

Law Society of New South Wales

Mediation and Evaluation Information Kit

Have you reviewed your files for early dispute resolution options?

This Mediation and Evaluation Information Kit has been designed by The Law Society to disseminate information among the legal profession on the use of mediation and evaluation to promote the negotiated settlement of disputes and the early resolution of litigated matters.

Note:

Reproduction of the material contained in this Kit is encouraged to disseminate the principles and practice of mediation and evaluation amongst the legal profession. Acknowledgment of the Law Society's authorship should be included in any reproduced material.

Message from the President

The Mediation and Evaluation Information Kit has been revised and expanded in response to the profession's growing commitment to the range of ADR services offered to clients.

In addition to the guidelines to assist members actively involved in the practice of mediation, precedent documents including the Agreement to Mediate and an ADR Clause, the Kit contains the Charter on Mediation Practice, adopted by Council of the Law Society on 11 September 1997. I recommend the Charter to you as a useful guide to the rights and responsibilities of mediators, lawyers and parties during the mediation process under the Society's Mediation Program.

The Kit also includes the Law Society's Evaluation Model and Evaluation Agreement which were developed by the Dispute Resolution Committee over several years in order to assist practitioners in a new dispute resolution process of considerable potential.

I am pleased to endorse the Kit which I am certain will continue to serve as a ready reference for solicitors and their clients whenever considering the resolution of disputes.

June McPhie
1 January 2006

Introduction

Aims and Objectives

This Mediation and Evaluation Information Kit (The Kit) has been designed by The Law Society to disseminate information among the legal profession on the use of mediation and evaluation to promote the negotiated settlement of disputes and the early resolution of litigated matters.

Reasons why Practitioners should use the Law Society's Mediation Program

In addition to the advantages experienced by clients, legal practitioners who have referred matters to the mediation program have identified a number of benefits:

Improvement in solicitor/client relations by the provision of an appropriate forum for the parties to make decisions, as opposed to hasty settlements made on the court steps;

Expansion of solicitors' practices by the provision of an additional service as an alternative to litigation particularly in situations where litigation is neither cost-effective nor desirable;

Preparation for mediation facilitates the exchange of outstanding information such as updated medical reports, and additional particulars of claim;

Enhancement of the image of the legal profession as a whole when prompt preparation of a client's matter can be followed swiftly by structured settlement negotiations; and

Early recoupment of costs and funded disbursements.

The promotion of mediation to the legal profession and to the community has been uppermost on the agenda of The Law Society's Dispute Resolution Committee since 1990. Settlement Weeks 1991, 1992 and 2002 and the Mediation Program to date have resulted in the settlement of proceedings arising from wide ranging areas such as personal injury claims, commercial causes, probate matters, family and de facto matters, defamation actions, construction disputes, and claims in legal or medical professional negligence.

Generally, all types of disputes are suitable for mediation provided all parties and their legal representatives are prepared to negotiate in good faith and work towards a mutually acceptable outcome.

According to research data collected from mediators, lawyers and parties to mediations, as well as anecdotal information offered by participants in the mediation process, the program achieved considerable savings of time and costs for individual parties and for the courts. The settlement rate has consistently been in excess of 70%.

The Law Society's Evaluation Program

Solicitors and their clients have the benefit of the newly established Evaluation Program. All types of disputes may be referred to an Evaluator who will give a reasoned non-binding opinion on the merits of the case.

A Selection of government and non-profit organisations which offer alternative dispute resolution

The Law Society of NSW 170 Phillip Street, SYDNEY NSW 2000 DX 362 SYDNEY Tel: 9926 0214 Fax: 9231 5809	Health Conciliation Registry PO Box K599 HAYMARKET NSW 2000 Tel: 9219 7478 Fax: 9219 7575
ACDC (Australian Commercial Disputes Centre) Level 6, 50 Park Street SYDNEY NSW 2000 Tel: 9267 1000 Fax: 9267 3125	IAMA (Institute of Arbitrators and Mediators Australia) Level 19, 52 Phillip Street SYDNEY NSW 2000 Tel: 9241 1188 Fax: 9252 2911
Adolescent Family Therapy and Mediation Service Resources for Adolescents and Parents Level 1, Suite 102, 18-20 Ross Street NORTH PARRAMATTA NSW 2151 Tel: 9890 1500 Fax: 9890 1170	Land and Environment Court of NSW PO Box 3565 SYDNEY NSW 1043 DX 264 SYDNEY Tel: 9228 8388 Fax: 9235 3096
Administrative Appeals Tribunal Level 7, 55 Market Street SYDNEY NSW 2000 DX 10200 SYDNEY STOCK EXCHANGE Tel: 9391 2400 Fax: 9283 4881	LEADR Level 9, 15-17 Young Street SYDNEY NSW 2000 DX 1067 SYDNEY Tel: 9251 3366 Fax: 9251 3733
ALAM (Association of Lawyer Arbitrators and Mediators) Edmund Barton Chambers Level 44 MLC Centre 19-29 Martin Place SYDNEY NSW 2000 Tel: 9220 6100 Fax: 9232 3949	Local Court of NSW Level 5, Downing Centre 143-147 Liverpool Street SYDNEY NSW 2000 DX 11550 SYDNEY Tel: 9287 7923 Fax: 9287 7196
ACCESS Programs (NSW) Ltd Level 15 133 Liverpool Street, Sydney NSW 2000 Tel: 9283 5588 Fax: 9267 1653	Office of the Ombudsman Level 24, 580 George Street SYDNEY NSW 2000 Tel: 9286 1000 Fax: 9283 2911

<p>Arts Law Centre of Australia The Gunnery 43 Cowper Wharf Road WOOLLOOMOOLOO NSW 2011 Tel: 9356 2566 Fax: 9358 6475</p>	<p>Relationships Australia (NSW) Mediation Service (Offices throughout greater Sydney, Illawarra, the Hunter and in every State) Level 2 135 New South Head Rd Edgecliff Tel: Head Office 9245 4999; Mediations 9387 4211; Training Enquiries 9806 3288</p>
<p>Community Justice Centres of NSW L8 Goodsell Bldg, 8-12 Chifley Square SYDNEY NSW 2000 Tel: 9228 7455 or 9228 7452 Fax: 9228 7456</p>	<p>Retail Tenancy Disputes Registry Business and Regional Development Level 8, St James Centre 111 Elizabeth St SYDNEY NSW 2000 Tel: 9223 0466 Fax: 9223 1087</p>
<p>Consumer Claims Trader and Tenancy Tribunal L12, 175 Castlereagh Street SYDNEY 2000 Tel: 1300 135 399 Fax: 1300 135 247</p>	<p>Rural Assistance Authority Farm Debt Mediation Services Locked Bag 23 Orange NSW 2080 DX 3037 ORANGE Tel: 1 800 678 593 Fax: 6391 3098</p>
<p>Department of Fair Trading Strata Mediation Services Branch 33 Bligh St Sydney NSW 2000 PO Box A805 SYDNEY SOUTH 1234 Tel: 9338 7900 Fax: 9338 7999</p>	<p>Supreme Court of NSW Queens Square SYDNEY NSW 2000 DX 829 SYDNEY Tel: 9230 8111 Fax: 9230 8628</p>
<p>District Court of NSW John Maddison Tower Level 11, 86-90 Goulburn Street SYDNEY NSW 2000 DX 11518 SYDNEY DOWNTOWN Tel: 9377 5555 Fax: 9377 5777</p>	<p>Family and Child Mediation Service PO Box 145 FAIRFIELD NSW 1860 Tel: 9725 7077 Fax: 9727 9932</p>
<p>Family Court of Australia Mediation Section 97-99 Goulburn St SYDNEY NSW 2000 DX 1015 SYDNEY Tel: 9217 7326 Fax: 9217 7201</p>	<p>Interrelate Mediation Service 55 George Street BURWOOD NSW 2134 Tel 9745 5544 Fax: 9745 5522 Coffs Harbour: 6651 1010 Lismore: 6622 2158 Newcastle: 4969 6313 Kirrawee: 9545 3566</p>
<p>Federal Court of Australia Level 16, Law Courts Building Queens Square SYDNEY NSW 2000 DX 613 SYDNEY Tel: 9230 8042 Fax: 9223 7706</p>	<p>UNIFAM – The Family Mediation Centre Separation and Family Counselling L4,262 Pitt Street SYDNEY NSW 2000 Tel: 9261 4077 Fax: 9261 3255 PO Box 3156 PARRAMATTA NSW 2124 Tel: 9891 1628 Fax: 9891 5675</p>

I. The Law Society Mediation Model

1. Law Society Definition of Mediation

Mediation is a voluntary process in which a mediator independent of the disputants, facilitates the negotiation by disputants of their own solution to their dispute by assisting them systematically to isolate the issues in dispute, to develop options for their resolution and to reach an agreement which accommodates the interests and needs of all the disputants.

The mediator does not impose a solution upon the disputants. It is not his/her function to attempt to coerce a party into agreement nor should he/she attempt to make any substantive decision for the parties. He/she may raise and help the parties explore options for settlement. It is not the mediator's function to give legal advice to the parties.¹

2. Description of the Law Society Mediation Model

The Law Society's mediation model comprises a preliminary conference and a mediation session. The preliminary conference is scheduled to last for up to one hour and a mediation session for an average of three hours. The stages of the preliminary conference and the mediation are outlined below.

As a matter of policy, a co-mediation model (where two mediators are appointed instead of one) is adopted for interpersonal disputes involving family, de facto relationships, or disputes under the [Family Provision Act \(NSW\) 1982](#). Co-mediation, which involves no additional cost to the parties, is also adopted in other appropriate cases such as complex multi-party matters.

Preliminary Conference Stages

The preliminary conference may be conveniently divided into seven stages.

