



NEW ZEALAND
DISPUTE RESOLUTION
CENTRE

Te Pokapū Whakatau Tautohe o Aotearoa

COVID-19 COMMERCIAL LEASE MEDIATION RULES (fixed fee scheme)

2021 Revision



**NEW ZEALAND DISPUTE RESOLUTION CENTRE
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FOREWORD

The settlement of disputes by mediation is an important feature of the commercial and legal landscape.

With the Government funded commercial lease arbitration and mediation scheme not being reactivated in the current lockdown, NZDRC is offering a private, accessible, low cost and fixed fee arbitration and mediation service for parties to commercial leases who are in dispute about the payment of rent and outgoings where the tenant or landlord has experienced a material loss of revenue during an Alert Level 3 or 4 lockdown period (a **Lockdown Period**) because of government restrictions put in place to combat COVID-19 (the **Scheme**).

Mediation is a consensual, confidential, and informal negotiation process in which parties to a dispute use the services of a skilled and independent mediator to assist them to define the issues in dispute, develop and explore settlement options, assess the implications of settlement options, and negotiate a mutually acceptable settlement of that dispute which meets their interests and needs.

The primary objectives of mediation are to enable and empower the parties to negotiate and resolve the dispute promptly, cost effectively, and confidentially rather than have a decision imposed upon them by a judge or arbitrator.

Mediation enables the parties to negotiate flexible and creative solutions which need not conform to strict legal rights or general community standards.

NZDRC has developed these COVID-19 Commercial Lease Mediation Rules (fixed fee scheme) (these **Rules**) to promote and encourage the negotiated settlement and early resolution of disputes by mediation under the Scheme. NZDRC has also developed a Commercial lease Dispute Mediation Protocol (the **Protocol**) to provide a guide to the rights and responsibilities of all participants in the mediation process under these Rules.

These Rules and the Protocol provide both a framework and detailed provisions to ensure the efficient and effective resolution of disputes by mediation. These Rules are set out in a manner designed to facilitate ease of use and are intended to give parties the widest choice and the capacity to adopt fully administered mediation procedures which are fair, prompt and effective, and that provide structure and certainty to the mediation process.

NZDRC has long established itself as the leader in private commercial dispute resolution in New Zealand and these Rules allow NZDRC to continue to offer a world class mediation service that is tailored to meet the needs and requirements of commercial parties, and which is fundamentally and purposively directed to ensuring the resolution of commercial lease rent disputes relating to the COVID-19 lockdown in a manner that is private, efficient, effective and certain.¹

For more information visit: www.nzdrc.co.nz.

¹ NZDRC is respected as the country's most experienced and trusted provider of private commercial mediation and arbitration services and has been delivering commercial mediation and arbitration services under its institutional rules for over 30 years.



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COVID-19 COMMERCIAL LEASE MEDIATION RULES

1.0 INTRODUCTION

- 1.1 These are the COVID-19 Commercial Lease Mediation Rules of the New Zealand Dispute Resolution Centre (**NZDRC**) for COVID-19 Commercial Lease Disputes and may be referred to as the NZDRC COVID-19 Commercial Lease Mediation Rules (fixed fee scheme) (**Rules**).
- 1.2 NZDRC owns the copyright to these Rules and the NZDRC Mediation Protocol, and they may only be used by parties, or intending parties, to a mediation administered by NZDRC.
- 1.3 The functions of NZDRC under these Rules will be performed by the registrar appointed by NZDRC (the **Registrar**). All communications to NZDRC must be addressed to the Registrar and all communications with the mediator must be copied to the Registrar.

2.0 RIGHT TO REFER DISPUTES TO MEDIATION UNDER RULES

- 2.1 These Rules are solely for use by parties to commercial leases who are in dispute about the payment of rent and outgoings where the tenant or landlord has experienced a material loss of revenue during an Alert Level 3 or 4 lockdown period (a **Lockdown Period**) because of government restrictions put in place to combat COVID-19 (the **Scheme**).
- 2.2 Parties to a dispute will be eligible to access the Scheme if the dispute is a Qualifying Dispute.
- 2.3 A dispute is a **Qualifying Dispute** if:
 - (a) it is about the payment of rent and outgoings where the tenant or landlord has experienced a material loss of revenue during a Lockdown Period because of government restrictions put in place to combat COVID-19; and
 - (b) the payment of rent and outgoings during the relevant Lockdown Period has not previously been the subject of an agreement or arbitral award between the parties to the dispute.

