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AUSTRALIA

# Mediation vs Litigation For Return to Work & Industrial Claims

# A Little About Me



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- Nationally Accredited Legal Mediator.
- Lawyer with MBA Degree.
- 20 years of experience in litigation.
- In 2011, retired from Barnes Brinsley Shaw partnership in 2012, and set up SHAW Mediation Australia in 2013.
- Vision for SHAW is to offer relief by DR without Courts.



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# Meet Elizabeth Olsson

- Senior Solicitor at Mellor Olsson.
- Masters of Laws
- 30 years of experience in litigation.
- Specialises in Employment Law including RTW claims.
- Acted for both employees and employers including Self Insured Employers.



# Mediate or Litigate?



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# Case Study



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## Widgets RU Pty Ltd

- National Company
- Head Office – Melbourne
- HR in Surfers Paradise
  - RTW and Compliance Officer in Adelaide & no HR Manager
  - Site Manager + Admin Team
  - Con - Production Manager
- Widgets made in Adelaide
- Processed Interstate
- Staff 100 in SA - SISA

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# Case Study



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## Worker: Yarin known as 'Karin'

- Turkish descent
- Divorced, 28 years old
- 2 young children
- 1 child with Autism
- Length of service: 2 years
- Machinist of widgets
- Previous psychiatric issues

## Supervisor: Con

- Greek descent
- 45 years old
- Length of service: 15 years
- Valued for productivity

## Workplace H&S Requirements

- Clean & no jewellery – trapping hazard
- Protective clothing – glasses/hair nets

# Summary of Case Study



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## Employee:

1. Lodges a RTW(SA) claim for workers compensation.
2. Applies to FWC for a “Stop Bullying Order”.
3. Applies to FCC for a general protections claim to prevent her termination.
4. Applies to SAET for workers compensation.

## Employer:

1. Rejects the RTW Claim on grounds:
  - 1.1 Pre-existing psychiatric condition and work not the significant contributing cause, and
  - 1.2 Even if it was due to work, it was reasonable management action taken in a reasonable manner
2. Denies Bullying Claim.
3. Denies Breach of FWA.

# Case Study



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## What are the dispute resolution options for the SISA Member?

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# Fair Work Act 2009

## Complaints by Employee



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### Worker – Karin

- Bullying by Supervisor, Con
- General Protections Claim
  - adverse action due to worker choosing to exercise a workplace right
- Discrimination due to ethnicity, gender and carer obligations
- Employer: unfairly performance managing – risk of dismissal for serious misconduct



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Fair Work Commission and Federal Circuit Court

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# Return to Work Claim by Employee



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## Worker – Karin

- Workers Compensation Claim under RTWA (SA)
  - Employer obliged to give “suitable employment”
  - Risk of termination without 28 days notice under s20 RTWA
- ➔ SAET

# Fair Work Commission Process – Anti-Bullying



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## Timeframe

FWC →

Conciliation  
Conference

→

Hearing for Order  
to Stop Bullying

Within 14 days  
start to deal with  
complaint

- Stop performance management
- No compensation
- Objective to get employees back to work solely
- Fine to the Employer \$54K if orders contravened