1. The Mediator's Role

The role of the third party neutral is explained in terms of neutrality, impartiality and being in control of the process with the parties controlling the outcome.

2. Features and Objectives of Mediation

Features of mediation are outlined such as voluntariness, confidentiality, and the status of the final agreement reached by the parties. Parties are also alerted to the fact that new information often emerges in the course of a mediation. Objectives of mediation are outlined including:

seeking common ground and a range of possible solutions

empowering parties to settle their dispute to their mutual satisfaction.

3. The Role of Legal Representatives

The role of legal representatives in mediation is explained, their role being to assist their clients define their problem and to develop possible solutions.

4. Authority to Settle

In order to provide the other party with the opportunity to make an informed decision whether or not to proceed with the mediation, each party to the mediation is required to define to the other the scope of his or her authority to settle, including any limitation of that authority. A suggested explanation of full authority to settle might be: “Although it is reasonable to come to mediation with a perceived fair settlement figure in mind, full authority means, in principle, the ability to settle up to 100% of the claim if the mediation proceeds. This includes any new information which comes to hand, which convinces the other party that it is appropriate to settle”.

5. Finalising Approval for Mediation Participants

The same representatives present at the preliminary conference should attend the mediation session. Agreement should be reached as to whether absentees from the preliminary conference (eg. barristers) will be present at the mediation. No observers, regardless of their status should be invited to be present at the mediation. If parties request the attendance of observers, their attendance should occur only with the consent of the parties and the mediator. Support persons may attend provided advance consent is sought and obtained from the mediator and all parties to the mediation.

6. Signing the Mediation Agreement

This provides an opportunity for misunderstandings about the mediation process to be cleared up. It also allows parties to give informed consent to proceed to mediation and formalises their commitment to mediation.

7. Preparation for Mediation

A timetable is set for pre-mediation undertakings to ensure maximum readiness for the mediation as well as good faith bargaining. Preparation could include agreeing on the major issues to be dealt with at the mediation and updating and exchanging relevant documents.

Mediation Stages

Stages 1-4 and 6-7 are conducted in joint session with all participants present. Stages 1-4 focus on the present and stages 6-7 focus on the future. All seven stages are identified in the diagrammatic representation which follows the description.

1. Mediator’s Opening Statement

The opening statements include brief reminders of the role of the mediator, features of mediation and establishing ground rules. The process of mediation is explained.

2. Parties’ Statements and Mediator’s Summaries

Each party presents a statement of the dispute from his or her perspective. Parties’ statements are noted and summarised back by the mediator checking with the parties for accuracy. The advantages of this procedure include:

assuring the parties that their concerns have been heard by the mediator and each other; and

providing opportunities to create a positive social atmosphere conducive to effective negotiation.

providing two opportunities for an appreciation of each party's perspective.

Direct communication between the parties is not encouraged by the mediator at this initial stage. Emerging needs and options for settlement are acknowledged for use later in the mediation.

3. Identification and Listing of Issues (Agenda Setting)

A use of a whiteboard or equivalent allows parties to refer to the listed issues and concerns during the mediation. The listed issues form the basis for more effective negotiation and co-operative problem-solving. The issues are expressed in neutral and, whenever possible, mutual terms.

4. First Joint Exploratory Negotiation through Direct Communication

Parties are encouraged to select an item for exploratory discussion, ventilation or negotiation from the list of issues. The mediator encourages parties to communicate directly with each other, pinpointing and listing any proposed options emerging from the dialogue.

5. First Private Meeting

Parties are provided with the opportunity for expressing opinions and imparting information privately to the mediator if they feel more comfortable doing so than in joint sessions. It also allows the other party to have a break. The private meeting can also assist parties to rehearse negotiation, generate options and to ensure that particular proposals are realistic.

6. Second Joint Negotiation

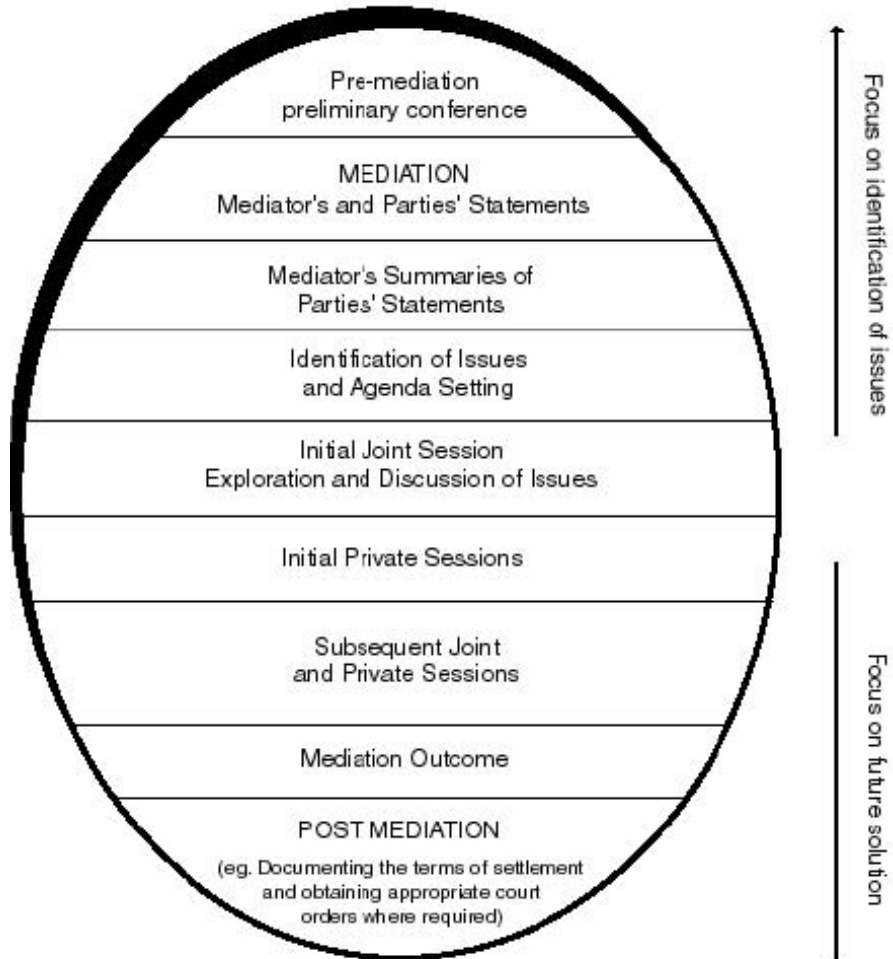
This provides the basis for finalising the agreement and can be followed by further private meetings and joint sessions where necessary.

7. Concluding Joint Session

The mediator facilitates final negotiations and fine-tuning of the agreement. Alternatively, the mediation may need to be adjourned or terminated.

Stages 1-4 are seen as necessary sequential stages. Other stages, with the exception of the concluding joint session are seen as optional strategies depending on the circumstances.

3. Law Society Mediation Model



(Reproduced with the kind permission of M. Dewdney, 1997)

II. The Law Society Guidelines for those involved in Mediations

1. Revised Guidelines for Solicitors who act as Mediators

The responsibilities of practitioners when acting as mediators are set out in revised guidelines developed by The Law Society's Dispute Resolution Committee and approved by Council on 29 July 1993.

Development of the Society's guidelines for mediators was prompted by the receipt of numerous enquires from members of the profession seeking advice before expanding their practices into the area of alternative dispute resolution. The original guidelines were approved by Council on 19 May, 1988. These revised guidelines were redrafted by The Law Society's Dispute Resolution Committee to keep pace with the changing legal environment with regard to mediation. The Council of the Law Society reaffirmed its commitment to provide a professional mediation service by requiring solicitors to have satisfactorily completed an approved mediation skills training course and to have completed at least one co-mediation with an experienced mediator.

The Council has approved the revised guidelines and resolved that the activity of mediation by solicitors, subject to the revised guidelines, be declared to be appropriate to be undertaken as part of a solicitor's practice for the purpose of professional indemnity insurance.²

Therefore, a solicitor being the holder of a full practising certificate who, as part of his or her practice as a solicitor, acts as a mediator will be entitled to indemnity pursuant to and within the terms and conditions of the Certificate of Insurance, issued to that solicitor, or his or her firm, under the Master Policy of Professional Indemnity Insurance. Solicitor mediators on a restricted practising certificate are not so covered unless they are employees in a firm and are acting as mediators as part of that firm's practice.

The revised guidelines below do not purport to prescribe the legal requirements which should be observed by a person who undertakes to act as a mediator. Solicitors who intend to practise as mediators in the area of alternative dispute resolution should inform themselves of the licensing provisions of any relevant legislative requirements.

The Guidelines

1. Introduction

- 1.1 These revised guidelines are intended to assist and guide solicitors acting as mediators.
- 1.2 These revised guidelines do not derogate from the usual obligations of solicitors.

2. Definition of Mediation

- 2.1 Mediation is a voluntary process in which a mediator independent of the disputants facilitates the negotiation by disputants of their own solution to their dispute by assisting them systematically to isolate the issues in dispute, to

develop options for their resolution and to reach an agreement which accommodates the interests and needs of all the disputants.

2.2 The mediator does not impose a solution upon the disputants. It is not his/her function to attempt to coerce a party into agreement nor should he/she attempt to make any substantive decision for the parties. He/she may raise and help the parties explore options for settlement. It is not the mediator's function to give legal advice to the parties.

2.3 The solicitor mediator should not attempt to direct the decision of the parties based upon the mediator's interpretation of the law as applied to the facts of the dispute. It is a fundamental principle of mediation that competent and informed parties can reach an agreement which need not conform to legal precedents or to general community standards.

