

THE INSTITUTE *of* ARBITRATORS & MEDIATORS AUSTRALIA
ACN 008 520 045
ARBITRATORS • MEDIATORS • CONCILIATORS

MEDIATION AND CONCILIATION RULES

Authority for Rules

The Council of The Institute of Arbitrators & Mediators Australia resolved at a meeting on 22 November 2001 that, where any two or more parties have agreed between them that a dispute arising or having arisen between them shall be submitted:

- to mediation in accordance with The Institute of Arbitrators & Mediators Australia Mediation Rules; or
- to conciliation in accordance with The Institute of Arbitrators & Mediators Australia Conciliation Rules,

the Rules numbered 1 to 13 hereafter shall apply.

PART I

PRELIMINARY

RULE 1 Definitions

In these Rules:

‘the Institute’ is the Institute of Arbitrators & Mediators Australia.

‘Agreement’ is any agreement between the parties embodying a submission of present or future disputes to mediation or conciliation.

‘conciliation’ is a process in which parties to a dispute with the assistance of a neutral third party (‘the Conciliator’) identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role in regard to the content of the dispute or the outcome of its resolution, but not a determinative role. The Conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions or give advice on terms of settlement.

‘the costs of the reference’ includes the fees and expenses of a Mediator, Conciliator or Nominee, any Nomination Fee or other fee payable to the Institute of Arbitrators & Mediators Australia or other nominating body, and costs for such things as room hire and transcript.

‘days’ means normal working days and shall exclude Saturdays, Sundays and public holidays.

‘the Dispute’ means the disputed issues which are referred to mediation or conciliation.

‘mediation’ is a process in which parties to a dispute with the assistance of a neutral third party (‘the Mediator’) identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The mediator has no advisory or other determinative role

in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.

‘Nominee’ means a Mediator or Conciliator who has been nominated by the Institute or agreed by the parties but who has not entered on the reference to mediation or conciliation.

‘Preliminary Conference’ means a meeting appointed to deal with procedural or administrative matters in connection with mediation or conciliation of the Dispute.

RULE 2 Appointment of Mediator or Conciliator

1. Unless otherwise agreed in writing by the parties, the mediation or conciliation shall be conducted:
 - a. by a person agreed between the parties; or
 - b. if the parties are unable to agree on the identity of the person to be appointed, by a person nominated by the Institute,who accepts appointment as Mediator or Conciliator.
2. Subject to any written agreement of the parties to the contrary, the provisions of Schedule A shall apply.
3. The Nominee shall, within seven (7) days of receiving advice of his or her nomination or agreed appointment, give written notice to the parties of the time and place of a Preliminary Conference to be held in accordance with Rule 7, which the parties or their duly authorized representatives shall attend.
4. Prior to that Preliminary Conference, the Nominee may advise any conditions he or she wishes to impose (including provision of security for the fees and expenses of the Nominee) and request the agreement of the parties to such conditions.
5. On the parties agreeing to any such conditions, the Nominee shall accept appointment and shall then be deemed to have entered on the reference as Mediator or Conciliator as the case may be.

RULE 3 Application of Rules

1. These Rules are subject to any law which governs mediation or conciliation in the place where the mediation or conciliation is held, and to any agreement between the parties in relation to the mediation or conciliation process.
2. Otherwise, where the parties to a dispute have agreed to mediation or conciliation in accordance with these Rules, they are thereby bound to comply with these Rules unless any part thereof is held to be void or voidable, in which case that part shall be severed from the remainder of the agreement.

