

ADR CHAMBERS MEDIATION AGREEMENT

This agreement is made between **Bruce Thiele** ("the mediator"), the parties as set out in Item 1 of the Schedule ("the parties") and their respective solicitors ("the solicitors") where;

- 1 There exists a dispute which is briefly described in Item 2 of the Schedule ("the dispute").
- 2 The parties, their solicitors and the mediator agree to this mediation upon the following terms and conditions.

Agreement to Appoint Mediator and Retention By Legal Representatives

- 3 The parties have agreed to appoint the mediator to assist resolving the dispute.
- 4 The solicitors retain the mediator to mediate the dispute.

Conduct of the Mediation

- 5 The Parties will comply with all reasonable directions of the mediator in relation to the conduct of the mediation.
- 6 The parties and the solicitors will make a genuine attempt to resolve their dispute, complying with the requirements and obligations of section 60I of the *Family Law Act* (Cth), the pre-action procedures in Schedule 1 to the *Family Law Rules 2004* and rule 1.03 of the *Federal Circuit Court Rules 2001* as applicable. Upon execution of this agreement the parties and their solicitors will
 - a. be proactive in identifying the appropriate times, and the appropriate ways, in which their client can participate in this mediation including any requested pre-mediation intake conference or pre-mediation meeting with the mediator, either alone or together, by agreement or by request of the mediator; and
 - b. be prepared to consider reasonable offers of settlement at any stage of the mediation.
- 7 The following provisions are incorporated as terms of this agreement:
 - (a) Chapter 10 of the *Family Law Rules 2001* (Cth)
 - (b) Section 131 of the *Evidence Act 1995* (Cth).These provisions explicitly refer to the confidentiality of the mediation process.
- 8 Unless otherwise agree between the parties and the mediator, the mediation will occur on the date and at the venue nominated at Item 3 in the Schedule. The venue hire costs will be met by either the mediator or the parties as specified in Item 4 of the Schedule.
- 9 Only the parties nominated in Item 1 and their legal representatives are permitted to attend the mediation. In the event the parties and the mediator agree to the attendance of any other person at the mediation, (the attendee) the party or parties requesting the attendance of such other person must:
 - a. obtain, for the benefit of all other parties and the mediator, agreement from those other persons that all information received in the course of the mediation:

- i. is and will be treated as confidential; and
- ii. has been provided on a “without prejudice” basis and solely for the purposes of the mediation;

and

- b. confirm the agreement required under subparagraph (a) to the other Party(s) and the mediator either at, or prior to, the commencement of the mediation.

The agreement of other persons attending the mediation described in subparagraph (a) above may be formalised by those other persons executing this agreement.

- 10 **Video and telephone conferencing** (where applicable) – The parties to this Mediation Agreement agree and warrant to each other that for the duration of the mediation, they will communicate from an office room or other room of a building or home in which they will have the exclusive use of during the mediation. The parties further agree and warrant that they will permit no other person (other than an agreed person) into such room and will ensure that there is privacy during all telephone or video-conference connections. The parties further agree and warrant that there will be no form of recording conducted of any part or all of the mediation including any private sessions between the mediator and a party and will ensure that no other person is recording or is able to record any part of the mediation.
- 11 The parties, their representatives and any other person attending at the mediation will keep confidential all things said or done during the mediation process, whether orally, in writing or by conduct, including all processes incidental to the mediation, unless the parties otherwise agree.
- 12 All statements made at the mediation concerning the dispute, including but not limited to the following matters, will be regarded as having been made on a “without prejudice” basis:
- a. the prior exchange of mediation outlines or other documents under this agreement or otherwise upon the mediation;
 - b. any statements made by any party concerning any matter or issue in dispute;
 - c. any views expressed or suggestions made by the mediator, any party or any other attendee, in respect of the possible settlement of any matter in dispute;
 - d. any proposals for the purposes of resolving or settling any matter in dispute, whether made by the mediator, any party or any other attendee; and
 - e. the fact that any party has indicated any willingness to accept any proposal or basis for settlement or resolution of any matter or issue in relation to the Dispute.

f. the notes or statements made by the mediator.