3. Qualification

3.1 No solicitor shall act as a sole mediator unless he/she has satisfactorily completed an approved course and has had appropriate mediation experience or such experience as may be approved by the Dispute Resolution Committee of the Law Society of New South Wales.

3.2 Italicised terms in 3.1 are defined in Schedule 1 to these revised guidelines.

3.3 It is the responsibility of solicitor mediators to engage in annual continuing mediation education as part of their CLE program to ensure that their mediation skills are current and effective.

4. Initial Duties of Mediators

The mediator should define and describe the process of mediation and its cost to the parties before they reach an agreement to mediate. He/she should give an overview of the process and assess the appropriateness of mediation for the participants. Among the topics covered, it is recommended that the mediator should address the following:

4.1 The mediator should define the process in context so that the parties understand the differences between mediation and other means of conflict resolution available to them. It is important that the mediator stress that the process is "without prejudice" and that in general unless both parties consent, communications during the course of the mediation process cannot be used as evidence in court proceedings.

4.2 The mediator should obtain sufficient information from the participants to enable them mutually to define the issues to be resolved in mediation.

4.3 The mediator in consultation with the parties, should establish the following procedures:

(a) the right of each party to talk without interruption;

(b) the order of presentation;

(c) any other rules for the conduct of the proceedings as may be appropriate.

4.4 It should be emphasised that the mediator may assist in generating options for the participants to consider, such as alternative ways of resolving problems but that all decisions are to be made voluntarily by the participants themselves.

4.5 The duties and responsibilities that the mediator and the parties accept in the mediation process should be agreed upon. The mediator should inform the parties that either of them or the mediator has the right to suspend or terminate the process at any time. It is recommended that the mediator include in any written agreement to mediate, a provision that he/she has a discretion to

terminate or suspend the process at any time.

4.6 It is strongly recommended that a written agreement to mediate be entered into by the parties and the mediator prior to commencement of the process. The mediator may include a provision in the agreement excluding his/her liability.³

4.7 The mediator should explain the fees for mediation and reach an agreement with the parties regarding payment.

4.8 The mediator should explain to the parties that he/she might consult with each of them in separate sessions and that information divulged during such separate sessions will be kept confidential unless he/she has that party's specific agreement to disclose to the other party. He/she should reach an understanding with the participants as to the circumstances in which he/she may meet alone with either of them or with any third party.

4.9 The mediator should inform the parties that they have the right at any time to obtain and may need to obtain independent legal or other professional advice during the mediation process.

4.10 The mediator should also raise the matters referred to in 6.5 and 6.6 below.

5. Impartiality and Neutrality

5.1 Impartiality

The mediator shall maintain impartiality towards all participants at all times during the mediation process. Impartiality means freedom from favouritism or bias in word or action. The mediator shall not play an adversarial role and shall maintain a commitment to aid all participants, as opposed to a single individual, in reaching a mutually satisfactory agreement.

5.2 Neutrality

If the mediator believes or any one of the participants states that the mediator's background or personal experiences or relationships would prejudice the mediator's performance or detract from his/her impartiality, the mediator shall withdraw from the mediation unless all parties agree to proceed after full disclosure of all relevant facts relating to the issue of neutrality.

Prior Relationship

If the mediator has at any time prior to the mediation provided legal, counselling or any other services or has had any social or professional relationship with any of the participants, he/she shall not proceed with the mediation. If after full disclosure, all parties to the mediation agree, the mediator may proceed.

Conflicts of Interests

The mediator shall disclose any circumstances to the participants which may cause or have any tendency to cause a conflict of interest. In particular a mediator who is a partner or an associate of any legal counsel retained by either of the parties should not act as mediator without the fully informed consent of all the parties.

6. Confidentiality

6.1 The mediator shall not voluntarily disclose information obtained during the mediation process without the prior consent of both parties.

6.2 The obligations of a solicitor relating to confidentiality as between solicitor and client shall apply as between the mediator and the participants.

6.3 If subpoenaed or otherwise notified or requested to testify, the mediator shall inform the remaining participants immediately.

6.5 The mediator shall, prior to entering into the mediation process, obtain all

parties' agreement not to require the mediator to give evidence or to produce documents in any subsequent legal proceedings concerning the issues to be mediated upon.

6.6 The mediator shall inform the parties that, in general, communications between them, and between them and the mediator, during the preliminary conference and the mediation, are agreed to be confidential. In general, they cannot be used as evidence in the event that the matter does not settle at the mediation and goes to a court hearing. The mediator shall also inform the parties that they should consult their legal representatives if they want a more detailed statement of the position or if they have any specific questions about it.

6.7 The mediator shall render anonymous all identifying information when materials are used for research or training purposes.

6.8 The mediator shall maintain confidentiality in the storage and disposal of records.

7. Disclosure

7.1 The mediator should if he/she considers it would facilitate settlement, recommend disclosure of relevant information.

7.2 The mediator may encourage participants to obtain independent expert information and advice.

8. Termination of Mediation

8.1 Where full agreement has been reached, the mediator should discuss with the participants the process for formalisation and implementation of the agreement.

8.2 Where the participants have reached a partial agreement the mediator should discuss with them procedures available to resolve the remaining issues.

8.3 Where the mediator believes the agreement being reached may be impossible to uphold or may be illegal, he/she should recommend to the parties that they obtain independent legal advice.

8.4 Without Agreement

(i) Each of the parties and the mediator has the right to withdraw from mediation at any time and for any reason.

(ii) If the participants reach a final impasse, the mediator should not prolong unproductive discussions which will result merely in a waste of costs to the participants.

(iii) If mediation has terminated without agreement, the mediator should suggest that the parties obtain additional professional services as may be appropriate.

9. Responsibilities to Other Mediators

9.1 A mediator may, if the parties desire, act where another mediator is already employed. He/she may consult with the other mediator with the parties' consent.

10. Observers

10.1 In principle, the presence of observers is not desirable nor should be invited.

10.2 If parties request the attendance of observers, their attendance should occur only with the consent of all parties and the mediator.

Schedule 1

1. "An approved course" is one which satisfies the following criteria:

(a) No less than 50% of the course involves skills based training which should generally include at least two simulated mediations where each participant acts as mediator.

(b) An evaluation component to enable the trainers to assess each participant. (It is expected that at the very least the course will identify those solicitors who

would benefit from further training and assessment before acting as sole mediators. Until then those solicitors will not meet the requirements of the revised guidelines to conduct sole mediations).

- (c) A course length of not less than 4 days or 28 hours.
- (d) For those solicitors who have already undertaken courses, approved courses include, as at the date hereof, those courses conducted by the following organisations:
 - (i) Australian Commercial Disputes Centre (ACDC)
 - (ii) BOND University (Qld)
 - (iii) CDR Associates (Colorado USA)
 - (iv) Community Justice Centres
 - (v) Family Mediation Centre (UNIFAM)
 - (vi) Lawyers Engaged in Alternative Dispute Resolution (LEADR)⁴
 - (vii) Marriage Guidance Council⁵
 - (viii) University of Technology, Sydney
 - (ix) other training courses approved by the Dispute Resolution Committee⁶ from time to time⁶.
- 2. “Satisfactory completion” means that the solicitor has been formally assessed during the training course as able to act as a sole mediator.
- 3. “Appropriate mediation experience” means that the solicitor has conducted at least one co-mediation with an experienced mediator or has undertaken simulated experience as a mediator after the initial training course.
- 4. Factors which the Dispute Resolution Committee would take into account when exercising its discretion to approve experience other than as in 3 above include any one or more of the following:
 - (i) experience in representing parties at a mediation;
 - (ii) regional factors, eg. isolation;
 - (iii) relevant legal experience;
 - (iv) public interest factors such as urgency.

2. Professional Standards for Legal Representatives in a Mediation⁷

The Law Society in several of its published guides or codes of good practice has encouraged solicitors to advise clients of the advantages of alternative dispute resolution (ADR).⁸

Preparing Clients for Mediation

The legal adviser’s role in preparing clients for mediation includes:

- Explaining the process, including the mediator’s neutral role (See Law Society Mediation Model).
- Assisting clients to identify their needs, interests and issues. (As well as the legal issues, the legal advisor should explore with the client why an issue has arisen and what kind of things he or she would like to see happen. This is often wider than just the legal issues and assists in generating options).
- If necessary, assisting clients to prepare their opening statement *and issues*

paper.

- Discussing the issues that would be considered by the court and the range of possible outcomes.
- Assisting the client in thinking through options for resolution that may be wider than those remedies available in a court. Ensure the client has information about the feasibility of options prior to the mediation commencing.
- Discussing ways to achieve the client's desired outcomes, or priorities.
- Discussing the likely reaction of the other party and ways to overcome any objections.
- Explaining the nature of a "without prejudice" and confidential discussion.
- Explaining that the mediator will not be deciding the matter and that the settlement decision must be their own.
- Advising of the legal costs incurred to date and likely to be incurred if the matter does not settle.

It is recommended that the above check list be explored with clients prior to the mediation, whether or not a preliminary conference is held.

Role of Legal Advisers during Mediation

Essentially the role of the legal adviser is:

1. To assist clients during the course of the mediation.
2. To discuss with the mediator, with the other party's legal representative and with clients such legal and evidentiary, or practical and personal matters as the mediator may raise or the clients might wish. (It is likely that once the client has heard the other party's version, the legal adviser may need to take further instructions from his/her client and perhaps review the legal advice).
3. To participate in a non-adversarial manner. Legal advisers are not present at mediation as advocates, or for the purpose of participating in an adversarial court room style contest with each other, still less with the opposing party. A legal adviser who does not understand and observe this is a direct impediment to the mediation process.
4. To prepare the terms of settlement or heads of agreement in accordance with the settlement reached at the end of the mediation for signature by the parties before they leave if appropriate or in accordance with any time table that is agreed for completion of that task.

