

## MEDIATION CONFERENCES

*Summary: This Circular provides information about mediation conferences conducted in the District Court, including guidance on how to apply for a mediation conference prior to the usual compulsory pre-trial conference and how to apply for orders for a private mediation.*

### 1. Introduction

The Court has the power to make a case management order that the parties confer on a 'without prejudice' basis in order to settle the case or, failing settlement, to resolve as many of the issues between them as possible, and to identify the issues to be tried (2005 DCR r 24(2)(e)). This conferral is referred to as a mediation conference.

The Court does not align itself to a particular mediation model. In general terms, mediation is a process in which the parties to the action, with the assistance of a Registrar (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement. The Registrar has no advisory or determinative role in regard to the content of the dispute or the outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted. In determining how best to facilitate the mediation process, Registrars will draw on their experience after reviewing the Court file, any preparatory material filed by the parties, the relationship of the parties and the quantum in dispute, to decide the best course to adopt.

As mediation is more of a process than an event, the Court may direct the parties to attend a mediation conference at any stage of the proceedings. Thus, if the parties consider it appropriate, they can apply for the Court to list the action for a mediation conference as soon as the Memorandum of Appearance has been filed. By the same token, it is open to the parties to request the Court to list the action for a mediation conference even after trial dates have been allocated.

There are two types of mediation conference in the District Court.

The first is a mediation conference before a Registrar which is listed pursuant to 2005 DCR r 35. This is dealt with in Part 2 below.

The second is a private mediation, which is a mediation conference listed pursuant to 2005 DCR r 35 before a private mediator arranged and paid for by the parties. Private mediations are dealt within Part 3 below.

The remainder of this Circular provides guidance as to the conduct of a mediation conference before a Registrar, though aspects of the guidance in this Circular are also relevant to a private mediation.

Circular to Practitioners CIV 2005/11, Early Mediation, is withdrawn and superseded by this Circular to Practitioners.

## **2. Listing a mediation conference before a Registrar**

Pursuant to 2005 DRC r 24(2)(e) and r 35, the Court can direct that the parties confer on a “without prejudice” basis for the purpose of attempting to settle an action or, failing settlement, to resolve as many of the issues between them as possible.

As a general principle, the Court has adopted a tailored approach to case management. As part of this approach, the Court will facilitate parties participating in a mediation conference at the point in the conduct of the action that the parties consider optimal.

The content of expert evidence, including medical evidence, is a key issue in many mediation conferences. A party wishing to seek orders listing the action for a mediation conference should liaise with the other parties to determine whether the expert evidence is sufficiently crystallised for the mediation to be held. Alternatively, it may be that all parties are content for the mediation conference to proceed prior to the parties formally obtaining and exchanging expert evidence

A party wishing to apply for a mediation conference may:

- (a) file a minute of consent orders seeking orders for a mediation conference;
- (b) file a chamber summons seeking order for a mediation conference; or
- (c) if the Court has listed the action for a directions hearing, serve a minute of proposed orders prior to a directions hearing.

The usual directions for the listing of a mediation conference are set out in Annexure A.

At the return of the chamber summons, or at the directions hearing, the presiding Registrar will assess whether it is appropriate to list the action for a mediation conference at that stage. One significant factor will be whether the other parties to the action consider it appropriate to hold a mediation conference at that stage.

If it is appropriate to list the action for a mediation conference, the Registrar will then consider what orders should be made to facilitate the mediation conference. Annexure C sets out some possible orders that may be made to facilitate the mediation conference in addition to the usual orders in Annexure A.

Where the Court orders the parties to attend a mediation conference before a Registrar, in the ordinary course, the mediation will be allocated a half day hearing. The mediation will take place at the District Court Building, 500 Hay Street, Perth.

If the parties have participated in a Court ordered mediation conference prior to the action being entered for trial, the presiding Registrar may make a direction that this mediation conference stand as the pre-trial conference in the action (2005 DCR r 35A). The usual form of this order is:

On entering the action for trial, the requirement on the parties to attend a pre trial conference be waived, and the action be listed for a listing conference.

The provisions of 2005 DCR r 41 relating to pre trial conference, other than r 41(3), apply to a mediation conference (2005 DCR r 35(10)).

### **3. Private mediation conferences**

If the parties consent, the Court has the power to direct that the parties participate in a mediation conference presided over by a mediator who is not a Registrar of the Court (2005 DCR r 24(2)(e) and r 35). An application for a private mediation conference may be made in the same manner as an application for a mediation conference before a Registrar, including by consent order.

