>Determination</b> at the <b>CADB Hearing</b> .
<b>Mediations</b>	A structured process for dealing with disputes and other problems in which the <b>Parties</b> in dispute are assisted by a third person, the mediator, to facilitate their discussions.
<b>Member</b>	The <b>Chair</b> , the <b>Deputy Chair</b> , or a Member of <b>CADB</b> .
<b>Notice of CADB Hearing</b>	See paragraph 10.1 and Annexure I <a href="#">PN1</a> .
<b>Parties</b>	The <b>Applicant</b> and the <b>Respondent</b> in <b>CADB Proceedings</b> .
<b>Preliminary Costs Determination</b>	The <b>CADB Panel's</b> preliminary view as to what if any costs order is appropriate and the basis of that order, included in the provided <b>Determination</b> .
<b>PN1</b>	Guidance for <b>Parties</b> involved in <b>CADB</b> Disciplinary Proceedings on Case Preparation, <b>Hearing</b> and Decision Procedures Practice Note.
<b>PN2</b>	This Mediation Practice Note.
<b>PN3</b>	Costs Practice Note.
<b>Pre-hearing Conference</b>	A conference held by the <b>Chair</b> under s1294A of the <b>Corporations Act</b> .
<b>Proposed Consent Orders</b>	Draft orders reflecting an outcome to the <b>Application</b> acceptable to each <b>Party</b> . Proposed Consent Orders must be accompanied by the <b>Parties' Statement of Agreed Facts</b> .
<b>Registered Auditor</b>	An Auditor registered by <b>ASIC</b> pursuant to s1280 <b>Corporations Act</b> .
<b>Registrar</b>	The Registrar of <b>CADB</b> .
<b>Respondent</b>	The <b>Registered Auditor</b> the subject of an <b>Application</b> to <b>CADB</b> .
<b>Scheme</b>	The scheme established by Part 9.2 <b>Corporations Act</b> for regulating <b>Registered Auditors</b> in Australia.
<b>Statement of Agreed Facts</b>	An agreement signed by the <b>Parties</b> or their legal representatives and tendered to the <b>CADB Panel</b> as evidence in the <b>CADB Proceedings</b> that identifies each <b>Agreed Fact</b> .
<b>Witness Summons</b>	<b>CADB</b> has power to compel persons to appear at the <b>CADB Hearing</b> to give evidence and produce documents. See <a href="#">PN1</a> paragraphs 10.2-10.11 for details.

## 1 INTRODUCTORY MATTERS

### 1.1 *Scope and Purpose*

**PN2** is designed to inform and guide **Parties** appearing before **CADB** and their professional advisers, about the use of **Mediation** as a pre-hearing step to streamline the conduct of a **CADB Hearing** when possible. **PN2** should be read in conjunction with [PN1](#), in particular paragraphs 8 and 9.

**PN2** is intended to provide an outline of some practical aspects of conducting a **Mediation** with a **CADB** appointed mediator and is not intended to constitute legal advice to any **Parties** in **CADB Proceedings**.

The scope of **PN2** is limited to those **Mediations** conducted by the **Parties** in which a **CADB Board Member** acts as mediator.

## 2 MEDIATION

### 2.1 *Overview of generally applicable principles of mediation*

**Parties** are asked to bear in mind the following general principles:

- (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 an **Application** might be determined by a **CADB Panel** following a **Hearing**.
- (c) **Mediation** upholds the principle of **Party** autonomy and a mediator's role is to facilitate the **Parties'** own decision-making process.

### 2.2 *Objective of invoking Mediation as a pre-hearing step in CADB proceedings*

**Parties** are referred to [PN1](#) - paragraphs 8 and 9.

### 2.3 *Mediation in the context of CADB's responsibility to hear and determine Applications received.*

It is important to recognise that the primary objective of **Mediation** in **CADB Proceedings** is to refine and isolate issues in dispute, rather than, necessarily to achieve a draft form of orders for consideration by **CADB**. However, a **Mediation** may lead to agreement between the **Parties** on all matters, including a consensus view on an appropriate sanction, in which case the **Parties** may submit to the **Panel** a draft form of orders for their consideration.

**Mediation cannot**, and is not intended to, usurp the primary function of a **Hearing** by the **Panel**, which is to determine **Applications**. Therefore, **Parties** are asked to keep in mind that **Mediation** will not necessarily resolve the existing dispute on the basis of terms agreed between the **Parties**, or at all, although the **CADB Panel** will take those terms into account in its deliberations.

