

7 May 2024

**Stephen Cooke**

Jacqueline Turner, Solicitor  
Clarity Lawyers

**Heather Cooke**

Anna Roberts, Solicitor  
Delaney Roberts Solicitors

Colleagues,

**In the matter of COOKE**

Thank you for the request for me to facilitate a mediation in the above matter. I note that the Mediation is fixed for **face-to-face Mediation on 18 June 2024 at 09.30am**. I understand that the issues for mediation property and parenting.

If litigation has commenced then you may provide copies of your clients' Initiating Application and Response and Financial Statements as the case may be, together with any other material you may wish me to consider. If Financial Questionnaires/Parenting Questionnaires have been filed a copy should be provided to me. Upon receipt of documents, I may seek further information.

By no later than **11 June 2024** can I have a "**Position Paper**" setting out the position adopted by your client as to the primary issue including an overview of your case theory supporting same together with a collaborative **Balance Sheet**. For background reading only, can I also have any documents including correspondence that define the parameters of the dispute and any other documents you wish me to consider.

**Fees**

My fees charged are set out in the Mediation Agreement attached. Please ensure that funds sufficient to cover fees including GST are paid to your Trust Account or a controlled money account *no later than 7 days before the mediation* as that is a basis of my accepting the appointment from you. I do not carry the risk of fees not being paid by your client.



Could you please confirm in writing no later than close of business that day that my mediation fees are secured in your trust account or in a controlled money account.

### **Venue**

If the Mediation is to be conducted face to face the parties are to organise an agreed venue. Kindly ensure that there are separate breakout rooms for each party.

### **Generally**

My usual practice is to see the legal representatives at 9:30am and then each party and their respective legal representatives separately in break out rooms. After those meetings, I will then discuss the usefulness or otherwise of a joint session.

It is important that the client reads the **Mediation – Some Common Questions and Answers** and the **Themes – How We Got Here** documents attached before the mediation.

### **Costs**

In private caucus at some stage, I will be talking in general terms about what costs have been incurred to date in the matter and the likely costs if the matter was to go to a hearing. Please ensure you have informed your clients of the estimates beforehand in writing, as is the required court practice.

### **Process**

If the view of either party or their lawyer is that the Mediation should be conducted entirely by shuttle, then I believe both parties should know this beforehand (if possible) so that there are no surprises on the day. The joint opening session at the outset with all participants is only for the purposes of me explaining the process to the participants.

If there are to be other persons present in the private conference break out rooms as support for your client, I have no problem with that and it often assists the process. Obviously, discretion needs to be used if the support person is/was an issue for the other side. I want everyone feeling as relaxed as possible and without any preconceived ideas as to “expected” outcomes

### **Risk Analysis**

Prudent mediation practice urges that lawyers should always take the client through a Risk Analysis. Forms of risk analysis arise in the process itself when we tell the client



of the costs (financial, emotional and time wise) in proceeding to court determination if the mediation fails. For your use, I attach a short **Risk Analysis** document you may want to use as a discussion basis for the client at an appropriate time.

Please remember also that it is prudent that if a legal practitioner negotiates the settlement of a litigious matter on behalf of a client, before the settlement is executed, the legal practitioner should disclose to the client a reasonable estimate of the amount of legal costs payable by the client.

If an impasse is reached during the mediation, I invariably have the parties do a Risk Analysis.

#### **Best Case - Worst Case Scenarios**

I would also like you to have given in writing to your client, a best case–worst case evaluation of the case. I appreciate that might be a wide range for a number of reasons and may depend on further disclosure or other pertinent legal issues. I expect that at some stage during the mediation I will be talking in private about best case–worst case scenarios.

#### **Cancellation Fees**

Please see my Mediation Agreement attached.

#### **Settlement**

It can save time at the mediation when doing documents after an agreement, if someone can have any court document on a flash drive for use on a laptop to assist in preparation of agreements/consent orders for printing and signing on the day, if required.

Otherwise please return a copy of the **Mediation Agreement** signed by your client and witnessed by you to me by **4 June 2024**. Upon receipt of both signed copies, I will sign and date same.

**The Hon. G. F. Foster**

Culwulla Chambers,  
11/67 Castlereagh St, Sydney, 2000.

**RISK ANALYSIS**

	<i>Applicable?</i>	<i>Estimated \$ value, best to worst</i>
Lawyer's fees to prepare up to hearing	√	
Lawyer's fees at hearing (Number of days)	√	
Counsel's fees at hearing	√	
Other professional fees (Valuers/Accountants)	√	
Legal costs spent	√	
Adverse costs Order (if you have to pay other side's costs)	√	
Personal stress and health risks	√	
Lost time/work	√	

## **MEDIATION - SOME COMMON QUESTIONS AND ANSWERS**

### **WHAT IS THE MEDIATOR'S BACKGROUND?**

Garry Foster has been a lawyer for 48 years. Firstly, as a solicitor in private practice and as an Accredited Specialist in Family Law until called to the Bar in 2001. He practiced as a barrister specialising in all aspects of family law until 2011 when he was appointed to the then Federal Magistrates Court, later the Federal Circuit Court of Australia.

