

Using mediation to resolve conflicts and disputes

Legal information for community organisations

This fact sheet covers:

- ▶ what is mediation?
 - ▶ the benefits of mediation
 - ▶ the kinds of disputes that can be mediated
 - ▶ how to find and choose a mediator
 - ▶ how to prepare for mediation
 - ▶ what happens during mediation, and
 - ▶ what happens if the dispute is not resolved at mediation
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Note

This fact sheet provides general information about using mediation to resolve conflicts and disputes. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

This fact sheet will help you understand how mediation can assist your organisation to resolve disputes (and avoid court unless it's absolutely necessary).

Different kinds of disputes arise in organisations. For example, a dispute might be between:

- members of your organisation
- members and the committee or board
- your organisation and a supplier, or
- your organisation and a member of the community



What is mediation?

Mediation is a flexible process by which a neutral third party (the mediator) helps parties in dispute to negotiate a mutual acceptable resolution.

Mediation is a common feature in the Australian litigation and dispute resolution landscape. Even if you start legal action in a court, the judge will usually send you and the other parties to mediation before they will hear the case.

In mediation, the parties in dispute meet in the presence of the mediator who assists the parties to:

- identify and assess resolution options, and
- negotiate an agreement to resolve the dispute

The mediator, who is neutral, guides the process but does not impose a resolution or outcome on the parties. Rather, the parties agree on the resolution or outcome

In guiding the mediation process, the mediator:

- facilitates communication between the parties (which should always be respectful and constructive)
- promotes understanding
- assists the parties to identify the issues in dispute
- helps the parties explore the important issues and their present and future needs without dwelling on who was right or wrong in the past
- helps the parties to identify options and alternatives, and to make decisions about the future, and
- uses creative problem-solving techniques to help the parties reach their own agreement

What are the benefits of mediation?

Mediation offers many benefits over traditional court processes, including:

- **time** – ordinarily a dispute can be resolved more quickly through mediation than through a trial
- **cost** – ordinarily a dispute can be resolved for less through mediation than through a trial (unlike a trial, there is no risk that the unsuccessful party will be ordered to pay the successful parties' costs)
- **flexibility** – unlike traditional court processes, mediation can be adapted to meet the specific needs of the parties and the characteristics of the dispute
- **confidentiality** – mediation is private

Unlike traditional court processes, the dispute is not heard and determined by a judge sitting in an open court.

Further, if a matter land up in court, the judge is not informed about what happened at the mediation (other than it was, or was not, successful). And information disclosed by a party in the mediation is normally not able to be used by another party in court if mediation is unsuccessful.

- **satisfaction** – because the parties decide and agree on the outcome of their dispute, they are more likely to be satisfied with the result and to comply with what has been agreed.

Is mediation confidential?

Typically, everything said in mediation is confidential unless it is specifically agreed otherwise before the mediation begins. The only exception to this rule is that, in limited circumstances, the mediator is legally obliged to disclose certain matters that arise in the mediation (for example, the abuse of a child must be reported). The mediator will tell you at the start what they can't keep confidential.



Note

You (or your organisation) might be worried that information shared in mediation can be used against you later in court. However, because the mediation process is confidential, that can't happen.

The whole process of mediation is confidential and 'without prejudice'. So if you can't agree to an outcome at the mediation, a court case can start (or continue) without the parties worrying about having 'given away' anything that another party will use against them in court.

However, it's still important to be careful about what you say because once you tell the other party about something, they may be able to verify that information another way (other than you having told them) and they can then use that information in court if no resolution is reached at the mediation. They can't, however, say in court that you gave or verified the information during a mediation.

If you are worried that another party won't keep your information confidential, have a private session with the mediator and tell them what you're worried about. That information can't be provided to the other party.

Is mediation quick?

Yes, mediation is usually much quicker than going to court.

You usually need to set aside a full day for a mediation. Hopefully, by the end of that day, you will have reached an agreement about your dispute.

A court hearing before a judge usually takes more than a day and usually costs a lot of money. It can take months, or even years, to have a case heard and finalised in court.

Significant, time-consuming and costly preparation of your side of the dispute is required before a hearing takes place in a court case, whereas a mediation can be held at any time during a dispute.