**Total legal costs for Employer approx \$15K**

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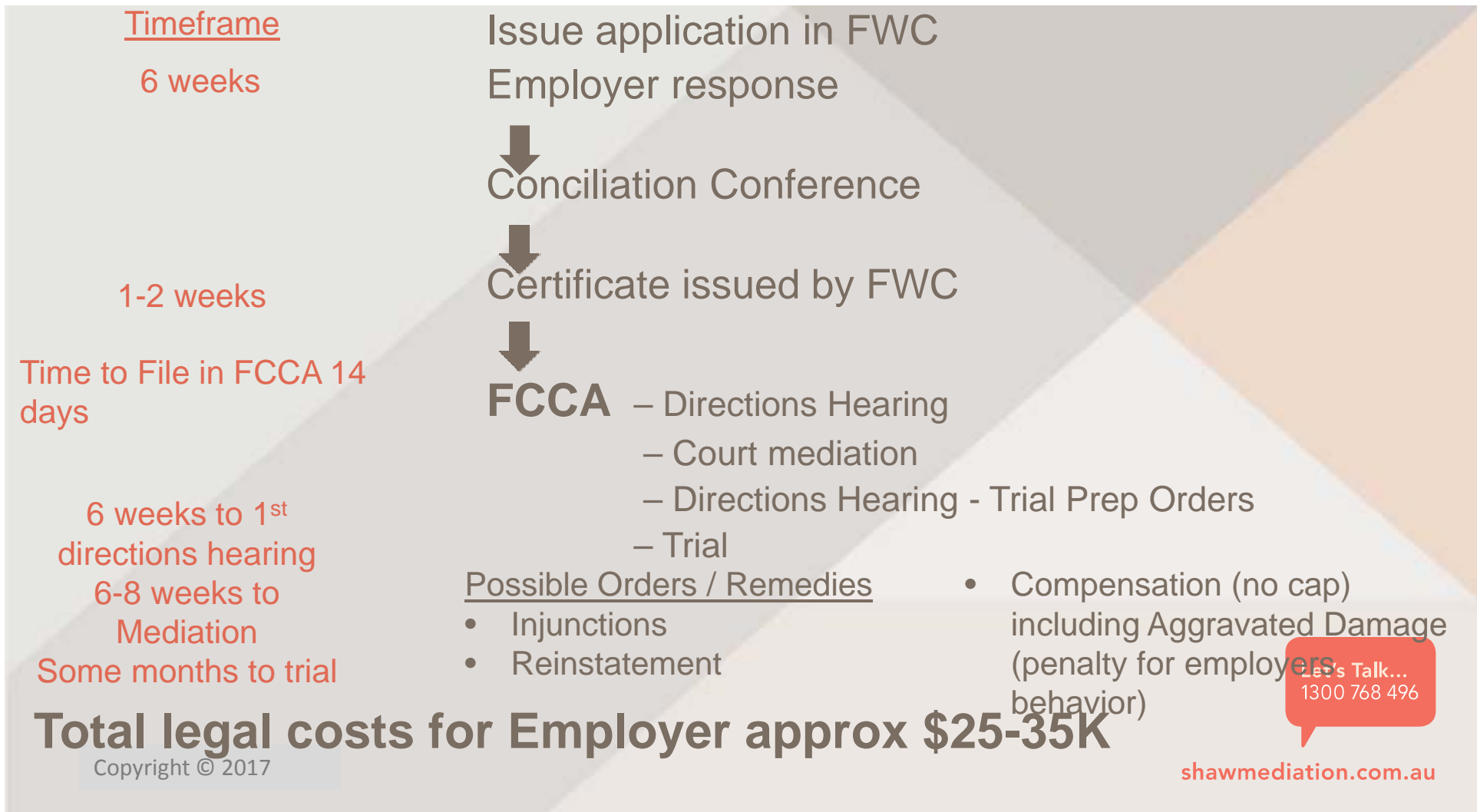
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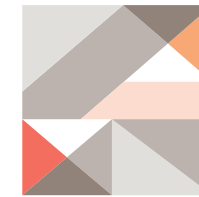
# General Protections Process



