

Residential Building Work Contracts and Dispute Resolution Act 2016, as amended by the Residential Building (Miscellaneous Consumer Protection Amendments) Act 2023

Guideline on mediation processes from 1 July 2024 in the Residential Building Work Contracts and Dispute Resolution Act 2016

Step 1

- A residential building work contract was entered into by the parties e.g., owner and building contractor.

Note: for a contract entered into after 1 January 2017, that may now include a verbal agreement.

Step 2

- Dispute(s) arise regarding the building work or regarding contract terms.
- Parties are then expected to communicate, negotiate in good faith and to make a genuine effort to resolve those matters.
- Parties may also seek general advice from CBOS on what they can do to resolve a dispute or how to negotiate a settlement through mediation.

Costs of mediation

- Unless otherwise agreed between the parties to a dispute, the costs of mediation are to be shared equally between the parties to the dispute. This should be clearly explained to the parties before mediation services are pursued.

Step 3

- A party may lodge a Notice of Dispute with the Director of Building Control regarding an unresolved dispute.
- The notice provides particulars of the parties and the dispute, and it is an application by that party for the dispute to be mediated through the Director.
- Notes:
 - The Notice of Dispute is in an approved form that complies with the Mediation Determination made by the Director.
 - The applicant is to send a copy of their notice, lodged with the Director, to the respondent.

Step 4

- The Director must consider the Notice of Dispute received and make certain decisions regarding it within 10 days after the Notice was lodged.
- The Director may request additional information before making a decision (s.48(1A)).

Whether Director is to reject a Notice of Dispute

Grounds (must reject) include:

- Work is more than six years after practical completion was reached, **or** it is now more than six years since work was last performed on the building project by the contractor (s.47(1A) and s.48(2)(a)); or
- Proceedings for that dispute are already instituted under another Act, or to a court (s.48(2)(b)); or
- The Notice relates to the same dispute already accepted by the Director (s.48(2)(ab)); or
- The Notice relates to a dispute that is subject to adjudication proceedings under the *Building and Construction Industry Security of Payment Act 2009* and has not been rejected or withdrawn (s.48(2)(ac)).

Grounds (may reject) include:

- The party lodging the Notice has not make a reasonable effort to resolve the dispute (s.48(3)(a)); or
- The Notice does not contain information required under the Act (s.48(3)(ab)); or
- Notice does not contain any grounds of a dispute (s.48(3)(b)); or
- The dispute is frivolous or vexatious (s.48(3)(c)); or
- It is more appropriate for the matter to be dealt with by a court or tribunal than by mediation (s.48(3)(d)).

The Director may also reject a part of a Notice of Dispute. If the Director makes a decision to reject a part of a notice of dispute, the Director is then to clearly identify the part of the notice, that has been rejected, in a written notice given to the applicant.

Note that a purported termination of a contract by a party, or that a contract was entered before 1 January 2017, are not grounds for rejection.

Step 5

Notification of decision to parties (to accept or reject Notice of Dispute)

- The Director must, by a notice in writing to the building contractor and owner to whom a notice of dispute relates, notify the building contractor and the owner of the Director's decision to accept or reject the notice of dispute (or to reject a part of the Notice).
- Note that the Director has template letters for giving this notification.

Step 6

Establishment of the mediation panel

- Within 2 business days after deciding under section 48(1) to accept a notice of dispute, the Director is to establish a mediation panel in relation to the dispute.
- The Director makes the appointments to this panel.

Joining of any other interested/ affected parties

- The Director may join parties to the dispute by giving them notice and a copy to the owner and contractor.
- This does not require that person must participate in mediation.

Director may issue guidance materials

- The Director may issue guidance materials to the panel to assist it exercise its powers and functions.
- Such guidelines would be expected to apply to the performance of mediation services generally, rather than for a specific dispute.