Is mediation formal (like court)?

No – mediation is much less formal than going to court. There are no legal forms and sometimes there aren't even any fees.

Unlike traditional court processes, mediation is flexible. The mediator and parties can adapt the process to meet the parties' needs and the characteristics of the dispute. For example, if the parties feel uncomfortable being in the same room, the mediation can be structured so that each party has their own space and the mediator moves between the parties. It can also mean the parties and mediator work out times and places to mediate to suit everyone, unlike when you go to court.

Does mediation usually work?

Yes, organisations which offer mediation services report that most disputes are resolved at mediation.

For example, [Community Justice Centres NSW](#) report that about 80% of the disputes that come to them are resolved at mediation and the [NSW Small Business Commissioner](#) reports that almost 94% of matters referred to it for mediation are resolved before a court or tribunal decision.

In Victoria, the [Victorian Dispute Resolution Settlement Centre](#) reports that 85% of the disputes that come to them are resolved at mediation, and that 86% of their clients are very satisfied with their services.

Mediation is effective because people find their own solutions — they don't leave decisions in the hands of a judge (which will cost them time, money and stress, and it's possible that no one will be satisfied with the result).

It's important that any agreement reached at a mediation be recorded in writing and signed by everyone on the day, if possible. This is to ensure that everyone is clear on the agreement, and makes the agreement more likely to work. You need to ensure that people who have the authority to sign such an agreement on behalf of your organisation are at the mediation.



Who pays for mediation and what does it cost?

Some mediation services are free. If mediation isn't free, the parties usually share the costs of the mediation.

The standard rates are between \$1,500 and \$5,500 per day (this amount is usually shared equally by the parties to the dispute).

Talk to the mediator about costs and fees associated with the process and make sure the mediator puts this in writing before the mediation begins.



Tip

If you think this sounds expensive, consider how much more it will cost to go to court.

In a lower court, a party's costs can be around \$6,000 - \$15,000 for each day of hearing, and this doesn't include the costs of preparing for trial. A hearing often takes more than one day.

In contrast, one day is the standard length for mediation (although the cost and length of a mediation can vary depending on the complexity and subject matter of the dispute).

What kinds of disputes can be mediated?

Because it's flexible, almost all disputes are appropriate for mediation, including manufacturer/supplier disputes, commercial lease disputes, franchise disputes, workplace conflict, wrongful dismissal, professional negligence disputes, construction disputes, contract disputes, estate disputes, corporate commercial disputes, environmental disputes, real property disputes, class actions, mass tort, business disputes, civil disputes, landlord/tenant disputes, real estate disputes, employment disputes, insurance disputes, personal injury, and family disputes.

What if it feels like the other party has all the power?

Sometimes a party is concerned they will not be able to negotiate effectively with the other party and that they will 'lose'. Often this is how one party feels if the other is more experienced at negotiation, has greater resources, has a better education or language abilities, or is 'in control' of the dispute.

Mediation is designed to create a level playing field for all parties. It's part of the mediator's job to:

- protect each party in the process
- make sure each party understands the issues
- make sure each party understands the available options and the pros and cons of each option
- make sure each party has a say, and
- make sure that one party doesn't take advantage of another



Caution

If there is a history of violence or intimidation between parties in a mediation, this should be disclosed to the mediator before mediation begins.

Mediation is not appropriate where it could make a potentially dangerous situation worse. The mediator will be guided by the idea that they should 'do no harm'.

The mediator may terminate mediation if the power imbalance can't be redressed through the process. You can withdraw from, or terminate, mediation at any time without legal sanctions.



Who controls the mediation?

The mediator controls the process (although this can be flexible, and the parties can provide input into this), while the parties control any outcomes of the process, including the resolution of their own dispute.

The mediator, or any of the parties to a mediation, can end the mediation at any time if they think it is no longer a useful process.

However, it's important to bring an honest and genuine approach when trying to settle the dispute through mediation. Where your rules or constitution require that the parties attempt to settle the dispute 'in good faith', simply attending a mediation without genuinely attempting to resolve the matter, or ending the mediation as soon as it starts, would not satisfy this requirement.

