**Draft Mediation Protocol**

**applicable to the Dispute Resolution Scheme Rules under the Natural Hazards Insurance Act 2023**

# **Background**

* 1. The Dispute Resolution Scheme Mediation Protocol (**Mediation** **Protocol**) applies where a dispute has been referred to mediation under Rule 6.1 in the Dispute Resolution Scheme Rules (as amended from time to time) (**Scheme Rules**).
  2. Mediation under the Scheme Rules is a confidential process where an independent mediator assists the parties to try to resolve their dispute through negotiation.

# **Interpretation**

* 1. The Mediation Protocol is to be read alongside the Scheme Rules including Rule 6 which sets out the “Mediation rules” that will apply to a dispute referred to mediation under the Scheme Rules, including appointment of the mediator, the length of the mediation process, the payment of costs, representation, enforcement, termination and related matters.
  2. Each person participating in a mediation under the Scheme Rules should ensure that they are familiar with both the Scheme Rules and this Mediation Protocol.
  3. Any defined term used in the Mediation Protocol and defined in the Scheme Rules has the same meaning as in the Scheme Rules.
  4. If any aspect of the Mediation Protocol conflicts with the Scheme Rules, the Scheme Rules take priority. In addition to Rule 6 the Scheme Rules cover the following matters which may be relevant to a mediation process and are not separately covered by the Mediation Protocol:
     1. Scheme Rule 2 which defines a number of terms in the Scheme Rules,
     2. Scheme Rule 3 which outlines principles by which the Scheme Rules are interpreted,
     3. Scheme Rule 8 which describes how the dispute resolution procedures under the Scheme will be conducted,
     4. Scheme Rule 9 which describes information management processes and confidentiality requirements,
     5. Scheme Rule 10 which describes the rules relating to exclusion of liability for (relevantly) the Scheme provider and mediator,
     6. Scheme Rule 11 which outlines the process by which participation in a mediation ends, and
     7. Scheme Rule 12 which describes general provisions applicable to the Scheme.
  5. A reference to the Mediation Protocol is a reference to this Mediation Protocol, as amended from time to time.

# **Purpose of the Mediation Protocol**

* 1. The purpose of the Mediation Protocol is to set out key roles and responsibilities and the process to be followed once the dispute has entered the mediation process under the Scheme Rules and the Scheme provider has appointed a mediator.

# **Role and responsibilities of the Mediator**

* 1. A mediator appointed by the Scheme provider to assist the parties to resolve a dispute must:
     1. carry out the mediation in accordance with the Scheme Rules, the Mediation Protocol and having regard to the principles of accessibility, independence, fairness, accountability, efficiency and effectiveness,
     2. act as an independent mediator for the parties to the dispute, and
     3. conduct the mediation in a timely manner and avoid incurring unnecessary expense for any party to the mediation.
  2. When facilitating a mediation, the role of the mediator is to assist the parties to resolve their dispute, including by assisting the parties to:
     1. clarify the issues in dispute,
     2. understand each other’s viewpoint,
     3. share information with each other,
     4. develop options to resolve the issues,
     5. explore the usefulness of each option and check whether the option is practical and sustainable,
     6. identify their own solutions to the dispute,
     7. reach an agreement that accommodates the interests and needs of all parties.
  3. The mediator must not:
     1. advocate a position for any party,
     2. give legal advice to any party,
     3. impose an outcome of the dispute on any party,
     4. make a decision for any party about how to resolve the dispute,
     5. pressure any party to enter into a written agreement reached at mediation (Mediated Agreement).

# **Responsibilities of the Parties**

* 1. Each party to a dispute referred to mediation must:
     1. comply with the Scheme Rules and the Mediation Protocol,
     2. co-operate in the mediation process in good faith, and
     3. assist in the proper conduct of the mediation by the mediator and cooperate with the mediator throughout the mediation process.

