

**Our reference**  
ECS/JC/BATA22169-9120903

**Your reference**  
A91550

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19 January 2017

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Dear Hannah and David

## **Application for authorisation A91550**

This letter responds to the draft determination on behalf of the Applicants.

### **1 Response to draft determination and request for conference**

- 1.1 The Applicants are disappointed by the Commission's draft determination but note the particular concerns that appear to underpin the conclusion contained in it. We are instructed to provide further clarifying information about the proposed conduct to address potential public detriments raised by the Commission in its draft determination.
- 1.2 The Applicants also request a pre-decision conference during which they will discuss various aspects of the draft determination. We look forward to receiving confirmation from the Commission of the proposed date, time and venue for the pre-decision conference.
- 1.3 The Applicants also request the opportunity to make a final written submission following the conclusion of the pre-decision conference and circulation of the Commission's written summary of the matters raised at it and prior to a final determination being made by the Commission.
- 1.4 The Applicants encourage the attendance of representatives of interested parties at the pre-decision conference, particularly:
  - (a) agencies and departments involved in combating the trade in illicit tobacco products; and
  - (b) representatives of retailer groups given that retailers are best placed to observe the impact that the illicit trade has on their business and to

articulate how the proposed conduct might positively impact on them as well as the public at large.<sup>1</sup>

- 1.5 Given some of the law enforcement issues raised by the Commission in the draft determination, discussing those issues before representatives of those agencies in a pre-decision conference may be a productive exercise that helps resolve some of the potential public detriment concerns expressed by the Commission.

## **2 Clarifications to address potential public detriments**

- 2.1 In the table below, the Applicants set out clarifications to address potential public detriments raised by the Commission.
- 2.2 We are instructed that the Applicants are also open to considering appropriate proposals from interested parties that may choose to attend the pre-decision conference, as well as from the Commission.
- 2.3 The Applicants consider that the clarifications put forward by the Applicants in this letter are consistent with their application for authorisation and the Applicants are willing for these clarifications to be reflected as conditions of authorisation.
- 2.4 In addition, the Applicants are willing to amend their application (and the terms of the Cooperation Deed) should the Commission form the view that any of the clarifications in this submission should be reflected as amendments to the application for authorisation.

Item	Summary of potential public detriment raised by Commission	Clarification by the Applicants
1.	Retailers would not have any opportunity for independent review of a decision made by the Applicants that the retailer has supplied illicit tobacco.	<p>The Applicants understand and acknowledge the concerns of the Commission with respect to an independent review process.</p> <p>The Applicants wish to clarify that, should any retailer or wholesaler (affected by a determination by the Applicants that the retailer or wholesaler has supplied illicit tobacco) require independent review of the decision, the retailer or wholesaler may issue a notice to the Applicants requiring the Applicants to submit to independent mediation (and, if the mediation is not successful), arbitration through the Australian Disputes Centre (<b>ADC</b>) (formerly, the Australian Commercial Disputes Centre).</p>

<sup>1</sup> In particular, the Applicants note the post-draft determination submission made by the Australasian Association of Convenience Stores (**AACS**), "the peak body for the convenience industry in Australia". The AACS submission strongly supports the proposed conduct and provides specific case studies which demonstrate the impact of illicit trade on its members.

		<p>The ADC is completely independent of the Applicants and has been operating for over 30 years. The ADC's Guidelines &amp; Rules govern how the relevant dispute resolution process will occur and are available on the ADC website for download.</p> <p><b>Attached</b> to Annexure B of this submission are copies of the:</p> <ul style="list-style-type: none"><li>• ADC Guidelines for Commercial Mediation; and</li><li>• ADC Rules for Domestic Arbitration.<sup>2</sup></li></ul> <p>As is usual, each party would be liable to bear its own costs of the mediation and arbitration.</p> <p>Such an approach would provide any affected retailer or wholesaler with a clear avenue for independent review using a cost-effective, independent and well-established mediation and arbitration process.</p> <p>Any arbitration decision would (subject to any genuine right of appeal of a party, such as a material failure in natural justice) be final and binding on both the Applicants and the retailer or wholesaler.</p> <p>The affected retailer or wholesaler would be provided with a reasonable period of time to request mediation or arbitration and no less than 14 days from the date of being notified of the outcome of the mystery shopper purchase(s) and the action proposed to be taken by the Applicants.</p> <p>Finally, the Applicants would not cease supply of their legal tobacco products while any mediation or arbitration process (and any genuine appeal flowing from it) remains on foot with the relevant retailer or wholesaler.</p>
2.	Uncertain length of boycott of a retailer.	<p>The Applicants acknowledge and understand the concerns of the Commission. The Applicants wish to clarify that the following fixed periods, which they consider to be fair and reasonable, would apply to cessation of supply by them:</p> <p>(a) for the first instance in which a retailer or wholesaler has refused to sign an undertaking not to supply any further illicit tobacco or to</p>

<sup>2</sup> The ADC guidelines are also available on the ADC website at the following link  
< <https://disputescentre.com.au/dispute-management/adr-guidelines/> >.

		<p>comply with an undertaking already given by that retailer to the Applicants, <b>6 months</b>;</p> <p>(b) for the second instance in which a retailer or wholesaler is found to have breached its supply contracts with the Applicants by supplying illicit tobacco, <b>12 months</b>; and</p> <p>(c) for the third instance in which a retailer or wholesaler is found to have breached its supply contracts with the Applicants by supplying illicit tobacco, <b>permanent cessation of supply</b>.</p> <p>Further, where the retailer or wholesaler has requested mediation and arbitration, the cessation of supply would only occur following completion of the mediation and arbitration process (and any genuine appeal flowing from it) and (where the dispute process has progressed beyond mediation through to arbitration), only where the arbitration decision is made in favour of the Applicants.</p>
3.	Uncertainty that the proposed conduct would be effective.	<p>The Applicants note that the Commission has formed the view that <i>'a substantial market in illicit tobacco exists and that any reduction in this market would constitute a benefit'</i>.<sup>3</sup> The Applicants agree with this view.</p> <p>The Applicants also note that the Commission acknowledges that <i>"Government enforcement agencies have previously identified a range of limitations on their ability to investigate and prosecute illicit tobacco offences."</i><sup>4</sup></p> <p>Recent press notes the particular health dangers of chop chop (a form of illicit tobacco), including the inhalation of fungal spores which can cause liver, kidney and skin problems.<sup>5</sup></p> <p>It is the availability and supply of such illicit tobacco that the proposed conduct has the potential to significantly reduce. The Applicants consider that this potential public health benefit should be given significant weight.</p>

<sup>3</sup> ACCC, draft determination, paragraph 56.

