

INDEPENDENT STATE OF PAPUA NEW GUINEA

RULES  
RELATING TO THE ACCREDITATION, REGULATION, AND CONDUCT OF MEDIATORS

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INDEPENDENT STATE OF PAPUA NEW GUINEA

**RULES**

**RELATING TO THE ACCREDITATION, REGULATION,  
AND CONDUCT OF MEDIATORS**

**Preamble**

Being an instrument to provide for Court Rules regulating Alternative Dispute Resolution (ADR) and to –

establish a system of accreditation, standards and code of conduct for mediators and providers of other forms of ADR for a proper conduct of mediation and other forms of ADR and to promote integrity and respect for a system of court annexed ADR;

and to give effect to the Constitutional assertion to resolve disputes peacefully through consensus.

MADE by the Judges pursuant to Section 184 of the Constitution and Section 7E of the National Court Act, Chapter 38 as amended.

**PART I.—PRELIMINARY.**

**1. Short Description and Commencement Date.**

These Rules may be called as the “ADR Rules” which shall be read as one and in conjunction with the National Court Rules and shall come into operation upon their signing by the Chief Justice and the Judges.

**2. Application.**

The Chief Justice may from time to time determine that such of these Rules shall not apply to proceedings filed in such registries of the National Court, and for such periods of time, as the Chief Justice may specify.

**3. Interpretation.**

In these Rules, unless the contrary intention appears from the context,

(1) all reference to:

- (a) any office or official means the relevant office or officer so recognised in Papua New Guinea;
  - (b) all reference to any rules means these Rules;
  - (c) one gender includes the other; and
  - (d) the singular word includes the plural and vice versa.
- (2) the words —
- “accreditation” means the process of accrediting a mediator under Division 2 of Part III of these Rules;
  - “accreditation criteria” means the requirements for the education, accreditation, and renewal of accreditation of mediators pursuant to these Rules;
  - “Act” means the National Court Act, Chapter 38 as amended;
  - “ADR” means alternative dispute resolution which includes mediation, arbitration, conciliation, expert case appraisal, early neutral evaluation, any combination of them and such other forms of dispute resolution that are different from the formal court process and includes any process undertaken to avoid or otherwise minimise prolonged disputes in the future;
  - “advisory” means an ADR process in which a mediator is able and qualified to give advice to parties in a dispute to enable them to reach an agreement settling their dispute;
  - “any other officer” means any administrative officer within the National Court;
  - “Authority” means the Complaints Authority established under these Rules;
  - “arbitration” means a process which is similar to a court process in which the parties to a dispute appoint a neutral third party dispute resolution practitioner (the arbitrator) to whom the parties present their evidence and arguments and the arbitrator makes a decision for them which is binding and can be enforced as a court order subject to meeting certain procedural requirements;
  - “blended process” means a form of ADR that combines two or more forms of ADR employed to help resolve a dispute or conflict;
  - “Board” means the Appeals Board established under these Rules;
  - “Code of Conduct” means the Code of Professional Conduct for Mediators contained in Part VI of these Rules;
  - “Committee” means the ADR Committee established under these Rules;
  - “complaints handling authority” means each of the Complaints Officer, the Authority and the Board;
  - “Complaints Officer” means the person appointed as such under these Rules;
  - “conciliation” means a less formal process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give

- expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement;
- “Council” means the Mediator Accrediting Council established under these Rules;
- “Court” means the National Court;
- “customary form of mediation” means a form of mediation that is based on a customary process which may involve the provision of some wise counsel by the mediator based on experience, knowledge and exposure to the subject matter in dispute between the parties;
- “date of accreditation” means the date when the Council decides to accredit a mediator;
- “early neutral evaluation” is a process in which the parties to a dispute present, at an early stage in attempting to resolve the dispute, arguments and evidence to a dispute resolution practitioner. That practitioner makes a determination on the key issues in dispute, and most effective means of resolving the dispute without determining the facts of the dispute;
- “expert case appraisal” means a process in which a dispute resolution practitioner (the case appraiser) usually chosen on the basis of their expert knowledge of the subject matter, investigates the dispute and provides advice on possible and desirable outcomes and the means whereby these may be achieved;
- “external mediators” means mediators who are not employed within the Court;
- “improper conduct” means conduct that is in breach of any of these Rules other than the duties and responsibilities imposed on mediators under Part IV (Code of Conduct of Mediators) of these Rules;
- “intake” means those things set out in Rule 54 (2) and (3);
- “independent assessor” means a person who is qualified and experienced as a mediator who is experienced and competent to properly assess and determine the competence of other mediators;
- “internal process” is a form of ADR arranged by an organisation to resolve a dispute between members of, or persons employed in, that organisation;
- “internal mediators” means mediators who are also Judges and Registrars and others employed within the Court;
- “Judge Administrator” means the judge appointed by the Chief Justice to be in charge of the ADR track in the National Court;
- “mediator” means:
- (1) a neutral third party who helps and facilitates parties in a dispute to communicate with each other and help them to, identify, clarify and explore issues, develop and evaluate options, consider alternative process for bringing their dispute or conflict to a conclusion and enable them to reach an agreement or make their own decisions about how to forward and or enhance their communication in a way that addresses their mutual needs with respect to their individual interests with future actions and outcomes and enable them to reach their own agreement or make a decision based on the principle of self determination; and
  - (2) a neutral third party who has the necessary expertise and may with the consent of the parties use a blended process and
  - (3) includes a provider of other forms of ADR;
- who is accredited as such under these Rules;

- “mediation” means the process a mediator uses to help the parties in a dispute to identify their disputed issues, develop and evaluate options, and enable them to make their own decisions about how to forward and or enhance their communication in a way that addresses their mutual needs with respect to their individual interests with future actions and outcomes and enable them to reach their own agreement or make a decision based on the principle of self determination and includes blended processes and customary forms of mediation;
- “misconduct” means conduct that is in breach of any of the duties and obligations imposed upon mediators by Part IV (Code of Conduct of Mediators) of these Rules;
- “Originating Summons” means the mode of commencement of proceedings as provided for under Division 4 of Order 4 of the National Court Rules;
- “participants” includes mediators, parties and all other persons present and participating at mediation;
- “party or parties” means the parties to any proceedings in Court or a dispute.
- “publication” means a book, pamphlet, brochure, business card, website, newspaper, magazine, periodical, journal, gazette, directory or other printed material but not information in booklet form or other written form;
- “Rule” means these Rules; and
- “the proceedings” means proceedings out of which mediation or another form of ADR has been ordered.

## **PART II      MEDIATION IN PROCEEDINGS**

### **4.      Exhaustion of or Dispensation with Mediation.**

(1)      After the commencement of these Rules but subject to the provisions of this Rule, no further step may be taken in any proceedings after:

- (a)      the filing of the defence;
- (b)      expiry of the time for filing of the defence; or
- (c)      the first appearance in Court,

save only with the leave of the Court.

(2)      Subject to Subrules (3) and (4) on the hearing of an application for leave, the Court may make any one or more of the following orders:

- (a)      to grant leave to proceed; or
- (b)      to dispense with the requirements of Subrule (3) (b); or

- (c) that the matter be mediated and a mediator appointed in accordance with Rules 5 and 6 respectively,.
- (3) Leave may not be granted under Subrule (2) (a) unless:
- (a) The parties establish to the Courts satisfaction that a meritorious issue exists warranting judicial consideration and determination; and
  - (b) the applicant for leave establishes to the satisfaction of the Court that it has made real and good faith effort to resolving the dispute through mediation supported by a certificate by a mediator in Form 1.
- (4) In determining whether to order mediation and the appointment of a mediator or to dispense with the requirement for mediation, the Court shall take into account the matters set out in Rule 5 (3).

## **5. Ordering Mediation**

- (1) At any time following commencement of proceedings the parties may agree to participate in a mediation of the issues to which the proceedings relate.
- (2) The Court shall on the request of all parties to a proceeding or on the application of any party to a proceeding or on its own motion order mediation for
- (a) a resolution of all or any parts of the proceedings; or
  - (b) failing settlement, identify and limit the real and meritorious issues in the proceedings that warrant judicial consideration and determination; and or
  - (c) enable the parties to reach consensus on the conduct of litigation.
- (3) At the time of considering whether or not to order mediation, the Court shall have regard to the following factors:
- (a) whether the mediation will result in prejudice to the rights of any of the parties;
  - (b) whether it is reasonably within the ability and the power of a party to comply with an order for mediation having regard to matters such as any urgency in the proceedings, costs, multiplicity of parties or lack of resources;
  - (c) whether the mediation will require substantial work which could be better directed to preparation for trial;
  - (d) the nature of the relief sought and the suitability of a mediation result;

- (e) the timing of the mediation including by reference to the status of the pleadings, discovery and the alternatives of when trial is likely and the length and costs of trial;
  - (f) the attitude of the parties to mediation though not significant;
  - (g) whether mediation was earlier attempted and whether any good purpose will be served by an order for further mediation;
  - (h) the appropriateness of deferring any final decision on a application for orders for mediation; and
  - (i) what the interest of justice in the particular circumstances of the case require.
- (4) If the Court decides to make an order for mediation, the Court shall ensure to incorporate in its order for mediation the:
- (a) matters specified in Section 7B (4) of the Act; and
  - (b) make an order in terms similar to one in Form 3 in Schedule 2.
- (5) Making an order for mediation does not:
- (a) automatically operate as a stay of the proceedings; and
  - (b) imply any authority for the mediator to impose a decision on the parties.
- (6) The Court may revoke or vary an order for mediation at anytime but before the conclusion of the mediation.