PART II	THE PROCEDURE
----------------	----------------------

RULE 4 Confidentiality

1. The Mediator or Conciliator, the parties and all advisers and representatives of the parties shall:
 - a. except as provided in paragraph 2 of this Rule, keep all information disclosed during the mediation or conciliation process confidential;
 - b. not use any information disclosed during the mediation or conciliation process for any purpose other than the mediation or conciliation;
 - c. sign Confidentiality Agreements in the terms of this Rule.
2. The obligation of confidentiality under sub-paragraph a of paragraph 1 above shall apply except:
 - a. if disclosure is compelled by law;
 - b. to the extent necessary to give effect to the Agreement, or to enforce any agreement to settle or resolve the whole or any part of the Dispute;
 - c. where disclosure is only of the occurrence of the mediation or conciliation (and not any communication during the mediation or conciliation), and the occurrence of the mediation or conciliation is relevant to subsequent arbitral or judicial proceedings relating to the Dispute.

RULE 5 Role of the Mediator or Conciliator

1. The Mediator or Conciliator shall be independent of, and act fairly and impartially as between the parties.
2. The Mediator or Conciliator shall assist the parties to negotiate between themselves a mutually acceptable resolution of the Dispute, by:
 - a. helping the parties to identify and define the issues in dispute;
 - b. helping the parties to develop a procedure which is aimed at achieving resolution of the Dispute quickly, fairly and cost-effectively;
 - c. where appropriate, suggesting particular dispute resolution techniques for individual issues aimed at narrowing the issues in dispute quickly, fairly and cost-effectively;
 - d. acting as the facilitator of direct negotiations between the parties.
3. During the mediation or conciliation process, the Mediator or Conciliator may convene such meetings between the parties (hereafter respectively called Mediation Meetings or Conciliation Meetings) as the Mediator or Conciliator considers appropriate, for the purpose of:
 - a. identifying and defining the issues in dispute,
 - b. resolving or narrowing the issues in dispute,

on terms acceptable to the parties.

4. During the mediation or conciliation process, the Mediator or Conciliator may, in his or her unfettered discretion, communicate and discuss the Dispute privately with any of the parties or their representatives or advisers. The Mediator or Conciliator shall preserve absolute secrecy of the content of any such communication, and shall not expressly or impliedly convey the content of such communication (or part thereof) unless specifically authorised to do so.
5. Unless otherwise agreed by the parties, a Conciliator may also exercise the additional functions set out in sub-paragraphs a, b and/or c below if the Conciliator considers that the exercise of those functions will assist the parties in resolving the Dispute.
 - a. make suggestions for settlement of the Dispute;
 - b. express opinions as to what would constitute a reasonable resolution of the Dispute, or any part thereof;
 - c. if the conciliation is terminated pursuant to Rule 8, the Conciliator may within seven (7) days of notice of termination provide a written report to the parties expressing the Conciliator's opinion of what would constitute a reasonable resolution of the Dispute, or any part thereof.

RULE 6 Role of the Parties

1. The parties shall do all things reasonably necessary for the proper, expeditious and cost-effective conduct of the mediation or conciliation.
2. Without limiting the generality of paragraph 1, each party shall:
 - a. participate bona fide in the Mediation or Conciliation process;
 - b. comply without delay with any direction made on procedural matters;
 - c. if not appearing in person:
 - (i) be represented at any Preliminary Conference by a person or persons with authority to agree on procedural matters;
 - (ii) be represented at any Mediation Meeting or Conciliation Meeting by a person or persons with full and unfettered authority to settle the Dispute unless, prior to the Mediation Meeting or Conciliation Meeting, it has disclosed to the Mediator or Conciliator and each other party the nature of any limitation on that authority and the procedure required to obtain that party's approval to settle the Dispute.

RULE 7 Preliminary Conference

1. Unless otherwise agreed by the parties, the Mediator or Conciliator shall convene a Preliminary Conference with the parties, in person or by teleconference, to be held as soon as practicable after reference of the Dispute to mediation or conciliation.
2. The purpose of the Preliminary Conference is for the parties, with the assistance of the Mediator or Conciliator, to:
 - a. discuss and agree on the issues in dispute, or formulate a process by which those issues can be clarified and agreed;

- b. plan and agree on how a negotiated resolution of the Dispute is to proceed including, where appropriate, a timetable for exchange of position papers and other documents and provision of copies to the Mediator or Conciliator;
- c. make arrangements for Confidentiality Agreements to be signed by all persons taking part in the mediation or conciliation process, in accordance with Rule 4;
- d. make such other planning and administrative arrangements as may be required for the mediation or conciliation to proceed, including in respect of the terms of appointment of the Mediator or Conciliator.