<sup>4</sup> ACCC, draft determination, paragraph 36.

<sup>5</sup> The Courier (Fairfax Regional Media), *Poorer health in smokers of chop chop* (17 January 2017) < <http://www.thecourier.com.au/story/4409113/poorer-health-in-smokers-of-chop-chop/> >

		<p>Quantitative consumer survey data supports the Applicants' claims that the bulk of supply of illicit tobacco to consumers occurs through existing retail channels. Based on consumer surveys conducted by Roy Morgan Research approximately 70% of unbranded tobacco is sourced by consumers from retailers of legal tobacco products, including independent supermarkets, tobacconists, convenience stores, service stations and newsagencies (please see summary of quantitative data extracted from Roy Morgan Research surveys at <b>Annexure A</b> of this submission).</p> <p>The problem at the retail level is supported by the high proportion of submissions made by retailers and retail associations in favour of the proposed conduct. Those groups include but are not limited to tobacconists, the Australian Retailers Association (which represents 5,000 independent and national retail members throughout Australia)<sup>6</sup> and the Australasian Association of Convenience Stores Limited (which represents over 5,000 major retail and convenience stores throughout Australia).<sup>7</sup></p> <p>The Applicants acknowledge that the Commission's current position (as expressed in the draft determination) is that it is not sufficiently certain that the proposed conduct would be effective.</p> <p>The Applicants' primary submission is that, given the acknowledged scale and highly damaging nature of the illicit trade problem (and related criminality), the current issues in effectively tackling it and the desirability of securing "<i>any reduction in this market</i>", there is a strong net public benefit in permitting the proposed conduct. Only then can a proper and meaningful assessment of its effectiveness in contributing to reducing the volume of illicit trade and/or deterring such conduct in the future be made.</p> <p>However, to address the concerns of the Commission, the Applicants also make the following proposals:</p> <p>(a) they will report to the Commission on a 6 monthly basis providing the following information:</p>
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<sup>6</sup> Australian Chamber of Industry and Commerce < <https://www.acci.asn.au/node/1652> >.

<sup>7</sup> Jeff Rogut, Chief Executive Officer of AACS, 19 January 2017.

		<ul style="list-style-type: none"> <li>(i) the number of mystery shopper purchases conducted;</li> <li>(ii) the number of those purchases that were of illicit tobacco;</li> <li>(iii) whether the retailer or wholesaler requested mediation or arbitration;</li> <li>(iv) the action taken against the retailer or wholesaler (for example, cessation of supply for 6 months); and</li> <li>(v) the Applicants' assessment of the impact of the conduct, as supported by any qualitative and quantitative evidence available; and</li> </ul> <p>(b) the period of authorisation is reduced to 3 years (instead of 5 years) to allow the Commission to consider the impact of the conduct at an earlier point in time and decide whether to re-authorise the conduct should the Applicants decide to re-apply for a new authorisation.</p> <p>The Applicants also note that the Commission has the power to review an authorisation at any time after it has been granted and, following consultation with interested parties, substitute or revoke the authorisation.<sup>8</sup></p> <p>To the extent that the proposed conduct is impacted by changes in distribution channels or changes in the law, the Commission may exercise its rights to review and substitute or revoke the authorisation.</p>
4.	Risk of inadvertent interference with law enforcement activities.	<p>The Applicants acknowledge the concerns of the Commission. They wish, however, to restate that they already communicate and cooperate with law enforcement agencies to combat illicit tobacco, including with respect to the sharing of intelligence regarding illicit trade. Such cooperation is entirely consistent with the approach of several Departments to cooperating with the private sector with respect to law enforcement, including the Department of Immigration and Border Protection.<sup>9</sup></p>

<sup>8</sup> *Competition and Consumer Act 2010*, sections 91B and 91C.

<sup>9</sup> See for example the reference to program for the ABF "Industry Summit – Partnering at the border" held late last year. The summit articulated the continuing need for industry co-operation. Workshop 2A titled "Protecting your

		<p>Consistent with that long-standing cooperation and to address the concerns of the Commission, the Applicants propose that, prior to them taking steps against any retailer or wholesaler that is found (pursuant to evidence acquired through a mystery shopper purchase) to have been supplying illicit tobacco, they will:</p> <ul style="list-style-type: none"> <li>(a) notify and disclose mystery shopper evidence acquired by the Applicants to the relevant law enforcement agencies and Departments (namely, the Australian Tax Office, the Department of Immigration and Border Protection, the Australian Federal Police and relevant State and Territory law enforcement involved in combating the trade in illicit tobacco); and</li> <li>(b) provided those agencies respond to the Applicants within a reasonable period of time of being notified of new mystery shopper evidence by the Applicants (which the Applicants propose be a period of 14 days), not take any action against the retailer or wholesaler should any of those agencies so request (for example, where the relevant agency considers that the proposed conduct may jeopardise a current or planned law enforcement activity in which the retailer or wholesaler may be implicated).</li> </ul> <p>This proposal is consistent with existing intelligence sharing and directly addresses the potential public detriment of interference in law enforcement activities.</p>
5.	The Applicants are likely to selectively target retailers of competing brands.	<p>The Applicants note that the proposed conduct is aimed at targeting illicit tobacco, not any suppliers of lawful tobacco products that may compete with those of the Applicants.</p> <p>Nonetheless, the Applicant's acknowledge the Commission's concerns and wish to address them by allowing other suppliers of lawful tobacco products (including minor brands) who may wish to participate</p>

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business" highlighted Operation Polaris (to detect threats to Australia's tobacco industry) and notes high levels of industry co-operation, see < <https://www.border.gov.au/Engagingwithindustry/Documents/industry-summit/industry-summit-workshops.pdf> >.