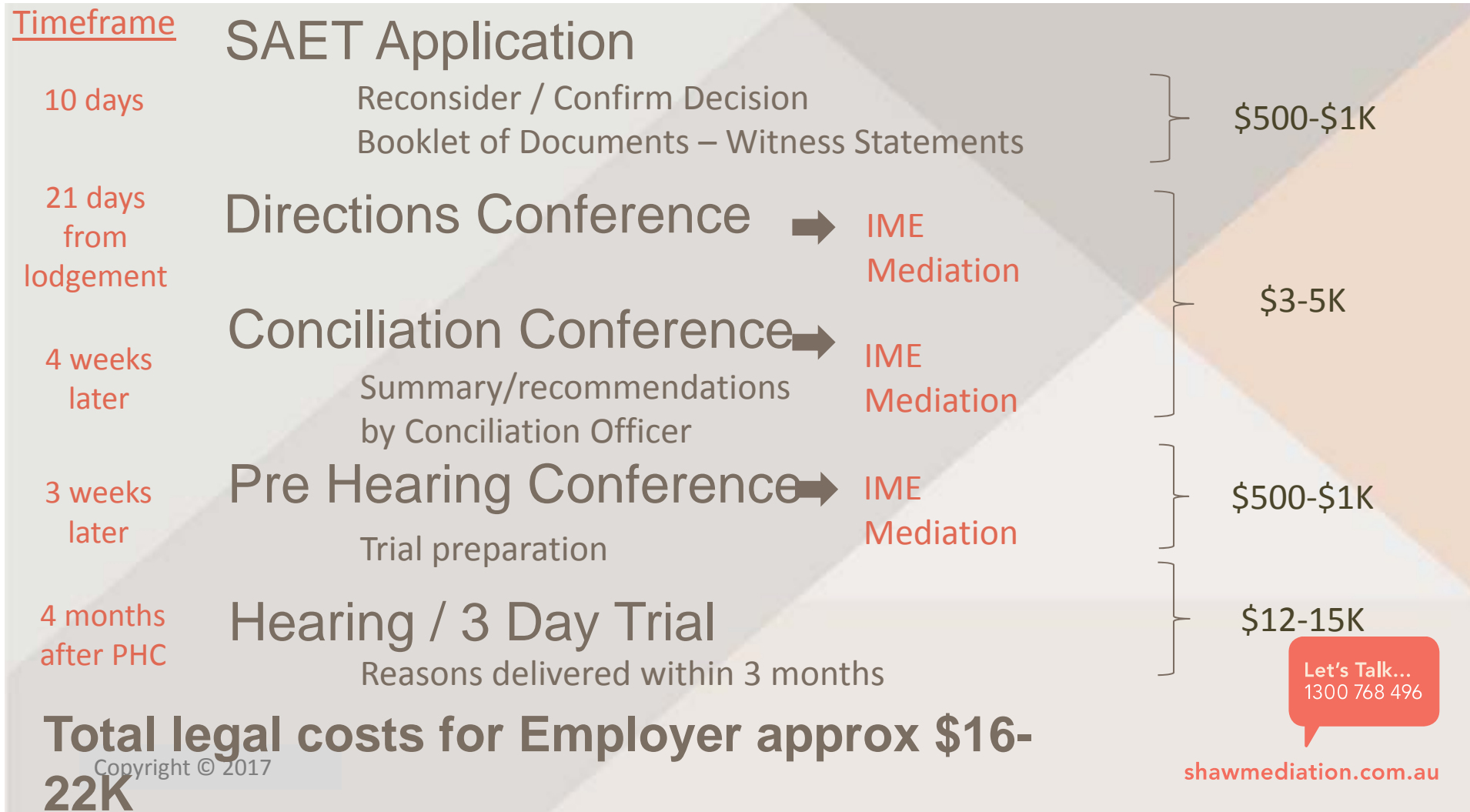
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# SAET Process



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# Total Litigation Costs for Employer