Where a private mediation conference is to be before an accredited mediator pursuant to the regime established by the Mediator Standards Board Ltd ([www.msb.org.au](http://www.msb.org.au)), then all that need be done by the party applying is to state that fact in a letter accompanying the application or consent order.

Where the mediator in a private mediation conference is not accredited then a brief statement in a letter setting out the mediator's name, qualifications and experience will be required.

The usual orders for a private mediation conference are set out in Annexure B.

The usual orders include an order for the plaintiff to provide the mediator with a copy of the 2005 DCR. This is so the mediator can be made aware of the provisions of 2005 DCR r 35(8), which provides that the mediator may notify the Court of any failure by a party to cooperate in the mediation conference, and of r 41, relating to pre trial conferences, other than r 41(3), apply to a mediation before a private mediator (2005 DCR r 35(10)).

### **4. Parties to the mediation conference**

The Court's usual orders for a mediation conference provide that each party must attend the mediation conference in person or, if the party is a body corporate, by an agent who is authorised by the body corporate to conduct settlement negotiations and to settle the case. These orders mirror the requirements of 2005 DCR r 35(4) and 40(1).

Where a party is represented by an insurer, a properly authorised representative of the insurer must attend the mediation conference in person, with or without the insured.

The Court's usual practice is that a party (or their representatives) who resides in another state or overseas will be required to attend in person rather than simply being available by telephone. This includes insurance representatives.

Any issues regarding the attendance of a party, including whether a party may attend by telephone conference, should be raised when the order for the mediation conference is made.

A representative of a party who attends a mediation conference must have authority to compromise the case. He or she must have flexibility in the approach they take to the mediation conference rather than being limited to making a single offer or a limited number of offers on behalf of the party without then having to obtain further instructions.

Sometimes a party will wish to have someone present at the mediation conference who is not a party but who can help resolve the dispute. There is no right to have that person present but, by agreement between the parties, the Registrar may allow them to be present. He or she will be required to give an oral undertaking to the Registrar to maintain the confidentiality of the mediation process. Alternatively, the party may take part in the private sessions in the mediation conference, but not in the joint sessions.

## **5. Preparation for a mediation conference**

The Court expects the lawyer with the conduct of the case or properly briefed counsel to attend the mediation conference with the party. The practitioner or counsel should have discussed the following matters with the party well prior to the mediation:

- The prospects of succeeding in the action (or successfully defending it if the party is a defendant).
- The relative strengths of the other parties' cases.
- The key issues in dispute in the action and the evidence likely to be led at trial on these issues.
- The parameters for settlement discussions.
- The best and moderate case outcomes following trial.
- The worst case outcomes following trial.
- The time and effort that will be involved in preparing for a trial and the trial itself.
- The legal costs involved in going to trial (noting the provisions of 2005 DCR r 36).

More information about the role of a lawyer in a mediation conference, and the preparation required for a mediation conference, is set out in the Guidelines for Lawyers in Mediations produced by The Law Council of Australia.

Lawyers should consider the form in which any settlement may be recorded and may wish to prepare a draft settlement deed or heads of agreement to take to the mediation (see further, Part 9 below).

In a personal injuries action, the lawyer for the plaintiff should obtain a notice of past benefits from Medicare Australia that will be current as at the date of the mediation.

Lawyers should also consider whether issues may arise in any possible settlement as to capital gains tax, income tax or GST and where possible, provide advice relevant to their client prior to the mediation.

## **6. Orders to facilitate the conduct of the mediation conference**

The usual orders convening a mediation conference (set out in Annexures A and B) provide for the exchange of without prejudice schedules of damages prior to the mediation conference. The usual orders also provide for a bundle of relevant documents to be provided to the Registrar or mediator prior to the mediation conference.

In some cases, when making orders listing the mediation, the Registrar may make orders for the preparation and exchange of documents in order to summarise the issues in dispute for the purposes of the mediation conference. Some of the orders that the Court has made from time to time to facilitate a mediation conference are set out in Annexure C.

The Registrar presiding at the mediation conference may wish hold a preliminary conference in the mediation conference. This could be by attendance before the Registrar or telephone conference.

Alternatively, the Registrar may hold a preliminary conference with the parties separately. Where this occurs, the Registrar will treat the preliminary conference as a private session in the mediation conference.

A party may request the Registrar conduct a preliminary conference if it would assist the mediation process. The request should be made when the order is made for the mediation conference and may be made by letter to the Principal Registrar.