Confidentiality

Any words, act or omission by a mediator in private session shall not be revealed to the other parties or legal representatives without prior permission of the Mediator.

Good Faith Participation

If the legal adviser forms the view either before or during the mediation that the other party is not

willing to negotiate in good faith, the legal adviser should raise this issue with his/her client and/or the mediator.

Mediation Standards

A legal representative should:

- (a) cooperate with the mediator;
- (b) extend professional courtesies to both the mediator and other legal representatives;
- (c) act in good faith and advise their client of the obligation to act in good faith;
- (d) withdraw from acting when the client gives instructions or acts in a manner that indicates bad faith;
- (e) act by word or deed in such manner as not to incite or condone a party to break the law.

A comprehensive description of the mediator's role is set out in the Charter on Mediation Practice and in the Revised Guidelines for Solicitors who act as Mediators. It is not the mediator's role to give advice or opinions, make suggestions which may disadvantage a party, propose or endorse possible outcomes or support either party's view. If the legal adviser is of the view that these standards, particularly those relating to neutrality, are not being met he/she should request a private meeting with the mediator immediately.

¹ Contributions to part of this document by Sir Laurence Street, Ruth Charlton and Bernadette Rogers, Director of Dispute Resolution Queensland Law Society are gratefully acknowledged.

¹ Such statements appear in the following: the Family Law Advisory Code of Practice (paragraph 2.4); the Protocol to Handling CTP Personal Injury Claims (paragraphs 4.1, 4.13 and 4.14); Civil Litigation, a Guide to Good Practice (paragraphs 4.5-4.9); New South Wales Solicitors' Manual, Service 9 (paragraph 2255A).

3. The Law Society of NSW Charter on Mediation Practice – A Guide to the Rights and Responsibilities of Participants

1. Underlying assumptions for the Charter

The majority of mediations conducted under the Law Society Mediation Program involve two-party disputes with a single mediator. It is acknowledged, however, that there are some disputes where more than one mediator, usually two, work together in co-operation.

Multi-party disputes may require a variation in the mediation process which is normally applied in the Law Society Mediation Program.

2. Objectives of the Charter

- 2.1 To set the highest standards of practice in accordance with the principles of mediation and to formulate guidelines consistent with the Law Council of Australia Ethical Standards for Mediators.
- 2.2 To inform parties of the principles and practice of mediation and of the role of mediators.
- 2.3 To provide guidelines to the parties for their role in mediation.
- 2.4 To provide opportunities for mediators and parties to give feedback on their experience as participants in mediation in order to foster and maintain the highest standards of mediation practice.

3. What parties can expect of the mediator

The mediator is experienced in assisting communication and negotiation

The role of the mediator is to guide the communication process so that a useful discussion can take place. The mediator will do this by asking you questions to assist in identifying and clarifying the issues in dispute, to help you sort out misunderstandings and to talk about what is important to you. The mediator aims to help you talk and negotiate with each other directly.

The mediator aims to be impartial

The mediator is not there to establish facts or to decide which of you is right or wrong, nor to take sides. The mediator will therefore not agree or disagree with statements you make nor put pressure on you to follow a particular idea or suggestion. The mediator aims to treat all parties equally.

The mediator is not an adviser

The mediator will not give legal advice, nor give professional or other advice.

The mediator respects confidentiality

What is discussed in mediation is confidential unless disclosure is required by law. This means that in nearly all cases, confidentiality will be maintained. Mediators cannot be called as witnesses in any court proceedings which may take place in the future. The mediator will not mention anything discussed by you during a private session to other parties during the mediation (unless you request the mediator to let

the other parties know), or to anyone else following the mediation.

Options for settlement

The mediator will encourage you to consider a range of options for settlement and to evaluate them for the purpose of reaching a mutually satisfying outcome for all of you. The mediator will not express any opinion about the merits of the options but will encourage you to assess their implications.

The mediator is not a decision-maker

You need to decide what is best for you, as the mediator will not impose or suggest final outcomes for you. The mediator has nothing to gain in any way from the outcome of the mediation, whether agreement is reached or not.

The mediator controls the mediation process but not the content of the discussions or the outcome of the dispute:

The mediator will encourage you:

- a. To take an active part in the mediation and to speak freely and with no interruptions from others present.
- b. To discuss issues which are important to you not issues which the mediator considers to be relevant or significant.
- c. To treat each other with courtesy.

What happens if you are accompanied by your lawyer at mediation

If your lawyer attends the mediation, the mediator will still encourage you to participate actively in the discussions and negotiations. You will, however, be given the opportunity, if you wish, to allow your lawyer to speak and negotiate on your behalf if you feel more comfortable with that arrangement. The mediator will also provide you with opportunities for breaks to allow you to consult with your lawyer in the course of the mediation or on the telephone if your lawyer is not present.

4. What parties can expect of the mediation process

The Law Society encourages mediators on its panel to follow a standard mediation process. However the parties can suggest variations provided the important principles of mediation are adhered to.

The Law Society mediation process normally consists of two sessions – a preliminary conference and a mediation session. Occasionally, the two sessions are merged into one.

4.1 What parties can expect at the Preliminary Conference

What mediation is and the mediator's role

The mediator will explain the features of mediation – its voluntary and confidential nature and the role of the mediator as a neutral third party facilitator, not an adviser or decision-maker. You will be told that as mediation is voluntary, it can be terminated at any stage by either party or the mediator without the need to give reasons.

The process of mediation

The mediator will outline the stages of the mediation process and you will be able to ask questions about it.

Preparing for the mediation session

The mediator will make sure that everyone is ready for the mediation session. An Agreement to Mediate will be signed by all participating in the mediation session.

A timetable will be set for all outstanding matters relevant to the mediation to be finalised prior to the mediation session including documents to be prepared and exchanged, and arrangements for the payment of fees.

The mediator will ensure that all parties to the mediation have authority to negotiate and settle.

4.2 What parties can expect at the Mediation Session

The mediator will ask you to make a brief opening statement outlining your individual concerns and the issues which have brought you to mediation whether you are accompanied by your lawyer or not. If your lawyer is with you, you may, if you wish, ask him or her to make the opening statement on your behalf.

The mediator will ensure that you get equal time to make your statement and that you do so uninterrupted.

The mediator will then summarise parties' opening statements and extract issues for discussion which emerge from the opening statements

You will be able to correct any errors you believe the mediator may have made when summarising back your opening statement. You will also be asked to check and agree on the list of issues for discussion.

The mediator will then facilitate direct communication between you and discussion of the issues.

You will be encouraged to communicate directly with the other party, asking each other questions to explore and clarify the issues extracted from your opening statements. The mediator will also facilitate your discussions so that you have the opportunity of becoming aware of each other's point of view.

The mediator may hold private and confidential sessions with each of you

During any private and confidential session you may have with the mediator you can raise any matter you consider relevant to the mediation.

The mediator will facilitate negotiations, settlement and agreement formulation. You will be able to discuss options and negotiate freely with the other party in order to reach a mutually satisfying resolution of your dispute. You will be given the opportunity to contribute actively to the substance and wording of the final agreement which is usually in writing.

You will also be given opportunities to give instructions to your lawyer, if present, on your wishes in relation to the agreement. If your lawyer is not present, you will be able to contact him or her to seek advice.

5. What the mediator can expect of the parties

Attendance at the mediation in good faith with the intention of seeking settlement

The mediator expects that parties are attending mediation in good faith with the

intention of seeking settlement not in order to prepare themselves for a court case.

Attendance at both the preliminary and mediation sessions

The mediator will expect you to attend the Preliminary Conference as well as the Mediation Session to ensure that the same information is imparted to you all at the same time.

Preparing for the mediation session

It is very helpful to the mediator if you maintain realistic goals when entering negotiations. You can prepare yourself for the negotiations by doing calculations and background work beforehand and bringing relevant documents to the mediation session.

The mediator will expect you to have authority to negotiate and to settle.

Setting the scene for a constructive mediation session

You can make it easier for everyone if you observe the normal rules of courtesy and listen to each other in a fair and open-minded way. Even if you do not agree with what is being said, it will be helpful to you to appreciate each other's point of view.

Maintaining a positive attitude and being prepared to give and take

It would be very helpful if you adopt a positive, practical and forward looking approach when negotiating about the future.

A spirit of compromise is usually required to achieve agreement. An agreement which is satisfying to you all is only possible if you agree to give and take rather than insist on one particular set of demands.

6. The Policy Regarding Observers

In principle, the presence of observers is not desirable. If you require the attendance of observers, their attendance should occur only with the consent of the parties and the mediator(s).

7. The Opportunity for Feedback

As participants in a mediation conducted as part of the Law Society Mediation Program you will have the opportunity, if you wish, to comment on your mediation experience by responding to a short questionnaire or by forwarding your comments in writing to the Dispute Resolution Committee of the Law Society of NSW.

Your positive, constructive and informed feedback will help us to maintain the standard of

mediation service provided by the Law Society Program at the highest possible level.

For a copy of the questionnaire or more information on any aspect of the Charter please contact Bridget Sordo, Manager, Dispute Resolution and Community Assistance Department, at the Law Society of NSW, 170 Phillip St, Sydney, 2000 or phone 9926 0284, fax 9233 7146, email bts@lawsocnsw.asn.au.

LAW SOCIETY OF NEW SOUTH WALES

This Agreement is provided by the Law Society as a guide only. It is the responsibility of the participants to the mediation to ensure that the agreement meets the needs of the dispute

THE AGREEMENT TO MEDIATE

(Including a Confidentiality Agreement to be signed by third parties)

During the preliminary conference the participants are asked to sign the Agreement to Mediate. The Agreement (reproduced in full below) sets out the procedure followed during the preliminary conference and mediation. The Agreement details the role of the mediator; the parties' commitment to co-operate with the mediator, the agreement to maintain confidentiality with respect to information disclosed during the mediation and agreement that certain matters will be privileged, including any settlement proposal. Participants to the mediation may agree to modify the Agreement to suit their particular circumstances.