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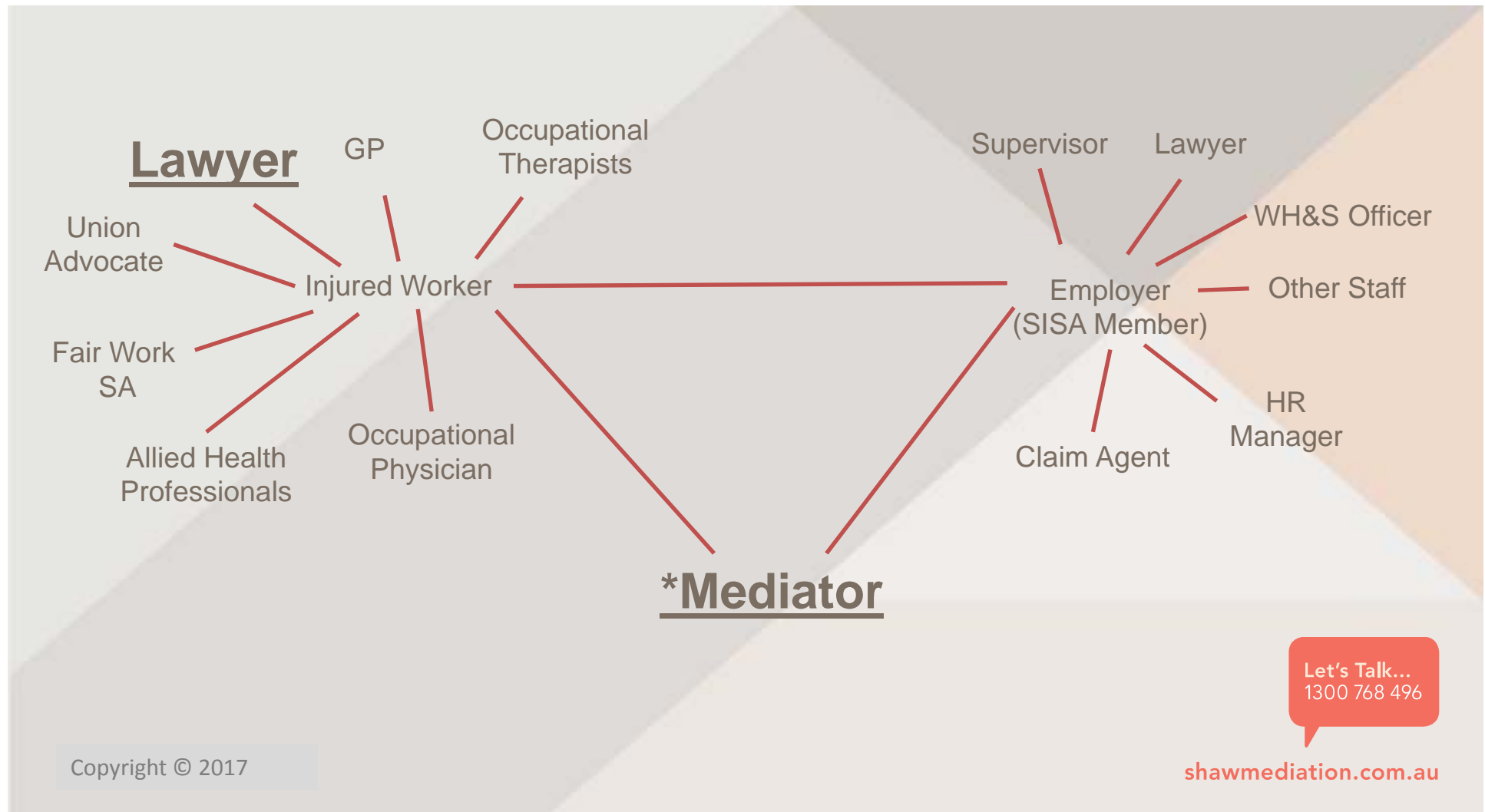
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# The Mediator Fit



# When Disputes Arise



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- Things feel unproductive, stuck or difficult conversations need to be had.
- Claims Agent communicates the involvement of a mediator.
- This can be arranged privately or through the FWC, FCC or SAET.
- You need to be confident and upfront about conditions, expectations, capacity and restrictions for the injured worker.



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# Benefits of a Mediator

Supports and facilitates the disputes between the Injured Worker, Employer, HR Manager, Case Manager and Insurer associated with all employee claims by:

- remaining independent without any vested interest in the outcome
- asking the hard questions and reality testing
- helps to keep claims smooth, moving forward and future focused
- remains private and confidential, as far as the law allows
- records the outcome for the relevant people



