Burke & Associates Lawyers

EVERYTHING YOU NEED TO KNOW ABOUT MEDIATION

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1. What is mediation?

Mediation is a form of alternative dispute resolution. It is an alternative to a judge imposing a decision on the parties.

Mediation is a structured negotiation process in which an independent person, known as a mediator, assists the parties to identify and assess options and negotiate an agreement to resolve their dispute. It allows for great flexibility in crafting a solution to a dispute, unlike a Court process which is usually much more rigid in approach.

If successful, mediation can help parties to avoid the heavy costs of litigation as well as the hard to quantify, but equally significant distraction, loss of time and emotional stress.

As a neutral person the mediator assists the parties to reach their own agreement. The mediator will usually not express a view about the merits of the matter. Nothing the mediator does or says is binding on the parties. The mediator decides nothing. A dispute is settled when the parties reach their own agreement.

Mediation is now long established in Victoria. It is routinely ordered before trial by Courts and Tribunals dealing with civil disputes. It is a process that is now much in demand and proven to be successful. If there is no settlement, then the parties' rights are not affected, and, because it is confidential, nothing said during the mediation can be used if the matter is not settled.

2. How do I find the right mediator?

In consultation with the other disputing parties, you can appoint your own mediator.

It is usually best to choose an accredited mediator.

Many barristers, solicitors and some retired judges have undertaken training to become an accredited mediator.

There are several places where you can find listings of accredited mediators, as follows:

- Law Institute of Victoria http://www.liv.asn.au/;
- Victorian Bar Association http://www.vicbar.com.au/home;
- LEADR http://www.leadriama.org/;

Sometimes a mediator with particular knowledge or expertise in the subject matter might be appointed even though they are not on the list of accredited mediators.

3. How much does a mediator cost?

The fees for mediators vary greatly.

As a general rule of thumb, the costs are borne equally by the parties. So, if there are two main parties they each pay half. If there are three parties they each pay a third, and so on.

Fees range from $2,000 per day to $10,000 per day in the case of very senior commercial barristers, usually of senior counsel status. Arrangements vary greatly. Some mediators charge reading and preparation time whereas others do not.

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

4. How do I book a mediator?

With solicitor mediators you can ask the mediator direct. With barrister mediators the more usual approach is to contact the mediator's clerk (effectively a booking manager) to make enquiry.

It is more common for the lawyers representing the parties to discuss a suitable mediator, arrange the booking and negotiate fees and terms of payment.

5. Mediation Agreements

Most mediators require that before the start of a mediation the parties sign a Mediation Agreement. We have listed a sample Mediation Agreement on our website.

Typically a Mediation Agreement will include the following:

- A listing of the parties and their legal advisers, if any;
- The agreed fees for the mediator and terms of payment;
- Agreement to keep discussions confidential;
- Protection for the mediator against having to give evidence, which would compromise confidentiality.

6. What cases are suitable for mediation?

All cases, regardless of their complexity or number of parties, are eligible to be referred to mediation. The types of matters commonly mediated are very diverse and include:

- Contract disputes;

- Landlord and tenant disputes;
- Commercial disputes;
- Estate disputes;
- Small business disputes;
- Neighbour disputes;
- Family Law matters;
- Disputes about companies and partnerships;
- Workplace and employer and employee disputes;
- Commercial disputes about intellectual property, industrial law, consumer law, human rights, admiralty, tax and costs.

Some factors indicate that a dispute is well suited to mediation. They include:

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

7. Why mediate?

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

- "**Time**": ordinarily a dispute can be resolved more quickly through mediation than through a trial.
- "**Cost**": if a dispute can be resolved through mediation, the costs of preparing and running a trial can be avoided.
- "**Flexibility**": mediation offers parties more control over the outcome.
- "**Stress**": mediation is less formal and less intimidating than appearing in court.
- "**Confidentiality**": mediation is private. The judge is not informed of the discussions and negotiation at mediation. Those discussions are usually unable to be used against a party if the case goes to trial.

- "**Satisfaction**": because the parties decide and agree on the outcome of their dispute they are more likely to be satisfied with the result and to comply with what has been agreed.

- "**Finality**": settlement agreements can usually only be modified with the agreement of all parties.

- "**Efficiency**": even if a dispute is not settled at mediation the process usually helps the parties to narrow the range of issues and thus limit the scope of a later trial. It also creates an environment that is conducive to further negotiation. Many disputes that do not settle at mediation settle soon after.

8. Who attends mediation?

The parties are in ultimate control of any decision to resolve their dispute.

It is essential that people attend the mediation with sufficient knowledge of the relevant issues in dispute and the authority to make decisions about how it might settle after the mediation. If attending on behalf of an organization the attendee should be an authorised officer who is able to make a decision about how the dispute might be settled and to enter into an agreement on behalf of the organization.

9. How do I prepare for mediation?

You can improve the quality of your mediation by considering:

- What issues are in dispute, including the facts and sources of conflict;

- What is important to you in any resolution of your dispute? The interests that you wish to preserve or pursue may be different to an outcome sought through a trial;

- How best to communicate this information, both to the mediator and the other party;

- What you would say at the start of the mediation, to assist in resolving the dispute;

- What the other party's aspirations might be and how these might be accommodated in any offer of settlement;

- Possible contents of an offer and methods of communication;

- What costs have already been incurred, are likely to be incurred and what part of these might be recovered; and

– The possible outcomes if the matter were to proceed to a trial, including the dollar value of any damages claimed and any limits on the Court to award these.

On our website we have included a mediation preparation tool that you might find useful.

10. What happens at mediation?

Before commencing mediation the mediator will consider the best process for mediating your dispute, taking into account suggestions from all parties where possible. The mediation will commence with an explanation of the process, followed by a discussion about the background of the matter and issues in dispute.

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

11. What are the possible outcomes of mediation?

The case may be settled in full or in part or parties may not be able to reach agreement.

If agreement is reached about part or all of the dispute, the details of that agreement will usually be recorded and signed by all parties before the end of mediation. If there are Court proceedings and the dispute is settled in full the mediator will notify the judge that the matter has settled. The mediator will not provide the judge with any details of the mediation discussions or the terms of any agreement the parties reached without the permission of the parties. In the case of a Court dispute once the agreement is finalized the parties will usually formally notify the Court that the case is not going to proceed and the case will be closed.

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