		<p>in the proposed conduct to become a party to the Cooperation Deed.</p> <p>For clarity, the Applicants would not agree to any supplier of tobacco products that has in the past, or is currently, under investigation by law enforcement agencies for supplying illicit tobacco products becoming party to the Cooperation Deed.</p>
6.	Lawfulness of mystery shopper conduct.	<p>Mystery shopper purchases are an accepted and long-established practice in Australia conducted by both government and the private sector, including in the tobacco industry.<sup>10</sup></p> <p>Mystery shopper purchases are also a key part of the long-standing cooperation and intelligence sharing that exists between the tobacco industry and law enforcement agencies with respect to the trade in illicit tobacco.</p> <p>Mystery shopper purchases made by or on behalf of the Applicants are conducted for the purposes of the Applicants enforcing their legal rights, not for any purpose proscribed by the Commonwealth legislation referred to by the Commission.</p> <p>Indeed, the practical effect of the mystery shopper purchases is to facilitate the objects of the <i>Tobacco Plain Packaging Act 2011</i> (Cth) by identifying instances where tobacco products do not comply with the mandated packaging and labelling requirements.</p> <p>The evidence collected by mystery shopper purchases is collected by trained operatives and conducted in a manner that would enable the evidence to be admitted as evidence in court.</p> <p>As set out in <b>item 4(a)</b> of this table, any mystery shopper evidence acquired pursuant to the proposed conduct would be provided by the Applicants to law enforcement agencies. Such evidence is not acquired at any cost to the public and will assist those agencies in their intelligence gathering efforts.</p> <p>Those agencies will therefore be fully informed of the mystery shopper purchases and could raise any concerns they might have regarding the lawfulness of</p>

<sup>10</sup> For example, late last year Swan Hill Rural City Council announced that it had conducted mystery shopper purchases which it referred to as 'test purchases' (see <<http://www.swanhill.vic.gov.au/2016/12/disappointing-results-for-underage-tobacco-test-purchasing/>>).



		<p>the conduct with the Applicants directly. In the Applicant's experience, law enforcement agencies are appreciative of and often welcome the provision of such evidence because it supports their efforts to combat illicit tobacco.</p> <p>Mystery shopper conduct is consistent with the shared interest of the Applicants and law enforcement agencies (and indeed the public at large) in combating the trade in illicit tobacco and should not be considered a potential public detriment by the Commission in making its final decision.</p>
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### **3 Conclusion**

- 3.1 Following the pre-decision conference and consideration of any final submissions, the Applicants request that the Commission re-evaluates its assessment of the likely public benefits and detriments of the proposed conduct, particularly in light of the clarifications put forward by the Applicants in this letter and the submissions made by interested parties to this application.
- 3.2 The Applicants consider that they have taken a reasonable and pro-active approach to proposing qualifications and restrictions on the proposed conduct so as to create a set of transparent and effective 'checks and balances' to address the Commission's concerns. The Applicants are also open to considering any other constructive and appropriate proposals from interested parties that may choose to attend the pre-decision conference.
- 3.3 Further, as noted in **item 3** of the table above, the Commission has the power to review any authorisation, should the Applicants not comply with its terms.
- 3.4 Importantly, the proposed conduct is unlikely to have any material impact on lawful competition for legal tobacco products and, to the extent it might, the proposals put forward by the Applicants in **item 5** of the table above address those potential detriments by enabling other suppliers of lawful tobacco products to participate in the proposed conduct.
- 3.5 The proposed conduct should be authorised to give that conduct an opportunity to be tested and evaluated for a limited period of three years.

Thank you for the opportunity for the Applicants to respond to the draft determination.

If you have any questions regarding this submission, please contact us to discuss.

Yours faithfully  
**Corrs Chambers Westgarth**

A handwritten signature in black ink, appearing to be 'ES' followed by a long horizontal stroke.

**Eddie Scuderi**  
Partner

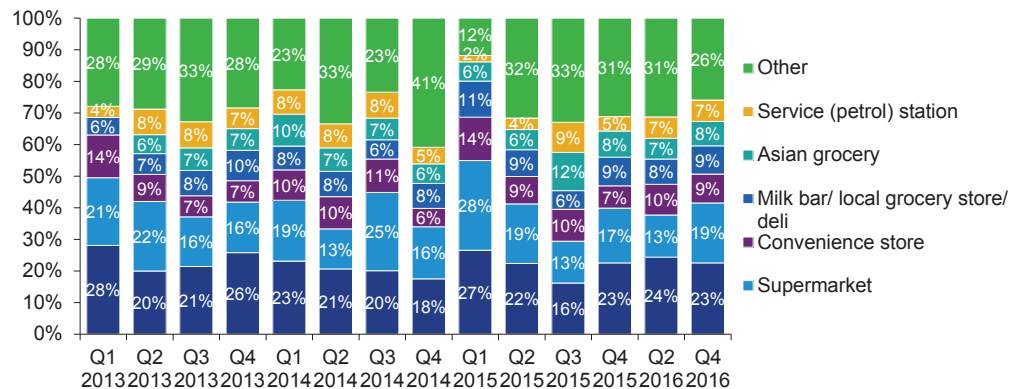
## Annexure A

### Major supply outlets for unbranded (chop chop) tobacco

**Source:** KPMG based on source data extracted from Roy Morgan Research consumer surveys conducted 2013, 2014, 2015, Q2 2015, Q4 2016.