**Mediation** does not therefore ever circumvent the need for a **Hearing** (although the **Hearing** time necessary is likely to be significantly reduced) and it may result in any **Proposed Consent Orders** proposed by the **Parties** being made by the **CADB Panel**, should it be satisfied, in its discretion that they represent an appropriate and proportional outcome, based on the facts<sup>1</sup>.

### 3 POLICY MATTERS

#### 3.1 *Legal rights*

The **Applicant** has the *legal right* to seek a **Hearing** of its **Application**, and neither **Party** is obliged to participate in a **Mediation**. However, **CADB** encourages the **Parties** to consider **Mediation** as a means of achieving the objectives set out in Paragraphs 8 and 9 of [PN1](#) in order to increase the likelihood of the more efficient dispatch by **CADB** of the **Application**.

**Parties** are referred to [PN1](#) for further guidance on initiation of **Mediation** as a step-in **Hearing** preparation.

#### 3.2 *Identity of Mediators and Avoidance of Bias*

If the **Parties** decide on **Mediation** and wish that to occur within the **CADB** framework, the **CADB Chair** will select a current **CADB Member** to preside at the **Mediation**.

No **CADB Member** involved in a **CADB** facilitated **Mediation** will participate in the **CADB Panel** subsequently convened to hear that matter.

#### 3.3 *Confidentiality and without prejudice status of mediation*

The presumption is that the without prejudice privilege will apply in respect of any **Mediation** convened, subject to the **Parties** agreeing otherwise (in writing) with respect to any aspect of the **Mediation**.

In any subsequent **Hearing**, no evidence can be led as to anything said or done during the course of **Mediation** unless the **Parties** agree (in writing).

Further, **CADB** notes the confidentiality of **Mediation** proceedings insofar as the presiding mediator is at all times subject to a duty of confidentiality with respect to any information provided, document initiated or communication made in the

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<sup>1</sup> See Decision and reasons Wayne John Wessels 05/QLD13 [Wayne John Wessels Decision](#)

**Mediation** process, unless disclosure is required by law or agreed to (in writing) by all **Parties**.

### **3.4 Roles and Functions of the CADB Mediator**

While the roles and functions of a mediator may vary, the following can be regarded as indicative for **Mediations** conducted pursuant to **PN2**:

- (a) To convene the **Mediation** conference and provide an environment 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 interaction between the **Parties** and assist them to explore and identify
  - i. the issues for **Determination** for inclusion in the **Issues Summary** (see paragraphs 8.2 and 8.3 of [PN1](#)) and:
  - ii. Any areas of common ground, with a view possibly to formulating either;
    - 1) An agreed statement of facts; or
    - 2) An agreed statement of facts **and** consensus orders; to be proposed to the **Panel** at the **Hearing**.
- (d) The Mediator will not provide legal or other advice or make recommendations. If specifically requested by both **Parties**, the Mediator may give a personal opinion about the range of outcomes that 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**

**Parties** are referred to paragraph 9 of [PN1](#) for guidance on timing for conducting pre-hearing **Mediation**. It is the responsibility of the **Parties** to arrange an appropriate time and forum for the **Mediation** to occur and to liaise with the **CADB** Mediator nominated with regard to pre-mediation preparation, for example the exchange of documents or statements. Except for the costs of a **CADB** appointed Mediator<sup>2</sup>, each **Party** is expected to bear their own costs of the **Mediation** and to share equally the cost, if any of the **Mediation** forum.

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<sup>2</sup> and subject to any subsequent costs order made by CADB under section 223(1)(c) or section 223(2)(c) ASIC Act.

## 4.2 Outline of Pre-Mediation Steps

**Parties** are referred to paragraphs 8 and 9 of [PN1](#) for guidance on and timing for convening the **Mediation**.

### Exchange of information for Mediation

The exchange of information *solely* required for **Mediation** will be agreed by the **Parties** on their own initiative. There is no need for **CADB** to make directions as to the exchange of this information.

Each **Party** is to copy the **Registrar** on any documents served on the other **Party** for the purpose of the **Mediation** so that they may be provided to the nominated Mediator. Such documents will otherwise be kept confidential by the **Registrar**.