13 The parties acknowledge that:

- a. the mediator may take notes during the course of the mediation;
- b. the notes will be made by the mediator to assist him in his / her role as mediator;
- c. the notes, when made, and that upon which they will be written are the property of the mediator;
- d. no party shall ask for, nor shall they be entitled to receive, the original or any copy of any notes made by the mediator.

Preparation for the Mediation

Conduct Preceding the Mediation

- 14 The parties expressly acknowledge and agree that a successful mediation process requires transparency from all parties.
- 15 The parties and their solicitors agree that they will use all reasonable endeavours to avoid unilateral communication with the mediator upon his appointment save for the purposes of scheduling a time, date and manner of any pre-mediation (intake) session between the mediator and a party.
- 16 Any communication from a party or their solicitor that is not upon a joint basis (with the express agreement of the other party) or that does not explicitly carbon copy the other party into such communication, **will be ignored and otherwise not answered or read and will be immediately deleted.**

Documentation to be exchanged

- 17 In the absence of any specific order of a relevant court direction to the contrary, the parties will agree upon the prior exchange of only those documents required to be exchanged pursuant to *Federal Circuit Court Rules 24.03-5* NO LESS THAN 14 days prior to the mediation date.

Identification and exchange of documents / Obtaining of expert reports

- 18 In the event there is no relevant court direction or agreement about disclosure or production or experts to be engaged within 14 days of the mediation date the parties or their legal representatives will;
 - a. notify the mediator;
 - b. will comply with the mediator's direction to convene a face-to-face or telephone conference with him;

- c. with the assistance of the mediator will agree at such conference about;
 - i. the issues genuinely in dispute; and
 - ii. the disclosure, production or expert opinion reasonably justified by the parties to assist them in the negotiation and resolution of the dispute.
- 19 In the absence of agreement at the conference referred to in paragraph 18 the parties agree that the mediator may make any direction to ensure the just, safe, efficient and timely resolution of matters at a cost to the parties that is reasonable and proportionate in all the circumstances of the case, having regard to the significant impact of family law disputes on children and families including but not limited to any or all of the following;
 - a. the disclosure, production or expert opinion required to facilitate the mediation;
 - b. the party or parties responsible for the disclosure or production of a matter or document; or
 - c. without limiting the operation of Item 4(g), postpone, re-appoint or terminate the mediation
- 20 The parties will confer and agree upon the preparation of an indexed copy of all material that:
 - (a) is necessary for the mediator to gain an understanding of the *critical issues* in the dispute; and
 - (b) which any of the Parties or any other Attendees might wish to refer to in the course of the Mediation;

(the mediator's brief)
- 21 The parties agree to nominate one of them to prepare and submit the mediator's brief.
- 22 In agreeing and providing the mediator's brief the parties agree to limit that brief to;
 - (a) Court documentation will be limited to only initiating applications / responses and supporting primary affidavits that disclose the parties' applications to court; and/or
 - (b) Correspondence will be limited to only to that which sets out the relevant parties' statement of relevant facts, issues and contentions; and/or
 - (c) Expert reports; and/or
 - (d) An agreed statement of agreed facts, disputed facts and agreed contentions and outcomes.
- 23 The mediator's brief will be provided to the mediator;

- (a) **upon a joint basis**;
 - (b) no later than **10 business days prior to the mediation date**;
 - (c) be in digital format; and
 - (d) will not exceed 200 pages
- 24 No less than **5 days prior to the mediation date** the parties will, for the purposes of the mediation, provide to the mediator and exchange the following;
- (a) For all matters, a brief outline of agreed and disputed facts, matters or circumstances
 - (b) For property settlement matters, a Comparative Asset, Liability and Position Schedule in or similar to [this linked document](#).
 - (c) For spousal maintenance or child support matters, an Income, Expense and Contention Schedule in or similar to [this linked document](#).
- 25 No less than **48 hours prior to the commencement of the mediation**, the parties will, for the purposes of mediation, provide to the mediator and exchange (in digital PDF and Word format) the following;
- (a) That parties' position statement that clearly identifies the proposed outcome that party seeks, and a brief outline of the contentions that support that position; AND
 - (b) A complete draft of proposed final order or binding financial agreement that the party seeks.

