

**MEDIATION AGREEMENT**

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

**Dated:**

**BETWEEN:**       **Stephen Cooke**  
Jacqueline Turner, Solicitor  
Clarity Lawyers  
  
(the First Party)

**AND:**             **Heather Cooke**  
Anna Roberts, Solicitor  
Delaney Roberts Solicitors  
  
(the Second Party),

both collectively called “the Parties”,

**AND:**             **The Hon. G.F. Foster, Mediator**  
  
**of Culwulla Chambers, 11/67 Castlereagh St Sydney, 2000**  
  
 (“the Mediator):

**WHEREAS:**

A.       The Parties have family related problems that have arisen from the breakdown of

- their relationship and they have determined that they wish to embark on an alternate dispute resolution process in an endeavour to resolve the problems;
- B. The Parties wish to appoint the Mediator to assist them in the resolution of the problems;
- C. The Mediator agrees to assist the Parties and so that the Parties and the Mediator understand their rights and the Mediator's functions, and each party and the Mediator's obligations in the Mediation, all Parties have agreed to enter into a written agreement.

## **OPERATIVE**

### **1. Appointment of Family Law Mediator and Protocols to be used**

The Parties hereby appoint the Mediator to assist them to negotiate and resolve disputes arising from their separation, divorce or related matters. Unless specifically dealt with in the following clauses, the Mediator will conduct the mediation in accordance with the Practice Standards of the Australian National Mediator Standards.

### **2. Nature of Family Mediation**

The Parties understand and agree that:-

- (a) Family Mediation is a problem-solving process designed to help separating or divorcing couples to reach their own mutually acceptable agreements regarding the resolution of financial matters and/or the on-going arrangements for their children. The Parties understand that the process is a consent process and is their process. They therefore have control of the process and should not feel under any compulsion in the process except to honour their commitment once given, to proceed with the process in good faith once it is commenced.
- (b) Family Mediation is a voluntary process with the responsibility for the resolution of a dispute resting with the Parties. Either of the Parties may withdraw from the mediation at any time with a written notice to the Mediator. The terms of the agreement about the meeting procedures below shall govern the conduct of the

mediation however the Parties understand that the Mediator needs flexibility in the way the matter proceeds and that if there is to be any significant changes from the procedures set out here, the Mediator will discuss the proposed changes with the Parties and gain their consent to the changed procedure.

- (c) The Parties' entering into mediation will not lead to an automatic stay of any legal proceedings between the Parties nor preclude them from commencing legal proceedings but the Parties agree that in order to facilitate the mediation process they will use their best endeavours to manage their communication in a conciliatory style and that for either of them to commence legal proceedings, would be a fundamental change in their agreement to mediate and constitute an abandonment of the mediation process.
- (d) The Parties agree that they have come to mediation voluntarily and in good faith to resolve their disputes and neither will refer to the content of the mediation in the Court process and will maintain confidentiality in the terms set out in this agreement.
- (e) If and when agreement is reached on issues the subject of the Mediation, the Mediator may assist in the preparation of draft documentation in accordance with this agreement.
- (f) If the Parties are not already legally represented, then the Mediator will request the Parties to seek their own independent legal advice with a view to documenting the agreement(s) reached at the Mediation in a form that is legally enforceable by each party against the other. The Mediator may if requested by a party, suggest the names of appropriate Accredited Family Law Specialists lawyers to act for either of the Parties.

### **3. Role of Mediator – Evaluative**

- (a) The Mediator's role is that of a neutral facilitator to assist the Parties to reach an informed and voluntary settlement. The Mediator will not make any decision for the Parties or coerce the Parties to enter into an Agreement. However, the Mediator by reason of his training and judicial experience will adopt a Mediation model that encompasses some evaluation of the positions adopted by the Parties and evaluation of any proposals made for settlement.

