

# THE MEDIATION AGREEMENT

PARTIES

and

and

JANE PENBERTHY (the Mediator)

## MEDIATION AGREEMENT

THIS is made on BETWEEN

of the first part,  
of the second part (collectively "the parties")  
JANE PENBERTHY of PO Box 6081 Geelong West Vic 3218 ("the mediator")  
of the third part:

### BACKGROUND:

- A. A dispute has arisen between the parties ("the dispute"), which is briefly described in the Schedule.
- B. The parties have requested the mediator to help the parties resolve the dispute, and the mediator has agreed, on the terms and conditions of this Agreement.

The Parties and Mediator agree as follows:

### **1 Appointment and Role of the Mediator**

- 1.1 The parties hereby appoint the mediator to mediate the dispute.
- 1.2 The mediator will assist the parties to reach their own resolution of the dispute.
- 1.3 The mediator will not make decisions or impose decisions on the parties.

1.4 Each party is entitled to retain one or more legal representatives in order to be properly counselled about legal interests, rights and obligations. The mediator will not offer formal legal advice.

## **2 Conduct of Mediation**

2.1 The parties agree:

2.1.1 To co-operate with the mediator in the conduct of the mediation; and

2.1.2 To use their best endeavours to comply with reasonable requests made by the mediator to promote the efficient resolution of the dispute; and

2.1.3 If considered by the mediator to be in the best interests of the parties, before meeting with the mediator to submit to each other and the mediator a written summary of the arguments in support of each party's position in the dispute; and

2.1.4 To meet with the mediator at mutually agreed premises on dates to be agreed upon.

2.2 The mediator may meet with the parties together or any party alone.

2.3 The mediator shall not disclose to any person (including a party hereto) information disclosed by one party to the mediator alone, without the prior consent of the disclosing party.

2.4 The mediator shall not disclose to any person information obtained during the mediation without the prior written consent of the parties, unless compelled by law to do so.

2.5 A party (not being the mediator) shall not disclose to any person other than that party's professional advisers for the purposes of the mediation, information obtained during the mediation without the prior written consent of each other party to this Agreement (other than the mediator), unless compelled by law to do so.

2.6 The parties agree that they will not at any time before, during or after the mediation call the mediator as witness in any legal administrative or other proceeding concerning the dispute or any part thereof.

2.7 A party may withdraw from the mediation at any time by giving written notice to the other party or parties and the mediator.

2.8 If the mediator believes the mediation is no longer productive the mediator may in his unfettered discretion and is hereby authorised to terminate the mediation immediately by giving written notice to the parties.

## **3 Effect of Mediation**

3.1 If the parties cannot resolve the dispute during the course of or as a result of the mediation the rights of the parties in any subsequent court, administrative or arbitral proceeding shall remain unaffected by the mediation.

3.2 For the purpose of any subsequent proceeding the mediation shall be regarded as a without prejudice conference and nothing said or done during the course or as part of the mediation may be given in evidence in any proceedings and no documents papers or other items created for the purpose of the mediation may be tendered in evidence or be required to be produced in any proceedings.

## **4 Payment**

4.1 The parties agree to pay the mediator fees at the rate of \$300 per hour plus any reasonable out of pocket expenses actually incurred within 7 days of the account for same being rendered.

4.2 If requested by the mediator, the parties shall lodge a reasonable amount in advance with the mediator to meet part of the mediator's anticipated fees and expenses.

4.3 Each party agrees to bear equally the mediator's fees and expenses unless otherwise agreed in writing.

4.4 If, despite clauses 2.5 and 3.2 of this Agreement the mediator receives a subpoena or an order or direction of like effect (all and each of which are in this clause called "the subpoena") from a party ("the requiring party") or any entity which in the opinion of the mediator represents or has the same interests as a party, the requiring party shall:

4.4.1 Pay all costs on an indemnity basis incurred by the mediator in relation to the subpoena including all legal costs incurred in dealing with or opposing the subpoena;

4.4.2 Pay to the mediator the sum of \$300 for each hour spent by the mediator in relation to the subpoena plus any reasonable out of pocket expenses actually incurred by the mediator; and

4.4.3 Indemnify and hold harmless the mediator in respect of all orders or claims for costs or fees that may be made against the mediator in relation to the subpoena.