## **6. Appointment of Mediators**

- (1) For the purpose of a mediation ordered under Rule 5 and subject to this Rule, the Court may on its own motion or on the application of all or any of parties to the proceedings appoint a mediator.
- (2) The parties to a proceeding may elect whether to have their mediation conducted by an internal or external mediator.
- (3) Where the parties wish to have the mediation conducted by an external mediator, but are unable to agree on a mediator, the Court will on the application of any party or on its own motion appoint an external mediator, unless the Court is satisfied that the interests of the administration of justice require otherwise.



(4) Where any party wishes to have the mediation conducted by an internal mediator, the Court will appoint an internal mediator where one is readily available or failing such availability appoint an external mediator.

(5) Provided the presiding Judge is accredited as a mediator under these Rules, the provisions of Subrules (1), (2) and (3) do not preclude the application of the provisions of Section 7B (3) (a) of the Act.

(6) Where a mediation conducted by a Judge fails to settle a matter, the provisions of Section 7D (4) of the Act applies without limiting:

(a) the Judge's powers to make such orders and issue such directions as are necessary to have the proceedings progressed to trial expeditiously; and  
or

(b) the parties right to allow by their consent for the Judge to preside and/or make a binding decision for them.

(7) The Court may revoke or vary an order for the appointment of a mediator at anytime but before the conclusion of the mediation.

## **7. Mediators Fees**

(1) The fees for a mediation conducted by an internal mediator shall be in accordance with those prescribed in Schedule 3.

(2) An external mediator shall be entitled to charge and receive such reasonable fees agreed upon between the parties and the mediator.

(3) Subject to any agreement between the parties or order of the Court, the fees shall be paid equally by the parties to the proceedings, and the liability of the parties for these fees shall be joint and several.

(4) No mediation shall commence unless all fees have been paid or by arrangement satisfactory to the mediator and the parties have been made in the case of mediation by an external mediator.

## **8. Immunity of Mediators**

Without affecting the operation of the provisions of Part V (Complaints Handling) of these Rules, a mediator who conducts mediation in accordance with these Rules, has the same protection and immunity as a Judge performing judicial duties and functions.

## **9. Mediation Process.**

- (1) Rules 8 -10 inclusive apply to mediations where the mediator is appointed in accordance with Rule 6.
- (2) Within seven days of receiving notification of appointment pursuant to Rule 6, the mediator must either decline the appointment, or accept the appointment and notify the parties in writing of the time and place for the conduct of the mediation.
- (3) Unless the Court otherwise directs, the parties and the mediator must conduct the mediation with the object, so far as practicable, of completing the mediation within 2 calendar months of appointment of the mediator.
- (4) The mediation shall commence with the first contact between the mediator and any one of the parties, and shall include all communications between the mediator and any of the participants in the mediation.
- (5) The mediator shall file in the Court a certificate in form 2 of Schedule 2 to these Rules within seven business days of the completion of the mediation.

#### **10. Parties' Duties**

- (1) Each party shall, subject to any directions from the Court or the mediator, take such steps as may be necessary to ensure that the mediation conference occurs as soon as possible.
- (2) Unless the Court or the mediator otherwise directs, each mediation session shall be attended by each party or, if a party is a corporation, by an officer of the corporation having authority to settle the proceedings.
- (3) If the conduct of the proceedings by a party is controlled by an insurer, each mediation session shall also be attended by an officer of the insurer having authority to settle the proceedings.
- (4) A person who is required by these rules to attend a mediation session must attend in person unless granted leave by the Court or the mediator to attend by telephone, video link, or other form of communication in consultation with the other party.
- (5) Each party must participate in good faith in the mediation and not impede the mediator in conducting and completing the mediation process within the time set by these Rules or by the Court.
- (6) Where the mediator forms an opinion that a party has impeded the mediation, or has not participated in good faith, the mediator may provide a report to the Court of this opinion and the circumstances upon which it is based. Except to this extent, the mediator shall not include in the report the substance of any discussions or negotiations between the parties relevant to the resolution of the issues in the proceedings.

(7) Where the Court is satisfied that a party has not participated in good faith in the mediation or has impeded the mediation, it may:

- (a) order that any claim for relief by the defaulting party is stayed until further order;
- (b) take the defaulting party's conduct into account in awarding costs in the proceedings; or
- (c) make such further or other order as it may think appropriate in the proceedings.

(8) A party may be accompanied by that party's lawyer at any mediation session and such other persons as the mediator may approve.

#### **11. Confidentiality.**

(1) All participants in a mediation are subject to a duty of confidentiality and shall not, without the consent of all parties to the proceedings, disclose to any person not a party to the proceedings the nature or effect of any discussions and any documents produced during the mediation that are not otherwise discoverable.

(2) Nothing said, or the nature or effect of any documents produced, during discussions in the course of the mediation between the Mediator and any participant in the absence of any one or more of the parties shall be disclosed directly or indirectly by any participant to the absent parties without the consent of all participants in those discussions.

#### **12. Enforcement.**

(1) Where in the course of a mediation, the parties agree on a resolution of all or part of the proceedings, the agreement shall be written down and signed by or for each party.

(2) Any party to a mediation conducted by a mediator may apply to the Court for an order giving effect to an agreement reached during the mediation by:

- (a) notice of motion if the proceedings are current; or
- (b) Originating Summons if the proceedings have been concluded.

(3) Subject to sub rule (2) an agreement reached during the mediation shall have the same force and effect, and may be enforced in the same manner, as if it were an agreement reached otherwise than during a mediation.

#### **13. Admissibility**

Where a mediation has been conducted:

- (a) in accordance with Rule 9, or
- (b) in accordance with an agreement between the parties including a provision to a like effect to Rule 11,

no evidence shall be admitted in the proceedings or any other proceedings of anything said or done by any person at the mediation.

#### **14. Directions**

Subject to Rule 11, at any time following the commencement of proceedings any party or mediator may apply to the Court for directions in relation to any matter relating to the mediation of issues in those proceedings.

### **PART III — ACCREDITATION MECHANISM AND PROCESS.**

#### **Division 1 - General**

#### **15. Holding out and practicing as a Mediator**

- (1) No person shall hold himself or herself out as a mediator, unless accredited as such pursuant to these Rules.
- (2) A person may be accredited as a mediator if that person meets the accreditation criteria as set out in Schedule 1 to these Rules or such other requirements as the Council considers appropriate from time to time for the particular kind of accreditation applied for.

#### **Division 2 - Accreditation System, Qualification, Process and Accreditation**

#### **16. Establishment of the Accreditation Process**

For the purposes of accreditation of mediators, there is established a system of accreditation by which the Council receives and determines all applications for accreditation.

#### **17. Qualification for Accreditation**

Persons shall be qualified for accreditation (including renewal of accreditation) as a mediator if they:

- (a) are fit and proper persons to be accredited as a mediator as provided for Rule 22; and
- (b) meet the accreditation criteria as determined by the Council in accordance with Rule 15 (2) for the form of ADR for which accreditation is sought.

## **18 Application for Accreditation**

- (1) Subject to Subrule (2) a person may apply for accreditation as a mediator by lodging an application with the Council.
- (2) All applications shall clearly specify the form of ADR for which accreditation is sought and shall be supported by:
  - (a) Evidence demonstrating that the applicant is a fit and proper person in accordance with Rule 22;
  - (b) Evidence demonstrating satisfaction with the accreditation criteria relevant to the form of ADR for which accreditation is sought; and
  - (c) a detailed curriculum vitae.

## **19. Certification as a Mediator**

- (1) Subject to Subrule 2, where the Council decides to accredit an applicant:
  - (a) the accreditation shall be in respect of such form of ADR and subject to such conditions and restrictions as the Council shall think appropriate; and
  - (b) the Council shall issue an appropriate certificate of accreditation under the hand of the chair and two other members or in the absence of the chair three members of the Council.
- (2) Where an application is based on residence or membership of a particular village or community, the applicant's accreditation shall be subject to a restriction of practice to that village or community.
- (3) For the purposes of considering and determining an application for accreditation, the Council may at its discretion request a person to observe and report to the Council the applicant's conduct either in role play or with the consent of the parties, in live conduct of mediation on location or captured on DVD, Video and or such other forms of electronic media as may be directed by the Council.

(4) The Council shall keep and publish at least once each calendar year a list of all accredited mediators and the form of ADR for which they are accredited.

## **20. Term and Renewal of Accreditation.**

(1) Subject to Subrule (4), accreditation shall be for a period of 2 years, and shall be renewable on application to the Council providing the applicant remains a fit and proper person to be accredited, and satisfies all other requirements for continuing accreditation.

(2) Where an application for renewal of accreditation is made within the 2 year period referred to in Subrule (1), the applicant's accreditation shall be deemed to continue until the application for renewal is decided by the Council.