- (b) The Mediator must remain as an impartial third Party, who represents neither of the Parties. Notwithstanding this the Mediator will at all times promote a settlement which is in the best interests of the children (if children's issues are relevant) and will assist the Parties to examine the separate and individual needs of their children as distinct from their own needs and desires.
- (c) The Mediator may communicate separately with either Party and the discussion shall be confidential between the Mediator and that Party unless they agree otherwise. Both Parties understand that such communication with one party will be by the mediator acting in good faith and for the purpose of facilitating further understanding of the issues and dispute and solely with the intent of assisting the Parties to reach an agreement.
- (d) Once the Mediator has acted as a mediator, he cannot subsequently act for either Party as a lawyer and/or as an expert witness without the written consent of both Parties.
- (e) To assist the Parties, the Mediator shall at appropriate stages of the mediation, if the Parties are unrepresented by lawyers, prepare draft documentation for the Parties, to enable the Mediator to illustrate for discussion purposes, the nature of documentation that can be used to document agreements reached by the Parties in the Mediation. Such documentation shall be treated as "draft only" and shall not constitute evidence of an agreement reached by the Parties. The Parties have the right to take such draft documentation to their own lawyer for comment or opinion. The Parties agree that the Mediator bears no liability or responsibility to either of the Parties for the content of any draft documentation.
- (f) By agreement of the Parties and the Mediator as to content, the Mediator may at the request of either party at any stage, prepare a summary/outline of issues and an opinion on the issues still considered to be in dispute. This document may be disclosed by either party to their own independent lawyer.
- (g) The Mediator reserves the right to see a party directly without their legal representative during the mediation notwithstanding that the party is legally represented.

#### **4. Information for the Mediator and Confidentiality**

- (a) The mediator will outline in a letter to the parties the nature of the information he

will require before the mediation to better inform him of the nature of the dispute.

- (b) If the parties so desire, they can send by agreement any documents such as
  - (i) copies of court documents.
  - (ii) copies of any other documents, summaries of issues or other schedules (e.g., assets and liabilities).
- (c) In the absence of agreement on documents to be sent, the parties may send the mediator any documents they consider are relevant for the mediator's information. Such documents will remain confidential between the mediator and the party sending the documents unless a document is one that would be required in the normal course of events to be disclosed to the other party in current litigation.
- (d) The Mediator is at liberty to contact the Parties/their lawyers directly for clarification purposes with respect to the issues they wish to bring to the Meeting. In such contact, the Mediator undertakes to limit his contact to discussion of matters to be included in the issues for mediation and not to discuss the merits or otherwise of the issues or make comment on factual matters behind the issues. In exchange for this undertaking, the party(s) if contacted shall not seek to discuss the Mediator any factual matters relating to the issues.
- (e) The Mediator will if requested schedule a first joint meeting at a time and location to be determined by the Parties and the Mediator. If there is to be no initial joint meeting the mediator will initially meet privately with the Parties and their lawyers. Anything discussed in the private meeting shall not be disclosed to the other side except with the consent of the party. Equal time will be given to each party for private meetings.

## **5. Co-operation and Full Disclosure**

- (a) The Parties agree to co-operate in good faith with each other and the Mediator in an attempt to reach agreement.
- (b) The Parties agree to disclose all relevant information fully and honestly as requested by the Mediator and by each other.
- (c) Any failure by either of the Parties to make full and frank disclosure may result in

the setting aside of any Agreement reached in mediation.

**6. Confidentiality – Communications and Documents**

- (a) All discussions and negotiations are to be held on a “privileged” and “without prejudice” basis. That is, the Parties agree not to refer to any information from the mediation in any proceedings that may subsequently take place unless ordered by the Court to specifically do so.
- (b) The Parties and/or their legal representatives shall not disclose to any other person the information from the mediation in any proceedings that may subsequently take place unless required by the Court to specifically make such disclosure. It is understood that the information and documents may be shared with the Parties’ respective lawyers but that such information cannot be used as evidence in Court proceedings.
- (c) The Parties agree that they shall not at any time, before, during or after mediation, call the Mediator or anyone associated with the Mediator as a witness, nor to subpoena them, nor to demand the Mediator to disclose any of the documents and/or information produced in the mediation, nor to demand the production of any records, notes, discs or the like of the Mediator in any legal proceedings concerning the disputes between the Parties.
- (d) The Parties agree to reimburse the Mediator for all legal fees and expenses he/she incurs in defending any subpoena and/or any application for disclosure and production of information and documents issued by either of the Parties in relation to the mediation.
- (e) The Mediator shall keep confidential all information and/or documents given to him/her during mediation unless such information discloses an actual or potential threat to human life or safety.
- (f) The Parties understand that some documents given by them to the Mediator for the Mediation may always have been discoverable by a party in Court proceedings, and the mere fact that they have been introduced into the Mediation process does not make them confidential.

- (g) No party to the mediation shall use any recording devices during the mediation whether audio or visual and a breach of this agreement shall render the contents of any recording of no effect for any purpose and inadmissible as evidence of any part of the mediation.

## **7. Independent Legal and/or Expert Advice**

- (a) Mediation does not replace independent and/or expert advice.
- (b) The Mediator shall not provide legal and/or expert advice to the Parties unless requested to by all parties/lawyers but shall advise and encourage the Parties to obtain independent legal and/or expert advice where necessary.
- (c) If the Parties both ask to Mediator to express an opinion on a matter and the Mediator agrees to do so it shall be solely for the purpose of assisting the Parties understanding of a legal matter and the mediator shall not bear any responsible for any reliance placed by a party on such opinion.

