

Mediation involves the appointment of an independent party. The appointment can be made by the parties, by a person in an official position, such as the President of the Law Institute or Law Society, or by a mediation centre. The Law Institute of Victoria provides a list of mediators.

For a construction dispute, the best mediator is most likely to be an experienced construction lawyer, construction barrister or technically qualified person with training as a mediator.

The mediation process involves the mediator calling a meeting and most likely instructing the parties to submit written submissions to the mediator before the later meetings. At the mediation, the mediator will advise the parties that he or she is not a judge and does not have any ability to make an award. The mediator is there to assist the parties in achieving some sort of commercial and fair resolution.

The mediator is usually given a stated period of time to assist the parties in settling the dispute. They are given the widest opportunity to deal with the problem because what they say in mediation proceedings cannot be used in any other proceedings. Lawyers are allowed to be present if a party requires representation, but the party is the principal participant in mediation, not the lawyer.

If the mediator is unable to assist the parties in settling a dispute, then the parties are free to decide whether they want to proceed to litigation or arbitration. If the parties can resolve the dispute by mediation, then the terms of settlement are incorporated into a written document. The document is signed by the parties and is binding upon them.

Mediation is the most cost effective way of settling disputes. It requires the co-operation of both parties to the dispute and can be frustrated if either side is not motivated by either cost effective concerns of the desire to maintain site harmony.

Opposite is an example of a Mediation Clause taken from the Victorian Law Institute of Victoria Home Renovations and Extensions Contract:

The parties must mediate disputes.

A party must use the mediation procedure to resolve a dispute before commencing legal proceedings.

The mediation procedure is:

- The party who wishes to resolve a dispute must give a notice of dispute to the other party, and to the selected mediator, or, if that mediator is not available, to a mediator appointed by the President of the Law Institute.
- The notice of dispute must state that a dispute has arisen, and state the matters in dispute.
- The parties must cooperate with the mediator in an effort to resolve the dispute.
- The mediator may engage an appropriately qualified expert to give an opinion on technical matters. Each party must pay a half share of the cost of the opinion.
- If the dispute is settled, the parties must sign a copy of the terms of settlement.
- If the dispute is not resolved in 14 days after the mediator has been given notice, or within any extended time that the parties agreed to in writing, the mediation must cease.
- Each party must pay a half share of the costs of the mediator to the mediator.

The terms of settlement are binding on the parties and override the terms of the contract if there is any conflict.

Either party may commence legal proceedings when mediation ceases.

The terms of settlement may be tendered in evidence in any mediation or legal proceedings.

The parties agree that written statements given to the mediator or to one another, and any discussions between the parties or between the parties and the mediator during the mediation period are not admissible by the recipient in any legal proceedings.