



## MEDIATION AGREEMENT

**Date:**

**Parties:**

**and**

**(collectively "the Parties")**

**Mediator: Julie Somerville of R3 Resolutions Pty Limited**

**("the Mediator")**

**Conducted at:**

**Recitals:**

- A. A dispute, as briefly set out in Schedule 1, has arisen between the Parties ("**the Dispute**").
- B. The Parties have requested the Mediator, and the Mediator has agreed, on the terms and conditions of this agreement to assist the Parties in their attempts to resolve the Dispute.

**AGREEMENT:**

**The Mediation**

- 1. "**The Mediation**" shall comprise:

- a. All steps taken to attempt to resolve the Dispute by mediation, whether prior (including but not limited to a pre-mediation conference) or subsequent to the execution of this agreement;
  - b. All communications between the parties during the course of the Mediation;
  - c. In the event that a settlement is reached, and the parties are unable to record that settlement in writing during the course of the Mediation, all communications taking place after the conclusion of the mediation between the parties (whether oral or in writing (including email) in relation to, or arising out of, the recording of the settlement reached.
2. If the parties come to the Mediation pursuant to an Order of the Court, whether or not by consent, further legislative provisions may apply, such as:
  - a. Civil Procedure Act NSW 2005 – Part 4;
  - b. Uniform Civil Procedure Rules NSW, Part 20;
  - c. Supreme Court of NSW Practice Note Gen 6 – Mediation;
  - d. District Court of NSW Practice Note 1, Part 11 – Alternative Dispute Resolution;

### **Appointment and functions of the Mediator**

3. The Parties appoint the Mediator, and the Mediator accepts the appointment, to mediate the Dispute in accordance with the terms of this agreement.
4. The Mediator will help the Parties to try and resolve the Dispute, or narrow the issues in Dispute, by:
  - a. Discussing with them the issues that are in dispute and options or possibilities by which the Dispute may be resolved: and
  - b. Considering with them their interests and needs.
5. The Mediator may discuss the matter with the Parties together or separately or with some of them together and the Mediator need not disclose the fact that a separate meeting has taken place.
6. The Mediator may, if it will advance the Mediation, enter confidential discussions with each Party separately to assist each to evaluate their prospects in litigation, including a final hearing. In doing so, the Mediator may enter active discussion and proffer views about possible outcomes of individual issues and the practicality of proceeding with litigation, however in doing so it not providing legal advice to the Parties.
7. The Mediator will not advise a Party, nor make decisions for nor impose a solution on the Parties.
8. 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. Any such advice or opinion shall be obtained only from such person or persons as may be agreed by the Parties.
9. The Mediator confirms that the Mediator has no interest in the Dispute, nor has the Mediator had any prior dealings with any of the Parties in relation to the Dispute.
10. 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, to the extent that the Mediator may properly do so,

immediately inform the Parties of those circumstances. The Parties will then confer, and the Mediator will continue to participate in the Mediation if the Parties so agree.

11. 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 any of the Dispute the Mediator may terminate the appointment as Mediator by giving oral or written notice to the Parties of that termination.

### **Co-operation, Costs and Mediator's Fees**

12. The Parties agree to participate in the Mediation and to co-operate with the Mediator, and each other, during the Mediation.
13. Each Party will comply with reasonable requests made by the Mediator prior to and during the Mediation, to promote the efficient and expeditious resolution of the Dispute.
14. Each party will meet its own costs of and in connection with the Mediation.
15. Irrespective of the outcome of the Mediation, the Parties will pay the Mediator's fees and disbursements as specified in Schedule 2, in the proportions there stated. In the event that the Mediator's fees and disbursements remain outstanding for in excess of 6 months, the Parties' legal representatives will be responsible for payment of the fees due and payable by their client.

### **Authority & Representation**

16. Each Party must be represented at the Mediation conference by a person or persons having, or able during the course of the Mediation to obtain, authority to settle the Dispute within any range that can be reasonably anticipated.
17. Any persons other than the Parties (including legally qualified persons) attending the Mediation to assist and advise a Party in the Mediation shall sign an acknowledgement and undertaking as to confidentiality as specified in Schedule 3.

### **Conduct of the Mediation**

18. The Mediation, including all preliminary steps, shall be conducted in such manner as the Mediator considers appropriate having due regard to the view of each Party as to the manner in which the Mediation should be conducted, and the Mediator may give directions as to:
  - a. The holding of preliminary conferences;
  - b. The exchange of written outlines of the views of the Parties on the issues raised by the Dispute;
  - c. The exchange of documents, experts' reports, the meeting of experts and the preparation of a joint experts' report; and
  - d. Service on the Mediator of any such reports and outlines.
19. In the event that the Mediation, or any part of it, takes place via electronic communications and/or over the internet each Party agrees, and undertakes to ensure, that:
  - a. The only persons who will participate in, listen to or observe those communications, shall be the persons who have signed the

acknowledgement and undertaking as to confidentiality as specified in Schedule 3; and

- b. In the event that a Party mistakenly enters, or is placed in, an incorrect breakout room, session, or private communication they will immediately leave that room, session or communication and inform the Mediator.
20. No party shall use any recording devices during the Mediation, whether audio or visual, without the written consent of the Mediator and all Parties. In the event that any Party becomes aware of a recording, they are immediately advise the mediator, not disseminate the recording, and immediately destroy the recording Any breach of this clause shall render the contents of any recording of no effect and will be inadmissible as evidence of any part of the Mediation.