**Note:** The green sections of the chart below represent 'other' (non-retail) sources. In the six months to December 2015, chop chop accounted for more than half (54%) of total illicit tobacco consumption.<sup>11</sup>

Major supply outlets for unbranded tobacco



<sup>11</sup> KPMG LLC, Illicit tobacco in Australia, 2015 Full Year Report (15 April 2016), page 6 (this report is reference document no.1 of the supporting reference material to the application for authorisation and available on the ACCC public register).

## Annexure B

### ADC guidelines and rules

[ADC documents commence on following page.]

# **Guidelines for Commercial Mediation**

**Effective 1 May 2015**

## Guidelines for Commercial Mediation

### Introduction

Parties can often best resolve business disputes with the assistance of a neutral third party, the mediator. Mediation promotes the goal of enabling the parties to settle their own dispute to their mutual satisfaction. It is a voluntary process. The mediator does not impose a decision on the parties or make decisions for the parties. The mediator's role is to facilitate discussions between the parties by identifying and clarifying the issues in dispute, and assisting the parties to resolve the dispute by exploring alternatives and searching for solutions. If it is not possible to resolve all issues between the parties the mediator may be able to assist in narrowing or defining the issues in dispute, developing options to resolve them and satisfying the interests of the parties. The aim of mediation is to reduce adversity and to achieve a timely and cost effective solution for the parties.

Parties may agree to mediation at any stage of a dispute, irrespective of whether litigation or other proceedings have commenced. These Guidelines may be invoked by the parties referring the dispute to ADC either voluntarily, by Court order or as a consequence of an ADC (or Australian Commercial Disputes Centre (ACDC), a prior registered name of ADC) mediation clause in the contract which governs the subject of the dispute. If the parties to a dispute invoke these Guidelines by any of the above means they will be deemed to have agreed to be bound by the terms and conditions of these Guidelines and they shall fully co-operate to participate in the mediation process.

In the event that there is a conflict or inconsistency between the Mediation Agreement and these Guidelines:

- (a) the Guidelines shall prevail if the conflict or inconsistency relates to any matter set out in clause 4(b), 9, 12 or 13 of the Guidelines;
- (b) otherwise the Mediation Agreement shall prevail.

Mediation can be used prior to, or in conjunction with, other forms of dispute resolution such as expert appraisal, expert determination, arbitration and litigation.

**For more information about Commercial Mediation or other ADC dispute resolution methods, please ring ADC (Australian Disputes Centre) on (02) 9239-0700.**

**Address:**

**Australian Disputes Centre  
Level 16, 1 Castlereagh Street  
Sydney NSW 2000**

**Email: [info@disputescentre.com.au](mailto:info@disputescentre.com.au)**

## PROCEDURES

### 1. Notification of Parties to the Dispute

- (a) If these Guidelines have been invoked by referring the dispute to ADC, the party (or parties) who alleges it has suffered some loss or damage, or is otherwise aggrieved, shall give written notice to the other party (or parties) setting out the nature of the dispute, how the dispute arose and the solution it seeks to the dispute (the "Notice of Dispute"). There is no specific form for the Notice of Dispute, although it must be apparent on the face of the document that it is a notification of a dispute.
- (b) Within seven (7) days of receipt of the Notice of Dispute, the parties must take reasonable steps to confer and try to resolve the dispute.
- (c) If the dispute is not resolved within seven (7) days or within such further period as the parties agree, then the parties, or any one of the parties, shall notify ADC that the dispute has not resolved and that the dispute is to be referred to mediation. At the same time each party shall:
  - (i) pay half (or such other proportion as may be agreed by the parties and ADC) of the ADC registration fee set out in clause 13 and Schedule 1 in force on the date the dispute is referred to mediation (or such other time as ADC in its absolute discretion considers appropriate); and
  - (ii) provide ADC with a brief statement of the key facts and issues that each consider will arise in the mediation.

### 2. Selecting a Mediator

- (a) Upon receiving the registration fee and the statement(s) referred to in clause 1(c) from the parties, ADC will select two or more appropriately qualified mediators and provide the parties with details of each person's qualifications and experience together with information concerning the fees charged by the person.
- (b) Within seven (7) days of receiving the details and information concerning the fees, each party shall provide ADC with a list setting out its order of preference in relation to the proposed mediator. If any party believes that a person whose details have been provided is unsuitable to act as the mediator of the dispute for some reason (such as well known by a party) they should notify ADC accordingly.
- (c) Upon receipt of the lists of preferences, ADC will determine whether the parties have identified a preferred mediator. If so, ADC will appoint the preferred mediator.
- (d) If the parties have failed to identify a preferred mediator, and the agreement made by the parties has provided for an alternative method of appointing the mediator, ADC will follow that method. If the parties have not specified any alternative method, or the alternative method does not result in the appointment

of a mediator within a reasonable time, ADC will, in its absolute discretion, appoint a mediator.

- (e) Upon appointment of a mediator ADC will provide the mediator with the details of the dispute provided by the parties and request the mediator to advise ADC if there may be any conflict of interest or any reason for perception of bias in that person acting as mediator of the dispute. If so advised, ADC will inform all the parties. If the parties still wish to continue with that mediator they must provide ADC with a statement, in writing, that they are aware of the conflict of interest or facts that may give rise to a perception of bias but wish to proceed with the appointment of that mediator (see also clause 3). If the parties do not wish to continue with that mediator ADC will, in its discretion, appoint another mediator.

### **3. Neutrality of Mediator**

- (a) The mediator is independent and impartial and has no vested interest in the outcome of the settlement of the dispute.
- (b) If the mediator becomes aware at any stage of any circumstance that might reasonably be considered to affect adversely his or her capacity to act independently or impartially, the mediator must inform the parties immediately. The mediator must in such circumstances terminate the proceedings in accordance with clause 10, unless the parties agree otherwise.
- (c) The Mediator will not later act for any party in, or relating to, any arbitral or court proceedings or expert determination in respect of the dispute.