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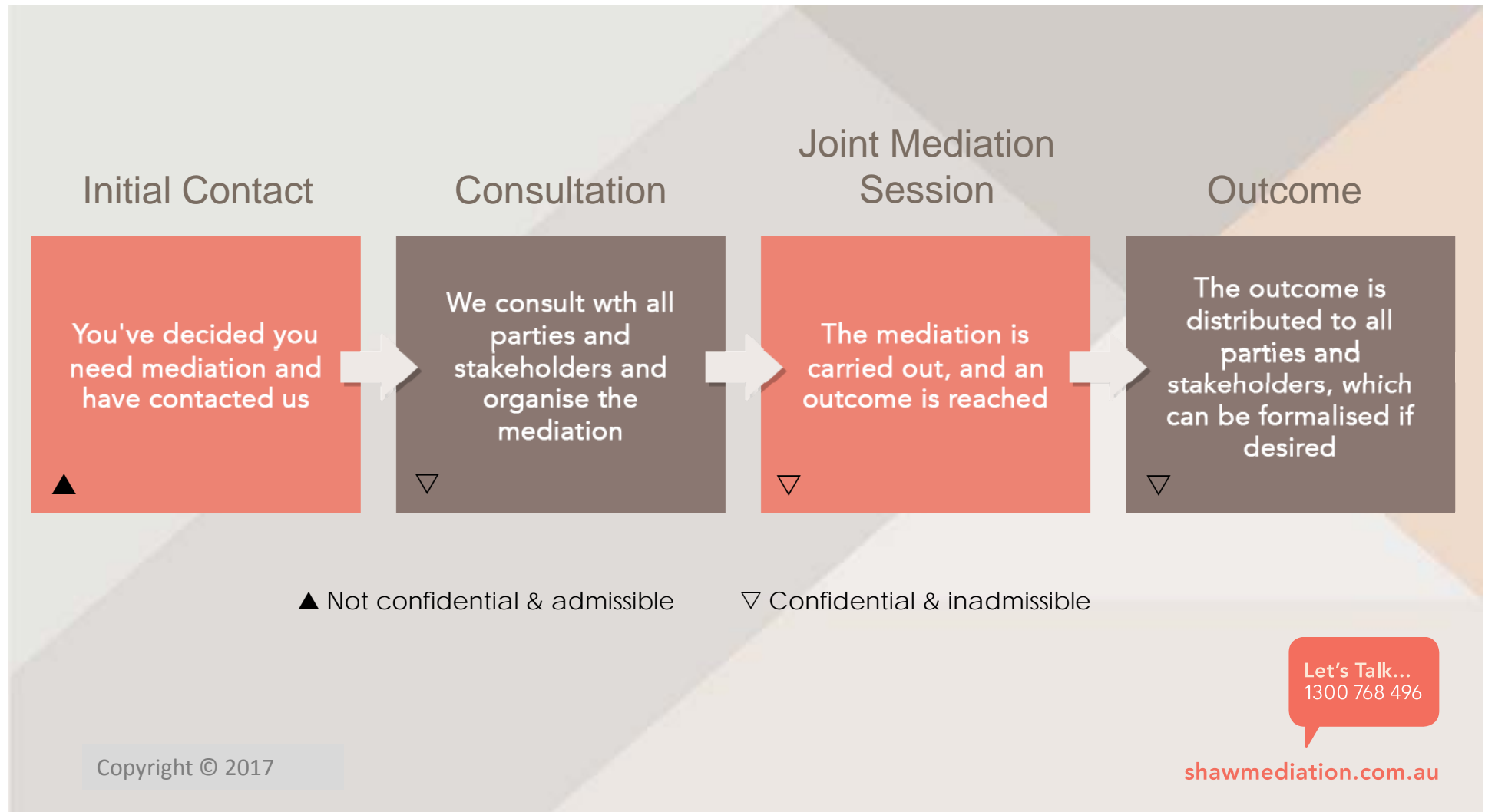
# Role of the Mediator

- Offers the process for the way forward
- Assists communications without input
- Remains independent
- Provide a safe environment with ground rules, timeframes
- Listens, acknowledges, asks the hard questions, reality tests and reframes



