

## PRACTICE NOTE SC Gen 6

### Supreme Court - Mediation

#### Commencement

1. This Practice Note commences 17 August 2005.

#### Application

2. This Practice Note applies to proceedings in the Court of Appeal, the Common Law Division (civil cases only) and the Equity Division. This Practice Note does not apply to proceedings in the Court of Criminal Appeal or criminal proceedings in the Common Law Division.

#### Definitions

3. In this Practice Note:

**CPA** means the *Civil Procedure Act 2005*

#### Introduction

4. The purpose of this Practice Note is to explain the Court's mediation procedures and its expectations of parties in proceedings that have been referred to mediation.

#### Referrals generally

5. Part 4 of the CPA permits the Court at any stage of the proceedings, by order, to refer parties to mediation where, in the opinion of the Court, mediation appears appropriate. The Court's power does not depend on the consent of the parties, or of any of the parties.
  6. It is not the intention of the Court that mediation will be ordered in all proceedings.
  7. The parties themselves may, at any time, agree to mediation, nominate a mediator and request the Court to make the appropriate orders.
  8. The Court may consider ordering mediation on the motion of a party, or on referral by a registrar, or on the Court's own motion. Where mediation is ordered, the parties will usually agree on the person to be the mediator. If they do not:
    - the Court may select the mediator to be appointed or may appoint the mediator pursuant to the Joint Protocol set out in this Practice Note;
    - the Court may refer the proceedings to a registrar or other officer of the Court certified by the Chief Justice as a mediator to meet with the parties to discuss mediation and report back to the Court with a recommendation as to whether the proceedings are suitable for mediation; or
    - the Court may decide against ordering mediation.
  9. The Joint Protocol describes the expected course but its terms are not mandatory.
  10. The Court requires the parties to inform the Court of the outcomes of mediations ordered by the Court. Where a mediator is appointed under the Joint Protocol, the Court also requires the parties to provide the Joint Protocol Evaluation Information referred to in the Joint Protocol, which should be sent in writing to the Principal Registrar.
- #### Referral to a registrar or other officer
11. Where the Court refers proceedings to a registrar or other officer, that person will notify the parties of the time and place for an information session. It is anticipated that the information session will take no more than 15 to 30 minutes. Parties as well as their representatives must attend the session.
  12. At the conclusion of the information session, if the parties agree to mediation, the officer will make the necessary orders. If the mediator is to be a registrar, directions may be given for the filing and serving of position statements and any documents, reports, valuations etc that will assist the parties and the mediator. A direction will generally require all parties to the mediation to exchange relevant material not less than seven days before the mediation.

13. Where the parties do not agree to mediation or to a mediator, the officer will report to the Court the outcome of the information session with his or her recommendation.

#### **Proceedings case-managed by registrars**

14. A registrar may, at his or her discretion, refer proceedings that in the opinion of the registrar are suitable for mediation, to the Court notwithstanding that the parties, or any one of them, do not consent to mediation.

#### **Mediators**

15. A person may be appointed by the Court as a mediator if the person:

- consents to being appointed; and
- agrees to comply with the provisions of Part 4 of the CPA and the provisions of this Practice Note.

16. The Chief Justice may certify registrars or other officers of the Court as qualified mediators.

17. Section 33 of the CPA describes the exoneration from liability that exists for mediators appointed under the provisions of this Practice Note.

#### **Form of order for referral to mediation**

18. Where proceedings are referred to mediation under section 26 of the CPA, the Court's order should provide one of the following:

- if the parties agree on a mediator or if the Court appoints a specific mediator (for example, where specific expertise is considered desirable), an order should be made that the proceedings be referred to that mediator; or
- if the Court appoints a registrar or other officer as the mediator, the order should be that the proceedings be referred to that person for mediation; or
- otherwise, the order should be that if the parties cannot agree on a mediator within a specified time (say 14 days) after the referral under section 26 of the CPA, the Joint Protocol described in this Practice Note then will apply and the mediator will be the person appointed under the Joint Protocol.

#### **Joint Protocol: obligation of the plaintiff(s)**

19. Where the Court's order requires a mediator to be appointed pursuant to the Joint Protocol, the plaintiff sends to the Principal Registrar a copy of the pleadings, or a copy of the summons if there are no pleadings, and informs the Principal Registrar of the **Joint Protocol Referral Information**. The plaintiff gives the Principal Registrar this information by letter within seven days of the Court's order and at the same time gives each other party a copy.