# **The Mediation Process**

* 1. The mediator may adopt any mediation process they consider appropriate provided that:
     1. it is consistent with the Mediation Protocol and the Scheme Rules, and
     2. in setting the process, they have regard to the context of the dispute and feedback provided by any party.
  2. Subject to the Scheme Rules and in consultation with the parties, the mediator shall schedule the mediation, including the locations where the mediation will be held, when it will be held and how long it will last.
  3. The mediator may require that the parties each provide a written statement of position stating briefly:
     1. what they consider to be the matters in dispute,
     2. the factual background to the dispute, and
     3. the party’s position on the matters in dispute.
  4. The statement of position may attach statements of a factual or technical nature.
  5. All statements of position and other documents attached to the statement of position that are sent to the mediator must also be sent to all other parties.
  6. The mediator may receive any information about any matter they consider relevant, and in any way they think is appropriate.
  7. The mediator may schedule meetings (either by video/telephone conference or in person) with any one or more of the parties and/or their representatives. Such meetings can take place before the mediation or at any time during the process of mediation. Either party, or the mediator can request this at any time. The content of all discussions will be confidential between the mediator and the party concerned, unless otherwise authorised.
  8. At any time in the mediation process the mediator may ask the parties questions to clarify and further explain their positions.
  9. The mediator will not offer an opinion on the accuracy or reliability of information or a party’s position, unless:
     1. requested by the party who provided the information or expressed the position, and
     2. the mediator considers it appropriate, and
     3. the opinion is provided in a separate meeting with the party who provided that information or position.

# **Authorisation and advice**

* 1. The parties must attend the mediation with either:
     1. all necessary authorisations to enter a settlement agreement, or
     2. reasonable access to a person who holds such authority.
  2. Where a party requires legal advice regarding their dispute this must be obtained before the start of the mediation and be available as needed during the mediation process, including for the purposes of entering a Mediated Agreement in accordance with clause 10 of this Mediation Protocol.

# **Confidentiality**

* 1. Mediation is a confidential process. A mediator appointed under the Scheme Rules and the Mediation Protocol is bound by the Information Management/confidentiality requirements in Rules 9.1 to 9.10 of the Scheme Rules as if references to the Scheme provider were references to the mediator (with all necessary modifications).
  2. Parties may communicate confidential information to the mediator on the condition that the mediator does not communicate it to the other party without their permission.
  3. The mediator and parties, including their support people and representatives, must treat as confidential all written and oral communications as well as documents disclosed during the process.
  4. The mediator must maintain confidentiality unless they have reason to believe that any person is threatened or in danger of physical harm, or property is in danger. The mediator will report to the Police or other appropriate authority any such threats of harm.
  5. The mediation is carried out on a without prejudice basis. Any information, whether written or spoken, about what occurred at mediation is privileged in accordance with the Evidence Act 2006. Nothing said during the mediation process or documents prepared for or produced during the mediation may not be used by any party in any judicial proceeding, administrative tribunal or Court unless required by law or all parties agree to waive that privilege.
  6. However, any Mediated Agreement reached at mediation (Mediated Agreement) and signed by the parties may be admissible as evidence in a judicial proceeding in which a party seeks to enforce the terms of the agreement. Also, such an agreement may be provided to specified third parties with the agreement of all parties.
  7. Unless the parties agree to waive privilege, they are directed by a Court to disclose information, or are required by law a mediator must not divulge any privileged information relating to a mediation in any proceeding. If they agree, or are required, to give evidence in any proceeding, the mediator must immediately inform the other parties.

# **Pausing/ending the mediation**

* 1. Mediation is voluntary. The parties must participate in good faith and with the intention of completing the mediation process.
  2. Prior to entering a settlement agreement, an applicant may end a mediation for a dispute in accordance with Scheme Rule 6.11.
  3. The mediator may pause the mediation at any time if:
     1. they believe the length of the session is disadvantaging any party; or
     2. to give the parties time to address any matters that may help to resolve the dispute.
  4. The mediator may end the mediation at any time if they consider that the safety of all cannot be assured.
  5. In all other cases, a mediation ends when a Mediated Agreement is signed by the parties to the dispute.

# **Settlement**

* 1. If a settlement is reached a Mediated Agreement will be prepared by the mediator and signed by the parties. Parties may seek legal advice before signing any Mediated Agreement. No settlement is binding unless and until it is in writing and has been signed by all the parties.
  2. All parties reserve their respective legal rights if the mediation does not result in a settlement being reached between them, and a binding Mediated Agreement being entered.