Conduct of the Mediation

- 26 The parties will not be bound by any comments, suggestions, or recommendations of the mediator.
- 27 Any agreement between the parties reached at or upon the mediation, in relation to the dispute or any discrete issue therein, is not binding on any party unless and until it is recorded in a written agreement signed by the parties or their legal representatives.
- 28 Without limiting any specific agreement concerning cancellation fees, mediation under this agreement may be terminated:
- (a) by all parties giving written notice to the mediator that the parties have resolved their dispute; or
 - (b) by any of the parties at any time giving written notice of termination of the mediation to the other parties and to the mediator; or
 - (c) by the mediator giving notice to each of the parties that:

- i. in the mediator's opinion, further efforts at mediation are not justified, desirable or appropriate; and
 - ii. the mediator has accordingly ceased to act as a mediator;

or
 - (d) otherwise according to law.
- 29 In the event of settlement of the dispute, or of agreement to cancel or postpone the mediation, the parties shall immediately and jointly notify the mediator in writing.
- 30 The parties and their solicitors (and any counsel retained by them) are expected to;
- (a) To allow the mediator to conduct the mediation process and to provide support to the mediator where appropriate
 - (b) To participate fully and directly in the mediation process
 - (c) To perform those steps nominated under the heading "Document to be exchanged" punctually
 - (d) To ensure that sufficient time is allotted for a mediation process to take more than 7 hours
 - (e) To focus upon **personal** and **commercial** interests as opposed to legal rights (entitlements)
 - (f) To reflect at all relevant times that the purpose of mediation is not to win but to resolve the dispute
 - (g) To at all times during the mediation process behave in a respectful, courteous and professional manner and to that end avoid combative, derogatory, demeaning, generalised and/or unsubstantiated accusatory communications
- 31 The solicitors (and any counsel retained by them) are expected to;
- (a) In advising and attending upon the mediation process;
 - i. Have explained the terms of this agreement;
 - ii. Have had the client signed this agreement;
 - iii. Ensured that the client's share of any expected mediation fee is retained irrevocably in a solicitor's trust account;
 - iv. Have explained that the purpose of mediation is not to win but to resolve disputes, provides a party with control over outcomes and is to save significant time, cost, risk and stress to the party
 - (b) During the mediation process;
 - i. Assist the parties communicate punctually, accurately and comprehensively
 - ii. Negotiate constructively and productively
 - iii. Attend upon those matters or things under the heading "Document to be exchanged" punctually
 - (c) Obtain complete instructions from a party concerning the subject matter of the dispute;
 - (d) Provide a party with a preliminary written assessment of their position upon the dispute;

- (e) Provide realistic alternative predictions about likely outcomes in court or other non-mediation processes and their relative advantage or disadvantages including a BATNA / WATNA, costs to achieve an outcome through court, possibility of costs orders, time delay to trial, lost opportunity pending trial risk of appeal;
- (f) Obtain instructions from a party and attend the mediation being instructed upon;
 - i. Best outcome offer
 - ii. Target offer
 - iii. Bottom line offer
- (g) Advise the client that despite your preliminary advices, and the clients instructed Bottom line offer, that their personal and commercial interests may require them to consider a lesser offer;
- (h) Prepare a detailed final agreement or proposed order well in advance of any Final Mediation and have had the client read and understand such draft;
- (i) Attend to all of those matters or things specified in the Lexon Insurance “Consent Orders – Family Law” and “Financial Agreements – Family Law” checklist;
- (j) Assist in the drafting of complete and final agreements and the formalisation of the mediation in an appropriate manner.

Noting that these expectations are drawn from the checklists provided by Lexon Insurance as at May 2018 and are otherwise considered to be best practice when representing the parties in the mediation process.

The Mediator’s Fees

- 32 The mediator will be paid the mediation fees in the amounts, proportions and at the times set out in Item 4 of the Schedule.
- 33 To the extent permitted by law, the Parties acknowledge and agree that the first acceptance by the Mediator of the Parties’ request to mediate the Dispute will render the Parties jointly liable to pay the Mediator’s fees.
- 34 If the dispute is not resolved by the agreement reached at the mediation, in the absence of any specific order of a court, the parties agree that the costs and expenses associated with the mediation (including the mediator's fees) shall be each party’s costs in the cause of the present or any future court proceeding between the parties concerning the dispute.
- 35 The solicitors agree that the mediator’s appointment as mediator is a retainer by the respective solicitors with each being responsible for their client’s share of the mediation fee.

