

## THE MEDIATION PROCESS: BACKGROUND MATERIALS

### A PREPARATION FOR MEDIATION

All persons to be present at the mediation, and their legal advisers, should read the form of mediation agreement, and this document.

Each party should sign a copy of the mediation agreement and table it at the pre-mediation conference or at the commencement of the mediation.

It would be helpful for the parties to notify each other, with a copy to the mediator, of the names of the persons who they expect will be present at the mediation.

If it has been agreed between the parties or otherwise requested by the mediator the parties should prepare, exchange and send to the mediator prior to the mediation a relatively brief paper outlining each party's understanding of the matters in dispute.

It will be open to any party at any stage to lodge with, or show to, the mediator confidential material such as legal opinions and the like. There is no obligation or expectation in this regard. Confidential access to the mediator is at times a valuable part of the inherent substance of the mediation process.

At the commencement of the mediation the mediator will make an opening statement outlining the process that will follow. Thereafter each party in turn will be asked to make a presentation of their understanding of the matters in dispute. This should be in narrative form and should preferably be given by the party personally or an officer of the party rather than by the legal representatives. The object is essentially to afford each party an early opportunity of giving a brief account of the dispute as seen through the eyes of that party.

### B REPRESENTATION AT MEDIATIONS

#### Legal Advisers

Legal advisers present at a mediation with their clients will take such part in the proceedings as their clients wish. It should be borne in mind at all times that a mediation is an informal meeting between the parties themselves in a non-legal context. It is essentially directed to the parties being able to engage in a free person to person exchange of views about the dispute and possible settlement options.

The role of legal advisers is essentially threefold:

- i. To advise and assist their clients in the course of the mediation; and
- ii. To discuss with each other, and with their respective clients, such legal, evidentiary or practical matters as they and their clients might wish; and
- iii. To prepare the terms of settlement or heads of agreement recording the agreement reached at the end of the mediation for signature by the parties prior to departure at the end of the mediation.

## **Parties**

It is essential that each party be present in person or have present at the mediation a representative with full authority to settle the dispute. The representative should not be subjected to any limitation or restriction of authority to settle. Companies are ordinarily represented by their chief executive, an executive director, or other very senior person who has been vested with total authority in the dispute.

At the heart of the mediation process is the opportunity for each party to make a fundamental, objective reappraisal of the whole situation. These discussions enable each party to make a more fully informed objective assessment of its own position and interests, of the other side's position and interests and of likely future developments and options. The reliability and validity of such assessment will develop and grow throughout the course of the mediation discussions. A pre-determined limit on the authority of a representative denies that party the full benefit of on-the-spot informed reappraisal and inhibits the prospect of a successful outcome.

There can, of course, be cases where unquestionable full authority cannot be present. It should, however, be possible for the representative attending the mediation to give a confident and responsible assurance of expectation that a recommendation will be accepted.

If the representative feels the need, or is required, to consult before concluding a settlement agreement, then the person or persons to be consulted should, if practicable, be present at the mediation throughout so that they too, can take part in the discussions and appraisal.