

Douglas Turnbull B. Juris., LL.B (Hons)

Barrister-at-Law  
Mediator

Liability limited by a scheme approved under  
professional standards legislation.

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## AGREEMENT FOR MEDIATION

PARTIES TO MEDIATION:

(Insert)

SOLICITORS:

(Insert)

MEDIATOR:

Douglas Turnbull, Barrister-at-Law.

This agreement provides an alternative dispute resolution procedure for the parties using the services of the Mediator.

### ***Mediator's fee***

- **\$660.00 inclusive of goods and services tax** for each hour actually spent by the Mediator, either reading the brief in preparation for the mediation, or actually conducting the mediation itself, or being involved in any arrangements for initial directions or finalising any agreement that might arise out of the mediation. I rarely spend more than 1 hour on reading time. The minimum charge however is **\$4,400 INCL of GST**
- The **maximum daily charge** is **\$5,500.00 (inclusive of GST)** even if it takes more than 8 hours.
- These fees apply **regardless of where the mediation is held** (in other words, there is no **"out of Chambers"** or **travel fee**).
- Unless otherwise agreed, the mediator's fee shall be **equally shared pro rata between the parties**.
- The Mediator's account is payable **jointly and severally** by the parties within 14 days after it is rendered.

### ***Mediator's Brief***

- A brief of relevant material (**agreed to by all parties**) shall be provided to the Mediator at least 3 working days prior to the mediation.

**Expert Witnesses**

- If there are any valuation, accounting, engineering, medical or other expert witnesses who are relevant to the matter, then it may help if they can be available by telephone so that any matters raised in their reports can be clarified without delaying the mediation.

**Availability of Clients**

- Unless otherwise agreed in writing, the respective clients will be personally present for the mediation.

**MEDIATION RULES**

***The parties agree that the mediation will be conducted in accordance with the following rules:***

1. If the mediation is being conducted pursuant to an order of a Court, then in the event of a conflict the terms of such Court order shall take priority over these rules.
2. The mediation, all discussion leading up to the mediation, and any discussions which relate to arrangements for terminating the mediation or finalising any agreement or the terms of any order arising out of the mediation, shall be deemed to be entirely ***without prejudice and confidential to the parties and the Mediator***, for all purposes, including any Court proceedings.
3. Further, all of the parties agree that any notes made by the mediator or any other party in the Mediator's brief, and/or correspondence, orders, directions, notes, notations or materials made by the Mediator in any manner, are entirely ***without prejudice and confidential to the Mediator***, and cannot be the subject of disclosure in any prior, concurrent or subsequent legal proceedings whatsoever, whether to a party to the mediation or to any other person, Tribunal or Court, and further, they cannot be called for production by subpoena, they cannot be referred to either directly or indirectly, or relied upon by any party in any way, including during any Tribunal or Court proceedings. Any return to any party of the Mediator's brief containing any Mediator's notations or any other supplementary or additional documents created by the Mediator, or provided to the Mediator, **shall not constitute any waiver of this privilege and confidentiality.**

4. **Submissions** at the mediation may be made on behalf of any party orally or in writing as that party sees fit. The other parties and the Mediator should be provided with a copy of any written submission as soon as reasonably practicable after its preparation.
  5. **At the commencement of the mediation:**
    - (a) The Mediator will make a brief statement to the parties as to the purposes and procedures of the mediation, and his role as Mediator;
    - (b) Each party will then make a brief opening submission dealing with issues of liability, quantum of any damages, and the nature of the relief being sought.
    - (c) The order of the openings may require discussion.
    - (d) The submissions should be properly structured and succinct, similar to an opening to a Court at the commencement of a trial.
    - (e) There should be no interruptions by any other party during the openings.
    - (f) Each party will then make a submission in response. The order of the responses will require discussion.
    - (g) Any party may request a short adjournment to take instructions before making any response;
  6. The further progress of the mediation after these opening submissions is then best determined by discussion between the parties. The procedures should be flexible, and they shall be designed to suit the circumstances of the mediation.
  7. Procedures for negotiation may include:
    - The parties retiring to separate rooms, with the Mediator speaking separately to the parties and their respective legal advisers.
    - The Mediator conferring with one or all of the legal advisers in the absence of their clients.
    - The Mediator, the parties and their legal advisers to convene at any time in open session.
- It is usually best left to the parties themselves to determine these procedures in discussion with the Mediator after the opening submissions have been made.*
8. **However, all parties will abide by any rulings or directions on procedural matters made by the Mediator prior to or during the mediation.**

9. If at any time during the mediation the Mediator speaks privately with any party, or with a party's legal advisers, then anything said to him in such a private discussion **will be strictly confidential and privileged to that party only**, and no particulars of what is said either to him or by him on such privileged occasion will be released by him to any other party **without the express consent of the original party**, nor can the Mediator be required at any later time (including after the mediation has finished) to divulge any such confidential and privileged communication or information to any other party, Tribunal or Court.
10. The Mediator will keep a written record of any offers made by any party during the progress of the mediation to prevent confusion as to what position the negotiations have reached at any time. **Therefore, the Mediator should be a party to the making of any offer by one party to another so that the offer and response can be properly recorded.**
11. The mediation shall not result in a final agreement between the parties on any issue, or on all of the issues, ***until the terms of that agreement have been set out in writing, each party or their authorised legal or other representative have signed those terms of agreement, and the Mediator has finally signed those terms to confirm that agreement has been reached.***
12. It will be a matter for the legal advisers of the parties to determine whether a consent order from any Court is desirable to assist with the enforceability of any agreement achieved at the Mediation, or whether an order or sanction by any Court is legally required to make it finally binding, and if so, to obtain any such Court order. **The responsibilities and duties of the Mediator will not extend past the point where the parties have executed the terms of any final agreement at the end of the mediation, and the Mediator has finally signed off on those terms as being the final agreement resulting from the ADR process.**
13. The parties should note that the rules of various Courts can include provisions to the effect that any court proceedings dealing with the subject matter of the Mediation are **stayed** for a certain period past the end of the Mediation, and that no steps can be taken in those proceedings, **including any formal offers under the rules of any**

**Court**, during the period of any such stay. **Each party should take separate legal advice about those matters.**

14. It is further specifically agreed between Mediator and the parties both jointly and severally:

- (a) That each party to the mediation shall take their own separate legal advice with respect to all matters of fact and/or law connected with and/or arising out of the subject matter of the mediation, the conduct of the mediation, and/or the meaning, effect and substance of any settlement agreement.
- (b) That the Mediator is not giving, shall not be required to give, and shall not be deemed to have given, any legal advice to any or all of the parties to the mediation in respect of any matter connected with and/or arising out of the subject matter of the mediation, the conduct of the mediation or the settlement agreement; and
- (c) Further, the parties and each of them do hereby jointly and severally release and/or indemnify the Mediator from all claims and/or causes of action of whatever cause of action or remedy and howsoever arising in respect of any expression by the mediator of his view of any relevant matter of fact and/or law connected with, and/or arising out of, the subject matter of the mediation, or the conduct of the mediation, or the terms of any settlement agreement, and the same shall not be used by any party as the basis for any claim against mediator, whether in contract, negligence or otherwise.

**DATED: Insert**

**We agree to the mediation being conducted in accordance with these conditions and rules:**

**Signed by DOUGLAS TURNBULL** .....

**Signed for and on behalf of (Insert name of party)**

.....

**Solicitor for party**

**Signed for and on behalf of (insert name of party)**

.....

Solicitor for party

**(ADD FOR MORE THAN TWO PARTIES)**