How do you find and choose a mediator?

Choosing a mediator is important – a mediator who manages the process well and understands the issues is going to be most likely to help you agree to something that works for everyone.

How you choose a mediator can depend on the type of dispute you are involved with.

You may find guidance in the following places:

- if the dispute is between members of an incorporated association or company limited by guarantee, read and follow **your organisation's rules or constitution** (as well as any relevant policies and procedures) – there may be requirements about choosing a mediator in these circumstances
- if the dispute involves terms of employment or a volunteer, check **your policies and procedures and the relevant terms of any employment contract or volunteer agreement** (if any), or
- if your organisation is arguing over the terms of a contract (for example, a lease), read the contract and find the **dispute resolution clause**, then follow what it says about choosing a mediator



Examples

When you are checking what the rules or agreement say, you might find words like this

(from the New South Wales model constitution for incorporated associations) –

'A dispute between two or more members of the association in their capacity as members must be referred to a Community Justice Centre for mediation under the Community Justice Centres Act 1983.'

(from the Victorian model rules for incorporated associations) –

'The parties to a dispute must attempt to resolve the dispute between themselves within 14 days of the dispute coming to the attention of each party.... If the parties to a dispute are unable to resolve the dispute between themselves within the time required ... the parties must within 10 days —

- notify the [Association's] Committee of the dispute; and
- agree to or request the appointment of a mediator; and
- attempt in good faith to settle the dispute by mediation.'

We have listed organisations at the end of this fact sheet that can help you find a mediator.

Before you engage someone to mediate your dispute, speak to some potential mediators and ask them questions, such as:

- are you accredited under the National Mediator Accreditation System and do you comply with the Practice Standards and Approval Standards of the Australian National Mediator Standards?
- what is your background, areas of expertise and experience?
- what are your fees?



Tip

It's recommended that you choose a mediator accredited under the [National Mediator Accreditation System](#). The [Australian National Mediator Standards](#) were developed to provide a base level of accreditation for all mediators irrespective of their field of work.

Also make sure the mediator you choose has training and experience relevant to your dispute.

How do you prepare for mediation?

To prepare, think about what's important to your organisation. Usually, 'resolving the dispute' is near the top of the list!

When you are preparing, think about:

- what you think the dispute is really about
- what could you compromise on, if it meant that the dispute would be over at the end of the mediation and no longer hanging over your organisation?
- what is the 'worst case scenario' for your organisation? How bad could this get for your organisation and its members?
- what is the 'best case scenario' for your organisation? What is the likelihood of your organisation getting everything it wants if it goes to court?
- the personal and financial costs to those involved (you may need to get information from a lawyer about the likely costs of going to court and how long that might take)



Tips for attending mediation

- Set aside time to see the mediation through (for example, make sure you don't have children to collect, you have more than three hours of parking, you have the whole day available and you are prepared to turn off your mobile phone).
- Have all the information to make an informed decision (for example, do you need figures from an accountant or details from another expert? Get those details before mediation or make sure the expert is available on the phone).
- Have authority to make a final decision on the organisation's behalf, or bring along someone who does.

What happens during the mediation process?

Before mediation

Usually the mediator speaks to each party separately and:

- outlines the process for the mediation and their role as mediator
- talks to you about costs (if any) and how these will be paid
- explains how mediation can be suspended or terminated
- talks to you about confidentiality and explains any limits on confidentiality
- gives you a copy of the [National Mediator Accreditation System Approval and Practice Standards](#)
- gives you a copy of a mediation agreement which all parties to the mediation will be required to sign, and
- discusses the venue and rough timing for the day



Sometimes, the parties exchange 'mediation papers', which set out the background to the dispute and the key issues, before the mediation.

During mediation

Usually, the mediator meets briefly with the parties separately and then brings them together to:

- give the parties a chance to explain their side of the dispute, and
- guide the parties through discussions about the issues

The mediator will not:

- advise you — even if the mediator is a lawyer experienced in the area
- pressure you to accept any proposed outcome, or
- pressure you to make a particular decision

What if mediation doesn't resolve the dispute?