## **5 Acknowledgment**

5.1 The mediator acknowledges that he has disclosed to the best of his knowledge the facts of which he is aware as to any prior relationship of the mediator with a party or with business associates of a party.

5.2 The parties acknowledge that the mediator or the firm of which the mediator is a member may have provided legal advice (other than in relation to the dispute) to a party or to business associates of a party and agree that the mediator may nevertheless conduct the mediation.

## **6 Exclusion of Liability and Indemnity**

6.1 The mediator is not and shall not be liable for any damage suffered (directly or indirectly) by any party arising in any way out of any act done or omitted to be done (including but not limited to, acts negligently done or

omitted to be done) by the mediator in the performance of the mediator's obligations under this Agreement, but may be liable for:

6.1.1 Deliberately, consciously and knowingly committing a breach of any positive obligations imposed on him by the express terms of this Agreement; and

6.1.2 Criminal fraud in respect of anything done or omitted to be done in the capacity of mediator.

6.2 The parties jointly and each of them severally indemnify the mediator against all claims arising out of or in any way referable to any act done or omitted to be done by the mediator in the performance of the mediator's obligations under this Agreement.

## **7 Restraints upon the Mediator**

7.1 The mediator shall not accept appointment as an arbitrator in or act as a solicitor for or provide advice to a party in relation to the dispute.

7.2 Where one or more of the parties to the mediation are legally represented, the mediator undertakes to refrain from acting for any party to the mediation in a legal capacity of whatsoever nature (without the written consent of the legal representative involved) for a period of two years from the date of this Agreement.

## **8 Confidentiality**

The parties and the mediator agree in respect of each and all of them that this Agreement and all proceedings and matters comprised in or included in the mediation shall remain confidential for all purposes and all time and that such confidentiality will bind all participants in the mediation whether same are parties to this Agreement or not.

## **9 Further Agreement**

The parties agree that if as a consequence of a resolution reached in the course of the mediation such resolution is to be reduced or committed to a subsequent agreement in writing then such subsequent agreement shall be final and binding upon the parties. In the event of there being any dispute as to the meaning of any part of such subsequent agreement made pursuant to this Agreement then the mediator shall be the sole arbiter and determinant of the interpretation and meaning of such subsequent agreement.

## **10 Variations**

All parties including the mediator agree that no variation to this Agreement shall be effective until committed to writing and signed by all of the parties hereto including the mediator.

## **11 Records of Mediator**

All of the parties including the mediator agree that upon and after the conclusion of the mediation whether successfully or otherwise, the mediator shall retain no and

shall destroy all notes or written or other records of the mediation in any form whatsoever other than this Agreement.

## **12 Other Actions**

The parties and the mediator agree that no statements or comments and whether written or oral made used implied or expressed by any one of them or any one or more of their representative or representatives in preparation for or in the course of the mediation shall or may be relied upon to assist, support, found or maintain any action whether for damages, defamation, libel, slander or any related or other complaint AND the parties and the mediator agree that this Agreement may be pleaded in complete and absolute bar to any such action. Further, the parties shall not call upon the mediator whether as a witness for any purposes or otherwise, to provide or give statements or evidence on or in way in direct or indirect relation to the dispute or this mediation; this provision shall be read in extension of the provisions of clause 2.6 of this agreement.

## **13 Release of Mediator**

The parties jointly and severally release discharge and indemnify the mediator in respect of any and all liability and responsibility of each and every kind whatsoever and whether involving negligence or not which may arise or be alleged to arise in connection with or to result directly or indirectly from or to relate in any way to the mediation referred to in this Agreement or to the matters addressed in clause 9 hereof.

## **14 Interpretation**

In this Agreement, where a party comprises more than one person (whether or not a corporate body), the obligations and responsibilities of each and all of same shall be joint and several.

SIGNED by the said

in the presence of:

Signature of Witness

Print full name of Witness

Print address of Witness

SIGNED by the said

in the presence of:

Signature of Witness

Print full name of Witness

Print address of Witness

SIGNED by the said JANE PENBERTHY in the presence of:

Signature of Witness

Print full name of Witness

Print address of Witness

#### THE SCHEDULE

Description of the Dispute to be mediated.