3.0 INITIATING MEDIATION

Agreement to Mediate

- 3.1 Where the parties have agreed to refer a Qualifying Dispute to mediation under these Rules, the parties must first complete an **Agreement to Mediate** in the form set out on the NZDRC website.



Application for Mediation under the Scheme

- 3.2 Any eligible party may then initiate mediation under these Rules by completing an **Application for Mediation** in the form set out on the NZDRC website.

Selection and appointment of mediator by NZDRC

- 3.3 A mediator will be appointed by NZDRC upon receipt of a duly completed Application for Mediation.
- 3.4 NZDRC will use best endeavours to appoint a mediator and serve a **Notice of Appointment of Mediator** on the parties within three working days following receipt of a completed Application for Mediation.
- 3.5 No party or third person may appoint a mediator under these Rules. NZDRC alone is empowered to appoint mediators.
- 3.6 NZDRC may require each party to provide such information as it deems necessary to fulfil its selection and appointment function under these Rules. NZDRC will have regard to such information but will not be bound by it in making such appointment as it sees fit.

Revocation of appointment of mediator

- 3.7 NZDRC may revoke a mediator's appointment and appoint a replacement mediator upon its own initiative, or on a written request by any party, if:
- (a) the mediator gives written notice to NZDRC and every party of the mediator's intent to resign as mediator;
 - (b) the parties agree to the revocation of the mediator's appointment;
 - (c) circumstances exist that in NZDRC's opinion give rise to justifiable doubts as to the mediator's impartiality or independence; or
 - (d) the mediator becomes, in fact or in law or by reason of infirmity, unable or unwilling to perform the functions of that office, or in fact fails to fulfil their functions within prescribed time limits in accordance with these Rules.
- 3.8 A decision to revoke a mediator's appointment is an administrative decision and is final and binding on the parties and the mediator. It is not subject to appeal to NZDRC. NZDRC is not required to state or communicate reasons for its decision.

4.0 THE NATURE OF THE DISPUTE

- 4.1 The only issue in dispute that may be referred to mediation under these Rules is the payment of rent and outgoings where the tenant or landlord has experienced a material loss of revenue during a Lockdown Period because of government restrictions put in place to combat COVID-19.



5.0 PROCEDURE

Exchange of pre-mediation position statements

- 5.1 In order that the parties and the mediator are better apprised of the issue and therefore better prepared for the mediation, each party must provide the mediator and every other party with a brief analysis of the dispute, identifying what legal and quantum issues are involved (**Position Statements**).
- 5.2 The parties must provide their Position Statements to the mediator and every other party three working days prior to the mediation date.

Mediation process

- 5.3 The mediator may conduct the mediation in such manner as the mediator thinks fit and may arrange conferences and mediation sessions at times to suit the parties.
- 5.4 The mediator will conduct the mediation by telephone and/or video conference, or by any other electronic communication means that the mediator considers appropriate in the circumstances.
- 5.5 The parties must co-operate in good faith with the mediator and with every other party to the dispute in attempting to settle the matters in difference. The parties must comply with the mediator's reasonable requests and directions to attend mediation sessions and provide information.
- 5.6 The mediator may conduct joint and separate sessions with any or all of the parties at any time during the mediation.
- 5.7 The mediator will not provide legal advice.
- 5.8 The mediator may, at their sole discretion, provide an analysis or evaluation of the relevant facts, evidence, and legal merits of the matters in dispute in the mediation to promote settlement discussions. In providing any such analysis or evaluation:
 - (a) the mediator will be acting as an independent neutral expert and not as an advisor to the parties; and
 - (b) any analysis or evaluation is not binding on the parties, and any decision the parties may make for the purpose of settling the dispute, whether in whole or in part, must be based entirely in reliance on their own skill and judgement, having taken such independent legal advice and having made their own enquiries as they think fit, and not in reliance on any understandings, statements, opinions or representations made by the mediator.
- 5.9 The parties may not at any time before, during, or after the mediation, call the mediator to testify in any legal or administrative proceeding concerning the dispute, or the nature and extent of any agreement reached as a result of the mediation.