RULE 8 Termination of the Mediation or Conciliation

1. Any party may terminate the mediation or conciliation, by written notice to each other party and the Mediator or Conciliator.
2. The Mediator or Conciliator may terminate the mediation or conciliation, by written notice to each of the parties, if the Mediator or Conciliator forms the opinion that the further conduct of the process will not be productive in achieving a resolution of the Dispute.

PART III	GENERAL
-----------------	----------------

RULE 9 Costs

1. Unless otherwise agreed by the parties, each party shall pay its own costs of or incidental to the mediation or conciliation.
2. Unless otherwise agreed by the parties, the parties shall be jointly and severally liable for the costs of the reference, and shall pay those costs in equal shares.

RULE 10 Extension of Limitation Period

1. If, during the mediation or conciliation, a limitation period for bringing any proceedings in relation to the Dispute expires, the parties agree that:
 - a. the limitation period will be extended by the number of days from the date of reference of the Dispute to mediation or conciliation to the date of termination in accordance with these Rules;
 - b. they will not rely, in any arbitral or judicial proceedings, on expiry of the limitation period other than as calculated in accordance with this Rule.

RULE 11 Subsequent Proceedings

1. If the Dispute is not resolved, the Mediator or Conciliator shall not, without the written consent of all parties, accept an appointment to act as arbitrator, or act as advocate or adviser to any party, in any subsequent arbitral or judicial proceedings arising out of or in connection with the Dispute.

2. The parties agree that the following will be privileged and will not be disclosed or relied upon or be the subject of a subpoena to give evidence or produce documents in any subsequent arbitral or judicial proceedings arising out of or in connection with the Dispute:
 - a. any view expressed, or admission or concession made, by or on behalf of a party;
 - b. any view expressed, or suggestion made by the Mediator or Conciliator;
 - c. any document created for the purpose of the Mediation or Conciliation.

RULE 12 Counting of Days

1. For the purpose of counting days under these Rules, such period shall begin to run on the day following the day when notice, notification, communication or proposal is actually received or deemed to be received under paragraph 2 of this Rule, whichever is earlier. If the last day of such period is a public or official holiday or a non-business day at the residence or place of business of the addressee, then the period is extended until the first business day which follows.
2. Any such notice, notification, communication or proposal which is posted is deemed to have been received on the second day following the day of posting. Any such notice, notification, communication or proposal which is sent by facsimile or other means of telecommunication or electronic transmission is deemed to have been received on the day of transmission.

RULE 13 Liability for Acts or Omissions

The parties agree that the Mediator or Conciliator, the Institute and its officers and employees are not liable to any party for or in respect of any act or omission in the discharge or purported discharge of their respective functions under these Rules unless such act or omission is shown to have been fraudulent.

SCHEDULE A

RULE A1 Inability to Agree on Person to be Appointed

1. This Rule applies to the extent that it is not inconsistent with the Agreement.
2. Any party may, by notice in writing (hereafter called the Notice of Dispute), give notice that it requires a dispute to be referred to mediation or conciliation, and call on the other parties to the dispute to agree on the identity of the person to be appointed as the Mediator or Conciliator, as the case may be.
3. The Notice of Dispute shall be served at the address for such party or parties specified in the Agreement. Unless otherwise provided in the Agreement, service may be effected personally, by mail, or by facsimile or other means of telecommunication or electronic transmission.
4. Unless otherwise agreed between the parties, if no agreement has been reached on the identity of the person to be appointed as mediator or conciliator within ten (10) days after service of the Notice of Dispute or deemed receipt of same, then the dispute, unless settled, shall be and is hereby referred to mediation or conciliation, as the case may be by a mediator or conciliator nominated by the Institute in accordance with this Schedule.
5. If the parties agree in writing that the giving of notice under this Rule shall not be required, then the parties may jointly call for nomination of a mediator or conciliator by the Institute in accordance with this Schedule.