In 2013 he was appointed to the Family Court of Australia sitting at Parramatta. He undertook extensive trial work delivering some 650 judgments in his time on the bench. He retired from the Court in August 2021.

He has returned to the Bar to undertake mediation and arbitration work only.

When a solicitor he undertook the Bond University Mediation Course and has previously been on the board of the Australian Institute of Family Law Arbitrators and Mediators (AIFLAM).

As a mediator, his focus is on providing to the clients, a secure negotiation environment in which they are asked to make some important decisions for themselves. All clients are treated with respect and empathy. The fact that there is conflict is recognized.

### **WHAT IS MEDIATION?**

Mediation is a confidential process whereby a trained person assists two or more people (and often their lawyers) who are in dispute, to negotiate a mutually satisfactory resolution to their dispute. It is a form of "*assisted*" or "*facilitated*" negotiation. Before mediation parties through their lawyers may have attempted settlement of their dispute, but then may have quickly run out of preparedness to compromise their position further.

Mediation offers the parties and the lawyers, a safe and secure negotiation environment in which to take the negotiations to the next level by introducing a third neutral person (the mediator) who manages the negotiation process and provides a level playing field for parties to explore settlement knowing that if they make concessions, they can expect to receive concessions in response.

The mediator has the advantage of hearing confidentially from both parties where the parties might be prepared to go in their negotiation to get the matter settled and can often

see where the parties have common interests in getting the matter settled which might never come out through a direct “party to party” negotiation. With this knowledge, the mediator can guide the parties towards resolution without their giving away their negotiation positions.

### **WHAT EVENTS PRECEDE MEDIATION?**

Typically (though every mediation process is varied), mediation involves the following steps:

- The Mediator is approached by a party or their lawyer with a request to assist and more often than not this can be due to a requirement of a Court that they attend mediation.
- The Mediator checks that both parties and lawyers agree to his/her appointment.
- If there is agreement, the Mediator sends to each person, information about costs, Mediator’s background and an Agreement relating to confidentiality and costs.
- A time and place (often a “neutral” venue) for the meeting is arranged by the parties.

### **IS MEDIATION CONDUCTED BY JOINT SESSIONS OR SEPARATE SESSIONS?**

In most relationship breakdowns (matrimonial or de facto) the need for a joint session at the beginning of the mediation can usually be dispensed with because the positions of each party will have been spelt out in exchanges of documents between lawyers or in Court filed documents. Additionally, parties can feel intimidated in a joint session, because of the presence of the other party and/or their lawyer.

Notwithstanding good intentions and rules about listening without interrupting, sometimes something said by the other party or their lawyer will cause an early upset and then resentment will be harboured for the rest of the mediation. Thus, joint sessions can be an uncontrolled environment where at the outset, something said may cause more harm than good, lessening the chance of a successful outcome.

First-up separate intake sessions are seen as a better way of enabling the mediator to get to know each party, what they seek to achieve out of the mediation and to enable the party to tell the mediator, things that they would not put out on the table in front of the other party and lawyers.



### **WHAT CAN I EXPECT IN THE INTAKE SESSION?**

It is important in this private session for the participants to be open with the mediator. Mediator and lawyers understand that parties often come to mediation impacted by certain emotions such as grief, fear or anger.

Mediations have more chance of success if everyone is feeling as much at ease as is possible. Mediators do not want people feeling intimidated or confronted by the process. The intake session helps the mediator work through these issues for the client as they will invariably have an influence on the way the party reacts to the mediation

Anything that is discussed in the private meeting is confidential and will not be disclosed by the mediator to the other party unless the mediator is specifically permitted by you to do so.

The Mediator clarifies each party's concerns and what issues they wish dealt with, and then tries to narrow down areas where the parties are in agreement or disagreement.

### **WHEN DOES THE NEGOTIATION STAGE HAPPEN?**

This stage normally commences after the separate intake sessions and often only with the lawyers for the parties. The preparatory work for a negotiation process is done in a session where the mediators and lawyers identify the issues in dispute.

The role of the mediator is to control the process, have the lawyers feeling comfortable with each other, and to convey offers and make suggestions on framing of the offers.

The Mediator will seek to have each party through their lawyers, continue to make concessions from their position conditional on knowing that the other party will do the same – in other words a two-way street. Often the matter simply proceeds through negotiation, by offer and counteroffer. In a non-confronting way, each of the parties is encouraged to come up with possible ways to resolve each issue. An agreement is pieced together, like a jig-saw puzzle.

### **CAN I TALK ABOUT THE MEDIATION SESSIONS WITH FRIENDS OR PROFESSIONAL ADVISERS?**

Yes, during the mediation you will have ample time to speak to your lawyer or adviser

with the mediator present, if you wish. You can call a halt at any time to discuss where the matter is going or to express any concerns. The mediation is not meant to be a coercive process. This is in stark contrast to the manner by which a case is adjudged by a Court, where the ability to discuss matters and have some control over outcome is taken away from the parties. Courts simply impose decisions on people who can't agree – the process is out of your control.