The Agreement to Mediate

THIS AGREEMENT IS MADE ON(day)(month)(year)

BETWEEN THE FOLLOWING PARTIES (In this Agreement called "the parties")

Name of party (please print):

Address:

Name of party (please print):

Address:

Name of party (please print):

Address:

Name of party (please print):

Address:

Name of party (please print):

Address:

AND THE MEDIATOR/S (called "the mediator/s")

Name of mediator (please print):

Address:

Name of mediator (please print):

Address:

Appointment of Mediator

1. The parties appoint the mediator to mediate in accordance with the terms of this agreement the dispute between them. The dispute is briefly described in Schedule 1 to this Agreement (the “Dispute”). The mediator accepts the appointment to mediate the Dispute at a time and place agreed to by the parties and set out in Schedule 2 to this Agreement.

Role of the Mediator

2. The mediator will be neutral and impartial. The mediator will assist the parties to attempt to resolve the dispute by helping them to:
 - systematically isolate the issues in dispute;
 - develop options for the resolution of these issues;
 - explore the usefulness of these options; and
 - meet their interests and needs.
3. The mediator may meet with the parties together or separately.
4. The mediator will not:
 - give legal or other professional advice to any party; or
 - impose a result on any party; or
 - make decisions for any party.
5. The mediator will not accept an appointment or act for any party in relation to any proceedings concerning the Dispute.
6. Neither party will take action to cause the mediator to breach Clause 5.

Conflicts of Interest

7. The mediator must, prior to the commencement of the mediation, disclose to the parties to the best of the mediator’s knowledge any prior dealings with any of the parties as well as any interest in the Dispute.
8. If in the course of the mediation the mediator becomes aware of any circumstances that might reasonably be considered to affect the mediator’s capacity to act impartially, the mediator must immediately inform the parties of these circumstances. The parties will then decide whether the mediation will continue with that mediator or with a new mediator appointed by the parties.

Co-Operation by the Parties

9. The parties must co-operate with the mediator and each other during the mediation.

Conduct of the Preliminary Conference

10. As part of the mediation the mediator will schedule a preliminary conference at a time and venue convenient to the parties to establish a timetable for the mediation.
11. The mediator, the parties and their representatives who are to attend the mediation session must attend the preliminary conference.

Authority to Settle and Representation at the Mediation Session

12. If a party is a natural person, the party is expected to attend the preliminary conference and the mediation conference in person with authority to settle within any range that can reasonably be anticipated. If a party is not a natural person it must be represented at the preliminary conference and the mediation conference by a person with full authority to make agreements binding on it settling the Dispute.
13. At the mediation each party may have one or more other persons, including legally qualified persons, to assist and advise them.

Communication Between the Mediator and the Parties

14. Any information disclosed to a mediator in private is to be treated as confidential by the mediator unless the party making the disclosure states otherwise.

Confidentiality of the Mediation

15. The participants will not disclose to anyone not involved in the mediation any information or document given to them during the mediation unless that person has signed the prescribed confidentiality agreement in the form attached to this agreement.
16. The participants agree that subject to Clauses 20 and 21, the following will be privileged and will not be disclosed in, or be the subject of a subpoena to give evidence or to produce documents, in any proceedings in respect of the Dispute:
 - 16.1 Any settlement proposal whether made by a party or the mediator.
 - 16.2 The willingness of a party to consider any such proposal.
 - 16.3 Any statement made by a party or the mediator during the mediation.
 - 16.4 Any information prepared for the mediation.

Documentation

17. The Mediator will return/destroy (delete as applicable) all documentation other than the mediation agreement and any terms of settlement.

Suspension or Termination of the Mediation

- 18.1. A party may terminate the mediation at any time after consultation with the mediator.
- 18.2. The mediator has a discretion to terminate or suspend the process at anytime.
- 18.3. The mediator may terminate the mediator's involvement in the mediation if, after consultation with the parties, the mediator feels unable to assist the parties to achieve resolution of the Dispute.

Settlement of the Dispute

19. If agreement is reached at the mediation, the terms of the agreement must be written down and signed by the parties before they leave the mediation.

Enforcement of the Settlement Agreement

- 20. Any party may enforce the terms of the settlement agreement by judicial proceedings.
- 21.1 For the purposes of Clause 20, any party may call evidence of the settlement agreement including evidence from the mediator and any other person engaged in the mediation.
- 21.2 All costs associated with this mediation to be paid for by (insert names)
or as otherwise ordered by the Court.

Exclusion of Liability and Indemnity

- 22. The mediator will not be liable to a party for any act or omission in the performance of the mediator's obligations under this agreement unless the act or omission is fraudulent.
- 23. The parties together and separately indemnify the mediator against any claim for any act or omission in the performance of the mediator's obligations under this agreement unless the act or omission is fraudulent.

The Cost of the Mediation

- 24. The parties together and separately will be liable to the mediator for the mediator's fees described in Schedule 3. The parties will share equally all the other costs of the mediation described in Schedule 3.
- 25. If the mediation does not result in an agreement to resolve the dispute, the costs of the mediation will be costs in the cause, i.e. costs of the mediation (including those of the legal representatives to attend the mediation) will be treated as part of the overall costs in subsequent court proceedings which are generally payable by the losing party.

Schedule 1: Description of the Dispute

The Dispute is the subject of proceedings:

No: of in the Court ; and/or

(Insert brief description of the Dispute)

.....

.....

Schedule 2: Date and Venue of Mediation Conference

The mediation of the Dispute will be held on:

..... (day) (month) (year)

at

.....

(Venue of mediation)

Confidentiality Agreement

Name of participant present at the mediation.

.....
(Please print)

I UNDERTAKE to the parties to the mediation that, in exchange for being permitted by them to participate at the mediation:

- 1. I will not disclose to anyone any information received by me during the mediation, unless required by law to make such a disclosure.
- 2. I will not disclose to anyone involved in the mediation any information received by me during the mediation from a party to the mediation unless expressly authorised by the disclosing party to do so.
- 3. To the extent that I am required to disclose any information either by law or otherwise I will immediately notify the other participants of this requirement.

.....
(Signature of participant) (Date)

.....
(Address)

2. Modifications to the Law Society Agreement to Mediate for Local Government Mediations

The replacement of existing paragraphs 11, 12, 15, 19-25 with the following paragraphs is recommended for local government mediations:

Conduct of the Preliminary Conference

11. The mediator, the applicant and the objectors or their representatives and any persons assisting/advising parties who are to attend the mediation session should attend the preliminary conference.

Authority to Settle

12. The parties must attend the mediation with authority to reach agreement or an agreed process to enable confirmation of agreement by a representative of a party.

Confidentiality of the Mediation

15. The parties and the mediator will not without the agreement of all the parties to the mediation disclose to anyone not involved in the mediation any information or document given to them during the mediation unless required by law to make such a disclosure. No communication shall be made to or discussion entered into with the media, without such agreement.

Acknowledgment and Declaration by the Parties

19. The parties jointly acknowledge and declare that should the consenting authority(ies) have the power to make a decision in relation to any application the subject of the dispute, its participation in the mediation does not in any way compromise its position as a consent authority or otherwise fetter its statutory authority in relation to the consideration and determination of the application.

Settlement of the Dispute

20. If agreement is reached at the mediation, the terms of the agreement must be written down and signed by the parties.

Statement of Result of Mediation

21. The parties may agree to issue a joint statement as to the outcome of the mediation or a mediation session. The contents of any such statement is to be agreed by all parties written down and signed by all parties before they leave the mediation or the session.

Enforcement of the Settlement Agreement

22. Any party may enforce the terms of the settlement agreement by judicial proceedings.
23. For the purposes of clause 22 any party may call evidence of the settlement agreement including evidence from the mediator and any other person engaged in the mediation.

Exclusion of Liability and Indemnity

24. The mediator will not be liable to a party for any act or omission in the performance of the mediator's obligations under this agreement unless the act or omission is fraudulent.
25. The parties together and separately indemnify the mediator against any claim for any act or omission in the performance of the mediator's obligations under this agreement unless the act or omission is fraudulent.
26. Unless the parties to the mediation agree otherwise the cost of the mediation will be borne by the parties in equal shares.

3. The Model Clause making ADR Mandatory and Mediation Rules

The Council of the Law Society adopted a dispute resolution model clause and Mediation Rules on 26 August 1993. The model clause was revised¹¹ in order to enhance enforceability in the light of the judgment of his Honour Justice Giles in *Hooper Bailie Association Limited v Natcon Group Pty Ltd and Anors* (1992) 28 NSWLR 194 and in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

In *Hooper*, Mr Justice Giles held that if an agreement to mediate is to be enforceable, it must provide sufficient certainty as to the conduct required of the parties who participate in the mediation. Accordingly, dispute resolution clauses must be drafted so that, in the event of a dispute, the conduct that is required of the parties can be determined with certainty.¹²

The Law Society's model clause now specifies the procedure to be followed in the event of a dispute.¹³ Where the parties¹⁴ cannot agree on the procedure to be followed, the parties are required to mediate the dispute in accordance with the Mediation Rules.

The Model Clause

Dispute

1. If any dispute arises out of this contract ("the Dispute") a party to the contract must not commence any court or arbitration proceedings unless the parties to the Dispute have complied with the following paragraphs of this clause except where a party seeks urgent interlocutory relief.

Notice of Dispute

2. A party to this contract claiming that a Dispute has arisen out of or in relation to this contract must give written notice ("the Notice") to the other party to this contract specifying the nature of the Dispute.