RULE A2 Exercise of Power of Nomination by the Institute

1. Where the Institute is to exercise powers to nominate persons to act as mediators or conciliators, those powers shall be exercised by:
 - a. the President of the Institute; or
 - b. the Senior Vice-President of the Institute or the Chair of any Chapter, to which the power of appointment is delegated in any particular case or cases.
2. Where the Institute is to nominate a mediator or conciliator:
 - a. the party giving a Notice of Dispute shall also provide evidence that it has deposited with the Institute of Arbitrators & Mediators Australia the prescribed Nomination Fee; or
 - b. if the parties agree in writing that the giving of notice under Rule A1 shall not be required then, unless the parties otherwise agree, they shall jointly deposit with the Institute of Arbitrators & Mediators Australia the prescribed Nomination Fee.
3. The Nomination Fee shall be the sum of \$330.00 or such other sum as prescribed by the Institute from time to time.
4. Lodgement of the prescribed Nomination Fee shall be a pre-requisite to the nomination of a mediator or conciliator by the Institute.

RULE A3 Call for Nomination

1. This Rule applies to the extent that it is not inconsistent with the Agreement.
2. Where a Notice of Dispute has been given pursuant to the Agreement or pursuant to Rule A1, and such dispute has not been settled within the time provided, any party may thereafter request the Institute in writing to nominate a mediator or conciliator and, in so doing, shall submit the following to the Institute:
 - a. a copy of the Notice of Dispute;
 - b. a copy of the Agreement containing the submission to mediation or conciliation;
 - c. the names and addresses of the parties to the dispute;
 - d. a brief description of the nature of the dispute containing such particulars of the dispute as will permit the Institute to nominate an appropriate mediator or conciliator.
3. If the parties agree in writing that the giving of notice under Rule A1 shall not be required then, in addition to the material referred to in paragraph 2 of this Rule, they shall provide to the Institute of Arbitrators & Mediators Australia a copy of their written agreement to that effect.
4. Within ten (10) days after receipt of the material submitted pursuant to paragraphs 2 or 3 of this Rule, or such further information as to the nature of the dispute as the Institute may reasonably require for the purposes of nomination, the Institute shall nominate a mediator or conciliator, and shall advise the parties and the Nominee accordingly.

RULE A4 Further Nomination

1. Where any party does not agree with the conditions advised by the Nominee, then the Nominee shall notify the parties in writing within two (2) days as to whether he or she accepts appointment as Mediator or Conciliator notwithstanding that disagreement. On acceptance of appointment, the Nominee shall be deemed to have entered on the reference as Mediator or Conciliator, as the case may be.
2. Unless the parties otherwise agree in writing, the Institute shall nominate a replacement Mediator or Conciliator, within ten (10) days of being called on to do so by a party, if:
 - a. appointment is declined by a Nominee pursuant to paragraph 1 of this Rule;
 - b. a Nominee nominated by the Institute does not enter upon the reference as Mediator or Conciliator, as the case may be, within one (1) month of the date of his or her nomination;
 - c. after entering on the reference, a Mediator or Conciliator shall die or shall otherwise become incapable by reason of ill health or otherwise, or be debarred in law, from continuing on the reference.
3. Where the Institute nominates a replacement Mediator or Conciliator pursuant to paragraph 2a of this Rule, then any dispute as to the reasonableness of the conditions notified by the replacement Mediator or Conciliator shall be determined by the President of the Institute or his or her nominee, which determination shall be final and binding.