### **4. Mediation Agreement / Fees / Conduct of Mediation**

- (a) Within fourteen (14) days of appointment of the mediator the parties and the mediator shall sign a Mediation Agreement. The Mediation Agreement shall be generally in the form of the agreement which will be provided to the parties after the matter is registered with ADC at an appropriate time during the running of a case or as amended in writing and signed by the parties and the mediator. The Mediation Agreement shall be incorporated into, and form part of, these Guidelines.
- (b) Following execution of the Mediation Agreement by the parties and the mediator, ADC shall provide the parties with an estimate of the fees that will be incurred by the mediator and ADC in the mediation. Unless otherwise agreed between the parties, the mediator and ADC, the parties shall provide ADC with a security deposit in the amount of the estimate within 14 days of receiving the estimate and in any case prior to the commencement of the mediation. The security deposit may be utilised in accordance with clause 13 of these Guidelines.
- (c) The parties shall confer with each other and the mediator, if necessary at a pre-mediation meeting, to determine what further steps, (including production of further documentation to the mediator), need to be taken.



**5. Date, Time and Place of Mediation**

- (a) The mediation shall take place as soon as practicable after ADC receives the security deposit and any further documentation agreed to be provided has been forwarded to the mediator. The mediation shall be fixed for a date, time and place agreeable to the parties and the mediator.
- (b) In the event that the parties cannot agree on the place for holding the mediation, the mediator shall nominate the place. The parties agree to be bound by the mediator's decision and will do all things necessary to enter into any necessary agreement to secure use of that venue.

**6. Authority of Mediator**

- (a) Each party to the dispute shall co-operate with, and abide by any reasonable directions given by, the mediator and ADC with the aim of efficient resolution of the dispute.
- (b) The mediator does not have the authority to impose a settlement on the parties, but will attempt to help them to reach a satisfactory resolution of the dispute. The mediator is authorised to conduct joint and separate meetings with the parties as and when the mediator considers appropriate.
- (c) If necessary, the mediator may seek the consent of the parties to enable the mediator to obtain expert advice concerning specialist technical aspects of the dispute. If the parties agree to the appointment of such an expert and agree to be responsible for the expenses of obtaining such advice, ADC will, in consultation with the parties and the mediator, make the arrangements for appointing the expert.
- (d) If the parties select a dispute resolution process that provides for the dispute to be referred to expert determination in the event that the mediation is unsuccessful, the parties and the mediator agree that the mediator cannot act as the expert.

**7. Representations and Attendance**

- (a) If a party is an individual, that individual must attend the mediation. If the party is a company, a representative authorised by the company must attend the mediation. That person must have authority to settle the matter.
- (b) Each party is entitled to bring its legal representative and any other person with information or knowledge relevant to the resolution of the dispute. Unless the parties and ADC otherwise agree, at least seven (7) days prior to the mediation, each party shall inform ADC, the mediator and the other parties who will be attending the mediation on its behalf.

**8. Separate Sessions**

- (a) Each party (with or without their advisers) may meet separately with the mediator.

- (b) Any information revealed in those separate sessions will not be revealed to the other parties by the mediator, unless otherwise agreed by the party in the separate session.

## **9. Confidentiality**

- (a) The parties agree that as far as possible, the mediation is confidential and that all persons attending the mediation will sign a confidentiality agreement. This agreement extends to any settlement proposal, statement made in or information prepared for the mediation. However, the requirement of confidentiality will not prevent a party from making necessary disclosures of information to its legal advisers, insurers or other necessary parties such as a party's board of directors or its employers or, to other members of a group making up a party to the mediation. In the event that a mediator is to act as an arbitrator in proceedings involving the parties, the requirement of confidentiality in this clause 9 will also not prevent the mediator from disclosing confidential information before conducting subsequent arbitration proceedings in accordance with the applicable legislative provisions allowing for a mediator to act as arbitrator.

All parties must understand at the outset that exceptions to confidentiality exist and if necessary the parties should seek their own advice on these exceptions.

- (b) Subject to clause 11, the following will be privileged and the parties agree not to call upon or seek to subpoena the mediator or any officer, employee, or agent of ADC to give evidence or to produce documents or to rely on or introduce as evidence in any arbitral or judicial proceedings:
  - (i) views expressed or suggestions made by the mediator or either party with respect to a possible settlement of the dispute;
  - (ii) admissions made by either party;
  - (iii) proposals for settlement of the dispute made by the mediator or either party;
  - (iv) the fact that either party has indicated a willingness to accept a proposal for settlement made by the mediator;
  - (v) documents presented at the mediation, such as position papers, unless those documents are otherwise discoverable, or notes made within the mediation by the mediator or by any party;
  - (vi) any matter arising in connection with the mediation.
- (c) The parties agree not to seek to join the mediator or any officer, employee, or agent of ADC to any legal proceedings brought by third parties, whether or not the proceedings relate to this dispute.
- (d) Every aspect of every communication within the mediation shall be without prejudice. However, if the dispute is settled then the agreement which is reached

shall be recorded in writing in a Settlement Agreement, signed by all the parties to the dispute. The parties agree that any such Settlement Agreement may be relied upon by the parties as evidence of the settlement of the dispute.

- (e) No statements or comments, whether written or oral, by any person at the mediation or by any officer, employee, or agent or ADC in preparation for or in the course of the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint against any one of those persons listed above, and the parties agree that this document may be produced and relied upon as a complete defence to any such action.
- (f) No transcript of records is kept of the mediation or a pre-mediation meeting.