Dispute Resolution

3. If the parties do not agree within seven (7) days of receipt of the Notice (or such further period as agreed in writing by them) as to:
 - (i) the dispute resolution technique (eg expert determination) and procedures to be adopted;
 - (ii) the timetable for all steps in those procedures; and
 - (iii) the selection and compensation of the independent person required for such technique,

the parties must mediate the Dispute in accordance with the Mediation Rules of the Law Society of New South Wales, and, the President of the Law Society of New South Wales or the President's nominee will select the mediator and determine the mediator's remuneration.

Mediation Rules

Functions of the Mediator

1. The mediator will assist the parties to explore options for and, if possible, to achieve the expeditious resolution of their dispute (“the Dispute”) by agreement between them.
2. The mediator will not make decisions for a party or impose a solution on the parties.
3. The mediator will not, unless the parties agree in writing to the contrary, obtain from any independent person advice or an opinion as to any aspect of the Dispute and then only from such person or persons and upon such terms as are agreed by the parties.

Conflicts of Interest

4. The mediator must disclose to the parties to the best of the mediator’s knowledge any prior dealings the mediator has had with either of them and any interest the mediator has in the Dispute.
5. If in the course of the mediation the mediator becomes aware of any circumstances that might reasonably be considered to affect the mediator’s capacity to act impartially the mediator will immediately inform the parties of those circumstances. The parties will then confer and if agreed continue with the mediation before the mediator.

Co-operation in the Mediation

6. The parties must co-operate with the mediator and each other during the mediation to achieve a mutually satisfying outcome to their dispute.
7. Each party must use its best endeavours to comply with reasonable requests made by the mediator to promote the efficient and expeditious resolution of the Dispute.

Authority and Representation

8. If a party is a natural person, the party must attend the mediation conference. If a party is not a natural person it must be represented at the mediation conference by a person with full authority to make agreements binding on it settling the Dispute.
9. Each party may also appoint one or more other persons including legally qualified persons to assist and advise the party in the mediation and to perform such roles in the mediation as the party requires.

Conduct of the Mediation

10. Subject to Rule 21, the mediation, including all preliminary steps, will be conducted in such manner as the mediator considers appropriate having due regard to the nature and circumstances of the Dispute, the agreed goal of an efficient and expeditious resolution of the Dispute and the view of each party as to the conduct of the mediation.
11. The mediation conference shall be held within fourteen (14) days of the selection of the mediator or within such other period as the parties may agree.
12. Without limiting the mediator’s powers under Rule 10 the mediator may give directions as to:
 - 12.1 Preliminary conferences prior to the mediation conference.
 - 12.2 The exchange of experts’ reports, the meeting of experts and the subsequent preparation of a joint experts’ report with a view to identifying areas of agreement, narrowing the area of disagreement and clarifying briefly the

reasons for disagreement.

12.3 The exchange of brief written outlines of the issues involved.

12.4 Service on the mediator prior to the mediation conference of any such reports and outlines.

Communication between the Mediator and a Party

13. The mediator may meet as frequently as the mediator deems appropriate with the parties together or with a party alone and in the latter case the mediator need not disclose the meeting to the other party.

14. The mediator may communicate with any party orally and/or in writing.

15. Subject to Rule 16, any document relied upon by a party and provided to the mediator must immediately be served by the party on the other party.

16. Information, whether oral or written, disclosed to the mediator by a party in the absence of the other party may not be disclosed by the mediator to the other party unless the disclosing party permits the mediator to do so.

Confidential Information

17. A party may prove objective facts, whether or not confidential, by direct evidence in any proceedings in respect of the Dispute. Subject to that, all confidential information disclosed during the mediation, including the preliminary steps:

17.1 may not be disclosed except to a party or a representative of that party participating in the mediation or if compelled by law to do so; and

17.2 may not be used for a purpose other than the mediation.

Privilege

18. Subject to Rule 25, the following will be privileged and will not be disclosed in or relied upon or be the subject of a subpoena to give evidence or to produce documents in any arbitral or judicial proceedings in respect of the Dispute:

18.1 Any settlement proposal, whether made by a party or the mediator.

18.2 The willingness of a party to consider any such proposal.

18.3 Any admission or concession or other statement or document made by a party.

18.4 Any statement or document made by the mediator.

Subsequent Proceedings

19. The mediator will not accept appointment as an arbitrator in or act as an advocate in or provide advice to a party to any arbitral or judicial proceeding relating to the Dispute.

20. Neither party will take action to cause the mediator to breach Rule 19.

Termination

21. A party may terminate the mediation immediately by giving written notice to each other party and to the mediator at any time during or after the mediation conference.

22. The mediator may immediately terminate the engagement as mediator by giving written notice to the parties of that termination, if, after consultation with the parties, the mediator forms the view that the mediator will be unable to assist the parties to achieve resolution of the Dispute. The mediation will not be terminated in that event unless a party gives notice to that effect to each other party. The parties must appoint another mediator, where the mediation is not terminated.

23. The mediation will be terminated automatically upon execution of a settlement agreement in respect of the Dispute.

Settlement

24. If settlement is reached at the mediation conference, the terms of the settlement must be written down and signed by the parties and the mediator before any of the participants leave the mediation conference.

Enforcement

25. In the event that part or all of the Dispute is settled either party will be at liberty:

25.1 To enforce the terms of the settlement by judicial proceedings.

25.2 In such proceedings to adduce evidence of and incidental to the settlement agreement including from the mediator and any other person engaged in the mediation.

Exclusion of Liability and Indemnity

26. The mediator will not be liable to a party except in the case of fraud by the mediator for any act or omission by the mediator in the performance or purported performance of the mediator's obligations in the mediation.

27. The parties shall jointly and severally indemnify the mediator against all claims, except in the case of fraud by the mediator, arising out of or in any way referable to any act or omission by the mediator in the performance or purported performance of the mediator's obligations in the mediation.

Costs

28. The parties will share equally and will be jointly and severally liable to the mediator for the mediator's fees for the mediation. The mediator may, at any time and from time to time, require each party to deposit with the mediator such sum as the mediator considers appropriate to meet the mediator's anticipated fees and disbursements. The mediator may decline to embark upon or continue the mediation until all such deposits are made.

29. If the mediation does not result in an agreement to resolve the Dispute, the costs of the mediation will be costs in the cause.

IV. The Law Society Evaluation Precedents

1. Courts Legislation (Mediation and Evaluation) Amendment Act 1994

The Courts Legislation (Mediation and Evaluation) Amendment Act ('the Act') commenced on 14 November 1994. The aim of the legislation is to encourage the referral of matters for mediation or neutral evaluation in certain court proceedings on a voluntary basis. The Act amends six Acts governing the administration of New South Wales courts of civil jurisdiction; these are as follows:

- Compensation Court Act 1984
- District Court Act 1973
- Industrial Relations Act 1991
- Land and Environment Court Act 1979
- Local Courts (Civil Claims) Act 1970
- Supreme Court Act 1970

The Courts Legislation Amendment Act 1995 No. 21 amended the Dust Diseases Tribunal Rules with similar provisions.

The Act is enabling legislation only, providing a broad framework for court-annexed mediation and evaluation. The application of the legislation in each jurisdiction will largely be a matter for the heads of each jurisdiction to implement. Parties agreeing to mediation or evaluation are to bear the costs of the procedure.

The Act covers the following areas:

- (i) Definitions of mediation and neutral evaluation;
- (ii) Attendance in mediation sessions and neutral evaluation sessions;
- (iii) Court can make orders to give effect to any agreement;
- (iv) Mediation sessions and neutral evaluation sessions are privileged;
- (v) Exoneration from liability for listed mediators and evaluators acting in good faith for the purposes of the mediation.

Supreme Court Rules (Amendment No.288) 1994

The Supreme Court Rules 1970 (amended by the Rules Committee on 17 October 1994) provide for an additional Part 72C regarding mediation and neutral evaluation. One essential feature is that on the first Directions appearance the parties/their legal representatives must indicate whether they consent to mediation or neutral evaluation, whether the parties agree as to the neutral appointee and whether the costs arrangements have been made.

2. The Law Society Early Neutral Evaluation Model

Following the enactment of the legislation, the Dispute Resolution Committee developed an Early Neutral Evaluation (ENE) Model. ENE is a process whereby parties obtain a non-binding, reasoned evaluation of their case on its merits from an experienced neutral third party acting as an evaluator. The Law Society model requires that the parties exchange essential information and position statements early in the pre-trial period, after which the ENE session takes place which typically lasts three hours. The evaluator may ask questions and help the parties identify the main issues in dispute as well as areas of agreement. He or she offers an opinion as to the likely incidence of liability and where appropriate, a range of damages. The evaluator has no power to impose a settlement or to determine the pre-trial management of the case. The process, whether or not it results in settlement, is confidential.

With the benefit of that assessment, the parties are encouraged to discuss settlement with or without the evaluator's assistance. They may also explore ways of narrowing the issues, exchanging information about the case, or otherwise preparing efficiently for trial. The Law Society maintains a list of solicitor evaluators all of whom are appointed to the Supreme Court Evaluators' Panel (under the Act); all senior practitioners who are highly regarded in their area of legal practice.

The ENE Model

(NOTE: Court Rules and Practice Notes may apply)

1. Preliminary Conference

A preliminary conference takes place (not exceeding 1 hour) which involves the following steps:

- (a) The parties sign a standard form of agreement.
- (b) Evaluator sets a time, date and place for the evaluation process, in neutral territory eg, evaluator's office, a Court (meeting) room.
- (c) Evaluator establishes that parties have authority to settle.
- (d) Evaluator establishes that parties must be accompanied by legal representatives.
- (e) 7 calendar days before the evaluation session, each party is required to forward to the evaluator and all other parties a written evaluation statement not exceeding 10 pages (double spaced) outlining:
 - (i) anything which may assist in reducing the issues in dispute or resolving of the dispute including liability and damages claimed; and
 - (ii) any discovery or other procedural process which will assist in expediting case preparation and in equipping the parties to assess the strengths and weaknesses of their positions.
- (f) Evaluator draws attention to the limitations of the evaluation process and to the existence of other ADR processes which the parties may consider resorting to at some stage.
- (g) Evaluator obtains the signed ENE Agreement.
- (h) Evaluator advises the Parties that the Evaluator will have no further involvement in the dispute once the Evaluation Report has been delivered.