Step 7

Panel to mediate dispute

The panel appointed by the Director must make a reasonable attempt to assist the parties to agree to a negotiated settlement of the dispute. The panel may:

- impose conditions on mediation
- give directions to parties
- request that parties provide documents
- impose timeframes for compliance with its directions/ requests
- have regard to the Guide to Standards and Tolerances

- assist in the resolution of a dispute in any manner it thinks fit that is not inconsistent with the Act or any guidance material provided by the Director.

Panel may refuse to proceed with mediation

A mediation panel may refuse to proceed with mediation for any of the reasons specified in the Director's Determination, including:

- (a) a party to the mediation has failed to comply with a direction given, or a request made, by the mediation panel; or
- (b) a party to the mediation has failed to comply with a condition imposed on the mediation by the mediation panel; or
- (c) a reason specified in the Director's determination as to why the mediation panel may refuse to proceed with mediation; or
- (d) any other reason that the mediation panel considers appropriate.

Completion of mediation sessions

Note the "Relevant Period"

- This is 20 business days after the Director establishes a mediation panel in relation to the particular dispute.

Step 8

Where parties reach settlement within the relevant period

If the parties to a dispute reach a settlement of the dispute as a result of mediation the mediation panel for the dispute must –

- (a) issue **a certificate of mediation (agreement)** in respect of the settlement; and
- (b) prepare **a document, setting out the terms of the settlement**, to be registered by the Director under section 53; and
- (c) provide to the Director and each party to the dispute a copy of –
 - (i) the certificate of mediation (agreement) issued in respect of the dispute; and
 - (ii) the document setting out the terms of the settlement.

Note that the Director has prepared templates of:

- the outcome certificate (settlement reached); and
- the Terms of Mediated Settlement document.

Registration of settlement document

The Director may register, or refuse to register, a settlement of a dispute by the parties to the dispute.

Grounds for refusal to register the agreement include:

- (a) it was not entered into in good faith by a party to the dispute; or
- (b) it was entered into as a result of unconscionable conduct by a party to the dispute or a person acting on behalf of a party to the dispute; or
- (c) it is not the result of a genuine attempt by the parties to the dispute to ensure the settlement is fair to all the parties to the dispute.

Section 53 provides that there may be other circumstances where the Director may refuse to register the settlement agreement.

Step 9 (where settlement reached)

Parties to sign registered settlement document

- If the parties to a dispute agree to a settlement of a dispute and the Director registers the settlement, the parties who have agreed to be bound by the settlement must sign a document setting out the terms of the settlement.
- The mediator panel members do not sign this document.

Cessation of mediation where no settlement is reached

If the parties cannot agree to reach a signed settlement within 20 days of the appointment of the mediation panel, then the panel must:

1. cease to assist the parties to the dispute; and
2. notify the Director that the mediation panel has ceased to assist the parties to the dispute.

Where parties cannot reach a settlement within the relevant period

If the parties to a dispute do not reach a settlement of the dispute as a result of mediation, and are unable to sign a settlement document within the “relevant period”, the mediation panel for the dispute must also –

- (a) issue a certificate of mediation (dispute not resolved) in respect of the settlement; and
- (b) within 2 business days after the certificate is issued, provide to the Director and each party to the dispute a copy of the certificate of mediation (dispute not resolved) issued in respect of the dispute.

A certificate issued, or a document prepared for this purpose, is to be in accordance with the determination made by the Director.

Note that the Director has a template of this certificate (dispute not resolved). It provides for recording details of reasons why mediation was unsuccessful.

Step 10 (optional)

Taking an unresolved dispute to the TASCAT

- Where parties were unable to agree during mediation to a signed settlement of their dispute, they may then consider whether to initiate a hearing of that matter by the TASCAT, by completing the tribunal's required application documents.
 - Importantly, the applicant must also provide to the TASCAT the certificate of mediation outcome (dispute not resolved) certified by the Director, as evidence that mediation had already been attempted.
- Notes:
 - The right of going to TASCAT is only available where the building contract was entered after 1 January 2017.
 - Parties may also consider other forms of legal redress to resolve a dispute, including court action.