(3) The Council may in its discretion accept an application for renewal notwithstanding that the applicant's accreditation has expired.

(4) An accreditation pursuant to Rule 19(2) shall have no maximum term and shall not require renewal save where a restriction or condition attached to a particular accreditation requires otherwise.

## **21. Refusal of Accreditation.**

If the Council decides not to grant accreditation, or grants accreditation subject to conditions or restrictions, it shall inform the applicant of its decision and the reasons for its decision.

## **22. Fit and Proper Person**

(1) In determining whether applicants are fit and proper persons to be accredited as mediators, regard shall be had to:

- (a) their probity;
- (b) their competence and soundness of judgment for fulfilling the responsibilities as a mediator;
- (c) the diligence with which they are fulfilling or likely to fulfill those responsibilities;
- (d) any record of any convictions or charges pending whether criminal, administrative or other misconduct;
- (e) whether the interests of mediators or a system of ADR are, or are likely to be, in any way threatened by their position as mediators;
- (f) their experience if any, within a system of dispute or conflict resolution;

- (g) their knowledge of the applicable laws, rules and regulations regarding the particular form of ADR accreditation applied for;
  - (h) any history of physical or mental health or serious behavioral problems; and
  - (i) any engagement in any business practices appearing to be deceitful or oppressive or otherwise improper (whether unlawful or not) or which otherwise reflect discredit on their conduct.
- (2) In addition to the foregoing, regard may also be had to such matters and evidence as may be relevant and obtained from any source.

### **Division 3 - ADR Committee**

#### **23. Establishment of the ADR Committee**

An ADR Committee is hereby established.

#### **24 Membership of the Committee.**

- (1) The Committee shall consist of:
  - (a) at least two Judges appointed by the Chief Justice who shall appoints one of them as the chair of the Committee;
  - (b) the Chief Magistrate or the Chief Magistrate's nominee;
  - (c) the Dean of the Law School of the University of Papua New Guinea;
  - (d) the Director of the Legal Training Institute;
  - (e) two lawyers representing the private bar appointed by the Council of the PNG Law Society;
  - (f) the Solicitor General or his or her nominee and another lawyer in the Public Service nominated by him or her;
  - (g) one person representing mediators and providers of other forms of ADR in the public sector appointed by the Chief Justice; and
  - (h) one person representing mediators and providers of other forms of ADR in the private or non government sector appointed by the Chief Justice.
  - (j) one other person appointed by the chair of the Committee in consultation with the members of the Committee.

(2) Any vacancies in the membership of the Committee shall be resolved by the relevant appointing authority within one month of the vacancy, failing which the chair in consultation with the Committee shall make an appointment to fill the vacancy.

(3) Only where the Committee considers appropriate, it may by absolute majority vote, appoint not more than two other persons who have a particular skill, knowledge and or experience and are willing to assist the Committee in carrying out its functions.

## **25. Loss of membership.**

(1) A member of the Committee other than a person who is a member by virtue of office who fails to attend 3 consecutive meetings of the Committee without excuse for absence satisfactory to the chair ceases to be a member of the Committee and the Committee shall request the relevant appointing or nominating authority to appoint or nominate another person to replace that member.

(2) Subject to Subrule (3), the term of a person's nomination or appointment shall not exceed 3 years, but that person shall be eligible for reappointment or renomination.

(3) Where a person's term referred to in Subrule (2) has expired and those responsible for making an appointment or nomination have not done so, that person will continue as a member of the Committee until the appointment or nomination is made.

## **26. Service of documents.**

Service upon the Committee of any order, notice or other document shall be executed by delivering the same or by sending the same by registered post to the Secretary at the office of the Committee.

## **27. Functions of the Committee.**

(1) The functions of the Committee are to:

- (a) promote the interest of the public and the interest of mediators in relation to mediation and other forms of ADR in a manner that is fair and just to all and generally to promote and uphold good and acceptable standards of practice of mediation and other forms of ADR;
- (b) promote and encourage proper conduct by mediators;
- (c) suppress illegal, dishonourable, improper and unprofessional practices and conduct by mediators;
- (d) preserve and maintain the integrity and status of mediators;



- (e) promote opportunities for the acquisition and diffusion of knowledge of the law and the proper practice of mediation and other forms of ADR;
- (f) package and deliver or sanction the packaging and delivery of trainings, conferences, workshops and such other educational programs with a view to promoting proper conduct of mediation and other forms of ADR;
- (g) initiate or contribute to the promotion, development and reform of the laws concerning mediation and other forms of ADR practices for the better conduct and provision of mediation and other forms of ADR services; and
- (h) provide a means for the amicable settlement of professional differences and disputes between mediators:
  - (i) provide advice to the Council as requested from time to time; and
  - (ii) have such other functions as are conferred upon it by the Chief Justice, by this instrument, the Act as amended or any other law.

**28. Powers of the Committee.**

The Committee has all powers necessary to carry out its functions.

**29. Meetings of the Committee.**

- (1) The Committee shall meet at such times, places and days as the chair determines in consultation with the members of the Committee for the efficient conduct of the Committee's meetings.
- (2) Five members of the Committee shall constitute a quorum.
- (3) The chair of the Committee shall preside and:
  - (a) all matters shall be decided by a majority of the votes of the members present and voting; and
  - (b) the chair has a deliberative and, in the event of an equality of votes on a matter, also a casting vote.
- (4) Minutes of each meeting shall be—
  - (a) kept by the Secretary;
  - (b) confirmed by the Committee at the next meeting of its previous meetings minutes; and

(c) signed by the chair of the Committee.

(5) In the absence of the chair from a meeting, those present shall elect a member who will act as chair of the Committee for the duration of the meeting.

**30. Protection of the Committee.**

No act done or proceeding taken under these Rules shall be questioned on the ground:

- (a) of the existence of any vacancy in the membership, or any defect in the constitution, of the Committee; or
- (b) of any omission, defect or irregularity not affecting the substantive merits of the case.

**31. Protection of the Committee Members.**

No action, suit, prosecution or other proceeding shall be brought or instituted personally against any member of the Committee in respect of any act done *bona fide* in pursuance of these Rules or in pursuance of the functions and powers of the Committee.

**32. Service of the Committee.**

(1) Unless otherwise provided for, the Assistant Registrar ADR shall serve as the Secretary of the Committee.

(2) Subject to the Salaries and Conditions Monitoring Committee Act 1988, the terms and conditions of appointment of the Secretary are as determined by the National Judicial Staff Service.

(3) The Secretary:

- (a) is the Chief Executive Officer of the Committee;
- (b) is the head of the service of the Committee; and
- (c) shall, subject to the directions of the Committee through its chair, administer the affairs of the Committee.

**33. Appointment of officers of the Committee**

(1) Other staff employed within the National Court under its ADR track or division shall serve the Committee in such manner and capacity as the Committee through its chair may direct in consultation with the Chief Justice and Secretary of the National Judicial Staff Services.

(2) Subject to the Salaries and Conditions Monitoring Committee Act, the terms and conditions of appointment of persons appointed under Subrule (1) are as determined by the National Judicial Staff Service.

### **Division 3 - Accreditation Council**

#### **34 Accreditation Council.**

A Mediator Accrediting Council is hereby established.

#### **35 Membership of the Council.**

The Council shall consist of the:

- (a) Chief Justice who shall be the chair of the Council;
- (b) Deputy Chief Justice;
- (c) Chair of the Committee;
- (d) Registrar of the National and Supreme Courts; and
- (e) Chief Magistrate.

#### **36. Service of documents.**

Service upon the Council of any order, notice or other document shall be executed by delivering the same or by sending the same by registered post to the Secretary at the office of the Council.

#### **37. Functions and Powers of the Council.**

- (1) The Council shall:
  - (a) receive and determine all applications for accreditation pursuant to these Rules;
  - (b) refer any complaint against any mediator for processing and resolution under Part IV;
  - (c) support the Committee in the discharge of the Committee's functions and powers as specified in these Rules and ensure it has such facilities and resources as are necessary to carry out its powers and functions;
  - (d) take all steps necessary and within its powers to enable the Committee to carry out its functions and powers effectively and efficiently.

- (e) publish or arrange for the publication of such written material as it considers of benefit to the public or to mediators;
  - (f) provide or arrange through the Committee for the provision of educational and training programs for mediators;
  - (g) determine the accreditation criteria to be applied for time to time; and
  - (h) have all powers necessary to carry out its functions.
- (2) Until the Council determines the accreditation criteria, the accreditation criteria set out in Schedule 1 to these Rules shall be deemed to be the Council's determination at the time of commencement of these Rules.

**38. Delegation.**

- (1) The Council may appoint subcommittees and delegate to those subcommittees such of its powers as it may from time to time determine.
- (2) A subcommittee may consist of one or more members.
- (3) At least one member of the subcommittee shall be a member of the Council. The chair of the subcommittee shall be appointed by the Council.

**39. Meetings of the Council.**

- (1) The Council shall meet at such times, places and days as the chair determines for the efficient conduct of the Council's meeting.
- (2) Any three members of the Council which shall include the Chief Justice or the chair of the Committee shall constitute a quorum.
- (3) The chair of the Council shall preside and:
  - (a) all matters shall be decided by a majority of the votes of the members present and voting; and
  - (b) the chair of the Council has a deliberative and, in the event of an equality of votes on a matter, also a casting vote.
- (4) Minutes of each meeting shall be:
  - (a) kept by the Secretary;

- (b) confirmed by the Council at the next meeting of the Council; and
- (c) signed by the chair of the Council.

