

The Model Clause

1. If a dispute arises from this contract, a party to the contract must not commence court or arbitration proceedings relating to the dispute unless that party has participated in a mediation in accordance with paragraphs 2 and 3 of this clause. This paragraph does not apply to an application for urgent interlocutory relief.
2. A party to this contract claiming that a dispute has arisen from the contract ("**the Dispute**") must give written notice specifying the nature of the Dispute ("**the Notice**") to the other party or parties to the contract. The parties must then participate in mediation in accordance with this clause.
3. If the parties do not agree, within seven days of receipt of the Notice (or within a longer period agreed to in writing by them) on:
 - 3.1 the procedures to be adopted in a mediation of the Dispute; and
 - 3.2 the timetable for all the steps in those procedures; and
 - 3.3 the identity and fees of the mediator; then:
 - 3.4 the President of The Law Society of New South Wales will appoint the mediator and determine the mediator's fees and determine the proportion of those fees to be paid by each party (to be in equal shares unless otherwise agreed by the parties);
 - 3.5 the parties must mediate the Dispute:
 - 3.5.1 with the mediator appointed under paragraph 3.4;
 - 3.5.2 with a genuine commitment to participate; and
 - 3.5.3 in accordance with the Mediation Guidelines of The Law Society of New South Wales.
4. If a party commences proceedings relating to the Dispute other than for urgent interlocutory relief, that party must consent to orders under section 26 of the Civil Procedure Act 2005 that the proceedings relating to the Dispute be referred to mediation by a mediator.
5. If the parties do not agree on a mediator within seven days of the order referred to in paragraph 4, the mediator appointed by the President of the Law Society of New South Wales will be deemed to have been appointed by the Court.
6. If a party:
 - 6.1 refuses to participate in a mediation of the Dispute to which it earlier agreed; or
 - 6.2 refuses to comply with paragraph 3.5 of this clause, a notice having been served in accordance with paragraph 2; then
 - 6.3 that party is not entitled to recover its costs in any court proceedings or arbitration relating to the Dispute, even if that party is successful; and
 - 6.4 that party is deemed to have consented to a decree of the Supreme Court of New South Wales that it will specifically perform and carry into execution paragraph 3.5 of this clause.

Notes to the Model Clause

The traditional remedy for failure to comply with an agreement to mediate was a stay of proceedings that were commenced in breach of the agreement to mediate. As a result of the enactment of section 26 of the Civil Procedure Act 2005, all Courts in New South Wales now have the power to order that proceedings be referred for mediation whether the parties consent or not. Accordingly, parties do not need to rely on the traditional remedy. Paragraph 4 provides that a party that commences proceedings in breach of the clause must consent to the making of an order under section 26.

Where a party to a contract refuses to mediate a dispute but does not itself commence proceedings, the traditional remedy of a stay of proceedings is of no use. Further, in this situation there are no proceedings in which an order under section 26 can be sought. What is needed by the party who wishes to mediate is an order that the other party participate in a mediation. Cases decided since *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*¹ and *Elizabeth Bay Developments Pty Limited v Boral Building Services Pty Limited*² strongly suggest that the Court would grant specific performance of an agreement to mediate that does not require supervision by the Court. Paragraph 5 provides for deemed consent to an order for specific performance.

Close analysis of *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*, *Elizabeth Bay Developments Pty Limited v Boral Building Services Pty Limited* and later cases, and the existence of an obligation under section 27 of the *Civil Procedure Act 2005* to participate in Court-referred mediation in good faith, both suggest that an agreement to mediate in good faith is enforceable. Paragraph 3.5.2 requires the parties to participate in the mediation in good faith. If not enforceable, the paragraph should be severable.

This clause is applicable for use in Law Society documents. The language in paragraphs 3.4 and 4.2 should identify the President of The Law Society as appointor of the mediator. The language in paragraph 4 provides that a party in breach “*must consent to*” rather than “*must not oppose*” orders that the proceedings be referred to mediation.

¹ (1992) 28 NSWLR 194.

² (1995) 36 NSWLR 709.