Should either **Party** form the view that a teleconference with the nominated Mediator is necessary prior to **Mediation**, that **Party** should email the **Registrar** (copied to the other **Party**) setting out the basis of their request and the **Registrar** will make the necessary arrangements for a teleconference with both **Parties** and the Mediator.

To the extent documents are created by the **Parties** solely for **Mediation**, those documents will remain confidential to the **Mediation**, unless the **Parties** otherwise agree in writing.

### Mediation Agreement

Should the **Parties** decide to mediate within the **PN2** framework, they must, prior to the **Mediation**, execute a **Mediation** Agreement that:

- (i) confirms the **Parties'** request for **Mediation** within the framework of **PN2**;
- (ii) specifies the date and time for the **Mediation**;
- (iii) stipulates and confirms the **Parties'** agreement regarding the Mediator's immunity; and
- (iv) confirms the terms on which confidentiality of information provided during the **Mediation** will be maintained.

A copy of **CADB's** suggested terms for such **Mediation** Agreement is attached as Annexure **A** hereto. It includes a term that a Mediator nominated by **CADB** will not be liable to the **Parties** severally or jointly, or to any third party for anything done or omitted in connection with the **Mediation**, and includes a term that 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.

**Parties** are asked to note that the right of any **CADB** nominated Mediator not to act as Mediator is specifically reserved unless the **Parties** execute a suitable **Mediation** agreement substantially in terms of Annexure **A**.



Further, the nominated Mediator may wish to specify further terms for inclusion in a **Mediation** agreement depending upon the particular circumstances of the relevant matter and it is entirely within his/her discretion to do so. Their right not to act as Mediator unless such terms are acceptable to the **Parties**, is specifically reserved.

### **Mediation Participants**

The **Respondent** is expected to be present personally at the **Mediation**, together with a representative of the **Applicant** who has been given full authority on behalf of the **Applicant** to negotiate on and if relevant, resolve within the scope of this practice note, all matters in the proceedings.

Lawyers and other professional advisers are entitled to participate in the **Mediation** proceedings.

## **4.3 The Conduct of the Mediation**

### **Opening statement**

The Mediator will make a short opening statement in order to outline the purpose and structure of the **Mediation**, the roles and tasks of the Mediator, the **Parties** and their advisers, the steps in the **Mediation** process, and confirm the basic terms and conditions under which the **Parties** have agreed to conduct the **Mediation**. The Mediator secures the **Parties'** agreement to these procedural guidelines and deals with any questions which they may have.

### **Parties' statements**

Each **Party** will then be invited to outline their concerns in a brief statement which does not go into any detail.

### **Identifying common ground**

The Mediator will attempt to identify any areas or potential areas of consensus between the **Parties** to lay the foundation for discussion of common ground on which subsequent agreements might be reached.

### **Establishment of list of issues requiring agreement**

The Mediator assists the **Parties** to define the list of issues in respect of which agreement is required, by reference to the **Application** and response which will form the basis of the **Issues Summary**.

### **Discussion of issues and negotiations**

The Mediator may assist the **Parties** to exchange information and views on the various issues identified, to negotiate on them with a view to identifying the facts on which they are based and whether any of those facts may be agreed and/or why the facts are disputed and/or the allegation is disputed

The Mediator will encourage and assist the **Parties** to work methodically through the issues identified, to communicate accurately and to negotiate constructively with a view to narrowing the key areas of dispute and reaching agreement as to facts and possibly, agreed **Proposed Consent Orders** to be submitted to the **Panel**.

### **Decision-making and recording**

The Mediator will assist the **Parties** to record any agreements they reach in writing, and to decide on what other steps it would be desirable to take for a more efficient **Hearing**, depending on the outcomes achieved at the **Mediation** e.g.: the drafting of the **Issues Summary**, the preparation of agreed facts, and **Proposed Consent Orders**.

### **Conclusion or termination of Mediation**

The **Mediation** shall be concluded when:

- (a) The **Parties** have recorded their agreement in writing;
- (b) The Mediator terminates the **Mediation**. The Mediator may do this in his/her discretion should he/she form the view that the **Mediation** does not appear to offer further benefit to the **Parties**, or that agreement is unlikely on relevant issues.
- (c) Either **Party** terminates the **Mediation** – however the Mediator may seek a **Party's** reconsideration of their decision if in their view they believe it is in the best interests of the **Parties** to continue.