**40. Protection of the Council.**

No act done or proceeding taken *bona fide* under these Rules shall be questioned on the ground:

- (a) of the existence of any vacancy in the membership, or any defect in the constitution, of the Council; or
- (b) of any omission, defect or irregularity not affecting the merits of the case.

**41. Protection of Councillors.**

No action, suit, prosecution or other proceeding shall be brought or instituted personally against any member of the Council in respect of any act done *bona fide* in pursuance of these Rules.

**42. Service of the Council**

- (1) Unless otherwise provided for, the Assistant Registrar ADR shall serve as the Secretary of the Council.
- (2) Subject to the Salaries and Conditions Monitoring Committee Act 1988, the terms and conditions of appointment of the Secretary are as determined by the National Judicial Staff Services.
- (3) The Secretary
  - (a) is the Chief Executive Officer of the Council;
  - (b) is the head of the service of the Council; and
  - (c) shall, subject to the directions of the Council, administer the affairs of the Council.

**43. Appointment of officers of the Council.**

- (1) Other staff employed within the National Court under its ADR track or division shall also serve the Council in such manner and capacity as the Council may direct in consultation with the Judge Administrator.

(2) Subject to the Salaries and Conditions Monitoring Committee Act, the terms and conditions of appointment of persons appointed under Subrule (1) are as determined by the national Judicial Staff Service.

## **PART IV. CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS**

### **Division 1 - Preliminary**

#### **44. Application.**

- (1) This Code shall be read and applied in conjunction with accreditation criteria established by these Rules.
- (2) In the event of any conflict between any provision in this Code and the Act or any other Act under which a mediator practices, the provision of the Act or other Act shall prevail to the extent of any such inconsistency.
- (3) This Code is in addition to and not in derogation of any applicable statute based professional conduct rule or code to which a mediator is subject and any such professional rule or code shall to the extent of any inconsistency override the provisions of this Code.

### **Division 2 - Duties and Responsibilities of Mediators**

#### **45. Duty of every Mediator.**

It is the duty of mediators :

- (a) not to engage at any time in conduct (whether in pursuit of their profession or otherwise) which is:
- (i) illegal;
  - (ii) dishonest;
  - (iii) unprofessional;
  - (iv) prejudicial to the administration of justice; or
  - (v) may otherwise bring the mediation profession into disrepute;
- (b) to observe the ethics and etiquette of the mediation profession as set out in this Code;
- (c) to be competent in all professional activities as a mediator;

- (d) to respond within a reasonable time and in any event within 14 days or such further time as may be extended by the Complaints Officer or the Complaints Authority, to any requirement of the Council for comments or information and in doing so, shall furnish in writing a full and accurate account of their conduct:
    - (i) in relation to the matter the subject of a complaint; or
    - (ii) in relation to any other matter the subject of an investigation or inquiry by the Council; and
- to comply with the relevant provisions of the Act, and this Code.

**46. Maintaining professional integrity.**

- (1) Subject to Subrules (2) and (3) a mediator shall not:
  - (a) provide any advice or opinion or an evaluation of a matter in dispute;
  - (b) attempt to impose a decision on the parties; or
  - (c) knowingly:
    - (i) assist; or
    - (ii) seek to induce, a breach of this Code by another mediator.
- (2) Subrule (1) does not preclude a mediator from providing information or referring parties to information that is generally available, exercising care not to provide any prescriptive advice or opinion.
- (3) The provisions of Subrule (1) do not apply to cases in which a mediator is providing a blended form or a customary form of mediation, where the mediator shall be at liberty to provide such advice or opinion as fairly and generally as is possible with good reason to help determine the dispute between the parties, provided:
  - (a) the mediator is an expert in the area of dispute (except in the case of customary process) and has the appropriate knowledge, experience and exposure on the matters in dispute between the parties;
  - (b) the participants have requested such advice or opinion and/or the parties have given prior consent for the provision of such advice or opinion; and
  - (c) the information or advice or opinion provided:

- (i) is within the mediators qualification and competence; and
  - (ii) does not amount to an interpretation of a law, a statement or behaviour.
- (4) Mediators shall take reasonable care to ensure that their partners, associates or employees do not commit an act or omission which would be a breach of this Code if committed by a mediator.
- (5) Mediators shall properly supervise all professional work carried out for them and on their behalf by a person who is not an accredited mediator.
- (6) Where Mediators become aware of:
  - (a) a breach of any provision of the Act or any other Act;
  - (b) a breach of the accreditation criteria; or
  - (c) a breach of this Code by another mediator,they shall report the matter to the Council.
- (7) A mediator shall not permit a party to make gifts or lend money:
  - (a) to the mediator or a member of his or her family;
  - (b) to a partner of the mediator or a member of that partner's family; or
  - (c) to a company (other than a company the shares in which are listed on any stock exchange) in which any of the parties referred to in paragraphs (a) and (b) has a significant beneficial interest.
- (8) Mediators shall take all reasonable steps to ensure that they and their partners and or associates do not engage in any conduct that brings into disrepute their integrity as mediators and the general good standing and repute of the mediation profession.
- (9) Mediators shall ensure that the participants are aware of the interests of vulnerable people such as children, aged parents, and others who may be affected by the dispute.

#### **47. Competence**

- (1) Mediators shall maintain their competency levels, by having the necessary knowledge and skills and ethical standards as specified respectively in Subrules (2), (3) and (4) and by undertaking amongst others, the following steps:



- (a) regular professional debriefing following solo or co-mediations through individual or group session with another experienced mediator, the purpose of which is to:
    - (i) address matters relating to skills development;
    - (ii) address conceptual and professional issues;
    - (iii) address ethical dilemmas; and
    - (iv) ensure the ongoing emotional health of mediators.
  - (b) participate in continuing professional development training; and
  - (c) where possible, participate in programs of peer consultation and help train and mentor the work of less experienced mediators.
- (2) A mediator's knowledge must include:
- (a) the nature and causes of conflict, including the dynamics of power and violence;
  - (b) appropriateness or inappropriateness of mediation;
  - (c) pre-mediation preparation, screening and intake;
  - (d) communication patterns in conflict and negotiation situations;
  - (e) negotiation dynamics in mediation;
  - (f) cross-cultural issues in mediation and dispute resolution;
  - (g) principles, stages and functions of a mediation process;
  - (h) roles and functions of mediators;
  - (i) roles and functions of support persons, lawyers and other professionals in mediation; and
  - (j) law of mediation on confidentiality, enforceability of mediated agreements and liability of mediators;
- (3) A mediator's skills must include:
- (a) preparation and dispute diagnosis in mediation;

- (b) intake and screening of both the parties and the dispute to assess suitability for mediation;
  - (c) conduct and management of the mediation process;
  - (d) appropriate communication skills, including listening, questioning, reflecting and summarising, required for the conduct of mediation;
  - (e) negotiation techniques and knowledge of the mediator's role in facilitating negotiation and problem-solving;
  - (f) mediator interventions appropriate for standard difficulties in mediation;
  - (g) potential responses to high emotion, power imbalances and violence;
  - (h) use of separate meetings and shuttle mediation; and
  - (i) asking questions about, or in appropriate circumstances, drafting mediated agreements.
- (4) A mediator's ethical understandings must include:
- (a) avoidance of conflicts of interest;
  - (b) proper and appropriate marketing and advertising of mediation;
  - (c) confidentiality, privacy and reporting obligations;
  - (d) neutrality and impartiality;
  - (e) fiduciary obligations;
  - (f) supporting fairness and equity in mediation; and
  - (g) withdrawal from and termination of the mediation process.

#### **48. Inter-professional Relationships**

- (1) Mediators shall respect other mediation professionals and other professional advisers and experts who complement their practice of mediation.
- (2) Mediators shall promote cooperation with other professionals and encourage their clients to use other professional resources when appropriate.
- (3) When disputes involve more than one facilitative or other decision-making process, mediators will keep themselves informed and keep other professional

colleagues informed about the processes taking place, having due regard to the duties of confidentiality.

(4) Mediators will consider and respond to any consultative responsibilities that extend beyond more narrowly defined obligations to facilitate a process directly between the disputants.

#### **49. Public Statements and Advertising.**

(1) A mediator who makes a public statement concerning mediation shall ensure that the statement:

- (a) has the purpose of educating the public about the mediation process as a form of dispute resolution and enable them to make informed decisions and choices concerning the resolution of their disputes or conflicts;
- (b) presents the mediation process objectively as one which seeks to empower participants directly and constitutes only one of several methods for arriving at an outcome;
- (c) is not misleading the public and or misrepresenting facts or containing any statements likely to mislead or deceive the public or create false or unjustified expectations of favourable outcomes;
- (d) does not suggest a representation of the mediation profession unless expressly authorised so to do;
- (e) does not promise or guarantee favourable outcomes; and
- (f) does not refer to any particular mediation and or participants in such a mediation.