If mediation doesn't result in an agreement, your dispute continues. If you don't already have it, you might need legal advice about further options, including going to court.



More information

If your dispute is within an incorporated association, go to [our webpage on disputes with members](#).

Other types of alternative dispute resolution (ADR) may be worth considering, depending on your dispute:

Conciliation In conciliation, the parties identify the disputed issues, develop options, consider alternatives and try to reach agreement with the assistance of an impartial conciliator.

Unlike in mediation, the conciliator may advise on the content of the dispute or how to resolve it and make suggestions for terms of agreement, give expert advice on the agreement, and actively encourage the participants to agree.

Arbitration In arbitration, two or more parties refer their dispute to an independent third person (the arbitrator). The arbitration process is private and can be confidential (if the parties agree). The arbitrator decides the outcome and their decision is binding, like a judge's decision.

It's important to understand that if you do not agree with the arbitrator's decision, there are only very limited ways that you can appeal it to a court. An arbitrator's decision is usually reached much more quickly than a judge will deliver it.

A small arbitration might be heard just based on written submissions but a bigger case might involve evidence and cross-examination.

In arbitration, the parties pay for the arbitrator and usually also the costs of the venue at which the arbitration occurs.



More information

For more information, see

- the [Attorney-General's department website](#) (a range of other ADR approaches are provided)
- the [Resolution Institute](#) website. The Resolution Institute (formerly the merged organisations – the Institute of Arbitrators and Mediators Australia and LEADR) is a national, independent community of mediators, arbitrators, adjudicators, restorative justice practitioners and other dispute resolution professionals

Initial contact points for mediation services

Details of contact points for mediation services are provided in the table below.

State or territory	Mediation services
New South Wales	Community Justice Centres provide free mediation services in NSW. Other providers of mediation services in NSW include the Law Society of NSW and BarADR offered by the Bar Association of NSW .
Victoria	The Dispute Settlement Centre of Victoria provides free mediation services for many Victorian not-for-profit community organisations. The service is funded by the Victorian Government and its role specifically includes helping to resolve disputes within committees, clubs or incorporated associations. The Victorian Bar association also provides mediation services in Victoria.
ACT	The Conflict Resolution Service is Canberra's leading provider of community dispute resolution services in the ACT. The service is free for low-income earners.
Queensland	The Dispute Resolution Branch (DRB) of the Queensland Department of Justice offers a mediation service. In most cases, it is free to take part in mediation although the DRB charges a fee for workplace mediations. The Queensland Law Society also offers mediation services.
South Australia	Uniting Communities supports South Australians in providing mediation services to assist with disputes at an early stage. This service is free if one of the parties has a low income or no income. The Law Society of South Australia also offers mediation resources.
Tasmania	Mediation and dispute resolution resources relating to building and construction, energy, fair trading, retail tenancies and neighbourhood disputes about plants (among other things) can be found at the Tasmanian Government's Department of Justice website . The Legal Aid Commission of Tasmania also offers a free walk in legal advice service while the Law Society of Tasmania provides details of members who provide mediation services.
NT	The Community Justice Centre was established to provide all Northern Territorians with a confidential, timely and cost-effective means of addressing conflict outside the more formal justice system. Services provided by the Centre include providing conflict resolution processes for the early resolution of disputes and empowering clients to identify and actively resolve conflict across a range of dispute areas.
Western Australia	The Citizen Advice Bureau (CAB) offers a low-cost Community Mediation Service where parties in a dispute can meet with trained mediators to negotiate a fair, workable solution. The CAB can deal with the following categories of community disputes: dividing fences; encroaching roots and branches; dog ownership; harassment and public nuisance disputes. The Law Society of Western Australia also offers mediation resources.



Details of lower courts (where mediation services are available) are provided in the table below.

State	Court
New South Wales	<u>District Court mediation</u>
Victoria	<u>Magistrates' Court of Victoria civil mediation program</u>
ACT	<u>Magistrates Court</u>
Queensland	<u>Queensland courts</u>
South Australia	<u>Magistrates Court mediation</u>
Tasmania	<u>Magistrates Court mediation</u>
Western Australia	<u>District Court mediation</u>