- 36 It is a condition of this agreement, the mediator's retainer and in order to secure any mediation booked that sufficient funds to cover a client's expected mediation fee is retained in the trust account of the relevant solicitor no less than **10 business days prior to the commencement of the mediation.**
- 37 Where a solicitor does not operate a trust account, or a party is self-represented;
- (c) the expected mediation fees is to be retained in the trust account of the solicitor firm nominated at Item 4 of the Schedule and held on behalf of the mediator without charge to a solicitor / client;
 - (d) the relevant party will sign an irrevocable authority in a form required by the mediator to that solicitor to release payment to mediator upon presentation by the mediator of his tax invoice.
- 38 The mediator will issue tax invoices upon completion of the mediation. The mediation fee and any additional fee is payable by the respective solicitors or authorised to be release from trust forthwith upon presentation by the mediator of his tax invoice.

General Matters

- 39 The Parties agree:
- (a) that the mediator is not a necessary party to any application, litigation, arbitration or proceeding between the Parties relating to any dispute between them;
 - (b) not to join the mediator as a party to any application, litigation, arbitration or proceeding between the Parties;
 - (c) jointly and severally, to indemnify the mediator for any costs or expense to which the mediator may be put in the event of being joined or made a party to any such application, litigation, arbitration or proceeding; and
 - (d) that none of the parties will require the mediator to give evidence or to produce any document in any legal proceeding concerning the dispute or in respect of anything in relation to the mediation, other than a legal proceeding brought to enforce, or to challenge the validity of, any agreement that has been reduced to writing and signed by the parties in the course of the mediation.

Entire agreement

- 40 To the extent permitted by law:
- (a) the express terms of this agreement contain the whole of the obligations of the mediator relating to this agreement and to the mediation;
 - (b) any obligation of the mediator which might otherwise be implied, whether under statute or otherwise, is excluded.

- 41 Nothing in paragraph 40 above derogates from any statutory protections or privileges in favour of the mediator.

Exclusion of liability and indemnity in favour of Mediator

- 42 To the extent permitted by law:
- (a) the mediator shall have no liability of any nature whatsoever to any person in respect of;
 - i. any matter arising out of this agreement, or in any way connected with this agreement; or
 - ii. anything done or omitted to be done under or in connection with this agreement or the mediation; and
 - (b) each of the parties jointly and severally indemnify the mediator against any liability in respect of:
 - iii. any matter arising out of this agreement, or in any way connected with this agreement; or
 - iv. anything done or omitted to be done under or in connection with this agreement or the mediation.

Counterpart Form Submission and Digital Execution

- 43 This document is completed and executed when the parties separately complete and submit the online form provided in the letter of engagement.
- 44 This digital version of the Mediation Agreement may be relied upon by a party to the same extent as if it was an original of this document executed by the signatory.

National Mediator Accreditation

- 45 The mediator is accredited pursuant to the National Mediator Accreditation System (NMAS). The NMAS contains Practice Standards for all accredited mediators. Pursuant to the Practice Standards, the Mediator must ensure that the Parties are provided with the following:
- (a) A description of mediation and the steps involved including the use of joint sessions, separate sessions and shuttle negotiations;
 - (b) information on how to provide feedback or lodge a formal complaint in relation to the mediator.

To that end the mediator:

- (c) refers the parties to those matters set within the following webpage <https://www.adrqueensland.com.au/ADRServices/Mediation-450/>
- (d) refers the parties to the NMAS, as to the matters referred to in paragraph 17(a) hereof. The NMAS can be found at <http://www.msb.org.au/sites/default/files/documents/NMAS%201%20July%202015.pdf>

- (e) informs the parties that feedback can be given direct to the mediator after the mediation by email addressed to bruce@adrqueensland.com.au
- (f) informs the parties that a formal complaint in relation to the mediator can be made to the Chairman for the time being of the ADR Committee of the Bar Association of Queensland, Bar Association Office, Ground Floor, Inns of Court, 107 North Quay, Brisbane, Queensland, 4000.