(2) Mediators may advertise in connection with their practice whenever they think fit, by means of a transmission or publication, provided that such advertising:

- (a) is not false in any material particular;
- (b) is not misleading or deceptive or likely to mislead or deceive;
- (c) is not vulgar, sensational, of such frequency or otherwise such as would or would be likely to adversely affect the reputation or standing of the mediator or any other mediator or of the mediation profession; or
- (d) does not claim or imply superiority of the mediator over any or all other mediators.

(3) An advertisement, including a business card, may contain any information that accurately describes the mediator's name, office address or location, contact details, training and experience in the mediation process, mediation qualifications such as certifications and accreditations, appropriate professional affiliations and membership status, advantages of a mediation process, any subject expertise and any additional relevant or important consumer information.

(4) Subject to this section, mediators may in any lecture, talk, public appearance, or publication on any subject be identified by their name, firm, academic qualifications and the fact that they are a mediator.

(5) Where the subject matter or part of the subject matter of a lecture, talk, public appearance or publication referred to in Subrule (4) concerns a matter in which the mediator is or has been professionally engaged the mediator shall be confined to giving an objective account of the matter without giving undue publicity to the mediators own part in the matter and without breaching the confidentiality rules.

(6) Mediators may report on any evaluation of their services that might assist parties to better understand the mediation process.

(7) No communication of a kind referred to in this Rule by a mediator shall include any information which might permit the identification of any of the parties to a mediation, without the consent of all of those parties.

(8) A mediator shall, where possible, encourage and or participate in research that can support further professional and public education.

#### **50. Display of Sign.**

Subject to Rule 49, mediators may display or permit to be displayed on or adjacent to their place of practice such signs indicating:

- (a) that they are a mediators;
- (b) where their office is to be found; and
- (c) such other information concerning their practice as they may think fit.

#### **51. Requirement for Alterations, Withdrawal of Statement, etc**

(1) Where the Council is of the opinion that an advertisement, sign or publication contravenes the provisions of this Code, it may, by notice in writing to the mediator, direct:

- (a) the alteration, withdrawal or discontinuance of an advertisement;

- (b) the removal or alteration of a sign; or
- (c) the alteration or discontinuance of the use of a publication, by the mediator.

(2) A mediator to whom a direction has been given under Subrule (1) shall forthwith comply with the direction.

(3) If the mediator who has been served with such direction fails to comply with it within 7 days, the Council may refer the matter to the Authority to inquire into and deal with the matter at the mediator's cost.

## **52. Diligence.**

(1) Mediators shall:

- (a) always be frank and open with the participants and shall at all times give them a candid opinion as to the mediator's role; and
- (b) take such steps as are necessary and reasonably available to undertake the mediation using their best endeavours to complete the mediation as soon as possible or within such period as might be agreed to by the participants and the mediator or as might be specified in any referral.

(2) If a mediator agrees to mediate and it is or becomes apparent that he or she cannot do the work within a reasonable time, the mediator shall so inform the participants.

(3) A mediator shall not:

- (a) take unnecessary steps or do work in such a manner as to increase costs to the participants; or
- (b) agree to and undertake mediation on a matter which is beyond his or her competence.

## **53. Confidentiality and Ethical Behaviour.**

(1) A Mediator shall not directly or indirectly:

- (a) disclose to any person who is not a party to the mediation information of the participants' confidence; or
- (b) use a participants' confidence in any way detrimental to the interests of that participant or any other participant ;or

- (c) lend or reveal the contents of the papers in any brief, advice or instructions to any person, except:
  - (i) for necessary administrative, research, supervisory or educational purposes, excluding any information which might permit the identification of any of the parties to a mediation, without the consent of all of those participants;
  - (ii) with the consent of the participants to the mediation process;
  - (iii) when required to do so by law;
  - (iv) where permitted by existing ethical guidelines or requirements, or the information discloses an actual or potential threat to human life or safety; or
  - (v) where necessary for replying to or defending any charge or complaint of criminal or unprofessional conduct or professional misconduct brought against the mediator or the mediator's partners, associates or employees.
  
- (2) Before undertaking the mediation process, mediators shall:
  - (a) clarify the participants' expectations of confidentiality;
  - (b) ensure that the participants understand their duties and responsibilities of confidentiality;
  - (c) secure their agreement to the mediation process to be applied;
  - (d) if there is any written agreement to enter into the mediation, ensure that appropriate and adequate provisions are made for the confidentiality of the process;
  - (e) inform the participants of the limitations of confidentiality, such as statutory, judicially or ethically mandated reporting, such as any reporting required pursuant to professional ethical requirements; and
  - (f) inform the participants concerning the mediator's obligations of confidentiality in respect of any private session that might be conducted.
  
- (3) If subpoenaed, or otherwise notified to testify or to produce documents, the mediator shall attempt to inform the participants as soon as reasonably practicable.

(4) A mediator shall not give evidence without an order of the Court or Tribunal if the mediator reasonably believes doing so would violate an obligation of confidentiality to the participants.

(5) The mediator may include in any agreement relating to a mediation, indemnification provisions in relation to costs incurred.

(6) With the participants' consent, the mediator may discuss the mediation process with the participants' lawyers and other expert advisors where such advisors have not attended all or part of the actual mediation session.

(7) Where the participants reach an agreement in a mediation process, the substance of the proposed agreement may, with the permission of participants, be disclosed to their respective representatives, advisors or others and may be used for debriefing, research processes and discussion purposes for educational or other purposes aimed at promoting mediation, excluding any information which might permit the identification of any of the parties to a mediation, without the consent of all of those parties.

(8) Mediators shall maintain confidentiality in the storage and disposal of client records and must take all reasonable measures to ensure that their office and administrative staff maintain such confidentiality.

(9) Mediators are not required to retain documents relating to a dispute but may retain a copy of any written agreement to enter into the mediation process and any written agreement as to outcomes and notes relating to the content of the dispute, particularly where duty-of-care or duty-to-warn issues are identified.

(10) Mediators shall at all times strive to establish and maintain a relationship of trust and confidence with the parties.

(11) Mediators shall impress upon the parties that they can not serve them adequately without knowing everything that might be relevant to their case and that they should not withhold information which they might think is embarrassing or harmful to their respective interests.

### **Division 3 – Conducting a Mediation.**

#### **54. Starting a Mediation Process.**

(1) Prior to the commencement of mediations, mediators shall:

- (a) describe and explain to the participants the mediation process that is to be used;

- (b) where necessary, discuss the appropriateness of the process for the participants in light of their particular circumstances, the benefits and risks of the process, and other alternatives open to the participants;
- (c) discuss with the participants the confidentiality of the mediation and any limitations on such confidentiality;
- (d) advise the participants about how they or the mediator can suspend or terminate the mediation;
- (e) reach agreement with the participants about any costs and how such costs are to be paid;
- (f) advise the participants about any indemnity provisions contained in any agreement to mediate, for example, where a mediator seeks to be indemnified in respect of his or her costs in response to any legal costs that may be incurred by the mediator;
- (g) advise the participants of the mediator's role in relation to the provision of advice or other services;
- (h) if the mediator is also :
  - (i) a lawyer, the mediator shall inform the participants that he or she cannot provide legal advice unless using a blended process and with their clear consent and cannot represent any of the participants in any related legal action;
  - (ii) a psychologist, counsellor or therapist, he or she shall inform the participants that he or she cannot counsel or practise therapy with either or any of the participants; or
  - (iii) a professional in other fields, the mediator shall inform the participants that he or she will not provide advice or an opinion based on the mediator's professional skills and experience; and
- (i) inform the participants about the procedures and practices in the mediation, such as:
  - (i) the circumstances under which separate sessions may be held:
  - (ii) how participants may seek information and advice from a variety of sources during the process:
  - (iii) how participants may withdraw from the process:



- (iv) that participants are not required to reach an agreement;
  - (v) the opportunities for separate communication with the participants and or with their legal representatives; and
  - (vi) the circumstances in which other persons can be involved in the process, for example, the participation of experts, support persons or interpreters that may be required.
- (2) In addition to requirements of Subrule (1) the mediator shall ensure that an intake is conducted either by the mediator or some other person.
- (3) The objectives of an intake process may include, amongst others:
- (a) determination of whether mediation is appropriate;
  - (b) determination of whether variations such as the provision of interpretation;
  - (c) co-mediation and an appropriate model for the mediation are required;
  - (d) determination of whether there are any power imbalances and security issues and, if so, making provision to adequately address those issues;
  - (e) assisting the participants to prepare for the process;
  - (f) ensuring that, by receiving relevant advice participants are in a better position to make an informed decision when attending a mediation;
  - (g) ensuring that every participant receives information about the roles of each party in the mediation, which may involve questions relating to the role of lawyers, support people and others;
  - (h) checking whether any information needs to be exchanged, how this can be done and what information, documents or things need to be available during the mediation process;
    - (i) settling any preliminary procedural issues; and
    - (ii) determination of whether the process will be confidential and if it is an internal process, what reporting will take place;
  - (i) confirmation that the participants will have authority to negotiate;
  - (j) clarifying the terms of any agreement to enter into the process;

- (k) settling venue and timing issues; and
  - (l) explaining where or how the participants can access information and copies of the accreditation criteria and these Rules and providing them with the copies of the criteria and these Rules.
- (4) Where possible, the participants and the mediator shall endeavour to execute an agreement to enter into mediation.
- (5) If the participants and the mediator are not able to execute an agreement in terms of Subrule (4) the mediator shall ensure that an explanation to the participant and the participants' understanding of the mediation process including the confidential nature of the process, is recorded.

