



*This paper was prepared and settled jointly by the members of ADRAC*

## **Preparing for mediation: pre-mediation sessions and intake**

### **What are pre-mediation sessions/preliminary conferences/intake sessions?**

Pre-mediation sessions are an important part of any mediation process. They take place before the all-party mediation, and are an opportunity for the mediator to:

- meet the people in dispute and any other participants (and for them to meet the mediator and ask any clarifying questions)
- undertake a range of activities aimed at clarifying that all participants are making an informed decision to participate in the mediation, that they understand what their participation entails, and that mediation is the most suitable process for the conflict and the people in dispute
- assess their suitability to conduct the mediation

In some organisations, an intake person may conduct the pre-mediation, rather than the mediator. The complexities of intake are discussed in the wiki paper [Initial Separate Sessions](#), also available on the ADRAC website.

### **What do the National Mediator Accreditation Standards (NMAS) say?**

The Mediator Standards Board has been responsible for the development of Australian mediator standards and the implementation of the NMAS since 2010. The NMAS (available at <https://msb.org.au/themes/msb/assets/documents/national-mediator-accreditation-system.pdf>), give substantial coverage to preparation for mediation ('Preliminary conference or intake') and the mediator's (or intake person's) relevant responsibilities. For the current NMAS (as at 2020), pre-mediation sessions have three overriding purposes: to assess the conflict and disputants' suitability for mediation; to ensure the disputants are making an informed decision to participate in the mediation; and that various logistical matters are agreed for the all-party mediation.

Under both the NMAS Approval (Part II) and Practice Standards (Part III), mediators are required to have relevant specified knowledge, skills and ethical understandings that enable them to conduct the pre-mediation sessions. For example, the informed consent of the people in dispute is an *ethical principle*; the mediator is required to have *knowledge* about preparing for a mediation, and assessing suitability; and a mediator is required to have relevant specific *skills* (e.g. dispute diagnosis and participant screening).

***What would someone who is watching see? What would someone who is listening hear?***

Pre-mediation is known by various names, depending on the circumstances or organisation conducting the process. For example, it can also be called a 'first separate session', a 'single party mediation', a 'preliminary meeting' or other descriptors. The NMA also refer to 'preliminary conferences', a term that is widely used in commercial mediations to describe preliminary meetings that are attended jointly by all participants. These latter have a similar purpose to the pre-mediation sessions referred to in this paper.

In general terms, pre-mediation enables the mediator to meet the NMA requirements and to commence assisting the people in dispute to work toward resolution. In pre-mediation, the mediator meets with a participant on their own, or with their support person (such as a friend or family member); their representative (such as a lawyer, union representative or advocate); and/or their advisor (such as an accountant, anthropologist or social worker). Where a person in dispute brings along a support person, representative and/or advisor, it is important for the mediator to discuss and clarify with them the role of each of these attendees, so that everyone is clear as to the nature and extent of their involvement.

The mediator will be an impartial third party who listens, engages and hears the people in dispute, in an endeavour to tease out the underlying issues that will assist or impede reaching agreement. Mediators clarify their own role and what it includes (e.g. facilitating the disputants' discussions) and what it does not include (e.g. the mediator will not make substantive decisions on the content of discussions, nor contribute to the substance of any final agreement).

At the end of each pre-mediation session, it can be useful for mediators to check the disputant's understanding of the process in which they have just engaged (e.g. what they now understand about how the mediation will proceed and their own role within it), confirm any homework they may have to do before the all-party mediation proceeds (if it has been established that a mediation will proceed), and reality test how such homework will be undertaken and in what form it may be presented at the mediation session (unless it is just for the individual's benefit).

During each pre-mediation session, mediators can check for suitable dates and times for the all-party mediation with a view to confirming a mutually agreeable time and date. Typically, after the completion of all pre-mediation sessions, mediators will confirm the date, time, and location of the all-party mediation. Mediators will also confirm who will be attending, and their respective roles. An all-party mediation can run aground at the outset if a surprise participant turns up without the agreement or prior knowledge of other participants. Careful preparation and thought put in at the early stage of a mediation process will yield dividends throughout the rest of the process.

Pre-mediation is an opportunity for mediators to clarify that disputants will have appropriate decision-making authority at the all-party mediation, and, if it seems prudent, to check how additional authority might be obtained on the day. Mediation can be derailed when it becomes apparent that the participants who have developed and reached agreement did not have authority to do so. Pre-mediation sessions provide an opportunity to pre-empt and plan to

prevent such situations.

## **When to use pre-mediation**

### ***What precedes it? What follows it?***

Pre-mediation meetings are typically conducted as part of all mediations and include meetings between a mediator and each person in dispute, with their support person and/or advisor, as needed. Often there will be two participants to a mediation and, therefore, two separate pre-mediation sessions—one for each participant. In multi-party mediations, a number of pre-mediation sessions will need to be held. This can be seen as a disincentive to going forward with pre-mediations, given the time and cost of organising such meetings, and it can be tempting to go directly to an all-party mediation. However, time spent attending and engaging with each individual participant and organising the all-party mediation contributes to the effectiveness of the all-party session, with disputants and other participants being generally at ease, and prepared.

Pre-mediation sessions assist mediators in deciding how best to conduct the mediation. For example, are the disputants ready to attend a joint session and have face-to-face discussions or might there be a safety risk which necessitates the use of shuttle mediation.