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2. The Evaluation Process

2.1 Evaluator's Opening Statement:

- (a) Sets out goals and procedure of the session.
- (b) Suggests constructive and co-operative problem solving approach by the parties.
- (c) Outlines the role of evaluator.
- (d) Sets ground rules (including no interruption during parties' statements).
- (e) Reminds parties that all oral communications are privileged and that the process and the evaluation are confidential.
- (f) Reminds the parties that there are no rules of evidence, no testimony or cross examination.
- (g) Reminds the parties that opportunities for a negotiation session will be provided before the evaluator gives the evaluation.

2.2 Parties' Statements:

- (a) Parties in turn outline their views on areas in dispute on the facts and give a summary of evidence for 15-30 minutes.
- (b) Each party may use documents during the statement if appropriate, to explain or support contentions.
- (c) The evaluator may interrupt to ask clarifying questions.

2.3 Evaluator's Summary of Party Statements and Outline of the Working Session Procedure

- (a) Evaluator identifies actual or potential areas of substantial agreement.
- (b) Evaluator identifies key facts that have not been established in the following categories:
 - (i) unknown to the parties; and
 - (ii) disputed.
- (c) Evaluator enters into the working session with the parties exploring the areas of dispute (including joint fact finding).
- (d) Evaluator asks questions of the parties as to the strengths and weaknesses of the evidence of each party.
- (e) At the conclusion of that working session the evaluator reminds the parties of the function of early neutral evaluation and reminds the parties of the availability of a plan which is entered into if the evaluation process does not reach settlement, in order to ascertain and exchange further relevant information (refer 2.4(d)).

2.4 Opportunity for a Settlement Conference

- (a) If sufficient information is available the evaluator leaves the session room and drafts an evaluation summarising the strengths and weaknesses of each party's case, the legal opinion and the potential litigation outcome.
- (b) When the evaluator returns to the session room, the parties are invited to enter settlement negotiations before the evaluation is given. The evaluator asks the parties if they wish to explore possibilities for settlement. Providing all the parties request it, the evaluator may then chair a discussion of settlement prospects with all parties and legal representatives present:¹⁶
 The evaluator when acting as chair, will not disclose any part of the evaluation and will not act as a mediator or a conciliator or undertake a mediation process (e.g. option generation)

If settlement is reached the evaluator encourages the parties to commit it to writing.

(c) If the parties do not wish to enter settlement negotiations, the evaluator provides the evaluation on the information available at that time, predicts the probability of success by each party (including the legal position, liability and quantum range), reduction through contributory negligence, if any, (eg. 60-80% chance of liability and damages between \$75,000-\$100,000), the prospect of other remedy and the likely cost of completing discovery and hearing. These views may be expressed conditionally (eg. if X is accepted then A but if Y is accepted then B).

The evaluation is given in the presence of all parties and legal representatives.

The evaluation is usually given orally on the day of evaluation or if that is not possible, on another day by telephone to each party.

The evaluation is given in writing at a later date if necessary.

(d) If settlement is not reached, the evaluator may, in appropriate cases by mutual consent, record for each party a plan to ascertain and exchange further relevant information which may include:

(i) formal or informal discovery;

(ii) the sharing of additional evidence on the most significant aspects of the case;

(iii) additional evidence from key witnesses;

(iv) expeditious discovery of crucial documents.

(v) information about other dispute resolution processes and facilities.

(e) The evaluator should advise the Parties that the evaluator will have no further involvement in the dispute once the Evaluation Report has been delivered.¹⁷

3. Report to the Court

The evaluator reports to the court the fact that the evaluation has taken place but not the details of the evaluation.

4. Re-evaluation or Other Available Processes

At the conclusion of the initial evaluation, if agreed by the parties, a re-evaluation session or any other process including mediation (not by evaluator) is possible. Any other process including mediation would not be undertaken by the evaluator.

Alternatively, the further session might be limited to a party responding, by a date stipulated:

(a) to a request for certain information about the merits of the case or discovery of documents; or

(b) to an offer or demand that was made at the initial ENE session.

3. Evaluation Agreement

The Evaluation Agreement

Developed by the Law Society’s Dispute Resolution Committee, the Evaluation Agreement sets out the procedure to be followed during the preliminary conference and the evaluation session. The Agreement details the role of the evaluator; the parties’ commitment to co-operate with the evaluator, the agreement to maintain confidentiality with respect to information disclosed during the evaluation session and agreement that certain matters will be privileged.

THIS AGREEMENT IS MADE ON THE . . . (day). . . (month) . . . (year)
BETWEEN THE FOLLOWING PARTIES (together called “the parties”)

Name of Party: (please print):

Address:

Name of Party: (please print):

Address:

Name of Party: (please print):

Address:

Name of Party: (please print):

Address:

Name of Party: (please print):

Address:

Name of Party: (please print):

Address:

AND THE EVALUATOR

Name of Evaluator (please print):

Address:

.
.

(Signature)

Appointment of Evaluator

1. The parties appoint the evaluator and the evaluator accepts the appointment to evaluate the dispute briefly described in Schedule 1 to this agreement (the “Dispute”) in accordance with the terms of this agreement. The evaluator accepts that appointment as an expert and not as an arbitrator.

Role of the Evaluator

2. The evaluator will express his/her views of the likely outcome of the Dispute if resolved by a court based on the material (oral or written) put forward in the course of the evaluation session.
3. The evaluator may only meet with or conduct a conversation with a party in the presence of the other parties.
4. Before giving the evaluation the evaluator may chair settlement negotiations between the parties if requested to do so by the parties and the party statements and

- working sessions are concluded.
5. The evaluator will **not**:
 - Impose a result on any party; or
 - Make decisions for any party; or
 - Obtain from any independent person any advice or opinion as to any aspect of the Dispute.Accept any subsequent appointment in any proceedings relating to the Dispute.
 6. Neither party will take action to cause the evaluator to breach Clause 5.

Conflicts of Interest

7. The evaluator must immediately on appointment inform the parties of any circumstance which might reasonably be considered to affect the evaluator's capacity to act impartially. The parties will then decide whether the evaluation will continue with the evaluator or with a new evaluator appointed by the parties.

Co-operation by the Parties

8. The parties must co-operate with the evaluator and each other during the evaluation and will endeavour to comply with reasonable requests by the evaluator or other parties to promote the efficient and expeditious completion of the evaluation.
9. A party must provide to the other party/ies a copy of any document provided by it to the evaluator.

Conduct of the Preliminary Conference

10. The evaluator will schedule a preliminary conference at a time and venue convenient to the parties and the evaluator will establish a timetable for the evaluation and the procedures to apply for the evaluation.
11. The evaluator, the parties and their representatives who are to attend the evaluation session must attend the preliminary conference.

Representation at the Evaluation Session and Authority to Provide Information for the Purpose of the Evaluation

12. The parties must attend the evaluation unless otherwise agreed with the evaluator. Parties who attend must have authority to provide the information required by the evaluator for the purposes of the evaluation.
13. At the evaluation each party may have one or more other persons, including legally qualified persons, to assist and advise them and to perform such a role or roles as the parties and the evaluator require for the purposes of the evaluation.

Conduct of the Evaluation

14. The parties or their representatives will in turn outline their respective cases on liability and damages and any other remedies sought and produce any related evidence by which they intend to prove their case.
15. The evaluator will then leave the parties to prepare the evaluation providing his/her view on:
 - (a) the likelihood of any claim made by a party to the evaluation succeeding if the claim is determined in court.
 - (b) the likely range of damages recoverable.
16. The evaluator will then join the parties. If the parties indicate to the evaluator that they wish to proceed to settlement negotiations, the evaluator may offer his/her services as a chairperson.
17. If parties do not proceed with settlement negotiations, the evaluator will provide them with the evaluation. The evaluation will include reasons for the evaluator's

- conclusions. The evaluation may be confirmed or expanded upon later in writing.
18. The evaluator may also:
- (a) formulate a discovery plan and record it for each party
 - (b) provide information about other dispute resolution options.
19. The parties may then decide on subsequent action which may include adopting one of these other dispute resolution options.

Termination of the Evaluation

20. A party may terminate the evaluation at any time after consultation with the evaluator.
21. The evaluator may terminate any involvement in the evaluation if, after consultation with the parties, the evaluator feels unable to assist the parties in providing an evaluation of the Dispute.

Confidentiality of the Evaluation

22. The parties and the evaluator will not disclose to anyone not involved in the evaluation any information given to them during the evaluation unless the parties agree otherwise or unless required by law to make such a disclosure.
23. The parties and the evaluator agree not to use any information produced for the evaluation for a purpose other than the evaluation.

Privilege

24. The parties and the evaluator agree that the following will be privileged and will not be disclosed in or relied upon in relation to any proceedings in respect of the Dispute:
- (a) Any statement made by a party or the evaluator for the purpose of the evaluation
 - (b) Any information provided by a party or the evaluator for the purpose of the evaluation
 - (c) Any settlement proposal made by a party or the evaluator
 - (d) The willingness of a party to consider any such proposal.

Settlement of the Dispute in the course of the Evaluation

25. If the parties settle their dispute in the course of the evaluation, the terms of settlement must be written down and signed by the parties before they leave the evaluation.