#### **55. Power Issues**

- (1) Where in a dispute there exists serious power imbalance, safety concerns or issues of control or intimidation, the mediator shall not proceed with the mediation, unless the requirements of Subrule (2) are satisfied.
- (2) Where there exists any power imbalance, the mediator shall not undertake the mediation unless the mediator has completed training that assists him or her to recognise power imbalance and issues relating to control and intimidation and take the steps that are appropriate to manage the mediation process.
- (3) If at any time during the mediation process, abuse is present, implied or threatened, the mediator shall take appropriate measures to ensure the safety of participants by, inter alia:
- (a) immediately activating appropriate pre-determined security protocols;
  - (b) using video conferencing;
  - (c) requiring separate sessions with the participants;
  - (d) enabling a friend, representative, advocate, or legal representative to attend the mediation sessions;
  - (e) referring the participants to appropriate resources or authorities to deal with the issues presented if they go beyond the mediator's abilities;
  - (f) suspending or terminating the mediation session, with appropriate steps to protect the safety of the participants; or
  - (g) any other personal protective and screening arrangements.

**56. Impartiality and Conflict of Interest.**

(1) A mediator shall conduct the mediation process in an impartial manner and adhere to the Mediator Standards and this Code and must avoid:

- (a) any conflict between the interests of the mediator and those of any of the participants;
- (b) any personal judgement or belief of the mediator which would affect the behaviour of the mediator; or
- (c) any favouritism or bias in word or in action or the omission of word or action that gives the appearance of any favour or bias.

(2) Except where it is customarily or culturally required and with the express agreement of all of the participants but subject to Subrule (4), mediators shall not facilitate a mediation process involving:

- (a) close friends;
- (b) relatives;
- (c) colleagues;
- (d) supervisors or superiors in their employment; or
- (e) their students,

by reason of which it will be difficult for them to maintain their professional independence.

(3) If mediators have or acquire any interest in the subject matter of a dispute they are mediating or are to mediate which:

- (a) may conflict with; or
  - (b) is adverse to,
- the interests of the parties,

the mediator shall fully disclose the nature of the interest and all actual and any potential grounds of bias and conflicts of interest well in advance of the mediation process or as soon as the circumstance giving rise to a possible conflict of interest arises whereupon the participants shall be free to retain the mediator by an informed waiver of the conflict of interest or appoint another mediator.

- (4) Notwithstanding Subrule (3), if mediators form the view that a bias or conflict of interest impairs or has the likelihood of impairing their impartiality, they shall disqualify and withdraw regardless of any express agreement of the participants for an informed waiver and to retain them as their mediator.
- (5) Save only to provide a list of alternatives if need be, mediators shall avoid conflicts of interest, or potential grounds for bias or the perception thereof, in recommending the services of other professionals, including the appointment of another mediator.
- (6) Mediators shall not use information about participants obtained in the course of mediation for their personal benefit or any other person's gain or advantage.
- (7) A perception by one or all of the participants that the mediator is partial does not in itself require the mediator to withdraw but gives cause for the participants to terminate the mediation and an obligation on the mediator to remind the participants of their right to terminate the mediation process.
- (8) Prior to and or during the course of mediation, mediators shall not become involved in relationships with any of the participants that might impair the mediators' professional judgment or in any way increase the risk of exploiting participants.
- (9) Mediators shall adhere to, and be familiar with, this Code and the accreditation criteria as well as any ethical standards prescribed by their professional organisations, such as the Professional Conduct Rules for lawyers.

#### **57. Procedural Fairness**

A mediator will conduct the mediation process in a procedurally fair manner by, but not limited to:

- (a) avoidance of making of statements or expressing any view as to the truthfulness, validity or the reasonableness of any statement, view, representation or offer made by any of the parties in a mediation;
- (b) avoidance of any pressure or undue influence on the participants to reach an agreement;
- (c) supporting all participants to reach an agreement voluntarily without any undue influence and on the basis of informed consent;
- (d) providing each participant with an opportunity to speak and to be heard in the mediation, and to articulate his or her own needs, interests and concerns;

- (e) suspending or terminating a mediation process if the mediator believes that a participant is unable or unwilling to participate in the process after due consultation with the participant concerned;
- (f) encouraging and supporting balanced negotiations and ensuring that manipulative or intimidating negotiating tactics employed by any of the participants do not adversely affect the fairness of the process;
- (g) enabling negotiations to proceed in a fair and orderly manner;
- (h) taking reasonable measures to ensure that the participants have sufficient time and opportunity to access sources of advice or information, if a participant needs either additional information or assistance;
- (i) encouraging participants to obtain independent professional advice or information where necessary and appropriate;
- (j) taking reasonable measures to ensure that the participants are competent and informed and can reach an agreement fairly; and
- (k) enabling the participants to assess the feasibility and practicality of any proposed agreement in both the long and short term, in accordance with the participants' own subjective criteria of fairness, taking into account where appropriate, any cultural or customary differences and the interests of any vulnerable stakeholders.

#### **Division 4 – Termination, Suspension, and Conclusion of Mediation.**

##### **58. Termination and Suspension of Mediation.**

- (1) Mediators may suspend or terminate a mediation process if in their opinion a continuation of the process might harm or prejudice one or more of the parties.
- (2) Mediators may decide to suspend or terminate the mediation if in their opinion either or both of the parties or their advisers are seeking to misuse the mediation process to achieve other ends such as:
  - (a) delaying proceedings in the hope of reinforcing the continuation of an existing arrangement or to prolong litigation, loss of the other parties evidence or obtain another advantage;
  - (b) 'buying' time in order to dissipate or conceal assets;
  - (c) attending the mediation process other than in good faith to find a solution to the dispute being mediated;

- (d) in some other way exhausting the usefulness of the mediation process; or
  - (e) causing prejudice to another party in the mediation.
- (3) Before suspending or terminating a mediation process, mediators shall first give reasonable notice of their intention to do so to the parties and the reasons for giving such notice.
- (4) Unless the parties make real and genuine effort toward a proper use of the mediation process and satisfactorily address the reason for the mediator giving notice under Subrule (3), the mediator shall effect the suspension or termination.
- (5) Where the parties to a mediation process reach an agreement that is unconscionable in the mediator's opinion, the mediator may terminate the mediation.

#### **59. Conclusion of Mediation**

A mediation shall conclude upon:

- (a) the parties reaching agreement on all of the issues present in the dispute that is the subject of the mediation process, or only some of the issues and an agreement as how the remaining issues are to be resolved;
- (b) termination by the mediator or any one of the parties; or
- (c) agreement by the parties to terminate the mediation

#### **Division 5 - General Provisions**

#### **60. Fees and Charges.**

- (1) External mediators are entitled to charge reasonable fees for their services having regard to:
- (a) the complexity of the matter, the time and skill (s) involved;
  - (b) any scale of costs that might be applicable; and
  - (c) the skills, standing and experience of the mediator.
- (2) At the commencement of an external mediation process, the mediator shall make it clear to the parties all charges related to:
- (a) the mediator's services and how they are calculated and charged;

- (b) the mediation process and any related costs; and
  - (c) the parties' joint responsibility to meet the costs.
- (3) The mediator shall obtain agreement from the participants as to costs of the mediation process, how they will be shared, when and how they become payable and the method of payment.
- (4) The agreement on the mediator's costs shall be incorporated in an agreement to enter into mediation.
- (5) The amounts due and payable under the fee agreement shall become a debt due to the mediator and may be enforced in the event of non payment as a liquidated debt.
- (6) Mediators shall not base their fees on the outcome of the mediation, but may act pro bono or leave to the discretion of the parties the payment of any fees.
- (7) Where the mediation fees have been collected in respect of a mediation process that is terminated, so much of the fees as are unearned shall be returned promptly, subject to a deduction on account of reasonable administration costs. These may include the mediator's time committed to the mediation process.
- (8) Mediators shall not in the course of their practice:
- (a) give or agree to give an allowance in the nature of an introduction fee or spotter's fee to any person for introducing professional business to them; or
  - (b) receive or agree to receive any such allowances referred to in paragraph (a) from any person for introducing or recommending clients to that person.
- (9) Subject to Subrule (10), internal mediators shall not charge any fees or charges.
- (10) Where mediation is to be conducted by an internal mediator, the parties shall prior to the commencement of the mediation, pay into the National Court in equal shares the fees prescribed in Schedule 3.

## **Part V – Complaints Handling**

### **61. Complaints and Complaints Handling System**

1. A system of receiving and handling complaints regarding the proper conduct of mediators is hereby established.

2. This part shall not apply to complaints against mediators who are judges or magistrates.

## **62. Processing and Handling of Complaints**

(1) The Council shall appoint a person to be the Complaints Officer whose function it is to receive and process all complaints from users of a form of ADR or any other person interested in the integrity and confidence in a system of ADR recognised under these Rules.

(2) Any person may lodge a complaint in relation to the conduct or behavior of a mediator.