### **Duration and Adjournments**

**Mediation** must take place within a time range specified by paragraph 8.9 of [PN1](#)

The Mediator may adjourn a **Mediation** meeting in certain circumstances, for example where one or both **Parties** submit reasons that provide, in the Mediator's view, a proper basis for an adjournment or where it is necessary in order to obtain further information or where the Mediator forms the view it will further facilitate progress of negotiation that may identify agreed facts between the **Parties** and/or greater definition of the disputed issues between the **Parties**. In making such a decision the Mediator must have due regard to **CADB's** obligation to dispose of **Applications** efficiently as well as fairly.

## **4.4 Variations in Mediation Procedure**

### **Separate meetings**

Usually, following the introductory session of the **Mediation**, the Mediator will meet separately with the different **Parties**, with a view to assessing progress, discussing opportunities for compromise or agreement and exploring ways of encouraging constructive discussion with respect to disputed issues or facts. Such meetings take place on a confidential basis and no disclosures will be made by the Mediator except with the consent of the disclosing **Party**.

## **Shuttle mediation**

Where in the Mediator's view, the circumstances require it, or at the **Parties'** request, the **Parties** may not reconvene but instead utilise the Mediator to move between the **Parties** while they are located in different rooms in order to act as the channel of communication between them.

### **4.5 Rules of Procedure, Evidence and Natural Justice**

There are no formal rules of procedure or evidence applicable to a **Mediation**. 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. A **CADB** Mediator will at all times uphold the principles of fairness and natural justice by avoiding any conflict of interest or bias and by acting impartially as between the **Parties**.

### **4.6 The Role of Witnesses and Experts**

Any third **Parties** that either **Party** may wish to have participate in the **Mediation** for the purpose of addressing evidentiary matters, including experts, must sign a confidentiality agreement beforehand that is to be provided to the other **Party** and the Mediator before commencement of the **Mediation**.

To the extent either **Party** involves an expert in the **Mediation**, the Mediator may ask that expert to prepare a document that summarises their view on the matters identified by the **Parties** as in dispute and, if each **Party** has an expert present, that document would usefully include each expert's reasons for not agreeing with the other expert's view.

### **4.7 Agreements reached to be documented.**

To the extent **Parties** agree any matters/facts as the result of **Mediation**, they must be reduced to writing. This may be done either by:

- (a) Amendment of documents already filed in the proceedings to reflect the impact of the matters agreed; or
- (b) Settlement between the **Parties** of agreed draft **Proposed Consent Orders**, and agreed facts, for submission to the **CADB Panel** for its consideration at **Hearing** (see [PN1](#) paragraph 12).

Any **Proposed Consent 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 order/s it is proposed be made by the **Panel** e.g.: suspension for a specified period, reprimand, undertakings, etc.

As noted, a **Panel** is not obliged to approve any draft orders proposed by the **Parties**, and may, in the exercise of its discretion, or because the terms of a mediated agreement are beyond its jurisdiction vary or reject the **Proposed Consent Orders**.

Any order made by **CADB** *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 or otherwise is not a matter which may be negotiated.

Further, parties are asked to note that **CADB** will **not** vary its practice of disseminating details of the orders gazetted to interested parties, such as the professional accounting bodies.

The **Mediation** Agreement (Annexure A) includes acknowledgement by the **Parties** that the views of the (**CADB**) Mediator are their personal views and are entirely independent of the views and conclusion of the **CADB Panel** once it has considered the relevant material at a **Hearing**.

**Mediation** is confidential and separate from **CADB Hearing** procedures. Should one **Party** or both subsequently decline to honour any agreement apparently reached at **Mediation**, before a **CADB Panel** has made its **Determination** on the **Application**, then that purported agreement lapses and has no effect. Nothing said or done at the **Mediation** may be raised at a subsequent **Hearing**, and no evidence may be led regarding any written agreement created during the mediation that is subsequently abandoned.

#### **4.8 Costs and Costs Orders**

Where **Parties** choose to mediate matters privately, i.e. without a **CADB** appointed mediator, the **Parties** accordingly bear all costs of such **Mediations**, including the cost of a mediator.

Each **Party** will bear its own costs in relation to **Mediation**, including the costs of preparation and professional representation.