#### **10. Termination of the Mediation**

The mediation may be terminated:

- (a) by a party giving written or oral notice to each party to the mediation and the mediator;
- (b) upon execution of a written Settlement Agreement in respect of the dispute;
- (c) by the mediator giving written or oral notification to the parties if, after consultation with the parties, the mediator forms the view that he or she will be unable for whatever reason to assist the parties to achieve resolution of the dispute. If the mediation is terminated in accordance with this clause, and the parties so request, ADC shall appoint a further mediator to complete the mediation.

#### **11. Enforcement of the Settlement Agreement**

In the event that one or more of the disputed issues is, or are, settled, any party to the mediation may enforce the terms of the Settlement Agreement reached at the mediation by judicial proceedings.

#### **12. Liability**

Except in the case of fraud:

- (a) the parties release ADC, its officers, employees, and agents and the mediator from any liability of any kind whatsoever arising out of or in connection with the mediator's appointment and / or the mediation.
- (b) the parties jointly and severally indemnify, and will keep indemnified, ADC, its officers, employees, servants and agents and the mediator for and against any claim for negligence or breach of any trade practices or fair trading legislation which may arise in connection with or resulting from the mediator's appointment or any act or omission arising out of or in connection with the mediation. The indemnity is expressly given for the benefit of the parties indicated and may be enforced by them individually if necessary.

This document may be produced and relied upon as a complete defence to any such claim.

**13. Fees**

- (a) For each mediation, ADC charges a non-refundable registration fee as specified in Schedule 1.
- (b) The parties agree they are equally responsible for the costs of the mediation, including room hire, ADC's non-refundable registration fee, any further administration fees due to ADC as specified in Schedule 1, and the mediator's fee (of which 10% is payable to ADC) and any other disbursements.
- (c) The parties shall forward to ADC their half share or other such proportion of the security payment as required by these Guidelines.
- (d) The mediator and ADC may submit progressive invoices to the parties which can be drawn down against the security deposit.
- (e) In the event that the security deposit is insufficient to cover the anticipated fees and disbursements of the mediator or ADC, the parties agree to submit such further security deposit as may be reasonably requested by ADC or the mediator.
- (f) If the further security deposit is not received by ADC within seven (7) days of ADC's or the mediator's request, (or such shorter period as ADC or the mediator reasonably require), the mediator and ADC may suspend provision of their services in the mediation until such time as the further security deposit is received.
- (g) In the event that the mediation is suspended in accordance with the above clause, the parties agree that neither ADC, its officers, employees, servants or agents nor the mediator shall have any liability whatsoever to the parties and the parties will indemnify ADC, its officers, employees, servants and agents and the mediator from and against any such claim by any person. This document may be produced and relied upon as a complete defence to any such claim.

## **SCHEDULE 1**

1. For each mediation, ADC charges a registration fee as follows:
  - a. \$1,100 (inclusive of GST) which covers registration and the first 5 hours of administration by ADC; or
  - b. in the case of a mediation in which the claims of more than one aggrieved party are consolidated, ADC may in its absolute discretion charge each party \$550 (incl. of GST) which covers registration the first 5 hours of administration by ADC.
2. ADC may in its absolute discretion charge a further administration fee at the rate of \$250.00 (incl. GST) per hour after the first 5 hours of administration covered by the registration fee.

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## Rules for Domestic Arbitration

Australian Disputes Centre (ADC) arbitrations are conducted in accordance with the provisions of the *Commercial Arbitration Act* in each State. Where the parties have provided that arbitration is to be conducted in accordance with the laws of a State other than New South Wales or another country, the procedure may be subject to legislation governing that State or country. These Rules are not necessarily appropriate when the contract or dispute has international elements. If an arbitration has international elements the parties should seek their own professional advice regarding the appropriateness of these Rules to their particular dispute.

Parties submit a dispute to an arbitrator of their choice and the arbitrator makes an award binding upon the parties. The parties may structure the conduct of the arbitration themselves, although the relevant Act regulates certain important aspects of the arbitration. There are timetable procedures available from ADC, which may assist the parties.

Parties may decide to attempt mediation or negotiation during the arbitration process. Legal representation is optional although advisable where there are legal issues involved.

**For more information about ADC Arbitration, or other dispute resolution methods, please contact ADC (Australian Disputes Centre) on (02) 9239-0700.**

**Address:**

**Australian Disputes Centre  
Level 16, 1 Castlereagh Street  
Sydney NSW 2000**

**Email: [info@disputescentre.com.au](mailto:info@disputescentre.com.au)**

## **1. Notification of Parties to the Dispute**

- (a) If the parties to a dispute have invoked these Rules by referring the dispute to ADC (either by consent of the parties, by way of an ADC (or Australian Commercial Disputes Centre (ACDC), a prior registered name of ADC) arbitration clause in the contract or otherwise), the party who alleges it has suffered loss or damage, or seeks a declaration, or is otherwise aggrieved, must, subject to any terms of the contract to the contrary, give written notice to the other party (or parties) setting out:

- (i) the nature of the dispute,
  - (ii) how the dispute arose; and
  - (iii) the remedy it seeks,
- (the “Notice of Dispute”).

There is no specific form for the Notice of Dispute, although it must be apparent on the face of the document that it is a notification of a dispute.

- (b) Within seven (7) days of receipt of the Notice of Dispute, the other party (or parties) to the dispute shall provide a written response stating its position in relation to the dispute (the “Notice of Response”). Again, there is no specific form for the Notice of Response, although it must be apparent on the face of the document that it is a notification of a response.
- (c) Within seven (7) days of receipt of the Notice of Response the parties must take reasonable steps to confer and try to resolve the dispute.
- (d) If the dispute is not resolved within seven (7) days or within such further period as the parties agree, then the parties, or any one of the parties, may notify ADC that the dispute has not been resolved, that the dispute is to be referred to arbitration and each party shall pay half (or such other proportion as may be agreed by the parties and ADC) of the ADC registration fee set out in clause 13 and Schedule 1 in force on the date the dispute is referred to arbitration (or such other time as ADC in its absolute discretion considers appropriate).