(3) All complaints against mediators shall be lodged with the Complaints Officer or other officers performing an administrative function within the ADR division or track of the National Court.

(4) Complaints may be lodged:

- (a) in writing;
- (b) by telephoning or emailing the Complaints Officer or any other officer;  
or
- (c) by personally attending and speaking to the Complaints Office or any other officer.

(5) All complaints lodged under Subrule (4) (b) and or (c) shall be recorded by the officer receiving the complaint and the complaint, if in writing, and the record of it if not, shall be signed as a true and correct complaint received by the officer from the complainant.

(6) Complaints lodged shall specify the conduct or behavior complained of in sufficient detail to fully inform the person against whom the complaint is made and the Complaints Authority and must be lodged within 60 days from the date of occurrence of such conduct or behaviour.

## **63. Processing of Complaints**

(1) Within seven days of the receipt of the complaint, the Complaints Officer shall deliver a copy of the complaint to the mediator who is the subject of the complaint.

(2) On receiving the complaint, the mediator against who the complaint has been made shall:



- (a) Within 14 days of receipt or such further time as the Complaints Officer shall permit, provide to the Complaints Officer a full and frank explanation of the behaviour or conduct alleged; and
- (b) unless excused by the Complaints Officer, take every step to have the matter resolved promptly and amicably through joint discussions with the complainant, the mediator and the Complaints Officer and or mediation facilitated by the Complaints Officer within 30 days from the expiry of the 14 days stipulated under Subrule (2)(a).

(3) Any failure by a mediator to take the steps as required under Subrule (2) without reasonable excuse shall be deemed to be improper conduct as a mediator.

(4) If the complaint is not resolved satisfactorily in accordance with Subrule (2), the Complaints Officer shall refer the matter to the Authority and advise the parties of the referral.

(5) Regardless of whether the complaint has been resolved in accordance with Subrule 2, the Complaints Officer shall, if the complaint includes allegations which would if proven amount to misconduct, refer the matter to the Authority and advise the parties of the referral.

(6) A referral under Subrule (4) shall not include the content of any discussion or mediation pursuant to Subrule 2 (b).

(7) A referral may include a report and recommendations from the Complaints Officer.

(8) An inquiry under these Rules shall continue notwithstanding that a mediator has ceased to be a mediator after the commencement of the enquiry.

#### **64. Complaints Authority**

(1) A Complaints Authority is hereby established.

(2) The Authority shall be constituted by a judge or magistrate who is a member of the Committee and is appointed by that Committee, and shall hold that position for the currency of his or her membership of the Committee or such lesser period as the Committee decides.

#### **65. Protection of the Authority.**

No action, suit, prosecution or other proceeding shall be brought or instituted personally against a person constituting the Authority in respect of any act done *bona fide* in pursuance or execution or intended execution of these Rules.

#### **66. Functions of the Authority**

The function of the Authority is to receive any referral of a complaint from the Complaints officer and have it processed and determined expeditiously.

**67. Powers of the Authority.**

The Authority shall have the powers of a commission of inquiry under the Commissions of Inquiry Act (Chapter 31), but may otherwise determine its own procedures when enquiring into complaints of misconduct or improper conduct and shall observe the rules of natural justice in carrying out an inquiry.

**68. Proceedings before the Authority**

- (1) All proceedings of the Authority shall be conducted in private and remain confidential save only for its final decision.
- (2) Evidence given before the Authority shall be given on oath and witnesses may be examined and cross examined but the witnesses shall be protected from self incrimination.
- (3) The Authority may permit counsel assistance to both the complainant and the mediator the subject of the inquiry provided the Authority is of the view that counsel will assist in the enquiry and allow for an expedited outcome.
- (6) The Authority shall cause a written record to be kept of proceedings of its enquiries which shall remain confidential and available only for use in aid of determining the accreditation and certification of a mediator within and outside Papua New Guinea.

**69. Decisions of the Authority**

- (1) After duly conducting an inquiry, the Authority may return a decision of guilty or not guilty of a misconduct or improper conduct as a mediator, based on the weight and strength of the evidence before the Authority.
- (2) Where the Authority is of the opinion that a mediator is not guilty of misconduct or improper conduct, it shall return a decision of not guilty and may order costs against the complainant in favour of the mediator.
- (3) Where the Authority is of the opinion that a mediator has been guilty of misconduct or improper conduct as a mediator, it may impose any one or more of the following penalties depending on the nature of the misconduct:
  - (a) make a finding of misconduct or improper conduct as a mediator;
  - (b) reprimand the mediator;

- (c) order the removal the mediator's name from the list of accredited mediators;
- (d) suspend the mediator from practice for such period as it thinks proper;
- (e) order that the mediator pay compensation in cash or in kind to another person affected by the mediator's misconduct;
- (f) impose conditions or restrictions on the mediator's accreditation for such period as it thinks fit;
- (g) order the mediator to complete such course of mediator education as the Authority determines;
- (h) order that the mediator make his or her practice and books of accounts relating to the practice available to such persons and at such times as the Authority determines;
- (i) order the mediator to report on the conduct of his or her practice at such times and in such form as the Authority determines;
- (j) order the mediator to take advice on the management and conduct of his or her practice from such persons and for such period as the Authority determines;
- (k) order the mediator not to accept work or to hold himself or herself out as accepting work in any form of ADR specified by the Authority;
- (l) order that the mediator employ in his or her practice a member of a class of persons specified by the Authority;
- (m) order that the mediator not employ such persons as are specified by the Authority; or
- (n) order that the mediator pay the costs of the inquiry.

**70. Decision against a person other than a Mediator, etc.**

(1) Subject to Subrule (2), where in the course of an inquiry, the Authority is of the opinion that a person who is not a mediator has been a party to, or has caused, or assisted in causing any act of default in the practice of a mediator who employed that person, it may order that no mediator shall, in connection with a practice as a mediator, employ such person for such period as it may specify.

(2) The Authority shall first accord the person concerned a reasonable opportunity to be heard before making orders under Subrule (1).

(3) An order made under Subrule (1) shall be published in a newspaper circulating in the country.

#### **71. Establishment of the Appeals Board**

(1) An Appeals Board is hereby established.

(2) The Appeals Board shall consist of the following persons:

- (a) A Judge who is an accredited mediator but not a member of the Committee or Council and appointed by Chief Justice as the chair of the Board;
- (b) one practicing mediator with not less than 4 years unrestricted practice in Papua New Guinea or other countries approved by the Committee and, appointed by the Council taking into account the recommendations of the PNG Law Society and any association of mediators in Papua New Guinea; and
- (c) one respectable citizen lay person with a tertiary qualification and who practices a recognised profession, appointed by the Council.

(3) Appointments under Subrule (2) shall be for a period of one year or such longer period as the Council may determine.

(4) The Council may make more than one appointment pursuant to each of Subrules (2) (b) and (c) to provide a panel from which the members of the Board may be drawn for a particular appeal.

(5) The Chair of the Board shall preside at all proceedings and meetings of the Board and decisions in the proceedings or meetings shall be by consensus or failing that by simple majority of any two members of the Board.

#### **72. Vacation of office.**

(1) The office of a member of the Board is vacated if that member:

- (a) dies;
- (b) becomes incapable of carrying out his or her duties by reason of mental or physical illness;

- (c) becomes insolvent or makes an arrangement or composition with creditors;
- (d) is convicted of an offence be it criminal or disciplinary whether it involves imprisonment or not;
- (f) not being a mediator or the provider of a form of ADR at the date of the member's appointment becomes such a person during the period of appointment;
- (g) being a mediator at the date of the member's appointment, ceases to practice in that capacity during the period of appointment; or
- (h) ceases to reside permanently in the country.

(2) Where a vacancy exists in the composition of the Appeals Board , the Council shall forthwith fill the vacancy by making the relevant appointment in a timely manner.

### **73. Defect in Appointment**

No action or omission of the Appeals Board or an action or omission under its authority shall be declared invalid by reason of any defect that is subsequently discovered in the appointment or qualifications of any member of the Board.

### **74. Protection of the Appeals Board**

No action, suit, prosecution or other proceeding shall be brought or instituted personally against any member of the Appeals Board in respect of any act done *bona fide* in pursuance of these Rules.

### **75. Appeal from decision of Authority.**

(1) A person who was the subject of an adverse finding by the Authority may appeal to the Board within 21 days of the date of the decision.

(2) An appeal to the Board may be against the Authority's findings or against any penalty imposed or both.

(3) The appellant shall state succinctly and clearly the grounds relied upon with the relevant particulars.

(4) Subject to Subrule 5, an appeal under Subrule (1) shall be by way of rehearing by the Board.

(5) At the hearing of an appeal, the Board shall consider the record of proceedings of the inquiry by the Authority, any evidence and or submission put before the Authority and Authorities opinion.

**76. Decision on Appeal.**

- (1) After duly hearing an appeal under Rule 75, the Board may:
  - (a) either uphold the appeal in part or in whole;
  - (b) dismiss the appeal either in whole or in part; and either
  - (c) affirm or confirm the decision appealed from; or
  - (d) vary the decision the subject of the appeal either wholly or in part as the case might be.
- (2) The decision of the Board is final and is not open to further appeal or review.