Where a **CADB** Mediator is engaged **CADB** shall meet the Mediator's reasonable costs of conducting the **Mediation** (subject to its right to make orders under ss223(1)(c) and 223(2)(c) **ASIC Act**).

The **Parties**, subject to agreement otherwise, will bear in equal shares any cost associated with hiring a **Mediation** venue and any associated joint expenses of conducting the **Mediation**.

The **CADB** Mediator has no power to make costs orders but it is open to the **Parties** to reach an agreed position on costs (within the scope of Section 223 **ASIC Act**) that is reflected in the **Proposed Consent Orders** submitted to the **CADB Panel** at the **Hearing**.

Should, at **Mediation**, the **Parties** reach a consensus position that includes a **Statement of Agreed Facts** and **Proposed Consent Orders** (including costs as between them) that would, if confirmed by a **Panel** after consideration at the

**Hearing**, dispose of all issues in the proceedings, the **Parties** may expect that in the normal course, the **CADB Panel** would not exercise its discretion to further order that any costs of **CADB** be payable by either **Party** pursuant to ss223(1)(c) or ss223(2)(c) **ASIC Act**, unless there are exceptional circumstances

## PN2 ANNEXURE A MEDIATION AGREEMENT

**AGREEMENT** dated [\*] 202[\*] between:

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

### RECITALS

- A. **ASIC** is the **Applicant** to the Companies Auditors Disciplinary Board (**CADB**) in respect of the **Respondent** in a matter numbered [\*] (**the Proceedings**).
- 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 conduct a **Mediation** in accordance with these Guidelines and **PN1** with respect to the Proceedings.

**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 conduct a **Mediation** in accordance with **PN2** on the terms and conditions of this Agreement.
- 1.2 The **Mediation** shall take place at the offices of [\*] commencing at [\*] on [\*] 202[\*] 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 objectives for **Mediation** of **CADB Proceedings** as set out in **CADB Practice Notes 1 and 2**.
- 2.3 The Mediator will not make decisions for either **Party** with respect to the matters the subject of the Proceedings being mediated (**the Issues**).
- 2.4 The Mediator will not, unless the **Parties** otherwise agree in writing, 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/she has disclosed to the **Parties** to the best of his/her knowledge any prior dealings he/she has had with either of them and/or any interest in or prior knowledge he/she has, in **the Issues**.
- 4.2 If, during **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** in accordance with the Guidelines in [PN1](#) and **PN2**.

### 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** with respect to **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 preparatory 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 objectives for **CADB Mediations** set out in [PN1](#) and **PN2**.

- 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 provide their view of the range of possible outcomes which could result following a **Hearing** of the proceedings by a **CADB Panel**, 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 **CADB's** view or a **Panel's** likely view on the appropriateness or otherwise of **Proposed Consent Orders**, should the **Parties** reach agreement at **Mediation** on such.
- 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 with the **Parties** as frequently as the Mediator deems appropriate either 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 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 13**, 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 proposals, 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** that is subsequently convened to hear the matter the subject of this **Mediation** agreement 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 **Panel Hearing** 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**, and;
  - (b) the **Parties** shall not 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) either **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.

## 13. SETTLEMENT

- 13.1 If the **Parties** reach consensus on agreed **Proposed Consent Orders** to be submitted to **CADB** for consideration that dispose of all **Issues** in the proceedings, those terms shall be recorded in a written agreement which shall contain the substance of clauses 13.2 & 13.3 (Resolution Agreement) and include in a separate document the facts agreed by the **Parties** on which the agreed **Proposed Consent Orders** are based, 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 Resolution Agreement is produced for the purpose of submission to the Board, which shall determine the matter in accordance with Part 12 [PN1](#). Having taken note of the terms of the Resolution Agreement, **CADB** is not bound to make orders in the same terms as that agreement, or at all.
- 13.3 The Resolution Agreement is enforceable by any **Party** to the Settlement Agreement to the point of submission to the **CADB** but will be superseded by any order by the **CADB Panel**, following its **Determination**, 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/her 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/her 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.

**MARIA MCCROSSIN**  
**CADB CHAIRPERSON**  
**April 2020**

**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**).

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*(Name of person. Please print)*

I UNDERTAKE to the **Parties** to the **Mediation** and the Mediator 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.

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*(Signature of the person)*

*(Date)*

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*(Address)*