Issues that may be dealt with at a preliminary conference include:

- Where the mediation is to be held.
- The length of the mediation conference.
- Who is to attend the mediation conference and when.
- Whether a number of actions will be mediated at the same time or one after the other.
- Confidentiality issues that arise from actions involving different parties being mediated at the same time.
- Facilities that may be required for the mediation conference, such as teleconferencing or a monitor on which to play a DVD.
- The making of orders or requests for information to facilitate the conduct of the mediation conference.

The Registrar may also write to the parties to request information, for example, a short memo setting out the position of the parties or the key issues in dispute. The letter may request information along the lines set out in the orders in Annexure C.

## **7. Confidentiality of the mediation process**

Evidence of anything said, or any admission made, at a pre trial conference or mediation conference is not admissible at the trial of the case (2005 DCR r 35(10), r 41(1)). Other than these rules, there is no wider obligation of confidentiality for District Court mediations along the lines of *Supreme Court Act 1935* (WA) Part VI. However, the effect of the without prejudice privilege would produce a similar obligation of confidentiality: *C v M* [2011] WASC 175, at [64]. It may well also be that the implied undertaking of confidentiality would apply to documents or information received at a District Court mediation or pre trial conference.

## **8. Post mediation**

Where the action does not settle, the Registrar presiding at the mediation conference may convene a directions hearing at the conclusion of a mediation conference to make orders to progress the action. The Registrar will not make contested orders and may simply list the action for a further directions hearing and make orders as to costs of the mediation.

Where the parties provide the Registrar convening the mediation with copies of “without prejudice” documents, the documents will not form part of the Court file and will be returned to the parties or destroyed at the conclusion of the mediation.

## **9. Settlement documents**

The Court has template consent orders available for the parties to use to record any agreement reached at a mediation conference.

The Court also has available a computer and printer in the pre trial conference area for use by the parties’ solicitors. The computer is not connected to the courts technology system. The Court’s computer uses the standard Windows format.

Parties are encouraged to bring to the mediation conference a lap top and a USB 2.0 thumb drive or just a thumb drive with a draft settlement agreement already downloaded. Alternatively, the Court has, on the Courts computer, template consent orders for use by the parties. The template consent orders can be downloaded to the thumb drive. The parties can then use their own draft, or the Courts templates, to record any settlement agreement.

Once the draft agreement or template has been amended to reflect the terms of the agreement it can be printed from the Court’s computer via the thumb drive for signature.

**GEORGE KINGSLEY**  
Acting Principal Registrar

## Annexure A

### Usual orders for a mediation conference before a Registrar

1. the parties attend a without prejudice mediation conference before a Registrar on a date to be fixed by the Court taking into account the following unavailable dates of the parties:  

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2. each party must attend the mediation conference in person or, if the party is a body corporate, by an agent who is authorised by the body corporate to conduct settlement negotiations and to settle the case.
3. where the settlement negotiations are to be conducted on behalf of a party by its insurer, a representative of the insurer with authority to conduct settlement negotiations and to settle the case attend the mediation conference in person, in which case the attendance of a corporate representative of the party is dispensed with;
4. not less than 7 days before the mediation conference, the lawyer for each party provide the party with notice in writing of the issues as to costs set out in 2005 DCR r 36;
5. not less than 7 days before the mediation conference, the plaintiff [and the defendant if there is a counter claim] serve on each other party a “without prejudice” schedule of damages complying with 2005 DCR rule 37(3)(b) or (c);
6. not less than 3 clear days before the mediation conference, each party must send to the Registrar presiding at the mediation a bundle of documents comprising:
  - (a) any schedule of damages served pursuant to paragraph 5; and
  - (b) a copy of any significant without prejudice correspondence exchanged between the parties;
  - (c) a copy of any document that would be useful for the Registrar to have to facilitate the mediation [*eg the contract allegedly breached or a key expert report*].
7. unless otherwise ordered at the mediation conference, the costs of each party of, and incidental to, the mediation conference be in the cause;
8. unless otherwise ordered, on entering the action for trial, the requirement on the parties to attend a pre trial conference be waived, and the action be listed for a listing conference.

9. the action be listed for a directions hearing on a date not earlier than 14 days after the date of the mediation conference.