## **2. Selecting an Arbitrator**

- (a) Upon receiving the notice referred to in clause 1(d), the registration fee and a copy of the Notice of Dispute and Notice of Response, ADC will select two or more appropriately qualified arbitrators and provide the parties with details of the qualifications and experience of each proposed arbitrator together with information concerning the fees charged by each person.
- (b) Within seven (7) days of receiving the details and information concerning the fees each party shall provide ADC with a list setting out its order of preference in relation to the proposed arbitrator. If any party considers that a person whose details have been provided is unsuitable to act as the arbitrator of the dispute for



some reason (such as being well known by a party) they should notify ADC accordingly.

- (c) Upon receipt of the lists of preferences, ADC will determine whether the parties have identified a preferred arbitrator. If so, ADC will appoint the preferred arbitrator.
- (d) If the parties have failed to identify a preferred arbitrator, and the parties have agreed to invoke an alternative method of appointing the arbitrator, ADC will follow that method. If the parties have not specified an alternative method, or the alternative method does not result in the appointment of an arbitrator within a reasonable time, ADC will in its absolute discretion, appoint an arbitrator.
- (e) Upon appointment of the arbitrator, ADC will provide the arbitrator with a copy of the Notice of Dispute and the Notice of Response provided by the parties in accordance with clause 1 of these Rules and request the arbitrator to advise ADC of any conflict of interest or any reason that a perception of bias may arise if that person acts as the arbitrator of the dispute. If so advised, ADC will inform all the parties. If the parties still wish to continue with that arbitrator they must provide ADC with a statement, in writing, that they are aware of the conflict of interest or facts that may give rise to a perception of bias but wish to proceed with the appointment of that arbitrator (see also clause 3). If the parties do not wish to continue with that arbitrator ADC will, in its discretion, appoint another arbitrator.

### **3. Neutrality of Arbitrator**

- (a) The arbitrator is independent and impartial and has no vested interest in the outcome of the arbitration.
- (b) If the arbitrator becomes aware at any stage of any circumstance that might reasonably be considered to affect adversely the arbitrator's capacity to act independently or impartially, the arbitrator must inform the parties immediately. The arbitrator must in such circumstances terminate the proceedings, unless the parties agree otherwise.

### **4. Date, Time and Place of Arbitration**

- (a) Within seven (7) days of ADC notifying the parties of the appointment of the arbitrator ADC shall provide the parties with an estimate of the fees and disbursements that will be incurred by the arbitrator and ADC in the arbitration. Prior to commencement of the arbitration, and no later than fourteen (14) days after receiving the estimate, the parties shall provide ADC with a security deposit in the amount of the estimate. The security deposit may be utilised in accordance with clause 13 of these Rules.
- (b) The arbitrator will notify the parties of the date, time and place for holding a preliminary conference so that the parties and the arbitrator can decide upon a timetable for exchange of documents and statements of issues and other procedural matters. Unless the parties agree otherwise, this meeting is to occur within fourteen (14) days of notification by the arbitrator.

- (c) The arbitration shall commence as soon as practicable after ADC has received the security deposit. The arbitration shall be fixed for a time, date and place agreeable to the parties and the arbitrator.

## **5. Authority of Arbitrator**

If the parties are unable to agree upon a timetable, the arbitrator may give directions stipulating the timetable the parties are to follow. These directions are binding upon the parties. If the parties are unable to agree as to the terms of reference of the arbitration, the arbitrator may make a binding determination on the issue.

## **6. Statement of Issues**

Unless otherwise agreed by the parties and ADC, within fourteen (14) days of ADC notifying the parties of the appointment of the arbitrator, each party shall provide the arbitrator and the other party (parties) with a brief statement outlining the issues which that party considers are required to be resolved by the arbitrator and its position with respect to those issues.

## **7. Hearing**

- (a) In reaching a determination on the matters in issue, the arbitrator is to proceed to a hearing unless the parties agree to proceed by documents only. The arbitrator may take oral evidence and receive documentary evidence on subpoenas issued at the request of the parties.
- (b) In order to assist the arbitrator to determine the matter(s) in issue, the arbitrator may view the subject matter(s) of the dispute or any site connected in whatever way with the dispute. The arbitrator may use his/her own observations to assist him/her in understanding the evidence and then in applying that evidence to determining the issues the subject of the arbitration.
- (c) The parties are bound by any procedural direction which may be given by the arbitrator both in preparation for and during the course of the hearing. Subject to the requirements of any relevant Act, the arbitrator may determine the submission of, or the limitation of:
  - (i) pleadings;
  - (ii) discovery;
  - (iii) opening address and closing addresses;
  - (iv) lodgement of sworn statements or affidavit evidence which the parties seek to rely on;
  - (v) rights of reply to documents tendered;
  - (vi) attendance of deponents for cross-examination;
  - (vii) expert witnesses;

- (viii) expert reports;
- (ix) calling, examining, cross-examining or re-directing witnesses and experts;
- (x) procedural directions.