- 5.10 The parties may not call for the records, notes, or work product of the mediator for any purpose, including any legal or administrative proceedings that might arise before, during, or after the mediation. However, any Settlement Agreement resulting from the mediation that is intended by the parties to have legal effect and to be legally enforceable, may be subpoenaed, called for, or produced in any proceedings to which it is relevant.
- 5.11 The mediation will be held without prejudice to any other legal rights or remedies available to the parties.

Representation and Support

- 5.12 Each party must be represented at all conferences and mediation sessions by a person with authority to make final and conclusive decisions.
- 5.13 Parties may be represented at mediation by any person, whether legally trained or not, (**Representative**) provided that the engagement of the Representative by a party does not threaten or bring into question the integrity of the mediation due to a past or present relationship with any party or the mediator, unless none of the parties object after proper disclosure.
- 5.14 Parties may have a support person accompany them during the mediation session (**Support Person**). A Support Person may provide reassurance and emotional support for a party. A Support Person is not entitled to intervene or participate in the mediation process.
- 5.15 Parties must advise NZDRC, the mediator and every other party of the names and relevant details of those persons who will be accompanying them at any mediation session not less than three days prior to the session. All Representatives and Support Persons must sign a Confidentiality Agreement in the form set out at Appendix 1 of these Rules and provide a copy of that Agreement to the Registrar as a condition of their attendance at the mediation.
- 5.16 The mediator may withhold approval for a Representative or Support Person to attend mediation sessions where the mediator, in the mediator's sole discretion, considers their attendance could threaten or bring into question the integrity of the mediation.
- 5.17 The mediator may also limit the number of Representatives and Support Persons to preserve the integrity of the mediation.

Termination of the mediation

- 5.18 The mediation may be terminated at any time:
- (a) on signing of a settlement agreement in respect of the matters referred to mediation;
 - (b) by a party, after consultation with the mediator;
 - (c) by the mediator, if the mediator feels unable to assist the parties to achieve resolution of the dispute; or



- (d) by the mediator, if the mediator determines that any party is not engaged in the mediation in good faith.

Settlement

- 5.19 If the parties reach agreement on any or all matters, such agreement must be recorded in a **Settlement Agreement** signed by the parties. Any Settlement Agreement will be legally binding on the parties, and any party may enforce the terms of the Settlement Agreement by issuing court proceedings.
- 5.20 If the mediator considers that any agreement reached may be illegal or impossible to enforce or uphold, the mediator may recommend to the parties that they take further independent legal advice.
- 5.21 The parties must comply with the terms of any Settlement Agreement in good faith and in a timely manner.

6.0 COSTS OF MEDIATION

Mediator's fees

- 6.1 Unless the parties agree otherwise in writing before a mediation, the mediator's fees and expenses shall be met by the parties in equal proportions.

Party's own costs and expenses

- 6.2 The parties must meet their own costs and expenses of the mediation (for example, legal or expert fees).

7.0 CONFIDENTIALITY

- 7.1 The mediator must conduct the mediation in private.
- 7.2 The parties, their Representatives, Support Persons, the mediator, NZDRC, and any other person involved in the mediation, must keep confidential and not publish, communicate, or otherwise supply (**disclose**) confidential information to any non-party. **Confidential information** means all non-public materials and information that relate to the mediation or to any Settlement Agreement and includes:
 - (a) all statements, admissions, or other information supplied to the mediator by a party;
 - (b) any notes made by the mediator;
 - (c) any document otherwise created or made for the purpose of the mediation;
 - (d) all matters disclosed orally in the course of the mediation;



- (e) all non-public materials and information provided for the mediation by a party, including documents used or generated for the purpose by a Representative or advisor to a party in the mediation; and
- (f) the terms of any Settlement Agreement.

7.3 If a party seeks or is required to involve in the mediation a Representative, Support Person, fact or expert witness, translator, interpreter, or any other person who is not a party to the dispute (**non-party**), that party must secure the non-party's advance agreement to preserve the confidentiality of the Confidential information. All non-parties must sign a Confidentiality Agreement in the form set out at Appendix 1 of these Rules and provide a copy of that Agreement to the Registrar as a condition of their attendance at the mediation.