## **8. Liability of the Mediator**

- (a) The Mediator shall not be liable to the Parties for any statement, act or omission in assisting the Parties to resolve their disputes unless the act or omission is fraudulent.
- (b) The Parties agree to indemnify the Mediator against any claim for any statement, act or omission made by the Mediator in assisting the Parties to resolve their dispute unless the act or omission is fraudulent.

## **9. Termination of Mediation**

- (a) If the Mediator determines that it is not appropriate to continue with the mediation process for any good reason, the Mediator may terminate the mediation, without specifying such reason. The mediator will confirm such termination by a written notice to the Parties.
- (b) Either of the Parties may terminate the mediation at any time but each Party hereby agrees that, before doing so, they will discuss their intention to terminate with the

Mediator in a private individual session.

## **10. Mediation - Reaching an Agreement**

- (a) Except for the specific documents referred to in clause 3(e) for unrepresented Parties, the Parties acknowledge that any agreement reached at mediation and documented and signed by the Parties, will probably be enforceable in a Court of law as a concluded agreement. The parties understand that in some circumstances a Court may later order a party to pay all the costs of a mediation, where an agreement was reached but then later resiled from by a party.
- (b) If the Parties are unrepresented by lawyers and an agreement is reached, the Mediator shall provide the Parties with a written “*Without Prejudice*” Mediation Agreement which the Parties shall sign in good faith. This agreement shall not be legally binding and is expressly subject to the review of the Parties, after obtaining independent legal advice. The Mediator will also provide to the Parties any draft documentation prepared during the mediation.
- (c) The Parties are encouraged to seek independent legal advice to review the “Without Prejudice Mediation Agreement” and draft documentation. If the agreement involves the Parties entering into a Financial Agreement under the Family Law Act, the Parties understand that they will have to obtain independent legal advice and have the agreement certified to that effect, to make such a Financial Agreement binding under the terms of that Act.
- (d) The Mediator shall assist the Parties’ own lawyers with any explanation required of the “Without Prejudice Mediation Agreement” and the draft documentation.

## **11. Costs of Mediation**

- (a) Each Party agrees to pay for one-half of the Mediator’s fees at the rate of: -
  - (i) **\$6,000 per day, plus GST \$600: \$6,600.**  
(a day is typically from 9.30 a.m. to no later than 4.30pm and the fees include allowance for two hours reading and or preparation time to facilitate the mediation being conducted on an evaluative basis),

- (ii) Should the mediation finish within the above time frames, no adjustment to the above fees will be made.
- (iii) **Additional hours** including if requested a preliminary conference are charged at **\$600 an hour plus GST \$60: \$660.**
- (b) Notwithstanding a Court may have ordered that one party pays the mediator's fees in the first instance or the parties have reached an agreement to that effect, the Mediator shall issue Tax Invoices to each party for one-half of the estimated fee to be incurred or actually incurred. Any agreement between the parties for payment of the fees on some basis other than equal sharing does not bind the mediator.
- (c) The Mediation is to be conducted in Newcastle and the agreed fee for travel and accommodation is \$1000 plus GST \$100 Total \$1100.
- (d) The parties shall organise the facilities or rooms necessary for the mediation. Each party agrees to pay one half of the reasonable costs of any facilities or rooms hired for the mediation and every endeavour shall be made by the parties to limit such costs. The agreed venue is the Newcastle Resolution Centre 42 Church St.
- (e) The Mediator's estimated fees are in the sum of \$7,700 incl of GST and each party shall **deposit to their respective solicitor's trust account one half of such fees not less than 7 days before the proposed mediation date.** Confirmation of payment by each party shall be communicated to the Mediator not less than 7 days before the Mediation date in default the Mediation may be vacated by the Mediator.

## **12. Cancellation fee**

A **cancellation fee of \$2000 plus GST \$200: \$2,200** is charged for any cancellation made less than 7 days before the proposed Mediation date. The parties agree to pay one-half of the fee each and a Tax Invoice will be rendered accordingly. The Mediator's reservation of the mediation date shall be conclusive as to the party's agreement as to such fee.

## **13. Execution**

This agreement may be signed as counterparts and the counterparts together, shall comprise the one agreement. The agreement signed as requested should be returned to me no later than 14 days before the date fixed for mediation and upon receipt I will sign and date them.

**SIGNED by the first party**

in the presence of:

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**SIGNED by the second party**

in the presence of:

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**SIGNED by the Hon. G. F. Foster**  
Mediator

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