Other mediation information

Use of evidence obtained during mediation

- Evidence of anything said, or of any admission made, in the course of mediation is:
 - (i) not admissible in a court; or
 - (ii) able to be used by the Director or other officer, for example for the investigation of licensing breaches, e.g., for the review of the conduct of a licensee under the *Occupational Licensing Act 2005*.
- However, there is an exception where a party has signed a settlement document in relation to the mediation, that was prepared to give effect to a decision taken, or an undertaking given, or a settlement. This is because a breach of a settlement document can be enforced before the TASCAT by it making a declaration under s.62(2)(h).

Review of Director's decision to refuse mediation

The TASCAT has been provided with a review jurisdiction to consider:

- the refusal by the Director to accept a Notice of Dispute lodged with the Director; or
- a decision of the Director to register, or to refuse to register, an agreed settlement.

Review of mediator's decisions

- Mediators do not make decisions about the nature of a dispute and only guide the parties to negotiate in good faith.

There is no provision in the Act for a review of their decisions, such as to suspend mediation if they consider that it was inappropriate to continue.

Reference: Timing of processes for mediation proceedings (including periods prescribed by the Act):

Action by the Director, a mediation panel or a party to a dispute	Period as determined by the Director	Act Reference
Period in which the Director is to accept or reject a Notice of Dispute.	Within 10 business days after a Notice of Dispute is lodged.	s.48(1)
Period in which the Director is to advise the respondent or other parties of the acceptance of a Notice of Dispute.	Within two business days after a Notice of Dispute is accepted.	s.48(5)
After the rejection of the whole or a part of a Notice of Dispute Period, period in which the Director is to advise a party of that decision, by a written notice.	Within two business days after all, or a part, of a Notice of Dispute, is rejected.	s.48(6)
After a Notice of Dispute is accepted, period in which the Director is to establish a mediation panel and appoint persons to the panel to consider the dispute.	Within two business days of acceptance of the Notice of Dispute.	s.49(1)

Action by the Director, a mediation panel or a party to a dispute	Period as determined by the Director	Act Reference
Period in which Director is to identify any other parties relevant to mediation proceedings and to give them notice that they are to be a party to the mediation proceedings.	Within two business days of acceptance of the Notice of Dispute.	s.50
Period in which a party must comply with a request by the Director, or the appointed mediation panel, to provide any relevant information.	Within two business days of the Director's or panel's request.	N/A
Period in which an appointed mediation panel is to convene a hearing of the matters for mediation.	If the parties have complied with any prior requests to provide further information, within five business days after the Director has established the panel.	N/A
Period in which parties are to reach a negotiated settlement, to sign a written document evidencing the terms of the settlement, and for it be registered by the Director.	Within 20 business days after the Director establishes a mediation panel in relation to the dispute.	s.54
Period in which a copy of the Terms of Mediated Settlement is to be provided to the Director by the mediation panel.	Within two business days after the conclusion of mediation proceedings and the signing of the Outcome Certificate.	s.53

Action by the Director, a mediation panel or a party to a dispute	Period as determined by the Director	Act Reference
Period in which: • a member of the mediation panel is to sign a Certificate of Mediation Outcome regarding the outcome of the mediation proceeding; and • the member is to provide it to the Director, with a copy to the parties to the dispute.	Within two business days after the conclusion of mediation proceedings and the signing of the Outcome Certificate; Within two business days of the signing of the Outcome Certificate.	s.51A(1) or (2)
Period in which the Director may refuse to register a Mediated Settlement that has been reached by parties to a dispute.	Within two business days after the conclusion of mediation proceedings and the signing by the parties of the Mediated Settlement.	s.53
Period in which parties to mediation are to pay the fees of the mediation panel or its members.	As per the individual contract between the parties and the mediator(s) appointed to a panel.	N/A