### **Communication between the Mediator and a Party**

21. The Mediator may communicate with a Party or the Parties orally, in writing and/or electronically, including via e-mail, instant messaging, the R3 Resolutions Online Mediation Platform, Zoom and Skype.
22. The Mediator may as frequently as the Mediator deems appropriate meet or communicate with the Parties together or separately.
23. Information, whether oral, written or electronic, disclosed in confidence by a Party to the Mediator will be treated as confidential, and may not be disclosed by the Mediator to any other Party unless the Party by whom that information was disclosed consents to such disclosure.

### **Confidentiality**

24. Subject to professional disciplinary complaint to an appropriate and applicable disciplinary body able to act by law the Parties, and all persons present at, or otherwise participating in, the Mediation, agree (unless otherwise compelled by law), to preserve full confidentiality of all statements and events before and during the Mediation and communications in relation to the Mediation that may come into their knowledge during or from the Mediation.
25. This agreement does not restrict any person's freedom to disclose and discuss communications during or concerning the Mediation:
  - a. With the organisation on whose behalf or at whose request such person is present at the Mediation, including the advisers and insurers of that Party; or
  - b. Any person within the legitimate field of personal intimacy of the Party

provided that any such disclosures and discussions will only be on this same basis of confidentiality, which shall be secured by the person divulging the information to the intimate person, legal, institutional or insurance advisor.

### **Privilege**

26. Subject to Clause 29, in any arbitral or judicial proceedings the following will at all times be kept confidential and will be privileged, and the Parties and the Mediator will not disclose nor rely upon them nor issue nor cause to be issued any subpoena to give evidence or to produce documents concerning them:

- a. Any settlement proposal;
- b. The willingness of a Party to consider any such proposal;
- c. Any statement, admission or concession made by a Party; or
- d. Any statement or document made by the Mediator.

### **Termination**

27. A Party may at any time terminate the Mediation.
28. The Mediator may terminate the Mediation if the Mediator feels unable to assist the Parties further for any reason in the discretion of the Mediator.

### **Enforcement**

29. Any Party will be at liberty:
  - a. To enforce the terms of a settlement agreement entered into at, or as a result of, the Mediation;
  - b. In any enforcement proceedings, to adduce evidence of and incidental to the settlement agreement including evidence from the Mediator and any other person engaged in the Mediation.
30. The Parties acknowledge that at the conclusion of the Mediation, all notes and documents created by the Mediator, save for this agreement, will be destroyed.
31. The Mediator will not accept appointment as an arbitrator nor act as an advocate in, nor provide advice to a Party to, any arbitral or judicial proceeding relating to the Dispute or any of them

### **Exclusion of Liability and Indemnity**

32. The Parties expressly agree that the Mediator will not be liable to any Party or person for any views, opinions or recommendations expressed by the Mediator, nor for act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement, unless the act or omission is fraudulent.
33. Each party, together and separately, indemnifies the Mediator against all claims by that Party or anyone claiming under or through that Party, 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 obligations under this agreement, unless the act or omission is fraudulent.
34. No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the Mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded as a bar to any such action.
35. The Parties and the Mediator agree that the Mediator has, in the exercise of her functions as a Mediation in relation to the Dispute, the same protection and immunity as if she was a judicial officer of the Court exercising functions as a judicial officer whether or not the Mediation is a mediation to which Section 23 of the Civil Procedure Act, 2005 (NSW) applies.
36. None of the parties to this Agreement will call the Mediator as a witness.

### Legislative Provisions

37. The terms of this agreement are subject to the provisions of any legislation that may be applicable to or govern the Mediation, and in the event of any inconsistency the provisions of the legislation will prevail.

### Counterparts

38. This agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

### Executed as an agreement

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NAME	ROLE	SIGNATURE

NAME	ROLE	SIGNATURE
Julie Somerville	Mediator	

## Schedule 1

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*Description of the Dispute including the title and number of any related legal proceedings:*

## Schedule 2

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The Parties agree to pay the Mediator's fees and expenses, plus GST, within 30 days of the Mediation as follows:

1	For the mediation (2 parties)	\$	per day
2	For additional preparation or other services	\$	per hour
3	Accommodation, meals and travel expenses (if applicable)	N/A	
4	Long distance calls, couriers, etc. (if applicable)	N/A	
5	Room hire fees	N/A	
6	Allocation of costs		
			%
			%

## SCHEDULE 3

### PARTIES TO THE AGREEMENT AND PERSONS PRESENT AT THE MEDIATION

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The Parties have entered into a Mediation Agreement dated \_\_\_\_\_ in accordance with which the Mediator will conduct the Mediation.

1. The undersigned acknowledge by their signatures that they participate in the Mediation on the basis of their agreement to the terms of clause 2 and 3 below.
2. Each of the undersigned undertakes to the Parties and the Mediator:
  - a. To keep confidential to themselves and any persons to whom by reason of the terms of their employment or any contract of insurance they may properly communicate it, all information disclosed during the Mediation, including the preliminary steps (“confidential information”);
  - b. Not to act contrary to the undertaking in sub-paragraph (a) unless compelled by law to do so or with consent of the Party who disclosed the confidential information;
  - c. Not to use confidential information for a purpose other than the Mediation.
3. Each of the undersigned undertakes to the Parties and the Mediator that the following will be privileged and will not be disclosed in or relied upon or be the subject of any subpoena to give evidence or to produce documents to any arbitral or judicial proceedings between the Parties to the Mediation:
  - a. Any settlement proposal;
  - b. The willingness of a Party to consider any proposal;
  - c. Any admission or concession made by a Party;
  - d. Any statement or document made by the Mediator.

NAME	ROLE	SIGNATURE