Exclusion of Liability and Indemnity

26. The evaluator will not be liable to a party for any act or omission in the performance of the evaluator's obligations under this agreement unless the act or omission is fraudulent.
27. The parties together and separately indemnify the evaluator against any claim for any act or omission in the performance of the evaluator's obligations under this agreement unless the act or omission is fraudulent.

The Cost of the Evaluation

28. The parties together and separately will be liable to the evaluator for the evaluator's fees described in Schedule 2. The parties will share equally all the other costs of the evaluation described in Schedule 2.

Schedule 1: Description of the Dispute

The Dispute is the subject of proceedings:

No: of in the Court

(Insert brief description of the Dispute)

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Schedule 2: Costs of the Evaluation

1. Evaluator’s Fees and Expenses: For the preliminary conference, all preparation time and a 3 hour evaluation session:	\$550 per party (including GST).
Additional time: (time beyond the first 3 hours of the evaluation session)	Up to \$275 per hour (including GST) to be shared equally between the parties.
2. The Law Society’s Administration Fee:	\$110 per party (including GST).
3. Room Hire:	At cost.

Confidentiality Agreement

Name of independent person present at the evaluation.

.....

(Name of independent person. Please print)

I UNDERTAKE to the parties to the evaluation that, in exchange for being permitted by them to be present at the evaluation:

1. I will not disclose to anyone any information received by me during the evaluation, unless required by law to make such a disclosure.
2. I will not disclose to anyone involved in the evaluation any information received by me during the evaluation from a party to the evaluation unless expressly authorised by the disclosing party to do so.

.....

(Signature of independent person) (Date)

.....

(Address)

Signing of the Evaluation Agreement

The parties and the evaluator have signed this Agreement as follows:

Date:(day) (month)(year)

.....

(Name of party or representative. Please print) (Signature)

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(Name of party or representative. Please print) (Signature)

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(Name of party or representative. Please print) (Signature)

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(Name of party or representative. Please print) (Signature)

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(Name of evaluator. Please print) (Signature)

V. The Law Society Mediation and Evaluation Initiatives

1. Mediation Services Offered by the Law Society

The Law Society has successfully provided mediation services to the profession since 1991. During this period over 1,000 matters have been mediated with a settlement rate in excess of 70%.

The Law Society Mediation Program

The program provides a forum in which the parties may discuss settlement with the aid of a Law Society mediator or mediators with a view to achieving resolution of their dispute earlier than might otherwise have been the case. Mediations are held at any time suitable to the parties and the mediator.

The mediator is a solicitor who is a member of the Society's mediators' panel. Panel members are legally qualified solicitors. All are experienced mediators who have undergone specific and advanced mediation skills training including co-mediation training. Some panel members have been mediating disputes for over 12 years and during that time have conducted several hundred mediations.

Parties are required to pay \$660 (GST inclusive) each to the Law Society for the cost of providing a mediator for a preliminary conference and a mediation session of up to three hours. In the case of co-mediators the fee is divided between them (except in cases where a pro-bono co-mediator is appointed). Although room hire is not included in this fee, Law Society rooms may be made available from time to time. The mediation fee is refundable if a party withdraws prior to the preliminary conference. If the withdrawal occurs after the preliminary conference and before the mediation session, half the mediation fee is refundable. The mediation fee includes in all cases a \$110 (GST inclusive) administrative fee from each party which is retained by the Law Society.

Upon receipt of the mediation fee, a mediator (or two mediators in the case of co-mediation) is appointed by the Law Society and will contact the referring solicitors to arrange a date, time and place for the preliminary conference. The parties and their legal representatives are required to attend. Parties are required to be present in person. If a party is not an actual person it should be represented by a properly authorised person with a written authority to settle the matter.

If you would like to use the Mediation Program, follow [this link](#) to an electronic form which you can use to submit your application online.

Law Society's Pro Bono Mediation Register

Run under the auspices of the Law Society's Pro Bono Publico Scheme, the register comprises a large number of legal practitioners of varying degrees of legal and mediation experience prepared to co-mediate matters in the pro bono scheme. The register was compiled in response to requests made by the users of the scheme, and is designed to match the skills and abilities of volunteer firms and sole practitioners with

community needs. The register includes amongst others, mediators from Gosford, Newcastle, Richmond, Penrith, Canberra, Goulburn, Merimbula, Nowra, Toronto, Maitland, Byron Bay, Lismore and Murwillumbah.

To date approximately 80% of matters referred to the pro bono scheme have been litigious. Referral is made to a practitioner on the pro bono register after the matter is assessed as satisfying the following criteria:

- (i) the dispute is one of a non commercial nature;
- (ii) the client meets the criteria of financial need; and
- (iii) the merits of the matter indicate reasonable prospects of success.

In matters where mediation may be considered suitable by the disputants, the practitioner on the pro bono register with carriage of the matter makes a request of the Law Society's Pro Bono Officer, (tel: 9926 0364), for the appointment of co-mediators who are prepared to mediate the dispute on a pro bono basis.

2. Specialist Accreditation in Mediation

Law Society Specialist Accreditation Scheme

Specialist accreditation for mediators is seen as a first step by the Law Society's Specialist Accreditation Board in recognising ADR specialist accreditation. To conform with threshold criteria components in other recognised specialisations under the Specialist Accreditation Scheme, it is considered essential that an ADR specialist should have a reasonably long-standing and substantial involvement in the field.

Accordingly, applicants must:

1. have been qualified to practise as a legal practitioner for at least 5 years;
2. have successfully completed a skills based training course in mediation extending over a minimum of 4 days, with an evaluation component or equivalent;
3. have conducted mediations as a mediator for a minimum of 3 years;
4. have undertaken a minimum of 24 mediations as a mediator (each of which has taken not less than 3 hours) within the three year period immediately preceding the application. These mediations should be in the form prescribed in the Law Society generic model; and
5. have undertaken a minimum of 12 hours workshop participation and/or trainer/coach involvement over the preceding 12 months.

Details on the current status of the specialist accreditation of mediators may be obtained by contacting the Committee's Legal Officer in the Law Society Specialist Accreditation Department on 9926 0266.

Other Accreditation Schemes

There is no universal mediator accreditation in existence at this stage. Each ADR agency requires its own panel members to have satisfied certain pre-requisites before appointment (and in some agencies re-appointment) to the agency's mediators' panel. Most agencies offer a mediation referral service and some offer other ADR processes. A selection of these agencies with contact details is provided as part of this Kit.

3. The Law Society Early Neutral Evaluation (ENE) Program

The purpose of this program is to give parties a forum in which they can obtain a reasoned, non-binding evaluation of their case on its merits from a third party neutral, acting as an evaluator, who is experienced in the area of dispute.

The evaluator will be a senior solicitor who is currently appointed to the Supreme Court Evaluators' Panel. The fee is \$660 (GST inclusive) per party, which covers a preliminary conference of up to one hour and a three-hour evaluation session.

The Law Society ENE model requires that the parties exchange essential information and position statements early in the pre-trial period, after which the ENE session takes place, which typically lasts three hours. The evaluator may ask questions and help the parties identify the main issues in dispute as well as areas of agreement. He or she offers an opinion as to the likely incidence of liability and where appropriate, a range of damages. The evaluator has no power to impose a settlement or to determine the pre-trial management of the case. The process, whether or not it results in settlement, is confidential.

With the benefit of that assessment, the parties are encouraged to discuss settlement with or without the evaluator's assistance. They may explore ways of narrowing the issues, exchanging information about the case, or otherwise preparing efficiently for trial. For further detail see The ENE Model and the Evaluation Agreement from the Law Society.

If you would like to use the Evaluation Program, follow [this link](#) to an electronic form which you can use to submit your application online.

¹ This definition appears in the Revised Guidelines for Solicitors who act as Mediators.

² A solicitor conducting a separate business as a mediator in the area of alternative dispute resolution, as distinct from providing the service as an incident to the solicitor's private practice, would not, under the present certificate of insurance, issued pursuant to the compulsory Professional Indemnity Master Policy, be entitled to indemnity from LawCover in respect of a negligent act or omission occurring in the course of that separate business.

³ The Law Society Agreement to Mediate provides for the exclusion of mediator liability in Clause 22.

⁴ Now known as LEADR.

⁵ Now known as Relationships Australia (NSW).

⁶ Before undertaking mediator training, it is important for solicitors to determine whether the course (whether abovementioned or not) fulfils the criteria in paragraph 1 of this Schedule.

⁷ Contributions to part of this document by Sir Laurence Street, Ruth Charlton and Bernadette Rogers, Director of Dispute Resolution Queensland Law Society are gratefully acknowledged.

8

Such statements appear in the following: the Family Law Advisory Code of Practice (paragraph 2.4); the Protocol to Handling CTP Personal Injury Claims (paragraphs 4.1, 4.13 and 4.14); Civil Litigation, a Guide to Good Practice (paragraphs 4.5-4.9); New South Wales Solicitors' Manual, Service 9 (paragraph 2255A).

11

This clause was approved by the Dispute Resolution Committee on 24 July 1998.

12

The courts will not grant specific performance of the above clause but may grant a stay of proceedings commenced in breach of the clause until the dispute resolution procedure is concluded. (See also *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd and Anors* (1992) 28 NSWLR 194, *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.)

13

Any mediator nominated by the President of the Law Society or the President's nominee will be a NSW solicitor mediator who is bound by the Law Society's Revised Guidelines for Solicitors who act as Mediators.

14

The clause will require amendment if there are more than two parties to the contract.

15

Amended by Dispute Resolution Committee on 5 Sept. 1997.

16

Amended by Dispute Resolution Committee on 5 Sept. 1997.

17

Amended by Dispute Resolution Committee on 5 Sept. 1997.