7.4 Notwithstanding Rules 7.1-7.3, NZDRC, a party, the mediator, a Representative, a Support Person, or any other non-party involved in the mediation, may disclose Confidential Information to the extent necessary to:

- (a) protect the safety of any person from being endangered;
- (b) enforce any Settlement Agreement reached in the mediation;
- (c) pursue a legal right;
- (d) protect a party's legal rights in relation to a third party;
- (e) respond to a legitimate subpoena, governmental request for information, or other compulsory process;
- (f) seek legal, accounting, or other professional services, or satisfy information requests of potential acquirers, investors or lenders, provided that in each case the recipient agrees in advance to preserve the confidentiality of the Confidential Information; or
- (g) comply with an order of a court of competent jurisdiction, or the law of any State which is binding on the party making the disclosure,

provided always that such publication, disclosure, or communication is no more than what is reasonably required for those purposes.

7.5 Any person intending to make disclosure under Rule 7.4(b)-(g) must first, within a reasonable period of time prior to the intended disclosure, notify the mediator, every party, and NZDRC and provide full details of the intended disclosure and the reasons for it.

8.0 EXCLUSION OF LIABILITY AND INDEMNITY

8.1 The parties, together and separately, release and discharge the mediator and NZDRC, its agents and employees, from all liability of any kind (whether involving negligence, misrepresentation, breach of contract, or breach of any equitable, fiduciary, statutory or other duty, or otherwise) which may be alleged to arise in connection with, or to result from, or to in any way relate to the exercise of any of



their functions, duties or powers, whether at law, under these Rules, or otherwise, unless the act or omission is the fraudulent act of the mediator, NZDRC, its agents or its employees. The mediator, NZDRC, or any agent or employee of NZDRC, who has not acted fraudulently and is shown to be unaware of the fraud of any other person, will continue to be released and discharged from liability as provided in these Rules.

- 8.2 No statements or comments, whether written or oral, made or used by the mediator, NZDRC, its agents or employees in connection with, or resulting from, or in any way relating to the mediation, may be relied upon to found or maintain any action for defamation, libel, slander, or any related complaint.
- 8.3 The parties, together and separately, undertake to indemnify and keep indemnified the mediator and NZDRC, its agents and employees, against all claims, costs, expenses, liabilities, awards, damages, and proceedings of any kind (properly sustained or incurred by them directly, or indirectly made by any third party) in relation to, or in connection with, the exercise of the functions, duties, or power of the mediator, NZDRC, its agents or employees, whether at law, under these Rules, or otherwise, unless the claims, costs, expenses, liabilities, awards, damages or proceedings arise out of a fraudulent act or omission of the mediator, NZDRC, its agents or its employees. If the mediator, NZDRC, or any agent or employee of NZDRC has not acted fraudulently, they will continue to be indemnified as provided in these Rules.
- 8.4 The purpose of Rules 8.1-8.3 is to provide the mediator, NZDRC, its agents and employees, with the widest immunity from liability that the law will allow.

9.0 STORAGE OF MEDIATION DOCUMENTS

- 9.1 On conclusion or termination of the mediation, the mediator will destroy all documents and records provided by the parties for the purpose of the mediation.

10.0 COMMUNICATIONS

- 10.1 All applications, notifications, submissions, documents, or other communications in relation to the mediation may validly be served by email.

11.0 MISCELLANEOUS

- 11.1 All decisions by NZDRC with respect to its functions and obligations under these Rules are final and binding on the parties and the mediator. Such decisions are of an administrative nature. They are not subject to appeal to NZDRC and NZDRC is not required to state or communicate reasons for its decisions.
- 11.2 By agreeing to mediation under these Rules, the parties and the mediator are deemed to have agreed not to apply to any court, judicial authority, or any other body having jurisdiction, for any relief regarding NZDRC's jurisdiction or authority under these Rules so far as that agreement is not inconsistent with the law.



- 11.3 In all matters not expressly provided for in these Rules, NZDRC, the parties, and the mediator must act in the spirit of these Rules and must make every effort to ensure that a Settlement Agreement made under these Rules is enforceable.
- 11.4 The Registrar may from time to time issue Practice Notes to supplement, regulate, and implement these Rules for the purpose of facilitating the administration of mediations governed by these Rules.