**Annexure B****Usual orders for a mediation conference before a private mediator**

1. the parties attend a mediation presided over by [name of mediator] (“mediator;)
2. each party attend the mediation in person or, if the party is a body corporate, by an agent who is authorised by the body corporate to conduct settlement negotiations and to settle the case.
3. where the settlement negotiations are to be conducted on behalf of a party by its insurer, a representative of the insurer with authority to conduct settlement negotiations and to settle the case attend the mediation conference in person, in which case the attendance of a corporate representative of the party is dispensed with;
4. within 14 days after the conclusion of the mediation conference, the plaintiff to file a report, signed by or on behalf of the parties concerned, confirming that the mediation conference took place;
5. unless otherwise ordered, on entering the action for trial, the requirement on the parties to attend a pre trial conference be waived, and the action be listed for a listing conference.
6. the action be listed for a directions hearing on a date no earlier than 21 days after the filing of the report referred to in Order 4 hereof.

## Annexure C

### Directions to facilitate a mediation before a Registrar

#### Summary of issues

1. by [date] each party must send<sup>1</sup> to the Registrar presiding at the mediation conference a briefing note of not more than 3 pages (prepared on a confidential and without prejudice basis, and on the basis that its contents will not be revealed to the other parties unless authorised by the party), setting out the following:
  - (a) the finding(s) on liability contended by party, including any issues of apportionment and any alternate findings;
  - (b) the 3 most critical findings of fact or law which the Court must make in order for the Court to make the finding(s) in paragraph (a);
  - (c) any issues on which there appears to be a consensus in the expert evidence;
  - (d) the contested expert evidence that the Court would have to accept in order to make the findings in paragraph (b);
  - (e) the 3 main reasons why the party contends the Court will prefer the expert evidence in paragraph (d) over contrary expert evidence; and
  - (f) any policy, background, personality or relationship issues which may make it difficult for the action to settle or otherwise sidetrack the mediation;

#### Chronology

2. by [date], the plaintiff serve on the defendant by email a draft chronology cross referenced to documents discovered by each party.
3. by [date], the defendant serve on the plaintiff by email either:
  - (a) an amended version of the document in paragraph 2, with its additions noted and cross referenced to discovered documents; or
  - (b) a stand alone draft chronology cross referenced to documents discovered by each party.
4. by not less than 7 days prior to the mediation either:

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<sup>1</sup> The word “send” is used rather than “file” to denote that the document will not form part of the Court file, but will go the Registrar directly and be destroyed or handed back to the parties at the conclusion of the mediation.

- (a) the plaintiff send to the Registrar presiding at the mediation an agreed consolidated chronology cross referenced to discoverable documents;  
or
- (b) each party send to the Registrar presiding at the mediation a chronology cross referenced to discoverable documents

**Without prejudice Scott Schedule – building case**

- 5. by [date], the plaintiff serve on the defendant, by email, on a without prejudice basis, a Scott Schedule of the claims in paragraph [ ] of the statement of claim in the form set out in Schedule A<sup>2</sup> to this order, having completed columns 1, 2, 3 and 4;
- 6. by [date], the defendant serve on the plaintiff, by email, on a without prejudice basis, a response to the document in paragraph 5 having completed columns 4, 5 and 6 (prepared on the assumption that the plaintiff is successful on liability);

**Schedule A**

Item No	Description of defect and/ or incomplete work	Plaintiff's discovered documents	Plaintiff's cost of remedying	Defendant's cost of remedying	Defendant's comments	Defendant's discovered documents

- 7. by not less than 7 days prior to the mediation, the plaintiff send to the Registrar presiding at the mediation, and serve on each other party, the completed without prejudice Scott Schedule.

**Scott schedule style damages analysis for a personal injuries case**

- 6. by [date], the plaintiff serve on the defendant, by email, on a without prejudice basis, a version of the particulars of damages in the form set out in Schedule B to this order, having completed columns 1, 2, 3 and 4;

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<sup>2</sup> The form of the schedule is broadly taken from the usual Scott Schedule in Circular to Practitioners CIV 2007/3, Scott Schedules. Other forms of the Scott Schedule are set out in this Circular to Practitioners. The key difference in format with the without prejudice version is that the two columns containing the numbers are adjacent to facilitate ease of comparison at the mediation.

7. by [date], the defendants serve on the plaintiff, by email, on a without prejudice basis, a response to the document in paragraph 6 having completed columns 5 and 6 (prepared on the assumption that the plaintiff is successful on liability);

**Schedule B**

Item No.	Head of damage	Assumptions or factual basis relied on by plaintiff	Amount claimed by plaintiff	Defendant's assessment of likely award	Assumptions or factual basis relied on by defendant