**77. Secretary of Authority and Appeals Board.**

The Secretary of the Council shall act as Secretary of the Authority and of the Board.

**PART VI FEES**

**78. Fees.**

The Council may from time to time prescribe fees to be paid for and on the making of applications for accreditation and renewal of accreditation.

**PART VII REVIEW**

**79. Review of Rules**

These Rules shall be reviewed by the Committee two years after the date of their commencement.

**PART VIII TRANSITIONAL**

**80. Transitional Provisions**

- (1) Until the Chief Justice decides otherwise, the Judicial Committee on ADR established in 2000 shall function as if it were the ADR Committee established under Rule 23 and members appointed under Rule 24 of these Rules.

(2) A person who the Chief Justice has already recognised as a mediator on referral from the Judicial Committee on ADR shall continue to act as a mediator as if accredited under these Rules under a category or type of accreditation the Chief Justice or the Council considers appropriate and confirms in a certificate to that effect issued to that person.

(3) Any certificate issued under Subrule (2) shall be deemed to be a certificate under these Rules.

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## SCHEDULE ONE

Rule 15 (2)

### **Requirements for the education, accreditation, and renewal of accreditation of mediators**

#### **A. Accreditation**

A person may satisfy the accreditation criteria for mediators by:

(1) Satisfaction of Minimum Training and Education which shall consist of EITHER a process including:

- (a) a mediation training conducted by a training team comprised of at least two instructors where the principal instructor has more than three years' experience as a mediator who has complied with the continuing accreditation requirements under the accreditation criteria and has at least three years' experience as an instructor and has assistant instructors or coaches with a ratio of one instructor or coach for every three course participants in the final coached simulation part of the training and where all coaches and instructors are accredited,
- (b) a minimum of 38 hours in duration which may be constituted by more than one mediation, training workshop provided not more than twelve months has passed between workshops, excluding the assessment process,
- (c) involvement of each course participant in at least nine simulated mediation sessions and in at least three simulations each course participant performs the role of mediator, and
- (d) provision of written debriefing and coaching feedback in respect of two simulated mediations to each course participant by different members of the training team.
- (e) an assessment by an independent assessor as having achieved competency as a mediator.

OR

Satisfying the Council that the applicant has worked as a mediator prior to coming into operation of the accreditation criteria and has experience, training, and education that satisfies the Council that the mediator is equipped with the necessary skills, knowledge and understandings as set out in the core competencies referred to in the Code of



Conduct, and who has met the continuing accreditation requirements set out below in the 24 months prior to making an application.

- (2) Qualifying by Experience by satisfying the Council that the applicant:
- (a) resides in a village or tribe with specific linguistic and cultural characteristics and the mediator has specialised skills and knowledge and experience in mediation that are needed in the village or tribe in which the applicant resides; or
  - (b) comes from a rural or remote community where there is difficulty in attending a mediation training course or attaining tertiary or similar qualifications and has practiced a form of mediation which is recognised and needed in the applicant's community.

## **B Continuing Accreditation**

(1) In addition to all other requirements that the Council may require of mediators from time to time for the purposes of renewing and maintain the currency of their accreditation, mediators shall provide evidence of having in the last 12 months preceding their application for renewal:

- (a) met all of the requirements of the ADR Rules and Code of Conduct; and
  - (b) conducted at least 25 hours of mediation or the particular form of ADR practiced or co-mediated or co-conducted the form of ADR for which certification is sought; and
  - (c) attended at least two continuing education programmes for mediators.
- (2) These continuing accreditation requirements shall not apply to persons who have qualified by experience as mediators pursuant to Criteria A (2) above.

## **C Recognition of Foreign Qualifications.**

The Council may from time to time deem the holding of a particular foreign qualification to satisfy in all or part the requirements of Criteria A(1) above for either or both persons applying to be accredited as mediators, or persons acting as coaches and instructors for the purposes of these Accreditation Criteria.

Holders of the Australian National Alternative Dispute Resolution Advisory Council (NADRAC) accreditation shall be deemed to be so accredited for the purposes of acting as instructors and coaches.

**SCHEDULE TWO**

**FORMS**

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**FORM 1**

Rule 4 (3) (b)

IN THE NATIONAL COURT)  
OF JUSTICE AT .....)  
PAPUA NEW GUINEA )

.../NO. ....OF.....20.....

BETWEEN

(Insert name of plaintiff(s) \* in block letters)

*Plaintiff(s)\**

AND

(Insert name of Defendant(s)\* in block letters)

*Defendant(s)\**

**MEDIATOR/FACILITATOR'S\* CERTIFICATE**

I, (*insert name of mediator*), certify that —

1. (*Insert name of parties*) have participated in a mediation before me. ---

OR---

---OR---

1. (*Insert name of party or parties*) has made reasonable efforts to convene a mediation<sup>1</sup> before me of issues in dispute with (*Insert name of party or parties*).

---OR---

---

\* strike out or remove the brackets as the case might be.

<sup>1</sup> Insert and replace with the form of ADR attempted.

1. The issues in dispute between the parties are not, in my opinion, suitable for mediation<sup>1</sup>.

2. *(Insert if appropriate)* The mediation<sup>1</sup> [was / was not] conducted in accordance with an agreement between the parties including a provision to a like effect to Rule 11 (1) of the National Court Rules.

3. I am a Mediator/Facilitator\* accredited in accordance with the PNG National Accreditation Standards

.....  
Signed (by the mediator):

Dated: the .... day of .....20....

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**FORM 2**

Rule 9(5)

IN THE NATIONAL COURT)  
OF JUSTICE AT .....)  
PAPUA NEW GUINEA )

.../NO. ....OF.....20.....

BETWEEN

(Insert name of plaintiff(s) \* in block letters)

*Plaintiff(s)\**

AND

(Insert name of Defendant(s)\* in block letters)

*Defendant(s)\**

**MEDIATOR'S CERTIFICATE**

I, *(insert name of mediator)*, certify that —

1. *(Insert name of parties)* have participated in a mediation before me resulting in a resolution of all of the issues in dispute between them in these proceedings.

---OR---

1. (Insert name of parties) have participated in a mediation before me which resulted in a resolution of the following issues:

*(Insert the issue (s) – if more than one list them)*

and were not able to resolution the following issues on which the parties agreed to return to the Court of hearing and determination:

*(Insert the issue (s) – if more than one list them).*

...OR...

1. *(Insert name of party or parties)* has/have made reasonable efforts to convene a mediation before me of the issues in dispute between the parties but was not possible to conduct a mediation.

-OR---

---

\* strike out or remove the brackets as the case might be.

1. (Insert name of party or parties) have not made reasonable efforts to participate in a mediation or the behaviour of *(Insert name of party or parties)* was such that it was difficult to conduct a mediation on the basis of which the mediation was terminated.

2. *(Insert if appropriate)* The mediation<sup>1</sup> [was / was not] conducted in accordance with an agreement between the parties including a provision to a like effect to Rule 11 (1) of the National Court Rules.

3. I am a Mediator/Facilitator\* accredited in accordance with the PNG National Accreditation Standards

.....  
Signed (by the mediator):

Dated: the .... day of .....20...

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**FORM 3**

Rule 5

IN THE NATIONAL COURT)  
OF JUSTICE AT .....)  
PAPUA NEW GUINEA )

.../NO. ....OF.....20.....

BETWEEN

(Insert name of plaintiff(s) \* in block letters)

*Plaintiff(s)\**

AND

(Insert name of Defendant(s)\* in block letters)

*Defendant(s)\**

**MEDIATION ORDERS**

THE COURT ORDERS (by consent of parties if that is the case) THAT:

1. Pursuant to Rule 5 of the ADR Rules, the proceedings be referred to mediation by <INSERT THE NAME OF THE MEDIATOR>.
2. The purpose of the mediation is for the parties to make genuine and good faith attempts to:
  - (a) resolve all or any parts of the proceedings; or
  - (b) failing settlement, identify and limit the real and meritorious issues in the proceedings that warrant judicial consideration and determination; and or
  - (c) enable the parties to reach consensus on the conduct of litigation..
3. The Mediation shall be conducted no later that <INSERT DATE> and concluded no later than <INSERT DATE>..
4. If no settlement is reached at the conclusion of the initial mediation, the matter shall return to the Court on <INSERT DATE> for case management conference to consider the most economic and effect means to bring the proceedings to trial expeditiously.
5. At the case management conference:
  - (a) the parties shall demonstrate to the satisfaction of the Court the existence of an serious and meritorious issue which can only be heard and determined by the Court; and
  - (b) on such a case being made out, the Court may make such other orders and or further directions as a necessary to have the matter tried expeditiously.

.....  
BY THE COURT

Ordered: On <INSERT DATE>  
Entered: On <INSER DATE.

\* strike out or remove the brackets as the case might be.

SCHEDULE THREE

FEES FOR MEDIATION

Rule 7 (1)

(1) The following fees are payable prior to the commencement of any mediation where the estimate value of the claim is worth:

	K10,001 – K50,000.	Excess of K50,000.00
(a) first day	K200.00	K400.00
(b) each additional day	K200.00	K400.00.

(2) The above fees may be varied from time to time by the Chief Justice in consultation with the Judges.