### **ARE ARRANGEMENTS REACHED AT THE MEDIATION BINDING AT LAW?**

If agreement is reached the parties will be expected to sign either a Heads of Agreement document or in the case of pending Court matters, final consent orders or other documents that make the mediated agreement binding.

In some cases that cannot occur at the mediation due to the need to take further steps or sign further documents to make the mediated “agreement” binding such as requirement to give notice to a superannuation Fund of a proposal to split superannuation benefits of a party.

### **WHAT IF I FEEL UNCOMFORTABLE WITH THE MEDIATION PROCESS?**

You can have a break at any time – no reason is needed. You will find that dealing with some issues will be confronting. You can ask to speak to the Mediator alone. Or you can express your concern immediately and the Mediator will try to deal with it openly. Or you can ask for the mediation session to be adjourned.

One of the Mediator's tasks is to try to balance the negotiating strengths of each person and to minimise any feelings of intimidation.

### **WHAT DOES IT COST?**

Mediators usually charge a “per day” rate and then an hourly rate for matters that go past normal finishing times (usually 5.00pm). If rooms are hired for the mediation those costs are also shared by the parties. The mediator's costs are set out in the Mediation Agreement signed by all participants.



### **FINALLY – SOME SUGGESTIONS**

Try to relax when you get to the mediation – you probably won't have slept well beforehand – that's not unusual.

Try not to come with preconceived ideas as to the outcome you must achieve. Be prepared to be flexible as you hear new information during the mediation.

You may already be frustrated with prior processes and feel negative and hopeless about achieving a positive outcome. Remember mediation on average settles about 4 out of 5 matters. Try to be positive and patient.

Try not to rush decisions - the mediation will be conducted in a structured way so there will be plenty of time to think through and discuss with your lawyer and the mediator the important decisions to be made. Tell the mediator about how you feel – it will help him gain a better understanding of what your needs and interests are.

### **THEMES - HOW WE GOT HERE**

People, usually of goodwill, espouse different positions or interests. Each side seeks advantage in an outcome that suits them. They clash. They attempt to work things out. They fail. They start demonising each other. Communication channels get clogged – lawyers are introduced into the equation – communication is lost.

Lawyers rightly espouse the best positions of their clients. Each side relies on brinkmanship and bluff to further positions. Court proceedings are commenced, and each party tells a different story in their affidavits. Parties start to lose respect for each other and whatever trust there was disappears.

Finally, staring into the mirror of uncertainty, and possibly an inferno of future conflict, someone says “Let's try to mediate”. There is a shuffling of feet, some throat clearing, a bit of denial, some face saving and finally people sit down and negotiate. Familiar story?

**Common themes/myths that arise in Mediation**

<u>The Myth</u>	<u>The Reality</u>
<p><u>Parties believe they are right</u> ("<i>the myth of justice</i>") and that a Court will determine the matter clearly and definitively the way they expect ("<i>the myth of rationality</i>").</p> <p>Also called "appealing to the court of public retribution" &amp; "the court will see that my position is right"</p>	<p>A natural and common defensive position that parties adopt when under pressure to move from an entrenched position when asked to compromise.</p> <p>This position involves a fundamental misunderstanding of the limitations of litigation and the Court system and the difficulty the Courts have in arriving at a just result for both parties.</p>
<p>The lawyer is there at the mediation to <u>put the client's case</u> as he/she would if you were in Court and convince the other side you are right.</p>	<p>The lawyer is there to assist resolution and should play a different role to merely being an advocate. It can be surprising or confusing for a client when a lawyer, who has been advocating their cause forcefully with the other party, suddenly says, "<i>let's think about settling the matter the matter</i>". This different role can be difficult for the lawyer to feel comfortable with because of the close relationship he/she has had with a client during litigation. The purpose of mediation is not "victory" but "resolution"</p>
<p>Having received a lawyer's opinion on possible outcomes in Court, the opinion becomes the non-negotiable position of the party for the mediation process.</p>	<p>Arises from an inability to appreciate and embrace the fluidity of a mediation process. Outcomes don't necessarily have to be in accord with some other yardsticks such as <i>what would a Court order here?</i></p>

<p>Feelings of disillusionment or disappointment in mediation when another view of a possible outcome for the dispute comes into play and participants are asked to consider those views.</p>	<p>Again a naturally defensive reaction arising from “the myth of rationality” referred to in the first point or from being unaware that other possible outcomes not previously thought of, could be worthwhile considering. Studies show that the worth of an offer is more often assessed on who conveys it, rather than the actual contents of the offer itself. Thus if an offer is made by one side to the other, the party receiving often may treat the offer with some disdain, simply because it is made by the “opposition”.</p>
<p>Feelings of disillusionment or helplessness arise like in the last example when during exchange of offers and counteroffers in a mediation, a party’s position seems to get whittled down or constantly chipped away at.</p>	<p>This is a very common feeling during mediation as a settlement decision become imminent. It is quite normal and is due to parties not feeling comfortable with the negotiation process and what it seeks to achieve - an outcome within reasonable limits for both parties. The feeling will disappear and be replaced by a feeling of relief at the finality of the whole proceedings.</p>