46 In consideration of the above, the mediator agrees to mediate the dispute for the period specified in the Schedule.

SCHEDULE
MEDIATOR'S FEES AND EXPENSES

NOTICE: The Items referred to below incorporate the details as submitted by the party or their solicitor through an online form that has been directly emailed to the party or their solicitor.

1. Item 1: The Parties

As per the responses from the submitted form.

2. Item 2: Brief Description of the Dispute

(Insert brief description, e.g. "parenting dispute" / "property dispute" / "child support")

As per the responses from the submitted form.

3. Item 3: Time, Date and Venue of Mediation

As per the responses from the submitted form.

4. Item 4: Mediator's Fees

- a. The mediator will be paid a fee of;

*As per the response from the submitted form **being either***

- i. Full day mediation - **\$4,400.00** (being **\$4,000.00** plus GST of **\$400.00**);

Or

- ii. Half day mediation for matters requiring a sect. 60I Certificate for the period 9:00 am to 1:00 pm - \$2,200.00 (being \$2,000.00 plus GST of \$200.00

as the case may apply referred to below as "the fee".

- b. The fee includes prior reading and preparation, pre-mediation (intake conference), the mediation hearing and mediation administration.
- c. The fee is struck on the basis that the documents received do not 200 pages in volume (provided digitally) and the mediation is to ensue on the date

- appointed for 1 day (not longer than **7** hours) for a full day mediation or ½ day (not longer than **4** hours) for a ½ day mediation. Any additional time spent (in reading a larger volume of documents, or in extended mediation duration (consented to by continued participation therein), will be charged and payable at a rate of **\$400.00** per hour plus GST (“the additional fee”).
- d. The fee includes the mediator’s travel from chambers to the mediation location. Where travel time exceeds **3** hours duration or requires travel by airline, travel time will be charged and payable at a rate of **\$200.00** per hour plus GST (“the travel fee”) for such travel time exceeding **3** hours or for such air travel.
- e. The fee includes the cost of venue hire where such venue is any of the following;
- i. The mediator’s chambers as listed upon his website; or
 - ii. Queensland Law Society; or
 - iii. Bar Association of Queensland; or
 - iv. Northlakes Mediation Centre
- f. If the mediation is cancelled or postponed by one or more of the parties, irrespective of fault, or the matter settled thereby dispensing with mediation, in either case with the same communicated to the mediator or the mediator’s staff later than 5.00 pm on the third last working day prior to the appointed mediation date then, the fee will be **\$660.00** (**\$600.00** plus GST of **\$60.00**) being an assumed 1 ½ hours preparation hearing time on the mediation hearing date calculated at the said rate of **\$400.00** per hour.
- g. If the mediation is cancelled or postponed by the mediator due to one or both parties failing to;
- i. attend at a pre-mediation (intake) conference, or
 - ii. to provide the Documents to be Exchanged
- the fee will be **\$660.00** (**\$600.00** plus GST of **\$60.00**) being an assumed 1 ½ hours preparation hearing time on the mediation hearing date calculated at the said rate of **\$400.00** per hour.

5. Item 5: Retention of Fees in Trust

a. The solicitors are retaining the mediator for the mediation and agree to pay the fee (and the additional fee, travel fee, cancellation or postpone fee, if any) in respect of the parties. The proportionate liability for the fee (and the additional fee, if any) is as follows:

- *As per the responses from the submitted form.* —

Such fee liability is several between the parties, not joint, in respect of such share.

b. The fee (and any additional fee) will be paid forthwith upon receipt of the mediator's tax invoice.

c. Where a/the party/s are not represented or a/the solicitor/s do not operate a trust account then **Highland Ferguson Solicitors** (the stakeholder) is appointed by the mediator to retain fees on behalf of that party and contemporaneously with payment to the stakeholder an irrevocable authority in a form approved by the mediator will be executed and delivered to the stakeholder and the mediator.

The mediator:



Dated: This Mediation Agreement is current as at 7 February 2020