Pre-mediation is an important component in all mediations, and can be especially useful for planning multi-party processes. For example:

- Elder Mediation can include a range of participants who are involved in an elder person's care (such as medical professionals, social workers, and family members) necessitating complex preparations by the mediator;
- native title mediations typically include many participants such as traditional owners, pastoralists, miners/exploration companies, government bodies, and their representatives, all of which mediators must accommodate in the all-party mediation
- many environmental disputes can include diverse participants such as land-holders, utility representatives (e.g. water or electricity), government decision-makers, and representatives of environmental bodies requiring mediators to take into account the varying power differentials between individuals and corporate/government entities.

## **Purpose and rationale of pre-mediation**

In addition to the purposes described above, pre-mediation sessions can also be an opportunity to prepare disputants to make their own decisions by:

- establishing guidelines for the mediation—for example, confidentiality, the voluntary nature of the process (where their participation is voluntary), courtesy expectations;
- explaining the process to participants individually so they have some idea of what to

expect, which is reinforced within the all-party mediation through the mediator's opening statement;

- giving time for a participant to air any concerns or issues about the process or their own role, or any substantive issues they have concerns about;
- raising issues which may require a participant to do some homework to be better prepared for the all-party mediation;
- suggesting that the disputants develop an agreed chronology of events or a joint issues statement;
- suggesting that the disputants exchange relevant documents; and
- establishing rapport between the mediator and each participant.

In terms of its rationale, pre-mediation sessions give mediators an opportunity to assist the disputants in preparing for the all-party mediation by, for example, encouraging interest-based bargaining, and assisting disputants in taking a broader view of resolution options. The longer a conflict continues, the more likely it is that participants will become positional and move away from interest-based bargaining – the pre-mediation sessions are an opportunity for disputants to put positions to one side.

### **Issues that can arise regarding pre-mediation**

#### ***If I have more than two participants to a conflict, is it worthwhile spending time organising a number of pre-mediation meetings?***

It can sometimes be tempting to leap into a preliminary conference with all participants, to 'air issues' and 'get to the heart of a matter quickly'. It can appear to be logistically easier to organise an all-party mediation, than a series of individual pre-mediations. Taking the time to organise and hold pre-mediations usually means participants are prepared, more familiar and comfortable with the mediation process, and have some rapport with the mediator, all of which increase the prospects of reaching a mutually agreeable settlement or outcome.

#### ***Is there a risk in having an individual repeat their version of events in a pre-mediation session?***

Generally the longer a conflict has existed, the more entrenched and positional disputants will become, leading them to keep repeating their version of the conflict without considering their underlying interests. Pre-mediation is a useful tool during which disputants can describe their version of events, and mediators can then move to reality test each element and assist by re-focusing on interests.

#### ***Do I always have to do a pre-mediation session with each participant?***

The NMAS anticipate that mediators will always conduct pre-mediation sessions. In addition, the more heavily conflicted participants are with each other, or the more complex a matter (whether in terms of its substance or the number of parties), the more useful a pre-mediation session with each participant will likely be.

### ***Should I take notes in a pre-mediation, or use pre-scripted questions?***

It can be useful to take notes in pre-mediation. When choosing to take notes, it is appropriate to advise participants why that is happening—for example, to use as a memory prompt for the all-party mediation. Sometimes it is possible to jot down important points on an electronic whiteboard and give the participant a copy for them to take away, particularly where some homework has been agreed upon. If a whiteboard is used, it is important to clean it before leaving the room, so all information is removed. When conducting the pre-mediation with a co-mediator, it is important to decide beforehand how the joint process will work. For example, one person can take notes and one ask questions, or both can take notes and both ask questions—whatever works best for both and is appropriate in the circumstances.

Again, it is important to inform participants of your method, which also models appropriate and inclusive communication. Similarly, if you intend to use pre-scripted questions, let participants know what you are doing and why. It may be that the organisation you are working for has a series of standard questions to be used in pre-mediation—if that is the case, it is useful for participants to know this.

It is important to remember that, if mediators take notes during the pre-mediation sessions, those notes are covered by confidentiality protections. It can help develop confidence in the mediation process if mediators are open about why they are taking notes, and what will happen to the notes once the entire mediation process has concluded.

### **Does mediation confidentiality apply to pre-mediation as well as during the mediation?**

The short answer is “yes”. Pre-mediation sessions are recognized as being part of the mediation process and confidentiality protections should be in place prior to or at least at the start of the first pre-mediation session. Anything said at pre-mediation should have the same protection as in the all-party mediation.

### **Some core elements of pre-mediation**

- Each disputant, and other participants, receive the same process information from the mediator, and makes an informed decision to participate in the mediation.
- Open-ended questions are part of the mechanism by which mediators will move a participant from a position about their version of the conflict, towards interest-based bargaining. It is important for mediators to ask open-ended questions and avoid making statements or asking closed questions.
- Each disputant will identify their own needs and interests.

## **Some optional elements of pre-mediation**

- Although many pre-mediation sessions are held at the same venue as the mediation, it may not always be possible for the same venue to be used, particularly in rural and remote conflicts where the pre-mediation may have been done by telephone or videoconference. One advantage of using the same venue is that it encourages familiarity with the environment and may assist participants to feel more at ease in subsequent all-party meetings.
- It may assist mediators to develop rapport with a disputant and other participants if the pre-mediation sessions are conducted in a less formal location, where possible.
- Where a mediation is to be conducted by way of co-mediation, both co-mediators should jointly conduct all pre-mediation sessions. This ensures that, throughout the mediation, the co-mediators are seen to be jointly responsible for conducting the process. Where this is problematic, the dates and times can be adjusted to suit, or different co-mediators be appointed, or the need for co-mediation be reconsidered.

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This wiki paper was prepared and settled jointly by the members of ADRAC – some of the content is based on Shurven, H (2011) Pre-mediation for Mediators. The ADR Bulletin: the monthly newsletter on dispute resolution, Vol 12, No. 6, p 220-222.