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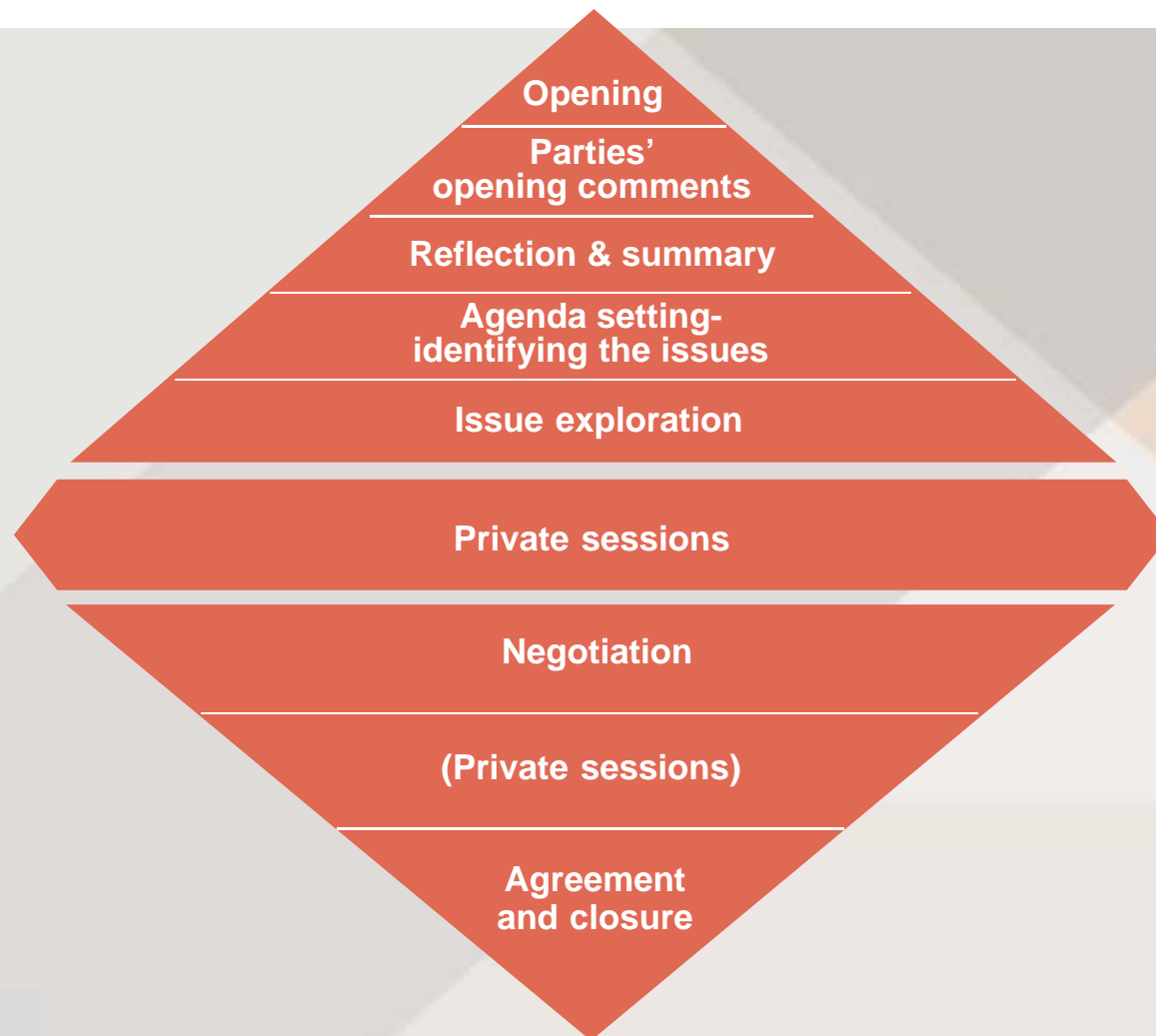
# The Mediation Process





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# The Mediation Joint Session



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# Red Flags



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- Allegations about others and blame
- Lack of respect and trust
- Break down in communication
- Lack of understanding
- Complaints
- No progress or clear way forward

# When to Litigate, When to Mediate

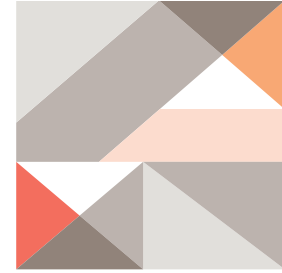


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## Litigate if:

- Legal point of difference; or
- If employee is fraudulent.

Mediate all other concerns.



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Thank You - Questions?