## **8. Confidentiality**

- (a) The parties agree that as a condition of being present or participating in the arbitration, they will, unless otherwise compelled by law, preserve total confidentiality in relation to the course of proceedings within the arbitration and in relation to any exchanges that may come into their knowledge, whether oral or documentary, concerning the dispute, passing between any of the parties and the arbitrator or between any two or more of the parties within the arbitration. This agreement does not restrict the parties' freedom to disclose and discuss the course of proceedings and exchanges within the arbitration with advisers and insurers of a party to the dispute provided always that any such disclosures and discussions will only be on the same basis of confidentiality. In the event that an arbitrator is to act as a mediator, conciliator or other non-arbitral intermediary in proceedings involving the parties, the requirement of confidentiality in this clause 8 will also not prevent the arbitrator from disclosing confidential information before conducting subsequent arbitration proceedings in accordance with the applicable legislative provisions allowing for the power of an arbitrator to act as a mediator, conciliator or other non-arbitral intermediary.
- (b) The parties agree not to call upon or seek to subpoena the arbitrator or any officer, employee, servant or agent of ADC to give evidence or to rely on or introduce as evidence in judicial proceedings:
  - (i) views expressed or suggestions made by the arbitrator or either party with respect to a possible settlement of the dispute;
  - (ii) admissions made by either party;
  - (iii) documents brought into existence for the purpose of the arbitration such as position papers or notes made within the arbitration by the arbitrator or by any other party;
- (c) The parties agree not to seek to join the arbitrator or any officer, employee, servant or agent of ADC in any legal proceedings brought by third parties, whether or not the proceedings relate to this dispute.
- (d) No statements or comments, whether written or oral, made or used by the parties or their representatives, the arbitrator or any officer, employee, servant or agent of ADC in preparation for or in the course of the arbitration shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be relied upon as a complete defence to any such action.

**9. Mediation and Arbitration**

- (a) If during the course of the arbitration, the arbitrator and the parties believe that some direct negotiation, or some assisted negotiation or mediation would assist resolution of the dispute, then the arbitration will be adjourned for that process to occur. Unless otherwise agreed by the parties, this process must take place within twenty-one (21) days of the commencement of the adjournment and conclude within twenty-eight (28) days.
- (b) If the parties wish to mediate (whether before or during the course of the arbitration), the mediator shall be:
  - (i) the same as the arbitrator only if the parties have so agreed in accordance with the applicable legislative provisions on arbitrators acting as mediators; and
  - (ii) in all other cases, selected by ADC in accordance with the ADC Guidelines for Commercial Mediation in force at the time the matter is referred to mediation, which terms shall be deemed to be incorporated into these Rules.
- (c) The same confidentiality requirements under these Rules apply to any such mediation referred to in clause 9(b) above.

**10. Termination of the Arbitration**

The arbitration is terminated:

- (a) after the handing down of a final award and an award to cost if any, by the arbitrator; or
- (b) by the execution of a settlement agreement prior to the handing down of an award by the arbitrator.

**11. Award of Arbitrator**

- (a) The award of the arbitrator is binding upon the parties. Unless otherwise agreed, the parties have no right of appeal other than that provided in the *Commercial Arbitration Act* or any other legislation which governs the conduct of the arbitration.
- (b) The arbitrator in proceeding to make an award on the matter(s) in issue shall:
  - (i) take into consideration all documents, information, other written and oral material and views that the parties place before the arbitrator, including documents, information and material relating to the facts in dispute and to the argument and submissions upon the matter in issue prepared by the parties;
  - (ii) determine whether an inspection or site visit is required;
  - (iii) not be expected or required to obtain or refer to any other documents, information or material, but may do so if he/she desires;

- (iv) be required to give reasons unless otherwise agreed between the parties;
  - (v) act with all appropriate expedition so as to give an award on the matter in issue as soon as practicable.
- (c) Should the security deposit lodged with ADC be insufficient to meet the costs of the arbitration, the arbitrator may withhold his/her award until such costs as specified by ADC in accordance with clause 13 of these Rules have been paid.

## **12. Liability**

Except in the case of fraud:

- (a) the parties release ADC, its officers, employees, servants and agents and the arbitrator from any liability of any kind whatsoever arising out of or in connection with the choice of the arbitrator or the arbitration.
- (b) the parties jointly and severally indemnify, and will keep indemnified, ADC, its officers, employees, servants and agents and the arbitrator from and against any claim for negligence or breach of any trade practices or fair trading legislation which may arise in connection with or resulting from the arbitrator's appointment or any act or omission arising out of or in connection with the arbitration. The indemnity is expressly given for the benefit of the parties indicated and may be enforced by them individually if necessary.

This document may be produced and relied upon as a complete defence to any such claim.

## **13. Fees**

- (a) Subject to clause 13(g) of these Rules, the parties will be equally responsible for the costs of the arbitration including room hire, ADC's non-refundable registration fee as specified in Schedule 1 of these Rules, any further administration fees due to ADC as specified in Schedule 1 of these Rules, and the arbitrator's fee (of which 10% is payable to ADC) and any other disbursements.
- (b) The parties shall forward to ADC their half share or other such proportion as agreed to by the parties of the amount as required by these Rules.
- (c) The arbitrator and ADC may submit progressive tax invoices to the parties, which can be drawn down against the security deposit.
- (d) In the event that the security deposit is insufficient to cover the anticipated fees and disbursements of the arbitrator and / or ADC the parties agree to submit a further security deposit in the amount reasonably requested by ADC or the arbitrator from time to time.
- (e) If the further security deposit is not received by ADC within seven (7) days of ADC's or the arbitrator's written request then the arbitrator may withhold his or her award in accordance with clause 11 of these Rules.

- (f) In the event that the award is withheld in accordance with the above clause the parties agree that neither ADC, its officers, employees, servants and agents nor the arbitrator shall have any liability whatsoever to the parties and the parties will indemnify ADC, its officers, employees, servants and agents and the arbitrator from and against any such claim by any person. This document may be produced and relied upon as a complete defence to any such claim.
- (g) Nothing in these Rules shall affect the power of the arbitrator, under any relevant Act, to make directions in relation to the costs of the arbitration.

## SCHEDULE 1

1. For each arbitration, ADC charges a registration fee as follows:
  - a. \$1,100 (inclusive of GST) which covers registration and the first 5 hours of administration by ADC; or
  - b. in the case of an arbitration in which the claims of more than one aggrieved party are consolidated, ADC may in its absolute discretion charge each party \$550 (inclusive of GST) which covers registration the first 5 hours of administration by ADC.
2. ADC may in its absolute discretion charge a further administration fee at the rate of \$250.00 (incl. GST) per hour after the first 5 hours of administration covered by the registration fee.

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