20. The Joint Protocol Referral Information is:

- the Court's order referring the proceedings to mediation;
- the nature of the proceedings; and
- the identity of the parties.

#### **Joint Protocol: role of the Principal Registrar**

21. The Principal Registrar keeps a list of proceedings in which the plaintiff(s) has informed him or her of the Joint Protocol Referral Information.

22. The Principal Registrar sends the Joint Protocol Referral Information and accompanying documents to one of the nominating entities listed at paragraph 24, with a request for nomination of a person as the mediator in the proceedings. The Principal Registrar sends the information on the day of receiving it or the following day.

#### **Nominating entities in the Joint Protocol**

23. The Court's Alternative Dispute Resolution Steering Committee keeps a list of professional associations that accredit mediators and provide mediation services suitable for Supreme Court proceedings.

24. The initial nominating entities are:

- the NSW Bar Association;
- the Law Society of New South Wales;
- the Institute of Arbitrators and Mediators Australia;
- the Australian Commercial Disputes Centre;
- LEADR; and
- the Australian Branch of the Chartered Institute of Arbitrators.

**The nominating entities' fees for mediation**

25. The Court may request that the President or Chief Executive Officer of any of the nominating entities consider providing mediation on a reduced or no fee basis.

**Role of the nominating entity**

26. Each of the nominating entities establishes a panel of suitable persons to whom Court ordered mediations may be referred. Each nominating entity regularly reviews its panels.

27. Within seven days of receiving the Joint Protocol Referral Information the President, the Chief Executive Officer or a delegate nominates in writing a person who:

- is a suitably qualified and experienced person, and
- consents to the nomination as the mediator in the proceedings.

The representative of the nominating entity then provides the telephone number, facsimile number and email address of the mediator to the Principal Registrar.

28. The person nominated is a person named on the panel of a nominating entity, but not necessarily on the panel of the nominating entity to which the Principal Registrar sent the Joint Protocol Referral Information.

29. Where the Court has requested mediation on a reduced or no fee basis the nominating entity endeavours to nominate a mediator who will provide mediation services on this basis.

30. A co-mediator can also be nominated if the President, Chief Executive Officer or delegate considers that this is warranted.

**Effective date of appointment of mediator**

31. On receipt of a nomination under paragraph 27 (and under paragraph 29, if applicable), the Principal Registrar promptly, by letter, facsimile or email, informs the parties to the proceedings of the name, telephone number, facsimile number and email address of the mediator (and any co-mediator).

32. When the Principal Registrar has dispatched the notifications referred to in paragraph 31, the person nominated by the President or the Chief Executive Officer of the nominating entity as the mediator (and any co-mediator so nominated) is deemed to have been appointed the mediator (and the co-mediator, if applicable) in the proceedings under section 26 of the CPA.

**Request for review of appointment of mediator**

33. A party to the proceedings may request the judicial officer who made the order referring the proceedings to mediation to review the appointment of the mediator (and the co-mediator, if applicable). Such a request should:

- be in writing;
- be received by the Principal Registrar within 10 days of dispatch of notifications under paragraph 31;
- state with specificity the objections that the party has to the mediator that has been appointed; and
- be served by the party making the request on the other parties to the proceedings.

**Evaluation of referral of proceedings to mediation and entry of any consent orders**

34. Within 14 days after the conclusion of the mediation, the plaintiff in writing informs the Principal Registrar of the following ("**Joint Protocol Evaluation Information**"):

- the name and file number of the proceedings;
- the name of the mediator;

- the date(s) of the mediation;
- the number of hours occupied by the mediation;
- whether the parties were represented at the mediation by solicitors;
- whether the parties were represented at the mediation by counsel;
- whether the parties agreed to settle, or partly settle, the proceedings or whether no resolution of any issues was achieved;
- to the extent that any terms of settlement are not confidential to the parties, the terms of settlement; and
- if the parties agreed to the Court making orders, a signed consent order in a form suitable for entry by the Registry.

35. On receipt of the Joint Protocol Evaluation Information, the Principal Registrar will forward a copy of that information to the relevant nominating entity.

J J Spigelman AC  
Chief Justice of New South Wales  
17 August 2005

**Related information**

Practice Note SC Gen 6 was commenced and issued on 17 August 2005.  
This Practice Note replaced Former Practice Note No. 125 on 17 August 2005.

See also:  
Practice Note SC Gen1 Supreme Court – Application of Practice Notes  
*Civil Procedure Act 2005*